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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of
WALLINGFORD COMMUNITY COUNCIL, ET AL.
of adequacy of the FEIS issued by the director, Office of Planning and Community Development.

Hearing Examiner File:
W-17-006 through **W-17-014**
WALLINGFORD COMMUNITY COUNCIL APPEAL: CLOSING ARGUMENT

I. SUMMARY

SEPA requires that meaningful alternatives to a proposed action be part of required environmental review. OPCD and the FEIS itself acknowledge that the EIS intentionally only considered limited variations of the single proposal under consideration designated as MHA-R. OPCD refused to consider or analyze alternatives to the MHA program for reaching the City’s claimed objectives of affordable housing. OPCD does not claim it has complied with SEPA requirements to consider alternatives to the stated proposal to reach the City’s objectives. OPCD contends that MHA is exempt from the broad and vital requirements of SEPA to consider environmental impacts of alternatives. Although OPCD may strongly argue that this is true, the law is clear: OPCD and MHA are not exempt from

1 SEPA's requirements. The department's refusal to comply with SEPA because of political
2 considerations mandates that the EIS be remanded for compliance with the law.

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4 **II. BACKGROUND AND SINGLE ISSUE ON APPEAL**

5 The only issue presented by WCC's appeal is whether MHA is exempt from SEPA
6 requirements to consider alternatives to the proposed action. The question WCC presents is
7 not the adequacy of the consideration of alternatives, but whether OPCD is excused from
8 such consideration in the environmental review of MHA—a proposal that will forever change
9 the physical and environmental landscape of Seattle.

10 At the beginning of this consolidated appeal, both WCC and OPCD filed cross
11 motions for summary judgment. Both parties acknowledged there were no questions of fact
12 concerning this issue, and both sought a determination of the question as a matter of law.
13 Given the many combined appeals, summary judgment was denied to both sides pending the
14 presentation of evidence. Extensive hearings have now been completed. To the extent that
15 testimony presented during the hearings relates to the question raised by this appeal, it
16 reinforces the position taken by WCC.

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18 In the summary judgment motions, OPCD claimed it was exempt from broad SEPA
19 requirements because of its misinterpretation of a phrase in a portion of a WAC subsection.
20 WCC strongly disagreed with OPCD's claims. However, to avoid unnecessarily discussing
21 OPCD arguments which may no longer be relevant or advanced by the department, WCC
22 will withhold a specific response to OPCD arguments until they are presented in a current
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1 form though its closing argument. Any claimed defenses by OPCD will be addressed in
2 WCC's responsive closing argument.

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4 **III. CONTROLLING LEGAL AUTHORITY**

5 **SEPA requires that meaningful alternatives to MHA be considered.**

6 The requirement to consider alternatives ways to meet objectives is central to the
7 SEPA. The basic requirements of the law are set out in RCW 43.21C.030:

8 The legislature authorizes and directs that, to the fullest extent possible: (1) The
9 policies, regulations, and laws of the state of Washington shall be interpreted and
10 administered in accordance with the policies set forth in this chapter, and (2) all
branches of government of this state, including state agencies, municipal and public
corporations, and counties shall:...

11 (c) Include in every recommendation or report on proposals for legislation and other
12 major actions significantly affecting the quality of the environment, a detailed
13 statement by the responsible official on: ...

14 (iii) alternatives to the proposed action;

15 RCW 43.21C.030 (c)(iii). [underline added]

16 The requirements of an EIS are detailed in WAC 197-11-440. The regulation
17 mandates that the EIS include a section titled "Alternatives Including the Proposed Action."
18 "This section of the EIS describe and presents the proposal (or preferred alternative, if one
19 (1) or more exists) and alternative courses of action." SMC 25.05.440 D. 1. (WAC 197-11-
20 440 (5))

21 "This section of the EIS shall: ...

22 e. Devote sufficient detailed analysis to each reasonable alternative to permit a
23 comparative evaluation of the alternatives including the proposed action. ...

1 f. Present a comparison of the environmental impacts of the reasonable alternatives,
2 and include the no action alternative.”

