BEFORE THE CITY OF SEATTLE HEARING EXAMINER

ELIZABETH CAMPBELL, SAFE AND AFFORDABLE SEATTLE, MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL, Appellant, v. CITY OF SEATTLE, Respondent.	NO. W-19-006 APPELLANTS' OPPOSITION TO CITY'S MOTION TO DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

The City of Seattle ("City") seeks to dismiss the Appellants' appeal on the basis that the Appellants did not comment on the SEPA DNS prepared for a draft council bill that has not been assigned a legislative number or been passed out of the City Council's Human Services, Equitable Development, and Renter Rights Committee; that not comment commenting as part of a comment period is fatal to the appeal under Seattle's SEPA code. Appellants request that the Hearing Examiner deny the City's Motion to Dismiss.

II. ARGUMENT AND LEGAL AUTHORITY

The City's motion to dismiss should be denied because the City is relying on criteria other than that provided by the Seattle Municipal Code. The City's interpretation of the its SEPA regulations is erroneous, and the related Revised Code of Washington and Washington Administrative Code cited in its motion to dismiss is inapplicable or misapplied as the case may be.

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1. Standing. The criteria for standing to appeal is established in SMC 25.05.680.B.1 as"any interested person" as provided in this subsection." The definition of "interested person" is provided in SMC 25.05.755 is: "Interested person" means any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before an agency, and shall include any party in a contested case.

   This is the sole criteria provided in the relevant city code for standing.
2. The City's references to WAC 197-11-455 and WAC 197-11-502, and similar provisions in SMC 20.25.545.B are irrelevant. The City's claim that the Seattle Municipal Code requires an appellant to comment on an environmental document in order to appeal that document was previously raised and denied by the Hearing Examiner in Case W-14-001 and W-16-003. The conclusion of the hearing examiner in the referenced cases, a copy of the Order on Motion to Dismiss for each case is attached and included herein as Exhibit A, is that an appellant is not legally required under the Seattle Municipal Code to comment in an environmental review process in order to have standing to appeal an SEPA/environmental review/document/decision:

Case W-14-001 Excerpt from *Order on Motion to Dismiss* dated September 2, 2014:

"The language of 25.05.545.A is very different from that in subsection B. Subsection A refers specifically to consulted agencies who fail to comment on a draft EIS, and it plainly states that these agencies are 'barred from alleging defects' in the final EIS. But subsection B only states that the lack of comments on environmental document is to be construed as a "lack of objection to the analysis. This phrase is general and nature, and could be interpreted to mean that an agency may move forward by issuing its environmental analysis. Presumably if the drafters had intended to bar the public and non-consulted agencies from appealing a DNS they would have used the same language as appears in subsection A, but that language is absent." (Paragraph 1, Page 3)

"…the City's SEPA Code adds language to that found in WAC 19-11-545(2). SMC 20.05.545B includes a statement that appeals to the Hearing Examiner are consider de novo, and the only limitation on appeal issues is that they are limited to those cited in the notice of appeal." (Paragraph 4, Page 3)

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"Furthermore, the notion the public must provide comments before appealing a DNS, is at odds with the fact that the Code allows appeals to raise issues that were never identified during the comment period…[r]equiring all appellants to have submitted public comments would serve little purpose (at least in terms of early notice to DPD of environmental concerns), since the Code does not limit the appeal issues to those identified in public comments. Thus, no frustration of SEPA's purposes occurs by allowing appeals to be filed by those who did not submit public comments.

"SMC 25.05.545 does not require that a member of the public comment on a DNS in order to appeal that DNS. The motion is therefore denied." (Paragraph 4, Page 3 and Paragraph 1) Page)

Case W-16-003 Excerpt from *Order on Motion to Dismiss* dated July 29, 2016:

