

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

NO. 43158-1-II

THE LANDS COUNCIL,
Appellant,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION,

Respondents,

and

MOUNT SPOKANE 2000,

Intervenor.

OPENING BRIEF OF THE LANDS COUNCIL, APPELLANT
(Corrected to Add Supplemental CP Citations)

David A. Bricklin, WSBA No. 7583
BRICKLIN & NEWMAN, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
(206) 264-8600
Attorneys for The Lands Council

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I. INTRODUCTION

The decision at issue is a decision by the seven member Washington State Parks Commission to reclassify 279 acres of largely old-growth forest lands in Mt. Spokane State Park and allow the development of a new ski lift and seven new ski runs. The Commissioners made this decision without the benefit of an environmental impact statement (EIS). An EIS would have informed the Commissioners before they acted about the proposal's environmental impacts in comparison with the impacts of alternative uses of the land.

The superior court dismissed the action, apparently believing that an EIS which the agency said it would prepare later could somehow rectify the omission. The EIS to be prepared later may assist the agency's staff in deciding on a particular layout of ski runs in the expansion area, but it cannot be used by the Commissioners to decide whether to allow downhill skiing in this area. That decision has already been made and will not be revisited by the Commissioners later. Only their staff will make the remaining, implementing decisions.

The agency erred in not preparing an EIS for the Commissioners to use when deciding whether to convert the 279 acres of old growth forest into a ski area. The superior court erred in dismissing the lawsuit.

II. ASSIGNMENTS OF ERROR

The superior court erred in entering the Order of Dismissal on February 3, 2012 (CP 192-194).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether an EIS is necessary before the Commissioners decided whether to change the park's land use plan and authorize conversion of 279 acres of old growth forest for use as a downhill ski area?

Whether the trial court erred in dismissing the suit on grounds that "SEPA was properly followed?"

Whether the superior court had jurisdiction under either the State Environmental Policy Act (SEPA) or the constitutional writ of review?

IV. STATEMENT OF THE CASE

A. Proceedings Before the Parks Commission

Mt. Spokane is Washington State's largest state park. CP 93. It is primarily devoted to protection of the natural environment. Primary uses include protection of wildlife habitat, hiking trails, snowshoeing, backcountry

skiing, cross-country skiing, mountain biking, and downhill skiing in a developed ski area. CP 43.

Uses within the park are set forth in a master land use plan (the “Management Classification Plan”) adopted by the seven member Washington State Park Commission. The plan allocates a portion of the park to a downhill ski area. Other portions of the park are devoted to preserving wildlife habitat, forests, and other, less intense forms of outdoor recreation, such as hiking, birding, and wildlife viewing. CP 65.

Intervenor MS 2000 operates the downhill ski area and sought to have the park’s land use plan amended to allow an expansion of the ski area into 279 acres of pristine forest land. CP 93-94. That land currently is dedicated to wildlife habitat and very low intensity recreation (*e.g.*, hiking trails, but no campgrounds). CP 43.

The State Environmental Policy Act (SEPA) requires preparation of an EIS before agencies make decisions that have probable significant adverse impacts. RCW 43.21C.030. A staff person for the Commissioners decided that the Commissioners could make the land use decision (*i.e.*, whether to convert the 279 acres of forest into a ski area) without the benefit of

environmental analysis in the form of an environmental impact statement.
CP 17-19.

Many individuals, agencies, and organizations expressed concern about the ski area expansion when it was proposed and about staff's intention to present the proposal to the Commissioners without the benefit of an EIS. For instance, the Washington Department of Fish and Wildlife (WDFW) opposed the 279 acre expansion because of the potential impacts it would have to fish and wildlife. It also complained about the staff's decision – documented in a “Mitigated Determination of Non-Significance” – not to prepare an EIS. As WDFW stated in its comment letter:

WDFW is concerned about the Mitigated Determination of Non-Significance because the proposed land use action will effectively eliminate nearly 300 areas of old-growth forest habitat and reduce the ecological value and function of the remaining habitat. ... Applying mitigation measures *during* construction and completing an Environmental Impact Statement (EIS) *after* issuing an MDNS does not effectively mitigate all probable significant adverse impacts on the environment. The issuance of an MDNS prior to completion of an EIS would suggest that the full extent of the environmental impacts from the project are known and understood. In order for this project to be an MDNS, a suitable alternative must be available that does not have significant impacts (*e.g.*, Alternative 2). We believe that analysis of these two alternatives and possibly others should be done within an EIS using Best Available Science prior to the issuance of an MDNS.

