SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

COLUMBIA RIVERKEEPER, **Appellant,** **v.** **WASHINGTONS STATE DEPARTMENT OF NATURAL RESOURCES, the BOARD OF NATURAL RESOURCES, and the COMMISSIONER OF PUBLIC LANDS HILARY FRANZ(in her official capacity),** **Respondents,** **And** **PORT OF WOODLAND,** **Intervenor-Respondent**	**No. 17-2-01108-08** **COURT FINDINGS AND DECISION ON APPEAL**

This matter having come before the Court for hearing and trial upon the notice of appeal filed by the appellant, the Court having reviewed the record and file and having considered the arguments of counsel as well as supplemental briefing subsequent to oral argument, the Court makes the following Findings:

Extent of Court's Jurisdiction

In it's supplemental briefing, Columbia Riverkeeper (Riverkeeper) has raised the issue of whether the Court can even consider the determination of the exemption under WAC 197-11-800(5)(b). The Superior Court acquired jurisdiction over this case by way of the Riverkeeper filing their notice of appeal of Board Resolution No. 1507.

The filing is under the auspices of, and the process is governed by, RCW 79.02.020. The appeal essentially challenges the Department of Natural Resources' (DNR) determination of non-significance (DNS) related to the sale of their school trust land to the Port of Woodland. The operative language of RCW 79.02.020 is:

> *The hearing and trial of said appeal in the superior court shall be de novo before the court, without a jury, upon the pleadings and papers so certified, but the court may order the pleadings to be amended, or new and further pleadings to be filed.*

Trial de novo means a retrial, conducted in the appellate court (in this matter the Superior Court) as if it is a new trial. In that the proceeding being is that of an agency action as opposed to a trial, the Court is directed by the statute to look at the record of the agency decision below, assess anew, and essentially determine if it would make the same or a different decision based on the same record. It is of note this is not an administrative appeal, but rather a statutory appeal of an agency decision to the Court.

The record certified to the Court included numerous references related to the determination whether the transaction fell into an exempt status based on it being a land sale between two public entities. The bird release site issue[1] is the crux of that decision. Whether the land transaction was exempt or not was addressed extensively in the briefing filed with the court.

It is this Court's finding that it has jurisdiction to review the agency decision in total, including the determination whether or not a SEPA analysis was required as the Court is directed to conduct a trial de novo on the entire certified record..

This decision will address the following issues:

1. Was the transaction "exempt" from SEPA under WAC 197-11-800(5)(b)?;
2. If the transaction was exempt, what is the effect of DNR issuing a non-mandated SEPA determination?
3. Was DNR's determination of DNS clearly erroneous?

1. Was the transaction "exempt" from SEPA under WAC 197-11-800(5)(b)?

It is clear that if there were no bird release site on the property, the transaction would be exempt from SEPA under WAC 197-11-800(5)(b)[2]. The WAC cited indicates

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[1] The Court is using "bird release site" as a shorthand reference to the various facts that was the basis of DNR making an assumption that the transaction did not qualify for the exemption. Factually it relates to the designation by WDFW's designation of the leased portion of the property as a pheasant release and hunting site.

[2] WAC 197-11-800(5)(b) - (5) **Purchase or sale of real property.** The following real property transactions by an agency shall be exempt: (b) The sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to a specifically designated and authorized public use established by the public landowner and used by the public for that purpose.

that unless the[3] public landowner makes a public use designation, and the property is used for that purpose, it is an exempt transaction.

In this case, it is not disputed that DNR is the land manager of the property. Ultimately, the State of Washington is the Landowner, however following that line of reasoning, only the State of Washington could designate the property as contemplated in WAC 197-11-800(5)(b). The legislature has granted all management of the land in question to DNR (RCW 79.10.130(1)). The statute provides the DNR with all authorizations to manage the property including the ability to lease the property. DNR is the agency involved in the sale of the property, not the Department of Fish and Wildlife (WDFW).

If the Washington Department of Fish and Wildlife (WDFW) were the land owner contemplated in the referenced WAC, it would seem that WDFW be the land owner effecting the sale. DNR is the agency effecting the sale because WDFW had no agency management rights over the land in question. DNR is the only agency which could have effectively designated this particular land for a public purpose.

It is clear from the record that WDFW did not obtain prior agreement or permission from DNR to designate the land as a bird release site or enter into the bird release agreement with the farmer.

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[3] The Court has emphasized "the" as it is a critical word in the analysis of the WAC.

It is also clear that the farmer who was leasing a portion of the property did not have ownership authority to WDFW for this purpose.

Appellant in their materials urges the Court not to read the statute in a "hyper technical" fashion. The Court agrees. The statute's plain reading would indicate that DNR is the landowner for purposes of the WAC (i.e. – it is the landowner). WDFW could not make a legal designation of the property as it was not the landowner or land manager and had no legislatively designated power to do such a designation within the plain reading of that rule.