"…WAC 197-11-545 and SMC 25.05.545 have been considered in previous cases before the Hearing Examiner. SMC 25.05.545 addresses the effect of no comment by consulted agencies, other agencies and the public. Under SMC 25.05.545.A, a 'consulted agency' which fails to submit 'substantive information' to a lead agency in response to a draft EIS is 'barred from alleging any defects in the lead agency's compliance' with Subchapter VI of Chapter 25.05 SMC. SMC 25.05.545.B refers to 'lack of comment by other agencies or members of the public on environmental documents,' and says that the lack of comment may be 'construed as lack of objection to the environmental.' No bar on appeals is mentioned; indeed, the subsection goes on to state that appeals to the Hearing Examiner are de novo and that the only limitation is that the issues on appeal are those cited in the notice of appeal…SMC 25.05.545 does not require a member of the public to comment on a DEIS [or Determination of non-significance] before he or she may appeal…" (Paragraph 3, Page 1)

3. Chapter and verse the City's motion for dismissal herein parrots almost word for word and cites all of the losing arguments and citations that it first put forth in 2014 (W-14-001), and again in 2016 (W-16-003), claiming that unless a person or organization comments in a City of Seattle environmental matter process under SMC 25.05, then they have no standing rights in a subsequent appeal or even a state court judicial review. The City has again cited the following cases and hearing board forums and even and academic treatise now a third time. Despite being disavowed of the case they are trying to make,

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having adverse rulings by the hearing examiner in now two cases, they are introducing the same arguments, cases, and hearing forums as being guiding, dicta for the City's proposition related to standing in this matter. To each citation listed by the City in the matter, the Hearing Examiner previously responded to their inapplicability in an attempt to dismiss an appellant on the basis of failing to comment as follows, in re:

a) *Kitsap County v. State Department of Resources, "*That case involved a consulted agency which failed to comment on a draft EIS, and was therefore barred from the appealing the FEIS, pursuant to WAC 1970110545(1). The decision did not address whether a member of the public should be barred from an administrative appeal of a DNS for lack of comment during the comment period."[1]

*b) Spokane Rock Products v. Spokane County Air Pollution Control Board "*In the cited PCHB case, *Spokane Rock Products v. Spokane County Air Pollution Control Authority*, PCHB 05-127, the Board determined that Appellants lacked standing to challenge an MDNS. The PCHB noted that the Appellants had filed their comments not only after the end of the comment period, but after a permit was issued by the lead agency, and the Board noted that exhaustion of local Administrative remedies was required prior to bringing a procedural SEPA claim to the Board; PCHB 05-127 Order at page 9."[2] Likewise, the City's reliance upon *Pacificorp v. City of Walla Walla* before the Washington Pollution Control Board is not guiding either as it relies upon *Spokane Rock Products.*

c) *Brown v. Snohomish County* Shoreline Hearing Board, "In *Brown v. Snohomish County*, SHB 06-035, the SHB dismissed Appellant's SEPA appeal for lack of standing, where the Appellant indicated that he was actually challenging a shoreline decision, not a SEPA decision; the SHB also cited Spokane Rock, and noted that the Appellant had failed to show that he had commented during the SEPA comment period."[3]

[1] Watanabe, Anne. "W-14-001 Order on Motion to Dismiss". City of Seattle, Office of Hearing Examiner. September 2, 2014. https://web6.seattle.gov/Examiner/case/document/3004
[2] Ibid.
[3] Ibid.

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d) R. L. Settle, The *Washington State Environmental Policy Act*. "DPD also cites a treatise, Settle, The Washington State Environmental Policy Act, and its reference to a 1991 Hearing Examiner decision, in support of its motion. The SeSettle treatise refers to In the Matter of the Institute for Transportation and the Environment, MUP-91-079(W), in which the Hearing Examiner dismissed a challenge to an EIS, and referred to the Appellant's failure to comment. That decision is not controlling, and it is not clear from the filings that the analysis there is relevant in this DNS appeal; the Settle treatise also merely comments that failure to comment may preclude administrative appeal."[4]

e) *Lowen Limited Family Partnership v. City of Seattle* Washington Central Puget Sound Growth Management Hearing's Board the situation and the response to the proposition that it is guiding is the same as all of the other boards the City invoked to support its failure to comment. As Hearing Examiner Watanabe noted in 2014 and in 2016, "Those divisions are not binding on the Hearing Examiner, but in any event, the analyses in the cited decisions turn on facts and a SEPA administrative appeal framework not present here."[5]

4. In regards to the City's reference to the appellants and MUP-18-019, the appeal was not rejected. The findings and decision in the matter affirmed the City's decision related to its MUP, that it had not made it in error – a far different outcome than that claimed by the City in its motion to dismiss in this matter – that the appellant's appeal had been rejected by the hearing examiner. Not only was the appeal accepted, the appellants had standing, the case was prosecuted, and accordingly a decision made therein.[6]

5. Note for the Record: Contrary to the City's claims that it published its notice of decision for the DNS in the Daily Journal of Commerce, Appellants can find no evidence that occurred.

