

## Appellant's Response To Staff Report

**TO:** Donald Largen, Sedro Woolley Hearing Examiner

**RE:** SEPA Appeal by Janicki; Deluxe Recycling and Disposal

**DATE:** April 25, 2008

This Response is submitted on behalf of Appellant in response to the undated "Transmittal & Report Memorandum" prepared by Jack Moore, Planning Director and Building Official for the City of Sedro-Woolley. That document will be herein referred to as the "staff report" from the City that is in response to the MDNS appeal filed by the Appellant. To the extent possible Appellant will address issues in the order submitted by the staff report. The term "project" is reference to the Deluxe Recycling proposal.

### **Resolution No. 743-07**

The City cannot escape the implications of the pre-judgment of this project by the elected decision makers. It is not mitigated by receiving public comments. It is exacerbated by the disclosure that "two interdepartmental meetings were also held so as to determine the potential impacts<sup>1</sup>" on the City. The elected officials have already made a public expression of support for the Deluxe project and the staff who are employed by the elected officials are then asked to ignore what the boss wants done with the project. Too much mitigation becomes a burden on the applicant. Requiring an EIS would be seen as a roadblock to what the decision makers have already said they want.

Planners are human beings, and, like any employee, it is only rational that they would be concerned about the security of their employment. With that in mind, it is useful to contemplate that City Planner Jack Moore attended the May 23, 2007 meeting at which the Sedro-Woolley City Council publicly voted for a Resolution expressing support for the Deluxe project, a decision made after extensive discussion by Deluxe's principals, the City Mayor, the City Council and the City Supervisor about the specific site Deluxe proposes and the SEPA review that Mr. Moore had yet to perform. This is reflected in detail by the minutes of the May 23, 2007 City Council Meeting. *See, Exhibit A.*

It is also useful to note that the City Mayor and City Supervisor/City Attorney appeared with Deluxe's principals as part of a televised presentation before the Board of Skagit County Commissioners on May 22, 2007. The City's officials and Deluxe put on the presentation with

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<sup>1</sup> Page 3, last sentence, first paragraph of Staff Report.

the apparent aim of convincing the County Commissioners of the merits of locating Deluxe's facility at the proposed site across the street from the Sedro-Woolley High School. In this presentation (delivered months before Deluxe even submitted an application to the City), Mayor Anderson presented argument supporting the Deluxe facility at the site Deluxe proposes across the street from a high school. According to a transcript of the event (true and correct excerpts of which are attached as **Exhibit B**), Mayor Anderson expressed public support for Deluxe's plan:

**MAYOR ANDERSON:** Good morning, I'm Mike Anderson, Mayor of Sedro-Woolley. And to answer one of [County Commissioner] Ken [Dahlstedt's] concerns, we really, really concerned about some of the issues you brought up about being close to the high school, but that property is zoned industrial and it has had a mill on it for like a hundred years. Someone else could come in with a business that is noisier and has the same issues, and our city really can't do anything 'cause it's zoned industrial. Now we have been addressing the concerns and we went up to Ferndale and checked out [RDS, a garbage handling facility owned by Deluxe's principals]. It's night and day difference between their operation and the county's. I go to the county like once a week. You guys have dirt; I mean it's just filthy compared to their operation. Noise? We went and talked to neighbors around the surrounding areas of their plant; no noise. We went and talked to the city officials at Ferndale; they've had no noise, traffic issues. It looks like a win-win. Now we've had a, people have always said Sedro-Woolley's been down on business, and then here's an issue where we could have a business that could be a win-win situation where, where it's, you're getting recycling, which is good for the ecology. We're getting jobs in our community; our trucks don't have to go as far. I'm maybe being selfish, Sedro-Woolley, we don't have to go out to the port and spend "window time." We have fuel we're saving there. And then there could be a tax that our city, which we don't have a mall, we don't have an oil refinery to help our city, so this is something that could be real beneficial to Sedro-Woolley. I didn't smell any smells, I don't think they have any rats there, I don't know, to as clean as it was when I was there. So I can see, you know, we're going in with this eyes wide open. I mean we don't want to be called the garbage city of the county. I look at it as recycling. I don't look at it as garbage. But so that's the way I'm taking issue, and I kind of, maybe you might have a, a prejudice of keeping them at the port. Thank you.

