

No. 36556-1-II
DIVISION II COURT OF APPEALS OF THE STATE OF
WASHINGTON

ARTHUR S. WEST
and
JERRY DIERKER
Appellants
v.

PORT OF OLYMPIA
Respondent

DEPUTY
BY
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

RESPONSE BRIEF OF RESPONDENT PORT OF OLYMPIA

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ORIGINAL

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I. RESPONDENT PORT'S RESTATEMENT OF ISSUES PERTAINING TO ASIGNMENTS OF ERROR

A. Have Appellants Met Their Burden To Show that the Port's Record on Review is inadequate? (Appeal Issue #1) NO.

B. Have Appellants Met Their Burden To Show they have standing to appeal this SEPA Decision? (Appeal Issue # 2) NO.

C. Have Appellants Met Their Burden To Show the Port Undertook an Improper SEPA "Phased Review," or Failed to Consider Alleged 'Foreseeable Impacts'? (Appeal Issues # 3& 5) NO.

D. Have Appellants Met Their Burden To Show that FAA NEPA is Incomplete or Was Improperly Relied On By the Port? Appeal Issue # 4). NO.

E. Have Appellants Met Their Burden To Show the Port's SEPA Processes or Fees are Improper? (Appeal Issue # 5): NO.

F. Have Appellants Met Their Burden To Show They Are Entitled to a Default Judgment? (Appeal Issue #6):

II. INTRODUCTION

This is an appeal of an administrative State Environmental Policy Act (SEPA), Chapter 43.21C RCW decision made by the Port of Olympia, which was appealed to Superior Court by Appellant Mr. West & Mr Dierker. The MDNS was issued by the Port on June 29, 2006. AR 102.¹

The Superior Court in its appellate capacity reviewed the appeal, considered the extensive briefing submitted by the parties at the Superior

¹ References to "AR" denote the Administrative Record filed with this Court by the Superior Court; "Attachments" refer to AR and CP documents attached to the subjoined Declaration of counsel Carolyn Lake.

Court level, heard extensive argument, and ultimately ruled to deny the appeal and uphold the Port's decision. CP 232-4, 241-2. See **Attachments 1, 2 and 3.** The Superior Court denied the initial appeal finding (1) the Appellants had no standing to bring the appeal, and (2) that Appellants raised no viable substantive issues. *Id.* Appellants then appealed further to this Court of Appeals.² This Court should similarly find that Appellants present no debatable issues. Appellants also fails to meet their burden on appeal to show that any substantive or procedural errors occurred. Therefore, the Court should deny the appeal and decline to disturb the Port's SEPA MDNS for this Line of Sight Airport paving and safety project.

III. RESPONDENT'S RESTATEMENT OF FACTS

AIRPORT HISTORY

To put the Project in context, the Port provides the Court information on the Airport's History, Operations, WSDOT's Role in Statewide Airport Pavement Management, the Port's Airport Pavement Management Program, FAA Pavement Engineering Design Standards and Project-specific information on how this Project complies with WSDOT and FAA

² At the Court of Appeals level, and for the first time throughout the extended appeal process, Mr. West applied for a Stay of the airport run way paving and safety improvements. On August 29, 2007, the Honorable Commissioner Ernetta G. Skerlec of the Division II Court of Appeals entered a ruling denying the Stay. Mr. West subsequently filed a Motion to Modify the Commissioner's ruling. This Court ruled to uphold the Commissioner's Ruling and to deny the Stay.

recommendations. All information is supported by references to the Port's administrative record.

The Olympia Airport is geographically located at the southern-most reached of Puget Sound, just 4.5 miles south of the shores of Budd Inlet and Capitol Lake and lies within the incorporated city limits of Tumwater. The airport is among the oldest public airports in the United States, with development initiated in 1927 by the Aviation Committee of the Olympia Chamber of Commerce. Air shows were held at this location as early as 1911. (Olympia Airport Master Plan Update, November 1996 at 2-1 to 2-4). AR 88-89, AR 2344. The municipally-owned facility was expanded in 1929 and again the 1937 when the State of Washington Highway Department paved three turf runways in exchange for a free hangar located at the airport. The first permanently based operator at Olympia signed a 20 year lease in 1935. Id. AR 89. AR 2344. Olympia Air Transport Company began offering passenger flight services in 1936, the year in which federal public works efforts (WPA) constructed the public terminal building and over \$100,000 worth of additional improvements on the airfield. In 1938, the existing operator's lease was taken over by a new operator who expanded services. Id. AR 89. AR 2344. Immediately after the start of U.S. involvement in World War II in 1942, the military obtained control of the airport and all Olympia civilian aviation activity

was relocated to Eastern Washington and Idaho. The airport was renamed Olympia Army Air Field, and operated as a satellite facility to McCord Field located approximately 21 miles to the northeast. An additional 1,000 acres were acquired by the military for the airport, resulting in the airport's current configuration of 1,392 acres including three paved runways, 3.6 linear miles of paved taxiways, and 24 hardstands providing service areas for the P-38 military aircraft. Id. AR. 89-90. AR 2346. Immediately after World War II, the airport served as a site for surplus military aircraft. Id. AR 90. AR 2346. Operation of the airport was transferred back to Olympia in 1947. The city also acquired title to the additional land and facilities from the U.S. government. The covenant between the city and the federal government associated with this transfer of title included assurances that the city would maintain and operate the facility as a public airport. This agreement also restricted usage for non-aviation purposes and included the right of the U.S. government to re-enter the field in event of a national emergency. Id. AR 90. AR 2346. Olympia, by resolution, authorized the transfer of the airport to the Port of Olympia on June 4, 1963. Id. AR 90. AR 2346.

Since operation of the airport transferred to the Port District, a series of facility improvements were accomplished including airport lighting, improved pavement conditions, and additional taxiways and T-hangers.

Additional property was also purchased and aviation easement secured in the north and south runway protection zones. An FAA air traffic control tower was constructed in 1974. Id. AR 91. AR 2346.

AIRPORT ROLE

The Olympia airport is included in the 1990 National Plan of Integrated Airport Systems (NPIAs) which is published by the U.S. Department of Transportation Federal Aviation Administration. The NPIAs contains 3,285 existing airports representing the nation's system of public-use airports in the United States. The Plan documents capital improvement recommendations planned for maintenance and development of the nation's airports over a 10-year period and defines federal funding availability based on established service level and role for each airport. AR 91. AR 2347. According to the 1990 NPIAS, the service level for Olympia Airport is presently designated as General Aviation for the first five years (1990-1994) of the plan. This class of airport service level may provide one or more of the following services: community access (within 30 minutes average driving time) to the national airport system, U.S. mail service, military activity, and/or other functions related to the accommodation of ten or more based small single-and multi-engine aircraft. AR 92. AR 2347.

The Airport's **service level** is elevated to a Commercial Service level in the 10-year time frame (1995-1999) of the nation plan. Commercial service airports enplane annually 2,500 or more passengers and receive scheduled passenger service. AR 92. AR 2347.

The **Airport Role classification** relates to airport design, construction, and maintenance to accommodate aircraft of certain size. Olympia Airport's role, as designed in the 1990 NPIAS, is Transport. Transport airports accommodate business jet and transport type passenger airplanes. (Olympia Airport Master Plan Update, November 1996 at 2-4). AR 92-3. AR 2348.

AIRPORT SITE DESCRIPTION

The Olympia Airport is located two miles south of Olympia, within the city limits of Tumwater; 1,461 acres are within Tumwater and the remaining 39 acres in unincorporated Thurston County. The Port also controls a total of 76 acres adjacent to airport property located north, east, and south for runway protection zone easements. Fifty-seven of these acres are in the county. AR 093. AR 2348. Airfield facilities occupy the east portion of the property; the business park occupies the west portion. (Olympia Airport Master Plan Update, November 1996 at 2-5). AR93.Ar 2348.

LANDING FACILITIES

Companies and public agencies at the Airport include Gower Flying Service, Glacier Aviation, Olympia Avionic Inc., Pearson Air, Soloy Corporation, the Washington State Patrol, the U.S. Department of Natural Resources (DNR), the State Department of Fisheries, JRW, and the Peninsula Group. AR 93. The current FAA Form 5010 Airport Master Record indicates 142 based aircraft and 28 based helicopters at the Olympia Regional Airport. AR 93. (Olympia Airport Master Plan Update, November 1996 at 2-13). AR 93. AR 2354.

AIRSIDE FACILITIES

The Port's Airside facilities include runways, taxiways and taxi lanes. There are two runways in operation with numerous connecting taxiways providing access and egress to the general aviation and air carrier/corporate aviation areas located northeast and west with respect to the runways on the airfield. See Existing Airport Layout, to Decision of the Responsible Official AR 257, **Attachments 4**, hereto. (Olympia Airport Master Plan Update, November 1996 at 2-9). AR 2351. In addition to the two runways, the paved airport areas consist of taxiways and taxi lanes, described as follows:

Taxiway (TW). A defined path established for the taxiing of aircraft from one part of an airport to another. (AC 150/5300-13 CHG 5).

Taxilane (TL). The portion of the aircraft parking area used for access between taxiways and aircraft parking position. (AC 150/5300-13 CHG 5). AR 94.

If analogized to vehicular roadway categories, the following terms would apply:

Runways: (freeway)
Taxiways: (arterial)
Taxilanes: (driveways/alleys).

WSDOT'S ROLE IN STATEWIDE AIRPORT PAVEMENT MANAGEMENT

Airport pavements are designed, constructed, and maintained to support the critical loads imposed on them and to produce a smooth, skid-resistant, and safe-riding surface. The pavement must be of such quality and thickness to ensure it will not fail under the loads imposed and be durable enough to withstand the abrasive action of traffic, adverse weather conditions, and other deteriorating influences. (Olympia Airport Pavement Management Report at February 2006 Appendix A Chapter 2 P. 3). AR 94-2626.

Visible evidence of excessive stress levels or environmental distress in pavement systems may include cracks, holes, depressions, and other types of pavement distresses. Distresses in airport pavements may severely affect the structural integrity, ride quality, and safety of airport pavements. To alleviate the effects of distresses and to improve the airport pavement serviceability, WSDOT recommends that airports adopt an effective and timely maintenance program and adequate repair procedures. (Olympia Airport Pavement Management Report at February 2006 Appendix A Chapter 6 P. 19). AR 95, AR 2642.

Washington's airport system, which includes the Olympia Airport, represents a tremendous capital investment and plays a critical role in the economic health of the state. The upkeep of the existing pavements is increasingly important. Therefore, the Washington State Department of Transportation (WSDOT) Aviation maintains a statewide airport pavement management system (APMS) to provide the airports, the State, and the FAA with the pavement information and analytical tools that can help them identify pavement-related needs, optimize the selection of projects and treatments over a multi-year period, and evaluate the long-term impacts of decisions made regarding the Washington airport pavement infrastructure. (Washington Airport PMS Manual at iii). AR 95, 2797.

WSDOT recommends use of an Airport Pavements Management System (APMS) to address 1) determining their pavement needs, 2) optimizing the selection of projects and treatments over a multi-year period, and 3) evaluating the long-term impacts of their projects priorities. (Washington Airport PMA Manual at Section 1 P. 1-1). AR 96. AR 2799.³

³ The importance of identifying not only the best repair alternative but also the optimal time of repair has been documented in US Army Corps of Engineers, Construction Engineering Laboratory (USACERL) Technical Report M-90/05 and is summarized in Exhibit 2 to Declaration of Andrea Fontenot, AR 136, **Attachment 5** hereto. This figure shows that over the first 75% of the pavement life, approximately 40% of the pavement condition deterioration takes place. After this point, the pavement deteriorates much faster with the next 40% drop in

As part of its airport operations oversight role, WSDOT engaged APTech, with assistance from CH2M HILL, to inspect the pavements at Washington airports using the Pavement Condition Index (PCI) procedure, which was developed by the US Army Corps of Engineers, Construction Engineering Research Laboratory.⁴ The PCI is used to indicate the condition of the operational surface of the pavements and, to some extent, the structural integrity of the pavement. During a PCI survey, distress type, distress severity, and distress quantity are recorded and analyzed, and used to calculate the PCI value of the section. AR 97, 2596. Airport pavement sections are then rated via a final calculated PCI value of a number from 0 to 100, with 100 representing a pavement in excellent condition, as illustrated in Exhibit 4 to Declaration of Andrea Fontenot, AR 97, 138-154, 2804-2825.⁵ (Washington Airport PMS Manual at Section 1 P. 1-6).

pavement condition occurring over the next 12% of the pavement life. The financial impact of delaying repairs until the second drop in pavement condition can mean repair expenses 4 to 5 times higher than repairs triggered over the first 75% of the pavement life. (Washington Airport PMS Manual at Section 1 P. 1-1). AR 96, 2799.

⁴ The PCI procedure is described in Federal Aviation Administration (FAA) Advisory Circular (AC) 150/5380-6A, *Guidelines and Procedures for Maintenance of Airport Pavements*, and ASTM Standard D5340, *Standard Test Method for Airport Pavement Conditions Index Surveys*, incorporated herein by reference. AR. See also FAA Advisory Circular (AC) 150/5300 - 13 dated 9/29/89, incorporated herein by reference. AR 96, 2596.

⁵ The types of distress identified during the PCI inspection provide insight into the cause of pavement deterioration. PCI distress types are characterized as load-related (such as alligator cracking on AC pavements or corner breaks on PCC

PORT'S AIRPORT PAVEMENT MANAGEMENT PROGRAM

As recommended by WSDOT, the Port uses an APMS as a tool for preserving the condition of pavement networks within an environment of increased competition for available funds. AR 98, 2592-2792. The pavement conditions at the Port's Olympia Municipal Airport were assessed in 2005 using the Pavement Condition Index (PCI) procedure. AR 98-9, 2596. Programmed into the Port's APMS, PCI information is used to determine which preventive maintenance actions (such as crack sealing) are advisable and also to identify the most cost-effective time to perform major rehabilitation (such as overlay). The importance of identifying not only the type of repair but also the optimal time of repair is illustrated in Exhibit 3 to Declaration of Andrea Fontenot, AR 137. This figure shows that there is a point in a pavement's life cycle where the rate of deterioration increases. The financial impact of delaying repairs beyond this point can be severe. (Olympia Municipal Airport Pavement Management Report (APMR) February 2006 at P. 1). AR 97-8, 2596.

pavements), climate/ durability-related (such as weathering [climate-related on AC pavements] and D-cracking [durability-related on PCC pavements]), and other (distress types that cannot be attributed solely to load or climate/durability). Understanding the cause of distress helps in selecting a rehabilitation alternative that corrects the cause and thus eliminates its recurrence. *Id.* During WSDOT's statewide airport PCI survey, photographs of each branch were taken. These photographs provide an overview of typical conditions, and cover any unusual or severe distress identified in the field. (Washington Airport PMS Manual at Section 1 P. 1-7). See Exhibit 4 to Declaration of Andrea Fontenot, AR 98, photos depicting various pavement distress conditions. AR 138-154.

