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No. 74327-9-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CITY OF MUKILTEO, 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.

**RESPONSE BRIEF
OF PROPELLER AIRPORTS PAINE FIELD, LLC**

Dennis D. Reynolds
Brian T. Hodges
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
*Counsel for Respondent Propeller
Airports Paine Field LLC*

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I. INTRODUCTION

This case involves the State Environmental Policy Act, RCW 43.21C, (“SEPA”), but it is not about a failure to abide with SEPA. The Superior Court correctly dismissed a legal challenge by the City of Mukilteo and Save Our Communities (collectively, “the City”) to Snohomish County’s approval of a conditional option to lease to Propeller Airports Paine Field, LLC (“Propeller Airports”), titled “Option to Lease Land at the Snohomish County Airport Contingent on Compliance with SEPA” (the “Option”), on the basis that no “action” occurred under SEPA which invokes the terms of that law.¹ The City fails to show reversible error.² The Option simply sets out a process by which Propeller Airports will determine the feasibility of constructing and operating a commercial passenger terminal. Specifically, the conditional Option contains a license allowing Propeller Airports to access Snohomish County’s property at Paine Field to explore and conduct due diligence regarding the possible

¹ The FAA has already considered all of the impacts alleged by the City herein and issued a Finding of Nonsignificance, which determination was upheld by the Ninth Circuit Court of Appeals in *City of Mukilteo v. U.S. Dep’t of Transportation*, ___ F.3d ___, slip op. No. 13-70385 (9th Cir. 2016); *pet. rhng. en banc denied*, April 12, 2016. The Ninth Circuit’s decision is attached hereto as **Appendix A-1**.

² Alternatively, this Court can affirm because the Option is categorically exempt under WAC 197-11-800(5)(c) as an authorization to use real property “when the property use will remain essentially the same as the existing use for the term of the agreement.” The Superior Court did not reach this issue, but it alone justifies denial of the appeal. *See Mt. Park Homeowners v. Tydings*, 125 Wn.2d 337, 343, 883 P.2d 1383 (1994) (Appellate courts may sustain a trial court’s judgment upon any theory established by the pleading and supported by the record).

use.³ Reinstitution of commercial service is a goal of the Paine Field Master Plan Update (“Master Plan”), approved by the Federal Aviation Administration (“FAA”) for the Airport.⁴

The Option does not thwart the goals of SEPA. It does not commit the County to any course that would prevent environmental review, and is specifically conditioned on environmental review. No dirt will be turned until environmental review occurs and land use permits are approved by the County in compliance with SEPA. As the Superior Court correctly held, the County’s action was a “non-project” action under SEPA because the Option is not a lease. The City’s attempts to conflate the Option with a lease ignores the plain language of the agreement.

The County Code did not deny the County the authority to approve the Option. As Snohomish County fully explains in its brief, the County Council had the authority to authorize the Snohomish County Executive to sign the Option to Lease based on two county code sections: SCC § 2.10.010(12) and SCC § 15.04.040(3).⁵ Read together, these sections reveal the Council’s authority to require more details from the Executive

³ The Option appears at CP 77-80 (The exhibits to the Option appear at CP 81-140).

⁴ The 2002-2021 Airport Master Plan Update is found at <http://www.paineairport.com/153/Airport-Master-Plan>. See also Supplemental Declaration of Brett Smith dated October 2, 2015 (Exhibits A-C) (“Second Smith Decl.”). (CP 565-96) The Airport Layout Plan approved by the FAA on November 14, 2014, depicts the area designated to accommodate passenger service at Paine Field as envisioned by the Master Plan. See First Dolan Decl. at ¶ 12 (CP 661).

⁵ The cited code sections are attached at **Appendix A-2**.

whenever it needs or wants more details under SCC § 15.04 and the power to forego further detail when it has sufficient information to make a decision to license or lease airport property under SCC § 2.10.⁶ The approval complied with these sections.

II. STATEMENT OF THE ISSUES

(1) Whether the trial court correctly dismissed the City's claims because the conditional option was not a "project action" as defined by RCW 43.21C.031(1) and WAC 197-11-704(2)(a) where (a) the Option does not grant an interest in property and (b) expressly requires SEPA review prior to execution of a lease, and (c) where the Option will neither result in a significant impact to the environment nor limit the range of reasonable alternatives going forward.

(2) Whether dismissal should be affirmed because execution of the Option is categorically excluded from SEPA review by WAC 197-11-800(5)(c) because use of the property "will remain essentially the same as the existing use for the term of the agreement."

⁶ On February 11, 2015 the Executive recommended approval of the Option to the Council on an Executive/Council Approval Form ("ECAF"). The evaluations of various alternatives for accommodating air service were provided to Council over the previous 18 months by Executive staff, airport staff and the prosecutor's office. *See* First Declaration of Bill Dolan Dated September 2, 2015, ¶ 3 (CP 659) Alternatives included a county-built terminal, an airline-built terminal, and a private third party terminal as proposed by Propeller. *Id.* The ECAF provided the final recommendation of the Executive to the Council to approve the Option. (First Dolan Decl., Ex. B (CP 752-53) The ECAF from the Executive informed Council of the two code sections. *Id.* On March 2, 2015 the Council by Motion No. 15-069 approved the Option at an open public meeting. *Id.* ¶ 6 (CP 660) In its Motion approving the Option, the County Council specifically cited their authority under Code § 2.10.010(12) not § 15.04 as the basis for their decision. *Id.* ¶ 5 (CP 659-60)

(3) Whether the Snohomish County Council had authority to approve and execute the Option where SCC § 2.10.010(2) requires that the County Executive include a written assessment of alternatives only when recommending approval of an “airport lease” and where the Option is not an “airport lease.”

III. RESTATEMENT OF THE FACTS

A. The History of Paine Field and the Goal to Recommence Commercial Passenger Service

This case involves one aspect of the County’s and the FAA’s longstanding goal to recommence commercial passenger air service at Paine Field Airport, located in Snohomish County, Washington. Paine Field operates as a public airport in conformance with applicable federal and state laws and deed and grant restrictions.

For decades, federal and state governments, as well as private interests, have considered recommencing commercial airline service⁷ at Paine Field to further the public good by alleviating regional transportation demands. During that time, Mukilteo and Save Our Communities publicly opposed any use of Paine Field for commercial airline flights.

⁷ The ramp of the optioned property was used for commercial passenger air services by San Juan Air in 1998. First Smith Decl. ¶ 11 (CP 661), Ex. D (CP 757-771).

Today, Paine Field hosts significant general aviation activity and noncommercial aviation services. *See* Smith Declaration dated September 3, 2015, ¶ 5 (CP 233) (“First Smith Decl.”). The Airport consists of three runways serviced by an extensive system of taxiways, aircraft parking aprons, hangars, an old terminal building, and various other facilities. *Id.* at ¶ 3 (CP 233). Paine Field currently has 650 based aircraft, including different types of Boeing aircraft as well as military F-18s. *Id.* at ¶ 5 (CP 233) Several major aerospace companies conduct operations from Paine Field daily. *Id.* The largest operator at Paine Field is the Boeing Company. *Id.* Among the other companies conducting operations at Paine Field is Aviation Technical Services, which provides maintenance, inspection, and repair services for several major airlines. *Id.*

The FAA has provided the County tens of millions of dollars in federal grant money over the years for the operation of Paine Field. The federal grants place conditions on the County, including Assurance 22(a), which requires the County to “make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the Airport.”⁸ The same assurance requires the Airport to make areas available for lease on

⁸ Available at <http://www.paineairport.com/DocumentCenter/View/285>

reasonable terms and to negotiate in good faith for the lease of parcels to conduct aeronautical activities.⁹ First Dolan Decl., ¶ 4 (CP 659).

Airspace procedures are the sole authority of federal government pursuant to 49 U.S.C. § 40103(a)(1). Snohomish County, as the owner and operator of the Airport, has no ability to regulate aircraft noise in airspace. The County receives and responds to noise complaints as part of its noise monitoring program, but the County has no enforcement action or penalty for violations of the noise abatement procedures. Nevertheless, the Airport has a voluntary noise abatement procedure and a noise monitoring program to measure the success of its voluntary noise monitoring program to measure the success of its voluntary noise abatement procedures. *See* Second Declaration of Bill Dolan dated September 24, 2015, at ¶ 4 (CP ____) (“Dolan Second Decl.”).¹⁰ Snohomish County has not authorized any violations of its noise ordinances or any other noise law for activities within its control. The draft lease provides for noise abatement as follows:

⁹ This grant assurance is consistent with the policy of the United States established after deregulation of the airline industry in 1978 to allow airlines to select their own routes and serve airports of their choice. *See* 49 U.S.C. § 41713(b)(1). Any airport that receives federal funding is considered a “public use” airport, and must accommodate commercial airline service if a provider seeks to serve that airport and can do so safely. Critically, a public use airport like Paine Field may not deny an air carrier access solely on the basis of nonavailability of existing facilities, but must make reasonable accommodations if possible. *See* FAA Order 5190.6B, Airport Compliance Manual, section 9.8 (Sept. 2009), available at http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/.

