BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

FOUR SEASONS HOTEL SEATTLE, ET AL.,

from a decision issued by the Director, Department of Construction and Inspections
Regarding a Major Public Project Construction Variance

Hearing Examiner Files:
HC-18-001 through HC-18-007

Department Reference:
3027346

ORDERS ON MOTIONS

The Department of Construction and Inspections ("Department") issued a decision on August 21, 2017 granting with conditions a Major Public Project Construction Noise Variance ("Decision"), to the Washington State Department of Transportation ("WSDOT"), which allows WSDOT to exceed otherwise required noise limits of SMC Chapter 25.08 in its project to demolish the Alaska Way Viaduct. The Four Seasons Hotel Seattle, 98 Union Homeowners Association, Kay Smith-Blum et al., Jackie Swarts, Andrew Konstantaras, and Michael Roberts (collectively herein "Appellants") appealed the Decision. WSDOT also appealed the Decision. WSDOT and the City of Seattle ("City") filed a motion for summary judgment regarding State Environmental Policy Act ("SEPA") compliance. Appellant Konstantaras filed a response in opposition to that motion. In addition, Appellant Konstantaras filed a motion for summary judgment, and the City and WSDOT filed a response to that motion. Appellant Konstantaras filed a reply supporting his motion for summary judgment. The Deputy Hearing Examiner ("Examiner") has reviewed the file in this matter including the motions documents.

Having considered the evidence and pleadings, the Examiner enters the following orders. For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

Motion for Summary Judgment Regarding SEPA Compliance

WSDOT and the Department have moved for summary judgment seeking to dismiss the claim raised by Konstantaras that a SEPA threshold determination was required to be made for the Decision issued by the City. The Applicant and Department claim that SEPA compliance occurred when WSDOT and the City, acting as lead joint agencies in concert with the Federal Highway Administration ("FHWA"), prepared and issued a National Environmental Policy Act ("NEPA") Final Environmental Impact Statement ("FEIS") in June 2011. This NEPA FEIS was published to support a FHWA Record of Decision ("ROD") with respect to replacement of the Alaska Way Viaduct with a bored tunnel, a project that includes the demolition of the Alaska Way Viaduct.

Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc.* v. *Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure ("HER")

provides that for questions of practice and procedure not covered by the HER, the Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." "Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law." *Verizon Northwest, Inc. v. Washington Employment Sec. Dept.*, 164 Wn.2d 909, 916, 164 P.3d 255 (2008).

Here there is no dispute that the Applicant and the City completed NEPA compliance in 2011 and that neither the City nor WSDOT issued a separate SEPA threshold determination in connection with the Decision. The question here is one of law: May Appellant Konstantaras challenge SEPA compliance in this appeal?

Appellant Konstantaras makes two arguments in his response: 1) that SEPA compliance cannot be met without fulfilling the obligations set forth in a NEPA FEIS; and 2) his SEPA claim, which challenges the Decision on the basis that a SEPA threshold determination was never issued, implicitly challenges the FEIS. For the following reasons, both these arguments fail to defeat WSDOT's and the City's summary judgment motion.

As argued by WSDOT and the City, SEPA explicitly does not require the preparation of a FEIS if a NEPA FEIS has already been prepared for the same project. RCW 43.21C.150 states:

> **RCW 43.21C.030(2)(c) inapplicable when statement previously prepared pursuant to national environmental policy act.**
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> The requirements of RCW 43.21C.030(2)(c) pertaining to the preparation of a detailed statement by branches of government shall not apply when an adequate detailed statement has been previously prepared pursuant to the national environmental policy act of 1969, in which event said prepared statement may be utilized in lieu of a separately prepared statement under RCW 43.21C.030(2)(c).

The SEPA Administrative Rules adopted by the Washington State Department of Ecology indicate that subsequent use by another agency of a federal EIS for the same proposal does not require that agency to go through the EIS adoption process for an FEIS that has not been found inadequate.[1] This FEIS was adopted June 20, 2011 and according to WSDOT and the City, no appeal of the August 2011 ROD was filed. Therefore, no court has found the FEIS inadequate. The time for appeal of that document expired long ago. While WSDOT did not go through a formal adoption process to adopt the FEIS for the purposes of SEPA compliance, it was not required to do so under WAC 197-11-610.

Appellant Konstantaras' first argument, that SEPA compliance requires fulfillment of obligations stated within the FEIS has no merit. He cites no authority for this proposition; nor is the meaning of his argument clear. It is true that the project is required to comply with the conditions set forth

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[1] WAC 197-11-610; *see Boss v. Wash. St. Dept. of Transp.*, 113 Wn.App. 543, 552-53, 54 P.3d 207 (2002) (SEPA challenge dismissed when NEPA EIS for Tacoma Narrows Bridge project had been prepared).

in the ROD regarding noise,[2] but again, any challenge regarding compliance with conditions of the ROD must be brought in federal court. The Examiner has no jurisdiction over federal matters.