PROJECT SPECIFIC PAVEMENT MANAGEMENT RESULTS

As a result of the 2005 pavement survey, the Port produced a Table depicting “Olympia Airport Pavement Evaluation results”. The results for the Runway 17/35, which is the subject of this Project and SEPA determination were included in the administrative record. AR 0155. (Olympia Municipal Airport Pavement Management Report at February 2006 P. 14). AR 2610. A copy of the entire Table was attached as Exhibit 6 to Declaration of Andrea Fontenot, AR 156-160, **Attachment 6** hereto. Photos of Runway 17/35 are Exhibit 7 to Declaration of Andrea Fontenot, AR161. The photos depict the longitude and transverse cracking, patching, raveling and weathering of Runway 17/35. Id. The entire Table 2, “Olympia Municipal Airport presents and future PCI values and anticipated repair needs” from the Olympia Municipal Airport Pavement Management Report at February 2006 P. 15, AR 2611-2613 is attached as **Exhibit 8** to Declaration of Andrea Fontenot, AR. 0163-65.

PROJECT DESCRIPTION

Runway paving rehabilitation was the initial basis for The Port’s undertaking this Project. However, Federal Aviation Administration (FAA) national policy requires that safety deficiencies be corrected in conjunction with any runway project. AR 102. Runway 17-35 at Olympia Regional Airport currently does not meet FAA standard line-of-

sight criteria due to a high point in the runway profile on the southern portion of the runway. This Project will result in a runway that meets the required design standard. In addition Runway 17-35 pavement surfaces are in need of asphalt overlay rehabilitation. The scope of paving is strictly within the scope of the existing runway 17/35 footprint. AR 102. A section of runway 17 was last paved in 1980. The runway is experiencing stress in the forms of cracking and weathering. The contractor will excavate, grade, compact and repave the runway, install a full length runway sub-drainage system which is a relatively recent FAA requirement. Existing runway lights are old and were constructed with direct burial cable, and will be replaced. Also, the runway will be grooved for improved aircraft performance. AR 104 and SEPA checklist AR 3-23. The runway cross section will be constructed to adequately support the existing & forecast fleet mix of aircraft that use the airport. AR 104 and checklist AR 3-23. FAA policy is to design and purchase a twenty year design strength pavement.

The FAA requires that the runway pavement be engineered to accommodate the current and future fleet of aircraft using the airport. AR 104. This pavement engineering design is based on two factors: (1) the Airport's typical aircraft design type, including landing gear type, and (2) the volume of aircraft, as follows:

- **Aircraft Design**⁶. The applicable airport design standard requires the Port to design the pavement to accommodate the aircraft of highest impact. To comply with this standard, the C-III, 94,000 lb, dual wheel aircraft currently operating at Olympia Regional Airport drove the pavement design on this Project.⁷ For example of this aircraft type, see Exhibit 20 to Declaration of Andrea Fontenot, AR 106, AR 178. This Project does not change the type

⁶ Aircraft are assigned an Airport Reference Code based on approach speed & wingspan. Airports are designed for a Reference Code is based on the most critical aircraft projected to use the airport. AR 105. The Olympia Airport Layout Plan assigns the Olympia Airport an Airport Reference Code of C-II for Runway 17/35. AR 105. The Airport Layout Plan also recommended Design Group C-III standards be preserved to accommodate group III aircraft currently using the airport. AR105.

⁷ **Types of Aircraft.** There were two design aircraft selected as a basis for the Project's pavement engineering for the Olympia Airport. AR. The first type is the Dornier 328 jet, depicted in Exhibit 11 to Declaration of Andrea Fontenot, AR 105, 169. This aircraft is a 30 seat regional jet designated C-II, with a maximum takeoff weight of 35,000 lbs. Id. The second critical aircraft selected was the Beech jet 400. This aircraft is also a C-II type with a maximum takeoff weight of 16,000 lbs, and is shown on Exhibit 12 to Declaration of Andrea Fontenot, AR105-6, 170.

Some examples of C-III aircraft currently operating at Olympia are the Gulfstream V, shown on Exhibit 13 to Declaration of Andrea Fontenot, AR 105, 171 which has a maximum takeoff weight of 92,000 lbs. Id. Another example of a C-III aircraft currently operating at Olympia is the Bombardier Global Express, shown on Exhibit 14 to Declaration of Andrea Fontenot, which has a maximum takeoff weight of 94,000 lbs. AR 105, 172.

The three basic landing gear configurations are single wheel, dual wheel and dual tandem wheel.

a. Exhibit 15 to Declaration of Andrea Fontenot, is an example of a single wheel aircraft. AR 106, 173.

b. Exhibit 16 to Declaration of Andrea Fontenot, is an example of a Dual wheel aircraft. AR 106, 174.

c. Exhibit 17 to Declaration of Andrea Fontenot, AR. is an example of a dual tandem aircraft. AR 106, 175.

Single Wheel landing gear aircraft are generally in the FAA A & B Reference Code and are light aircraft. AR106. See Exhibit 18 to Declaration of Andrea Fontenot, AR176. Dual Tandem wheel aircraft generally fall in to the D=V or D-VI category and are too large to operate at Olympia. See Exhibit 19 to Declaration of Andrea Fontenot, AR 106, AR 177. The Olympia Airport use is classified as Reference Code C Type II, serving some existing Code C Type III aircraft. Most Reference Code C aircraft have dual wheel landing gear. AR 106.

of aircraft which the Airport can accommodate. (C-II and C-III). AR105.

- **Landing Gear.** Another factor in pavement engineering is to consider the types of aircraft landing gear that typically uses the airport. AR. A particular pavement design will yield a certain weight bearing capacity, which is specific to each of the three aircraft landing gear classifications. This is because the footprint of actual tire surface touching the pavement varies with the landing gear type. AR 105-6. The Olympia Airport use is classified as Reference Code C Type II, serving some existing Code C Type III aircraft. Most Reference Code C aircraft have dual wheel landing gear. AR 106.
- **Improved Pavement Weight Bearing Capacity.** The Project also will provide improved weight bearing capacity. AR 107. Prior to 1980, the pavement weight bearing capacity for Runway 17/35, adjoining taxiways and the terminal apron were rated at 107,000 lbs, 142,000 lbs, and 240,000 lbs respectively. AR107. In 1980, a portion of 17/35 runway received an overlay, resulting in that portion of runway's ratings change to 55,000, 69,000 and 117 thousand pounds respectively. That overlay resulted in the lower numbers being used for the entire runway. AR 107. In 2000, a pavement study recommended that runway 17/35's weight bearing capacity be reduced further because of the deteriorating condition of the pavement. The design for the Project will prevent a reduction to the weight bearing capacity, and improve the values to 75,000 lbs, 94,000 lbs, and 142,000 lbs respectively. AR107-8.

YEAR	SINGLE Landing Gear:	DUAL Landing Gear:	DUAL TANDEM Landing Gear:
Pre - 1980	107,000	142,000	240,000
1980-2000	55,000	69,000	117,000
2000	30,000	50,000	100,000
As a Result of Project	75,000	94,000	142,000
Actual Need	27,000	94,000	-0-

- **Volume.** In 2000, when work first began on the last Airport update, the 2005 forecast was around 76,000 aircraft operations. AR 106-7. However, in 2004 there were over 98,000 actual operations, resulting in a 29% increase over the forecast:
 - 2005 Forecast 76,400
 - 2004 Actual 98,274
 - Exceeded Forecast 21,874 (29%)

AR 107. Actual and forecast operations for 2008 and 2013 were adjusted and considered in the project design and the environmental review. AR 107.

In sum, the Project was undertaken to ensure the Port of Olympia Airport maintains safe and effective operations. The Project was undertaken in accordance with applicable WSDOT, U.S. Army Corp of Engineer, and FAA pavement management guidelines. AR 108.

PORT'S SEPA ENVIRONMENTAL REVIEW

The Project's initial checklist was submitted on January 20, 2006 by Airport Director Rudy Rudolph. AR.108. The then-Public Works Director for the Port of Olympia, Andrea Fontenot, prepared the draft SEPA determination, and submitted the information, analysis and draft determination to the Port's Executive Director, who is also the Port's SEPA Responsible Official pursuant to the Port's SEPA Policy, Port of Olympia Commission Resolution -2006-03. AR 087.⁸ By Decision dated January 24, 2006, the Port as Lead Agency for this proposal issued a Mitigated Determination of Non-Significance (MDNS) with conditions and determined that it did not have a probable significant adverse impact upon the environment. SEPA No. 06-1. AR. The Port received timely comments from six persons/entities. AR 0108. In March 2006, the Port of

⁸ A copy of Resolution 2006-03 is attached as **Exhibit 1** to Declaration of Andrea Fontenot. AR 0127-0135.

Olympia withdrew the initial SEPA No. 06-1 Mitigated Determination of Non-significance. AR. 201.

On June 26, 2006, Port Staff, Staff from the Federal Aviation Administration (FAA) and an expert in noise analysis provided the Port with an update and technical information, including a Noise Report which described the expected noise impacts as minimal and not extending beyond airport boundaries. AR 202. The FAA provided information on the SEPA/NEPA process and explained the extensive review of this project by FAA and Port staff. AR 202.

On June 28, 2006 the Port through Airport Director Rudy Rudolph submitted an updated SEPA checklist for the Project. AR 202, and AR 004-022, which noted the following environmental information had been prepared directly related to this Project, which are incorporated by reference.

Final Environmental Impact Statement for the Port of Olympia Strategic Plan, issued by the Port of Olympia on February 7, 1994. Evaluates potential cumulative impacts for development on Port property.

Addendum to the Port of Olympia Strategic Plan Final Environmental Impact Statement for the Budd Inlet and Airdustrial Park land use plans, issued by the Port of Olympia on December 23, 1994.

Determination of Non-significance for the Port of Olympia Airport Master Plan Update, 1995. This review examined the proposed changes to the airport master plan.

Determination of Non-significance for the Port of Olympia 1995-2000 Capital Facility Plan, issued by the Port of Olympia on April 14, 1995. Includes Airport capital facility improvements; and environmental checklist.

Mitigated Determination of Non-significance for Comprehensive Plan and Airport Master Plan amendment, issued by the Port on January 29, 2001.

Mitigated Determination of Non-significance for the Olympia Regional Airport Runway Relocation, issued by the Port on June 30, 2003.

2004 Vegetation Survey and Prairie Condition Assessment Olympia Regional Airport, Richard Easterly and Debra Salstrom, October 7, 2004.

Determination of Non-significance for the City of Tumwater Comprehensive Plan Amendment, June 30, 2004, affirming the Airport Related Industrial zoning for the Airport property (available from the City of Tumwater, 555 Israel Road, Tumwater)

Northwest Mountain Region – Airports Division, NEPA Environmental Checklist for the Olympia Regional Airport, Runway 17-35 Line of Sight Improvements and Runway Rehabilitation Project, 7/10/06.

AR 0005.

The following additional planning documents pertain to the Project and were also incorporated by reference:

1. Olympia Airport Master Plan Update - November 1996. AR 88-94, AR 2326-2591.
2. Olympia Regional Airport Layout Plan Update. AR 2841-3013.
3. Olympia Municipal Airport 2005 Pavement Management Report. AR.98-101, AR 138-154, AR 163-165, AR 2592-2792, AR 2793-2840.

On July 10, 2006 the Port's Responsible Official issued a mitigated determination of non-significance because the Project does not cause adverse environmental impacts. AR 110.

REQUEST FOR RECONSIDERATION

Six parties timely requested reconsideration (Requestors) of the Port of Olympia's SEPA decision to issue a Mitigated Determination of Non-Significance (MDNS) for the paving proposal. AR 1024. The Port's SEPA Resolution 2006-3 contains a requirement for the filing of a request for Reconsideration to be filed with the Responsible Official as a condition precedent to filing a formal appeal. AR 130-135. Resolution 2006-3. The Reconsideration process is intended for parties to informally meet and resolve any issues related to the Port's SEPA decision, if possible, *prior* to an appeal being filed. AR 204. Pursuant to this policy, on September 7, 2006 at 9:00 AM the reconsideration meeting was held between the Reconsideration Requestors and the Port's Executive Director, in his role as SEPA Responsible Official. AR 205, 995,1000-1. The Requestors requested to audio tape the meeting, which was allowed. AR 205. There, the Port staff provided Requestors with the Port's Staff Report for the Responsible Official's consideration. AR 205. The Requestors submitted

the following written materials supplemental to the Reconsideration

Request at the meeting:

- a. Appeal of Port SEPA 06-2 submitted 8/31/06. AR 205.
- b. Quotes from the Records of Public Comment.” AR 205, 1004-1009.

The Requestors asked for an extension of time to submit information in response to the Port’s Report, which was granted through Thursday, September 14, 2006. AR 205, 1010. The Requestors timely submitted the following additional information.

- c. September 13, 2006 Letter from Christi Johnson. AR 1012.
- d. September 13, 2006 Letter from Janice Witt. AR 1013-1028.
- e. Jerry L. Dierker’s 14 September 2006 Brief in Response to the Port’s Declaration of Andrea Fontenot. AR 1042-1121.
- f. Author West’s September 14, 2006 Reply to Port’s Pleading. AR29-1041.

