

1 Presiding Judge: Judge Castleberry
2 Hearing Date: August 29, 2008
3 Time: 12:15 p.m.
4 Department: Telephonic Conference

5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF SKAGIT

8 ANNIE JANICKI,)

9 Petitioner,)

10 vs.)

11 CITY OF SEDRO-WOOLLEY, a municipal)
12 corporation, and DELUXE RECYCLING)
13 AND DISPOSAL LLC, a Washington)
14 Corporation,)

15 Respondents.)

No. 08-2-01130-8

**PETITIONER'S RESPONSE IN
SUPPORT OF SKAGIT COUNTY'S
MOTION TO SHORTEN TIME AND
MOTION REMAND AND CLARIFY
RECORD**

16 **COMES NOW** Petitioner, by and through her attorney, C. Thomas Moser, and does state
17 in response to the Motion To Clarify Record, Vacate The Hearing Examiner's Decision And
18 Remand the Proceedings filed by Skagit County, as follows:

19 **1) IT IS NOT IMPORTANT WHY THE LEO JACOBS LETTER WAS REMOVED FROM THE PLANNING**
20 **DEPARTMENT FILE. IT WAS REMOVED AND THE COURT SHOULD DECIDE ON THAT BASIS.** The
21 fact that important information and comments were removed from the City's record is sufficient
22 for the Court to remand this quasi-judicial decision back to the City. For the purpose of this
23 motion the Court need only know that somebody removed the Solid Waste Manager's SEPA
24 Comment letter and deprived the lead agency, the Hearing Examiner and the Court of the

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1 information and input that was submitted by Mr. Jacobs. The public was likewise deprived of
2 this information.

3 **2) Leo Jacobs would have been Petitioner's first witness at the SEPA appeal if the letter**
4 **was in the record.** Petitioner would have called Mr. Jacobs as a witness to testify before the
5 Hearing Examiner about his SEPA comment letter if it was known that the letter existed. The
6 issues he raised in the comment letter went to the heart of the SEPA appeal filed by Petitioner
7 back in March 2008.

8 Before the Hearing Examiner, Petitioner argued "Because the City has rejected and failed
9 to adopt the 2004 CSWMP under which Deluxe claims the right to permit, construct and operate
10 its proposed facility, the City is legally precluded from authorizing the applicant's proposal."
11 SEPA Appeal, page 3. This theme is virtually mirrored in Mr. Jacobs' February 5, 2008 SEPA
12 comment letter, which states: "The City of Sedro-Woolley did not accept the Counties 2004 plan
13 therefore we may not be in compliance with the Department of Ecology." Jacobs' comment 12.
14 Had this comment letter been part of the record it would have allowed the Planning staff to
15 consider the merits of the argument that Deluxe was not even allowed to apply for a permit to
16 operate a garbage facility in the City based on the City's own solid waste comprehensive plan.

17 A second example, Petitioner raised the concern before the Hearing Examiner that
18 "Deluxe's proposal will clearly involve very loud noises and the odors of putrescent garbage,
19 with the prevailing southwest winds carrying in the exact direction of the high school's
20 classrooms." Appellant Response to City Staff Report at 10 (Record Index #3). This concern
21 was raised in part because it was obvious "the MDNS conditions provide no meaningful or
22 enforceable mechanism to control odors." SEPA Appeal at 4 (Record Index #3) The Jacobs
23
24

1 letter provided: "The Solid Waste Division requires that dust control and odor control systems
2 be in place at this facility for the building and recycling yards." Comment #1, Jacobs letter

3 A third example pertains to zoning. The City took the position that the Deluxe proposal
4 was a permitted use, and not a conditional use as the City's code would seem to require. This
5 was raised by Petitioner before the Hearing Examiner:

6 **Mr. Moser:** We believe that this project is not an out and out
7 permitted use as argued by the city and by Deluxe. The applicant
8 should be required to obtain a conditional use permit under the
city's own code and I'm citing Sedro-Woolley municipal code
17.28010...¹

9 The Hearing Examiner sided with the City on this point, but he might have seen things
10 differently had he been furnished with Comment # 14 in the Jacobs letter, which states as
11 follows:

12 This facility does not comply with the Zoning Codes Section 17
13 Industrial zoned land. This is not an approved use. Deluxe will
need to apply for a conditional use permit before proceeding.

14 Beyond that, Jacobs raised issues that were not considered by the City at all, perhaps
15 underscoring the reason that it is improper to allow the City to selectively weed out expert
16 comments from the SEPA record that it finds inconvenient to the ultimate outcome. For example,
17 in Comment # 2, Jacobs raised the following issue:

18 A prevailing winds study must be done to determine the path of a
19 projected hazardous waste spill and/or a radiation exposure.
Especially with Sedro-Woolley High School less than 500 feet
away.

20 Neither the City Planning Department nor the Hearing Examiner appears to have
21 considered this issue in any fashion. And the core of Petitioner's appeal is as follows:

22 _____

23 ¹ Hearing Examiner Transcript, 9:13-10:17.

