

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 REPLY TO  
DELUXE AND CITY REPOSE IN  
OPPOSITION COUNTY MOTION TO  
CLARIFY RECORD AND REMAND  
PROCEEDINGS**

The affidavits submitted by the City fail to rebut any of the relevant facts on this motion. The following facts are undisputed: (i) The Jacobs letter was written for the SEPA record, accepted by the City and stamped into the SEPA record in the same fashion as other comment letters in the SEPA record; (ii) the Jacobs letter was removed by someone who is not Mr. Jacobs from the City's SEPA file; (iii) the Jacobs letter was not considered by the City in its administrative determination, was not provided to the

SKAGIT COUNTY'S REPLY TO CITY'S  
REPOSE IN OPPOSITION COUNTY  
MOTION TO CLARIFY RECORD AND  
REMAND PROCEEDINGS- 1 -

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1 Petitioner prior to the Hearing Examiner proceedings, was not transmitted to or  
2 considered by the Hearing Examiner, and was not included in the record certified to this  
3 Court.

4 Deluxe and the City argue that this Court has no authority to remand a proceeding  
5 in the face of un rebutted evidence that the City tampered with the administrative record.  
6 The City and Deluxe argue that this Court lacks authority to order further discovery to get  
7 to the bottom of the City's bad acts. The County does not share the City's and Deluxe's  
8 parsimonious view of this Court's authority to manage these proceedings. The County's  
9 motion should be granted, and the Court should remand these proceedings for a new  
10 and unadulterated SEPA process. If the Court declines to do so, the Court must allow  
11 discovery into the circumstances under which the record came before this Court.  
12

#### 13 **1. The Facts Relevant To This Motion Are Undisputed.**

14 The City's and Deluxe's basic argument in their responsive briefing is that this  
15 Court lacks authority to remand the matter for new proceedings when there is undisputed  
16 evidence that the SEPA record (and thus the SEPA process) was adulterated and tainted  
17 from the outset. The City offers a stack of declarations replete with amazing  
18 grammatical contortions, but does little to rebut the relevant evidence brought forward by  
19 the County. Before addressing the erroneous legal arguments proffered by the City and  
20 Deluxe, the County revisits the undisputed facts relevant to this motion:  
21

- 22 • City Solid Waste Division Manager Jacobs testified under oath that he  
23 wrote a letter for the Deluxe SEPA record on February 5, 2008, which was  
24 accepted and stamped by the City into the Deluxe SEPA record on  
25 February 6, 2008 in the same manner as other documents in the record.  
26 This is reflected by the Jacobs letter itself. This is not rebutted by anything  
27 in the City's various declarations.

- 1 • City Supervisor / City Attorney Berg testifies in his declaration that he saw  
2 the Jacobs letter before his discussion with Jacobs, and Berg testifies that  
3 he “*may have...call[ed]* Leo [Jacobs] to city hall over the letter.”<sup>1</sup>
- 4 • Assistant City Planner John Coleman testifies that it is “likely” he removed  
5 the Jacobs letter from the SEPA file.<sup>2</sup>
- 6 • City Planners Moore and Coleman testified that they were part of a  
7 discussion thereafter during which, according to Berg’s declaration, Berg  
8 gave Mr. Jacobs “a bit of a tutorial on SEPA comments.”<sup>3</sup>
- 9 • Berg testifies that he told Jacobs: “I would not make the comments the  
10 way you wrote it, but it is up to you, Leo.”<sup>4</sup>
- 11 • Berg testifies that during his allegedly impromptu “tutorial,” Jacobs was  
12 “unsure,”<sup>5</sup> “nervous,”<sup>6</sup> and “very deferential.”<sup>7</sup>
- 13 • The Jacobs letter disappeared from the SEPA file and was not considered  
14 by the City.
- 15 • The Jacobs letter was not furnished to the Petitioner prior to the Hearing  
16 Examiner proceedings. Had the Jacobs letter been in the file, Petitioner  
17 would have examined Jacobs before the Hearing Examiner.<sup>8</sup>
- 18 • The Jacobs letter was not transmitted to the Hearing Examiner or  
19 considered by the Hearing Examiner.
- 20 • Because the Jacobs letter was not in the SEPA file, the Petitioner did not  
21 have the opportunity to cross-examine City Planner Moore as to why he  
22 approved an application inconsistent with the Solid Waste Division  
23 Manager’s view about the applicable plan.<sup>9</sup>
- 24 • The City failed to include the Jacobs letter in the certified record to this  
25 Court.

26 These are the facts relevant to this motion, and they are undisputed. The City tampered  
27 with the SEPA record in this matter, based on the undisputed evidence before this Court.

