Judge Castleberry, Department 1
September 9, 2008, 1:00 p.m.

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

ANNIE JANICKI,

Petitioner,

vs.

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,

vs.

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

Intervenor.

No. 08-2-01130-8

RESPONDENT CITY OF SEDRO-WOOLLEY'S RESPONSE TO MOTION TO CLARIFY THE RECORD, VACATE THE HEARING EXAMINER'S DECISION AND REMAND THE PROCEEDINGS

I. INTRODUCTION

The City of Sedro-Woolley ("City"), by and through its attorneys, Robert A. Carmichael and Simi Jain of Zender Thurston, P.S submit this Response to Skagit County's Motion to Clarify the Record, Vacate the Hearing Examiner's Decision and Remand the

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Proceedings (Motion to Clarify). Skagit County's (County) Motion to Clarify requests this Court to clarify the record and vacate and remand the Hearing Examiner's decision. Additionally, the County requests this court to allow pre-trial discovery on matters unrelated to the Hearing Examiner's decision.

This case is a Land Use Petition Act (LUPA, RCW 36.70C) appeal of the Hearing Examiner's decision. The Hearing Examiner's decision may only be vacated in specific circumstances as listed in RCW 36.70C.130. The County instead requests that this court vacate and remand the Hearing Examiner's decision because it alleges that the City of Sedro Woolley's City Supervisor and City Attorney, Eron Berg, allegedly removed a public comment letter from the City's SEPA file. There is no basis in the LUPA for the County's request to vacate and remand. Further, the County has not provided any other legal basis for their request to vacate and remand. Finally, the document in question was not removed from the record by Eron Berg or anyone else; but was withdrawn by Leo Jacobs on his own accord. Therefore, this Court should deny the County's request.[1]

II. ISSUES

1. Should this court vacate the Hearing Examiner's decision and remand the MDNS back to the City when no documents were improperly removed from the record by the City?
2. Should this court require that the record include a document voluntarily withdrawn by the employee that submitted it?
3. Should this court allow unlimited discovery of issues unrelated to the Hearing Examiner's decision?

[1] The City also resubmits that the County's Motion to Clarify should be served on Respondent Fire Ridge LLC. Fire Ridge was joined by Petitioner as a party. That they have not answered is of no importance. There is no requirement to file an answer under LUPA. RCW 36.70C.080(6).

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III. FACTS

On or about December 17, 2007, the City of Sedro Woolley accepted an application from Deluxe Recycling and Disposal LLC (Deluxe) for a solid waste handling and recycling facility ("Project"). Record Exhibit 2. The public comment period for this Project closed on February 6, 2008. *Id.* The City Planning Department ("Department") issued its SEPA threshold decision, an MDNS for the Project on or about March 7, 2008. Record Exhibit 7. Petitioner Janicki appealed the Department's threshold determination to the City Hearing Examiner on or about March 26, 2008. Record Exhibit 1. In a detailed written decision, the City Hearing Examiner upheld the MDNS determination by the Department.[2]

The City transmitted a complete and accurate record of the proceedings to this court on or about August 18, 2008. Over seven months after the public comment period concluded and shortly after Leo Jacobs lost his bid for County Commissioner in the primary election, Mr. Jacobs submitted a statement alleging that the City Attorney and Supervisor, Eron Berg, removed Jacobs's comment letter from the City's SEPA file and told Jacobs that the letter was not to become part of the Deluxe SEPA record. Declaration of Jacobs; Declarations of Moore and Rosario.

Jacobs failed to mention that several other City employees were present during Jacobs' conversation with Berg namely, Planner John Coleman and Planning Director, Jack

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[2] Among his findings, the Hearing Examiner found that appeal issue number two raised by Petitioner Janicki that the City should have rejected Deluxe's application as non-compliant with the City's solid waste plan was outside the scope of an appeal of the MDNS. Record Exhibit 38 at 4. Whether the Hearing Examiner made an error in this finding is an issue of this appeal and not an issue for purposes of the County's Motion to Clarify or this Response. However, the County presented unsubstantiated facts pertaining to this appeal in its Motion to Clarify that require response. Resolution No. 706-04 did not invalidate the County's 2004 Solid Waste Management Plan or its applicability to the City. Record Exhibit 2 at 4. Despite Resolution No. 706-04, the City remained legally bound by the 2004 Interlocal Agreement with the County to follow the County's Solid Waste Plan. *Id.* at 3. The City determined that the County's Solid Waste Plan allows for two (2) transfer stations. *Id.* Therefore, the Deluxe Project may be permitted. *Id.* at 4. It would be error to conclude otherwise.