¹⁰ The Second Declaration of Dolan was not listed on the docket and was not designated for the Clerk’s Papers. Respondent has submitted a motion to supplement the record to cure that oversight.

The County and Propeller recognize the importance and joint responsibility of compatibility between the Airport and the surrounding community. Therefore, Propeller shall actively participate and comply in all material respects with all noise abatement procedures, policies, and programs as set for the by the County to greatest extent possible.

CP 129 (Section 9.08 Noise Abatement); *see also* Second Dolan Dec. at ¶ 4 (CP ____), Ex. A (CP ____).

In 2008 Allegiant Airlines and Horizon Air expressed interest in establishing passenger flights that would create five percent (5%) more operations.¹¹ First Smith Decl. ¶ 7 (CP 234). Two federal approvals were required from the FAA: (1) amendment of the “operating specifications” of the airlines; and (2) modification of the operating certificate to reflect provision of commercial service as a “Class I airport.” *Id.* at ¶ 8 (CP 234). This triggered a federal environmental review process through the National Environmental Policy Act (“NEPA”). *Id.* at ¶ 9 (CP 234-35). The U.S. Department of Transportation completed in December 2009 a “Draft Environmental Assessment (“EA”) for initiation of Air Carrier Operations, Amendment to its FAR Part 139 Certificate and Modification

¹¹ In the year between August 2007 and July 2008, Paine Field’s airport control tower counted 143,931 operations, which is an average of 348 operations per day. First Smith Decl. ¶ 6 (CP 233-34). An “operation” refers to either a departure or a landing. *Id.* The great majority of these operations (121,172 of them in 2008) were general aviation aircraft. *Id.* Others included over 700 military operations, over 2,500 air carrier operations of commercial aircraft being serviced, and approximately 2,500 air taxi operations. *Id.* In 2014 there were 113,460 aircraft operations at Paine Field, consisting of 106,344 by general aviation aircraft and 7,116 by other aircraft, which include 4,663 air carrier operations. *Id.*

of the Terminal Building.” Snohomish County held open a public comment period, during which Mukilteo and Save Our Communities raised their concerns about noise and traffic impacts, among other issues. First Dolan Dec. at ¶ 14 (CP 661) Mukilteo stated it would “make it time consuming, expensive and stretch it out. We’ll fight the terminal legally.”¹² After considering hundreds of comments, the FAA issued a Final Environmental Assessment allowing commercial passenger service to recommence at Paine Field. First Dolan Dec. at ¶ 14 (CP 661) Thereafter, the FAA approved a Finding of No Significant Impact and Record of Decision (“FONSI/ROD”) on December 4, 2012 for the proposal, concluding that commercial airplanes could fly out of Paine Field without significantly adding to local noise and traffic. First Smith Dec. at ¶ 9 (CP 234), Ex. A (CP 241-350).

The City (among others) challenged the FAA’s decision, claiming that the FAA failed to fully analyze the environmental, noise, and traffic impacts arising from new commercial airline services at Paine Field. *Mukilteo*, ___ F.3d ___, slip op. No. 13-70385, at 6. On March 4, 2016, the U.S. Court of Appeals for the Ninth Circuit rejected every argument raised by petitioners and affirmed the FONSI/ROD. *Id.* at 10, 12-13. The Court denied Mukilteo’s petition for rehearing *en banc* on April 12, 2016.

¹² See copy of news article attached at **Appendix A-3**.

B. Negotiations Between Propeller Airports and the County

Propeller Airports began discussions with the County and the Airport Authority in June 2014 about developing a plan for the construction and operation of a commercial passenger terminal at Paine Field. First Smith Decl., ¶ 10, (CP 235) Propeller Airports wished to explore the potential to lease land from the Airport, finance construction of a two-gate passenger terminal, and find tenant airlines. *Id.* Such a project will offer many beneficial effects, including providing traffic and infrastructure relief. *Id.* Notably, the Ninth Circuit specifically concluded that Propeller Airport’s project concept to construct and operate an approximately 25,000 square foot passenger terminal will neither exceed nor expand the level of use contemplated by Allegiant and Horizon and evaluated in the FAA’s FONSI/ROD. *Mukilteo*, __ F.3d __, slip op. No. 13-70385, at 12-13 (concluding that substituting Propeller Airports for the former airlines was a “minor variation and would not require additional environmental review at this stage of the proposal); *see also* First Smith Decl. ¶¶ 14-15, 17 (CP 236).

C. The Option Agreement

Called an “Option to Lease Land at the Snohomish County Airport Contingent on Compliance with SEPA,” the Option grants Propeller Airports “an exclusive right and option to negotiate and enter into a lease

of the Property, in substantially the form attached hereto as Exhibit B (the “Lease”).” CP 77 (Option at 1). During the term of the Option, Propeller Airport’s only right regarding use of the property is to access the property “to make engineering studies” to “determine the suitability of the Property for Propeller’s proposed use.” First Smith Decl. ¶ 16 (CP 236), CP 78 (Option at § 4.1). As noted, “No construction may begin on the Property until the Lease has been executed and delivered by Propeller and Propeller has taken possession of the Property.” CP 78 (Option at § 6). Propeller Airports may not modify the environment during the term of the Option. First Smith Decl. ¶ 16 (CP 236).

The Option allows Propeller Airports three years to carry out preliminary design work, feasibility studies, environmental studies, and to obtain permits needed to construct a proposed two-gate passenger terminal. Per the terms of the agreement, implementation of any project proposal will occur via submittal of land use applications subject to both SEPA and the substantive decision-making authority of the Director of Planning and Development Services. First Smith Decl. ¶ 19 (CP 237-38). Preliminary steps for the land use/SEPA review process have already occurred.

The Option expressly requires completion of full SEPA review prior to execution of any lease, and reserves to the County full SEPA authority, as follows:

2.This Option may be exercised following completion of environmental review as provided in paragraph 7 herein

7. Exercise of Option Subject to SEPA

Compliance. Exercise of the Option and execution of the Lease are subject to compliance with RCW 43.21C, the State Environmental Policy Act (“SEPA”). Propeller and County agree that a SEPA process must be completed prior to exercise of the Option and execution of the Lease.

CP 77-78. Paragraph 7 demonstrates that execution of a lease is specifically conditioned on completion of SEPA review. The type or level of SEPA review remains in the discretion of the County’s SEPA Responsible Official if Propeller Airports opts to go forward with a land use application, and will be determined by the scope and nature of that application. *Id.* at ¶ 17 (CP 236).

D. Procedural History

The City filed a petition for judicial review, writ of review, and a declaratory judgment order in King County Superior Court, asking the court to declare the Option void. CP 1-7. The City alleged that the County approved the Option in violation of SEPA. *Id.* The parties filed

cross-motions for summary judgment. CP 439-62 (City); CP 209-31 (Propeller Airports); CP 22-74 (Snohomish County). Although not raised in the complaint, the City raised in opposition to Snohomish County's motion a new argument that the County's approval of the Option violated SCC § 2.10.010(2) and SCC § 15.04.040(3). CP 523-26.

The Superior Court dismissed the complaint, concluding that execution of the Option was not a "project action" nor did the County violate its Code:

The March 11, 2015 Option to Lease Land at the Snohomish County Airport ("Option Agreement") specifically provided that exercising the option to the lease was contingent upon and subject to compliance with RCW 43.21C, the State Environmental Policy Act ("SEPA"). Paragraph 2 stated "This Option may be exercised following completion of environmental review as provided in paragraph 7," which in turn stated "Propeller and County agree that a SEPA process must be completed prior to exercise of the Option and execution of the Lease." As such, compliance with SEPA constituted a condition precedent for exercising the option by Respondent Propeller.

This Court does not find that the execution of the Option Agreement constituted a "project action" as defined under RCW 43.21C.031(1) and WAC 197-11-704(2)(a).

Finally, this Court does not find that Respondent Snohomish County violated SCC 2.10.010(2) and,

therefore grants summary judgment in favor of the County.

CP 655-57. Accordingly, the Superior Court entered judgment in favor of the County and Propeller Air. *Id.* The City now appeals. CP 653-54.¹³

IV. ARGUMENT

Snohomish County’s approval of the Option did not violate SEPA or the County Code. The City’s arguments are premature and improperly conflate the effects of the Option with those of a future a lease. The City strains to suggest that this appeal presents a case of public officials acting – or intending to act – without regard to environmental consequences, but this characterization is false. The City’s concerns were meaningfully considered in the NEPA process and will be considered in any SEPA review conducted by the County.¹⁴ (The County is entitled to consider the NEPA process. *See* WAC 197-11-610.) The law and its purposes have been fulfilled to date, and the SEPA review process continues.