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**CMNR MUNKS:** Mike, the only difference is, and I lived in Ferndale for 20 years. I know where RDS's facility and RDS's facility is more like what our facility is at Ovenell. It's not in the town of Ferndale. So there is a big difference between whether you're bringing all those vehicles, hundreds of pickups and then all of the municipal waste trucks coming in and out of Sedro-Woolley, and I don't think that's fully been understood. What we would request, if we're going to more forward with the Sedro-

Woolley project, you will take everything. You will take all the self-haulers; you will take all the municipal, all the vehicles that are coming to Ovenell will come to Sedro-Woolley. So that's basically what we're saying is going to happen. Now RDS's facility is like the area that the Ovenell is right now, it's rural; it's not against the city. So, you know, and I'm not objecting, I'm just saying there are things that need to be looked at so we can put a comprehensive county program together because we want to cooperatively work with whatever happens, but it is an overall county transfer facility that would occur.

Deluxe principal Steve Snell responded to Commissioner Munks:

**SNELL:** . . . I think, I think that the city, the City of Sedro-Woolley also has made, is making some changes in terms of, you know, traffic and some roads and different things as well that mitigate the traffic congestion or problems and it might be a concern, I don't know if Mike [Anderson] or [Sedro-Woolley City Supervisor / City Attorney] Eron [Berg] are prepared to discuss them today or not.

Again, it is important to note that this all occurred before Deluxe had yet submitted an application to the City, before a single public hearing was conducted by the City, and before the public was given any opportunity to comment.

This environmental review clearly lacked the indicia of a fair and impartial public process. Months before Deluxe even submitted an application to the City, officials from the City effectively made the City's environmental determination about the Deluxe proposal. Mayor Anderson then appeared together with Deluxe's principals as an integral part of Deluxe's public presentation to the County Board of Commissioners, and the presentation made explicitly clear that Deluxe had already met extensively with the Mayor and City Supervisor to plan the project, including condemnation of private property and major road improvements involving city, county and state roads.

It is difficult to imagine an environmental review that was *more* pre-judged and inadequate than this one. The reality of this appeal is that Planner Jack Moore never had any discretion to exercise in the first place, and the outcome of the yet-to-occur public process and SEPA review was a foregone conclusion.

Under ordinary circumstances, the law affords broad deference to planning officials' discretionary decisions. However, the facts of this case pose a different dilemma: It is not reasonable to suppose that municipal staff will independently exercise their discretion in a manner that directly contradicts their employers' publicly-stated wishes. Necessary and proper mitigation becomes an onerous burden on the applicant. An EIS fully justified by a regional garbage center's probable adverse impacts becomes a mere speed bump along the road to what the bosses have publicly said they want to see happen.

The City could have avoided this issue by employing a consultant to review the proposal with some degree of objectivity. Because the City's process was legally flawed, the Hearing Examiner must remand the City's MDNS for objective environmental review.

### **Applicant and City Not Allowed or Permitted**

As discussed in appellant's opening brief, the City has chosen to follow the County's Comprehensive Solid Waste Management Plan ("CSWMP") rather than adopting its own. The County CSWMP prior to 2004 disallowed private transfer stations. In 2004, the County amended its CWSMP to allow consideration of private transfer stations. The City affirmatively rejected the County's 2004 CSWMP by resolution in 2004. At the time, the City declared this a breach of the Interlocal Agreement under which the City says it "promised to follow the County's lead."

The City's approach to this critical issue is confusing. The City is trying to have it both ways by now arguing that the "City is part of the County's Comprehensive Solid Waste Management Plan (CSWMP)."<sup>2</sup> The City declared a breach of the Interlocal Agreement with Skagit County in 2004 adopted a resolution rejecting the amendment to the CSWMP. The City now argues that:

"; the City staff did review the application for compliance with its Comprehensive Plan and the CSWMP. The City staff found that the application is in accordance with both for the reasons listed above."<sup>3</sup>

The City has rejected the CSWMP and now claims to have used that document to review the project application. Obviously, City staff didn't review the applicable Solid Waste Comprehensive Management at all. Had they actually done so, City staff would have rejected Deluxe's application outright.

The City tips its hand with a questionable Resolution presented by the City Supervisor and passed by the Council at the April 23, 2008 Sedro-Woolley City Council meeting. See **Exhibit C**. In his letter to the Council introducing the Resolution, the City Supervisor /City Attorney claims the Resolution was necessary to adopt a countywide governance plan, something the City has already approved and the Mayor has already signed. In reality, the Resolution is an effort to retroactively adopt and affirm the 2004 amendments to the County's Solid Waste Management Plan, the amendments affirmatively rejected by the City Council in 2004.

The City's recent "midnight resolution" does this by asserting highly dubious factual findings to the effect that the City has *always* observed the 2004 plan. Appellant suggests the matter is that

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<sup>2</sup> Page 3, first sentence, last paragraph of Staff Report.