The land sale transaction would be exempt under WAC 197-11-800(5)(b) from doing the SEPA review. On that basis alone, the Court could deny the appeal and approve Board Resolution No. 1507.

The case is somewhat more complicated in that DNR chose to do a SEPA review and issue their DNS, which lead to the question the Court had requested further briefing on:

2. **If the transaction was exempt, what is the effect of DNR issuing a non-mandated SEPA determination?**

From the Court's review of the record, it appears that the SEPA analysis was only instituted because of the bird release site issue. Whether the SEPA analysis was done "in an abundance of caution" or simply in error would not seem to impact the answer to question 2 above.

The supplemental brief provided by the State seems to address this question most succinctly, citing to Clallam County Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wash. App. (214, 2007). That case stands for the proposition that an agency can make a finding of a transaction being exempt as well as issue a DNS decision, as the two findings are not inconsistent.

There was no citation to any law or case which would indicate that doing a SEPA review, even if the outcome did not result in a DNS, would negate a transaction's exempt status. The decision of the agency in this case is not inconsistent with the Court's finding that the underlying transaction was exempt from SEPA review.

3. Was DNR's determination of DNS clearly erroneous?

In the case at bar, Appellant ask the Court to set aside the DNS finding by DNR[4] which seems somewhat moot as the underlying transaction would not be subject to the SEPA review. The Court in this process necessarily has reviewed the record below. It is significant. It makes sense for the Court to address this question as well.

It is of note that one of the prime bits of evidence pointed to by Appellant for the proposition of known future development were exhibits 17 & 18. These were the only diagrams presented showing any type of actual development plans and appeared to designate fairly detailed plans and diagrams for a railroad line.

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[4] Were this Court to determine that the DNS finding was clearly erroneous, it would not appear to affect the Court's finding that the transaction was exempt in the first place. The transaction would to remain exempt.

It is unrebutted that these diagrams were not proposed by the Port, or by DNR, in this process, but rather were diagrams of a third party not involved in actual case. To attribute those documents as evidence of "known future development plans" is misplaced and misleading.

Reviewing this case in the context of the various cases cited by counsel, it appears that DNR carefully conducted a threshold determination related to the transaction as requested by appellant and others. It received voluminous commentary and documentation set forth in the record.

It is obvious if the Port determines to proceed with some sort of development of the Austin Point land necessitating access through the subject property, such development would be subject to a full environmental review. Currently, the stated plans for the property from the record is to keep the current use for the time being.

Riverkeeper argues the theory that the land sale will have a "snowballing" effect, creating inertia for the future development. It is the concept that initial government decisions made without proper EIS statements will over ride environmental issues which may be uncovered in future EIS statements. The principal is related to agency decisions which shape a project or limit options.[5] In this case the transaction is purely a land sale. There are no permitting decisions, planning decisions, etc. being addressed. It is purely changing owners of a piece of bare land. As such it seems to

[5] Columbia Riverkeeper v. Port of Vancouver USA, Wash.App. 800, (2015); KING COUNTY v. WASHINGTON STATE BOUNDARY REVIEW BOARD FOR KING COUNTY, et. al., 122 Wash.2d 648 (1994)

fall outside of the "snowballing" concept. Should any future development be proposed, it will be subject to a full EIS (unless it is likewise an exempt transaction, say if the Port decided to sell the property to the County).

Court's Ruling

This case is an appeal *de novo* of a Determination of Non-Significance by the Department of Natural Resources. It is based on the Court's review of the complete record of the proceeding below as certified with this Court. As a trial de novo, this Court can consider the full record, and can reverse, support or modify the DNS as issued, based upon any reasoning supported by the record. The Court therefore orders as follows:

1. The transfer of ownership of land from one public entity to another is exempt under the stated WAC under the facts of this case. Therefore the sale is exempt from the SEPA review.
2. The Agency determination of DNS does not erase that exemption.
3. The determination was not arbitrary, capricious, or unlawful, nor is it clearly erroneous.
4. Therefore, the Court denies the appeal and upholds Board Resolution No. 1507.

Costs

The State has requested attorney's fees/costs in its answer.
RCW 79.02.030 provides:

Costs on appeal shall be awarded to the prevailing party as in actions commenced in the superior court, but no costs shall be awarded against the state, the board, or the commissioner. Should judgment be rendered against the appellant, the costs shall be taxed against the appellant and the appellant's sureties on the appeal bond, except when the state is the only adverse party, and shall be included in the judgment, upon which execution may issue as in other cases.

Due to the agreed intervention order, the State is not the only adverse party. At this point, the Court has no information in the record or pleadings as to either the positions of the parties to this issue, or the nature and extent of same. It is unknown if the Port is making any requests for costs/fees.

As this is a mandated section of the statute, the Court will entertain further briefing, submission of cost documentation, and/or argument as requested by the parties before addressing same.

This decision will be filed with the court, and a copy provided directly to the parties via email.

Dated this 16th day of April, 2019.

Judge Gary Bashor