III. CONCLUSION

Appellants request that the Hearing Examiner deny the City's Motion to Dismiss.

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[4] Ibid.
[5] Ibid.
[6] Vancil, Ryan. "MUP-18-019 (TU, W): Findings and Decision". City of Seattle, Office of Hearing Examiner. November 22, 2018. https://web6.seattle.gov/Examiner/case/document/11288

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Dated this 7th day of October 2019.

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CERTIFICATE OF SERVICE

I certify that on this date, a copy of APPELLANT'S OPPOSITION TO CITY's MOTION TO DISMISS was sent via email and U.S. First Class Mail to the following:

Respondent	***Respondent Legal Assistant***
City of Seattle Dan Mitchell, WSBA #38341 Assistant City Attorney Seattle City Attorney's Office 701 Fifth Ave., Suite 2050 Seattle, WA 98104-7097 Ph: (206) 684-8200 Fax: (206) 684-8284 Email: daniel.mitchell@seattle.gov	Legal Assistant to Daniel B. Mitchell & Patrick Downs, Land Use Section Seattle City Attorney's Office Civil Division 701 Fifth Avenue, Suite 2050 Seattle, WA 98104-7095 Phone: 206-684-8247 FAX: 206-684-8284 alicia.reise@seattle.gov

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

Dated this 7th day of October 2019, at Seattle, Washington.

/s/ Elizabeth A. Campbell
ELIZABETH A. CAMPBELL

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EXHIBIT A

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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of **W-14-001**

SMART GROWTH SEATTLE

From a SEPA Determination by the Director,
Department of Planning and Development

ORDER ON MOTION TO DISMISS

The Department of Planning and Development (DPD) filed a motion to dismiss this appeal on the grounds that the Appellant Smart Growth Seattle (Smart Growth) failed to submit comments on the Determination of Non-Significance (DNS) during the public comment period. Smart Growth filed its Opposition to DPD's Motion to Dismiss on August 15, 2014. DPD filed a Reply on August 21, 2014. Having reviewed the filings in this matter, the Hearing Examiner enters the following order, and denies the motion.

1. On May 29, 2014, DPD issued a DNS for a proposal to amend the Land Use Code. On that day, DPD also published a Notice of Environmental Determination stating that DPD had issued the DNS, and that comments regarding the DNS or potential environmental impacts could be submitted through June 12, 2014. Between May 29, 2014 and June 12, 2014, DPD received no comments which identified the commenters as being members of Smart Growth or representing Smart Growth. However, a letter was submitted by Bruce Harris to DPD on June 16, 2014, which is shown in the filings. A letter dated January 15, 2014, was sent by Smart Growth to City Councilmember O'Brien, and is also shown in the filings.

DPD's motion asserts that SMC 25.05.545 and WAC 197-11-545 require the appeal to be dismissed for failure to submit public comments during the SEPA comment period.

SMC 25.05.545 states:

> *Effect of no comment.*
> *A. Consulted Agencies. If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with Subchapter IV of these rules.*
>
> *B. Other Agencies and the Public. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the*

environmental analysis, if the requirements of Section 25.05.510 (public notice) are met. Other agencies and the public shall comment in the manner specified in Section 25.05.550. Each commenting citizen need not raise all possible issues independently. Appeals to the Hearing Examiner are considered de novo; the only limitation is that the issues on appeal shall be limited to those cited in the notice of appeal. (See Section 25.05.680 B3.)

WAC 197-11-545 states:

Effect of no comment.
(1) Consulted agencies. If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with Part Four of these rules.
(2) Other agencies and the public. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of WAC 197-11-510 are met.