1 It is obvious to any reasonable observer that Deluxe's proposal will
2 involve significant adverse impacts. The City's conclusion to the
3 contrary was little more than a foregone conclusion, driven by City
4 officials' pre-approval of this proposal and their desire for
5 additional revenue. The City's threshold determination is clearly
6 erroneous, and must be sent back for an objectively performed
7 environmental impact statement.²

8 Mr. Jacobs, the City's resident expert on solid waste management and operations,
9 provided the City Planning Department with his views in clear and unambiguous terms
10 (Comment #13): "**This facility must do an environmental impact statement.**" Petitioner
11 believes that the Hearing Examiner would have viewed this issue much differently with the
12 benefit of Mr. Jacobs' input. The fact Jacobs input was not considered means that the City's
13 process is defective, inadequate and tainted on its face. The Court should vacate the Hearing
14 Examiner's decision and remand the matter for an adequate process.

15 **3) The Hearing Examiner was deprived of the Leo Jacobs evidence and thus disregarded**
16 **the Petitioner's argument.** The Hearing Examiner determined that "the question of whether the
17 permit application is compliant with the City's participation in the Skagit County Solid Waste
18 Management Plan is outside the scope of this appeal." Hearing Examiner Decision, paragraph D.
19 Perhaps if the record had contained the Leo Jacobs SEPA comment letter the Hearing Examiner
20 would have determined that the City's own resident solid waste expert was concerned that the
21 City did not have legal authority to accept the permit application, the Hearing Examiner would
22 have considered this important issue. We will not know the answer unless this matter is
23 remanded and the City is ordered to place the Jacobs letter back into the record and start the
24 process over. The City and Planning Department staff should be allowed (or ordered) to consider

25 ² Appellant's Response To Staff Report, page 10 (Record Index #3)

1 the Jacobs letter. If they fail to do that the Petitioner may again be allowed to file a SEPA appeal,
2 but that is speculation at this point.

3 **4) MOTIVE, MISTAKE OR MISUNDERSTANDING ARE NOT RELEVANT IN DECIDING THIS MOTION.**

4 Petitioner does not know why the Jacobs letter was removed from the Planning Department and
5 does not think it is important in deciding this motion. The motive of the City or how a
6 misunderstanding occurred is not relevant for the Court to make a decision that the record was
7 incomplete from the moment the letter was removed.

8 Mr. Jacobs' testimony has a material impact on the overall adequacy of the SEPA
9 process. Mr. Jacobs is clearly the most qualified and knowledgeable individual in the City about
10 solid waste management, operations, planning and policy. Jacobs Dec. ¶¶ 1-3. Mr. Jacobs'
11 comment letter raises most of the issues that have been raised by Petitioner as well as the County
12 before the Hearing Examiner and now this Court. In effect, the City muzzled its resident expert
13 and removed his comments from the record. *Why* they did so is mostly unimportant. The Court
14 should decline to waste judicial resources reviewing a defective and inadequate process, and
15 instead should remand this matter to the City for an adequate process.

16 **5) EXTRAORDINARY FACTS REQUIRE REMAND.** The mishandling of the record by the City, for
17 whatever reason, is an extraordinary act that can only be remedied by remand in a LUPA
18 context. The purpose of the administrative appeal process is to allow a quasi-judicial officer (the
19 Hearing Examiner) to review the record before the administrative official and make a decision on
20 appeal. The purpose of the LUPA process is to allow a judicial officer to review the same record
21 and make a determination about whether there was error below. If the record has been
22 mishandled by the city before it ever got to the quasi-judicial officer the LUPA process is flawed
23 and frustrated. If the Court is to include the missing document in the record at the LUPA process,

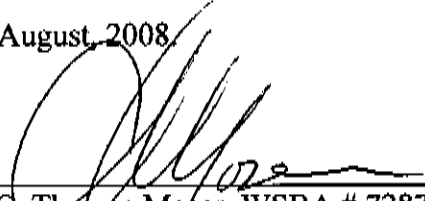
1 the Court is not looking at the same record that was before the Hearing Examiner. Likewise, the
2 Court is not looking at the original record before the administrative official who made the
3 original SEPA determination. Sending the matter back to the City with instructions to include the
4 improperly excised document in the record allows the administrative official to review the matter
5 in the context of complete record.

6 **6) BRIEFING NOW IS A WASTE OF JUDICIAL TIME AND RESOURCES IF THE COURT IS INCLINED**
7 **TO GRANT THE MOTION.** Petitioner's and the County's briefs are due next Wednesday,
8 September 3, 2008. The briefing will be dramatically different if the Court grants any portion of
9 the County's motion and may be unnecessary altogether should the Court grant the vacation and
10 remand requested by the County's motion.

11 CONCLUSION

12 The Court should grant the motion vacating the Hearing Examiner's decision and
13 remanding the matter for an adequate and objective SEPA process. The Court should also order
14 the City to retain an objective consultant in order to handle the SEPA review upon remand. In
15 the event the Court declines to vacate and remand, Petitioner requests an adequate opportunity to
16 conduct discovery to learn among other things whether there is other evidence that was removed
17 from the record.

18 Dated: this 27 day of August, 2008.

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21 C. Thomas Moser, WSBA # 7287
22 Attorney for Petitioner
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