Thursday, July 11, 2013
6:00 p.m.

BEFORE THE HEARING EXAMINER FOR KITTITAS COUNTY

IN. RE. STEIGLEDER/CHRISTMAN CONDITIONAL USE PERMIT (CU-13-00002)	APPLICANT'S RESPONSE TO SEPA APPEAL

I. ISSUES

A. Has the County engaged in procedural errors that invalidate this SEPA process?

B. Was the County's issuance of a DNS for the proposed Produce Stand CUP clearly erroneous?

I. BRIEF ANSWERS

A. The County complied with the Optional DNS Process, and the County's SEPA appeal procedures remain in effect. The Applicant has stipulated to allowing an open record hearing on the SEPA appeal issues, if so desired by the Appellant and the County.

B. The County reviewed the Applicant's checklist, independently evaluated each item on that list, solicited public comments, and considered the comments submitted by Thorp Fruit & Antique Mall. The record reveals that the County considered environmental factors before issuing a final threshold determination, and as such its decision was not clearly erroneous.

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II. EVIDENCE RELIED UPON

The Applicant relies upon the Administrative Record supplied by the County for Steigleder CUP (CU-13-00002) and upon the legal authorities cited herein.

III. STATEMENT OF FACTS OF RECORD

Kathy and Terry Christman filed a complete application for a Conditional Use Permit to operate a produce stand from the roughly 1080 square foot detached garage situated at their residence on 8341 South Thorp Highway ("Produce Stand"). With that application, they completed an environmental checklist in the form required under WAC 197-11-960. The Christmans completed that checklist in good faith, based upon their personal knowledge of their property and their proposed use.

The County, utilizing the Optional DNS Process of WAC 197-11-355, issued a notice of application that stated on the first page that the County expected to issue a DNS for the proposal, the optional DNS process was being used, the comment period being offered may be the only opportunity to comment on the environmental impacts of the proposal, and a copy of the subsequent threshold determination could be obtained from the County.

The County received citizen comments—several being "form letters" in support of the proposal, and several being "form letters" against the proposal. A few independent comment letters were filed in support of, and in opposition of, the project. Thorp Fruit & Antique Mall ("Thorp Fruit Mall") submitted extensive comments, making all of the assertions that it makes in the current appeal. The Kittitas County Fire Marshal proposed mitigation, but no other public agencies submitted mitigation comments or requested an EIS.

The County provided the Christmans with an opportunity to respond to the public comments in writing. By email dated April 12, 2013, the Christmans' attorney addressed the comments that were raised by the public. The County engaged in its own independent analysis of environmental factors, and thereafter issued the MDNS that is the subject of this appeal.

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II. LEGAL AUTHORITY AND ARGUMENT

A. Preliminary, Procedural Issues.

1. The County Properly Utilized the Optional DNS Process.

The basis for Thorp Fruit Mall's objection to the County' Optional DNS Process is unclear. State law provides an "Optional DNS Process" that enables the County to use "a single integrated comment period to obtain comments on the notice of application and the likely threshold determination for the proposal." WAC 197-11-355. State law expressly provides, "If this process is used, a second comment period will typically not be required when the DNS is issued." WAC 197-11-355(1). The State regulation expressly sets out the requirements with which a County's notice must comply to fulfill the optional DNS process, and the County's notice complied. The County noted that a copy of the proposed threshold determination for the specific proposal may be obtained upon request, and indicated that mitigations *may* be required.

WAC 197-11-355(2)(b) requires that anticipated mitigation be identified with specificity; but, such requirement pertains only "if a mitigated DNS is expected." The County's notice indicated an intention to issue a DNS, not an MDNS; it merely indicated that "mitigations may be required." The County had no obligation to list in the notice all proposed conditions being considered to mitigate environmental impacts given that it was indicating an intention to issue a DNS; it was not proposing an MDNS at the time of the notice.