The actual facts support affirmance, including (1) the County approved only a conditional Option, which is not a “project action;”

¹³ The Superior Court did not reach the alternative ground for dismissal of the complaint offered by Respondents that execution of the Option was categorically exempt under SEPA. *See* CP 655-57.

¹⁴ Indeed, much of the City’s complaints about traffic and noise has already been addressed during the federal environmental review process, and will be revisited via SEPA review in due time. *Mukilteo*, ___ F.3d ___, slip op. No. 13-70385. As noted, federal environmental review identified no significant adverse impacts arising from the level of passenger service at Paine Field in which Propeller Airport’s anticipated proposal fits, including the noise and traffic impacts. *Id.*

(2) the Option is contingent upon completion of SEPA review; and (3) the County retains full SEPA authority to consider any specific land use application submitted by Propeller Airports and to impose mitigation conditions and to select a “no action” alternative.

In the face of these facts, the City rightfully concedes that an option contract does not fall within the definition of “project actions” subject to SEPA. Opening Br. at 20. This concession is fatal to the appeal because the agreement at issue is a conditional Option and not a lease, as the City would have it. The City must weave a fiction to argue that the Option is “*effectively*” a lease and, therefore, the law required immediate environmental review. This Court should reject the City’s false premises.

A. Standard of Review

The City acknowledges that, in reviewing summary judgment, this Court engages in the same inquiry as the trial court.¹⁵ *Anderson v. State Farm Mutual Insurance Company*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). The City then argues for the wrong legal standard. Certainly, legal issues regarding the interpretation of SEPA and its rules are reviewed *de novo*. *Klickitat County Citizens v. Klickitat County*, 122

¹⁵ Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” demonstrate no genuine issues of material fact remain, entitling the moving party to judgment as a matter of law. CR 56(c); *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Wn.2d 619, 632-33, 860 P.2d 390 (1993). But the City’s challenge regarding the appropriate timing of environmental review turns on the application of facts to law — *i.e.*, whether the terms of the Option constitute a “project action” or commit the County to a course of action in regard to the passenger terminal proposal. These issues present mixed questions of law and fact that are governed by the clearly erroneous standard.¹⁶ *See Clallam County Citizens v. Port Angeles*, 137 Wn. App. 214, 225, 151 P.3d 1079 (2007) (clearly erroneous standard governs review of determination that action is exempt from SEPA review).

Even under a *de novo* standard, the County’s decision is due substantial deference pursuant to statute:

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of a requirement, or the adequacy of a ‘detailed statement’, the decision of the governmental agency shall be accorded substantial weight.

RCW 43.21C.090; *see also Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990) (court gives “substantial weight” to agency in its *de novo* review of legal questions); *Clallam County Citizens*, 137 Wn.

¹⁶ A matter is considered “clearly erroneous” when the reviewing court “is left with the definite and firm conviction that a mistake has been committed.” *Wenatchee Sportsman v. Chelan County*, 141 Wn.2d 169, 176, 4 P.2d 123 (2000). Under this standard, the Court does not substitute its judgment for that of the decision-making body, but “examine[s] the entire record and all of the evidence in light of the public policy contained in the legislation authorizing the decision.” *Rural Residents v. Kitsap County*, 141 Wn.2d 185, 196, 4 P.3d 115 (2000).

App. at 224-25 (determination that proposal is exempt from SEPA review is afforded substantial weight).¹⁷ See also WAC 197-11-055(2)(b) (Subject to WAC 197-11-070, agencies have the option of identifying, “the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis.”); *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (“Selection of environmental review process ... is left to the sound discretion of the appropriate governing agency, not this court.”). For these reasons, the Court should grant deference to the County’s interpretation of SEPA

B. Because the Option Is Not a “Project Action,” SEPA Review Was Not Triggered.

In this case, SEPA review was not required prior to execution of the Option because (1) an Option is not an “action” and (2) in context, the Option is a preliminary decision that neither impacts the environment nor limits the range of reasonable choices. To argue otherwise, the City pretends the Option is a lease. It is not. The Option is a preliminary step to facilitate fact gathering and formulation of a specific project proposal that will contain sufficient “principal features” to allow environmental impacts to be identified and considered. The Legislature wisely drafted

¹⁷ Moreover, “[i]t is a well-established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement.” *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992)

SEPA to allow these preliminary steps before environmental review is required. As an end-around, the City argues that the Option is “effectively” a “project action,” (Opening Br. at 20-23) or alternatively that the Option is an incremental step toward a project action that will limit the choice of alternatives or commit the County to a particular course of action. Opening Br. at 23-31. Neither proposition is correct. No amount of “spin” can turn the conditional option into a lease that might be executed in the future if the conditions are met and SEPA review is completed.

1. SEPA Is Not All Inclusive

Not all activities are subject to SEPA requirements. See Richard L. Settle, *The Washington State Environmental Policy Act: A Legislative and Policy Analysis*, § 12.02 at 12-1 (2012) (“Only ‘proposals’ for ‘actions’ by ‘agencies’ are potentially subject to SEPA’s threshold determination and EIS requirements.”). Case law firmly establishes that “not every decision concerning a project is a ‘project action.’” *Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512 at 520, 309 P.3d 654 (2013). SEPA review is only required for defined “actions.” WAC 197-11-310, -704. Even if an “action” is anticipated, preliminary activities such as securing an option contract may occur before environmental review, provided that they do not, in and of

themselves, have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070. In this case, SEPA review was not required prior to execution of the Option. The Superior Court correctly concluded that the Option is not a “project action” and is not subject to environmental review under SEPA.

SEPA is implemented through regulations adopted by the State of Washington Department of Ecology, codified as WAC Chapter 197-11 (“the SEPA Rules”). The SEPA Rules define a “proposal” more narrowly than the common understanding. For the purpose of review, a proposal exists “when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated.” WAC 197-11-784. The SEPA Rules clarify that “[a]ppropriate consideration of environmental information shall be completed before an agency commits to a particular course of action,” while also recognizing that “[p]reliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental review.” WAC 197-11-055(2).

Of special importance here, preliminary steps (such as “developing plans or designs, issuing requests for proposals (RFPs), **securing options**, or performing other work necessary to develop an application for a

proposal”), may occur without SEPA review as long as such activities do not result in adverse environmental impacts or limit the choice of reasonable alternatives. WAC 197-11-070(4) (emphasis added). Notably, the City does not cite or discuss this provision of the SEPA rules; instead, it opts to ignore this analysis and simply argue that the decision to approve the Option is the equivalent of a decision to approve the anticipated lease. This strategy is inconsistent with the law and should not succeed.

2. The SEPA Definition of “Action” Does Not Encompass The Option

The Option is not an “action” that is subject to environmental review. SEPA review requirements, as noted, only apply to specified “action” defined in WAC 197-11-704. *Magnolia Neighborhood Planning Council v. Seattle*, 155 Wn. App. 305, 313, 230 P.3d 190 (2010); *see also* WAC 197-11-310 (“threshold determination is required for any proposal that meets the definition of action and is not categorically exempt...”).

The term action is defined to include both project and non-project actions. WAC 197-11-704. At issue here is the definition of project actions:

A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to: (i) License, fund, or undertake any activity that will directly modify the environment, whether the

activity will be conducted by the agency, and applicant, or under contract. (ii) Purchase, sell lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

WAC 197-11-704(2)(a). The City attempts to fit the Option into WAC 197-11-704(a)(i), (ii) not by arguing that the Option itself authorizes any physical construction or alteration of the environment, nor by arguing that the Option transfers any possessory rights in public lands. Instead, the City argues that the Option should be viewed as the *functional equivalent* of a lease because the Option contemplates a future transfer of public property contingent on SEPA review. Opening Br. at 20-23. That argument fails. It requires the Court to strip the Option of its terms and conditions.

The Option is not an agreement to sell or lease property. Instead, it is an agreement to hold an offer open for a defined period of time. *See Pardee v. Jolly*, 163 Wn.2d 558, 573, 182 P.3d 967 (2008) (examining option). In such an agreement, “[t]he optionor parts only with the right to [lease] the property to any other person during the time limited, and the optionee acquires only the right to [lease] the property in futuro, *upon the terms and conditions prescribed by the option contract.*” *Id.* (quoting *Hopkins v. Barlin*, 31 Wn.2d 260, 266, 196 P.2d 347 (1948)) (emphasis added). It is the very terms and conditions in the Option that show SEPA

review is not triggered. The Court should reject the City's invitation to strip these terms and conditions from the agreement. The SEPA Rules recognize that securing an option is a preliminary decision, which is distinct and separate from a decision to lease or sell public property. WAC 197-11-070(4); *see also Lassila v. Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978) (project planning activities are typically exempt from SEPA). Under the law, the Option is an option that does not, under its terms, trigger SEPA review.

