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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT**

ANNIE JANICKI,

Petitioner,

v.

**CITY OF SEDRO-WOOLLEY, a municipal
corporation; DELUXE RECYCLING AND
DISPOSAL LLC, a Washington limited
liability company; and FIRE RIDGE LLC,
an Oregon limited liability company,**

Respondents,

v.

**SKAGIT COUNTY, a political subdivision
of the State of Washington,**

Intervenor.

No. 08-2-01130-8

**SKAGIT COUNTY'S RESPONSE
TO DELUXE'S MOTION TO STRIKE**

In its brief opposing the City/Deluxe motion to dismiss, Skagit County furnished a concise, accurate and logically connected background discussion for the Court, which was supported almost entirely by documents in the administrative record. Without citing a single relevant legal authority, Deluxe asks the Court to strike vast swaths of the

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**SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3RD ST. -- Courthouse Annex
Mount Vernon, WA 98273
Phone: (360) 336-9460
Fax: (360) 336-9497**

1 County's evidence and briefing, including exhibits that were themselves exhibits to the
2 Hearing Examiner's decision. Deluxe's request is based on the bare Declaration of Phil
3 Serka, which simply pronounces much of the County's submission "hearsay" or
4 "irrelevant." Notably, however, Deluxe declines to dispute a single fact asserted in the
5 County's opposition brief and supporting evidence.
6

7 While Deluxe may find the evidence and briefing at issue damaging to its case, no
8 legal authority supports Deluxe's motion to strike. The question on a motion to strike is
9 not whether evidence offered by the County comports with Deluxe's theory of the case;
10 nor does admissibility depend on whether the evidence is likely to be necessary to the
11 Court's decision on the underlying dispositive motion. Rather, the operative question is
12 whether there are legally permissible grounds for striking the evidence and briefing
13 submitted by the County. There are not, which perhaps explains why Deluxe cites none.
14

15 ER 401 governs relevance, and the rule sets a very low bar. See, e.g., *State v.*
16 *Brown*, 132 Wn.2d 529, 579-80 (1997)(evidence of defendant's preparation for trip to
17 Seattle where crime was committed was relevant to establish background). Karl
18 Tegland, considered the leading expert on Washington evidence, writes that ER 401
19 "requires only a showing of minimal logical relevance—that is, *any* tendency to make
20 the existence of a fact more or less probable." Tegland, 5D Washington Practice
21 Series, Handbook on Washington Evidence, ER 403 (2008 Ed.), at ¶ 3(a)(*citing State*
22 *v. Bebb*, 44 Wn.App. 803 (1986), *aff'd* 108 Wn.2d 515 (1987)(emphasis in original).
23

24 With respect to contextual background information, Deluxe is confused as to
25 which evidence rule applies. The question is not whether contextual background
26 information is relevant under ER 401, but whether the information is a "waste of time"
27

1 under ER 403. As Tegland observes, background information's "admissibility turns on
2 Rule 403 rather than 401." Tegland, 5D Washington Practice Series, Handbook on
3 Washington Evidence, ER 403 (2008 Ed.), at ¶3(e)(citing *United States v. Provenzano*,
4 620 F.2d 985 (3d Cir.1980).

5
6 For its part, ER 403 allows the Court to exclude evidence if "its probative value
7 is substantially outweighed...by considerations of undue delay, waste of time, or
8 needless presentation of cumulative evidence." ER 403 (relevant part). "The rule was
9 intended primarily to curtail the presentation of cumulative evidence...." Tegland, 5D
10 Washington Practice Series, Handbook on Washington Evidence, ER 403 (2008 Ed.),
11 at ¶7. "Although evidence is most often deemed a waste of time because it is
12 cumulative, evidence may be a waste of time for a variety of other reasons. For
13 example, a photocopy of a document that is illegible might be a waste of time, or a
14 recording that is inaudible might be a waste of time." *Id.* But neither Deluxe nor the
15 City claim that anything presented by the County is a "waste of time," perhaps in
16 recognition that informational harmful to their case does not in itself constitute grounds
17 for exclusion under the rules of evidence the Court must apply.
18

19
20 There is no legal authority that allows a moving party to comb through the non-
21 moving party's papers, selectively snipping out evidence and briefing that fails to
22 conform to the moving party's subjective construct of the issues at hand. The
23 adversarial legal system would cease to function if counsel had the ability to control an
24 opponent's legal theories, counterarguments and contextual background discussion in
25 this fashion.
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1 In its opposition brief, the County furnished the Court with a concise and
2 coherent explanation of the County's interest and involvement in this motion, as well
3 as background concerning the City's relationship to the applicant, Deluxe.¹ This is
4 entirely relevant, useful and admissible contextual background for the Court to
5 consider. With that in mind, the County discusses the relevance and grounds for
6 admissibility of the specific exhibits and briefing challenged by Deluxe.
7