The County considered timely comments on the notice of application and *thereafter* prepared and issued an MDNS. WAC 197-11-355(2) expressly authorizes the County to issue a DNS or a mitigated DNS without the need for a second comment period. Upon issuance of the threshold determination, the County sent a copy of the full MDNS to the appropriate parties, as required by law, affording such parties an opportunity to appeal the threshold determination. It does not appear the County failed in any way to comply with the optional DNS process of WAC 197-11-355, and, insofar as any deviation from the statutory requirements occurred (and it does not appear that any did), the County's process would

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nonetheless have resulted in full and adequate notice to Thorp Fruit Mall and hence amount to substantial compliance with the notice requirements. *See, e.g., Crosby v. Spokane County*, 137 Wn.2d 296, 302, 971 P.2d 32 (1999) (substantial compliance doctrine may be applied when actual compliance in respect to the substance essential to every reasonable objective of the statute is present); *Moss v. City of Bellingham,* 109 Wn.App. 6, 25-26, 31 P.3d 703 (2001) (no prejudice to appellants where council imposed additional mitigation before approving it); *Felida Neighborhood Assn' v. Clark County,* 81 Wn.App. 155, 161-62, 913 P.2d 832 (1996) (Board may have substantially complied with notice requirements despite failure to give statutorily-prescribed official notice).

2. Consolidated, Open Record SEPA Appeal Hearing Is Appropriate.

The case of *Ellensburg Cement Products, Inc. v. Kittitas County*, 171 Wn.App. 691 (2012) has called into question the closed record appeal process for the SEPA threshold determination. The County has indicated that it has filed a petition for review of the case with the Supreme Court of the State of Washington, although review has not yet been accepted. To date, the County has not revised its Code to come into compliance with the decision, although, ostensibly, KCC 15A.04.020/Table A and KCC 15A.04.210 for an open record appeal hearing, consolidated with the hearing on the CUP.[1]

The Christmans have no objection to allowing a single consolidated open record hearing for the SEPA appeal and the CUP application, consistent with the recent decision in *Ellensburg Cement Products*. Such a consolidated open record appeal hearing will alleviate the objection of Thorp Fruit Mall to a closed record hearing, and the applicant agrees to waive all objection

[1] KCC 15.04.210(1)(b) expressly provides for an administrative appeal hearing on a DNS nonexempt action that requires a public hearing (i.e. a CUP) to be "combined with and heard by the reviewing body for the underlying action." KCC 15.04.020, dealing with Appeal of SEPA actions, expressly states that the SEPA appeal shall be consolidated with the hearing on the underlying governmental action "by providing for a single simultaneous hearing before one hearing body." Indeed, Table A of KCC 15A.04.020(5) provides for an open record hearing for "SEPA Actions: Appeals of threshold determinations."

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or rights to challenge any such consolidated open record appeal hearing based on process (i.e. holding an open record hearing as opposed to a closed record appeal hearing).

B. The County Properly Considered Environmental Factors And Conditioned the Proposal's Impacts.

1. Standard of Review for County's SEPA Determination.

SEPA requires that an agency's threshold determination must be accorded substantial weight. RCW 43.21C.090. The issuance of a threshold determination, along with its use of substantive SEPA authority, is reviewed under the clearly erroneous standard. *Wenatchee Sportsmen Association v Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *Cougar Mountain Assoc. v. King County,* 111 Wn.2d 742, 748, 765 P.2d 264 (1988). A determination is clearly erroneous if, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County,* 86 Wn.App. 290, 302, 936 P.2d 432 (1997).

A DNS or MDNS must be upheld if the entire evidence under consideration demonstrates that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue the DNS or MDNS was based on information sufficient to evaluate the proposal's environmental impact. *Wenatchee Sportsmen* 141 Wn.2d at 176. The County's decision must be given substantial weight. RCW 43.21C.090. In reviewing the SEPA decision, the reviewing body "defers to the expertise of the administrative agency." *Pease Hill Community Group v. County of Spokane,* 62 Wn.App. 800, 809, 816 P.2d 37 (1991).

In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city's development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project. *Moss*,

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109 Wn.App. at 16. Contrary to popular belief, "SEPA does not demand a particular substantive result in government decision making; rather, it ensures that environmental values are given appropriate consideration." *Moss*, 109 Wn.App. at 14.