By Decision dated October 5, 2006, the Port issued the Decision of the Responsible Official declining the Request for Reconsideration for the Line of Site SEPA 06-3 DNS.⁹ AR 0198. Thereafter, on October 12, 2006, an administrative appeal was filed by six persons, including

⁹ **The Port’s SEPA Policy, Resolution 2006-03, Section 8, provides: “Appeals of SEPA threshold determination and adequacy of final environmental impact statement.”**

(1) Request for Reconsideration. Any challenge to a SEPA threshold determination and adequacy of final environmental impact statement shall be initiated by filing a Request for Reconsideration with the Responsible Official no later than close of business seven (7) days following the end of the fourteen (14) day comment period for the SEPA determination. The Request for Reconsideration is a mandatory condition precedent to filing an administrative appeal. If the Request for Reconsideration is denied, an appeal must be filed no later than close of business seven (7) days from the date the Reconsideration decision issues. If the Request for Reconsideration is granted, no additional reconsideration required or allowed. An appeal must be filed no later than 7 days from the date the Reconsideration decision issues.

Appellants. AR 1123. Pursuant to the Port Commission's adopted SEPA Policy Resolution 2006-3, Section 8(2), administrative appeal of the Responsible Official's SEPA Determination presents a three prong option for action as follows:

- (2) Commission, Hearing Examiner Appeal. If an appeal is filed after the Request for Reconsideration process is complete, the Commission, at its discretion, may:
 - (a) elect to hear the appeal, and after a public hearing, issue a Final Decision;
 - (b) forward the appeal to the Hearing Examiner, who would hold a public hearing and issue a Final Decision; or
 - (c) decline to hear the appeal and adopt the Decision of the Responsible Official as the Port's Final Decision.

AR 0127-0135. At their next regularly scheduled November 13, 2006 Commission meeting, Port Commissioners chose option three above, and declined to hold an appeal hearing. In doing so, the Decision of the Responsible Official became the Port's Final Decision for SEPA 06-3.

AR. AR 320. Appellants were notified to consider November 15, 2006 as the date this Decision was "entered," for purpose of any further appeal.

AR 320.

SUPERIOR COURT APPELLATE REVIEW

Two Appellants thereafter timely filed their appeal with Thurston County Superior Court, Mr West and Mr Dierker. After the appeal was filed, Appellants filed various request for relief, including Motion for Remand and Motion to Supplement the Record, which relief was denied

by the Court. CP 142-3. Appellants also named the City of Tumwater and its Mayor as parties to the judicial appeal. Prior to the substantive briefing, the Court granted the City's Motion to dismiss both Tumwater and its Mayor. See CP 87-89.

The Thurston County Superior Court (Honorable Judge Hicks) in its appellate capacity reviewed the appeal, considered the extensive briefing submitted by the parties, heard extensive argument, and ultimately ruled to verbally deny the appeal on June 1, 2007, and uphold the Port's decision. See Court's Order Denying West appeal entered 15 June 2007, and Order Denying Motion for Reconsideration, CP 232-4,241-2, **Attachment 1 and 2**, hereto. See Transcript of Decision, **Attachment 3** hereto. Following the Superior Court's Decision favorable to the Port, the Port began the construction of the Airport Project on July 10, 2007. Mr West & Mr Dierker appeal to this Court.

IV. ANALYSIS

A. STANDARD OF REVIEW

The procedural determinations of the Responsible Official shall be given substantial weight. RCW 21C.075(3)(d). *Hayden v. Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d 1164 (1980), *overruled on other grounds*; *Save A Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 286 N.1, 676 P.2d 1006 (1984). If appealed, the Port must demonstrate that it actually

considered relevant environmental factors before reaching its decision.

WAC 197-11-444 lists relevant environmental elements.

The record must demonstrate that the Port adequately considered the environmental factors "in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978); see also *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (citing *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)). Further, the decision to issue a MDNS must be based on information sufficient to evaluate the proposal's environmental impact. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) WAC 197-11-335.

The Responsible Official's determination to issue a MDNS is to be given substantial weight. RCW 43.21C.090; *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Ass'n v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994). If the Port affirmatively demonstrates prima facie compliance with the procedural requirements of SEPA, the burden falls on the party challenging the SEPA action to prove the Port's SEPA Decision was invalid.

If appealed, the Decision is reviewed under the "clearly erroneous" standard. A decision is clearly erroneous when, "although there is

evidence to support it, the reviewing body on the record is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (citing *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)).

B. APPELLANTS FAIL TO MEET THEIR BURDEN TO SHOW THAT THE PORT'S RECORD ON REVIEW IS INADEQUATE. (Issue No. 1)

Despite the 3659 pages of administrative record, and the Port's reliance on extensive pavement management tools,¹⁰ Appellants suggest that "the record is silent as to what actually was the basis for the agency decision". In making this claim, Appellants ignore the extensive, supporting record. Appellants' appeal is an "action for review under the State Environmental Policy Act of the determination of the Port of Olympia under SEPA 06-3 to issue a DNS..." As such the proper information to be included in the record is the information considered by the Responsible Official in making the **environmental** determination for the Project.¹¹ This is precisely what occurred as part of the Port's environmental review for this Project.

¹⁰ See Declaration of Filing Administrative record, CP to be assigned per Port's Designation of Clerks Papers, filed May 28, 2008.

¹¹ State regulations regarding SEPA direct that "Agencies shall to the fullest extent possible:... (b) Find ways to make the SEPA process more useful to decision makers and the public; promote certainty regarding the requirements of

Here, in addition to the Reconsideration materials, the Port's administrative record consists of the (first) SEPA 06-01 SEPA checklist and attachments, the SEPA 06-01 MDNS, any comments received for SEPA 06-01, the Port's response to said comments, if any, the (second) SEPA 06-03 checklist and attachments, the SEPA 06-03 MDNS, any comments received for SEPA 06-03, the Port's response to said comments, if any, the 7 September 2006 Declaration of Andrea Fontenot and the twenty one attached Exhibits, the supplemental documents submitted by the Requestors at the 7 September 2006 Reconsideration meeting, and the Requestor's Supplemental materials submitted by the deadline date of 14 September 2006.

RCW 43.21C.075(3) provides that

If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:...(c) **Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record,** consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An electronically recorded transcript will suffice for purposes of review under this subsection;...

the act; **reduce paperwork and the accumulation of extraneous background data; and emphasize important environmental impacts and alternatives, and ...** (c) Prepare **environmental documents** that are concise, clear, and to the point, and are supported by evidence that **the necessary environmental analyses** have been made. WAC 197-11-030.

The record must demonstrate that the Port adequately considered the environmental factors "in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978); see also *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (citing *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)).

Further, the decision to issue a MDNS must be based on information sufficient to evaluate the proposal's environmental impact. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) WAC 197-11-335.

Here, the Port's administrative record supports the Project's MDNS, and contains information on the Airport's History, Operations, WSDOT's Role in Statewide Airport Pavement Management, the Port's Airport Pavement Management Program and Project-specific information, and information regarding WSDOT, Corps of Engineer and FAA pavement management recommendations, how the Port complies with the recommendations and the Port's SEPA review for this Project. The Port properly filed the administrative record which was actually relied on by the SEPA Responsible Official in issuing the environmental decision. Upon filing the record, the Port was bound to support, and did support, its

environmental decision only by reference to that administrative record filed with the Court. In this case, the Port filed its record 9 February 2007.¹² That record contains the complete proceedings before the SEPA environmental official. Appellants offer this Court no basis for determining otherwise. Their appeal on this issue should be denied.

2. Appellants Wrongly Claim that the Port is Required to Hold an Appeal Hearing & Produce Transcript. (Issue #2).

Appellants argue contrary to state SEPA law when they claim that the Port is required to hold SEPA administrative appeal hearings. Instead, State SEPA laws allow each agency to decide whether or not to offer an administrative appeal. See RCW 43.21C.060:

Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a non-elected official of a local governmental agency, **the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.**

The State's intent to make administrative appeal optional at the agency's discretion is reinforced in other portions of SEPA state law:

A. (4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to

¹² See Declaration of Filing Administrative record, CP to be assigned per Port's Designation of Clerks Papers, filed May 28, 2008.

seeking any judicial review, use such agency procedure **if any such procedure is available**, unless expressly provided otherwise by state statute. RCW 43.21C.075 -Appeals.

RCW 43.21C.075 and see WAC 197-11-680.

Pursuant to the Port Commission's adopted SEPA Policy Resolution 2006-3, Section 8(2), a judicial appeal of the Port's Responsible Official's SEPA Determination presents a three prong option for action as follows:

(2) Commission, Hearing Examiner Appeal. If an appeal is filed after the Request for Reconsideration process is complete, the Commission, at its discretion, may:

- (a) elect to hear the appeal, and after a public hearing, issue a Final Decision;
- (b) forward the appeal to the Hearing Examiner, who would hold a public hearing and issue a Final Decision; or
- (c) decline to hear the appeal and adopt the Decision of the Responsible Official as the Port's Final Decision.

AR 0127-0135.

In response to the administrative appeal filed for this Line of Sight paving Project, Port Commissioners chose option three above, and declined to hear the appeal. AR 320. In doing so, the Decision of the Responsible Official became the Port's Final Decision for SEPA 06-3. Accordingly, consistent with state law and the local agency's adopted SEPA process, no appeal hearing was held or required. Appellants' argument fails.

C. APPELLANTS FAIL TO ESTABLISH STANDING TO PURSUE THIS SEPA APPEAL (Issue #3).

1. Appellants Lack of Standing Due to No Injury in Fact

In the present case, Judge Hicks ruled specifically that Appellants did **not** have standing to bring the appeal. See **Attachment 3**. To establish standing, Appellants were required to show they would suffer an injury in fact. Judge Hicks properly found they did **not**.

Courts apply two-part test in determining whether person or entity has standing to challenge State Environmental Policy Act (SEPA) determination: (1) interest that petitioner is seeking to protect must be arguably within zone of interests to be protected or regulated by statute; and (2) petitioner must allege injury in fact, i.e., that he or she will be specifically and perceptibly harmed by proposed action. West's RCWA 43.21C.010 et seq., 43.21C.075(4). *Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524, Wash.App.,1992.

First, the interest that the Appellant is seeking to protect must be “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question’ ”. *Save a Valuable Env't v. Bothell*, 89 Wash.2d 862, 866, 576 P.2d 401 (1978) (quoting *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970)).

Second, the Appellant must allege an “injury in fact,” i.e., that he or she will be “specifically and perceptibly harmed” by the proposed action. *Save*

a Valuable Env't, 89 Wash.2d at 866, 576 P.2d 401; *Concerned Olympia Residents v. Olympia*, 33 Wash.App. 677, 683, 657 P.2d 790 (1983); *Coughlin v. Seattle Sch. Dist. No. 1*, 27 Wash.App. 888, 621 P.2d 183 (1980).

In order to show injury in fact, Appellants must present facts that show they will be adversely affected by the Port's SEPA decision. Their "affidavits [must] collectively demonstrate sufficient evidentiary facts to indicate that he will suffer an 'injury in fact' ". *Concerned Olympia Residents*, 33 Wash.App. at 683, 657 P.2d 790.

Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. *Roshan v. Smith*, 615 F.Supp. 901, 905 (D.D.C.1985). If the injury is merely conjectural or hypothetical, there can be no standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973).

In order to invoke the inherent power of the courts to review non-judicial administrative action which violates fundamental rights, a plaintiff must show that he is or will be **directly and perceptibly harmed** by the challenged action. *Coughlin v. Seattle School District*, 27 Wn App. 888, 621 P2d 183, (1980) (appeal alleging failure to require EIS as error

dismissed based on lack of standing). “Standing ...requires the plaintiff to allege and prove facts that show a **direct adverse effect on her from the proposed action.**” *Leschi Improvement Council v. State Highway Comm'n.*, 84 Wn.2d 271, 525 P.2d 774 (1974).

The pleadings and proof are **insufficient** if they merely reveal imagined circumstances in which the plaintiff could be affected. The Washington Supreme Court has expressly adopted the federal approach to standing in environmental cases and has required the allegations and proof to include "**injury in fact,**" i.e., a perceptible present or future harm caused by the challenged action. *Save A Valuable Environment v. Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978); *See also Moran v. State*, 88 Wn.2d 867, 568 P.2d 758 (1977).

Here, Appellants attempted to address standing by claiming the following:

Plaintiff West is a landowner and citizen presently residing within the geographical boundaries of the municipal entity of Tumwater and conducting business in Thurston Count Washington.

Plaintiff West is a resident of the city of Olympia.

See Superior Court Complaint at paragraph 2.1 and 2.2.CP 3-8, 8a-21. The Superior Court found the facts alleged by the Appellants do not support standing. Appellants failed to present any evidentiary facts to show that they or their property would be injured by the Port's SEPA action. Bare

assertions that the Port action will likely create serious adverse impacts have absolutely no factual support in the record and do not support standing. *Concerned Olympia Residents*, 33 Wash.App. at 683-84, 657 P.2d 790 (plaintiff's bald assertion of injury is insufficient to support standing absent evidentiary facts to support it); *see also Roshan*, 615 F.Supp. at 907.

In so ruling on the issue of standing, Judge Hicks found that neither Appellant suffered "any particularized injury" as a result of the Airport Project:

Now, that's important for another reason, and that's on this standing issue. In reading what I think is probably a key case here, which is *Trepanier versus Everett*, 64 Wn.App. 380, the Court of Appeals, Division I, by Judge Agid, addresses this language of "any 'person aggrieved' can obtain judicial review under SEPA," but then goes on to explain that this "term 'person aggrieved' was intended to include anyone with standing to sue under existing law." And interestingly, she cites someone that's often cited by Mr. West, which is professor -- at one time -- Professor Settle. Now, to get standing, a person has to pass a two-part test. They have to be within the zone of interest thought to be protected by the environmental action, and second, they have to have some type of particularized injury here. I should have highlighted this. An injury in fact. This is at page 382 to 383 of the decision. And there the Court of Appeals found the individuals did not pass that test, and I think Mr. Dierker and Mr. West are in the same boat here. They may come under the zone of interest part of the test, **but I don't recognize where they have any particularized injury. They have only just a general injury.** Mr. West referred to bird watching for instance, or the quality of the air.

See **Attachment 3**, Transcript of Court's ruling at 4: 8-25 and 5: 1-6.