Whether Smart Growth failed to comment on the DNS.
Smart Growth asserts that it filed SEPA comments, and therefore there has not been a "lack of comment" within the meaning of SMC 25.05.545.B. Smart Growth points to its the January 2014 letter to Councilmember O'Brien, and the June 16, 2014 letter from Mr. Harris to DPD, as constituting SEPA comments. DPD argues that these communications do not constitute comments "by members of the public on environmental documents, within the time periods specified by these rules" under SMC 25.05.545.B. The January 2014 letter was not made within the time period for SEPA comments; the June 16 letter does not mention Smart Growth or SEPA, and there is nothing on the face of the letter or even Mr. Harris's Declaration to show that he was actually a member of Smart Growth at the time he wrote the letter. It appears from the filings, that Smart Growth therefore did not file comments within "the time periods specified." Nevertheless, as noted below, this is not a bar to its appeal.

The effect of "no comment."
DPD argues that Smart Growth is barred from this appeal for failure to submit comments during the SEPA comment period. WAC 197-11-545(1) and SMC 25.05.545.A specify that *"any consulted agency"* which fails to submit substantive information to a lead agency on a draft EIS is "thereafter barred from alleging any defects" in the EIS. But that language is absent from the next subsection regarding other agencies and the public. Instead, the lack of comment by the public is to be construed as "lack of objection to the environmental analysis." The question is whether this phrase means that a member of the public who fails to comment during the SEPA comment period is barred from appealing a DNS.

The language of 25.05.545.A is very different from that in subsection B. Subsection A refers specifically to consulted agencies who fail to comment on a draft EIS, and it plainly states that these agencies are "barred from alleging defects" in the final EIS. But subsection B only states that the lack of comments on environmental documents is to be construed as a "lack of objection" to the analysis. This phrase is general in nature, and could be interpreted to mean that an agency may move forward by issuing its environmental analysis. Presumably if the drafters had intended to bar the public and non-consulted agencies from appealing a DNS, they would have used the same language as appears in subsection A, but that language is absent.

However, in support of its argument, DPD cites *Kitsap County v. State Department of Natural Resources*, 99 Wn.2d 386, 622 P.2d 381 (1983). That case involved a consulted agency which failed to comment on a draft EIS, and was therefore barred from the appealing the FEIS, pursuant to WAC 197-11-545(1). The decision did not address whether a member of the public should be barred from an administrative appeal of a DNS for lack of comment during the comment period. DPD also cites a treatise, Settle, The Washington State Environmental Policy Act, and its reference to a 1991 Hearing Examiner decision, in support of its motion. The Settle treatise refers to *In the Matter of the Institute for Transportation and the Environment*, MUP-91-079(W), in which the Hearing Examiner dismissed a challenge to an EIS, and referred to the Appellant's failure to comment. That decision is not controlling, and it is not clear from the filings that the analysis there is relevant in this DNS appeal; the Settle treatise also merely comments that failure to comment may preclude administrative appeal.

DPD also cites decisions of the State Pollution Control Hearings Board (PCHB) and the Shoreline Hearings Board (SHB) construing WAC 197-11-545. Those decisions are not binding on the Hearing Examiner, but in any event, the analyses in the cited decisions turn on facts and a SEPA administrative appeal framework not present here. In the cited PCHB case, *Spokane Rock Products v. Spokane County Air Pollution Control Authority*, PCHB 05-127, the Board determined that Appellants lacked standing to challenge an MDNS. The PCHB noted that the Appellants had filed their comments not only after the end of the comment period, but after a permit was issued by the lead agency, and the Board construed this action as a failure to exhaust available administrative remedies. The Board noted that exhaustion of local administrative remedies was required prior to bringing a procedural SEPA claim to the Board; PCHB 05-127 Order at page 9. In *Brown v. Snohomish County*, SHB 06-035, the SHB dismissed Appellant's SEPA appeal for lack of standing, where the Appellant indicated that he was actually challenging a shoreline decision, not a SEPA decision; the SHB also cited *Spokane Rock*, and noted that the Appellant had failed to show that he had commented during the SEPA comment period.