3 SMC 25.05.440 D. 3. (WAC 197-11-440 (5)(v)(vi))

4 The consideration of impacts and alternative under SEPA are a central requirement
5 of an EIS. The section titled “Contents of EIS on nonproject proposals” SMC 25.05.442
6 (WAC 197-11-442) includes the following:

7 The lead agency [the city] shall discuss impacts and alternatives in the level of
8 detail appropriate to the scope of the nonproject proposal and to the level of
9 planning for the proposal. Alternatives should be emphasized. In particular,
10 agencies are encouraged to describe the proposal in terms of alternative means
11 of accomplishing a stated objective (see WAC 197-11-060(3)). Alternatives
including the proposed action should be analyzed at a roughly comparable
level of detail, sufficient to evaluate their comparative merits (this does not
require devoting the same number of pages in an EIS to each alternative).
[underline added]

12 SMC 25.05.442 B; (WAC § 197-11-442 (2))

13 In directing the alternatives to be considered, SMC 25.05.060 B.4.c. (WAC § 197-
14 11-060) provides:

15 Proposals should be described in ways that encourage considering and comparing
16 alternatives. Agencies are encouraged to describe public or nonproject proposals in
17 terms of objectives rather than preferred solutions. A proposal could be described,
18 for example, as "reducing flood damage and achieving better flood control by one
19 or a combination of the following means: Building a new dam; maintenance
20 dredging; use of shoreline and land use controls; purchase of floodprone areas; or
relocation assistance." [underline added]

21 Those requirements were summarized by the Supreme Court in *Weyerhaeuser v.*
Pierce Cty., 124 Wash. 2d 26, 873 P.2d 498, 506 (1994).

22 Not all potential alternatives must be examined. *Solid Waste Alternative Proponents*
23 *v. Okanogan Cy.*, 66 Wn. App. 439, 443, 445, 832 P.2d 503, *review denied*, 120
24 Wn.2d 1012, 844 P.2d 435 (1992). Adequacy is determined under the "rule of
reason". *Barrie v. Kitsap Cy.*, 93 Wn.2d 843, 854, 613 P.2d 1148 (1980). There must
be a reasonably detailed analysis of a reasonable number and range of alternatives.

1 Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and*
2 *Policy Analysis* § 14(b)(ii) (4th ed. 1993). Under WAC 197-11-440(5)(c), the
3 alternatives section of the EIS must describe the objectives, proponents and principal
4 features of reasonable alternatives, including the proposed action with any mitigation
5 measures; describe the location of alternatives, including a map, street address and
6 legal description; identify phases of the proposal; tailor the level of description to the
7 significance of environmental impacts; devote sufficiently detailed analysis to each
8 alternative so as to permit a comparison of the alternatives; present a comparison of
9 the environmental impacts of the alternatives; and discuss benefits and disadvantages
10 of reserving implementation of the proposal to a future time.

11 *Weyerhaeuser* at 41, 506.

12 **IV. SUMMARY OF UNDISPUTED FACTS**

13 The essential facts relevant to this appeal are not disputed. Both OPCD and WCC
14 recognized in their cross motions for summary judgment that there are no issues of material
15 fact. **OPCD admitted in its summary judgment pleadings that it refused to consider**
16 **alternatives to MHA in the EIS.** It simply claims it did not have to do so.

17 Given SEPA's requirement to focus on the objectives of a proposal and the
18 requirement to consider alternative ways to meet those objectives, the objectives of MHA as
19 set out in the EIS should have been a prominent consideration in OPCD's claims of
20 compliance with SEPA. However, OPCD never mentioned the stated objectives in
21 attempting to justify its lack of alternatives analysis. As set out in the FEIS at pg. 1.3, the
22 objectives of the MHA proposals are:

23 *1.2 OBJECTIVES OF THE PROPOSAL*

24 *The City's objectives for this proposal are to:*

- 25 • *Address the pressing need for housing affordable and available to a broad range of households.*
- *Increase overall production of housing to help meet current and projected high demand.*

- *Leverage development to create at least 6,200 net new rent- and income-restricted housing units serving households at 60 percent1 of the area median income (AMI) in the study area over a 20-year period.*
- *Distribute the benefits and burdens of growth equitably.*

The stated objective in the EIS is affordable housing. OPCD admits that no alternatives to MHA to encourage affordable housing were considered. *See* “The Final EIS evaluates alternative approaches to implementing MHA.” Ex. 2. (FEIS, “Proposed Action and Alternatives,” pg. viii; See FEIS §2.3 for summary of alternatives considered.) Variations on the implementation of MHA are the only type “alternatives” considered by OPCD. Yet the law requires that OPCD consider alternatives to meeting the stated affordable housing objectives. The admission that OPCD did not examine alternatives to meeting the EIS’s stated objectives should result in judgment in favor of Wallingford Community Council’s appeal since it considers no alternatives to MHA, instead offering only slight variations on that proposal. Alternative methods or programs of meeting the affordable housing objective of the City must be identified and analyzed so decision makers can be informed prior to making a decision. The City alleges the decision to move forward with MHA has already been made and therefore no alternatives need be considered. As a result, it did not identify any alternatives or analyze them during environmental review. This argument would nullify the core objective of SEPA, and the admission is fatal to OPCD’s effort to defend its actions.