Appellants fail to show any "injury in fact," sufficient to establish standing, i.e., 'a perceptible present or future harm caused by the challenged action [the port's SEPA processes in general) that is suffered by the Appellants **beyond** that shared in common with other citizens. In *Coughlin*, the Trial Court' dismissal was upheld in an appeal of a school district's failure to require an EIS based on the appellant's lack of standing. "These standing requirements **preclude** standing based solely upon the harm claimed by Coughlin in her capacity as a **concerned and active citizen, taxpayer and resident** of the District. Such harm is too remote to establish standing in a SEPA case." *Coughlin* at 893-4. Just as true, here, Appellants lack standing and the appeal should be dismissed.

2. Standing is Constitutional Issues that May Be Raised For First Time On Appeal.

Appellants also argue that the Port is barred from raising standing, if the issue was not raised at the administrative level. However, standing is a constitutional issue which can be raised for the first time on appeal. Standing is a constitutional doctrine designed to assure that the plaintiff has a direct stake in the controversy. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973), *as quoted in Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524 (Wash.App. Div. 1 Feb

24, 1992), *review denied, Trepanier v. City of Everett*, 119 Wash.2d 1012, 833 P.2d 386 (Wash. Jun 03, 1992).

D. APPELLANTS FAIL TO SHOW ANY IMPROPER SEPA “PIECEMEALING”, OR THAT MDNS WAS NOT PROPER BASED ON CLAIMED FORESEEABLE IMPACTS. (APPELLANTS’ ISSUES 3 & 5).

Appellants have not shown that the Port unlawfully segmented or “piecemealed” its environmental review of this Project. The record shows that this runway pavement and safety rehabilitation project is a stand-alone, independent Project, and as such, there is no improper piecemealing.

The pertinent section of the SEPA regulations pertaining to “piecemealing” WAC 197-10-060(1) and (2) provide in part:

- (1) The proposal considered by . . . the lead agency during the threshold determination and EIS preparation, shall be the total proposal including its direct and indirect impacts. . . .
- (2) The total proposal is the proposed action, together with all proposed activity functionally related to it. Future activities are functionally related to the present proposal if:
 - (a) The *future activity* is an expansion of the present proposal, facilitates or is **necessary to operation of the present proposal**; or
 - (b) The present proposal facilitates or is a *necessary prerequisite* to future activities.

"Piecemeal review is *permissible* if the first phase of the project is *independent* of the second and if the consequences of the ultimate development cannot be initially assessed. *Cathcart-Maltby-Clearview*

Comm'ty Coun. v. Snohomish Cy., 96 Wn.2d 201, 210, 634 P.2d 853 (1981). Conversely, piecemeal review is **impermissible** where a "series of interrelated steps [constitutes] an integrated plan" and **the current project is dependent upon subsequent phases.**" *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976).

SEPA does not require that every speculative consequence of an action be included in a project specific environmental review. *Cheney*, at 344; *Richland v. Franklin Cy. Boundary Review Bd.*, 100 Wn.2d 864, 868, 676 P.2d 425 (1984). An environmental decision need not cover subsequent phases if the initial phase under consideration is **substantially independent** of the subsequent phase or phases, **and the project would be constructed without regard to future developments.** *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976), (citing *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974)). Emphasis added.

In the present case, the re-paving of the Runway 17/35 is part of the Port's ongoing airport pavement management system, and will correct safety deficiencies. The re-paving action is not inter-dependent upon other actions, such as the Port's taxi lane re-paving project SEPA 06-02, or Port tenant hanger construction as argued by the Appellants. This runway re-paving activity is consistent with the Port's pavement

management system and the recommendation of the FAA, the Corps of Engineers and WSDOT, and would occur absent any other independent action at the Port.

In addition to the Port's information and determination, the FAA independently determined that the Project does not violate the cumulative impact requirements of FAA ORDER 5050.4A and as amended by St. George Utah, Washington DC Circuit Court Decision of May 24, 2002. See Attachment 1 to NEPA Checklist AR. 179-196. The Appellants have not shown that repaving of the Run way is dependent upon any specific subsequent proposed development. Thus, no improper piecemeal review occurred.

Further, contrary to Appellant's bare assertions, unsupported by materials in the record, the Project will not lead to increased size and amount of air traffic at the airport. Both the SEPA 06-3 (AR 235) and related FAA/NEPA checklist (AR 179-196) conclude that the strengthening of pavement of the main airport runway will not increase likelihood of the airport accommodating heavier aircraft or encourage future expanded use. Id. The Project will not lead to increased size and frequency of air traffic, and instead is a safety maintenance issue.

E. APPELLANTS FAIL TO SHOW FAA NEPA IS INCOMPLETE OR WAS IMPROPERLY RELIED ON BY THE PORT. (Issue No. 4)

Appellants also argue as an appeal issue that the Port improperly relied on the FAA's NEPA categorical exclusion and that this somehow renders the Port's SEPA determination flawed. These arguments fail because (1) the Port incorporated but did not exclusively rely on the FAA NEPA decision; and (2) in fact the Port undertook its own SEPA review.

1. Port Undertook its own Environmental Review & Appellants Fail to Show the Port Improperly Relied on FAA NEPA Decision.

NEPA (National Environmental Policy Act), a term undefined by Appellants, is the federal equivalent of SEPA, the State Environmental Policy Act. Although Appellants claim that NEPA is a pre-requisite to a valid Port SEPA decision, they provide this Court with no legal citation in support. Appellants also claim that the Port undertook an insufficient degree of cooperation with the FAA/failed to incorporate NEPA decision. However, Appellants also offer no legal support of this argument.

The FAA requires all projects requesting to receive federal funds to fill out and submit the FAA environmental checklist (NEPA). If the FAA finds no environmental concerns in their review of the project and checklist they will sign off and approve the checklist as a Categorical Exclusion, pursuant to FAA Order 5050.4A, Airport Environmental Handbook, Chapter 3, paragraph 23. For this Project, the FAA issued a Categorical Exclusion on July 10, 2006. AR 179-196. A true and correct

copy of the FAA Airport Division's NEPA determination that the Port's Line of Sight Project qualifies as an FAA Categorical Exclusion is part of the Port's administrative record on file with this Court. AR 000299-000316.

SEPA allows the unfettered use of **all** NEPA documents to meet SEPA requirements [WAC 197-11-610]¹³. "An agency may adopt **any environmental analysis prepared under the National Environmental Policy Act (NEPA)** by following WAC 197-11-600 and WAC 197-11-

¹³ WAC 197-11-610 - Use of NEPA documents.

(1) An agency may adopt any environmental analysis prepared under the National Environmental Policy Act (NEPA) by following WAC 197-11-600 and 197-11-630.

(2) A NEPA environmental assessment may be adopted to satisfy requirements for a determination of nonsignificance or EIS, if the requirements of WAC 197-11-600 and 197-11-630 are met.

(3) An agency may adopt a NEPA EIS as a substitute for preparing a SEPA EIS if:

(a) The requirements of WAC 197-11-600 and 197-11-630 are met (in which case the procedures in Parts Three through Five of these rules for preparing an EIS shall not apply); and

(b) The federal EIS is not found inadequate: (i) By a court; (ii) by the council on environmental quality (CEQ) (or is at issue in a predecision referral to CEQ) under the NEPA regulations; or (iii) by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, 42 U.S.C 1857.

(4) Subsequent use by another agency of a federal EIS, adopted under subsection (3) of this section, for the same (or substantially the same) proposal does not require adoption, unless the criteria in WAC 197-11-600(3) are met.

(5) If the lead agency has not held a public hearing within its jurisdiction to obtain comments on the adequacy of adopting a federal environmental document as a substitute for preparing a SEPA EIS, a public hearing for such comments shall be held if, within thirty days of circulating its statement of adoption, a written request is received from at least fifty persons who reside within the agency's jurisdiction or are adversely affected by the environmental impact of the proposal. The agency shall reconsider its adoption of the federal document in light of public hearing comments.

630.” WAC 197-11-600 describes when and how “existing documents may be used to **meet all or part of an agency's responsibilities under SEPA.**” In other words, SEPA goes so far as to specifically authorize agencies to use NEPA documents **in lieu of undertaking their own SEPA review**, if certain steps are taken.

Here, however, the Port did **not** “adopt” the NEPA Categorical Exclusion in place of its own SEPA review. Instead, the Port undertook its own SEPA review, considered essential information, and issued its own independent SEPA determination. The FAA NEPA decision was included within the body of information considered by the Port’s Responsible Official, but was not used by the Port as a substitute for its own environmental review.

F. PORT’S RECONSIDERATION PROCESS & FEE ARE PROPER (Issue # 5).

Appellants object to the Port’s requirement that parties participate in a Request for Reconsideration process as a condition precedent to any appeal, and that a fee be paid as a condition precedent to a Request for Reconsideration and appeal of any Port SEPA decision. However, Washington Courts have upheld such fees as proper, the Port’s Reconsideration process complies with state law, and the Thurston County Superior Court has previously ruled on both issues, finding them proper and granting Summary Judgment to the Port against one of the same

Appellants herein. This Court should similarly uphold the Port's administrative SEPA processes as compliant with state law.

1. Port's SEPA Process

The Project is located within the Olympia Municipal Airport, which is within the Port of Olympia. AR 108. Pursuant to the Washington Administrative Code provision governing SEPA, the Port is the lead agency for environmental review purposes of its own agency projects. WAC 197-11-926. The Port's SEPA procedures are contained in the Port's adopted Resolution 2006-03. AR 125-134. That Resolution was adopted by the Port Commissioners pursuant to their authority as a public agency to adopt local administrative SEPA policies and procedures. See RCW 43.21C.030 "Guidelines for state agencies, local governments" ¹⁴

¹⁴ RCW 43.21C.030 Guidelines for state agencies, local governments -- Statements -- Reports -- Advice -- Information.

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

The Port's Resolution 2006-3 contains a requirement for the filing of a request for Reconsideration to be filed with the Responsible Official as a condition precedent to filing a formal appeal.

8. Appeals of SEPA threshold determination and adequacy of final environmental impact statement.

(1) Request for Reconsideration. Any challenge to a SEPA threshold determination and adequacy of final environmental impact statement shall be initiated by filing a Request for Reconsideration with the Responsible Official no later than close of business seven (7) days following the end of the fourteen (14) day comment period for the SEPA determination. **The Request for**

-
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
 - (iii) alternatives to the proposed action;
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;
 - (d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;
 - (e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
 - (f) Recognize the world-wide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;
 - (g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;
 - (h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

Reconsideration is a mandatory condition precedent to filing an administrative appeal. If the Request for Reconsideration is denied, an appeal must be filed no later than close of business seven (7) days from the date the Reconsideration decision issues. If the Request for Reconsideration is granted, no additional reconsideration required or allowed. An appeal must be filed no later than 7 days from the date the Reconsideration decision issues.

Resolution 2006-3. Emphasis added. AR 130-131.

The Port's Resolution 2006-3 also contains a requirement for a fee to be paid as a condition precedent to filing an administrative SEPA appeal or request for reconsideration:

(3) Appeal Procedures.

(a) Appeal Procedure/Fee. A notice of appeal, **together with a filing fee as set forth in the Port of Olympia Proprietary Type-User Charges for Port Goods and Services Fee Resolution** shall be filed with the Public Works Department. The Public Works Department shall process the appeal in accordance with the procedures set forth in this Resolution.

(b) Time Requirement. A Request for Reconsideration and an appeal shall be filed within the time frames set forth in Section 8(1) herein. If the last day for filing an appeal falls on a weekend day or holiday, the last day for filing shall be the next Port working day.

(c) Content of the Reconsideration and Appeal. Requests for Reconsideration and Appeals **shall** contain:

- (i) The name and mailing address of the Requestor/appellant and the name and address of his/her representative, if any;
- (ii) The requestor's/appellant's legal residence or principal place of business;
- (iii) A copy of the decision which is appealed;
- (iv) The grounds upon which the requestor/appellant relies;

- (v) A concise statement of the factual and legal reasons for the appeal;
 - (vi) The specific nature and intent of the relief sought;
 - (vii) A statement that the requestor/ appellant has read the appeal and believes the contents to be true, followed by his/her signature and the signature of his/her representative, if any. If the requestor/appealing party is unavailable to sign, it may be signed by his/her representative, and
- (v) the appropriate fee.**

Port of Olympia SEPA Resolution 2006-03, section 8.3. AR 130-135. IEmphasis added.

2. Port Fee is Proper.

Appellants' objection to payment of the appeal fee is unsupported by law. Washington Courts have upheld the requirement that certain fees or costs in connection with an appeal shall be prepaid or secured, or payment made within a specified time. Where payment is required in accordance with an adopted administrative appeal process, the payment has been held to be mandatory and jurisdictional, and a condition precedent to the perfecting of an appeal. See *Graham Thrift Group v. Pierce County*, 75 Wn.App. 263, 267, 877 P.2d 228 (1994).

In *Graham Thrift*, a community group, the Graham Thrift Group, Inc. (Graham Thrift) appealed the trial court's grant of a motion to dismiss. The trial court had ruled that Graham Thrift had not timely filed their administrative appeal of a decision by the Pierce County Hearing Examiner because Graham Thrift failed to pay the appeal filing fee until after the proper time period had expired. The Division II Court of

Appeals affirmed the trial court based on their conclusion that the payment of the filing fee is a jurisdictional requirement under the Pierce County Code.

The Pierce County Code states:

The final decision by the Examiner on any land use matter within his jurisdiction, may be appealed to the Council by any aggrieved person directly affected by the Examiner's decision. Said appeal procedure is as follows:

A. The appellant *must* file written notice of appeal with the Planning Department *and the appeal fee* within ten (10) working days of the date of mailing of the Examiner's final order or decision[.]

(Italics ours.) Pierce County Code § 2.36.120.

In order for courts acting in an appellate capacity to acquire jurisdiction, an appellant must comply with the statutorily imposed time limit for filing an appeal. *See North Street Ass'n v. Olympia*, 96 Wash.2d 359, 364, 635 P.2d 721 (1981). Where the Pierce County Council accepts appeals from decisions of the Hearing Examiner it is acting in an appellate, quasi-judicial capacity. **Under these circumstances, the Council acquires jurisdiction over an appeal through the Code provision authorizing the appeal.** *See North St.*, 96 Wash.2d at 364, 635 P.2d 721.

