

BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In Re: Appeal by ) NO: W-19-006  
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)  
4 **SAFE AND AFFORDABLE SEATTLE;** )  
)  
5 **MAGNOLIA NEIGHBORHOD PLANNING** ) CITY’S MOTION TO DISMISS  
**GROUP;** )  
)  
6 **ELIZABETH CAMPBELL** )  
)  
)  
7 of a determination of non-significance of )  
8 amendments by the City of Seattle. )  
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**I. INTRODUCTION**

None of the appellants commented on the Determination of Non-Significance (DNS) within the required public comment period, which by state and City law “shall be construed as lack of objection to the environmental analysis.”

Failing to comment precludes administrative or judicial challenge of the DNS. Because the appellants failed to comment on the DNS, the City respectfully requests the Hearing Examiner (Examiner) dismiss the appeal.

**II. FACTS**

The City prepared proposed legislation amending the City’s Land Use Code to modify development standards for transitional encampments and increase the maximum number of authorized interim use encampments.<sup>1</sup> The legislation is a non-project action under SEPA.<sup>2</sup>

<sup>1</sup> SMC 25.05.340; WAC 197-11-340.  
<sup>2</sup> WAC 197-11-774; 197-11-704(2)(B)(ii).

1 The SEPA analysis resulted in a determination of non-significance (DNS), published on  
2 August 8, 2019.<sup>3</sup> Consistent with state and City code requirements,<sup>4</sup> the DNS was published in  
3 the Department of Ecology’s SEPA register,<sup>5</sup> the Daily Journal of Commerce,<sup>6</sup> the Land Use  
4 Information Bulletin,<sup>7</sup> and the SDCI SEPA Public Information Center.<sup>8</sup>

5 The comment period extended to August 22, 2019.<sup>9</sup> Within the comment period, the only  
6 communication from the appellants was an August 19 request from Ms. Campbell regarding a  
7 hyperlink, the ordinance text, and the link to the DNS.<sup>10</sup> The City responded the same-day and  
8 no comments were subsequently received.

9 On August 29, 2019, the appellants filed their appeal.

10 **III. ISSUE**

11 The DNS included a comment period for agencies and the public. Under the WAC, SMC,  
12 and administrative decisions, failing to comment during the comment period precludes an appeal.  
13 Should this appeal be dismissed when the appellants failed to comment?

14 **IV. SUPPORTING EVIDENCE**

15 This motion relies on the Declaration of Ketil Freeman, the Declaration of Bill Mills, and  
16 the pleadings on file with the Examiner in this appeal.

17 **V. ANALYSIS**

18 Although a DNS is subject to appeal “by any interested person” that person must have  
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20 <sup>3</sup> Declaration of Ketil Freeman, Exhibit 1.

21 <sup>4</sup> WAC 197-11-545(2); SMC 25.05.545.B.

22 <sup>5</sup> Declaration of Ketil Freeman, Exhibit 2.

23 <sup>6</sup> *Id.*, Exhibit 3.

<sup>7</sup> *Id.*, Exhibit 4.

<sup>8</sup> *Id.*, Exhibit 5.

<sup>9</sup> *Id.*, Exhibit 1.

<sup>10</sup> *Id.*, Exhibit 6.

1 standing.<sup>11</sup> Failing to comment on a DNS is “construed as lack of objection to the environmental  
2 analysis.”<sup>12</sup>

3 In *Kitsap County v. State Department of Natural Resources*, the Washington Supreme Court  
4 precluded considering the county’s SEPA appeal when it failed to comment on the environmental  
5 analysis.<sup>13</sup> The court explained the importance of the comment requirement, noting the comment  
6 requirement is designed to integrate public response when the participation is “meaningful and  
7 contributes to the environmental assessment.”<sup>14</sup> The Court further explained “where an objection  
8 [...] is saved until the parties receive an unfavorable decision, the purposes of SEPA are  
9 frustrated.”<sup>15</sup>