The Option, moreover, cannot be viewed as an actual lease. "The fundamental right delivered in a lease is possession." 1 M. Friedman on Leases § 4:2, at 4-12 (5th ed. 2005 & supp). "A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property." Restatement (Second) of Property, Land. & Ten. § 1.2 (1977). Here, possession is not transferred to Propeller Airports.

The Option only provides Propeller Airports the opportunity to determine the feasibility of opening a commercial passenger terminal before commencing environmental review and binding itself to a lease term. CP 77-78. Indeed, the only right granted in the Option is "an exclusive right to negotiate and enter into a lease of the Property, in substantially the form attached hereto as Exhibit B (the 'Lease')." CP 77. The Option, by its plain terms, provides no present rights to occupy or use

the land. The City cannot satisfy its burden of demonstrating clear error by the Superior Court where no project action occurred under SEPA.

3. The Option Does Not Limit Choice of Reasonable Alternatives

The City also argues that SEPA review was triggered because the agreement “limited” the alternative sites to be considered. This is not true. Propeller Airports retains full ability to craft and determine the scope of any actual project proposal it may submit, and the County retains full ability to review, condition, and approve or reject any proposal.

As stated above, the SEPA rules allow government to take preliminary steps toward a project so long as the action (1) does not result in “an adverse environmental impact;” or (2) does not “limit the range of reasonable alternatives” going forward. WAC 197-11-070(1)(a)-(b). This section of the rules also explicitly states that actions consistent with these limitations do 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.” WAC 197-11-070(4).

Consistent with these rules, the Option will not result in adverse environmental impacts. The Option holds open an exclusive right to “negotiate and enter a lease” for a portion of property at Paine Field while Propeller Airports determines the feasibility of building and operating a

commercial passenger terminal. The Option establishes a process under which the terminal proposal will be considered before the parties will negotiate and enter a lease. And, as part of that process, the Option expressly provides that SEPA review will be completed before Propeller Airports can exercise its option. CP 77. Once again, the Option does not authorize any land transfer or physical development and, consequently, will not itself result in environmental impacts.

Neither will the Option limit the County's consideration of reasonable alternatives during SEPA review, contrary to the City's argument. See Opening Br. at 22-31.¹⁸ WAC 197-11-786 defines a "reasonable alternative" as:

an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly through requirement of mitigation measures.

¹⁸ In advancing this argument, the City relies on the recent Division II case, *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn. App. 800, 814, 357 P.3d 710 (2015). Opening Br. at 23-27. That case, however, is immediately distinguishable because it involved a challenge to the Port's decision to enter a contingent lease—not an option—to develop a crude oil terminal on public property. *Id.* at 804. At issue was whether the lease agreement was exempt from immediate SEPA review under the Energy Facility Site Locations Act, RCW 80.50.180, and which government agency should conduct SEPA review. *Id.* at 813. The Court found that entry into a lease agreement constituted an "action," but did not violate SEPA because the decision had not limited the range of alternatives or caused a snowballing effect. *Id.* at 815-18. Division II's opinion has been accepted for review by the State Supreme Court. *Columbia Riverkeeper v. Port of Vancouver*, 185 Wn.2d 1002, 366 P.3d 1243 (2016).

“The word ‘reasonable’ is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.” *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 510, 306 P.3d 1031 (2013) (quoting WAC 197-11-440(5)(b)(i)). During SEPA review, an agency considers three categories of alternatives: no action, other reasonable courses of action, and mitigation measures. WAC 197-11-792(2)(b). For a private action, as here, alternatives analysis is limited to the specific site within the Paine Field complex. *See* WAC 197-11-440(5)(d) (“When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal’s objective on the same site.”).

A decision will only be deemed to limit the range of reasonable alternatives if it “coerces” a specific final outcome prior to the completion of SEPA review. *Pub. Util. Dist. No. J of Clark County v. Pollution Control Hearings Board*, 137 Wn. App. 150, 162, 151 P.3d 1067 (2007) (“Clark PUD”). This does not mean that an agency or applicant cannot propose a specific course of action, but only that the final decision must not be predetermined. *See* Washington Department of Ecology, *SEPA Handbook* § 3.3.2.2., App. 22-23 (“Early designation of a preferred alternative in no way restricts the lead agency’s final decisions.”). Nor

does the designation of the preferred location of a future project improperly coerce the final outcome. *See* *Settle, supra* at § 14.01 (“Designation of the proposal as the preferred alternative or benchmark for alternatives is commonplace and allowed by SEPA rules.”); *see also* WAC 197-11-440(5)(c)(v).

The City’s claim that the Option binds the County to “a decision on a specific construction and operation project in a specific location” is mistaken. *See* Opening Br. at 26. The County retains sufficient discretion to act in response to SEPA review, including the right to impose mitigation conditions or issue a “no action” determination. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998) (“The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal” — so long as government retains the “no action” option, it has not limited the range of reasonable alternatives). On its face, the Option does not limit the range of alternatives to be considered in the SEPA process. CP 77-80.

Certainly, the Option relates to the FAA decision to issue approvals for renewed commercial passenger service *at Paine Field*. SEPA, in requiring the government to consider *reasonable* alternatives, does not require the County to ignore the reality of FAA permitting. It is a fact that there is only one location currently proposed to construct passenger terminal. This

does not prevent the County from conducting an analysis of alternative locations under SEPA. At the very least, the County will review a “no action” alternative as part of the SEPA review. Thus, through its SEPA authority, the County retains the ability to select a range of reasonable alternatives to be included in environmental review. WAC 197-11-440(5); WAC 197-11-792(b).

There is not a plausible argument that the terms of the Option could limit the range of alternatives to be considered by the Council, much less coerce the final result. Perhaps recognizing this fact, the City does not address this legal standard, and does not attempt to distinguish *Clark PUD*, where the Court held that issuing a permit to drill test wells did not foreclose the ultimate application process for a wellfield. *Clark PUD* is instructive. There, the plaintiffs argued that issuance of an exploratory well permit, and the PUD's expenditure of funds on exploratory drilling, would limit reasonable alternative sites for a wellfield. *Id.* The Court disagreed because the permit did not have any bearing on whether Ecology would eventually grant a wellfield permit. *Id.* This Court should reach a similar conclusion regarding the Option.

Here, the case against coercion is stronger, since the Option is expressly contingent upon SEPA review. CP 77. The Option does not restrict full consideration of the proposal, including the “no action”

alternative, by the County. It simply frames the proposal for Propeller Airport's feasibility studies. Because the Option is contingent on environmental review, it has similarities to the memorandum held not to limit alternatives by this Court in *Int'l Longshore and Warehouse Union*. That case involved a memorandum of understanding, which conditioned the government's possible expenditure of \$200 million in public funds to build a new basketball arena, upon the completion of SEPA review and determinations by the government bodies "whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review..." 176 Wn. App. at 517-18. The Court held that these conditions meant that "[t]he city and county remain free to change course" after the completion of environmental review, and there was no SEPA violation. *Id.* at 526.

The same is true here. The Option is conditioned on the outcome of SEPA review, and the County retains discretion to approve, condition, or deny any land use permits thereafter. CP 77-80. The County also has authority to review and approve all design specifications through the permit procedures. The County also has the ongoing authority, after SEPA review, to require compliance with all environmental laws and permits, which will be an express lease requirement, once executed.

CP 128. Like the city and county in *International Longshore*, the County can change course if the SEPA review suggests it should.

