

The Hon. Ronald Castleberry
1:00 p.m. September 9, 2008

**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 SEPA comments that were in the record but which were apparently concealed by the City during the administrative proceedings below. Because

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

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1 the entire process has been tainted as a result, Skagit County requests that the Court
2 remand the matter to the City for an uncontaminated SEPA process.

3 II. SUMMARY

4 The City of Sedro-Woolley's Solid Waste Division Manager submitted SEPA
5 comments in the Deluxe SEPA record in February 2008, comments that are centrally
6 relevant to the issues raised before the Hearing Examiner and this Court. However, the
7 Solid Waste Division Manager's comment letter was apparently removed from the City
8 Planning Department's files. This is described more fully by the Declaration of Leo
9 Jacobs dated August 25, 2008, attached to the accompanying Honea Declaration as
10 **Exhibit 1**. The Court should clarify that the record below properly includes the Solid
11 Waste Division Manager's February 5, 2008 comment letter.
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13 The Petitioner and the County should not be forced to challenge a decision based
14 on an incomplete, tainted record. The decision presently before this Court is the result of
15 a tainted process that deserves no deference. The Court should vacate the hearing
16 examiner's decision and remand the matter to the City for a new and untainted SEPA
17 process.
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19 III. EVIDENCE RELIED UPON

- 20 1. Declaration of William Honea dated September 2, 2008;
- 21 2. Declaration of Rob Simpson dated August 29, 2008.

22 IV. FACTUAL BACKGROUND

23 In this litigation, Petitioner Janicki and Intervenor Skagit County ("County") point
24 out that the City of Sedro-Woolley ("City") should not have accepted an application nor
25 issued a SEPA determination of non-significance for Deluxe Recycling and Disposal
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1 LLC's proposed garbage transfer station. The City's solid waste management plan
2 prohibits private transfer stations, because in 2004 the City rejected a solid waste plan
3 that would have allowed private transfer stations. Accordingly, the 1994 solid waste plan
4 remains in effect, which requires the City to send all of its municipal waste to a single
5 publicly-owned regional transfer station. Petitioner and the County also argue that the
6 City should have required an environmental impact statement ("EIS"), given the probable
7 adverse impacts to the regional solid waste system and the environment in general
8 involved in siting a private regional garbage facility across the street from a high school
9 and a residential neighborhood. These issues have been heavily and publicly debated
10 for the past year and a half, as public policy matters, and in the context of this action and
11 other litigation.
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14 During the City's SEPA comment period for the Deluxe proposal (January-
15 February 2008), various agencies, citizens, public entities and other City departments
16 submitted comment letters for the Deluxe SEPA record. Curiously, however, the SEPA
17 record certified to the Hearing Examiner and subsequently to this Court contains no
18 comment whatsoever from the City department with perhaps the most expertise in the
19 issues at hand, i.e., the City's Solid Waste Division.
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21 Skagit County has learned that this mystifying omission was no mere accident:
22 Solid Waste Division Manager's February 5, 2008 SEPA comment letter was improperly
23 removed from the Planning Department's files. See, Declaration of Leo Jacobs, City of
24 Sedro-Woolley Solid Waste Division Manager, dated August 25, 2008 (Honea Dec. Exh.
25 1).
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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/or demanded an EIS), various City departments provided SEPA comments
5 to the City Planning Department. Honea Dec. Exh. 2, 3. Other departments' comment
6 letters were not removed from the Planning Department's files, and are included in the
7 administrative record index recently certified by the City to this Court. *Id.*

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

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

- 19 • *A prevailing winds study must be done to determine the path*
20 *of a projected hazardous waste spill and/or a radiation*
21 *exposure. Especially with Sedro-Woolley High School less*
22 *than 500 feet away.*
- 23 • *Is [the Deluxe proposal] consistent with the City [of] Sedro-*
24 *Woolley's Solid Waste Comprehensive Management Plan? The City of Sedro-Woolley did not accept the Count[y's] 2004*
25 *plan therefore we may not be in compliance with the*
26 *Department of Ecology.*
- 27 • *This facility must do an environmental impact statement.*

- *This facility does not comply with Zoning Code Section 17 Industrial zoned land. This is not an approved use. Deluxe will need to apply for a conditional use permit before proceeding. This facility may receive Hazardous waste from drop off of garbage.*

