

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 MOTION TO CLARIFY RECORD, VACATE THE HEARING EXAMINER'S DECISION, AND REMAND THE PROCEEDINGS**

**I. MOTION**

Skagit County moves to correct the record certified by the City of Sedro-Woolley on August 7, 2008, based on recently-discovered evidence apparently concealed by the City during the administrative proceedings below. Because the City sanitized the record and tampered with evidence material to this action, Skagit County requests that the Court remand the City's decision for an untainted SEPA process.

**SKAGIT COUNTY'S MOTION TO CLARIFY THE RECORD, VACATE THE HEARING EXAMINER'S DECISION, AND REMAND THE PROCEEDINGS - 1 -**

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



1 proposed by the County under a prior administration that would have privatized the  
2 regional solid waste system. Accordingly, the 1994 solid waste plan, which requires the  
3 City to send all of its municipal waste to a single publicly-owned regional transfer station,  
4 remains in effect. Petitioner and the County also argue that the City should have  
5 required Deluxe to complete an environmental impact statement (EIS), given the  
6 probable adverse impacts to the regional solid waste system and the environment in  
7 general that are involved in siting a private regional garbage facility across the street from  
8 a high school and a residential neighborhood. These issues have been heavily and  
9 publicly debated for the past year and a half, as public policy matters and through this  
10 and other litigation.  
11

12  
13 During the City's SEPA comment period for the Deluxe proposal (January-  
14 February 2008), various agencies, citizens, public entities and other City Departments  
15 submitted comment letters for the Deluxe SEPA record. Curiously, however, the SEPA  
16 record certified to the Hearing Examiner and subsequently to this Court contains no  
17 comment whatsoever from the City department with perhaps the most expertise in the  
18 issues at hand, i.e., the City's Solid Waste Division.  
19

20 By means of information furnished on August 22, 2008 under the protection of  
21 RCW 42.41, Skagit County has learned that this mystifying omission was no mere  
22 accident: the City Supervisor/Attorney apparently sanitized the SEPA record, removing a  
23 February 5, 2008 SEPA comment letter from the Solid Waste Division from the Planning  
24 Department's files. See, Declaration of Leo Jacobs, City of Sedro-Woolley Solid Waste  
25 Division Manager, dated August 25, 2008 (Honea Dec. Exh. 1).  
26  
27

1 The relevant events are summarized as follows: The City invited SEPA  
2 comments for the Deluxe proposal in January and February 2008. Along with a large  
3 number of agencies, entities and citizens (almost all of whom opposed the Deluxe  
4 proposal and asked for an environmental impact statement), various City departments  
5 provided SEPA comments to the City Planning Department. Honea Dec. Exh. 2, 3. The  
6 other City departments' comment letters were not removed from the Planning  
7 Department's files, and are included in the administrative record index recently certified  
8 by the City to this Court. *Id.*

10 As noted above, conspicuously absent from the record is any comment by the  
11 City's Solid Waste Division. Having represented the City in a regional solid waste policy  
12 advisory committee for the past several years, the Solid Waste Division Manager is  
13 easily the most knowledgeable City staff member on issues related to solid waste  
14 planning and policy issues. See, Jacobs Declaration ¶¶ 1-3 (Honea Dec. Exh. 1).

16 On February 6, 2008, the City of Sedro-Woolley's Solid Waste Division Manager  
17 submitted a letter dated February 5, 2008 into the Deluxe SEPA record. Declaration of  
18 Leo Jacobs at ¶¶ 4-6 and Exh. A (Honea Dec. Exh. 1). Among other things, the Solid  
19 Waste Division's comment letter states as follows:

- 21 • *Is [the Deluxe proposal consistent with the City [of] Sedro-*  
22 *Woolley's Solid Waste Comprehensive Management Plan? The*  
23 *City of Sedro-Woolley did not accept the Count[y's] 2004 plan*  
*therefore we may not be in compliance with the Department of*  
*Ecology.*
- 24 • *This facility must do an environmental impact statement.*

1 Jacobs Dec. ¶ 5 and Exh. A. As discussed above (see 2:21-3:12), these and other  
2 comments in the Solid Waste Division Manager's February 5, 2008 letter go to and  
3 directly support some of the core contested issues before this Court.