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Moore. Declarations of Coleman and Moore. Also, because the discussion took place in an open hallway area at the old city hall, other city employees over heard Jacobs's conversation including Julie Rosario, Public Works Assistant and Eric Potash, Buildings Inspector and Plans Examiner. Declarations of Rosario and Potash. Eron Berg did not tell Jacobs that Jacobs "lacked authority" to submit his SEPA comments. Declarations of Berg and Coleman. Eron Berg is the City Supervisor and City Attorney and it is within his authority to counsel and provide direction to City employees. Declaration of Berg. Nonetheless, Moore, Coleman and Berg testify that no one told Jacobs to not submit his comments. Declarations of Coleman, Berg and Moore.

It is worth noting that Mr. Coleman was engaged in the discussion over the form and wording of Leo's letter before Mr. Berg or Mr. Moore arrived. Mr. Coleman pointed out to Leo that the letter was not written in the form of a comment letter but as if it was placing conditions on the applicant, which was something he could not do in a SEPA comment letter and was something for the Planning Department to decide. Declaration of Coleman. Mr. Coleman also pointed out to Leo that the letter was addressed to the applicant, not the SEPA official or the planning department, again, making it appear he was placing conditions directly on the applicant. *Id.*

Leo seemed unsure about the letter and was already talking about rewriting it when Mr. Berg and Mr. Moore showed up. *Id.* Much of the same discussion continued along these lines after Mr. Berg and Mr. Moore arrived. Declarations of Berg, Moore, and Coleman. For example, Jack Moore testifies:

> Regarding the appropriateness of his comments, we discussed the idea that some of his comments were written as if they were permit requirements. For instance

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> he used words like "shall" which made his comments sound like mandatory conditions. Since the Solid Waste Department doesn't assign conditions to the permit, we thought that this language could be confusing. The Planning Department conditions the permit. None of us told him not to submit his comment letter. Declaration of Moore.

Clearly, setting conditions for an MDNS is within the purview of the lead agency (City), the duties of which are performed by the City Planning Department. *Id.*; Declaration of Coleman. The Solid Waste Division does not have the role of imposing conditions on the Deluxe project.

Leo Jacobs was never told by anyone, however, that he should not submit his comments. All describe the conversation as a discussion and not confrontational or authoritative. Julie Rosario describes the conversation as jovial. Declaration of Rosario. John Coleman testifies that he was under the impression that Leo was going to revise and resubmit the comment letter. Declaration of Coleman. Mr. Coleman further points out that he later reminded Leo to submit written comments. *Id.*

Because Jacobs apparently withdrew his letter and did not submit a revised letter, the City Planning Department did not have a letter in its possession from Jacobs to submit as part of the record. Declarations of Coleman, Moore and Potash. Jacobs also chose not to submit his comments for the Hearing Examiner. Therefore Jacobs' comment letter was not submitted as part of the City's record to this court. Many of Jacobs' comments were addressed in the MDNS. Declaration of Moore and Coleman. Jacobs also made comments during the Planning Department's meeting with Department Heads. Declaration of Coleman and Moore. Many of Jacobs' comments from that meeting were incorporated as conditions in the MDNS when the Planning Department made its threshold decision.

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Neither the city planners nor Mr. Berg recall the late October 2007 meeting with Rob Simpson described in paragraph 2 of the Simpson declaration. Declarations of Berg, Moore and Coleman. If Deluxe substantially alters its proposal as is alleged to be its intent, the City may require a new SEPA threshold determination at that time. Declaration of Moore; WAC 197-11-600(3)(b). Additionally, the City has enforcement powers if Deluxe does not follow the conditions of the MDNS. *Id;*. SWMC 2.88.100(D)

IV. LEGAL ARGUMENT

A. There is no legal or factual basis for vacating and remanding the Hearing Examiner's decision based upon the County's theories of contamination of the record.