28 <sup>1</sup> Berg Dec. ¶ 2 (italics added). This seems seriously inconsistent with Berg’s detailed memory about his ensuing discussion with Mr. Jacobs, and the County would suggest that this goes to Mr. Berg’s credibility.

<sup>2</sup> Coleman Dec. ¶ 7.

<sup>3</sup> Berg Dec. ¶ 4.

<sup>4</sup> Berg Dec. ¶ 6.

<sup>5</sup> Berg Dec. ¶ 5.

<sup>6</sup> Id.

<sup>7</sup> Berg Dec. ¶ 7.

<sup>8</sup> Petitioner’s Response Brief, 2:3-7.

<sup>9</sup> The City’s outside counsel once again offers self-serving pronouncements about the applicability of the solid waste plan. See, City Response Brief at 3, fn.2. After the fact rationalization from the City’s outside counsel is not justification for agency action.

1  
2 A. The City's Witnesses Lack Credibility.

3 Unsurprisingly, Mr. Berg and City planning staff attempt to blame everything on  
4 Mr. Jacobs. This is entirely predictable, since the only other (and far more plausible)  
5 explanation<sup>10</sup> is that Berg put pressure on Jacobs to keep quiet, and Messrs Moore and  
6 Coleman went along with it.

7 The City of Sedro-Woolley has come forward with declarations from City  
8 Supervisor Eron Berg and several people over whom Mr. Berg has firing authority (John  
9 Coleman, Jack Moore, Eric Potash, and Julie Rosario). These tortuously-worded  
10 affidavits are a compendium of incompetent evidence, purporting to testify as to things  
11 the declarants do not recall, did not personally witness, or have since forgotten; as well  
12 as statements worded in the passive voice assigning action to unknown agents;  
13 unsubstantiated descriptions of Mr. Jacobs' alleged mental state; internally inconsistent  
14 statements; and a series of negative propositions about things that didn't happen.

15 Moreover, despite having nearly two weeks to coordinate their stories in written  
16 statements, the City's witnesses contradict each other throughout their declarations:

- 17
- 18 • "I do not recall calling Leo [Jacobs] to city hall over the letter, but I may  
19 have done so." Berg Dec. 2:10.
  - 20 • "Leo appeared by my desk and we began talking about his comment letter.  
21 Leo did not indicate he was there to talk to Eron Berg." Coleman Dec.  
22 2:16-17.
  - 23 • "I do not recall either Eron Berg or Jack Moore addressing specific  
24 comments made by Leo in his letter. Leo was not told to change any  
25 comments or to leave anything out... Coleman Dec. 4:10-14.
  - 26 • "[W]e discussed the idea that some of his comments were written as if they  
27 were permit requirements. For instance he used words like 'shall' which  
28 made his comments sound like mandatory conditions." Moore Dec. 3:1-3.

26  
27 <sup>10</sup> Occam's Razor comes to mind.

- 1 • "I do not recall discussing the specific topics in [Leo's] letter..." Berg Dec. 2:24.
- 2
- 3 • "I recall Leo Jacobs speaking with John Coleman, Jack Moore and Eron Berg around John Coleman's desk." Potash Dec. 2:6-7.
- 4
- 5 • "I recall over-hearing a conversation between Leo Jacobs and John Coleman about Leo's public comment letter...I do not recall seeing any other persons present..." Rosario Dec. 2:1-2.
- 6
- 7 • "I am not sure if Leo Jacobs was submitting the document that day or if he just came in to ask questions..." Potash Dec. 2:14-15
- 8
- 9 • "I never saw the document and no one asked me my opinion that day." Potash Dec. 2:16.
- 10
- 11 • "I'm pretty sure that Leo Jacobs took the document with him...." Potash Dec. 2:19
- 12
- 13 • "I don't think I saw the comment letter being stamped, taken from Leo or returned to Leo." Rosario Dec. 2:5-6.
- 14
- 15 • "I don't remember whether Leo took the letter with him but if Leo had not taken the letter with him then it would have been in the public comment file for the project." Moore Dec. 3:13-14.
- 16
- 17 • "I did not pay attention to whether or not Leo took the letter with him; nor did I notice or inquire whether the letter was ever in the file..." Berg Dec. 3:16-17.
- 18
- 19 • "While I do not clearly recall, I likely pulled the letter out of my file of SEPA comment letters as part of our discussion." Coleman Dec. 2:23-24.
- 20
- 21 • "I do not recall this meeting, nor do I recall Mr. Simpson. I am not saying that the meeting did not take place, simply that I do not recall it." Berg Dec. 3:21-23.
- 22

23 Suffice to say, the City's witnesses lack any credibility, and the County would very  
 24 much like to take their depositions to the extent the Court does not remand this matter.  
 25 That being said, it is not necessary for the Court to find the City's witnesses more or less  
 26 credible. Based on the undisputed evidence, Jacobs wrote a letter that was stamped in  
 27 and accepted in the SEPA record, which was removed from the SEPA record by

1 someone other than Jacobs because of unspecified "concerns." These are the  
2 undisputed facts, which neither the City nor Deluxe has countered with any credible  
3 evidence. With that, the County's reply turns to the legal significance of the undisputed  
4 facts.