CP 126-129 (emphasis in original).

The Washington Department of Natural Resources opposed the expansion because of the impacts on wildlife habitat. CP 86.

The Park Commission's own study indicated that the development of new ski facilities in this area would have potential adverse impacts to wildlife habitat. CP 86-87 (Juel Dec., ¶¶ 8-9).

Many park users, including members of petitioner The Lands Council, voiced similar concerns. CP 130-133; CP 159-162; CP 134-138.

Despite the environmental concerns raised by three state agencies and the public, the agency's staff stuck with its decision not to provide the Commissioners with an EIS before the Commissioners made their decision. No appeal of that decision was available within the agency.

The staff then recommended to the Commissioners that they amend the park's land use plan to open the 279 acres for downhill skiing. The Commissioners reviewed the staff recommendation and approved it. CP 93-105; CP 123-125. That decision -- made without the benefit of an EIS -- is the subject of this appeal.

The Commissioners adopted what was known as "Amended Option 3." CP 89-125. That option called for 279 acres of old-growth forest to be

designated for downhill skiing and allows seven new ski runs to be cut out of the forest and a new ski lift installed. The decision also allows development of toilet facilities, a warming hut, and other support facilities.

The Commissioners' decision to allow the 279 acres to be used for downhill skiing did not include a decision on the exact layout of ski runs within that area. That decision was delegated to staff to resolve in a second step. The Commissioners also decided that an EIS should be prepared before staff decided on a specific layout of the trails. But the Commissioners made their own land use decision – opening up the 279 acres for downhill skiing -- without the benefit of an EIS. The Lands Council then initiated this action in superior court seeking review of the Commission's action.

B. Proceedings in Superior Court

The Lands Council's Petition for Review in superior court alleges that an EIS was required before the Commissioners made their decisions and that the Commissioners' action adopting the new land use plan was invalid because it was taken without the benefit of an EIS. CP 3-13.

The Petition sought to invoke the superior court's jurisdiction pursuant to a constitutional writ of review, the provisions of SEPA, a

statutory writ of review, the Administrative Procedures Act (“APA”), and/or the Declaratory Judgment Act (“DJA”). CP 5.

The procedure for judicial review in a constitutional writ case involves the Court issuing the writ of review directed to the agency. This writ has the effect of requiring the agency to submit its administrative record to the Court for review. Petitioner moved for issuance of the constitutional writ in the alternative, *i.e.*, if jurisdiction was not available through any other means. Supp. CP 216-222. The Commission opposed issuance of the writ, contending it failed to allege facts that the agency’s decision was illegal, arbitrary, or capricious. Supp. CP 223-233. The Commission argued that it had done nothing wrong because staff still had to approve a specific layout of the ski runs and an EIS would be prepared before *that* decision was made. *Id.*

The Commission, joined by Intervenor MS 2000, filed a cross-motion. Supp. CP 61-78; 83; 223-233; 235-243. The Commission argued that its action was not reviewable pursuant to the APA, the DJA, and the statutory writ of review. Supp CP 62; 70; 72; 74. The Lands Council responded that it had no objection to the court dismissing the other jurisdictional grounds addressed in the agency’s motion, as long as it confirmed it had jurisdiction

via the constitutional writ or a direct cause of action under SEPA. Supp. CP 309-318.

The Commission also moved to dismiss the constitutional writ and SEPA claim on grounds that The Lands Council lacked standing. Supp CP 72-74; 229-230; 239-240; 265-269. The agency decision being reviewed is a decision to commit an undeveloped portion of a state park to downhill ski area use. Members of the petitioner use that portion of the park for a variety of wildlife viewing, passive recreation, and other purposes which will undeniably be frustrated if that area is instead converted to a ski area. CP 132 (¶ 12); CP 161 (¶¶ 9, 11); CP 135 (¶ 7). The superior court rejected the Commission's defense that the petitioner's members would not be adversely impacted by the Commission's decision. CP 193.

But the superior court accepted the Commission's argument that environmental review was premature, *i.e.*, that the EIS could be prepared after the Commissioners made their land use decision, as long as it was prepared before the staff made its decision on the layout of the ski runs. The superior court dismissed the action. CP 192-194. This appeal followed.