The Code uses the terms “must file written notice … and the appeal fee within ten (10) working days”, indicating that the filing fee is a mandatory, statutory requirement. We cannot rewrite or modify the language of the statute under the guise of statutory interpretation or construction. *See State v. McAlpin*, 108 Wash.2d 458, 465, 740 P.2d 824 (1987) (citing *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wash.2d 321, 326, 617 P.2d 415 (1980)). Rather, we must give full effect to the plain language of the statute, “even when the results may seem unduly harsh”. *Geschwind v. Flanagan*, 121 Wash.2d 833, 841, 854 P.2d 1061 (1993) (citing *State v. Pike*, 118 Wash.2d 585, 591, 826 P.2d 152

(1992)). **Accordingly, Graham Thrift's failure to timely pay the filing fee acts as a jurisdictional bar to its appeal.**

Graham Thrift at 267-8. Emphasis added.

Graham Thrift thus **upholds** the ability of the legislative branch of a public agency to adopt appeal fees, and to require that appeal fees be paid as a jurisdictional requirement to perfecting administrative appeals.

A legislative body may determine that the interest in finality justifies applying a mandatory time limit for filing an appeal **and paying a filing fee. This is particularly true in the context of land use decisions, where time is usually of the essence for the parties involved.** See *Concerned Women v. Arlington*, 69 Wash.App. 209, 219, 847 P.2d 963, review denied, 122 Wash.2d 1014, 863 P.2d 73 (1993) (citing *Deschenes v. King Cy.*, 83 Wash.2d 714, 521 P.2d 1181 (1974)). Pierce County appears to have made just such a policy decision. **We decline to impose a different policy on the County under the guise of statutory interpretation.**

Graham Thrift at 268-9. The Court declined to relax or waive the fee requirement, explaining that to do so, invades the legislative prerogative of the public jurisdiction.

Even though this court and others have liberalized jurisdictional rules for appeals to the court, we cannot impose the same liberal interpretation onto legislation enacted by Pierce County. See *Geschwind*, 121 Wash.2d at 841, 854 P.2d 1061.

Graham Thrift at 268-9. The ability of a public agency to require an appeal fee as a requirement for an administrative appeal fee has been

strongly endorsed and protected by the Courts.¹⁵ Accordingly, Appellants' appeal of the fee as an arbitrary and capricious action should be denied.

3. Appellant's Objection to Fee and Reconsideration Process Were Previously Rejected.

In other recent Thurston County Superior Court Causes where the Port's SEPA processes including reconsideration and fee requirement were challenged, the Superior Court upheld the processes as valid, granting Summary Judgment to the Port and Cities of Tumwater and Olympia, and dismissing the challenge, (*West v. Port of Olympia and Cities of Tumwater and Olympia*, Thurston County Superior Court Cause No. 06-2-01313-9). Copy of Order attached as **Attachment 7**.

4. Appellants' Claims Are Time barred.

Resolution 2006-03 was adopted by the Port Commissioners on or about February 2006. The Resolution was **not** appealed, and the deadline for appeal has long since passed. Because Appellants did not appeal the Port's SEPA Resolution which adopted the complained of fees, they cannot now assert the invalidity of the process. Specifically, nowhere in

¹⁵ The *Graham Thrift* Court cited to the *Myers* case, "...like the Pierce County Code, former Rule on Appeal 33(1) stated that in order for this court to acquire jurisdiction, an appellant "must" file a notice of appeal and filing fees within the prescribed time period to the superior court. *See Myers v. Harris*, 82 Wash.2d 152, 154, 509 P.2d 656 (1973). The *Myers* court determined that the language of the rule clearly and unambiguously made payment of the filing fee a jurisdictional prerequisite. *Myers*, 82 Wash.2d at 154, 509 P.2d 656.

their pleadings do Appellants indicate why they did not appeal the Port's SEPA Resolution, the adoption of which occurred over two years ago.

5. Reconsideration Process is Proper.

WAC 197-11-680(2) grants to public agencies both the authority to craft their own appeal processes and sets out the parameters for appeals. That statute makes clear that "appeals" are processes which occur before the "local legislative body."

Appeal to local legislative body. RCW 43.21C.060 allows an **appeal to a local legislative body** of any decision by a local non-elected official conditioning or denying a proposal under authority of SEPA. **Agencies may establish procedures for such an appeal, or may eliminate such appeals altogether, by rule, ordinance or resolution.** Such appeals are subject to the restrictions in RCW 36.70B.050 and RCW 36.70B.060 that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.

Here, consistent with the WAC 197-11-680(2), the Port established its procedures for such an appeal resolution. See Resolution 2006-03.

In addition, the Port's reconsideration process is not an "appeal." The reconsideration meeting is not public and occurs between the concerned parties and the Port's "local non-elected official" who has the authority to condition or deny a proposal under authority of SEPA . It is intended to be process for parties to informally meet and resolve any issues related to the Port's SEPA decision, if possible, *prior* to an appeal being filed.

Thus, the process does not violate SEPA's criteria that there be only one administrative appeal process. See RCW 43.21C.075(3)(a). See also WAC 197-11-680(2).

In fact, adopting Appellants' argument that the Reconsideration Process is an "appeal" is an interpretation renders the Port's process inconsistent with SEPA's criteria that there be only one administrative appeal process. *Id.* Such a finding would run counter to rules of statutory interpretation that require courts to harmonize and avoid statutory interpretations that render a statute void.

G. APPELLANTS DO NOT SUPPORT CLAIM FOR DEFAULT JUDGEMENT.

Curiously, Appellants include an appeal issue where they apparently claim they are entitled to a default judgment. Appellants did not move for default as part of its judicial appeal of the Port's agency determination at the Superior Court level. The issue is improperly raised at the appellate level. It is a longstanding tenet of appellate practice that an appellate court may refuse to review a claim of error that was not raised in the trial court. *E.g., New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 687 P.2d 212 (1984); *Boes v. Bisiar*, 122 Wn.App. 569, 94 P.3d 975 (2004), *review denied*, 153 Wn.2d 1025, 110 P.3d 755 (2005); *Ackerman v. Sudden Valley Community Ass'n*, 89

Wn.App. 156, 944 P.2d 1045 (1997) (appellate court confines itself to issues parties have raised and which trial court considered), review denied, 134 Wn.2d 1014, 958 P.2d 315 (1998). The purpose of this rule is to promote judicial efficiency by allowing the trial court the opportunity first to consider all issues and arguments and correct any errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); *Postema v. Postema Entreprises, Inc.*, 118 Wn.App. 185, 72 P.3d 1122 (2003), review denied, 151 Wn.2d 1011, 89 P.3d 712 (2004); *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 20 P.3d 447 review denied, 145 Wn.2d 1002, 35 P.3d 380 (2001). Although not absolute, the rule is applied quite scrupulously in practice, and an appellate court may enforce it even if it has not been asserted by a party. *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992); see also *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405, 36 P.3d 1065 (2001) (rule applies with particular force to claims of waiver or estoppel); *Smith v. Arnold*, 127 Wn.App. 98, 110 P.3d 257 (2005).

Further, all issues were contested by the Port and fully litigated by the Superior Court seated in an appellate capacity. Appellants cite *Hill v. King County*, 41 Wn2d 592, 250 P2d 960 (1952) in support. The *Hill* ruling was based on now-repealed RCW 4.36.160, (Repealed by Laws 1984, ch. 76, § 12). The repealed statute is replaced in relevant part by CR 8, General

Rules of Pleading¹⁶. There can be no question that the Port denied all allegations averred by Appellants in its many responsive pleadings. See:

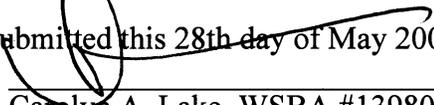
- Port's Response Opposing Petitioners' Untimely Motion For Additional "Portions Of Agency Record
- Port's Response Opposing Remand
- Port's Response Opposing Petitioners' Motion For Extension Of Time To File Opening Briefs, and
- Port Of Olympia's Reply In Opposition To Appeal Of SEPA Administrative Decision, & Motions To Strike

Appellants' claim for Default is without merit.

V. CONCLUSION

Appellants fail to meet their burden on appeal to show that any substantive or procedural errors occurred. Therefore, the Court should deny the appeal and decline to disturb the Port's SEPA MDNS for this Line of Sight Airport paving and safety project.

Respectfully submitted this 28th day of May 2007.



Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port of Olympia
Goodstein Law Group PLLC

DECLARATION OF COUNSEL

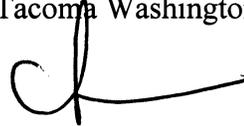
1. I am Carolyn Lake, one of the Port's attorneys.
2. Attached are true and correct copies of

¹⁶ **CR 8(d) Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

- a. The Court's Order Denying Appellant West's appeal attached hereto as **Attachment 1**
- b. Order Denying Appellant West's Motion for Reconsideration, attached hereto as **Attachment 2,**
- c. Relevant portions of the transcript of Superior Court's Decision denying West's appeal Decision, **Attachment 3,** and
- d. Copy of Court's Order dismissing appeal in *West v. Port of Olympia and Cities of Tumwater and Olympia*, Thurston County Superior Court Cause No. 06-2-01313-9, **Attachment 7.**

I declare under the laws of perjury for the State of Washington that the foregoing statement is true and correct.

Signed this 28th day of May 2008 at Tacoma Washington.



Carolyn A. Lake

*6/15 pld 02116-6
6/15*

FILED
SUPERIOR COURT
THURSTON COUNTY WA

07 JUN 15 10:38

BETTY J. COULD

BY _____ DEPUTY

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appear*

EXPEDITE
 HEARING -JUNE 15, 2007
re: Rulings at Hrgs previously held on June 1, 2007
JUDGE Richard Hicks

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

JERRY DIERKER and ARTHUR WEST,
et al,

NO. 06-2-02116-6.

Petitioners,

ORDER DENYING
PETITIONERS' APPEAL

v.

PORT OF OLYMPIA, CITY OF
TUMWATER, EDWARD GALLIGAN,
STEVE POTTLE, ROBERT VAN
SCHOORL, PAUL TELFORD, and
RALPH OSGOOD

Respondents,

These matters came regularly before the Court on June 1, 2007 for hearing on Petitioners' appeal of the Port of Olympia "action for review under the State Environmental Policy Act of the determination of the Port of Olympia under SEPA 06-3 to issue a DNS". Appearing at the June 1, 2007 substantive appeal hearing were Petitioners Arthur West and Jerry Dierker, pro se; Respondent Port of Olympia represented by Carolyn A. Lake of Goodstein Law Group PLLC. The City of Tumwater represented by Counsels Jeff Myers and Karen Kirkpatrick was previously dismissed as a party to these proceedings.

ORDER DENYING PETITIONERS'
APPEAL- 1

GOODSTEIN LAW GROUP
PLLC
1001 Pacific, Ste 400
Tacoma, WA 98402

ATTACHMENT 1

1 The Court considered the argument of the parties, reviewed the
2 administrative record on file and the following pleadings:

3 Date Filed	Pleading
4 02-09-2006	Administrative Record
5 04-19-2007	Brief by Plaintiffs
6 04-20-2007	Notice of Plaintiffs Excerpt
7 04-23-2007	Motion To Strike
8 04-23-2007	Declaration In Support
9 04-23-2007	Motion To Strike
10 05-03-2007	Reply In Opp To Mt To Strike
11 05-03-2007	Affidavit/dclr/cert Of Service
12 05-03-2007	Reply
13 05-04-2007	Order Denying Motion/petition
14 05-18-2007	Brief Petitioner In Response
15 05-18-2007	Brief Petitioner Reply
16 05-18-2007	Motion To Strike
17 05-25-2007	Motion To Strike
18 05-30-2007	Response Of Petitioner
19 05-30-2007	Response Of Petitioner
20 05-31-2007	Reply In Support

21 Based on the records, pleadings, the file and arguments of the parties,
22 the Court makes the following:

23 **ORDER.**

24 1. Neither Mr West nor Mr Dierker have legal "standing" to challenge the Port's
SEPA decision. Under Washington law, to have standing to bring an
environmental SEPA appeal, the appellant must show two things:

a) That the appellant falls with in the zone of interest (this prong may be
met), and

ORDER DENYING PETITIONERS'
APPEAL- 2

GOODSTEIN LAW GROUP
PLLC
1001 Pacific, Ste 400
Tacoma, WA 98402

1 b) That appellants have a "particularized injury" personal to them, and not
2 suffered by the public at large.

3 The Court finds that neither Mr Dierker nor Mr West meet the second prong of
4 this test.

5 2. In reviewing the Port of Olympia Executive Director Mr Galligan's Findings of
6 Fact, the Court finds that substantial information in the record supported the
7 Findings of Facts. **AND THE DECISION AS A WHOLE IS NOT CLEARLY ERRONEOUS**

8 3. The Court finds no errors in the Port's Conclusions of Law.

9 4. The Port is the proper SEPA Lead Agency for this Project.

10 5. There was no conflict of interest by the Port acting as Project proponent and
11 SEPA Lead Agency; the Port complied with the required degree of separation
12 under SEPA. The Port's Reconsideration process and the Court's judicial review
13 provide an additional measure of independent review.

WAS NOT IMPROPER IN THIS CASE

14 6. The Port's Reconsideration process ~~is not flawed.~~

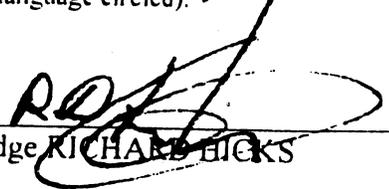
15 7. The Port may lawfully require appeal and reconsideration fees.