8 **A. Deluxe's Original Motion Was Full Of Contextual Background**
9 **Information. Deluxe Opened The Door, And Should Not Be Heard**
10 **To Complain.**

11 Deluxe asserts that contextual facts are inadmissible unless directly relevant to
12 the issues as Deluxe says they should be framed, something this Court should reject.
13 Moreover, Deluxe offers no explanation for its own extensive effort to paint a
14 contextual background in its motion and reply brief. This includes the declarations of
15 Messrs Seeger, Snell and McCarter, which attempt (albeit half-heartedly) to distance
16 Deluxe from Fire Ridge LLC, declarations that are completely extrinsic to the
17 administrative record below, and theoretically unnecessary to a ruling on the narrow
18 legal question of whether a landowner must always be served under the LUPA statute.
19 Nor does Deluxe explain its effort, in both of its motions to dismiss, to characterize this
20 matter as a simple question of Petitioner's alleged "inexcusable neglect" and
21 "complete negligence."
22

23 Deluxe opened the door with its own contextual background discussion,
24 presumably offered in the hopes of persuading the Court that the context weighs in
25

26
27 ¹ County's Opposition Brief at 4:12-6:2.

1 Deluxe's favor. Deluxe's motion to strike appears to be little more than a belated
2 recognition that the contextual background does not, in fact, weigh in Deluxe's favor.

3 The County is fully entitled to rebut Deluxe's contextual background, from the
4 County's viewpoint. As the County explains in its brief opposing the City/Deluxe
5 motion to dismiss:
6

7 This motion is not about "inexcusable neglect," as Deluxe would have
8 the Court believe. To the contrary, Petitioner Janicki is the only party
9 with standing at this point because of a highly irregular effort to
10 suppress lawful opportunities for well-grounded challenge to the
11 Deluxe proposal in general and the MDNS in particular. If granted,
12 the City/Deluxe motion would injure the County: it would end this
13 litigation and uphold the decision below...²

14 ...
15 Partly as a result of the events discussed above, Mrs. Janicki is the
16 only petitioner in this action. Dismissal of her case would uphold the
17 decision below, which would injure the County for the reasons set
18 forth in the County's motion to intervene and this opposition brief.³

19 Moreover, Deluxe argues that the Court is obligated to dismiss Petitioner
20 Janicki's case on the basis of an ordinance establishing appeal regulations that were
21 put into place by City government a mere two days before the Deluxe MDNS was
22 issued. Deluxe says this is necessary to protect Deluxe's alleged economic
23 expectations as a property owner, arguing that "[a]n error in the publication of the
24 notice does not extend the statutory appeal deadlines that were implemented to
25 protect Deluxe..."⁴ When considering Deluxe's assertion of its rights allegedly
26 violated, it is obviously relevant that the deadline in question was shortened by the City
27 on March 5, just two days prior to the date from which Deluxe argues the appeal

28 ² County Opposition Brief, 3:21-27, pleadings on file with the Court.

³ County Opposition Brief, 7:12-18.

⁴ See, Deluxe's Memorandum of Law in Support of Motion to Dismiss, 7:15-9:27.

1 period should have run (March 7), not to mention the fact that the appeal fee was
2 dramatically increased the same day the MDNS was published (March 12).

3 The County believes it important for the Court to understand that all of this
4 occurred on a background in which City officials were busily paving the way for Deluxe
5 many months before Deluxe so much as submitted a permit application to the City.
6 This is relevant to both theories advanced by Deluxe. The motion to dismiss is *not*
7 about “inexcusable neglect” or “complete negligence” as Deluxe argues. The County
8 is fully entitled to adduce evidence that provides a more complete and accurate picture
9 than Deluxe’s contextual arguments, particularly since these arguments were raised
10 initially by Deluxe.
11

12 For the reasons set forth above, **Exhibits A, D, F, G, K, L, M and N** to the
13 Fallquist Declaration make the County’s assertions more likely, are relevant, and
14 cannot properly be stricken by the Court. There is no basis for their exclusion under
15 ER 403. For the same reason, there is no legal basis for the Court to strike sections of
16 the County Opposition Brief, as requested by Deluxe’s Motion to Strike paragraph 4(a)
17 (“Evidence Predates Filing of Application”); paragraph 4(b)(“Appeal Fees”); and
18 paragraph 4(c)(“Credibility of Hearing Examiner”).⁵
19