10 Multiple state hearing boards have applied the same language in the City’s “effect of no  
11 comment” provision, stating that so long as the requirements of WAC 197.11.510 are met, a lack of  
12 comment by other agencies or the public is considered to be lack of objection to the analysis.<sup>16</sup>

13 In *Pacificorp* the Pollution Control Hearings Board (PCHB) determined that a party must  
14 “comment to the lead agency during the SEPA review process, or it will lack standing to pursue  
15 SEPA claims on appeal.”<sup>17</sup> Citing *Spokane Rock Products Inc.*, the *Pacificorp* board found the  
16 PCHB’s reasoning persuasive and held that a party’s failure to comment results in a lack of standing  
17 to raise SEPA issues on appeal.<sup>18</sup> The board further noted that principles of waiver and exhaustion  
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19 <sup>11</sup> SMC 25.05.680.B.1; *Pacificorp v. City of Walla Walla*, 2014 WL 1390955 (Wash.Pol.Control Bd) at 8.

20 <sup>12</sup> SMC 25.05.545.B and WAC 197-11-545(2).

21 <sup>13</sup> The court considered WAC 197-10-545, which contained the same language later codified in WAC 197  
22 11-545(1); *Kitsap County v. State Dept. of Natural Resources*, 99 Wn.2d 386, 662 P.2d 381 (1983).

23 <sup>14</sup> *Kitsap*, 99 Wn.2d at 391.

<sup>15</sup> *Id.*

<sup>16</sup> WAC 197-11-545; *Pacificorp v. Walla Walla*; *Kitsap v. State Dept. of Natural Resources*; *Spokane Rock  
Products v. Spokane County Air Pollution Control Authority* 05-127 (2006).

<sup>17</sup> *Pacificorp d.b.a Pacific Power and Light v. City of Walla Walla & Columbia Rural Electric Ass’n*, 2014  
WL 1390955 (Wash.Pol.Control Bd.).

<sup>18</sup> *Id.* at 10.

1 apply to failing to use public comment periods, stating the comment period is provided as an  
2 available administrative process to be used by interested members of the public.<sup>19</sup> Particularly, the  
3 *Pacificorp* board stated that by failing to comment to the lead agency during SEPA’s review process  
4 the appellants failed to exhaust their administrative remedies and they lacked standing to pursue  
5 their appeal.<sup>20</sup>

6 In *Brown*, the Shorelines Hearings Board (SHB) cited *Spokane Rock* to dismiss an appeal  
7 where the appellant failed to comment within the required timeline for SEPA comments, precluding  
8 his standing.<sup>21</sup>

9 In *Lowen*, the Growth Management Hearings Board (GMHB) echoed PCHB and SHB  
10 decisions; the appellant was precluded from raising a SEPA appeal because they had not  
11 participated in the comment period.<sup>22</sup> Further, in *Lowen*, the GMHB clarified that participation by  
12 the public in the EIS process is a prerequisite for SEPA compliance, and that failing to comment is  
13 lack of objection; “a comment period is part of an available administrative process,” and failing to  
14 use the process precludes an appeal.<sup>23</sup>

15 These boards sit in the same position as the Examiner when hearing City SEPA DNS  
16 appeals; and the language the boards construed is identical to the City code provision.<sup>24</sup> Here, the  
17 appellants had an opportunity to comment and did not comment.<sup>25</sup> Throughout the DNS comment  
18 period, the only communication between the City and appellants was Ms. Campbell’s request for  
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20 <sup>19</sup> *Spokane Rock Products, Inc., et al., v. Spokane County Air Pollution Control Authority*, PCHB Case No.  
05-127, Order Granting Motion for Summary Judgment (February 13, 2006) at 10.

21 <sup>20</sup> *Pacificorp v. Walla Walla*, 2014 WL 1390955, at 8 (citing *Spokane Rock Products* at 11-12).