2. The Checklist Fulfilled Its Purpose.

The County requires applicants to complete an environmental checklist when filing an application for a conditional use permit. The environmental checklist was designed to be simple enough to permit compliance by laypersons, without the need for expertise in environmental science. K. Hirokakwa, *The Prima Facie Burden and the Vanishing SEPA Threshold,* 37 Gonzaga L. Rev 403, 413-14 (2001-02).

The Christmans fulfilled their obligation; they completed the environmental checklist based upon their actual knowledge, in good faith, and no evidence indicates any intention to mislead the County or the public. No authority exists, and Appellants have cited none, to indicate a standard of care for completion of the environmental checklist which the Christmans failed to meet.

The County could have found the checklist deficient or requested additional information from the Christmans, but it did not. *See, e.g., Brown v. City of Tacoma,* 30 Wn.App. 762, 765, 637 P.2d 1005 (1981). Instead, the County utilized the completed checklist, consistent with its purpose under State law: "*to assist* in making threshold determinations for proposals." WAC 197-11-315(1) (emphasis added).

Even if the checklist submitted by the Christmans had been deficient in some areas, that would not invalidate the checklist or preclude a reasonable consideration of environmental factors by the County. *Brown,* 30 Wn.App. at 765. In *Brown,* the County had found the checklist prepared by the applicant to be deficient, but the Court held that the record as a whole revealed independent evaluation by the County of the checklist and, as a result, enabled reasonable consideration of environmental factors before a final decision was made. The Court noted that SEPA regulations do not contemplate complete reliance by the lead agency upon the statements contained in a checklist. *Id.* Rather, the agency "shall independently evaluate each

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item on the checklist" and, if after its initial review of the checklist deems additional information is needed, it may require such information of the applicant, consult with other agencies, or initiate further studies or research. WAC 197-11-330(1). The Christmans completed an environmental checklist, which the County utilized to *assist* it in its own, additional, and independent review of environmental factors.

3. The Record Demonstrates Adequate Consideration of Environmental Factors.

To survive scrutiny, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA. *Sisley v. San Juan Cy,* 90 Wn.2d 78, 85, 569 P.2d 712 (1977). The determination must be "based upon information reasonably sufficient to evaluate the environmental impact of the proposal." WAC 197-11-355; *Moss v. City of Bellingham,* 109 Wn.App. 6, 14, 31 P.3d 703 (2001). The record reveals that the County had sufficient information to identify and consider the environmental impacts of the proposed Produce Stand enterprise. *Boehm v. City of Vancouver,* 111 Wn.App. 711, 47 P.3d 137 (2002); *Indian Trail Property Owner's Ass'n v. City of Spokane,* 76 Wn.App. 430, 886 P.2d 209 (1994).

a. The County Did Not Rely Blindly Upon the Checklist.

Contrary to Appellants' suggestion, the County's threshold determination was not based solely, or even primarily, on the checklist completed by the Applicants. In making its threshold determination, the County did not (and cannot) accept blindly, without independent analysis or further information, the answers provided by the applicant in the environmental checklist.

WAC 197-11-330 states that, in making a threshold determination, the responsible official shall:

> (a) Review the environmental checklist, if used: (i) *Independently evaluating* the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist; and (ii) Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant.
>
> (b) Determine if the proposal is likely to have a probable

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> significant adverse environmental impact, *based on the proposed action*, the information in the checklist (WA 197-11-960), *and* any additional information furnished under WAC 197-11-335 and 197-11-350 . . .

(Emphasis added). State law further provides that:

> *if, after reviewing the checklist*, the agency concludes that there is insufficient information to make its threshold determination: (1) Require the applicant to submit more information on the subjects in the checklist; (2) make its own further study, including physical investigations on a proposed site . . .

WAC 197-11-335.