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

On or about February 8, 2008, City Supervisor / City Attorney Eron Berg summoned Solid Waste Division Manager Jacobs to City Hall. Jacobs Dec. ¶ 7. As the City Supervisor, Berg is Jacobs' superior, with hiring and firing authority over Jacobs. Berg is also the City Attorney, and has appeared in this action but withdrew from representation of the City on August 26, 2008, one day after the County filed the Jacobs Declaration with this Court.¹ Although it is not entirely clear whether Berg was purporting to act in his capacity as City Supervisor or City Attorney in doing so, Berg told Jacobs that Jacobs "lacked authority" to submit his SEPA comments. *Id.*

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

Thereafter, the City failed to provide the Solid Waste Division's SEPA comment letter to the Hearing Examiner. The City then failed to include the letter in the Certified Copy of the Record transmitted to this Court by the City Attorney's Office. Honea Dec. Exh. 3. In particular, the Certified Copy of the Record dated August 7, 2008, furnished by the City Attorney's office, certifies that that "the attached copies of the following listed

1 documents are true and correct copies of documents located in the Building, Planning &
2 Engineering Department files.” *Id.* But the February 5, 2008 comment letter from the
3 Solid Waste Division is *not* included among these documents, for the reason that it was
4 removed from the Building, Planning & Engineering Department files.
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6 IV. ARGUMENT AND AUTHORITY

7 A. A Document Submitted Into The SEPA Record Does Not Leave The 8 SEPA Record As A Legal Matter Simply Because It Was Removed 9 From The File.

10 RCW 36.70C.120(4) provides that “[t]he court may require or permit corrections
11 of ministerial errors...in the preparation of the record.” Putting this series of events in
12 the kindest light possible, the City Attorney’s removal of the Jacobs letter from the
13 Planning Department’s SEPA file was a “ministerial error” this Court ought to correct.

14 The February 5, 2008 SEPA letter from the City’s Solid Waste Division Manager
15 was a part of the SEPA record when it was submitted, and it remains part of the Deluxe
16 SEPA record – regardless of its improper removal from Planning Department files. The
17 County respectfully requests that the Court issue an order clarifying this issue for the
18 purposes of the Petitioner’s and the County’s forthcoming briefing. Moreover, as set
19 forth below, the County respectfully requests that the Court vacate the Hearing
20 Examiner’s decision and remand the matter to the City for an uncontaminated SEPA
21 process.

22 B. A SEPA Determination Based On A Contaminated Record Must Be 23 Vacated And Remanded To The City For An Untainted SEPA Process.

24 SEPA is intended to systematically and objectively consider the impact of project
25 proposals on the natural and human environment. RCW 43.21C.030. In part, SEPA
26 accomplishes this mission by openly soliciting comments from all viewpoints, weighing

27 ¹ See, Notice of Withdrawal and Substitution of Counsel dated August 26, 2008 (on file with Court).

1 and responding to those viewpoints in an open public discussion about the merits and
2 risks of the proposal. WAC 197-11-500-.570. Done properly, this process helps identify
3 significant adverse impacts, allows expertise to come to the forefront, and assists in
4 crafting appropriate mitigating measures. *Id.*

5 SEPA is a legal mechanism designed to objectively inform the decision-making
6 process, and SEPA's entire purpose is defeated if it is allowed to become an outcome-
7 oriented exercise, or a rubber stamp for pre-conceived bureaucratic decisions. See,
8 WAC 197-11-406 (SEPA review is "not be used to rationalize or justify decisions
9 already made.") Federal courts have made this clear in the context of NEPA as well.
10 See, *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)(Environmental review "must
11 be taken objectively and in good faith, not as an exercise in form over substance, and
12 not as a subterfuge designed to rationalize a decision already made.")

13 LUPA envisions a reasonable level of deference to the administrative decision
14 below. But that deference rests on the fundamental assumption that the decision
15 below generally resembled a fair, objective, and impartial process. Because the City
16 seems to have removed highly material information prior to the relevant administrative
17 decisions, neither City staff nor the Hearing Examiner based their decisions on a
18 complete administrative record.