20 **Exhibit J** is a side-by-side summary comparison of the City appeal procedures
21 ordinance that existed prior to March 5, 2008 with the appeal procedure ordinance
22 adopted by the City on March 5, 2008. It is the latter ordinance that Deluxe argues
23 should apply to its permit application vested with the City on December 17, 2007.
24 Deluxe spends two pages arguing about its reliance on an appeal ordinance that was
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26

1 changed two days prior to the MDNS at issue in this litigation, changes that among
2 other things shortened the appeal time limit. This is relevant to the present motion to
3 dismiss. While Exhibit J is not in and of itself evidence, it is a summary comparison of
4 the two ordinances, and is admissible under ER 1006.
5

6 **B. The County Did Not Offer The July 3, 2008 Newspaper Article**
7 **(Exhibit O) For The Truth Of The Matters Asserted Therein. Exhibit**
8 **O Is Admissible For The Limited Non-Hearsay Purposes For Which**
9 **It Was Offered.**

10 Again, it is important to remember that Deluxe opened the door to this
11 discussion, in part by providing carefully-parsed evidence and argument in an apparent
12 effort to convince the Court that Deluxe and Fire Ridge are not related entities. When
13 Exhibit O came to the County's attention, the effect was to cause the County to believe
14 that discovery is necessary on this issue, to the extent the Court could view this as a
15 material issue in its ruling on the underlying dispositive motion to dismiss:

16 [T]he City/Deluxe motion to dismiss relies on the Declaration of Steve
17 Seeger for the questionable proposition that Deluxe "has no interests
18 in [Fire Ridge LLC]", finely tuned wordsmithing that does not rule out
19 what appears to be the case here, i.e., that Deluxe and Fire Ridge
20 LLC are related through an unseen business relationship that further
21 discovery would expose."⁶

22 In its reply, Deluxe furnished the declarations of Deluxe owners Snell and
23 McCarter, who narrowly testify that they hold no direct equity ownership in Fire Ridge
24 LLC, testimony that does not actually disclaim the dozens of other debt/equity
25 combinations by which the two companies could be financially related. Moreover, Mr.
26 McCarter did not see fit to state in his declaration that the statements attributed to him
27 in Exhibit O are false. While the simple solution to this issue would be sworn testimony
28 from Deluxe's owners that they are not aware of any business relationship between

26 ⁵ Declaration of Phil Serka dated July 23, 2008, 3:14-4:17.

27 ⁶ County Opposition Brief, 3:5-10.

1 Deluxe and Fire Ridge LLC, Deluxe declines to do. Instead, Deluxe argues that Exhibit
2 O, the July 3, 2008 newspaper article, is inadmissible hearsay.

3 The County did not submit Exhibit O to prove the truth of any matters asserted
4 therein, something the County made clear in its opposition brief.⁷ Rather, the County
5 submits Exhibit O in support of the proposition that a financial connection between
6 Deluxe and Fire Ridge LLC was broadly publicized in the community. The County,
7 having been made aware of this, believes that further discovery is necessary before a
8 ruling on the underlying dispositive motion, to the extent the Deluxe-Fire Ridge LLC
9 relationship could be material. While the County believes the underlying motion to
10 dismiss can easily be decided as a matter of law by looking to the admitted facts and
11 the plain language of the LUPA statute, the County cannot predict with certainty that
12 the Court will approach the issue this way. The County thus properly raises its
13 concern.

14 Out-of-court statements are not hearsay in the first place when used to show
15 something other than the truth of the matter asserted. 2 McCormick on Evidence, §
16 249 (6th Edition). In particular, writings offered to show the effect on a reader are
17 admissible, recognizing that “the statement is not offered for a hearsay purpose
18 because its value does not depend on its truth.” *Id.* Here, the County offers the
19 newspaper article for substantiation of the fact that the County was left with a strong
20 impression, after reading the newspaper article, that additional discovery is needed to
21 the extent these issues (first raised by Deluxe) will inform the Court’s decision on the
22 underlying motion.