An EIS is supposed to be prepared *before* key decisions are made so that the decision-makers have the benefit of that environmental analysis when

they are making important decisions. *See, e.g.*, WAC 197–11–406; *King County. v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). Because the Commission employed a “cart-before-the-horse” approach, The Lands Council brought this appeal to set aside the decision and require preparation of the EIS first -- as required by SEPA.

V. ARGUMENT

A. The Superior Court Had Jurisdiction to Review the Challenge to the Commission’s Petition

The initial issue is to determine whether the Superior Court had jurisdiction to address the merits of The Lands Council’s claims. The petition asserted that the court “had jurisdiction under several provisions including a direct cause of action under the State Environmental Policy Act (SEPA) and, if no other jurisdictional basis was available, a writ of review pursuant to the Constitution.” CP 5, CP 13 (¶ 3). The constitutional writ is not available if there is another remedy available. Therefore, we begin by demonstrating that direct review was available under SEPA. We then demonstrate that, if resort to the constitutional writ was necessary, the superior court erred in determining that review was not available pursuant to the constitutional writ.

1. SEPA provides a direct cause of action for review of decisions that are alleged to be taken in violation of that statute

As originally enacted, SEPA provided no direct right of judicial review. *See* Laws of Washington 1971, ch. 109. Therefore, SEPA claimants commonly sought review using other claims. *See, e.g., Short v. Clallam County*, 22 Wn. App. 825, 829, 593 P.2d 821 (1979). In 1983, the Legislature amended SEPA to expressly provide for judicial review of SEPA compliance. Laws of Washington 1983, ch. 117, § 4 (RCW 43.21C.075).

The amendment provides:

The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter.

RCW 43.21C.075(1). The amendment further specifies that “any appeal brought under this chapter shall be linked to a specific governmental action.”

Id. (emphasis added). Thus, it is clear that SEPA authorizes direct, judicial appeal.

The legislative history of the 1983 amendment leaves no doubt that the Legislature intended to establish “a statutory right of appeal under SEPA” to eliminate the use of “other statutes or inherent constitutional review power to hear SEPA cases.” *See* “Ten Years’ Experience with SEPA, Final Report

of the Commission on Environmental Policy on the State Environmental Policy Act of 1971,” Washington State Legislature, 40-41 (June 1983). *See also Harris v. Pierce County*, 84 Wn. App. 222, 232, 928 P.2d 1111 (1996) (SEPA creates an independent right of judicial review). Consistent with the statute, the legislative history and case law, the petition in this action invokes the superior court’s jurisdiction as a direct appeal pursuant to SEPA. It is not clear if the superior court agreed that it had jurisdiction under SEPA. It appears the Court concluded it did have jurisdiction under SEPA (but then dismissed the case on its merits). Regardless, this Court should conclude that SEPA provides the Court with jurisdiction to review these claims without resort to the constitutional writ of review.

2. In the alternative, the court had jurisdiction to review the merits pursuant to a constitutional writ

If the Court determines that jurisdiction exists pursuant to the direct right of action provided by SEPA, then resort to a constitutional writ is unnecessary. In the alternative, if review pursuant to SEPA is not available, then review should be available pursuant to a constitutional writ.

The inherent authority of the judiciary to review claims that an agency has acted in violation of SEPA was established long ago in *Leschi Improvement Council v. Washington State Highway Commission*, 84 Wn.2d 271, 525 P.2d

774 (1974). In that case, the State Highway Commission made a decision to build a highway without first complying with SEPA. The Supreme Court emphatically recognized the authority of the courts to provide a venue for review of agency action alleged to be illegal. “[O]ur courts possess[] constitutional and inherent power to review illegal or manifestly arbitrary and capricious action violative of fundamental rights.” *Id.* at 278. The court went on to apply that constitutional standard to a situation, like the one alleged here, where an agency has taken action without first preparing an environmental impact statement:

An illegal act, in the context of administrative agency action, is an act which is contrary to statutory authority. Where an administrative agency fails to have before it, as required, an adequate environmental impact statement when it enters its findings and conclusions, it acts illegally, contrary to the statutory authority of our State Environmental Policy Act, RCW 43.21C. Such agency fact-finding without benefit of an adequate impact statement violates the procedural process created by the legislature to protect each person’s “fundamental and inalienable right to a healthful environment.” RCW 43.21C.020(3).