<sup>3</sup> Page 4, last sentence of first paragraph of Staff Report.

the City is attempting to illegally implement revisions to its Solid Waste Management Plan, quietly, in the midst of this appeal, with no public notice, no opportunity for public comment, and no public hearing. The City's efforts are little more than a thinly-disguised (but ultimately unavailing) attempt to undermine Mrs. Janicki's appeal and further inappropriately accommodate Deluxe's proposal.

The City affirmatively rejected the County's CSWMP in 2004 by a Council-adopted resolution, yet now claims to have used that same document to review the project application. The City cannot have it both ways. Land use applications vest at the time they are accepted as complete, and applicants cannot pick and choose those rules they deem more favorable to their application – especially when City officials illegally change the law, mid-stream, in an effort to accommodate the applicant's proposal and defeat the present appeal.

The applicant's proposal is plainly disallowed under the City's Solid Waste Management Plan presently in place, something that cannot be amended through a no-notice Resolution done with no public comment or opportunity to be heard, no discussion by the City Planning Commission, and inadequate explanation of the Resolution's consequences to the Sedro-Woolley City Council. For this reason alone, the Hearing Examiner should reject the MDNS as failing to comply with other relevant laws and regulations applicable to this proposal.

### **Inadequacy of Mitigation**

The City argues that the 27 mitigation conditions are not illusory and are enforceable. These arguments will be addressed in the order contained in the Staff Report:

**Vague and Unenforceable:** Rather than admit that several of the conditions are vague, the City argues that the non-specific nature of the conditions “strikes a balance between the need for some specificity and the need to preserve sufficient flexibility to deal with unforeseeable problems.”<sup>4</sup> The City confuses useful flexibility with unenforceable vagueness. Appellant submits that dictates of flexibility have created MDNS conditions without meaning.

**Comparison to County MDNS on Cimarron Proposal:** Having failed to adequately respond to these deficiencies in the MDNS, the City then attempts to lower the professional standards by comparing its own inadequate MDNS to an MDNS done by the County involving a proposal by Cimarron Transfer and Recycling Company.

In effect, the City argues that someone else's inadequate MDNS excuses the City's inadequate MDNS, a logical fallacy we presume the Hearing Examiner will quickly discard. The City explains neither why any of this is relevant, nor how any of this excuses the City's inadequate MDNS at issue in this appeal.

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<sup>4</sup> Page 4, first full paragraph of Staff Report.

It is worth mentioning that the County's review of the Cimarron proposal was also tainted by the appearance of a process that was less than fair, and, much like the Deluxe proposal, involved the appearance that top officials were pressuring staff into making the project happen. For example, in an October 20, 2006 Skagit Valley Herald article entitled "Former Director blasts two commissioners," the local newspaper of record reported on revelations about the process associated with the Cimarron proposal, divulged by Skagit County's former Public Works Director Chal Martin (copy attached as **Exhibit D**):

Skagit County's former public works director has criticized his former bosses, accusing two of the county commissioners of pushing a controversial solid waste contract and setting up a system that could hurt the county in the long term.

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The result could have been a private monopoly set up with virtually no competition, Martin said.

"This was a big deal," he said. "My staff was getting serious pressure from those two commissioners to negotiate that contract. The staff of the county resisted."

It is clear that the County's process relating to the Cimarron garbage facility -- held out by the City's staff report in this appeal as its role model for the City's handling of the Deluxe proposal - was something considerably less than ideal.

It is also useful to note that the County review of the Cimarron proposal involved Hearing Examiner review as part of the code-required process, affording the concerned public a meaningful opportunity to challenge the project outside of SEPA review (unlike the Deluxe proposal, which the City has declared an outright permitted use).

Moreover, it is worth mentioning that the site proposed by Cimarron was located in an area surrounded by other compatible industrial uses -- a publicly-owned transfer station, a Puget Sound Energy co-generation facility, and the region's largest sawmill, to name a few -- as opposed to the Deluxe site, which is located adjacent to a high school and a historic residential neighborhood.

The City inappropriately compares apples to oranges in the context of a site-specific, factually-dependent environmental determination, drawing parallels to an entirely different solid waste process that had its own appearance of fairness issues. This comparison is both irrelevant and misleading.

Environmental review of a project proposal is a site specific activity, as a matter of law. The Hearing Examiner should pay no attention to the City's comparison of its Deluxe process to the County's Cimarron process.