1. The City followed the proper SEPA procedure when it issued an MDNS.

The County's request that this court vacant and remand the Hearing Examiner's decision is not based upon SEPA or LUPA. Indeed, the County provides no applicable legal authority in support of its request. Petitioner Janicki also provides no legal authority for this argument. For the MDNS to survive judicial scrutiny, the record must demonstrate that the City adequately considered the environmental factors "in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal's environmental impact." *Lassila, v. City of Wenatchee,* 89 Wn.2d 804, 814, 576 P.2d 54 (1978). *see also Anderson,* 86 Wn. App. at 302.

SEPA requires the City provide the public with the opportunity to make public comments. With regards to procedural issues unrelated to SEPA, the proper standard is whether the action was arbitrary and capricious. *Pease Hill Community Group v. Spokane,* 62

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Wn. App. 800, 804, 816 P.2d 37 (1991).[3] The court will only reverse "willful and unreasoning action in disregard of facts and circumstances." *Id.* citing to *Washington Waste Sys., Inc. v. Clark Cy., 115 Wn.2d 74, 81, 794 P.2d 508 (1990).* An error in judgment does not constitute arbitrary and capricious action. *Id.* citing to *Washington Waste Sys., at 81.*

In this case, the City employed the optional DNS process. WAC 197-11-355; Record Exhibit 2 at 1; Record at Exhibit 15. The City provided the opportunity to the public to submit comments through February 6, 2008. Record at Exhibit 15. City staff was able to comment after that date. Declarations of Coleman and Moore. The Planning Department contacted Department Heads for purposes of eliciting comments and held a staff meeting on the subject after the public comment period. Declarations of Coleman and Moore. Once the Planning Department received and considered all of the comments and environmental documents, it made its threshold decision. The City clearly complied with the procedural dictates of SEPA and neither the County nor Janicki have demonstrated otherwise.

Leo Jacobs's Declaration does not prove that the City failed to follow the procedural dictates of SEPA. Moreover, Jacobs himself withdrew his comment letter. Declarations of Coleman, Berg, Potash, and Moore. Nonetheless, even if everything that Leo Jacobs states in his Declaration is true, the evidence in the record demonstrates that all of the environmental factors mentioned by Jacobs were either otherwise in the record and/or considered by the City and expressly made conditions of the MDNS.

A careful review of the MDNS and the City's Staff Report indicate the following: Jacobs comment no. 1 is addressed by MDNS condition no. 26. Jacobs comment no. 2 and 3

[3] With regards to the merits of a threshold decision, the proper standard is "clearly erroneous." *Anderson v.*

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are addressed by MDNS conditions 18 and 19. Jacobs comments nos. 4 and 5 are addressed by MDNS condition 14 and 21. Jacobs comment no. 6 is addressed by MDNS condition number 19. Jacobs comment no. 7 is addressed by MDNS condition number 18. Jacobs comment no. 8 is addressed by MDNS condition no. 19. Jacobs comments 9-12 and 14 are addressed by MDNS condition no. 3. Jacobs comment no. 13 is a conclusory statement and not a statement of concern. Jacobs comment no. 14 is addressed in the City's Staff Report. Record Exhibit 2 at 3. Jacobs's comment no. 15 is addressed by MDNS condition no. 24. Jacobs comment no. 16 is addressed by MDNS condition no. 20 and 6.

All the issues raised by Jacobs in his comment letter were issues considered by the Planning Department when it imposed its conditions. Further, the City considered and incorporated Jacobs comments during the February 19, 2008 meeting with Department Heads. Declarations of Coleman and Moore. The City committed no error under SEPA and its actions were not arbitrary and capricious. Moreover, the City followed the statutory requirements under LUPA to provide a certified record of the MDNS appeal before the Hearing Examiner under RCW 36.70C.110. The City also followed the Hearing Examiner's requirements to provide a record for purposes of the appeal to the Hearing Examiner.[4] No where in LUPA does it state that if an employee removes his SEPA comments from the record, said comments are still part of the record.

Pierce County, 86 Wn. App. 290, 302, 936 P.2d 432 (1997).

[4] Materials required Before Hearing.

Materials relevant to a particular application or appeal shall be received by the Hearing Examiner prior to the public hearing. For an appeal, materials should include a staff report accompanied by the relevant application documents, an Petitioner's brief including any supporting documentation, and a response to the Petitioner's brief, if applicable. … Additional exhibits may be allowed an entered at the public hearing of the Hearing Examiner. Sedro Woolley Hearing Examiner Rules of Procedure (attached to Declaration of Simi Jain).