4 On or about February 8, 2008, City Supervisor / City Attorney Eron Berg  
5 summoned Solid Waste Division Manager Jacobs to City Hall. Jacobs Dec. ¶ 7. As the  
6 City Supervisor, Berg is Jacobs' direct superior, with hiring and firing authority over  
7 Jacobs. Berg is also the City Attorney, and has appeared in this action. Berg told  
8 Jacobs that he "lacked authority" to submit the SEPA comment letter into the Deluxe  
9 SEPA record. *Id.* Berg removed Jacobs letter from the City Planning Department's file  
10 for the Deluxe project, and handed the letter to Jacobs *Id.*

11 As a result, City Planning staff was unable to consider the Solid Waste Division's  
12 expert input in reaching their determination of non-significance for the Deluxe project, the  
13 agency action now being challenged before this Court.

14 The City failed to provide the Solid Waste Division's SEPA comment letter to the  
15 Hearing Examiner, and thereafter failed to include the letter in the Certified Copy of the  
16 Record transmitted to this Court by the City Attorney's Office. Honea Dec. Exh. 3. In  
17 particular, the Certified Copy of the Record dated August 7, 2008, furnished by the City  
18 Attorney's office, certifies that that "the attached copies of the following listed documents  
19 are true and correct copies of documents located in the Building, Planning & Engineering  
20 Department files." *Id.* But the February 5, 2008 comment letter from the Solid Waste  
21 Division is *not* included among these documents, for the reason that it was removed from  
22 the Building, Planning & Engineering Department files by the City Attorney.  
23  
24  
25  
26  
27

1 IV. ARGUMENT AND AUTHORITY

2 A. A Document Submitted Into The SEPA Record Does Not Leave The  
3 SEPA Record As A Matter Of Law Through Improper Concealment By  
4 The City Attorney.

5 SEPA is intended to systematically and objectively consider the impact of project  
6 proposals on the natural and human environment. RCW 43.21C.030. In part, SEPA  
7 accomplishes this mission by openly soliciting comments from all viewpoints, weighing  
8 and responding to those viewpoints in an open public discussion about the merits and  
9 risks of the proposal. WAC 197-11-500-.570. Done properly, this process helps identify  
10 significant adverse impacts, allows expertise to come to the forefront, and assists in  
11 crafting appropriate mitigating measures. *Id.*

12 The City Attorney has no lawful authority to remove SEPA comments from the  
13 record that he finds inconsistent with the outcome he hopes to obtain. SEPA is a legal  
14 mechanism designed to objectively inform the decision-making process, and SEPA's  
15 entire purpose is defeated if it is allowed to become an outcome-oriented exercise or a  
16 rubber stamp for preconceived bureaucratic decisions. See, WAC 197-11-406 (SEPA  
17 review is "not be used to rationalize or justify decisions already made.") Federal courts  
18 have made this clear in the context of NEPA as well. See, *Metcalf v. Daley*, 214 F.3d  
19 1135, 1142 (9<sup>th</sup> Cir. 2000)(Environmental review "must be taken objectively and in good  
20 faith, not as an exercise in form over substance, and not as a subterfuge designed to  
21 rationalize a decision already made.")

22 RCW 36.70C.120(4) provides that "[t]he court may require or permit corrections  
23 of ministerial errors...in the preparation of the record." Putting this series of events in  
24 the kindest light possible, the City Attorney's removal of the Jacobs letter from the  
25 Planning Department's SEPA file was a "ministerial error" this Court should correct.

26 The February 5, 2008 SEPA letter from the City's Solid Waste Division Manager  
27 was a part of the SEPA record when it was submitted, and it remains part of the Deluxe

1 SEPA record – regardless of its improper removal from Planning Department files by the  
2 City Attorney. The County respectfully requests that the Court issue an order clarifying  
3 this issue for the purposes of the Petitioner’s and the County’s forthcoming briefing.