19 Moreover, it is impossible to know for certain whether there are *other* comment
20 letters and material evidence that were removed from the administrative record that
21 have simply not yet come to light. City planning staff should not be faulted here,
22 particularly given that the City Supervisor / City Attorney is their superior as well. But
23 the process can and must be questioned.

24 Generally speaking, the Court in a LUPA action considers only that which the
25 Hearing Examiner considered, and the Hearing Examiner has analyzed only the
26 decision made at the administrative level. With that in mind, it is disingenuous for the
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1 City to suggest that the County and Petitioner should be forced to muddle along on the
2 basis of a tainted record and a resultantly contaminated process.

3 The Court should afford the administrative decision below neither procedural
4 nor substantive deference. Given the unusual circumstances this case presents, the
5 Court should vacate the hearing examiner's decision and remand the matter back to
6 the City for an uncontaminated SEPA process.

- 7 1. The Court Should Remand This Matter To The City Without Forcing The
8 County And Petitioner To Go Through The Entire Exercise Of A Hearing
9 On The Merits.

10 The City has suggested that the County and Petitioner should simply "make
11 their best arguments" at the LUPA hearing. Under the circumstances, this is wholly
12 unsatisfactory. Even if the Court allows discovery, the City's approach to its own
13 contamination of the SEPA process is akin to an industrial polluter proposing that
14 downstream water users install filters on their taps. The County's suggested approach
15 makes far more sense: clean up the contamination by returning to the source of the
16 pollution.

17 A LUPA proceeding is a species of appellate review, and the Court has a
18 statutorily limited range of remedies:

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

25 RCW 36.70C.140. While a decision affirming or reversing the decision below on the
26 substantive merits would presumably require a hearing on the substantive merits, nothing
27 requires the Court to allow a patently flawed process to go forward through the expense
28 and difficulty of a LUPA hearing on the substantive merits. That is to say, the Court is
not obligated to churn ahead through the substance afforded by a process that was
flawed, defective, and tainted from its very outset. Rather, this Court has the plenary

1 authority of a trial court to control the proceedings based on the Court's sound judgment
2 and discretion. RCW 36.70C.030(2)("The superior court civil rules govern procedural
3 matters under [LUPA] to the extent that the rules are consistent with this chapter.")
4 The Court has the authority to (and should) remand the matter for further proceedings
5 now, without the expense and inconvenience of a hearing on the substantive merits on
6 the basis of a record that is clearly contaminated.

7 Considerations of judicial efficiency further warrant remand. The alternative will
8 be lengthy and contentious discovery under the auspices of this LUPA action that will
9 at once be constrained by the limitations of the LUPA statute as to new evidence, yet
10 must accommodate the County's and Petitioner's legitimate right to learn the full extent
11 of the problems with the record brought before this Court. As the Court is aware,
12 meaningful discovery necessarily leads to more discovery.

13 For example, if Mr. Jacobs is to be deposed as the City and Deluxe will no
14 doubt insist, then it is only fair that those who seek to impeach Mr. Jacobs should be
15 deposed. Deluxe's principals must also be deposed to learn whether they had any
16 knowledge of the issues with the SEPA record. Discovery is also proper as the City's
17 involvement with and accommodation of Deluxe. Depositions are only meaningful if
18 done after a period of documentary discovery, such that deponents can be presented
19 and challenged with relevant documentary evidence. Discovery is also about learning
20 previously unknown facts and pursuing them in whatever direction they may lead, and
21 thus discovery, if it is to have any effect or meaning, cannot reasonably be constrained
22 to a list of known unknowns. Given that this arises in the context of a closed-record
23 LUPA appeal, Deluxe and the City will presumably argue that no discovery should be
24 allowed whatsoever. While discovery would clearly be the only mechanism for
25 attempting to re-create a fair and objective look at this matter absent remand, it is safe
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1 to predict that all of this will inevitably give rise to extensive motion practice before this
2 Court.

3 Fortunately, all of this strain on the Court's resources is unnecessary. In the
4 County's view, a far better approach to this quandary is to simply vacate the Hearing
5 Examiner's decision, and place the entire process back into the context of the open
6 record that a new SEPA process would afford.

7 2. The Jacobs Letter Was, Is, And Remains Part Of The Record. It Should
8 Have Been Considered By Staff, Transmitted To The Hearing Examiner,
9 and Certified To This Court. It Was Not. Excuses As To Why It Was Not
10 Are Irrelevant. The Process Is Defective And Contaminated.