5 **2. The Jacobs Letter Is Part Of The SEPA Record. How It Disappeared And**  
6 **The Extent Of The Effect Of Its Disappearance Are Contested By The City**  
7 **And Deluxe, Which Does Not Change The Fact That It Is Part Of The**  
8 **SEPA Record.**

9 Timely SEPA comment letters are part of the SEPA record. This is undisputed.  
10 The Jacobs letter was accepted and stamped into the SEPA file by the City. This is  
11 undisputed. Jacobs testified that he intended his letter would become part of the SEPA  
12 record. This is undisputed. Jacobs' letter was removed by someone who was not  
13 Jacobs, "likely" City Assistant Planner John Coleman, according to Coleman's own  
14 declaration, after a discussion with Berg during which "concerns" were expressed.

15 The Jacobs February 5, 2008 is part of the SEPA record, and it remains a part of  
16 the SEPA record. The Jacobs letter is highly relevant to any reasonable mind, which  
17 explains the City's and Deluxe's extensive efforts to argue it is not. But the City's and  
18 Deluxe's arguments go the *effect* of the Jacobs letter, not the question of whether it is  
19 part of the record. The Jacobs letter is part of the SEPA record, based on the undisputed  
20 facts.

21 **3. The Court Should Vacate The Hearing Examiner's Decision And Remand**  
22 **The Proceedings. This Is Envisioned By The LUPA Statute.**

23 According to the City and Deluxe, this Court must afford unblinking respect to a  
24 contaminated record, and must base its decision solely on that record even in the face of  
25 un rebutted evidence that the record was adulterated by the City. According to the  
26 City/Deluxe view of this Court's authority, it wouldn't matter one iota if the City Attorney  
27 carefully and deliberately plucked out reams of inconvenient documents from the SEPA  
28 file. According to the City and Deluxe, this Court is obligated put on blinders to the

1 circumstances under which the record arrived to the Court, even if those circumstances  
2 involve fraud, intimidation of witnesses, or, for that matter, any kind of bad act by the City  
3 that one can possibly imagine. According to the City and Deluxe, the City can do  
4 whatever it wants, and this Court can't do anything about it. In addition to defying  
5 common sense, the City and Deluxe fail to comprehend the plain language of the LUPA  
6 statute:

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

11 RCW 36.70C.140. The Court has the authority to send this matter back to the City,  
12 i.e., the point in the process where the process broke down. This Court is *not*  
13 obligated to afford deference to a Hearing Examiner decision obtained on the basis of  
14 an adulterated record.

15       Deluxe's self-manufactured concept that the Court has an obligation to review  
16 the "entire" record (whatever that is under the present circumstances) through a  
17 substantive hearing on the merits and make a decision about that record under RCW  
18 36.70C.130 is a concept that finds its first and only known expression in Deluxe's  
19 response brief. There is no legal authority for this argument, and Deluxe cites none.

20       The City and Deluxe argue that the substantive standards of RCW 36.70C.130  
21 apply to this motion, in addition to RCW 36.70C.140. But RCW 36.70C.130  
22 establishes the standards for relief based on a substantive review of the record, i.e., it  
23 is a list of conclusions that the Court can permissibly draw from the documents in the  
24 record after the hearing on the merits. RCW 36.70C.130 does *not* speak to what  
25 happens when the record itself was adulterated. On this, the LUPA statute is silent.

1 As the City correctly points out, one of the grounds set forth by RCW  
2 36.70C.130 is procedural error by the decision-maker based on a review of the record.  
3 But the City offers a red herring argument; this motion is not about procedural error  
4 evidenced in the record, given that both Deluxe and the City claim the Jacobs letter is  
5 not part of the record in the first place. RCW 36.70C.130 does not speak to the  
6 conclusions the Court can draw about the record when undisputed evidence  
7 demonstrates the record was adulterated before it was ever considered by the  
8 Hearing Examiner.<sup>11</sup> The City's own response brief belies the City's arguments. If  
9 this is about sticking to the documents in the record, why does the City furnish six  
10 declarations to explain (poorly, albeit) that it did not adulterate the administrative  
11 record? If the City and Deluxe are correct, the record should speak for itself in  
12 guiding this Court's application of RCW 36.70C.130.

