Technical Defects in the San Juan County Land Bank Proposal to Purchase the Clure Property: SEPA, Trespass, and Legislative Authority

SEPA REQUIREMENTS

We note that the proposed San Juan County Land Bank purchase of what is referred to as the Clure property is on the agenda for an upcoming County Commissioners' meeting. The declared purpose of the purchase is to provide greatly improved access for the general public to a portion of what is sometimes referred to as the Lopez west-side beach.

The intent is to make it easy for the public to hike the two miles of the near-pristine beach between White [Cliffs] and Big Rock. To provide that access, the Land Bank has declared the intent to construct a path or road and possibly parking on the Clure property between Eagles Roost Lane and the beach.

Such a project, as a whole, is virtually certain to have significant detrimental environmental impacts on all of the beach and adjoining lands. Although we don't know the details of the Land Bank proposal submitted to the Commissioners, the County would most likely be the Washington's State Environmental Policy Act (SEPA) lead agency on the project. WAC 197-11-050

It is the responsibility of the lead agency to make sure that the project is properly defined. RCW 197-11-060(3) A proposal cannot be approved if it is for only a piece of an overall project, such as the purchase of land, and does not include the associated actions that are part the overall project. RCW 197-11-060(3)(b)

The lead agency should begin environmental review, if required, when an application is complete. RCW197-11-055(3)(a) Until the responsible official issues a final determination of nonsignificance (DNS) or final Environmental Impact Statement (EIS), no action concerning the proposal shall be taken by a governmental agency that would (a) Have an adverse environmental impact; or (b) Limit the choice of reasonable alternatives. RCW 197-11-070(1)

The Land Bank is not claiming to have given any consideration to environmental concerns raised by their proposal. As far as we know, the Land Bank has not presented to the County Commissioners a complete, competent application for their proposed action.

It is certain that there will be environmental concerns regarding the construction of a pathway to the beach on easily eroded soils. Although the construction will be in the Shoreline Management area, there is no indication that a responsible official for the Shoreline Master Plan (SMP) has been consulted. SMP 18.50.040

The Land Bank has argued that because the public tidelands are currently accessible by kayak or small boat, the proposed greatly improved access to them would not constitute a change in the use of that public land and would thus be exempt from SEPA.[1] However the County may view the similarity of the very limited use of that public land (which is often under water) to the potentially huge increase in foot traffic on the near-pristine privately owned portion of the beach, SEPA requires analysis of all potentially significant impacts, including "direct and indirect impacts caused by the proposal." That means impacts on not just the public portion of the beach, but also on the adjoining private properties. WAC 197-11-060(4)(d)

More than four decades after adoption of the National Environmental Policy Act (NEPA) and SEPA, it is hard to find court decisions finding that a permit-issuing or funding agency failed to prepare and issue a SEPA determination of non-significance. (DNS) The question of necessity of SEPA analysis is usually resolved well before litigation is commenced.

One of the relatively few cases dealing with that issue is Kucera v. Department of Transportation (WDOT), 140 Wn.2d. 200 (2000). In 1998, the Washington State Ferries (WSF) began passenger-only service between Seattle and Bremerton using the Chinook, a boat with a twin-hulled design expected to meet the existing WSF "wake wash (no harm) performance standard."

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[1] The Land Bank has apparently drawn an erroneous parallel between the transfer of 800' of beach lying west of Bayshore Road north of the day park. That strip, formerly owned by the Sunset Acres Owners Association (SAOA), has been treated by everyone as though it were public, from the time Otis Perkins platted Sunset Acres, and probably earlier. That transfer will not entail any change of use and or cause any new impacts on neighboring land.

That transfer to the Land Bank of that strip of land on Bayshore is within the scope of a categorical exemption from SEPA: "The purchase of or acquisition of any right to real property." RCW 43.21C.0383(5)(a). That exemption applies only to a change of ownership. When the transfer of ownership is part of a plan to change the use of the land, in nature or intensity, the change must be evaluated under SEPA for potential environmental impacts.

Although the "no-harm" standard was incorporated into the design of the Chinook, soon after it began operation several waterfront owners on a particular stretch of the boat's route sued WDOT on various grounds, including property damage caused by the boat's wake and violations of both SEPA and the Shoreline Management Act (SMA). The court denied the claims for property damage, but held that because the owners "allege[d] damage to the shoreline environment," they had standing to invoke SEPA. Kucera, at p. 213.

