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Case No. 94328-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

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

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I. INTRODUCTION

The Center for Environmental Law & Policy, Futurewise, Spokane Riverkeeper, and Washington Environmental Council ("Amici") invite this Court to accept review of *City of Mukilteo and Save Our Communities v. Snohomish County and Propeller Airports Paine Field LLC*, No. 74327-9-I (Division I, January 23, 2017) ("the Decision") based on Amici's articulation of general State Environmental Policy Act (SEPA) principles divorced from the facts of this case. Presumably, Amici do not analyze the "Option to Lease Land at the Snohomish County Airport Contingent on Compliance with SEPA" ("the Option") at issue here because doing so reveals the County's compliance, and the Decision's consistency, with SEPA.

First, the Option preserved the County's full authority to condition or deny the plan with respect to Paine Field in response to environmental review. Amici's assertion to the contrary, absent citation to the record or discussion of the plain language of the Option, is unavailing. In complete contrast to Amici's theoretical argument, the County in fact issued a Mitigated Determination of Non-Significance (MDNS) that included numerous conditions of approval imposed in response to a robust environmental review. The MDNS was not appealed by Amici or Petitioners.

Second, the appropriate time for SEPA review was not prior to execution of the Option. Amici ignore the fact that the Court of Appeals concluded that execution of the Option is not a "project action" and is categorically exempt under WAC 197-11-800(5)(c). Amici do not even mention the phrase "project action," one of only two issues presented for review by Petitioners in this case. And Petitioners did not seek review of the conclusion of the Court of Appeals that execution of the Option is categorically exempt. Accepting review on the basis of Amici's arguments would result in an advisory ruling only because a fundamental legal issue controlling the outcome of this case was not appealed.

That Amici can identify an earlier time when they would have preferred environmental review does not mean that the County's process was contrary to law. The Decision, which upheld the execution of the Option, is consistent with relevant case law and does not present an issue of substantial public interest for resolution by this Court. Snohomish County respectfully asks this Court to deny review.

II. ARGUMENT

A. The Option Preserved the County's Choice

Amici contend that a critical SEPA inquiry is whether the government actor retains the ability to shape a project in response to environmental review. However, Amici fail to analyze the Option under

that standard. Instead, Amici conclude, without citation to the record or discussion of the plain language of the Option, that the County lost "governmental choice." Amici are mistaken.

Amici cite with approval the statement in this Court's recent opinion in *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 102, 392 P.3d 1025 (2017), that delayed SEPA review is appropriate where "the lease language plainly preserves the Port's ability to shape the final project in response to environmental review, for example, by adopting additional mitigation measures, heightened insurance requirements, or modifying project specifications." Amici Memorandum at 6. The Option preserved that same ability to "shape the final project in response to environmental review."

The Option is conditioned on performance of SEPA review. Section 7 of the Option provides: "Exercise of the Option and execution of the Lease are subject to compliance with RCW 43.21C.... Propeller and the County agree that a SEPA process must be completed prior to exercise of the Option and execution of the Lease." CP 44-45. The County retains full authority to change course or alter the plan with respect to Paine Field if the results of SEPA review warrant such a decision. *See* RCW 43.21C.060 (providing that any governmental action may be conditioned or denied under SEPA). While a draft lease is attached to the Option,

exercise of the Option is for execution of a lease "substantially in the form" of the draft lease. CP 43, § 1. This language clearly contemplates modification of the lease. The draft lease specifies that it will include the project plans and operating procedures as developed during the option period, as informed by the required SEPA process. CP 92; 141; 142. The County retains discretion to approve, condition, or deny any land use permits related to the project. CP 45, § 9 ("...construction and grading permits must be obtained from the County in accordance with applicable law"). The Option fully preserved the County's ability to shape the final project in response to environmental review.

In fact, the County imposed a number of conditions in response to environmental review. These include the requirement to coordinate with Everett Transit for public transportation access to Paine Field, providing a minimum of four electric vehicle charging stations within the project parking areas, payment to the City of Mukilteo of $94,406.25 for mitigation of traffic impacts, compliance with the Fly Friendly/Quiet Departure Program to reduce departure noise, direction for Propeller to seek air carrier agreement to limit scheduled flights during nighttime hours, and others. *See* Appendix B to the County's Answer to the Petition for Review at 3-6. The County appropriately issued an MDNS that conditioned the proposed project consistent with environmental review, a

determination not appealed by either Amici or Petitioners. Amici's suggestion that the County lost its decision-making authority or lacked its full rights and obligations under SEPA because of execution of the Option is unsupported and in stark contrast to what actually happened.