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2. Vacation and remand of the Hearing Examiner's decision is limited by RCW 36.70C.130.

LUPA provides that this court can only grant Petitioner's relief in limited circumstances and that the burden is on the party seeking relief to prove their case. RCW 36.70C.130. The County admits that "A LUPA proceeding is a species of appellate review, and the Court has a statutorily limited range of remedies." County's Motion to Clarify, p. 8. Under RCW 36.70C.130 (1). Standards for granting relief under LUPA are as follows:

> (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief **only** if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

None of the sections in RCW 36.70C.130 (1) are applicable to the County's specific request. Section (1)(a), to which the County's argument probably comes the closest, does not apply because the County is not arguing in its motion that the Hearing Examiner engaged in unlawful procedure.

LUPA also requires that "another person aggrieved or adversely affected by the land use decision" must demonstrate that the decision has prejudiced or is likely to prejudice that

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person. RCW 36.70C.060(2)(a). Under LUPA, this Court can only grant the relief outlined in RCW 36.70C.130 when it finds that the Hearing Examiner committed a procedural error that caused harm and that the County is prejudiced. *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 26-27, 29 fn 52, 31 P.3d 703 (2001).

In *Moss v. City of Bellingham*, the appellants were appealing the City's permit decision and also the City Planner's threshold determination. City Planner issued a DNS before choosing to impose mitigating conditions on the project. *Moss* at 24. The court noted that mitigating conditions are to be imposed prior to issuance of the threshold decision. *Id.* at 25. The court found that despite this procedural error, the appellants were not prejudiced. *Id.* Also, in *Moss*, the appellants challenged the City's failure to mail the DNS to the Department of Ecology. *Id.* at 27. The City provided evidence that it did mail the DNS to the DOE. *Id.* The court concluded that the appellants failed to prove that the City committed a procedural error. *Id.* The court concluded, "Even if appellants were to prevail on any of their procedural claims, they have not demonstrated prejudice, as required by LUPA. They received notice of the DNS and challenged it extensively before the planning commission and city council. And they do not have standing to assert the interests of DOE or other agencies." *Id.* at 29.

Similarly, this court should not vacate and remand the Hearing Examiner's decision based upon the facts presented. Neither the County nor Petitioner Janicki were prejudiced by anything that the Hearing Examiner did. Further, they have failed to prove that the Hearing Examiner committed a procedural error. Again, the County and the Petitioner's issues with the City staff are not properly within the scope of this LUPA appeal when no relief can be granted under the statute.

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The County would like this Court to amend the statutory directives of SEPA and LUPA and not afford the agency deference. Under Washington law, the review of a quasi-judicial land use decision is limited to the administrative record and courts must give judicial deference to factual findings. RCW 36.70C.120(1). The court may **only** grant relief if the applicant has carried its burden of demonstrating that the decision was clearly erroneous, unlawful, not supported by substantial evidence, or in violation of the Constitution. RCW 36.70C.130 *emphasis added.*

The County also states that this Court can ignore the dictates of LUPA and change the proceedings under RCW 36.70C.030(2). However, when the legislature chooses to utilize the term "only" in RCW 36.70C.130 (listed above) this means that the Court is limited to the dictates of the statute any derogation by this court would be inconsistent with LUPA.

3. The argument of a "tainted" process falls short.

The County and Petitioner Janicki argue that the process was tainted by the removal of Mr. Jacobs' letter from the City's SEPA comment file and therefore the MDNS decision should be vacated and remanded. Petitioner Janicki argues that had they known of the letter, they would have called Mr. Jacobs as a witness in the proceedings before the Hearing Examiner. Petitioner, however, do not have a right to know what every staff member thought of the project, even those in the solid waste division. That this information may be useful to a Petitioner's presentation does not mean she is prejudiced in its absence.[5]

Moreover, City staff members surely have the prerogative of reconsidering and resubmitting their written comments. How could staff comments ever effectively be revised

[5] Further, based upon Jacobs' comments, the Petitioner could have called several County employees as witnesses to testify about the application of the County's Solid Waste Plan and whether an EIS should be required, as County employees made similar comments in the record . *See* Record Exhibit 18-19, 22-23.