16 8. ~~To the extent that Petitioners argued the NEPA decision was flawed, the Court~~
17 ~~found the Project was ^{INITIALLY} correctly determined to be "categorically exempt" such that~~ **UNGBR**
18 ~~no further NEPA EIS or environmental review was needed. BY THE FAA.~~

19 9. This Project was not improperly "piecemealed," and the Port did not err in
20 ~~failing to address cumulative impacts.~~

21 10. ~~A copy of the Transcript of the Court's oral ruling is attached. However, the~~
22 ~~Transcript of this Court's ruling: Pages 10, line 7 through page 14, line 9 is~~
23 ~~Ordered. Stricken or is clarified to be Dicta. (Applicable language circled).~~

24 Dated this 15th day of June, 2007.


Judge RICHARD HICKS

Presented By:
GOODSTEIN LAW GROUP PLLC

By: 
Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port

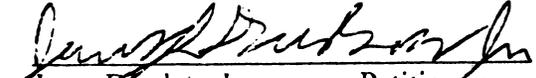
ORDER DENYING PETITIONERS'
APPEAL - 3

GOODSTEIN LAW GROUP
PLLC

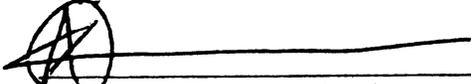
1001 Pacific, Ste 400
Tacoma, WA 98402

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Copy Received:


Jerry Bierker, Jr., pro se, Petitioner

Copy Received:


Author West, pro se, Petitioner

Superior Court of the State of Washington For Thurston County

4/25
flood paper

①

Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7
Anne Hirsch, Judge
Department No. 8



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Christine Scholler
Court Commissioner
709-3201
Indu Thomas
Court Commissioner
709-3201

Murti Maxwell
Superior Court Administrator
Gary Carlyle
Assistant Superior
Court Administrator
Ellen Goodman
Drug Court Program
Administrator
357-2462

June 25, 2007

Jerry Dierker
1720 Bigelow Ave. NE
Olympia, WA 98506

Arthur West
120 State Ave. NE, #1497
Olympia, WA 98501

Carolyn A. Lake
Attorney at Law
1001 Pacific Ave., Ste. 400
Tacoma, WA 98402-4440

②
Goodstein
③ handle 30
days from
6/25
- for
appeal
deadline

ORDER DENYING RECONSIDERATION

Re: *Dierker v. Port*
Thurston County No. 06-2-02116-6

Dear Mr. Dierker, Mr. West and Ms. Lake:

On June 22, 2007, Mr. Dierker filed a motion for reconsideration. This motion reargues what was already argued and to the extent it *may* offer anything new it could have been brought to the court's attention earlier through reasonable diligence. The court says '*may*' because Mr. Dierker floods the court with so much paper¹ (here a 31 page motion for

¹ Earlier Mr. Dierker filed an over length brief, and then filed an over-length memorandum in support of his brief, something so odd that this court has never seen, or even heard of such an attempt before by anyone, leading the Port to file over a 60 page response under the argument that the court should treat both parties justly insofar as to what each is allowed to submit.

Dierker et. al. v. Port
Letter and Order Denying Reconsideration
June 25, 2007
Page 2 of 3

reconsideration), ignoring local court rules, and yet claiming special status as a *pro se*, that it is often difficult to recognize any legitimate argument in the salad of his submissions. Nevertheless, the court must thoroughly review his documents, even though they don't conform either to the local rules, nor do they track logical arguments from the previous case law that is cited.

Pursuant to CR 59 motions for reconsideration may be filed within 10 days of filing of the written order. The ten days would run on June 25, 2007, so this motion is timely filed.

However, the standards for a motion for reconsideration are set out in LCR 59:

LCR 59 MOTIONS FOR RECONSIDERATION / REVISION

(1) Procedures

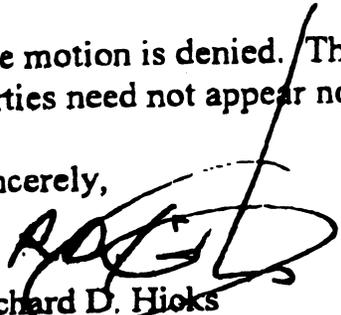
(A) Civil and Criminal Orders. At the time a motion for reconsideration is filed, working copies of the motion, brief, affidavit, proposed order, and notice of issue shall be provided to the judge's judicial assistant. All briefs and materials in support of a motion for reconsideration shall be filed at the time the motion is filed. At the time of filing, the motion for reconsideration shall be noted for a hearing to be held within 14 days. Briefs and materials in opposition to a motion for reconsideration, and reply briefs and materials shall be filed in accordance with LCR 5(b)(2). Each judge reserves the right to strike the hearing and decide the motion without oral argument. At the time of filing, the clerk of the court shall provide a copy of the first page of all motions for reconsideration to the judicial assistant for the assigned judge.

* * * * *

(3) Standards. Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

The motion is denied. The hearing set for June 29, 2007, is stricken. Other parties need not appear nor further respond.

Sincerely,


Richard D. Hicks
Superior Court Judge

cc: Original filed in Thurston County No. 06-2-02116-6

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

JERRY DIERKER and)
ARTHUR WEST, et al.,)
)
Plaintiffs,)
)
vs.) SUPERIOR COURT NO. 06-2-02116-6
)
PORT OF OLYMPIA, CITY OF)
TUMWATER, EDWARD GALLIGAN,)
STEVE POTTLE, ROBERT VAN)
SCHOORL, PAUL TELFORD and)
RALPH OSGOOD,)
)
Defendants.)

RULING BY THE HONORABLE RICHARD D. HICKS, DEPARTMENT 4

June 1, 2007
2000 Lakeridge Drive SW
Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1603 Evergreen Pk Ln SW
Olympia, Washington

APPEARANCES

Pro se: Jerry Dierker
1720 Bigelow Avenue NE
Olympia, WA 98506

Arthur West
120 State Avenue NE, #1497
Olympia, WA 98501

For the Port of Olympia: Carolyn Lake
Goodstein Law Group
1001 Pacific Avenue, Suite 400
Tacoma, WA 98402

1 Mr. Dierker and Mr. West, which isn't to say that there
2 might be some overlap and some of the arguments made by
3 Mr. Dierker and Mr. West might have been made by other
4 people who made comments down below -- that can be
5 recognized by the court -- but we're not going to
6 incorporate arguments of people who are not parties and
7 chose not to be parties.
8 Now, that's important for another reason, and that's
9 on this standing issue. In reading what I think is
10 probably a key case here, which is Trepanier versus
11 Everett, 64 Wn.App. 380, the Court of Appeals, Division
12 I, by Judge Agid, addresses this language of "any
13 'person aggrieved' can obtain judicial review under
14 SEPA," but then goes on to explain that this "term
15 'person aggrieved' was intended to include anyone with
16 standing to sue under existing law." And interestingly,
17 she cites someone that's often cited by Mr. West, which
18 is professor -- at one time -- Professor Settle.
19 Now, to get standing, a person has to pass a two-part
20 test. They have to be within the zone of interest
21 thought to be protected by the environmental action, and
22 second, they have to have some type of particularized
23 injury here. I should have highlighted this. An injury
24 in fact. This is at page 382 to 383 of the decision.
25 And there the Court of Appeals found the individuals did

1
2 THE COURT: Thank you. Well, let me first
3 address two references made by Mr. Dierker. One is that
4 the court should undertake some type of policing action
5 of the Port's administrative process, and that isn't the
6 function of the court. That would be a legislative or
7 executive function. Except in the most extraordinary
8 circumstances, courts don't enter into these types of
9 activities, and I decline that invitation, and I think
10 not only properly so, but it would be unlikely for any
11 court to do this, although there is some instances, such
12 as overcrowding of prisons, and so on, where courts have
13 taken a more active role. I don't think that's the kind
14 of thing we're dealing with here.

15 The second comment that I think needs to be addressed
16 is this reference about adopting all the arguments of
17 other people who maybe advanced such arguments below.
18 This appeal, although it's captioned incorrectly as
19 Mr. Dierker and Mr. West, et al., only involves
20 Mr. Dierker and Mr. West, who not being attorneys have
21 no capacity to represent other people, such as Ms. Witt
22 and others who might have joined with them, but either
23 chose or neglected to do that.

24 So that's important for a couple of reasons: One is
25 we can't incorporate arguments that don't belong to

1 not pass that test, and I think Mr. Dierker and Mr. West
2 are in the same boat here. They may come under the zone
3 of interest part of the test, but I don't recognize
4 where they have any particularized injury. They have
5 only just a general injury. Mr. West referred to bird
6 watching for instance, or the quality of the air.
7 And so I think this is something the Court of Appeals
8 may look at so I'm not going to stop here. I'm going to
9 address further arguments, but I am going to rule that
10 Mr. Dierker and Mr. West don't have standing in this
11 case. Having said that, I recognize that the Court of
12 Appeals may see this differently, and so I'm going to go
13 on and address some of the other issues that they raise.
14 In this regard I think it's important to keep in mind
15 what it is that we're talking about here, which is an
16 environmental review, and that as I understand it -- and
17 I certainly agree with Mr. Dierker that there's a
18 tremendous redundancy in this record as I went through
19 it, hundreds of pages of redundancy -- that essentially
20 this deals with safety issues regarding the aging
21 pavement or surfaces at the airport, and then while that
22 is being brought up to a safe standard, coming into
23 compliance with this long-standing request of the FAA to
24 remove this elevated portion of the runway sometimes
25 referred to as a "bump."

1 Now, Mr. Dierker in the record talks about -- and he
 2 thinks that there's evidence that this bump, or, this
 3 runway is exactly the dividing line between two
 4 watersheds, one of which empties into the Black River
 5 and into Grays Harbor; the other of which enters into
 6 the Deschutes River and Budd Inlet here in Thurston
 7 County. I don't know that this can be determined with
 8 this preciseness, but this also brings up the point that
 9 the airport's been there a long time. It's one of the
 10 oldest airports in the United States. And the issue
 11 here isn't whether the airport was placed in the
 12 environmentally optimal position, but whether these
 13 corrections and maintenance for safety purposes have an
 14 environmental impact that's adverse enough so that the
 15 Port shouldn't be allowed to undertake this.

16 Now, in this regard, and when I look at the findings
 17 and conclusions of Mr. Galligan, who heard the issue on
 18 reconsideration -- and I cited at the beginning of the
 19 hearing where these are found -- in the record there is
 20 substantial enough evidence to support his factual
 21 findings. Having said that, then looking at the
 22 conclusions of law, the conclusions of law I can't see
 23 any clear error based on those findings of fact.

24 Now, it's also true that the threshold decisions by
 25 the agency should be given substantial weight, as set

1 out in RCW 43.21C.075 (3)(d), so I don't just look at
 2 this de novo in that regard.

3 Insofar as the argument as to whether or not the Port
 4 is the lead agency, or is properly the lead agency, the
 5 Port is properly the lead agency here since they're the
 6 ones setting forth this government proposal, and there
 7 is this argument raised by Mr. West and Mr. Dierker
 8 regarding a WAC, that's WAC 197-11-926 (2) that sets out
 9 that whenever possible, the agency people carrying out
 10 SEPA procedures should be different from agency people
 11 making the proposal.

12 And the Trepanier case also happens to address that
 13 issue in addition to the standing issue and pointed out
 14 at page 385 that the person responsible was different
 15 than the person who was carrying out the review. And
 16 here we have Ms. Fontenot, if that's how she says her
 17 name, and Mr. Rudolph, two different individuals. Now,
 18 whether or not they build what in the law is sometimes
 19 called a "Chinese Wall" to separate their different
 20 areas of responsibility, they are two different
 21 individuals doing this, and then on top of that, we have
 22 the reconsideration by Mr. Galligan, who is a completely
 23 third individual.

24 So under the rule of the Trepanier case, there has
 25 been a sufficient segregation here, and at least there

1 hasn't been any showing that there's any unfairness
 2 here, particularly because a reconsideration hearing was
 3 allowed, and at that time the petitioners were allowed
 4 to address this procedure.

5 On the issue of the procedure for reconsideration and
 6 fees, those are proper and have been upheld as being
 7 allowable as long as they don't become punitive and
 8 chill someone's right to have reconsideration. Fees
 9 here aren't necessarily small, \$500 I think, but I don't
 10 think that they're so egregious that I can overturn this
 11 on that basis.

12 Now, two final things: One is this NEPA issue, and
 13 in this regard I think I want to start with a case of
 14 West versus the Department of Transportation. And this
 15 is of course Mr. West who's in front of us here. And in
 16 that case there was a NEPA categorical exclusion, and
 17 it's defined as a category of actions which do not
 18 individually or cumulatively have a significant effect
 19 on the human environment and which have been found to
 20 have no such effect in procedures adopted by a federal
 21 agency in implementation of those regulations. The
 22 court goes on to say, "Neither an EIS nor an EA is
 23 required for actions categorically excluded from NEPA
 24 review. Pursuant to CEQ regulations, each agency
 25 develops criteria to determine the appropriate level of

1 environmental review for different types of actions."
 2 And it cites to the code of federal regulations in that
 3 case.

4 So, then, that led me to what is the categorical
 5 exclusion that the FAA is talking about here. And I
 6 find in the Code of Federal Regulation in Section 1508.4
 7 this definition of what a categorical exclusion is, and
 8 it says, "'Categorical exclusion' means a category of
 9 actions which do not individually or cumulatively have a
 10 significant effect ...," and goes on pretty much in the
 11 same language as found in the West decision. And it
 12 concludes with saying, "Any procedures under this
 13 section shall provide for extraordinary circumstances in
 14 which a normally excluded action may have a significant
 15 environmental effect."

16 And then I go on to the particular categorical
 17 exclusion here, which is found in the FAA Order 1050.1E
 18 in Section 310aa. And the categorical exclusion that's
 19 being talked about here is, "Upgrading of building
 20 electrical systems or maintenance of existing
 21 facilities, such as painting, replacement of siding,
 22 roof rehabilitation," and then important to this case,
 23 "resurfacing, or reconstruction of paved areas, and
 24 replacement of underground facilities."

25 So that's the categorical exclusion, once I got to

1 the bottom of all this, that we're talking about here.
2 So for those reasons I don't think that the petitioners
3 have picked the best case to test the other theories
4 that they want to advance regarding the Port's
5 candidness and forthrightness, and therefore, for all
6 the above reasons, I would dismiss their petition.

7 But having said that, since we have Mr. Rudolph and
8 Ms. Lake here, let me say that the Port leaves itself
9 open for criticism that it could otherwise avoid if they
10 were a little more transparent and forthcoming here.
11 And I think I want to say it carefully here because I
12 think a lot of these things are legislative or executive
13 branch decisions and not judicial decisions. But one of
14 the things that was troublesome to this court was the
15 apparent contradictory arguments that were being made,
16 and are concurrently being made in Federal Court in
17 front of Judge Leighton, and here in front of myself,
18 and then when I learn that the US attorney has to create
19 amended pleadings disclosing that there's a half a
20 million dollars that wasn't earlier recognized and now
21 it turns out in fact was in existence, it makes me
22 uneasy -- I'll say it that way -- and a little
23 uncomfortable.