The County used the checklist as a starting point—"*to assist* in making threshold determinations for proposals;" but it did not rely blindly on such checklist. WAC 197-11-315(1). Rather, the County engaged in its own independent investigation of the information contained in the checklist and solicited comments from the public and agencies on the proposal *before* issuing its final threshold determination. *See* Staff Report. Such independent and additional investigation and consideration of environmental factors is evidenced through the comments considered by the County prior to rendering its threshold determination, which comments, notably, contained those of Thorp Fruit Mall. The County's independent and additional consideration of information beyond the checklist is also evidenced by the fact that the County ultimate issued an MDNS, rather than the DNS that the County originally anticipated. Finally, the County states, in its Staff Report, that it engaged in its own environmental review and considered comments. The County's actions and expertise in rendering its SEPA threshold determination are entitled to substantial weight. *Moss*, 109 Wn.App. at 13-14.

b. The County Had the Benefit of Thorp Fruit Mall's Written Comments, and Considered All Environmental Factors Mentioned Therein.

Notably, prior to rendering its threshold determination, the County had the benefit of Thorp Fruit Mall's comment letter in which it identified all of the aspects of the checklist that it believed were misleading or inaccurate. The County therefore had the benefit of all of Thorp Fruit Mall's analysis and critique prior to issuing its determination. To the extent there were

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any material inaccuracies or ambiguities contained in the checklist, or environmental factors of concern that needed to be considered, Thorp Fruit Mall identified them, thus giving the County the opportunity for full and adequate consideration of environmental factors. *See Moss,* 109 Wn.App. at 25-26.

The County offered the Applicants an opportunity to respond to the public comments. The Applicants provided a response to comments raised by the public. Thereafter, after its own independent review and analysis of the record and information that the County had gathered or deciphered on its own, and based upon consideration of mitigation measures in the County's development regulations and other applicable law, the County issued the MDNS. *Moss,* 109 Wn.App. 14-16.

c. Thorp Fruit Mall Mall's Objections Are Speculative, Conclusory, and Unsubstantiated—If Not Plainly Inaccurate.

Thorp Fruit Mall has identified no evidence to support their assertions that the 1050 square foot Produce Stand that the Christmans will operate out of their garage—subject to the conditions in the MDNS—will have a probable significant adverse impact to the environment. Rather, they have made conclusory and speculative assertions without factual substantiation, all of which are obviously an attempt to prevent the entry of a competitor into the local market.

The purpose of SEPA is to facilitate the decisionmaking process; it need not identify or evaluate every remote, speculative or possible impact on the environment, much less attempt to mitigate them. *Cheney v. Mountlake Terrace,* 87 Wn.2d 338, 344, 552 P.2d 184 (1976). It is impractical if not impossible to identify and evaluate every remote and speculative consequence of an action. Thus, the official does not need to consider impacts that are merely possible, speculative, or remote. *Id.*

(1) Water.

Thorp Fruit Mall suggests that it is impossible for the Christmans to engage in their Produce Stand business without utilizing the domestic well that serves their residence. (Thorp Brief pp. 12-14). Thorp Fruit Mall fails to recognize a number of opportunities available to the

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Christmans pertaining to water—including those that the Christmans will utilize: provision (through contract with an independent third party) of hand/produce washing facilities in conjunction with the sanicans, and provision of bottled water. To the extent that additional water is needed for such things as displaying asparagus, the Christmans can utilize water stored/purchased from a water company, or require their suppliers to provide display water with the asparagus. Furthermore, the Christmans can obtain Group B approval of their existing well, and thereafter utilize the well for washing fruit and associated activities. A shrewd business man like Mr. Rowley, touting an MBA and business background, may consider such proposed solution for water to be uneconomical; his subjective and unsubstantiated belief is not grounds for precluding the Christmans from engaging in such a practice to mitigate impact on water resources.

(2) Sewer/Waste/Public Health.

Thorp Fruit asserts that the County failed to adequately consider solid waste and impacts to surface water and human health. (Thorp Brief. pp. 13-16). In such regard, the Appellant argues, "there is the *possibility* that human sewage and waste water from fruit washing and incidental business use will be deposited into the ground and *potentially* run into the existing pond on the property." (Thorp Brief p. 13). They also note that "[h]and sanitizers are not adequate to totally remove 'human waste' residue and hence will result in food borne illnesses. (Thorp Brief. p. 15). The mere fact that Appellant devotes attention in its brief to such trifling matters shows the length that it had had to stretch to come up with challenges to the County's threshold determination. SEPA does not require the County to consider or investigate every remote, possible environmental impact. *Cheney,* 87 Wn.2d at 344.