An early Washington SEPA case, Sisley v. San Juan County, 89 Wn.2d 78 (1977), (hereafter "Sisley"), did not deal not with the issue of whether a DNS should environmental impact caused by the proposed action. The court wrote a detailed explanatory opinion, with instruction on how to proceed. Below are a few excerpts from that decision:

> "When a governmental agency makes [an] initial threshold determination, it must consider the various environmental factors even if it concludes that the action does not significantly affect the environment and therefore does not require an EIS. (Citing Juanita Bay Valley Community Ass'n v. Kirkland, 9 Wn. App. 59 (1973).)
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> "With this in mind we are compelled to comment on the inadequacy of the Board's record. It is filled with many assertions, numerous unanswered questions and a paucity of information. Unfortunately the Board's conclusion, supported by a 2-to-1 vote, is accompanied by no reasoning, explanation or findings of fact, however informal.
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> "The SMA, RCW 90.58, though dealing with a limited area of the environment, I.E., the wetlands and adjacent uplands, is no less vigorous than SEPA in declaring a policy aimed at the preservation of our natural resources. In fact, the permit system of the SMA is inextricably interrelated with and supplemented by the requirements of SEPA. (Citing Merkel v. Port of Brownsville, 8 Wn. App. 844, (1973))

ENABLING TRESPASSING

Along the two-mile stretch of beach in the Land Bank proposal, the upland landowners' lots extend to the ordinary high water line (OHW). The public tidelands, which are managed by the Washington Department of Natural Resources (DNR), are that portion of the tidelands that lie below OHW. The

private property portions of the beach are littered with driftwood, except during extreme high tides and are relatively level and dry during dry weather. The public tidelands that the Land Bank claims to provide access to are rockier, sloped, wetter virtually all the time, and usually devoid of driftwood.

Although the action proposed by the Land Bank is purportedly limited to providing access to the public lands, there is no feasible way to mark the dividing line between public and privately owned beach. Common sense and observation support the conclusion that hikers and picnickers will overwhelmingly, if not unanimously, choose to walk and sit on the drier, relatively flat private portion of the beach.

The Land Bank has argued that because the public tidelands are currently accessible by kayak or small boat, improving access to that public tidelands would not constitute a change in the use of the public tidelands "path" to the beach. That argument is ironic, because the current access for kayaks and small boats is undoubtedly used primarily to trespass on private property.

Claims that current users stay within the boundaries of the public lands and that the expected influx of hikers brought by better access to the beach will do so too are fanciful, at best. Approval of this Land Bank proposal would amount to the County enabling, even encouraging large-scale trespass that will be widely promoted by others.

The fact that hikers and others will prefer and will almost exclusively walk and picnic on the relatively flat and dry portion of the beach is easily demonstrated by examination of the beach south of Otis Perkins Day Park. There is a County "No Trespassing" sign at the south end of the park, but the beach beyond the sign, mostly above OHW, is commonly littered with driftwood constructions, plastic water and soda bottles, scattered scorched logs or on some occasions more direct evidence of "crab bake" with numerous dismembered carapaces, and other debris.

The greater significance of the damage that would surely follow if greatly increased foot traffic on the beach is that it will, over time, essentially destroy the ecological value of the sandy shelf immediately below the bluffs that will be the preferred "trail" for hikers. The west-side beach area bluffs are designated critical "feeder bluffs," meaning that the sandy shelf is formed by the sloughing of sand from the bluff. San Juan County Code (SJCC) 18.35.115(H)(6)

That sandy portion of the beach is habitat for numerous valuable species. Below that sand from the bluffs, the west-side beach is very rocky. Increased foot traffic on that sensitive sandy shelf will push sand toward the water and destroy habitat. Activities in environmentally sensitive area must be "managed in accordance with the applicable requirements of SJCC 18.35.020 through 18.35.140, environmentally sensitive areas." SJCC 18.35.080.

LAND BANK AUTHORITIES AND RESPONSIBILITIES

SEPA, at RCW 43.21C.020, directs "all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

> (a) **Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations**; (emphasis added)
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> (b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
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> (c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

The San Juan County Land Bank was established:

> "**to preserve in perpetuity** areas in the County that have environmental, agricultural, aesthetic, cultural, scientific, historic, scenic or low-intensity recreational value . . .. " SJCC 2.120.010 (Emphasis added.)

In this proposal, the Land Bank has neglected its primary purpose, "preservation," in favor of creating (or greatly expanding) a low-intensity recreational use that will mostly consist of trespass. No consideration of "preservation" of anything is evident in the proposal or any concern about environmental values is evident in any of its activities in support of the proposal.

At the beginning of the December 5, 2016 meeting sponsored by the Land Bank at the Lopez Fire House, the attendees were told that the intention of the meeting was not to answer questions, but only to hear what the attendees wanted to say. At the end of the meeting, the Lopez Preserve Steward, in reply to a query about the Land Bank's obligations under SEPA replied: "None."

That reply meant that the Land Bank's sense of its purpose was to provide a low-intensity recreational opportunity with no obligation to even consider the environmental values there might be in the affected area, much less preserve them. This proposal should be remanded to the Land Bank for adequate consideration of whether it is consistent with the purpose for which the Land Bank was created.

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