Id. at 279.

The right of petitioners affected to a “healthful environment” is expressly recognized as a “fundamental and inalienable” right by the language of SEPA. The choice of this language in SEPA indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state.

Id. See also, *Coughlin v. Seattle School District No. 1*, 27 Wn. App. 888, 891-92, 621 P.2d 183 (1980) (superior court “has jurisdiction to review the adequacy of an EIS prepared for a local administrative agency’s proposed action because of its inherent and constitutional authority to review administrative actions that are alleged to be violative of a fundamental right and either illegal or arbitrary and capricious”); *Saldin Securities, Inc. v. Snohomish County*, 80 Wn. App. 522, 516, 910 P.2d 513 (1996) (“Superior courts have inherent authority to review judicial and nonjudicial actions of administrative agencies pursuant to article 4, section 6 of the state constitution”).

Thus, the constitutional writ of review guarantees that the courts are open to review a claim that an agency has violated SEPA by taking action prior to completion of an EIS. If the Court does not agree that jurisdiction is available directly pursuant to SEPA, the Court should determine that jurisdiction is available via the constitutional writ of review.

The superior court determined that review pursuant to the constitutional writ was not available because “the evidence presented did not support an inference” that the Commission’s decision was ‘either illegal or arbitrary and capricious.’” CP 193. The superior court did not articulate the basis for that conclusion. Presumably, it followed from the arguments

advanced by the Commission. The Commission had argued that while a constitutional writ is available to review “illegal” agency action, the definition of “illegal” limits judicial review to an examination of whether the agency had jurisdiction to take the action under review, *i.e.*, only actions taken beyond the agency’s jurisdiction are “illegal.” But it is not only extra-judicial actions which are “illegal.” Actions taken in violation of statutorily required procedures are illegal, too. *Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources*, 143 Wn. App. 644, 651, 179 P.3d 844 (2008); *Leschi Imp. Council v. Wash. State Highway Comm.*, *supra*.

The Commission relied, in part, upon an assertion that *Leschi* was old and no longer valid law. To the contrary, recent cases continue to rely on *Leschi*, stating: “In the context of administrative agency action, an act contrary to statutory authority is illegal.” *Lake Union Drydock Co.*, *supra*, 143 Wn. App. at 651, *citing Leschi*.

The court in *Leschi* specifically held that the violation of SEPA constitutes an act contrary to statutory authority – an illegal act. 84 Wn.2d at 279. *See also Pierce County Sheriff v. Civil Service Comm.*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983) (an agency's decision is contrary to law where the agency violates rules governing its exercise of discretion). The Lands

Council asserted that the Commission acted illegally when it decided to authorize conversion of the 279 acre old growth forest to a ski area. That allegation was sufficient to warrant issuance of the constitutional writ.

The Commission and MS2000 also argued that the Petition did not allege that the Commission's actions were arbitrary and capricious. To the contrary, the Petition consistently asserts that the Commission's actions were arbitrary and capricious. CP 10-12 (Complaint at ¶¶ 6.1, 6.11, Claim for Relief ¶ 1).

In *King County v. Washington State Bd. of Tax Appeals*, the court explained that in a constitutional writ action, the superior court “looks initially to the petitioner's allegations to determine whether, if true, they clearly demonstrate [the agency acted illegal or arbitrary and capriciously]”, and “[i]f they do, review should be granted...” 28 Wn. App. 230, 238, 622 P.2d 898 (1981).

The heart of The Lands Council's claims is that an EIS is supposed to be prepared *before* key decisions are made so that the decision-makers have the benefit of that environmental analysis when they are making important decisions. Because the Commission employed a “cart-before-horse” approach, The Lands Council brought this appeal to set aside the decision and

require preparation of the EIS first -- as required by SEPA. The Lands Council asserted a number of allegations that, if determined to be true, amount to arbitrary or capricious agency action:

- Disregarding comments of State resource agencies and its own studies that indicate that expanding the ski area would significantly and adversely impact wildlife habitat, old growth forest, wetlands, and other natural resources. CP 3-4 (Complaint at ¶ 1.1).
- Completing a mitigated determination of non-significance instead of an environmental impact statement that would actually consider environmental impacts. *Id.*; see also CP 10 (¶ 6.1).
- Ignoring SEPA's mandate to prepare an EIS to assess environmental impacts of the major action significantly affecting the quality of the environment. CP 11 (¶ 6.2).
- Failing to study and develop alternatives and utilize ecological information in the planning and development of the MDNS. CP 11 (¶ 6.3).
- Issuing an MDNS that was not based on sufficient or adequate information. CP 11 (¶ 6.4).