The City considered only one proposal in its EIS; that of MHA—the “Grand Bargain.” OPCD does not claim it considered alternatives to reach the laudable and critical objectives of affordable housing. Instead, it incorrectly argues that it need not do so. And as testimony and exhibits revealed during the hearing, there are many viable alternatives to

1 MHA that could meet the stated objectives and should have been considered as part of the
2 SEPA process.

3 This failure to comply with a central mandate of SEPA will lead to disastrous results.
4 OPCD should have prepared an EIS to help inform decision makers—the City Council—as to
5 what program or proposal might best meet the goal of providing affordable housing.
6 Instead, OPCD merely specifies four methods of implementing the same program or
7 proposal: MHA. Alternatives are not even identified in the EIS, let alone analyzed.

8 The record shows that broad arrays of alternatives with lesser environmental impacts
9 were known—but ignored. Many alternatives were listed in “Solutions to Seattle’s Housing
10 Emergency from the Community Housing Caucus” Exhibit 258. The testimony of David
11 Levitus presented at the hearing identified others. OPCD’s response is to blindly ignore all
12 non-MHA proposals and instead just try to justify its refusal to comply with the SEPA
13 mandates to do so.
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16 **V. Conclusion: OPCD’s Construction of the Law Would Gut SEPA**

17 OPCD admits that it did not comply with SEPA requirements for the consideration
18 of alternatives in the preparation of the EIS. That noncompliance should not be given a
19 stamp of approval or be allowed to stand. If government agencies can avoid consideration of
20 alternatives for proposals which might have less environmental impact simply by labeling a
21 proposal as “formally adopted” as argued in its summary judgment pleadings thereby
22 ignoring consideration of other approaches to meet its objectives, what will be left of SEPA?
23 Not much. The proposal covered by the EIS will forever change the land use landscape of
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1 Seattle. The EIS should be remanded to OPCD for identification and analysis of reasonable
2 alternatives for meeting the objectives of affordable housing. The City should have to
3 comply with the law.

4 Respectfully submitted this 24th day of September, 2018.

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6 G. Lee Raaen, WSBA #6258
7 Attorney for Wallingford Community Council
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that this document was filed on this date by E-file with the Seattle Hearing Examiner’s Office. This Response was served on the parties' attorneys or authorized representatives of record at the email addresses listed below:

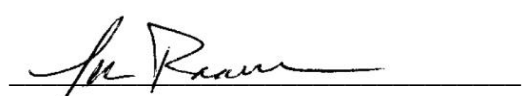
City of Seattle

- Jeff S Weber, Jeff.Weber@seattle.gov
- MHA.EIS@seattle.gov
- Alicia.reise@seattle.gov
- Daniel B Mitchell, Daniel.Mitchell@seattle.gov
- Geoffrey Wentlandt, Geoffrey.Wentlandt@seattle.gov

Appellants

- Beacon Hill Council, mira.latoszek@gmail.com
- Friends of Ravenna-Cowen, Judy Bendich jebendich@comcast.net
- SCALE, Claudia M. Newman, newman@bnd-law.com
David Bricklin, Bricklin@bnd-law.com
cahill@bnd-law.com
telegin@bnd-law.com
Talis.abolins@gmail.com
- Fremont NC, toby@louploup.net
- Friends of North Rainier, masteinhoff@gmail.com
- Seniors United, David Ward, booksgalore22@gmail.com
- West Seattle Junction, Rich Koehler, rkoehler@cool-studio.net
Junction Gen, admin@wsjuno.org.
- Morgan Community Association, Deb Barker, djb124@earthlink.net

Signed and dated by me this 24th day of September, 2018 at Seattle, WA.



G. Lee Raaen, WSBA #6258
Attorney for Wallingford Community Council