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and resubmitted if the initial document must remain part of the record? The fact that a city staff member withdrew his written comments hardly taints the process, particularly where that staff member was provided an opportunity to comment, did comment, and ultimately had those comments incorporated into the MDNS. Declaration of Coleman; Moore. Petitioner Janicki and the County have not cited any authority or presented any legal theory which would support a vacation and remand of the MDNS under the facts presented here. Their request for vacation and remand should be denied and this matter reserved for the final decision on the merits.

B. This Court may only supplement the record as limited by RCW 36.70C.120

The County and Petitioner Janicki have not demonstrated reasons sufficient for this court to find that under RCW 36.70C.120, discovery should be permitted. Under RCW 36.70C.120, the record may only be supplemented with additional evidence in limited circumstances:

> RCW § 36.70C.120. Scope of review -- Discovery
>
> (1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.
>
> (2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:
>
> (a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;
>
> (b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or

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(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

(3) For land use decisions other than those described in subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

(5) The parties may not conduct pretrial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a prima facie showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that are raised under subsections (2) and (3) of this section. If the court allows the record to be supplemented, the court shall require the parties to disclose before the hearing or trial on the merits the specific evidence they intend to offer. If any party, or anyone acting on behalf of any party, requests records under chapter 42.56 RCW relating to the matters at issue, a copy of the request shall simultaneously be given to all other parties and the court shall take such request into account in fashioning an equitable discovery order under this section.

The decision maker in this appeal is the Hearing Examiner, who conducted a quasi-judicial hearing. This case is of the type described in RCW 36.70C.120(1). The due process requirement listed above refers to the opportunity to make a record. RCW 36.70C.120(1). The City did not prevent Petitioner Janicki from making record. Additionally, as stated above, the Petitioner Janicki and the County had ample opportunity to provide comments to the Hearing Examiner. Furthermore, Leo Jacobs had ample opportunity to provide his comments to the City Planning Department.

The County and Petitioner Janicki must demonstrate that at least one of the subsections listed in RCW 36.70C.120(2) apply. None of the circumstances listed in RCW 36.70C.120(2), however, are present in this case. The County and Janicki merely contend that since one comment letter was withdrawn from the City's SEPA file, there may be others. There is no evidence presented to support such conjecture. The County's alternative

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argument that it must engage in additional discovery is a request for an expensive and needless fishing expedition, put forward to make its request for vacation and remand more attractive.

In any event, a request for additional discovery must be rooted in one of the grounds set forth in RCW 36.70C.120. There are no grounds for disqualification of the Hearing Examiner; the Hearing Examiner did not improperly exclude any thing from the record; Leo Jacobs is not even a party, nor was the County for purposes of the appeal to the Hearing Examiner; there are no matters presented in the County's Motion that are outside the jurisdiction of the Hearing Examiner. Because none of the grounds for additional discovery under RCW 36.70C.120 apply here, the request should be denied.

Assuming arguendo that this court concludes the Leo Jacobs's comment letter should not have been withdrawn from the SEPA file, then it may require or permit that the comment letter be included as part of the record under RCW 36.70C.120(4) under the guise of a ministerial error. Pre-trial discovery is only permissible when there is a prima facie showing of need, which the County has failed to demonstrate. RCW 36.70C.120(4).

V. CONCLUSION

Contrary to Petitioner Janicki's assertions, the City is not attempting to constrain the record. The legislature has limited judicial review of land use decisions under LUPA. The County and Petitioner Janicki have not satisfied the requirements of RCW 36.70C.120. Therefore, this court should not clarify the record as requested by the County. The City has demonstrated that it followed the procedural dictates of SEPA. The County and Petitioner Janicki have not demonstrated that the Hearing Examiner committed any errors listed in RCW

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36.70C.130. Neither the Count nor the Petitioner cite any applicable authority in support of the relief requested. Finally, under the circumstances presented, the withdrawal of the subject letter from the City's SEPA file did not taint, contaminate, or pollute the process.

The City respectfully requests that the County's motion to clarify the record and vacate and remand the decision or permit additional discovery, all be denied.

DATED this 8th day of September, 2008.

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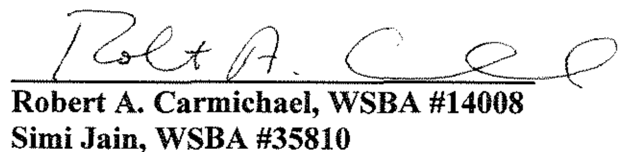
Attorneys for City of Sedro-Woolley



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