**Storage of Garbage On Site:** An example of the City’s flexibility is found in MDNS condition 24, which has no meaning. The City argues that:

“MDNS condition #24 prohibits the storage of material on site for a length of time and in such a way that result in unreasonably offensive odors interfering with the quiet enjoyment of uses on neighboring properties.”<sup>5</sup>

There is no prohibition when the City’s goal is flexibility. The City has not mitigated any impact in condition 24, but has created an illusion of protection from an environmental impact. The City announces that Deluxe is not allowed to stink, and then styles its pronouncement a mitigating condition. Given that Deluxe proposes a major garbage facility in close proximity to a high school and multi-family residences, it is not entirely clear the City’s fiat is even possible. The City’s foregoing description of Mitigating Condition No. 24 simply reflects the rush in which the City prepared the MDNS. It provides the worst of all worlds for both the public and the applicant, by providing no actual mitigation to prevent odors and other pestiferous problems, while at the same time managing to declare Deluxe a *de facto* public nuisance. The City has failed to mitigate any impact in condition 24, but rather has created an illusion of protection in order to mollify the aggrieved public.

**Traffic Impacts:** In response to the appeal related to the traffic impacts, the City now brings to the table a new set of documents and criteria. On appeal, the Hearing Examiner cannot be persuaded by the City’s after-the-fact justifications for its decisions. The City argues the impact of opening Jameson Street through to SR9 was studied as part of the City’s Comprehensive Plan process. Assuming this is true, it appears that there is still a disconnect between the TIA, the MDNS and the Comprehensive Plan which is not mentioned in the first 2 documents. As mentioned in the Appeal, the TIA *rejected* the option of extending Jameson Street across the adjacent property to SR 9.

**Quantity Of Garbage:** The Appellant raised the issue of importing foreign garbage to this facility. In response the City says:

“There has not been a limit established on the exact quantity of material that may be processed, but rather prohibitions on affecting the community as a result of the operation.”<sup>6</sup>

What does that mean? Isn’t this an admission of what Appellant has alleged that the conditions are unenforceable? The City is openly admitting that it failed to consider this proposal on the basis of the anticipated scale and scope of Deluxe’s anticipated operations. This is despite the

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<sup>5</sup> Page 5, paragraph number 2 of Staff Report.

<sup>6</sup> Page 7, paragraph number 7 of Staff Report.

fact that Deluxe is openly proposing to handle a very large volume of garbage from throughout the northwest region, and despite the fact that the Skagit County Board of Commissioners put Sedro-Woolley on notice that the County would expect the Deluxe facility, if allowed, to handle the County's entire waste stream. See hearing transcript quoted above at pp. 2, 3.

The City's determination was never based on information reasonably sufficient to determine this project's environmental impacts. In light of the foregoing, it is mystifying how City staff could possibly have concluded no probable adverse impacts will result from this proposal, or how the vague conditions imposed can adequately mitigate the unknown impacts.

**Requirement for EIS - Generally.** Large-scale household waste facilities inevitably involve offensive odors, which is why they are traditionally sited a reasonable distance away from schools, downtown business districts, and residential populations. As the comments quoted above indicate, the City has been ignoring and downplaying these concerns from the outset. Consider the following statements by Skagit County Commissioner Ken Dahlstedt, responding to the joint televised presentation by City and Deluxe representatives on May 22, 2007 (relevant transcript excerpts attached as Exhibit B):

**CMNR DAHLSTEDT:** I guess the one concern I would have with this particular facility is if Sedro-Woolley is going to become the garbage hub of the region, you know, I would hope, and I am a little bit concerned about having a facility like this right next door to a high school. I think that one of the things about municipal waste is historically there's always smells you need to deal with and try to handle and rats and a significant amount of truck traffic. And I recall very recently we had approved a grant of funding to do some road improvements in Sedro-Woolley for, I believe the company was called Truck Vault, and because of some additional traffic in a residential area there was a significant amount of concern that was brought forward, I believe, at the city council meeting and they opposed doing that. So I am a little concerned about seeing a garbage facility right in downtown Sedro-Woolley, especially right next door to a high school.

So I hope that at least the school district and people are involved in this process so they can feel reassured. I know certainly of having met with you, I know you have concerns of dealing with all of those issues responsibility, but nevertheless, I think a lot of times that the county, we've really taken a position when any major activity is going to occur in an area, that we try to notify all the neighbors early on in the process to try to alleviate the concerns rather than get a project started first and then having the public cry out foul and have concerns.