In contrast to the timeframes and administrative appeal framework presented in the above state board decisions, the City's SEPA Code adds language to that found in WAC 197-11-545(2). SMC 25.05.545.B includes a statement that appeals to the Hearing Examiner are considered de novo, and that the only limitation on appeal issues is that they are limited to those cited in the notice of appeal. The state Board decisions were concerned with appellants' failure to exhaust administrative remedies, but no such concern is presented here. By appealing to the Hearing Examiner, an appellant exhausts the available administrative remedy, and it is the Hearing Examiner's decision, not DPD's, which is the final City SEPA decision. Thus, unlike the situation before the Board in *Spokane Rock*, the decision maker for the underlying proposal

(here, the City Council) will not be deprived of the opportunity to review potential environmental concerns before making its decision. Furthermore, the notion the public must provide comments before appealing a DNS, is at odds with the fact that the Code allows appeals to raise issues that were never identified during the comment period. A citizen may, e.g., comment on water quality impacts during the comment period, but is allowed to raise completely different issues in a subsequent appeal of the DNS. Requiring all appellants to have submitted public comments would therefore serve little purpose (at least in terms of early notice to DPD of environmental concerns), since the Code does not limit the appeal issues to those identified in public comments. Thus, no frustration of SEPA's purposes occurs by allowing appeals to be filed by those who did not submit public comments.

SMC 25.05.545 does not require that a member of the public comment on a DNS in order to appeal that DNS. The motion is therefore denied.

Entered this 2nd day of September, 2014.

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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

CITIZENS FOR LIVABILITY IN BALLARD

From a Determination of Adequacy by the Director,
Seattle Department of Construction and Inspections

Hearing Examiner File:
W-16-003

ORDER ON MOTION TO DISMISS

1. The Office of Planning and Community Development[1] filed a motion to dismiss the above-referenced appeal on July 7, 2016. The Appellant, Citizens for Livability in Ballard (Citizens), filed a response on July 19, 2016. OPCD filed a reply on July 22, 2016. Hearing Examiner Rule 3.02(a) allows for dismissal of an appeal without a hearing if it *"fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay."*

2. OPCD's motion to dismiss asserts that Citizens' appeal should be dismissed because (1) Citizens failed to comment on the DEIS; (2) Citizens fails to allege injury-in-fact necessary to confer SEPA standing; and (3) various issues raised in the appeal are beyond the Hearing Examiner's jurisdiction.

3. OPCD argues that under WAC 197-11-545, Citizens' failure to comment on the DEIS means that Citizens has waived its right to appeal the FEIS. It is not disputed that Citizens as an organization did not submit comments on the DEIS. It is also not disputed that Steve Cohn, one of Citizens' members, did submit a timely written comment on the DEIS. As both parties note, WAC 197-11-545 and SMC 25.05.545 have been considered in previous cases before the Hearing Examiner. SMC 25.05.545 addresses the effect of no comment by consulted agencies, other agencies and the public. Under SMC 25.05.545.A, a "consulted agency" which fails to submit "substantive information" to a lead agency in response to a draft EIS is "barred from alleging any defects in the lead agency's compliance" with Subchapter VI of Chapter 25.05 SMC. SMC 25.05.545.B refers to "lack of comment by other agencies or members of the public on environmental documents," and says that the lack of comment may be "construed as lack of objection to the environmental analysis." No bar on appeals is mentioned; indeed, the subsection goes on to state that appeals to the Hearing Examiner are de novo and that the only limitation is that the issues on appeal are those cited in the notice of appeal. Even if it were assumed that Mr. Cohn's earlier comment could not be attributed to Citizens, SMC 25.05.545 does not require a member of the public to comment on a DEIS before he or she may appeal the FEIS.

[1] The Determination of Adequacy which is the subject of this appeal was issued by the Department of Construction and Inspections. The Final EIS was issued by Office of Planning and Community Development (OPCD), which appeared at the prehearing conference and is acting as the respondent in this matter.