4 **B. A SEPA Determination Based On A Falsified Record Must Be Vacated**  
5 **And Remanded To The City For An Untainted SEPA Process.**

6 The LUPA statute provides as follows:

7 The court may affirm or reverse the land use decision under review or  
8 remand it for modification or further proceedings. If the decision is  
9 remanded for modification or further proceedings, the court may make  
such an order as it finds necessary to preserve the interests of the  
parties and the public, pending further proceedings or action by the  
local jurisdiction.

10 RCW 36.70C.140.

11 A LUPA proceeding is a species of appellate review. At the same time, this Court  
12 has the plenary authority of a trial court to control the proceedings based on the Court’s  
13 sound judgment and discretion. RCW 36.70C.030(2)(“The superior court civil rules  
14 govern procedural matters under [LUPA] to the extent that the rules are consistent with  
15 this chapter.”)

16 LUPA envisions a reasonable level of deference to the administrative decision  
17 below. But that deference rests on the fundamental assumption of a fair and impartial  
18 process. Because the City Attorney seems to have removed highly material  
19 information from the record prior to the relevant administrative decisions, neither City  
20 staff nor the Hearing Examiner were able to base their decisions on a complete  
21 administrative record. Moreover, it is impossible to know for certain whether there are  
22 *other* comment letters and material evidence that the City Attorney similarly sanitized  
23 from the administrative record that have simply not yet come to light. City Planning  
24 staff should not be faulted here, particularly given that the City Supervisor / City  
25 Attorney is their direct superior as well. But the process can and must be questioned.

1 In light of the foregoing, the Court should afford the administrative decision  
2 below neither procedural nor substantive deference. Given the unusual circumstances  
3 this case presents, the Court should vacate the hearing examiner's decision and  
4 remand the matter back to the City for a SEPA process that is not tainted. The County  
5 also requests an order requiring the City to consider the comments of the Solid Waste  
6 Division Manager in any subsequent SEPA process involving the Deluxe proposal.

7 **C. The Petitioner And The County Should Be Afforded Additional Time**  
8 **To Prepare Their Opening Brief.**

9 The County's and the Petitioner's opening briefs are due on September 3, 2008,  
10 per the agreed-upon scheduling order in this case. Honea Dec. Exh. 4. The County  
11 believes that vacation and remand of this matter is the appropriate remedy under the  
12 circumstances, which would render the scheduling order and briefing deadlines moot.  
13 However, if the Court declines to remand the matter, the County and Petitioner should be  
14 afforded sufficient time to resolve the issues presented by this motion, and incorporate  
15 the newly-discovered evidence into the County's briefing.

16 In the event the Court does not vacate and remand the matter, the County  
17 requests opportunity to conduct discovery to learn whether other relevant documents  
18 were excised from the record, and requests an additional 60 days to incorporate the  
19 results of such discovery into its briefing. This is proper in light of the newly-discovered  
20 evidence suppressed by the City with no fault on the part of Petitioner or the County, and  
21 the fact that the Record Index is defective and requires correction.

22 //  
23 //  
24 //  
25 //  
26 //  
27 //

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**V. CONCLUSION**

The record should be clarified to correct the City Attorney's improper concealment of the Solid Waste Division Manager's February 5, 2008 SEPA comment letter. The administrative decision below should be vacated, and the matter remanded to the City for a new SEPA process that is not tainted by concealment of material evidence. In the event the Court declines to vacate the decision and remand the proceedings, the Court should amend the scheduling order and grant Petitioner and the County 30 days in which to conduct discovery as to material improperly removed from the record, with opening briefs being due 60 days from September 3, 2008 in order to afford Petitioner and the County adequate time to incorporate any such new information into their briefing.

DATED this 25<sup>th</sup> day of August, 2008.

SKAGIT COUNTY PROSECUTING ATTORNEY

By 

Stephen Fallquist, WSBA No. 31678  
William Honea, WSBA No. 33528  
Attorneys for Skagit County