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I do know out at the transfer site on Ovenell Road, I believe on their busier weekends there's about 600 vehicles a day that come in on the weekend, on Saturdays and Sundays

and also if you look along the roads it's not always the prettiest picture. People aren't always as responsible on making sure all their garbage stays in their cars and pickups. I know the cities and the trucks, you know, certainly they're responsible and have everything enclosed but I think that's another thing is you've got garbage blowing all over the place. If you go up Ovenell Road and look at some of those places.

But again, Sedro-Woolley is one of our partners just like the other cities are, but the responsibility we have is to make sure all of the cities and all of the citizens get a cost effective process and that's what we're going to work for. But I appreciate you coming forward and sharing with us because I think the more the public is aware of these things the better it is and certainly, I guess in Sedro-Woolley there's going to be a meeting, I believe, is it tomorrow night, and then certainly that'll be between the council and their citizens, how they feel about it.

The City has repeatedly argued that the Deluxe project is a permitted use, and therefore the City's hands are tied, and an EIS is not required. While the City's zoning interpretation is that Deluxe's proposal is a permitted use under the City's zoning code, that factor does not do away with the City's legal obligation to perform adequate environmental review; nor does it allow the City to ignore obvious environmental impacts or otherwise allow the City to turn the SEPA process into a foregone conclusion. *Cook v. Clallam County*, 27 Wn. App. 410, 418 (1980) ("The trial court was concerned that the Board was using SEPA as a substitute for the local zoning ordinance. SEPA, however, overlays local ordinances and must be enforced even where a particular use is allowed by local law or policy... The Board's decision was not clearly erroneous, and the superior court order is reversed."); *Polygon Corp. v City of Seattle*, 90 Wn.2d 59, 65 (1978) (Denial of building permit application on basis of adverse environmental impact and not on intended multifamily use for project, when intended use complied with existing zoning regulations, was not a de facto rezone of property and thus did not violate doctrine of vested rights.)

Washington law provides that an EIS is required when a project has likely significant adverse environmental impacts, whether the zoning allows the use outright or not. The mitigating conditions the City proposes, while themselves inadequate, have no bearing on this legal test established by state law.

Accordingly, failure to require an EIS must be overturned by the Hearing Examiner where the size and scope of the project is such that the government's non-significance determination is clearly erroneous. *Sisley v. San Juan County*, 89 Wn.2d 78, 87 (1977) (failure to require EIS for marina construction was clearly erroneous, County's threshold determination overturned); *Norway Hill v. King County, Council*, 87 Wn.2d 267, 278 (1976) (County's MDNS for 52 acre residential subdivision plat rejected; "[W]e feel that on its face the Norway Vista project will significantly affect the environment, and therefore, we are 'left with the definite and firm

conviction that a mistake has been committed.’ The King County Council's determination that an environmental impact statement was not required was ‘clearly erroneous.’”)

The Deluxe proposal is located across the street from Sedro-Woolley’s high school, immediately adjacent to a residential neighborhood, a mere three blocks from Sedro-Woolley’s historic downtown. In its proposal, Deluxe intends to construct and operate a 30,000 square foot garbage handling facility, sited on 10 acres of land. Deluxe envisions importing garbage from throughout Skagit County, and the larger northwest region – the anticipated quantity of which seems to have played no role at all in the City’s analysis. Deluxe’s proposal will involve dozens of garbage trucks and hundreds of self-haulers loaded with garbage driving up and down a residential street next to the high school. Deluxe’s proposal will clearly involve very loud noises and the odors of putrescent garbage, with the prevailing southwest winds carrying in the exact direction of the high school’s classrooms.

It is obvious to any reasonable observer that Deluxe’s proposal will involve significant adverse impacts. The City’s conclusion to the contrary was little more than a foregone conclusion, driven by City officials’ pre-approval of this proposal and their desire for additional revenue. The City’s threshold determination is clearly erroneous, and must be sent back for an objectively performed environmental impact statement.

**In conclusion:**

- The Deluxe proposal is disallowed by the City’s Comprehensive Plan, something unaltered by the City’s last-minute attempt to amend its Comprehensive Plan through factual findings via a no-notice Resolution on the eve of this appeal’s hearing;
- The City’s SEPA process violates the appearance of fairness doctrine, and should be overturned. The City must perform an objective EIS using outside consultants, at the bare minimum;
- The City’s MDNS conditions are vague and unenforceable, and the City’s SEPA determination should be remanded for an EIS and imposition of adequate mitigating conditions; and
- The Deluxe proposal clearly involves likely significant adverse impacts. The City’s failure to require an EIS is clearly erroneous. The City must require an adequate EIS.