The City argues that the Option predetermines the design of the facility to a degree that deprives the County of any regulatory authority. That argument, however, ignores the contingencies discussed above and outright disregards all of the conditions placed in specific clauses of the anticipated lease. Moreover, the City’s argument in regard to the Option limiting design choices is of no relevance. SEPA “does not preclude developing plans or designs” before completion of review. WAC 197-11-070(4). The County’s execution of the Option did not limit the range of reasonable alternatives.¹⁹

Relying on federal law (but ignoring the Ninth Circuit’s decision), the City offers a single string-cite—without analysis—for the proposition that a preliminary decision that establishes a framework for a future plan

¹⁹ Federal case law interpreting NEPA supports the conclusion that “preliminary decisions” like the Option are not actions subject to immediate environmental review. In construing SEPA, Washington courts may look to federal precedent interpreting NEPA. See *Eastlake Community Council v. Roanoke Assoc.*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1976). The operative regulations regarding the timing of environmental review of an “action” are similar. Compare WAC 197-11-070(1) with 40 C.F.R. § 1506.1(a). Under NEPA, agencies must complete an environmental assessment (“EA”) prior to the “go-no go” stage of a project. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). The NEPA threshold test for appropriate timing of an EA is whether the agency is prematurely “making an irreversible and irretrievable commitment of resources.” *Id.* at 1143 (quoting *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988)). Preliminary steps that retain an agency’s authority to “change course or to alter the plan it was considering implementing” are not “actions” requiring NEPA environmental review. *Wild West Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008); see also *Center for Environmental Law and Policy v. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011) (“*CELP II*”).

constitutes an “action,” because such a decision limits the selection of reasonable alternatives. Opening Br. at 30-31. The City misreads those decisions. For example, in *Center for Environmental Law and Policy v. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1189-90 (E.D. Wash. 2010) (“*CELP I*”), the court solely reviewed whether an agency’s application for water use permits was a NEPA action. Contrary to the City’s claim, the court did not hold that a preliminary commitment consisted an action. *Id.*

A more illustrative example of NEPA’s treatment of preliminary, procedural decisions is *CELP II*. On appeal to the Ninth Circuit, the *CELP* plaintiffs reasserted the claim that the agency’s preparation of an EA only after signing a memorandum of understanding violated NEPA by making an irreversible and irretrievable commitment of resources. *Id.* at 1006. The Ninth Circuit rejected this claim, stating:

The potential for agency bias does not impose a timing constraint separate from the irretrievable commitment rule. See, e.g., Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 782 (9th Cir. 2006) (emphasis added).

655 F.3d at 1006 n.1. Additionally, the Ninth Circuit found influential the fact — as is the case here — that the agreement was contingent on NEPA compliance. 655 F.3d at 1007 n.3. Accordingly, the Ninth Circuit held the MOU did not violate NEPA. *Id.* *CELP II* reiterates that preliminary,

procedural decisions are not “actions” under NEPA, contrary to Mukilteo’s claims in this case.

Nor does *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), support Mukilteo’s position. In that case, the tenants signed leases that did not allow them to “occupy[] or us[e] the surface of the leased land” prior to additional agency approval, which would include environmental review. 848 F.2d at 1447. The Ninth Circuit held that these leases

cannot be considered the go/no go point of commitment at which an EIS is required. What the lessee really acquires ... is a right of first refusal, a priority right much like the one granted in *Sierra Club [v. Fed. Energy Reg. Comm'n]*, 754 F.2d 1506 (9th Cir. 1985)]. This does not constitute an irretrievable commitment of resources.

Id. at 1448; *see also Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (An operating agreement did not irretrievably commit public resources where the government could later modify the details of the agreement). Similarly, the Tenth Circuit in *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004), approved an agreement that was conditional on completion of NEPA requirements. The court held that the conditional agreement did not limit the range of reasonable alternatives because there was “no indication here that the U.S. Air Force prejudged the NEPA issues.” *Id.* at 1240. These federal cases support affirmance.

Here, the Option cannot be exercised until after completion of all SEPA requirements. The Option does not coerce or prejudice the final outcome of the SEPA process, on which the lease's effectiveness is conditioned, nor does it irretrievably dedicate public resources to a passenger terminal or limit the range of reasonable alternatives. The City's SEPA claim fails as a matter of law.

4. The Option Does Not Improperly Build Momentum Toward Any One Decision

The City alternatively argues that early review is necessary to counteract the Option's purported momentum-generating impact which may sway the County in favor of establishing a new commercial airport terminal. Opening Br. at 24-27. The City's argument is based on a line of cases beginning with *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 860 P.2d 1024 (1993), in which the Supreme Court expressed concern with a "snowballing effect," stating,

[e]ven if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

122 Wn.2d 648, 663-64, 860 P.2d 1024 (1993); *see also Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230

P.2d 90 (2010), *review denied*, 170 Wn.2d 1003 (2010). Those cases, however, are inapposite.

Each of those cases concerned the existence of a binding decision on the part of local government meeting SEPA's definition of "action." No binding decision exists here. For example, in *Boundary Review Board*, the City of Black Diamond proposed to annex two areas into its boundaries and issued a determination of nonsignificance ("DNS") for the annexation. The Boundary Review Board approved the annexations. King County appealed. The Court held that an EIS was required for the annexations based on the key factor that a final action—an annexation—occurred that was binding on the city. 122 Wn.2d 648.²⁰

Similarly, in *Magnolia*, the city approved a plan for residential development of former military base property that required future federal approval for completion, without first conducting SEPA review. The city argued it was not required to conduct SEPA review before issuing this approval. The court disagreed because, if approved by the federal government, the plan would—as all parties to the litigation agreed—"bind the City's use of the property upon federal approval." 155 Wn. App. at 308.

²⁰ Indeed, the parties in *Boundary Review Board* did not dispute that SEPA review was required. The only question was whether SEPA review should take the form of a DNS or an EIS.

Here, the City ignores the dispositive factor in both cases: that each action at issue was final and binding. Here, no final and binding action exists to create a snowballing effect. The concern is misplaced and inconsistent with case law.

The City's suggestion that the County or Propeller Airports is trying to avoid, delay, or circumvent environmental review is unsupported and inconsistent with the facts. The proposal to recommence passenger service at Paine Field has undergone extensive regulatory and environmental review by the FAA and the federal courts. As part of this review, the FAA has already considered all of the impacts alleged by Mukilteo herein and issued a Finding of Nonsignificance, which determination was upheld by the Ninth Circuit Court of Appeals in *City of Mukilteo v. U.S. Dep't of Transportation*. That decision was not the end of environmental review, however. The Option conditions Propeller Airport's exercise of the right to "negotiate and enter" a lease upon compliance with SEPA. All of the impacts raised by the City will be properly considered *once again* before a lease is executed and before any permits will be issued. That administrative process provides the proper forum for the City to raise the issues it attempts to bring before the Court.

For these reasons, this Court should agree that the City's claims are premature. Judicial review under SEPA "shall without exception be of the

government action together with its accompanying environmental determinations.” RCW 43.21C.075(6)(c); *see also* RCW 43.21C.075(1), (2)(a). “This means that, until an agency has taken final action on a proposal, judicial review of an agency’s compliance with SEPA may not occur.” *Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 519, 309 P.3d 654 (2013) (citing *State v. Grays Harbor County*, 122 Wn.2d 244, 250-51, 857 P.2d 1039 (1993)). Requiring parties to wait until a government has taken an “action” before a court may review that action under SEPA serves the policy of avoiding piecemeal decision-making. *Id.* at 519-20 (citing *Grays Harbor County*, 122 Wn.2d at 250-51). Because the Option does not meet the definition of a government “action,” review may not occur. *Id.* at 520.

5. The Option Is Categorically Exempt from SEPA Review

The County’s decision to approve the Option is not only not a “project action,” it is categorically exempt from SEPA under WAC 197-11-800(5). Authorized use of the property will remain essentially the same as the existing use during the term of the option agreement.

Propeller Airports and the County raised this ground to support dismissal of the complaint, but the Superior Court did not reach it. The Court alternatively should affirm on this ground. *See Mt. Park Homeowners*, 125 Wn.2d at 343.

Actions categorically exempt from SEPA include real property transactions “when the property use will remain essentially the same as the existing use for the term of the agreement,” as follows:

(5) Purchase or sale of real property. The following real property transactions by an agency shall be exempt:

(c) Leasing, granting an easement for, or otherwise authorizing the use of real property when the property use will remain essentially the same as the existing use for the term of the agreement ...

WAC 197-11-800(5). This exemption applies to the Option. The Option provides no possessory interest in the land and none of the rights associated with a lease. Instead, the Option preserves the existing use of the land for a period of up to 36 months for Propeller Airports to develop a proposal and determine feasibility. CP 77. In other words, during operation of the Option, Paine Field will remain in its exact condition and subject to the same uses as existed prior to parties’ entry into the Option. The purpose of the agreement, after all, is to provide assurances necessary for Propeller Airports to perform feasibility studies and formulate a specific project proposal.

Agreements like the Option are exempted from environmental review “to avoid the high transaction costs and delays that would result from case by case review of categorically exempt types of actions that do

not have a probable significant adverse environmental impact.”

Dioxin/Organochlorine Center v. Pollution Control Hearings Bd., 131 Wn.2d 345, 363, 932 P.2d 158 (1997). The Legislature’s policy choice should be honored. The City may not like it, but the Option is perfectly legal and not violative of SEPA. The Legislature foresaw that the hands of government cannot be tied too tightly. The opportunity to explore and perform due diligence is necessary; the Legislature did not restrict it in these circumstances. Government must be able to partner with other parties in the planning stages in order to formulate plans that are suitable and sufficiently developed to support environmental review.

The City has no persuasive response to the plain application of the categorical exemption to the Option. The City asks this Court to ignore the nature and terms of the Option, focusing instead on uses that may occur in the future—*after* SEPA review, *after* permits have been issued, and *after* Propeller Airports exercises its right to “negotiate and enter” a lease. CP 77. But the City cannot show that the Option itself will result in any changes to the existing uses at Paine Field. The Option is therefore categorically exempt, and this Court should affirm for this reason.