4. OPCD also argues that Citizens has failed to demonstrate an injury in fact. The two-part test for standing to challenge actions under SEPA provides that: (1) the interest sought to be protected must fall within the zone of interests protected by SEPA; and (2) the party must allege an injury in fact. *Lands Council v. Washington State Parks Recreation Com'n*, 176 Wash. App. 787, 799, 309 P.3d 734, 740 (2013), citing *Kucera v. State Dep't of Transportation*, 140 Wash.2d 200, 212, 995 P.2d 63 (2000). To show an injury in fact, a petitioner must demonstrate that he or she will be adversely affected by the decision; if an injury is merely conjectural or hypothetical, there can be no standing. *Trepanier v. City of Everett*, 64 Wash.App. 380, 383, 824 P.2d 524, 526 (1992), *rev. denied*, 119 Wash.2d 1012 (1992). The injury in fact element is satisfied when a plaintiff alleges the challenged action will cause specific and perceptible harm; *Kucera* at 213. In *Leavitt v. Jefferson County*, 74 Wash.App. 668, 875 P.2d 681 (1994), a property owner's claim that impacts were "possible, not necessary, impacts of the Board's adoption of the Code" was deemed sufficient to establish standing; 74 Wash.App. at 679. By contrast, in *Trepanier,* the Court noted that the petitioner had failed to present any evidentiary facts to show that he would be injured by a new zoning code. The only injury alleged was that the new code would reduce allowable densities and development potential within the City of Everett and that this would in turn transfer growth to unincorporated Snohomish County and cause serious adverse impacts; but there was no factual support in the record to support this assertion. *Id.* at 384.

5. In response to the motion, Citizens has submitted declarations from its members, stating that they reside and own property in Ballard; two of the three members own property in or near an area mapped for inclusion in an expanded Crown Hill Residential Urban Village and the Ballard Hub Urban Village. The declarants state that they will be affected by increased traffic and congestion, loss of parking, impacts to parks and public schools, and pollution which will result, directly or indirectly, from the proposal's impacts which are not adequately analyzed by the FEIS.

6. OPCD argues that Citizens has not identified concrete and specific injuries, and that the claimed impacts are speculative and conjectural. The proposed Comprehensive Plan amendments appear to rely largely on future actions, e.g. enactment of development standards, to have any effect. However, Citizens has identified plan amendments that they claim have impacts that are not adequately analyzed in the FEIS, and which would cause direct injury to themselves as homeowners and residents of Ballard; Citizens Response at page 5. OPCD's reply argues that the identified changes to the parking policies make no "net" change to the existing policies, but this is disputed by Citizens and goes to the merits of the appeal rather than whether Citizens has adequately pled injury. Citizens has made a sufficient showing of injury in fact to be granted standing.

7. OPCD also moved to dismiss claims presented in Paragraph E of the Appeal Statement (page 15). Those claims argue that the EIS "deprives the appellant, and the general public, of due process, substantive due process and the rights recognized in 43.21C.020" and that EIS "abrogates the applicant's and the public's right to participation" under RCW 36.70A.070. Paragraph E does not state a claim for which the Hearing Examiner has jurisdiction to grant relief. The Hearing Examiner does not have authority to review Citizens' claims that its constitutional rights have been violated, or that public participation required by RCW 36.70A.070 has not occurred. These claims are dismissed.

8. OPCD's motion also asserts that the appeal improperly attempts to challenge the DEIS. The appeal is from the determination of adequacy for the FEIS; that is the only decision before the Hearing Examiner. The FEIS of course references the analyses and other content in the DEIS, and it is assumed that the appeal statement's references to the DEIS reflect this fact, rather than an attempt to appeal the adequacy of DEIS as a separate appeal.

9. The motion also seeks dismissal of Paragraph D in the appeal statement, on the grounds that this would represent an untimely challenge to the screenline methodology used by the City in its existing Comprehensive Plan. But the appeal does not challenge the existing Comprehensive Plan's reliance on this methodology; it instead argues that the FEIS is inadequate because this method by itself does not accurately measure congestion impacts. The motion is therefore denied as to Paragraph D.

10. As noted above, the motion is granted as to Paragraph E of the appeal, but otherwise denied.

Entered this 29th day of July, 2016.

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