11 We anticipate that the City will attempt to explain away the removal of the Jacobs
12 letter from the SEPA record as some sort of "misunderstanding" between City Attorney
13 Berg and Solid Waste Division Manager Jacobs. If the City Attorney had legitimate
14 concerns about the wording, grammar, spelling, syntax, etc. of Mr. Jacobs' letter, the
15 proper approach was not to remove the letter from the file. At most, the City Attorney
16 should have included a memo in the SEPA record explaining his concerns.

17 The implausible idea that this was all some collegial misunderstanding between
18 Berg and Jacobs also fails to reflect the reality of everything else that has transpired
19 around this project. The record reflects that the City Administration has gone to
20 extraordinary lengths to assist, facilitate and pave the way for Deluxe, starting well before
21 Deluxe even submitted a building permit application on December 18, 2007. For
22 example, the Mayor and City Attorney appeared with Deluxe in a televised presentation
23 on May 22, 2007 to promote the Deluxe project at the site in question.² In October 2007,
24 the City Attorney was threatening neighboring property owners with condemnation in
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27 ² See, Excerpts of Transcript of Presentation to Skagit County Board of Commissioners dated May 22,
2007 (Exh B. to Record Index # 3).

1 order to accommodate Deluxe's road needs.³ And in late October 2007, according to
2 Mr. Rob Simpson (one of Deluxe's construction project managers), "City Supervisor Eron
3 Berg suggested that we quickly submit a building permit in order to vest ahead of
4 regulations likely to be changing in the near future."⁴ And it is also useful to note that this
5 is merely the evidence that the County has stumbled upon without any concerted effort at
6 discovery. The disappearance of expert commentary from the SEPA file that could
7 occasion unwanted scrutiny of the Deluxe proposal is entirely consistent with the overall
8 appearance that the Deluxe proposal was a foregone conclusion – at least as far as the
9 City Administration was concerned.

10 The City will no doubt earnestly claim it considered Mr. Jacobs' concerns at the
11 time, but the fact remains that neither the Petitioner, nor the County, nor the citizens of
12 Sedro-Woolley, nor the Hearing Examiner, nor this Court were in the room to see any
13 alleged careful listening to Mr. Jacobs' concerns. That is the point of the sanctity of an
14 administrative record: a Court looking at the record should not need to depend on
15 convenient after-the-fact explanations about what government officials had in mind at
16 the time they made their decision. See, *Sacks v. Office of Foreign Asset Control*, 466
17 F.3d 764, 780 (9th Cir. 2006)(Courts owe no deference to "post hoc rationalization
18 advanced...to defend past agency action against attack.")

19 The relevant facts are as follows: Mr. Jacobs has testified under oath that he
20 submitted the February 5, 2008 letter into the SEPA record,⁵ and, indeed, the Jacobs
21 letter was stamped in and accepted by the City in the same manner and form as other
22 SEPA comment letters that the City has duly and properly included in the record
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25 ³ See, Email chain between City Supervisor / City Attorney Eron Berg and Deluxe principal dated
October 26, 2007 (Honea Dec. Exh. 4).

26 ⁴ Declaration of Rob Simpson dated August 29, 2008, at 2 ¶ 2. While urging a project proponent to rush
to submit a permit before the rules change is not unlawful *per se*, Mr. Berg's actions demonstrate an
ongoing pattern of an approach to the Deluxe project that is considerably less than impartial.

27 ⁵ Jacobs Dec. ¶ 6 (Honea Dec. Exh. 1).

1 certified to this Court.⁶ Mr. Jacobs has also testified under oath that it was his
2 “intention and belief that the comment letter attached as Exhibit A would become part
3 of the SEPA record now being considered by this Court.”⁷

4 The inevitable excuses as to why the Jacobs letter just turned up ought to be
5 ignored. The sum and substance of this matter is that the Jacobs letter should have
6 been included in the record considered by City staff, should have been transmitted to
7 the Hearing Examiner, and should have been certified to this Court as part of the
8 record. It was not, and this process is contaminated as a result.