24 Now, I'm not buying into any conspiracy theory, even
25 though I've ordered public records be disclosed that

1 were improperly withheld. And I think it's too much to
2 make a string of pearls out of these yet, but I would
3 say that Mr. Rudolph and Ms. Lake should take back to
4 the port commissioners that if there becomes a pattern,
5 which I don't necessarily find now, but if there becomes
6 a pattern of things that aren't being sent out --
7 keeping in mind that this is a municipal corporation,
8 and although it has proprietary functions, it has a
9 public function -- that the people complaining about
10 this will become much broader than just Mr. West and
11 Mr. Dierker.

12 And I guess this is just a word of caution. I don't
13 find it yet actionable, but I think it's something the
14 Port could easily avoid if they just took a little more
15 trouble to be more transparent, keeping in mind that
16 like a judge, for instance, they represent all the
17 people in their jurisdiction. I don't think I'll say
18 any more than that, but these kinds of things like the
19 \$500,000, and you can say, well, this was environmental,
20 not funding, but people were led to believe there was no
21 funding issue here, and then all of a sudden, my
22 goodness, there's surplus funds that do exist and are
23 going to be used here, and that doesn't give confidence
24 to the public that's being served.
25 And it wouldn't change things. That's the thing that

1 is troublesome. The Port wouldn't lose any edge. They
2 would still be able to do what they needed to do by
3 being transparent. They wouldn't lose any of their
4 ability to do the kinds of things that needed to be
5 done, like this safety issue on the airport, which is
6 basically to repair the paving surface. And I
7 recognize, as Mr. Dierker says, that it isn't just a
8 complete repair. There's some betterment here that's
9 going to allow larger aircraft to use the facility to
10 some extent. But part of that is the advance of
11 technology itself, which maybe isn't always a good
12 thing.

13 The final thing I want to speak to is this
14 piecemealing argument because that can be troublesome in
15 an appropriate case. But there should be an appropriate
16 review at each stage, and at a certain point then the
17 piecemealing has to pass and doesn't get a free pass by
18 what's gone before based upon the environmental impact.
19 There's not anything necessarily wrong with phasing, and
20 I think the petitioners are correct here that project
21 06-1 encompassed a much larger project and then was
22 voluntarily dropped by the Port when citizens complained
23 -- and I don't know what internal processes the Port
24 used to decide to abandon that -- and now they're coming
25 at it with these other projects, 06-2, which is not in

1 front of me, and 06-3, which is this case.
2 And that's not necessarily illegal, or even improper,
3 but I do agree that at some point the cumulative effect
4 of these has to be taken into account, and that's why I
5 think in the future, not in every case perhaps, but if
6 there are going to be more phasing of the same type of
7 projects that were originally in 06-1, I think the Port
8 would be well served by having an administrative
9 adjudicative hearing down below rather than just the
10 election that was made here to have simply an
11 administrative process that then a superior court
12 reviews in its appellate capacity because it would make
13 a much cleaner record. It would open the door for
14 concerned citizens like Mr. Dierker and Mr. West to have
15 a formal process to bring up the matters to which
16 they're concerned and then have a ruling by a judicial
17 officer down below with legal training and a record
18 made.
19 Then it would be much easier for someone sitting in
20 my position to say, well, here's a clear error of law or
21 the decision's clearly erroneous, without inviting me to
22 make tremendous supplementations of the record which
23 then would mean I'd have to undergo everything as if I
24 were the hearing officer himself or herself. That's a
25 burden that would be undertaken in an extraordinary

circumstance, but not one the court would just take on
2 as a -- I don't know, I don't want to trivialize it by
3 saying a lark. but if there was a substantial addition
4 to the record, then a court might not make findings that
5 just relied on the record below. All findings would
6 have to be re-visited. I'm not prepared to do that at
7 this stage because the findings are supported in the
8 record. There is no reason to believe this large
9 supplemental offer would change anything.

10 So it will be interesting to see what the Court of
11 Appeals has to say, particularly on the standing issue,
12 because they may go the other way on standing. I wanted
13 to reach these other issues so that they can address
14 those also if they find that there is standing here.

15 MS. LAKE: Thank you, your Honor.

16 MR. WEST: Thank you, your Honor.

17 (A recess was taken.)
18
19
20
21
22
23

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

) ss.

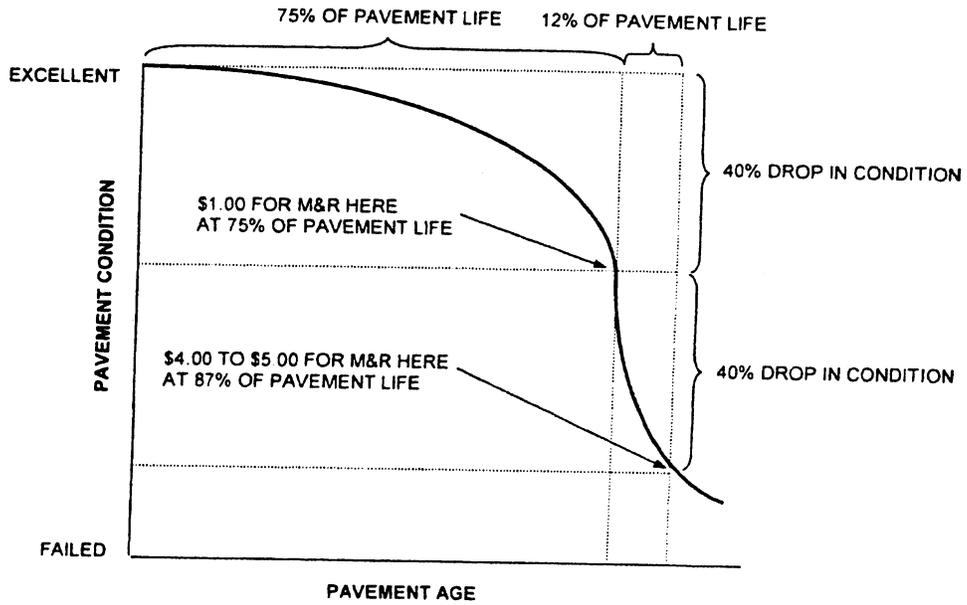
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of
the Superior Court of the State of Washington in and for the
County of Thurston do hereby certify:

That I was authorized to and did stenographically
report the foregoing proceedings held in the above-entitled
matter as designated by Counsel to be included in the
transcript.

Dated this 7th day of June, 2007.

RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023



M&R = major rehabilitation.

Typical pavement condition life cycle.
(Based on figure from USACERL Technical Report M-90/05)

Exhibit 2

ATTACHMENT 5

TCSC No.
06-2-02116
000136

Table 1. Olympia Municipal Airport pavement evaluation results.

Olympia Municipal Airport								
Branch ¹	Section	Surface Type ²	Section Area, sf	LCD ³	2005 PCI	% Distress Due to:		Distress Types
						Load ⁴	Climate or Durability ⁵	
A010L	01	AC	19,275	9/1/1937	22	21	75	Alligator cracking, block cracking, depression, longitudinal and transverse cracking, raveling and weathering, alligator cracking, block cracking, depression, longitudinal and transverse cracking, raveling and weathering
AAVOL	01	AC	7,631	9/2/1943	61	0	100	Longitudinal and transverse cracking
ACOV10L	01	AC	7,362	9/2/1983	66	0	100	Longitudinal and transverse cracking, patching, raveling and weathering
ACOV20L	01	AC	12,316	9/2/1984	74	0	100	Longitudinal and transverse cracking, raveling and weathering
ACOV30L	01	AC	12,177	9/2/1982	70	0	100	Longitudinal and transverse cracking, raveling and weathering
ACOV40L	01	AC	8,579	9/1/1984	77	0	100	Longitudinal and transverse cracking, raveling and weathering
AFISHOL	01	AC	12,358	9/1/1960	52	26	74	Alligator cracking, longitudinal and transverse cracking, raveling and weathering
AGOWOL	01	AC	14,995	9/2/1996	87	0	100	Bleeding, patching
AGOWOL	02	AC	14,265	9/2/1943	40	60	40	Alligator cracking, longitudinal and transverse cracking, patching
AGOWOL	03	AC	16,489	9/2/1996	99	0	0	Oil spillage
AGOWOL	04	AC	12,127	9/1/1968	58	16	80	Alligator cracking, longitudinal and transverse cracking, oil spillage, raveling and weathering
AGOWOL	05	PCC	4,559	9/1/1926	4	92	8	Corner break, joint seal damage, linear cracking, shattered slab
AGOWOL	06	AC	25,934	9/1/1928	2	55	42	Alligator cracking, depression, patching, rutting, raveling and weathering
AGOWOL	07	AC	9,774	9/1/2003	100	0	0	No distress
AH35OL	01	AC	31,201	9/3/1980	99	0	100	Longitudinal and transverse cracking
AH35OL	02	AC	13,125	9/2/1980	93	0	100	Longitudinal and transverse cracking
AHABCOL	01	AC	57,546	9/1/1996	100	0	0	No distress
AHDEOL	01	AC	24,391	9/3/1998	99	0	0	Oil spillage
AHDEOL	02	AC	44,835	9/1/1950	53	27	68	Alligator cracking, depression, longitudinal and transverse cracking, patching, raveling and weathering
AHFGHOL	01	AC	37,327	9/3/1998	99	0	100	Longitudinal and transverse cracking
APEAOL	01	AC	22,471	9/2/1943	14	47	49	Alligator cracking, depression, longitudinal and transverse cracking, oil spillage, patching, raveling and weathering
AS8OL	01	AC	5,044	9/1/1993	83	0	100	Longitudinal and transverse cracking, raveling and weathering

Table 1. Olympia Municipal Airport pavement evaluation results (continued).

Olympia Municipal Airport									
Branch ¹	Section	Surface Type ²	Section Area, sf	LCD ³	2005 PCI	% Distress Due to:		Distress Types	
						Load ⁴	Climate or Durability ⁵		
ASEAOL	01	AC	10,200	9/1/1973	61	0	100	Longitudinal and transverse cracking, raveling and weathering	
ASPOL	01	AC	124,038	9/3/1997	100	0	0	No distress	
ATERMOL	01	AC	150,068	9/3/1979	71	0	94	Longitudinal and transverse cracking, oil spillage, raveling and weathering	
ATRANSOL	01	AC	289,057	9/2/1996	99	0	0	Oil spillage	
ATRANSOL	02	AC	5,659	9/2/1943	65	45	55	Alligator cracking, longitudinal and transverse cracking, patching	
ATRANSOL	03	AC	29,769	6/1/2005	100	0	0	No distress	
R08OL	01A	AC	42,299	9/2/1943	73	30	70	Alligator cracking, longitudinal and transverse cracking, patching, alligator cracking, longitudinal and transverse cracking, patching	
R08OL	01B	AC	44,011	9/3/1992	100	0	0	No distress	
R08OL	01C	AC	43,293	9/2/1943	69	37	62	Alligator cracking, depression, longitudinal and transverse cracking, patching	
R08OL	02A	AC	154,891	9/2/1943	81	0	100	Longitudinal and transverse cracking	
R08OL	02B	AC	154,396	9/2/1943	76	41	59	Alligator cracking, longitudinal and transverse cracking	
R08OL	02C	AC	154,026	9/2/1943	85	0	100	Longitudinal and transverse cracking	
R17OL	01A	AC	124,948	9/3/1980	84	0	100	Longitudinal and transverse cracking, raveling and weathering	
R17OL	01B	AC	125,000	9/3/1980	73	0	100	Longitudinal and transverse cracking, raveling and weathering	
R17OL	01C	AC	125,116	9/3/1980	87	0	100	Longitudinal and transverse cracking, raveling and weathering	
R17OL	02A	AAC	124,609	9/1/1980	84	0	100	Longitudinal and transverse cracking, raveling and weathering	
R17OL	02B	AAC	124,609	9/1/1980	74	0	100	Longitudinal and transverse cracking, raveling and weathering	
R17OL	02C	AAC	124,609	9/1/1980	88	0	100	Longitudinal and transverse cracking, raveling and weathering	
R17OL	03A	AC	21,350	9/2/1980	82	0	100	Longitudinal and transverse cracking, patching, raveling and weathering	
R17OL	03B	AC	21,350	9/2/1980	75	0	100	Longitudinal and transverse cracking, patching, raveling and weathering	
R17OL	03C	AC	21,353	9/2/1980	74	0	100	Longitudinal and transverse cracking, patching, raveling and weathering	
R17OL	04A	AC	37,500	6/1/2005	100	0	100	No distress	
R17OL	04B	AC	37,500	6/1/2005	100	0	100	No distress	
R17OL	04C	AC	37,500	6/1/2005	100	0	100	No distress	
T01OL	01	AC	4,100	9/3/1979	77	0	100	Longitudinal and transverse cracking, patching, raveling and weathering	
T03OL	01	AAC	39,239	9/1/1996	100	0	0	No distress	

Table 1. Olympia Municipal Airport pavement evaluation results (continued).