23 The County expresses no direct opinion whether the matters asserted in the
24 newspaper article are true. However, it is fair to say that it appears from the County’s
25 subjective standpoint that these facts *might* be true, given that these facts have been
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1 expressed in a very public fashion, Deluxe took no apparent steps to ask the
2 newspaper run a correction, and Deluxe is now taking great pains to tiptoe around the
3 article's factual assertions without actually refuting them. The idea that facts *might* be
4 true is simply evidence that discovery is warranted, which is all the County has posited.

5 It is also useful to note that print media has frequently been held admissible for
6 various purposes other than to show the truth of the matters asserted. In particular,
7 newspaper articles have been deemed admissible to show matters related to public
8 notice, something very much relevant to the underlying motion given the moving
9 parties' allegations of "inexcusable neglect" by the Petitioner, and RCW 36.70C.050's
10 burden on the applicant to identify additional parties when those parties are known to
11 the applicant. See, *State ex rel Pierce County v. King County*, 29 Wn.2d 37, 45 (1947),
12 which describes a situation rather analogous to the one before the Court:

13 We readily agree with appellants that newspaper articles are hearsay
14 and inadmissible as evidence to prove the truth of the statements
15 contained therein. However, we do not think that under the special
16 circumstances of its admission in this case it was introduced for that
17 purpose. The appellants had affirmatively pleaded laches in their
answer to the complaint and by their theory of the case were
contending for the rule as heretofore mentioned that respondent
should have discovered the mistake, or fraud as they considered it, at
the time the supplemental agreement was entered into.

18 See also, *Alexander v. United States*, 181 F.2d 480 (9th Cir. 1950)("While the last
19 mentioned items of evidence were newspaper articles and are therefore not competent
20 evidence of the facts therein stated, they are competent to show the information
21 available to appellants and the reasonableness of their fear of prosecution"); *Krause v.*
22 *Buffalo and Erie County Workforce Dev. Consortium, Inc.*, 425 F.Supp.2d 352, 378
23 (W.D.N.Y.2006) (refusing to exclude two news articles in that they were not submitted
24 for the truth of the matter therein); *Pfohl Bros. Landfill Site Steering Comm. v. Allied*
25 *Waste Sys., Inc.*, 255 F.Supp.2d 134, 156, n. 22 (W.D.N.Y.2003)(admissible; news
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27 ⁷ County Opposition Brief, at 9, fn. 33.

1 articles were being entered for the purpose that such statements were published rather
2 than for the truth of the matter reported therein); *Chase Manhattan Bank v. Traffic*
3 *Stream (BVI) Infrastructure, Ltd.*, 86 F.Supp.2nd 244, *reversed on other grounds*
4 (S.D.N.Y. 2000)(relating to matters of public notice; newspaper article discussing
5 change in Chinese policy regarding remittance of guaranteed funds to foreign investors
6 held admissible as evidence supporting corporation's defense that change in Chinese
7 policy rendered performance under agreement impossible).

8 Although the complete absence of any legal authority or analysis in Deluxe's
9 motion to strike makes it impossible to say for certain, it appears that Deluxe assumes
10 newspaper articles are always inadmissible hearsay. That is not the law. Exhibit O is
11 not offered for the truth of the matters asserted therein. Exhibit O should not be
12 stricken.

13 **C. Exhibit P Is Relevant For The Proposition That Various Exhibits To**
14 **The Hearing Examiner's Decision Were Made Available For The First**
15 **Time on July 10, 2008 When They Were Posted To The City's**
16 **Website.**


17 When drafting its opposition brief, the County was concerned that the City had
18 just posted a large volume of documents on the City website on July 10, 2008,
19 documents that the City was representing as part of the Hearing Examiner's decision,
20 many of which documents Petitioner and the County were seeing for the first time. The
21 County thought it prudent to point this out in its opposition brief. **Exhibit P**, which is a
22 screen print depicting the that documents in question were posted on the City's website
23 on July 10, 2008, was introduced through the Fallquist Declaration to evidence the
24 foregoing. It appears that Deluxe seeks to strike Exhibit P simply because Deluxe fails
25 to comprehend why the County included Exhibit P. This is not a cognizable basis on
26 which to exclude relevant evidence. Exhibit P should not be stricken.

1 **CONCLUSION**

2 As discussed above, none of the County's exhibits or briefing can properly be
3 stricken. Deluxe's motion to strike should be denied in its entirety.

4 DATED this 24th day of July, 2008.

5 SKAGIT COUNTY PROSECUTING ATTORNEY

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9 By 
10 Stephen Fallquist, WSBA No. 31678
11 William Honea, WSBA No. 33528
12 Attorneys for Skagit County
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