22 <sup>21</sup> *Brown v. Snohomish County*, SHB 06-035 (Order Granting Summary Judgment, May 11, 2007).

23 <sup>22</sup> *Lowen Limited Family Partnership v. City of Seattle*, 2013 WL 5651357.

(Wash.Central.Puget.Sd.Growth.Mgmt.Hrgs.Bd) at 4.

<sup>23</sup> *Id.*

<sup>24</sup> SMC 25.05.545.B.

<sup>25</sup> Declaration of Ketil Freeman, Exhibit 6.

1 information.<sup>26</sup> In contrast to the appellants’ failure to comment on this DNS, these same appellants  
2 previously commented on a DNS issued for a homeless tiny house village that they subsequently  
3 appealed to the Examiner.<sup>27</sup> The appeal was rejected by the Examiner.<sup>28</sup>

4 Failing to comment on the DNS bars appealing the SEPA determination before the  
5 Examiner, just as failing to comment on a draft environmental impact statement bars an appeal.<sup>29</sup>  
6 Otherwise, the “effect of no comment” provision is meaningless. Like the appeals in *Pacificorp*,  
7 *Kitsap County*, *Spokane Rock*, *Lowen*, and *Brown*, the appeal before the Examiner should be  
8 dismissed because the appellants failed to comment on the DNS.

## 9 VI. CONCLUSION

10 The Examiner should dismiss the appeal of the determination of non-significance of this  
11 non-project action by the City. The appellants had an opportunity to comment and did not comment  
12 on the DNS within the comment period, precluding administrative or judicial appeals. The  
13 appellants’ DNS appeal should be dismissed.  
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21 <sup>26</sup> *Id.*

22 <sup>27</sup> Declaration of Bill Mills in Support of City’s Motion to Dismiss.

23 <sup>28</sup> In the Matter of the Appeal of Safe and Affordable Seattle, et al. from a decision issued by the Director,  
Seattle Department of Construction and Inspections, Hearing Examiner File MUP-18-019 (TU,W).

<sup>29</sup> See R. L. Settle, *The Washington State Environmental Policy Act*, § 14.01[10] p. 14-77.

1 DATED this 30<sup>th</sup> day of September 2019.

2 PETER S. HOLMES  
3 Seattle City Attorney

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**CERTIFICATE OF SERVICE**

I certify that on this date, I electronically filed a copy of the following documents with the Seattle Hearing Examiner using its e-filing system:

1. City’s Motion to Dismiss;
2. Declaration of Ketil Freeman in Support of the City’s Motion to Dismiss; and
3. Declaration of Bill Mills in Support of the City’s Motion to Dismiss.

I also certify that on this date, a copy of the same documents was sent to the following parties listed below via email and U.S. Mail prepaid postage:

<i><b>Appellant #1</b></i>	<i><b>Appellant #2</b></i>
Safe and Affordable Seattle (SAAS) 4027 – 21 <sup>st</sup> Avenue West, Suite 206 Seattle, WA 98199 (206) 769-8459 Email: <a href="mailto:safeseattlebuzz@gmail.com">safeseattlebuzz@gmail.com</a>	Magnolia Neighborhood Planning Council (MNPC) 4027 – 21 <sup>st</sup> Avenue West, Suite 206 Seattle, WA 98199 (206) 769-8459 Email: <a href="mailto:magnoliaplan@gmail.com">magnoliaplan@gmail.com</a>
<i><b>Appellant #3</b></i>  Elizabeth A. Campbell (Campbell) 4027 – 21 <sup>st</sup> Avenue West, Suite 206 Seattle, WA 98199 (206) 769-8459 Email: <a href="mailto:neighborhoodwarrior@gmail.com">neighborhoodwarrior@gmail.com</a>	

the foregoing being the last known address of the above-named parties.

Dated this 30th day of September 2019, at Seattle, Washington.

s/Alicia Reise  
ALICIA REISE, Legal Assistant

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