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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; DELUXE RECYCLING AND  
13 DISPOSAL LLC, a Washington limited  
14 liability company; and FIRE RIDGE LLC,  
15 an Oregon limited liability company,

16 Respondents,

17 vs.

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

20 Intervenor.  
21

No. 08-2-01130-8

CITY OF SEDRO-WOOLLEY'S  
RESPONSE TO COURT'S ORDER TO  
REMAND

22 **I. INTRODUCTION**

23 The City of Sedro-Woolley ("City"), by and through its attorney, Robert A.  
24 Carmichael of Zender Thurston, P.S., submits this Response to the court's order of remand  
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1 on or about September 9, 2008. The decision being remanded is the City of Sedro-Woolley  
2 Planning Department's (Department) issuance of a mitigated determination of non-  
3 significance (MDNS) on the Deluxe application. The City requires this court's instruction  
4 as to the scope of the remand.

5 The court may affirm or reverse the land use decision under review or  
6 remand it for modification or further proceedings. If the decision is  
7 remanded for modification or further proceedings, the court may make  
8 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.

9 RCW 36.70C.140.

10 There are at least two potential approaches to the scope of the remand: (a) Remand  
11 to City SEPA official, or his designee, to review the Jacobs letter and determine if the  
12 MDNS ought to be withdrawn; or (b) Remand to City SEPA official, or his designee, with  
13 direction to withdraw the MDNS and to make a new threshold decision. The City has no  
14 objection to either one of the above general approaches.  
15

## 16 II. RESPONSE

### 17 1. Remand to City SEPA official, or his designee, under options (a) and (b).

18 Option (a): Remand with direction (i) to include the previously removed Jacobs letter  
19 in the City SEPA file; and (ii) that the City SEPA Official reconsider whether the MDNS  
20 ought to be withdrawn based on the file and record.

21 Under option (a), the remand would direct the City SEPA official to include the Leo  
22 Jacobs letter previously removed, back into the SEPA comment file and then to reconsider  
23 whether the MDNS ought to be withdrawn based on the file and record. Regardless of the  
24 decision, any aggrieved party would have a new right of appeal to the hearing examiner in  
25 accordance with city code, this time with the Jacobs letter in the SEPA comment file.

1           Option (b): Remand with direction that the City SEPA official withdraw the MDNS  
2           and make a new threshold decision following review of the Jacobs letter.

3           Under option (b) the remand would direct the City SEPA official to withdraw the  
4 MDNS, to include the Jacobs letter in the SEPA file, and to make a new threshold  
5 determination, in accordance with Chapter 197-11 WAC. This court may also order the  
6 City SEPA official to allow additional public comment. In this event, the City has no  
7 objection to Mr. Jacobs submitting additional public comments in his personal capacity.  
8 However, the City submits that the court order should not direct that Mr. Jacobs be  
9 permitted to make additional comments in his official capacity as foreman of the Solid  
10 Waste/Fleet Department (beyond the letter previously submitted).

11           Mr. Jacobs appears to have a conflict of interest with Deluxe Recycling and Disposal  
12 Inc.'s (Deluxe) application. The applicable Sedro Woolley Municipal Code (SWMC)  
13 pertaining to conflicts of interest is as follows:  
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15           In order to avoid becoming involved or implicated in a conflict of interest  
16 or impropriety, or an appearance of conflict of interest or impropriety, no  
17 current city officer or employee should be involved in any activity that  
18 might be seen as conflicted with the conduct of official city business or  
19 adverse to the interests of the city. Even the appearance of the following  
20 prohibited conduct may be sufficient to constitute a violation of this code  
21 of ethics. The following shall constitute violations of this code of ethics:

22           (E) No city officer or employee shall engage in or accept private  
23 employment, or render services for, any person when such employment or  
24 services is incompatible with the proper discharge of official duties or  
25 would tend to impair independence of judgment or action in the  
performance of official duties.

SWMC 2.62.030.

Mr. Jacobs seems to have a conflict of interest under SWMC 2.62.030(E). Mr.

1 Jacobs apparently has an economic interest in Tri-County Recycling as either a  
2 shareholder, or consultant, or both, which may tend to impair his independence of judgment  
3 in providing SEPA comments as foreman of the Solid Waste/Fleet Department.  
4 Declaration of Hayden and Second Declaration of Berg. Moreover, Mr. Jacobs' comments  
5 thus far submitted are outside and atypical of prior SEPA comments he has made as  
6 foreman of the Solid Waste/Fleet Department. Second Declaration of Berg. Generally,  
7 Mr. Jacob's job duties include the day to day oversight of the solid waste and fleet  
8 functions of the public works department and his prior SEPA comments have been in that  
9 vein. Second Declaration of Berg. Mr. Jacobs's employment does not include policy  
10 making for the public works department on solid waste handling issues, nor does it include  
11 high level expertise. *Id.*

13 Given Mr. Jacobs's normal official duties and the appearance of a conflict of interest in  
14 providing comments on a new recycling business applicant in the City, the City respectfully  
15 requests that the final order of this court not direct the City to accept additional comments  
16 from Mr. Jacobs on city letterhead in his capacity as solid waste foreman.

17 **2. City Request for Clarification on Ability to Hire Outside Consultant.**

18 In delivering its ruling on September 9<sup>th</sup>, the court rejected the request of the County  
19 and Petitioners to require on remand that the City retain an outside consultant, acceptable to  
20 them, to perform the work of the Planning Department. The City appreciates the court's  
21 decision on this point. Notwithstanding this decision, the City would like to reserve the  
22 right to utilize an outside consultant of its own choosing to perform the work required on  
23 remand from this court. On information and belief, hiring an outside consultant at this  
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1 stage may be opposed by Deluxe. Given the respective position of the parties, the City  
2 requests that any remand order reflect both the court's decision not to require the City to  
3 hire an outside consultant on the terms requested by the County and Petitioner, but to also  
4 acknowledge that the City has the right to hire such a consultant of its own choosing.

5 **3. Costs to be awarded to the Substantially Prevailing Party.**

6 If the relief sought by the petitioner is granted in whole or in part the court  
7 shall equitably assess the cost of preparing the record among the parties. In  
8 assessing costs the court shall take into account the extent to which each  
9 party prevailed and the reasonableness of the parties' conduct in agreeing  
10 or not agreeing to shorten or summarize the record under subsection (2) of  
11 this section.

12 RCW 36.70C.110 (4).

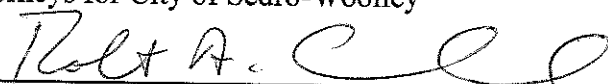
13 The City agrees that Petitioner Janicki is the substantially prevailing party and has no  
14 objection to the court's distribution of the actual cost of preparing the record.

15 **III. CONCLUSION**

16 The City does not advocate for a particular outcome on the remand. The City does,  
17 however, request (1) that the order expressly include the City's right to select an outside  
18 consultant to perform the duties of the Planning Department and SEPA Official on remand;  
19 and (2) that the order not include any requirement for acceptance of additional comments  
20 (beyond his letter originally submitted) from Leo Jacobs in his role as a city employee on  
21 city letterhead.

22 Dated this 29<sup>th</sup> day of September, 2008.

23 **ZENDER THURSTON, P.S.**  
24 Attorneys for City of Sedro-Woolley

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