His other argument is that his appeal implicitly challenges the FEIS. Even if it does, the Examiner would have no jurisdiction to hear it. Any appeal period lapsed many years ago, and in any event, any such challenge would have to be brought in federal court as a challenge of a federally issued document, with the FHWA served as a party. The Examiner has no jurisdiction over a federal agency or a document issued by a federal agency. Therefore, the Examiner grants summary judgment on this issue and dismisses Issue 2 from Appellant Konstantaras' appeal.

In accordance with the above, WSDOT's and the City's motion for summary judgment regarding SEPA compliance is **GRANTED;** Appellant Konstantaras' Issue 2 regarding SEPA compliance is **DISMISSED.**

Appellant Konstantaras' Motion for Summary Judgment

Appellant Konstantaras moves for an order of summary judgment reversing the Department's decision and rescinding the Decision, alleging that "[s]ince WSDOT did not provide any supporting evidence or analysis regarding the financial or practical impact of working only during the day, it failed to meet the standard set forth in SMC 25.08.655.A." WSDOT and the City responds by citing instances in which it contends that it did provide evidence that complying with the Noise Code would render the project economically and functionally unreasonable. In addition, it provides the Declaration of Brian Nielsen, calculating potential additional costs based on possible traffic impact delays if a decision on the noise variance is delayed.

Appellant Konstantaras argues that the record before the Examiner is limited to that established before the Department director in making his decision. However, according to the appeal procedure in the code, appeals are considered de novo, and the Administrator's decision on the variance is given no deference.[3] When an appeal is considered de novo, new evidence is permitted before the decision maker.[4] Whether that evidence was or should have been presented in that forum is a different question that cannot be resolved at this juncture.

For summary judgment, the facts in the record are "reviewed in the light most favorable to the nonmoving party." *Id.* "A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case ... Once the moving party has met its burden, the burden shifts to the nonmoving party *to present admissible evidence demonstrating the existence of a genuine issue of material fact.* ... If the nonmoving party does not meet that burden, summary judgment is appropriate." *Indoor Billboard/Washington, Inc.* v. *Integra Telecom of Washington, Inc.,* 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (internal citations omitted) (emphasis added). "An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, *i.e.,* information as to ... a reality as distinguished from supposition or opinion." *Curran* v. *City of Marysville,* 53 Wn.App. 358, 367,

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[2] http://data.wsdot.wa.gov/publications/viaduct/FEISComments/AWV-ROD-08222011.pdf at 25.
[3] SMC 25.08.610
[4] *See* R.Settle, **WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE** AT 149 (1983).

766 P.2d 1141 (1989), *quoting Grimwood* v. *University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Here the City and WSDOT have set forth facts evidentiary in nature through the Declaration of Brian Nielsen that, viewed in the light most favorable to the non-moving party, support their contention that without the Decision, the project would be rendered economically or functionally unreasonable due to financial cost or the impact of complying for the duration of the construction project. Given that, a grant of summary judgment is inappropriate, as WSDOT and the City have met their burden to show admissible evidence demonstrating the existence of a genuine issue of material fact.

In accordance with the above, the Appellant Konstantaras' Motion for Summary Judgment is **DENIED.**

Entered this 6th day of June, 2018.

Barbara Dykes Ehrlichman

Barbara Dykes Ehrlichman
Deputy Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
Phone: (206) 684-0521
FAX: (206) 684-0536

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CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Orders on Motions** to each person listed below, or on the attached mailing list, in the matter of **Four Seasons Hotel Seattle et al..**, Hearing Examiner Files: **HC-18-001 through HC-18-007** in the manner indicated.

Party	Method of Service
Appellants Four Seasons Hotel Seattle Michael Pedder michael.pedder@fourseasons.com 98 Union Homeowners Association John Gleason johng@secprop.com Kay Smith-Blum kay@butchblum.com Jackie Swarts jackie1.home@yahoo.com Andrew Konstantaras akonsta@me.com Michael Roberts mjsroberts@icloud.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Applicant/Appellant Legal Counsel Deborah Cade Assistant Attorney General deborahc@atg.wa.gov Danielle Oliver danielleo@atg.wa.gov Melissa Calahan Melissae1@atg.wa.gov E-service Mailbox tpcef@atg.wa.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Department Legal Counsel Patrick Downs Assistant City Attorney Patrick.downs@seattle.gov James Dasher James.Dasher@seattle.gov Dan Goodman Dan.Goodman@seattle.gov Dave Cordaro Dave.cordaro@seattle.gov Alicia Reise Alicia.reise@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: June 6, 2018

Alayna Johnson
Legal Assistant