C. The County Was Authorized to Execute the Option Under Its Code

The City finally argues that the County Council and Executive failed to satisfy a code provisions which—the City argues—requires the Executive to present a written evaluation of alternatives when recommending approval of “airport leases.” Opening Br. at 42-44 (citing SCC § 2.10.010(12) and SCC § 15.04.040(3)). The City claims that because the Executive’s recommendation did not include such a written analysis, the Council lacked lawful authority to approve the Option, rendering the agreement void. This argument must fail based on the plain language of the Code. Moreover, any suggestion that the County has not considered any alternatives to the proposed passenger terminal during this lengthy process is baseless.

Propeller Airports adopts the arguments in Snohomish County’s brief. The County Council has the decision-making authority to authorize the execution of the Option, as recommended by the Executive. The code provides the authority to approve the Option with as much detail as the council may require from the Executive:

(12) Approval of all licenses to occupy, use or access the Snohomish County Airport and all airport leases; PROVIDED, that in accordance with SCC 15.04.040, the county executive may recommend individual licenses or leases for approval by the council, and shall recommend in

such detail as the council may require proposed rates, terms and forms of leases to be approved ...
Any lease or license executed pursuant to this section shall be deemed to be with the approval of the county council as required by 15.04 SCC.

SCC § 2.10.010(12) (emphasis supplied).

During the 18 months that led up to execution of the Option, executive staff, airport staff, and the prosecutor's office provided the Council with various alternatives for accommodating commercial air service at Paine Field consistent with federal law and grant assurance obligations. Among the alternatives considered were a county-built terminal, an airline-built terminal, and Propeller Airport's private third party proposal. On February 11, 2015, the County Executive approved an Executive/Council Approval Form to recommend that the County execute the Option, citing SCC § 2.10.010(12) and SCC § 15.04.040(3). First Dolan Dec. at ¶ 5 (CP 659-60), Ex. B (CP 752-53). Based on the information provided throughout the process, the County Council accepted the recommendation and approved the Option on March 2, 2015, again citing SCC § 2.10.010(12). First Dolan Dec. ¶ 6 (CP 660), Ex. C (CP 755). The County Executive signed the Option on March 11, 2015. *Id.* According to the County, an option executed pursuant to SCC § 2.10.010(12) is deemed to be with the approval of the County Council under Chapter 15.04 SCC. (CP 30) That is because the code specifically

provides that the executive written recommendation contain only “such detail as the council may require.” SCC § 2.10.010(12). The Council’s motion to approve the Option, therefore, confirms that the Council was satisfied with the information provided by the Executive.

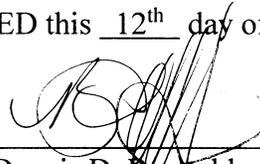
This Court should reject the City’s appeal on these grounds because the City’s interpretation of the code is incorrect, and the facts support that the code requirements were satisfied.

V. CONCLUSION

The law supports summary judgment to Snohomish County and Propeller Airports and dismissal of the City’s claims. The Trial Court should be affirmed on appeal.

RESPECTFULLY SUBMITTED this 12th day of May, 2016.

By



Dennis D. Reynolds, WSBA #04762
Brian T. Hodges, WSBA #31976
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
E-mail: dennis@ddrlaw.com
E-mail: brian@ddrlaw.com
*Counsel for Respondent Propeller
Airports Paine Field LLC*

CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that the original plus one (1) copy of the foregoing brief was timely filed by Priority U.S. Mail on May 12, 2016, pursuant to RAP 18.6(c), as follows:

Washington State Court of Appeals, Division I
600 Union Street
One Union Square
Seattle, WA 98101-1176

I further certify that I caused a true and correct copy of the foregoing brief to be served this date, in the manner indicated, to the parties listed below:

David A. Bricklin, WSBA #7583 Bricklin & Newman, LLP 1001 Fourth Avenue, #3303 Seattle, WA 98154 (206) 264-8600, tel / (206) 264-9300, fax bricklin@bnd-law.com ; cahill@bnd-law.com ; miller@bnd-law.com ; brooks@bnd-law.com <i>Attorneys for Petitioners</i>	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email <input type="checkbox"/> CM/ECF System
James L. Maynard, WSBA 6525 Office of Snohomish County Prosecuting Attorney Civil Division, Airport Office Snohomish County Airport at Paine Field 3220 – 100 th Street SW, Suite “A” Everett, WA 98204-1390 (425) 388-5108, tel / (425) 355-9883, fax jim.maynard@snoco.org <i>Attorneys for Respondent Snohomish County</i>	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email <input type="checkbox"/> CM/ECF System

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DATED at Bainbridge Island, Washington, this 12th day of May, 2016.



 Christy A. Reynolds
 Legal Assistant

APPENDIX INDEX

- A-1 Opinion, *City of Mukilteo v. U.S. Dep't of Transportation*, __ F.3d __, slip op. No. 13-70385 (9th Cir. 2016); *pet. rhng. en banc denied*, April 12, 2016.
- A-2 SCC § 2.10.010(12) and SCC § 15.04.040(3)
- A-3 News article: "Mukilteo promises battle over Paine Field flights," HeraldNet, Everett, Washington, February 11, 2009.

Propeller Airports RESPONSE BRIEF

APPENDIX A-1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF MUKILTEO, WASHINGTON, a
non-charter code city; CITY OF
EDMONDS, WASHINGTON, a non-
charter code city; SAVE OUR
COMMUNITIES, a tax exempt
organization; MICHAEL MOORE, an
individual; VICTOR M. COUPEZ, an
individual,

Petitioners,

v.

U.S. DEPARTMENT OF
TRANSPORTATION; ANTHONY FOXX,
Secretary of Transportation;*
FEDERAL AVIATION
ADMINISTRATION; MICHAEL P.
HUERTA, Acting Administrator,
FAA; DAVID SUOMI, Regional
Administrator, FAA Northwest
Mountain Region,**

Respondents.

No. 13-70385

OPINION

* Anthony Foxx is substituted for Ray LaHood as Secretary of Transportation. *See* Fed. R. App. P. 43(c)(2).

** David Suomi is substituted for Kathryn Vernon as Acting Regional Administrator, FAA Northwest Mountain Region. *See* Fed. R. App. P. 43(c)(2).

On Petition for Review of an Order of the
U.S. Department of Transportation
Federal Aviation Administration

Argued June 18, 2014
Submitted October 9, 2015
Seattle, Washington

Filed March 4, 2016

Before: Diarmuid F. O’Scannlain, Marsha S. Berzon,
and Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman

SUMMARY^{***}

Federal Aviation Administration / Environmental Law

The panel denied a petition for review challenging the Federal Aviation Administration’s (“FAA”) decision that no Environmental Impact Statement was necessary to commence operating commercial passenger service at Paine Field near Everett, Washington.

Under the National Environmental Policy Act (“NEPA”), and its implementing regulations, the FAA was required to analyze all “reasonably foreseeable” environmental impacts

^{***} This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

of its decision to open Paine Field to commercial passenger traffic.

The panel held that the scope of the FAA's review was not arbitrary and capricious. The panel further held that the FAA's demand-based flight operation projections for Paine Field were neither arbitrary nor capricious. The panel also rejected the petitioners' contention that the FAA violated 40 C.F.R. § 1508.25, which requires agencies to consider "connected actions" in NEPA documents, and held that it was not arbitrary for the FAA to have included no connected actions in the final Environmental Assessment. The panel rejected petitioners' bias-based arguments, and held that: the FAA's Finding of No Significant Impact was not predetermined by the creation of an optimistic schedule for completing the environmental review or statements favoring commercial service at Paine Field; and the FAA performed its NEPA obligations in good faith and did not prematurely commit resources to opening the terminal.

COUNSEL

Barbara E. Lichman (argued), Buchalter Nemer, Irvine, California, for Petitioners.

Lane N. McFadden (argued), Attorney, Environment & Natural Resources Division; Robert G. Dreher, Acting Assistant Attorney General, United States Department of Justice, Washington, D.C.; Patricia A. Deem, Office of Regional Counsel, NW Mountain Region, Federal Aviation Administration, Seattle, Washington, for Respondents.

OPINION

TALLMAN, Circuit Judge:

Paine Field, located in Snohomish County, Washington, near the city of Everett, was originally constructed in 1936 when it was envisioned to become a major airport serving the communities located north of Seattle. Over the years, it has been used for military purposes (both during and after World War II), and for commercial and general aviation aircraft. Today, the Boeing Company operates its 747 aircraft production factory at Paine Field. There are a host of related commercial businesses which repair and service large airplanes, providing jobs to more than 30,000 people. For that reason, the three existing runways are as long as 9,010 feet.

