

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IRON MOUNTAIN QUARRY, LLC, a
Washington Limited Liability
Company, and POPE RESOURCES,
a Delaware Limited Partnership,

Respondents,


v

JEFFERSON COUNTY, a
Washington Municipal Corporation,
acting through its Department of
Community Development; and
STACIE L. HOSKINS, Planning
Manager, Jefferson County
Department of Community
Development,

Petitioners.

No. 41375-2-II

RULING DENYING MOTION
FOR DISCRETIONARY
REVIEW

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

Jefferson County seeks discretionary review of the trial court's order vacating the county's Determination of Significance (DS) as to an application filed by Iron Mountain Quarry and Pope Resources (IMQ) to operate a hard rock mine. Concluding that Jefferson County has not shown that discretionary review is appropriate, this court denies review.

On February 25, 2010, IMQ filed an application in Jefferson County for a storm water management permit necessary for it to begin operating a hard rock mine. On March 22, 2010, Jefferson County issued a DS that required IMQ to

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prepare an Environmental Impact Statement (EIS) addressing issues of earth, air quality, surface water, animals, traffic, fly rock, noise, vibration, land use and aesthetics.

On April 7, 2010, IMQ petitioned for a constitutional writ of certiorari under which the superior court would review Jefferson County's issuance of the DS. IMQ and Jefferson County stipulated to the issuance of the writ and submitted a record and briefing to the superior court

On October 5, 2010, the court issued a memorandum opinion. In that opinion, the court found that Jefferson County's issuance of the DS was arbitrary and capricious because: (1) the county did not follow the State Environmental Policy Act (SEPA) protocols for evaluating IMQ's application, (2) county staff did not perform a sufficiently meaningful review of IMQ's application, (3) the county did not consider mitigation measures, (4) the county did not request any additional information from IMQ regarding its application; and (5) the county had a predisposition to deny IMQ's application. The court did not grant IMQ's request that it issue a Determination of Non-Significance (DNS). Rather, the court vacated the DS and remanded the application:

to Jefferson County for further proceedings not inconsistent with this Court's Memorandum Opinion to include further action of making a determination on the IMQ application in compliance with SEPA policy.

Motion for Disc. Rev., Appendix 1 at 8-9.

Jefferson County seeks discretionary review under RAP 2.3(b)(2). That rule permits this court to grant review if the petitioner shows that "[t]he superior

court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.”

Because there is no other mechanism for an applicant to obtain judicial review of a governmental body’s issuance of a DS, an applicant may obtain a constitutional writ of certiorari that allows the superior court to review the issuance of the DS. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 296, 949 P.2d 370 (1998). The superior court is to review the issuance of the DS to determine if the issuance “was illegal or arbitrary and capricious” *Saldin*, 134 Wn.2d at 296. The supreme court defined “arbitrary and capricious” as:

willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

Saldin, 134 Wn.2d at 296 (quoting *Pierce County Sheriff v Civil Serv Comm’n*, 98 Wn 2d 690, 695, 658 P.2d 648 (1983) (quoting *State v. Rowe*, 93 Wn 2d 277, 284, 609 P.2d 1348 (1980)))

Jefferson County argues that the superior court’s decision vacating its issuance of the DS is probable error in two respects. First, it contends that the court erred in conducting a “de novo” review of its issuance of the DS instead of the more limited review, announced in *Saldin*, to determine whether the issuance was arbitrary and capricious. *Torrance v. King County*, 136 Wn 2d 783, 793-94, 966 P.2d 891 (1998). Second, it contends that because there was room for more than one opinion regarding the need for a DS, the court erred in finding that its

determination that a DS should be issued was arbitrary and capricious *Foster v King County*, 83 Wn. App. 339, 347-49, 921 P.2d 552 (1996).

However, even if the superior court committed probable error in vacating Jefferson County's issuance of the DS, the county does not show that the decision substantially alters the status quo or substantially limited its freedom to act. The superior court declined IMQ's invitation to issue a DNS and instead remanded the application for "making a determination on the IMQ application in compliance with SEPA policy." Mot. for Disc. Rev., Appendix 1 at 9. Jefferson County claims that the superior court's decision "frustrates the administrative SEPA process and will delay or truncate public comment on the scope of an EIS for the mine." Motion for Disc Rev at 13. But the superior court's decision does not frustrate the administrative SEPA process. It only requires Jefferson County to restart and follow the administrative SEPA process. Jefferson County can still make a determination, after following the instructions of the superior court, that a DS, and therefore an EIS, are required. Thus, the superior court's decision neither substantially alters the status quo nor substantially limits its freedom to act.¹

Jefferson County fails to show that discretionary review is appropriate under RAP 2.3(b)(2). Accordingly, it is hereby

¹ Jefferson County's contention, that the superior court's finding of arbitrary and capricious action may collaterally estop the county from contesting IMQ's claim for damages, is too speculative to support discretionary review. Further, it is an issue that can be raised in an appeal from the final order entered in this proceeding.