9 Although Deluxe has predictably leaped in with both feet to attack Mr. Jacobs’
10 credibility, this is not actually about Mr. Jacobs. Rather, this is about the undisputed
11 fact that commentary by the City’s resident expert going to the core issues in this
12 litigation was stamped into the SEPA record and then disappeared without a trace until
13 it was brought forward by Mr. Jacobs one week ago.

14 The accompanying Declaration of Rob Simpson underscores the ultimate
15 reason that all of this is so important. Mr. Simpson, who is one of Deluxe’s project
16 managers, recently testified by declaration as follows:

17 [Deluxe’s] basic strategy was to quickly obtain a hastily drafted
18 MDNS, and then later exploit loopholes in various instances where
19 the conditions were arguably vague or unenforceable. This latter
20 strategy Deluxe has actually pursued, and has taken measures to
21 defeat what I understood to be the City’s intent.

22 It is my opinion, based on my experience working on this project,
23 that Deluxe has little intention to comply with the City’s intent in the
24 MDNS conditions. It is also my view that Deluxe has little regard or
25 concern for the High School and its students, nor for the City and its
26 citizens.

25 ⁶ Compare, Jacobs’ February 5, 2008 letter (Jacobs Dec. Exh. A) with Memorandum SEPA Comment
26 Letter from City of Sedro-Woolley Wastewater Treatment Plant staff dated February 5, 2008 (Honea
27 Dec. Exh. 2). The February 5, 2008 letter from Wastewater Treatment Plant staff is included in the
record certified to this Court as Record Index # 20. See, Honea Dec. Exh. 3 at 3.

⁷ Jacobs Dec. ¶ 6 (Honea Dec. Exh. 1).

1 Simpson Dec. ¶ 3, 5. Simpson goes on to explain with great specificity how Deluxe is
2 already in the process of attempting to roll over the top of the City's MDNS conditions
3 and ignore the City's basic intent. Simpson Dec. ¶ 4 and Exh. A. Perhaps if City
4 planning staff had been operating with the benefit of comments in the record from the
5 Solid Waste Division Manager (i.e., the City's resident expert on solid waste matters),
6 City planning staff might have felt sufficiently emboldened to write specific and
7 enforceable MDNS conditions notwithstanding the City Administration's clearly
8 expressed desire to push the Deluxe project through on greased rails. If constrained
9 to the record presented to this Court by the City, we will never know. Whatever
10 creative excuses the City plans to offer for the disappearance of Mr. Jacobs' letter
11 from the SEPA files, the proper legal analysis, in the County's view, is as follows:

- 12 • Jacobs' letter *is and remains* part of the SEPA record as a matter of law, but
13 was neither made available to the Hearing Examiner nor to the parties
14 challenging the City's decision.
- 15 • It is entirely conceivable that other relevant SEPA comments were excised from
16 the record.
- 17 • The information in the Jacobs Declaration and Jacobs letter have a direct
18 nexus to the basic administrative determination about significant environmental
19 impacts now at issue before this Court.
- 20 • The Jacobs Declaration and the Jacobs letter are new information that renders
21 everything that has happened thus far a flawed and defective process.
- 22 • **The Hearing Examiner's decision should be vacated, and the matter
23 should be remanded to the City for an objective environmental review, to
24 be performed by a reputable outside consultant acceptable to the County
25 and the Petitioner.**
- 26 • In the event the Court declines to vacate and remand, the County requests
27 opportunity to conduct discovery regarding the issues discussed in this briefing,
28 and additional time to incorporate the results of such discovery.
- That being said, the County believes that discovery comes in a poor second to
simply remanding the matter to the City for a non-contaminated process,
particularly given the difficulties and extensive judicial resources that meaningful
discovery will likely involve in the context of a closed record LUPA action.

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V. CONCLUSION

The stream on which this decision flows to the Court is contaminated, and the process must therefore be returned to a point in the stream that is uncontaminated. The matter should be remanded to the City for an adequate SEPA process.

In the event the Court declines to remand the proceedings, in the alternative, (a) the record should be clarified to correct the improper removal of the Solid Waste Division Manager's February 5, 2008 SEPA comment letter; and (b) the Court should grant Petitioner and the County an adequate period of time in which to conduct discovery, with an appropriate adjustment in the overall scheduling order.

A proposed form of order accompanies this motion.

DATED this 3rd day of September, 2008.

SKAGIT COUNTY PROSECUTING ATTORNEY

By 

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