Paine Field has not, however, become the hub of commercial passenger traffic originally envisioned when it was first built. In 2012, authorization was given to commence service by commercial passenger carriers, starting with permission to build a small two-gate terminal. This case brings to our attention a longstanding public debate over the future of the airfield.

Petitioners challenge the Federal Aviation Administration's (FAA) decision that no Environmental Impact Statement (EIS) is necessary to commence operating commercial passenger service at Paine Field. The FAA made that decision after preparing a draft Environmental Assessment (EA), a less robust form of environmental review. *See Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021–22 (9th Cir. 2012). Two and a half years and over 4,000 public comments later, the FAA published a final

EA in September 2012. It found no significant environmental impacts as a result of the FAA's approval. Petitioners claim that the FAA unreasonably restricted the scope of the EA, failed to include connected actions as required, and predetermined an outcome before conducting its review.

We heard argument on this appeal in June of 2014. Shortly thereafter, the parties requested that we stay this action because, for lack of funding, it appeared unlikely that development would proceed. Construction of the passenger terminal was indefinitely delayed after Snohomish County, which owns and operates Paine Field, decided it would not fund the three million dollars needed to construct a building that could handle passengers and their baggage. At the time, no one else was willing to step forward with the money, even though Alaska Airlines, through its subsidiary Horizon Air, and Allegiant Airlines had expressed an interest in providing service in and out of Paine Field if adequate facilities were made available.¹

After argument, we stayed the proceeding and requested interim status reports every six months. Based on the Respondents' September 2015 undisputed assurances that construction is now imminent, we reinstated this case and now reach the merits of the petition.

We have jurisdiction over this appeal under 49 U.S.C. § 46110(a). We have reviewed the record compiled by the

¹ It appears Horizon Air and Allegiant Airlines may no longer be interested in providing service at Paine Field. The government has represented, however, that there is no reason to believe that the new commercial service proposed at Paine Field would involve a different number of flight operations than provided for in the original proposal.

agency in support of its decision. We hold that the scope of the FAA's analysis was not arbitrary and capricious; we recognize that under the enabling act that created it, the FAA is allowed to express a preference for a certain outcome; and we deny the petition for review and uphold the FAA's decision to permit commercial passenger operations to begin at Paine Field once the terminal is built.

I

Petitioners make several arguments about the scope of the FAA's review, essentially claiming that the FAA wrongly failed to analyze what would happen if more airlines followed the first two proposed airlines into Paine Field. Under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, and its implementing regulations, the FAA was required to analyze all "reasonably foreseeable" environmental impacts of its decision to open Paine Field to commercial passenger traffic. *See* 40 C.F.R. § 1508.9 (requiring EAs to analyze environmental impacts of the proposed action); *Id.* at § 1508.8(b) (equating "impact" with "effect" and defining "indirect effects" as those that are "reasonably foreseeable"); *Id.* at § 1508.7 (defining "cumulative impacts" as those which result from the addition of impacts from current and past actions to those of "reasonably foreseeable" future actions). Similarly, the Clean Air Act, 42 U.S.C. §§ 7401-7671, and related federal regulations also require the FAA to analyze "reasonably foreseeable" emissions resulting from its action. *See* 40 C.F.R. § 93.153(b) (requiring agencies to analyze indirect and direct emissions); *Id.* at § 93.152 (defining "indirect emissions" as those that are, among other things, "reasonably foreseeable").

The Supreme Court has emphasized that NEPA only “guarantees a particular procedure, not a particular result” and “a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get ripper.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). Accordingly, when reviewing agency decisions under NEPA, the starting point is the administrative record. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *amended*, 867 F.2d 1244 (9th Cir. 1989). Our task is to determine whether the agency made an arbitrary and capricious decision based on that record. *Id.*

Here, the FAA based its flight operation projections on demand and determined that the only additional, and reasonably foreseeable, flights were those initially proposed by two airlines, amounting to approximately twenty-two operations² per day. Those airlines proposed to employ smaller aircraft with a capacity of up to 150 passengers. In contrast, the projections touted by petitioners were based solely on the airport’s maximum capacity and do not take into account actual historical demand. While it is true that we do not have the most current projections before us, that data is not necessary to determine whether the FAA based its 2012 decision on reasonable grounds. Further, the ongoing validity of that 2012 decision is unchallenged. The FAA claims that

² An “[a]ir carrier operation” is defined as a single takeoff or landing. See 14 C.F.R. § 139.5. Historical data shows that Paine Field peaked in air carrier operations around the year 2000. That year, Paine saw a total of 213,291 “operations.” More recently, operations declined to 117,104 operations per year in 2011. Thus, adding by 2018 approximately 8,340 operations per year from commercial passenger operators will leave the overall airport operations within the level of historic variation.

the 2012 finding of no significant impact (FONSI) is still valid because Propeller Air, Inc., the new outside investor, now plans to build “a terminal facility consistent with that evaluated in the Final EA,” and that the number of operations will be similar. Petitioners submitted nothing to challenge that statement.

The final EA evaluated four proposed FAA actions.³ The FAA must still take at least one of those original four actions—amending Paine Field’s Part 139 Certificate—to allow commercial passenger operations. Given that the major action⁴ analyzed in the original EA is now likely to occur, and the FAA maintains that it will occur “consistent” with the original plan, we evaluate the 2012 FONSI based on the existing administrative record.

Petitioners do not contest the FAA’s claim that the projections regarding the number of air carrier operations in the FONSI are still consistent with the current terminal construction efforts, despite being given the opportunity to do

³ The four actions were: (1) amending Paine Field’s Part 139 Certificate to allow it to host commercial passenger service; (2) amending the Part 119 Specifications for Horizon to allow flights in and out of Paine; (3) amending the Part 119 Specifications for Allegiant to allow flights in and out of Paine; and (4) determining whether Snohomish County was eligible to receive a federal grant to defray the cost of expanding and updating the existing terminal. Only action (1) is challenged here.

⁴ According to Petitioners, this, and the construction of a new terminal, are the FAA actions that they really seek to challenge. In a letter submitted to us on May 20, 2014, the Petitioners said the “cause of the harm that Petitioners allege and from which they require relief” is the FAA’s “plans to turn Paine Field into a commercial airport, and expand its facilities to accommodate commercial service,” rather than the change in Horizon’s and Allegiant’s Part 119 Specifications.

so. Given that we are to defer to the FAA “especially in areas of agency expertise such as aviation forecasting,” the FAA’s demand-based projections of approximately 8,340 operations per year in 2018, were not arbitrary and capricious.⁵ *Nat’l Parks & Conservation Ass’n v. U.S. Dep’t of Transp.*, 222 F.3d 677, 682 (9th Cir. 2000). We decline to apply the less deferential standard advanced by Petitioners because this is a factual determination dependent on agency expertise rather than a legal determination. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1028 (9th Cir. 2006).

We also reject Petitioners’ argument that amending Paine Field’s Part 139 Certificate to allow commercial passenger operations means that Paine Field “must allow access by all aircraft so requesting” in the future. Petitioners have provided no support for this come one, come all theory and instead rely on statutory provisions that limit the ability to take away airport access once access has been granted to a particular airline. *See* 49 U.S.C. § 47524(c)(1) (providing limits on new airport access restrictions); 49 U.S.C. § 41713(b)(1) (preempting state restrictions on access). The statutes cited by the Petitioners only go into effect after access has been authorized—meaning that the airport is open to commercial operations generally (via the airport’s Part 139 Certificate) and the airline specifically has authority to conduct operations at that airport (via the airline’s Part 119 Specifications). Thus, our decision today does not open the floodgates because any future airline must still get an amendment to its Part 119 Specifications in order to operate

⁵ These demand-based projections were actually quite close to the maximum terminal capacity projections advanced by Petitioners, which predicted 8,760 operations per year by 2018.

out of Paine Field. The FAA, therefore, reasonably based the EA on the number of operations Horizon and Allegiant intended to carry out, not on the speculative number of operations that could someday be carried out at Paine Field if other airlines also seek an amendment to their Part 119 Specifications.

Given the existing administrative record, we hold that the FAA's demand-based projections were neither arbitrary nor capricious.

II

Petitioners next argue that the FAA violated 40 C.F.R. § 1508.25, which requires agencies to consider “connected actions” in NEPA documents. Connected actions are those that are interdependent or automatically triggered by the proposed action. *See* 40 C.F.R. § 1508.25. The FAA determined that there were no connected actions for this project, and Petitioners have failed to provide anything more than mere speculation that the FAA's actions now will lead to more aircraft activity at Paine Field in the future than covered in the EA. Thus, it was not arbitrary for the FAA to have included no connected actions in the final EA.