Olympia Municipal Airport		Branch ¹	Section	Surface Type ²	Section Area, sf	LCD ³	2005 PCI	% Distress Due to:		Distress Types
								Load ⁴	Climate or Durability ⁵	
ASEAOL	01	AC	10,200	9/1/1973	61	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
ASPOL	01	AC	124,038	9/3/1997	100	0	0	0	0	No distress
ATERMOL	01	AC	150,068	9/3/1979	71	0	94	0	94	Longitudinal and transverse cracking, oil spillage, raveling and weathering
ATRANSOL	01	AC	289,057	9/2/1996	99	0	0	0	0	Oil spillage
ATRANSOL	02	AC	5,659	9/2/1943	65	45	55	45	55	Alligator cracking, longitudinal and transverse cracking, patching
ATRANSOL	03	AC	29,769	6/1/2005	100	0	0	0	0	No distress
R08OL	01A	AC	42,299	9/2/1943	73	30	70	30	70	Alligator cracking, longitudinal and transverse cracking, patching, alligator cracking, longitudinal and transverse cracking, patching
R08OL	01B	AC	44,011	9/3/1992	100	0	0	0	0	No distress
R08OL	01C	AC	43,293	9/2/1943	69	37	62	37	62	Alligator cracking, depression, longitudinal and transverse cracking, patching
R08OL	02A	AC	154,891	9/2/1943	81	0	100	0	100	Longitudinal and transverse cracking
R08OL	02B	AC	154,396	9/2/1943	76	41	59	41	59	Alligator cracking, longitudinal and transverse cracking
R08OL	02C	AC	154,026	9/2/1943	85	0	100	0	100	Longitudinal and transverse cracking
R17OL	01A	AC	124,948	9/3/1980	84	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
R17OL	01B	AC	125,000	9/3/1980	73	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
R17OL	01C	AC	125,116	9/3/1980	87	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
R17OL	02A	AAC	124,609	9/1/1980	84	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
R17OL	02B	AAC	124,609	9/1/1980	74	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
R17OL	02C	AAC	124,609	9/1/1980	88	0	100	0	100	Longitudinal and transverse cracking, raveling and weathering
R17OL	03A	AC	21,350	9/2/1980	82	0	100	0	100	Longitudinal and transverse cracking, patching, raveling and weathering
R17OL	03B	AC	21,350	9/2/1980	75	0	100	0	100	Longitudinal and transverse cracking, patching, raveling and weathering
R17OL	03C	AC	21,353	9/2/1980	74	0	100	0	100	Longitudinal and transverse cracking, patching, raveling and weathering
R17OL	04A	AC	37,500	6/1/2005	100	0	100	0	100	No distress
R17OL	04B	AC	37,500	6/1/2005	100	0	100	0	100	No distress
R17OL	04C	AC	37,500	6/1/2005	100	0	100	0	100	No distress
T01OL	01	AC	4,100	9/3/1979	77	0	100	0	100	Longitudinal and transverse cracking, patching, raveling and weathering
T03OL	01	AAC	39,239	9/1/1996	100	0	0	0	0	No distress

Table 1. Olympia Municipal Airport pavement evaluation results (continued).

Branch ¹	Section	Surface Type ²	Section Area, sf	LCD ³	2005 PCI	% Distress Due to:		Distress Types
						Load ⁴	Climate or Durability ⁵	
T05OL	01	AC	47,481	9/2/1943	26	48	44	Alligator cracking, depression, longitudinal and transverse cracking, raveling and weathering
TAVOL	01	AC	11,150	9/2/1943	53	17	80	Alligator cracking, longitudinal and transverse cracking, oil spillage, raveling and weathering
TAVOL	02	AC	2,981	9/2/1934	7	58	40	Alligator cracking, oil spillage, patching, rutting, raveling and weathering
TBOL	01	AC	64,896	9/3/1979	75	0	100	Longitudinal and transverse cracking, raveling and weathering
TCOL	01	AC	98,299	9/2/1943	15	55	40	Alligator cracking, longitudinal and transverse cracking, patching, rutting, swelling, raveling and weathering
TCOVOL	01	AC	8,060	9/2/1949	41	33	67	Alligator cracking, longitudinal and transverse cracking, patching, raveling and weathering
TDOL	01	AC	22,319	9/3/1979	75	0	81	Depression, longitudinal and transverse cracking, raveling and weathering
TEOL	01	AC	154,519	9/2/1943	51	40	60	Alligator cracking, longitudinal and transverse cracking, patching, raveling and weathering
TEOL	02	AAC	54,050	9/1/1998	99	0	100	Longitudinal and transverse cracking
TEOL	03	AC	8,909	9/2/1975	67	0	100	Longitudinal and transverse cracking, patching, raveling and weathering
TFOL	01	AC	116,590	9/3/1986	93	0	100	Longitudinal and transverse cracking
TFOL	02	AC	6,731	9/3/1986	82	0	100	Longitudinal and transverse cracking, raveling and weathering
TFOL	03	AC	38,087	9/3/1979	84	0	100	Longitudinal and transverse cracking, raveling and weathering
TFOL	04	AC	58,623	6/1/2005	100	0	0	No distress
TGOL	01	AC	31,387	9/2/1943	46	47	52	Alligator cracking, depression, longitudinal and transverse cracking, raveling and weathering
TGOL	02	AC	47,525	9/2/1943	36	44	56	Alligator cracking, longitudinal and transverse cracking, rutting, raveling and weathering
TNOL	01	AC	130,177	6/1/2005	100	0	0	No distress
TNOL	02	AC	18,639	6/1/2005	100	0	0	No distress
TGOL	03	AC	135,892	9/2/1943	48	41	59	Alligator cracking, longitudinal and transverse cracking, patching, rutting, raveling and weathering
TH1OL	01	AC	21,767	9/2/1943	64	42	58	Alligator cracking, longitudinal and transverse cracking
TH1OL	02	AC	6,498	9/1/1978	29	65	35	Alligator cracking, longitudinal and transverse cracking, rutting, raveling and weathering

Table 1. Olympia Municipal Airport pavement evaluation results (continued).

Olympia Municipal Airport		Section	Surface Type ²	Section Area, sf	LCD ³	2005 PCI	% Distress Due to:		Distress Types
Branch ¹	Section						Load ⁴	Climate or Durability ⁵	
THABCOL	01	AC	9,349	9/2/1996	98	0	100	Patching	
THAOL	01	AC	6,260	9/2/1945	49	38	62	Alligator cracking, longitudinal and transverse cracking, raveling and weathering	
THBOL	01	AC	6,260	9/2/1965	53	29	68	Alligator cracking, depression, longitudinal and transverse cracking, raveling and weathering	
THCOL	01	AC	6,260	9/2/1949	40	28	72	Alligator cracking, longitudinal and transverse cracking, raveling and weathering	
THEOL	01	AC	5,319	9/1/1938	28	50	38	Alligator cracking, depression, longitudinal and transverse cracking, raveling and weathering	
THFOL	01	AC	39,699	9/1/1960	61	0	100	Longitudinal and transverse cracking, raveling and weathering	
THGOL	01	AC	29,955	9/1/1995	91	0	61	Depression, longitudinal and transverse cracking, raveling and weathering	
THGOL	02	AC	4,205	9/1/1989	85	0	100	Longitudinal and transverse cracking, patching, raveling and weathering	
THHOL	01	AC	2,237	9/2/1943	75	0	100	Longitudinal and transverse cracking	
THHOL	02	AC	18,398	9/1/1999	100	0	0	No distress	
TTERMOL	01	AC	4,973	9/2/1979	64	0	100	Patching, raveling and weathering	
TTERMOL	02	AAC	35,853	9/1/1979	78	0	100	Longitudinal and transverse cracking, patching, raveling and weathering	
TWOL	01	AC	28,681	9/2/1980	96	0	100	Longitudinal and transverse cracking, raveling and weathering	
TWOL	02	AC	222,978	9/3/1992	99	0	100	Longitudinal and transverse cracking	
TWOL	03	AC	47,666	9/2/1943	34	55	41	Alligator cracking, depression, longitudinal and transverse cracking, raveling and weathering	
TWOL	04	AC	37,795	6/1/2005	100	0	0	No distress	

¹See Figure 3 for the location of the branch and section.

²AC = asphalt cement concrete; AAC = asphalt overlay on AC; PCC = portland cement concrete; APC = asphalt overlay on PCC.

³LCD = last construction date (date of construction or last major rehabilitation).

⁴Distress due to load includes those distresses attributed to a structural deficiency in the pavement, such as alligator (fatigue) cracking, rutting, or shattered concrete slabs.

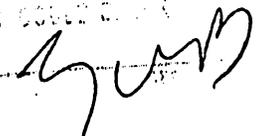
⁵Distress due to climate or durability includes those distresses attributed to either the aging of the pavement and the effects of the environment (such as weathering and raveling or block cracking in asphalt pavements) or to a materials-related problem (such as durability cracking in a concrete pavement).

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EXPEDITE
 Hearing is set:
Date: 9/29/06
Time: 9:00 a.m.
Judge: Hon. Chris Wickham

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'06 OCT 27 P4:06

BY 

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

ARTHUR WEST,

Plaintiff,

v.

**PORT OF OLYMPIA, CITY OF
OLYMPIA, and CITY OF TUMWATER,**

Defendants.

NO. 06 2 01313 9

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

THIS MATTER coming on for hearing on the motion of Defendants Port of Olympia, city of Olympia and City of Tumwater, for summary judgment, said defendants appearing by and through their attorney of record, Jeffrey S. Myers of Law, Lyman, Daniel, Kamerrer & Bogdanovich. Defendant Port of Olympia appeared by and through its counsel, Carolyn Lake of Goodstein Law Group, and plaintiff appearing pro se. The Court having heard argument of counsel and considered the records and files herein, including:

1. Defendant Cities of Olympia and Tumwater's Motion for Summary Judgment;
2. Declaration of Roger E. Gellenbeck; and
3. Declaration of Todd Stamm;
4. Response of Defendants Cities of Olympia and Tumwater to Plaintiff's Motion for Summary Judgment;
5. Defendant Cities of Olympia and Tumwater's Reply in Support of Motion for Summary Judgment;
6. The following documents submitted by the plaintiff:
 - a. Plaintiff's Motion for Summary Judgment

ATTACHMENT 7

- 1 b. Plaintiff's Memorandum in Opposition to Motion for Summary
2 Judgment
- 3 c. Plaintiff's Reply in support of Motion for Summary Judgment;
- 4 5. The following documents, if any, submitted by defendant Port of Olympia:
- 5 a. Port of Olympia's Motion for Summary Judgment
- 6 b. Declaration of Andrea Fontenot, September 11, 2006;
- 7 c. Port's Motion to Strike, Reply to Plaintiff's Motion for Summary
8 Judgment & Motion to file Overlength Brief;
- 9 d. Declaration of Andrea Fontenot, September 18, 2006;
- 10 e. Port's Reply in Support of Motion for Summary Judgment;

11 Based on the foregoing, and the Court being fully advised; the Court finds that to the
12 extent that the Complaint seeks judicial review of SEPA determinations of the Port of
13 Olympia arising from the decision of the Port of Olympia to lease property to
14 Weyerhaeuser, to repave it cargo yard and to conduct dredging, ^{and Reel Improvements I, II (2004 SEPA Decision)} the Court lacks jurisdiction
15 to consider the same. To the extent that the plaintiff seeks reconsideration of matters
16 determined in *Parker et. al. v. Port of Olympia*, Thurston County Sup. Ct. No. 05-2-
17 02460-4, the Court lacks jurisdiction over such claims.

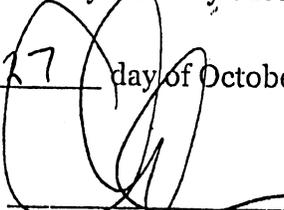
18 With respect to the remaining claims set forth in the Complaint, the Court finds the
19 Plaintiff's claims are not supported by the law. The Court finds that the agreements
20 between the Port of Olympia and the Defendant Cities for the Port to serve as the lead
21 agency for Port sponsored projects is consistent with SEPA. The Port is the appropriate
22 lead agency pursuant to WAC 197-11-926.

23 The Court further finds that the imposition of appeals fees was approved by the
24 Court of Appeals in *Graham Thrift v. Pierce County*, 75 Wn.App. 263, 877 P.2d 228
25 (1994). Despite its awareness of this holding, the Legislature has not chosen to take action
26 to limit imposition of such fees. As such, the imposition of appeals fees is within the
 authority of agencies granted by SEPA in RCW 43.21C.075 in establishing procedures for
 consideration of administrative appeals.

1 Now, therefore, IT IS ORDERED, DECREED AND ADJUDGED that:

- 2 1. Defendant Cities of Olympia and Tumwater's Motion for Summary
3 Judgment is GRANTED;
- 4 2. Defendant Port of Olympia's Motion to Strike is GRANTED;
- 5 3. Defendant Port of Olympia's Motion for Summary Judgment is GRANTED;
- 6 and
- 7 4. Plaintiff's Motion for Summary Judgment is DENIED.
- 8 5. Plaintiff's claims are hereby DISMISSED with prejudice.
- 9 6. Defendants are awarded statutory attorney's fees and costs.

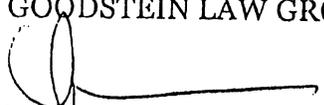
10 DONE IN OPEN COURT THIS 27 day of October, 2006.

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13 
Hon. Chris Wickham, Judge

14 Presented by:
15 LAW, LYMAN, DANIEL,
16 KAMERRER & BOGDANOVICH, P.S.

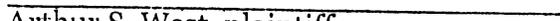
17 
Jeffrey S. Myers, WSBA #16390
18 Attorney for Defendants City of Olympia
and City of Tumwater

19 GOODSTEIN LAW GROUP, P.L.L.C.

20 
Carolyn A. Lake WSBA #13980
21 Attorneys for Defendant Port of Olympia

22 Approved as to form,
23 notice of presentation waived:

24 ARTHUR S. WEST

25
26 
Arthur S. West, plaintiff pro se

ORDER GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

FILED
COURT OF APPEALS
DIVISION II

08 MAY 28 PM 4:46

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST APPELLANT VS. PORT OF OLYMPIA, et al RESPONDENT	NO. 36556-1-II DECLARATION OF SERVICE
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The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. RESPONSE BRIEF OF RESPONDENT PORT OF OLYMPIA
2. MOTION TO STRIKE

to be served on May 28, 2008 on the following parties and in the manner indicated below:

Arthur West
120 State Avenue NE #1497
Olympia WA 98502

- by United States First Class Mail
 by Legal Messenger
 by Facsimile
 by Federal Express/Express Mail
 by Electronic Mail

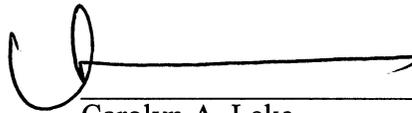
ORIGINAL

Jerry Dierker
1720 Bigelow Street NE
Olympia WA 98506

by United States First Class Mail
 by Legal Messenger
 by Electronic Mail
 by Federal Express/Express Mail
 by Personal Delivery

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 29 day of May 2008 at Tacoma Washington.



Carolyn A. Lake