(3) Emergency Services.

According to Thorp Fruit Mall, there "is a very real *possibility* that a customer could discard a cigarette into an adjacent landowner's cut and drying wheat or hay crops and cause significant fire damage." (Thorp Brief, p. 15). Thorp Fruit Mall cites this as evidence that the County did not adequately consider the environment and special emergency services that would

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be necessitated by the Produce Stand. (Thorp Brief, pp. 15-16). As discussed in greater detail, *Part B.3. (d), infra,* SEPA does not require the County to consider or investigate every remote, possible environmental impact. *Cheney,* 87 Wn.2d at 344. Moreover, there is no evidence that the presence of the Produce Stand increases the likelihood that a member of the public will start a fire by cigarette; it is equally likely that a passerby in a car will throw a cigarette out the window and ignite a fire.

(4) Traffic.

Thorp Fruit Mall relies on the traffic numbers that its operation of a large, visible, off-the-freeway ARCO *gas station* generated in 2012, and on its experience operating the ARCO gas station that adjoins its large, year-around commercial business visible from I-90 to indicate that the Christmans' little Produce Stand will create a significant increase in traffic. Such reliance is obviously misguided. The project and traffic impacts at issue are those of a small, local produce stand catering primarily to local residents who will *already* be on the subject roads en route to either their homes, or the Thorp Fruit Mall, or the ARCO gas station.

At issue is a small produce stand, not a gas station. We also are not dealing with a large "Fruit & Antique Mall" with gigantic signage, visible from the freeway, and seeking to divert people off of I-90. Moreover, Thorp Fruit Mall has never been required to mitigate for the traffic impacts associated with its large scale "fruit and antique mall" use; all traffic studies and traffic mitigation that have been imposed by the County have been imposed upon, and in conjunction with, Thorp Fuel (which just happens to be adjacent to Thorp Fruit and under the same ownership). (Thorp Brief, p. 18).

No evidence exists that the County did not adequately evaluate the traffic impact of the Produce Stand, and, it is impractical to engage in a traffic study for such a unique and small business that may not even survive in operation for a year. While traffic is within the scope of SEPA review, in this situation, it would appear that conditions pertaining to traffic could be best dealt with through conditions of approval imposed on the Produce Stand operation. (See Applicant's Hearing Brief). The County's evaluation of traffic impacts was made with the

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benefit of the analysis provided by Thorp Fruit in their comment letter, and the record indicates that such review and determination by the County was not clearly erroneous.

(5) Economic Competition Is Not An Element of the Environment.

It is fairly easy to see through Thorp Fruit Mall's Brief (and similar comment letter to the County that preceded the threshold determination) that the Appellant is not sincerely concerned about the impact that the Produce Stand will cause to the environment, but rather, about the impacts that the Produce Stand will have on its business. Thorp Fruit Mall appears to be concerned about a less sophisticated or educated citizen of Kittitas County entering the market and providing competition to Thorp Fruit Mall. Under SEPA, however, "economic competition, in and of itself, is not an element of the environment under WAC 197-11-448(3)." *Indian Trail Property Owner's Ass'n v. City of Spokane*, 76 Wn.App. 430, 444, 886 P.2d 209 (1994).

IV. CONCLUSION

The County complied with the requirements of SEPA in reviewing the CUP for the Produce Stand and issuing an MDNS. The Christmans submitted a complete environmental checklist, which the County used to *assist* in its review and further information gathering. The County received comments on the DNS, and including in such comments were the detailed and lengthy comments from Thorp Fruit and Antique Mall which raised all of the issues and concerns being raised in this appeal. The record demonstrates that the County reasonably examined and considered environmental factors before makings its final decision to issue an MDNS; its decision was not clearly erroneous.

DATED this 24th day of June, 2013.

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