- Concluding without evidence that the impacts of its action will be adequately mitigated. CP 11 (§ 6.6).
- Failing to consider the range of impacts by deferring its mandated analysis until a future date. CP 12 (§§ 6.7, 6.8).

Courts have defined arbitrary and capricious as unreasoning action in disregard to facts and circumstances. *Bennett v. Board of Adj. of Benton County*, 29 Wn. App. 753, 755, 631 P.2d 3 (1981). The petition included ample allegations that the Commission's actions were unreasoned without consideration of the facts presented. These allegations were easily sufficient to warrant issuance of the writ. If jurisdiction was not available pursuant to SEPA or any other means, the superior court had jurisdiction pursuant to the constitutional writ of review.

B. The Superior Court Erred in Determining that SEPA Was Properly Followed

In dismissing both the constitutional writ and direct SEPA cause of action, the superior court concluded that "SEPA was properly followed." CP 193. While the superior court did not explain the basis for this conclusion, it presumably followed from the arguments advanced by the agency and intervenor who asserted that there was no need for an EIS prior to the Commissioners making their decision. According to the agency, because an

EIS would be prepared before the staff approved a specific layout of the ski trails, the Commissioners did not need an EIS before making their land use decision. The superior court erred in reaching this conclusion.

SEPA was adopted to put an end to agency decisions made without the benefit of a thorough consideration of environmental impacts and consideration of alternative means of accomplishing the agency's goals with fewer environmental impacts. "The act's procedures promote the policy of fully informed decision making by government bodies when undertaking 'major actions significantly affecting the quality of the environment.'" *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976). "[T]he most important aspect of SEPA is the consideration of environmental values." *Id.* It is "an attempt by the people to shape their future environment by deliberation, not default." *Stemple v. Department of Water Resources*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973).

The mechanism by which environmental information and values are infused into agency decision making is via the environmental impact statement:

In order to achieve this public policy it is important that an environmental impact statement be prepared in all appropriate

cases. As a result, the initial determination by the ‘responsible official,’ See RCW 43.21C.030(2)(c), as to whether the action is a ‘major actions significantly affecting the quality of the environment’ is very important. The policy of the act, which is simply to ensure via a ‘detailed statement’ the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect ‘threshold determination’ is made. The determination that an action is not a ‘major action significantly affecting the quality of the environment’ means that the detailed impact statement of SEPA is not required before the action is taken or the decision is made. Consequently, ‘(w)ithout a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard.’

Norway Hill, supra at 273 (internal citation omitted).

The SEPA rules repeatedly emphasize the importance of preparing an EIS as early in the process as possible.

(2) Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, **at the earliest possible point** in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.

(i) The fact that proposals may require future agency approvals or environmental review shall not preclude

current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

(c) **Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action** (WAC 197-11-070).

WAC 197-11-055 (emphasis supplied). *See also* WAC 197-11-070(1) (until final EIS is completed, agency precluded from taking action which would limit the choice of reasonable alternatives).

WAC 197-11-406 explicitly addresses the timing of preparation of an EIS and emphasizes that it must be prepared early enough to accompany the recommendation to the agency decision-makers so that the agency decision-makers have the benefit of the EIS when they deliberate on the recommended course of action:

The lead agency shall commence preparation of the environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal, **so that preparation can be completed in time for the final statement to be included in appropriate recommendations or reports on the proposal** (WAC 197-11-055). The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision

making process and will not be used to rationalize or justify decisions already made. EISs may be “phased” in appropriate situations (WAC 197-11-060(5)).