III

Petitioners also argue that the FAA decided what the result would be before performing the EA for two reasons: (1) the FAA made statements favoring passenger service at Paine Field; and (2) the FAA gave a schedule to the consulting firm that prepared the EA which included the date on which a FONSI could issue. Petitioners argue this schedule and the FAA's statements show that the FAA

decided to issue a FONSI before even starting the environmental review process. We reject both of these bias-based arguments.

Petitioners' first argument, that the FAA favored commercial service, is easily rejected because NEPA does not prohibit agencies from having or expressing a favored outcome. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). Agencies are required only to conduct the required environmental review "objectively and in good faith," rather than as "subterfuge to rationalize a decision already made." *Id.* at 1142. Indeed, the enabling legislation that created the FAA includes an express congressional directive that the agency shall promote and encourage the development of commercial aviation throughout the United States. *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 102-103, 72 Stat. 731, 740 (later recodified and repealed) (explaining that the FAA is charged with "[t]he promotion, encouragement, and development of civil aeronautics"). The FAA acted well within the bounds of NEPA by advocating for commercial service at Paine Field.

Petitioners' second argument, based on the FAA giving the EA contractor a schedule which included the date a FONSI could issue, is also without merit. As the FAA points out, approving a schedule which included the date a FONSI *could* issue did not obligate the FAA to reach a Finding of No Significant Impact. The FAA simply identified its preferred outcome and laid out an optimistic timetable for achieving that outcome. This is consistent with regulations that actually encourage the FAA to identify a preferred alternative and encourage the FAA to set time limits during the environmental review process. *See* 40 C.F.R. § 1501.8

(encouraging time limits); 40 C.F.R. § 1502.14(e) (encouraging listing a preferred alternative).

As the FONSI at issue in this case states, the FAA did a “careful and thorough” review of the final EA before issuing its finding. Because the FAA reserved the “absolute right” to determine whether a FONSI would issue or not, creating this tentative schedule did not violate NEPA. *See Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1063–65 (9th Cir. 1998) (holding that tentative timber cutting schedule released before EIS did not violate NEPA).

In short, the FAA’s Finding of No Significant Impact was not predetermined by the creation of an optimistic schedule for completing the environmental review or statements favoring commercial service at Paine Field. The FAA performed its NEPA obligations in good faith and did not prematurely commit resources to opening the terminal. The Petitioners’ bias arguments fail.

IV

We emphasize that we base our decision today on the current administrative record. So far as that record shows, the only changes in the status quo since the FAA issued its 2012 decision is that a private entity, Propeller Air, Inc., has now stepped forward to pay for building the small passenger terminal which the FAA has previously approved, and that the airlines likely to use the terminal may change. These changes are not enough to warrant a supplemental EA, as neither of these changes, in themselves, will necessarily alter the environmental impact. *See Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 854 (9th Cir. 2013) (holding that supplementation is not required when the final

project is a “minor variation” of one of the alternatives discussed in the NEPA document); *see also* FAA Order 1050.1E (Change One) ¶ 402b(1) (requiring the FAA to supplement an EA only if “significant changes” have been made to the project).

Practical concerns also weigh against requiring the FAA to reevaluate or supplement the EA at this time. As previously discussed, any airline wishing to fly out of Paine Field, besides Horizon or Allegiant, needs to request access from the FAA and an amendment to their Part 119 Specifications, potentially triggering another round of environmental assessment subject to scrutiny under NEPA. We do not prejudice Petitioners by deciding this case on the current record because if they want post-2012 facts reviewed, the Petitioners can simply challenge the FAA’s future actions when further expansion is sought. But on this record we cannot say the FAA’s decision to permit limited commercial passenger operations to begin at Paine Field without a full environmental impact statement was arbitrary and capricious.

PETITION FOR REVIEW DENIED.

Propeller Airports RESPONSE BRIEF

APPENDIX A-2

2.10.010 Executive functions.

The following functions of government not otherwise provided for in the charter are deemed executive functions and shall be performed by the county executive:

(12) Approval of all licenses to occupy, use or access the Snohomish County Airport and all airport leases; PROVIDED, That in accordance with SCC 15.04.040, the county executive may recommend individual licenses or leases for approval by the council, and shall recommend in such detail as the council may require proposed rates, terms and forms of leases to be approved by the executive in which event the county council by motion will establish the rates to be charged and other terms of any such lease and approve the form of lease utilized which rates, terms and form may be changed from time to time by the county council; and PROVIDED, FURTHER, That the county executive shall submit an annual report to the county council, not later than February 15th of each year, showing the names of parties, rents, reserve, areas rented, and time period of each such lease and license. Any lease or license executed pursuant to this section shall be deemed to be with the approval of the county council as required by chapter 15.04 SCC;

SCC § 2.10.010(12)

=====

15.04.040 Authority-Manager/Executive.

(3) Any matter relating to management or operation of the airport that is presented to the county council for action by or through the airport manager or executive, including but not limited to individual licenses or leases of airport property or proposed rates, terms or forms of leases to be approved by the executive under SCC 2.10.010(12), shall be accompanied by a statement of the options that are available to the council, a written evaluation of their relative merits, and a written recommendation by the executive for council action.

SCC § 15.04.040(3)

Propeller Airports RESPONSE BRIEF

APPENDIX A-3

HeraldNet

Everett, Washington

NEWS01

Published: Wednesday, February 11, 2009, 12:01 a.m.

Mukilteo promises battle over Paine Field flights

By Bill Sheets
Herald Writer

EVERETT -- Opponents of commercial airline service at Paine Field vow to start a time-consuming, expensive legal battle to delay flights from the airport as long as possible.

Although Horizon Air wants to start service in just months, Mukilteo Mayor Joe Marine said they will take the fight to court.

"Let me put it this way," Marine said. "Horizon will not be flying out of Paine Field this summer."

Flight opponents were dealt a blow last week when the Snohomish County Council voted to consider building a terminal at the county-owned airport.

On Tuesday, Marine said Mukilteo will milk what it can out of federal laws to drag out the process.

"Make it time consuming, expensive and stretch it out," he said. "We'll fight the terminal legally."

Some south county cities and residents oppose regular airline service at the airport because they say noise could damage neighborhoods. Others favor it for convenience and potential economic benefit.

Federal aviation law requires that any airport that accepts federal grants to negotiate in good faith to provide space for any air carrier, including airlines.

Greg Tisdell, one of the leaders of the main flight proponent group, Fly From Everett, said the group's main hope is that opponents don't do anything to jeopardize federal funding.

"Please don't do anything silly to mess up the aerospace industry," Tisdell said. "They (opponents) claim they don't want to, but sometimes in life what you think you might not have an effect on, you certainly could."

Horizon Air of Seattle has said it would like to start service at the airport as early as April 1. The chief spokesman for Horizon Air, Dan Russo, was out of town and could not be reached Tuesday. Spokeswoman Jen Boyer declined comment.

In 2007 Mukilteo set aside \$250,000 to fight any plans for passenger service at the airport.

Last year, Mukilteo hired aviation attorney Barbara Lichman of the firm Chevalier, Allen & Lichman of Costa Mesa, Calif. Lichman lives in Newport Beach, under the flight path of John Wayne Airport in Orange County.

As a resident, she helped forge an agreement between the community and the airport to minimize the effects of flights on those who live nearby. That agreement includes a provision for steep takeoffs to reduce noise in the flight path.

Lichman used that experience to launch a career in aviation law.

Lichman said Tuesday she doesn't buy the reasoning by Snohomish County councilmen for stating a preference for a county-built terminal at Paine Field.

While some of the council members oppose commercial flights at the airport, they said the county could gain more control over air service there by building its own terminal rather than having it done by the airlines. The advice came from the Denver-based aviation law firm of Kaplan, Kirsch & Rockwell.

Many airports, including John Wayne, keep a rein on airlines through leases, Lichman said.

"They lease space but they control the configuration through lease conditions," Lichman said. "There are a million ways of doing it. They (the Snohomish County Council) chose the most burdensome."

Lichman said she does not believe the county had to cast its vote for a terminal last week to avoid losing grant funds for the airport.

"And we do believe that there are other ways they could meet their obligations, and still not unduly burden surrounding populations."

Allegiant Air of Las Vegas sent a letter to the county in May 2008 indicating interest in flying from Paine Field, followed by Horizon in October.

Allegiant has yet to submit a ballpark start date to the county, spokeswoman Tyri Squyres said.

"We are still looking forward to serving the community in the future," she said in an e-mail.

Snohomish County Executive Aaron Reardon said he hasn't discussed any plans for legal action with commercial air service opponents.

"I think it's important that members of the communities' voices are heard" and they have an opportunity to have their questions answered, Reardon said.

Lichman predicted airlines would not operate from Paine Field this year and offered an alternate timetable.

"How about two or three years from now?" she said.

Bill Sheets: 425-339-3439, sheets@heraldnet.com.

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