13 This motion is about undisputed evidence that the record considered by City  
14 staff and the Hearing Examiner was adulterated. Neither the City nor Deluxe cite any  
15 authority that would constrain the Court from affording the relief the County requests.  
16 This matter should be remanded to the City for the creation of a non-adulterated  
17 record.

18 Even if the City and Deluxe are right (they aren't) and RCW 36.70C.130  
19 controls this motion (it doesn't), this Court would nevertheless be fully justified in  
20 granting the relief sought by the County on grounds that the "[t]he body or officer that  
21 made the land use decision engaged in unlawful procedure or failed to follow a  
22 prescribed process." RCW 36.70C.130(1)(a). Removing critical comments from the  
23 SEPA file and pressuring the author into crawling off quietly is a "fail[ure] to follow a  
24 prescribed process." *Id.* However, this is not something this Court would learn by a  
25

1 review of the record, but rather through an open fact-finding process that is poorly  
2 suited to a LUPA action. Remand is thus more appropriate.

3 And the City's actions are clearly arbitrary and capricious, i.e, there is no legal  
4 excuse for removing the Jacobs letter from the file and sending Mr. Jacobs away, hat  
5 (or letter) in hand. Moreover, the City is confused: the LUPA statute on which the City  
6 relies for its opposition makes expressly clear that "[i]n order to grant relief under  
7 [LUPA], it is not necessary for the court to find that the local jurisdiction engaged in  
8 arbitrary and capricious conduct." RCW 36.70C.130(2).

9 Finally, Deluxe's argument that the relief sought by the County would violate its  
10 right to Constitutional due process ignores the County's and Petitioner's due process  
11 right to hearing on the basis of a record that is not adulterated by suppression of  
12 material evidence. That being said, if Deluxe is correct that Constitutional principles  
13 are indeed invoked by this motion, it is useful to observe that RCW 36.70C.130 allows  
14 the Court to grant relief where "[t]he land use decision violates the constitutional rights  
15 of the party seeking relief."

16 **4. If the Court Declines To Remand The Matter, Substantial Discovery Is**  
17 **Indispensible.**

18 RCW 36.70C.130 provides that the Court should consider "such supplemental  
19 evidence as is permitted under RCW 36.70C.120." For its part, RCW 36.70C.120(5)  
20 states that discovery "may be sought by motion at any time after service of the  
21 petition." If RCW 36.70C.130 applies as the City and Deluxe argue (it doesn't), then  
22 the Court should grant the County's motion in the alternative for discovery. If the  
23 Court declines to remand this matter, County seeks reasonable latitude to inquire as  
24 to the matters that the City and Deluxe attempt to rebut by declaration in opposition to  
25 the County's motion. This should include documentary discovery, followed by  
26 depositions, at minimum, of each person filing a declaration in opposition to this  
27 motion.

1 **IV. CONCLUSION**

2 If the City and Deluxe are correct, then a municipal government is free to  
3 tamper with the SEPA record; consider only that information convenient to a pre-  
4 ordained outcome; intimidate employees who attempt to speak up; and obtain a  
5 favorable Hearing Examiner decision on the basis of such a record. Thereafter,  
6 according to the City and Deluxe, a Court such as this one has no ability to hold the  
7 City accountable, because, according to Deluxe and the City, the process cannot be  
8 remanded; the record must be judged by the Court exactly as it is found; and no  
9 discovery is permissible into the circumstances surrounding the record's adulteration.  
10 Once again, the City and Deluxe offer a patently absurd and obviously unreasonable  
11 interpretation of the LUPA statute. As with the recent Deluxe/City motion to dismiss  
12 denied by this Court, all of this ultimately boils down to a question of statutory  
13 interpretation. In interpreting the language of a statute, "the court must remain careful  
14 to avoid 'unlikely, absurd or strained' results." *Berrocal v. Fernandez*, 155 Wn.2d 585,  
15 590 (2005). This Court has the authority to remand the matter for a new process,  
16 because the record presented to this Court is adulterated. Nothing in the LUPA  
17 statute precludes the Court from doing so. If the Court declines to vacate and  
18 remand, the Court should afford the County and Petitioner reasonable opportunity to  
19 conduct discovery into the circumstances by which the record was generated,  
20 including through depositions.

21 DATED this 8<sup>th</sup> day of September, 2008.

22 SKAGIT COUNTY PROSECUTING ATTORNEY

23  
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