WAC 197-11-406 (emphasis supplied). Obviously, preparing an EIS *after* the Commissioners have made their land use decision is inconsistent with this regulation and every other aspect of SEPA which calls for environmental review to be prepared to inform agency decisions not to “justify decisions already made.” *Id.*

The courts have long recognized that boundary line changes and land use decisions early in the development process can pave the way for later implementing decisions. The early decisions create inertia and a “snowballing effect” which compel that the EIS be prepared to inform those early decisions. In *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024 (1993), the City of Black Diamond sought to annex land that potentially would be used for a future development. The City had failed to prepare an EIS and argued that all that was involved at this stage of the process was deciding whether the land would be within unincorporated King County or annexed to the City. The Court recognized, though, that more was riding on the annexation than a simple line drawing exercise. Whether the land was annexed to the City would likely dictate

whether it was subject to urban development or protected as rural lands. The Supreme Court rejected the argument that the EIS could be postponed because no land use changes would occur as a direct and immediate result of the annexation:

One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. *Stempel v. Department of Water Resources*, 82 Wn. 2d 109, 118, 508 P.2d 166 (1973); *Loveless v. Yantis*, 82 Wn. 2d 754, 765–66, 513 P.2d 1023 (1973). Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can “snowball” and acquire virtually unstoppable administrative inertia. See Rodgers, *The Washington Environmental Policy Act*, 60 Wash.L.Rev. 33, 54 (1984) (the risk of postponing environmental review is “a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds”). Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

Id. at 663-64 (footnote omitted).

Here, the agency argued to the superior court that because an EIS will be prepared before staff determines a specific layout of the ski runs, that an

EIS was not required to inform the Commissioners' decision on whether to allow an expansion of skiing into the disputed 279 acre forest. Supp. CP 232; 263-265. The superior court apparently accepted this argument in determining that "SEPA was properly followed." CP 193. The agency and the superior court were wrong.

We recognize that SEPA allows for conducting environmental review in phases. *See, e.g.*, WAC 197-11-060. We have no objection to the agency conducting additional environmental review to address the issues that arise from selecting one ski run layout or another. But that EIS comes too late to inform the Commissioners' decision as to whether to allow downhill skiing in this area at all.

An EIS is required if significant adverse impacts are "probable." RCW 43.21C.030; -.031. *Norway Hill, supra*. The adverse impacts need not be certain. Here, the Commissioners' decision to amend the land use plan to allow a ski area to replace the old growth forest results in "probable" impacts. Those impacts will not arise until a specific trail plan is approved by staff, permits issued by the county, and construction commences by the intervenor. But waiting till any of those successive steps to prepare the EIS is waiting too

long. The superior court erred in determining that “SEPA was properly followed.”

Courts have been clear that the process of phasing cannot be used to avoid discussion or distortion of environmental impacts. *Indian Trail Prop. Owner's Assn. v. City of Spokane*, 76 Wn. App. 430, 443, 886 P.2d 209 (1994). Here, The Lands Council seeks review of the Commissioners’ land reclassification decision made without the benefit of an EIS. Segmenting discussions of impacts of the Commissioners’ decision to a later SEIS process after the Commissioners’ work is done and the reclassification decision has already been made is exactly the type of phasing that is prohibited by SEPA. The agency had a duty under SEPA to analyze and disclose impacts of new ski area development and alternative land uses prior to the Commissioners making their land use decision.

VI. CONCLUSION

For the foregoing reasons, the decision of the superior court should be reversed. This Court should determine that jurisdiction to hear this matter was available pursuant to SEPA (or, in the alternative, pursuant to the constitutional writ of review) and that the Washington State Parks Commission violated SEPA when it amended its Management Classification

Plan to allow downhill skiing on 279 acres of old growth forest without the benefit of an environmental impact statement.

Dated this 5th day of July, 2012.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:



David A. Bricklin, WSBA No. 7583
Attorneys for Appellant
The Lands Council

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

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Appellant,
v.
WASHINGTON STATE PARKS AND
RECREATION COMMISSION,
Respondents,
and
MOUNT SPOKANE 2000,
Intervenor.

NO. 43158-1-II
(Thurston County Superior
Court Cause No. 11-2-01340-2)

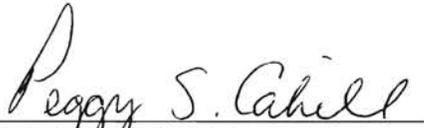
DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING) ss.

I, PEGGY S. CAHILL, under penalty of perjury under the laws of
the State of Washington, declare as follows:

DATED this 10th day of July, 2012, at Seattle,

Washington.



PEGGY S. CAHILL

Land Council\Mt. Spokane Ski Area\Appeals\Decsv