In addition, Amici mischaracterize the analysis in the Decision when they assert the Court of Appeals answered the wrong question. The statements highlighted by Amici are taken out of context. Amici Memorandum at 7, *citing* Decision at 10, 13, and 24. The observation in the Decision that Propeller cannot exercise the option until after environmental review is not a statement that the County lacks choice or decision-making authority. To the contrary, that Propeller cannot exercise the option until after environmental review means that the County controls the outcome because the County fully empowered itself to conduct environmental review and condition or deny the project as appropriate consistent with that environmental review. CP 44-45. This is entirely consistent with *Columbia Riverkeeper, International Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn.App. 512, 309 P.3d 654 (2013), and *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn.App. 305, 230 P.3d 190, *review denied*, 170 Wn.2d 1003 (2010).

Finally, execution of the Option cannot constitute an improper abandonment of governmental choice under SEPA because execution of the Option is categorically exempt. The Court of Appeals, in an unchallenged portion of the Decision, concluded that execution of the Option is categorically exempt under WAC 197-11-800(5)(c). Decision at 17. Categorically exempt activities "are immune from SEPA review." *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 348, 932 P.2d 158 (1997). The County did not fail to comply with SEPA by complying with SEPA. Accepting review on the basis of Amici's arguments would result in an advisory ruling only because a fundamental legal issue controlling the outcome of this case was not appealed. Advisory opinions are highly disfavored. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

The County did not give away its bargaining power or governmental choice by executing the Option, the exercise of which is contingent on SEPA compliance. There is no issue of substantial public interest or conflict with precedent for this Court to resolve and review should be denied.

B. The Option Preserved Appropriate SEPA Timing

Amici contend the Decision is inconsistent with the principle that SEPA review should occur at the earliest possible time before a project is

driven by its own momentum. In making this assertion, Amici weave together general pronouncements from case law regarding the timing of environmental review, which in sum amount to a policy argument separated from the actual words of the statute. Amici fail to acknowledge that environmental review cannot occur until there is a "project action" or when the decision at issue is categorically exempt. Amici also fail to acknowledge that the Court of Appeals concluded that execution of the Option is not a "project action" and is categorically exempt. The earliest possible time for environmental review was not prior to execution of the Option. Amici's policy arguments must be rejected.

First, Amici ignore the fact that execution of the Option is not a "project action" subject to environmental review. "SEPA does not compel environmental review of a decision that is not an 'action.'" *International Longshore*, 176 Wn.App. at 522. The Court of Appeals properly concluded that execution of the Option is not a "project action" under WAC 197-11-704(2)(a)(ii) because the Option is not a decision to purchase, sell, lease, transfer or exchange natural resources. Decision at 8-9. This conclusion was one of only two issues presented for review by Petitioners in this case, yet Amici fail even to mention it. Because execution of the Option is not a "project action," the earliest possible time for environmental review was not prior to execution of the Option.

Second, Amici fail to acknowledge that execution of the Option is categorically exempt and not subject to SEPA. "[A]ctions classified as categorically exempt are immune from SEPA review." *Dioxin/Organochlorine Center*, 131 Wn.2d at 348. The Court of Appeals properly concluded that execution of the Option is categorically exempt from SEPA, and Petitioners did not challenge this conclusion in their Petition for Review. Decision at 16-17. Because execution of the Option is categorically exempt from SEPA, the earliest possible time for environmental review was not prior to execution of the Option.

Amici's reliance on *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 860 P.2d 1024 (1993) is misplaced. *King County* addressed the adequacy of completed environmental review, not the question of when environmental review should occur in the first instance. The source of the Court's concern for the "snowball effect" articulated in *King County* was a "project action" – annexation – that during SEPA review did not consider future development. That is distinguishable from the circumstance here where execution of the Option is not a "project action" and, in any event, execution of the Option is categorically exempt under WAC 197-11-800(5)(c). Accordingly, execution of the Option is not subject to

environmental review. Amici's citation only to general statements concerning the timing of environmental review does not alter this.

The Option preserved the appropriate timing of environmental review and fully empowered the County to shape the project in response to that review. Environmental review was conducted, an MDNS was issued, the project was modified to address potential environmental impacts, and no appeals by Petitioners or Amici ensued. This case does not warrant this Court's review.

III. CONCLUSION

For the foregoing reasons, Snohomish County respectfully requests this Court deny review.

Respectfully submitted this 14th day of June, 2017.

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Attorney for Snohomish County

Case No. 94328-1

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Court of Appeals #74327-9-I

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

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DECLARATION OF SERVICE
Re. Snohomish County's Answer to Amici Center for Environmental Law & Policy, Futurewise, Spokane Riverkeeper, and Washington Environmental Council's Revised Memorandum in Support of Petition for Review

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DECLARATION OF SERVICE

I, Cindy Ryden, hereby certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney and that on this 14th day of June, 2017, I served a true and correct copy of Snohomish County's Answer to Amici Center for Environmental Law & Policy, Futurewise, Spokane Riverkeeper, and Washington Environmental Council's Revised Memorandum in Support of Petition for Review upon the persons listed herein and by the following method indicated:

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

SIGNED at Everett, Washington, this 14th day of June, 2017.

Cindy Ryden, Legal Assistant

SNOHOMISH COUNTY PROSECUTORS-LAND USE DIVISION

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