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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In Re: Appeal by) NO: W-19-006
)
SAFE AND AFFORDABLE SEATTLE;)
)
MAGNOLIA NEIGHBORHOD PLANNING) CITY'S REPLY
GROUP;)
)
ELIZABETH CAMPBELL)
)
)
of a determination of non-significance of)
amendments by the City of Seattle.)
)
_____)

I. ARGUMENT

A. The Appellants failure to comment is a failure to exhaust their administrative remedies beyond that of a SEPA appeal.

Parties appealing a SEPA DNS are required by WAC 197-11-545(2) and SMC 25.05.545.B to have fully exhausted their administrative remedies before raising an appeal. Failure to do so bars their appeal of a DNS.

Ms. Campbell incorrectly asserts that public comment during SEPA comment period is not an available administrative remedy. In *Your Snoqualmie Valley v. Snoqualmie*, the Central Puget Sound Growth Management Hearings Board (GMHB) determined that a challenge to a

1 DNS is barred for failure to comment during the specified SEPA comment period.¹ That board
2 determined that the SEPA comment provisions of WAC 197-11-545(2) are a major component
3 of available administrative remedies to be exhausted, as “public comment is a citizen’s primary
4 access to the administrative process, [and] appropriate issues must first be raised before the
5 agency.”² The board explained that “participation and objection to the environmental analysis is
6 therefore a prerequisite to a petition for review of agency SEPA compliance.”³

7 In *Shoreline v. Snohomish*, GMHB interpreted WAC 197-11-545(2) to require exhaustion
8 of administrative remedies before appeal of a DNS.⁴ That board determined that “commenting
9 through the environmental review process are in some circumstances the only administrative
10 remedy available to a party and thus are the forums in which exhaustion of remedies must occur
11 for the party to later make a claim.”⁵

12 Here, the Appellants had opportunity and awareness of the comment period for the DNS,
13 and failed to comment,⁶ precluding their right to appeal under WAC 197-11-545(2) and SMC
14 25.05.545.B.⁷ The Appellants lack of comment during the SEPA review process is their failure to
15 exhaust available administrative remedy and bars them from appealing a SEPA determination.⁸

16 In *Shoreline v. Snohomish*, the board cited *Citizens v. Mount Vernon*. In *Mount Vernon*,
17 the State Supreme Court determined that providing comment is a critical component of an
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20 ¹ *Your Snoqualmie Valley, et al. v. City of Snoqualmie, et al.*, 2012 WL 2190610
(Wash.Central.Puget.Sd.Growth.Mgmt.Hrgs.Bd.).

21 ² *Your Snoqualmie v. Snoqualmie* at 9.

22 ³ *Id.* at 8.

23 ⁴ *City of Shoreline, Town of Woodway, and Save Richmond Beach, et al., v. Snohomish County and BSRE Point Wells, LLC*, 2011 WL 7881226, at 2-3.

⁵ *Id.* citing *Citizens v. Mount Vernon*, 133 Wn.2d at 869.

⁶ Declaration of Ketil Freeman, Exhibit 6.

⁷ *Shoreline v. Snohomish*, 2011 WL 7881226, at 4.

⁸ *Id.*

1 available administrative remedy and failure to do so will bar an appeal.⁹ Echoing *Mount Vernon*,
2 in *Thun v. Bonney Lake* the Court of Appeals found that the landowners failure to exhaust their
3 administrative remedy will bar their appeal.¹⁰ *Mount Vernon* identifies that in land use decisions,
4 an available administrative remedy for citizens is a public hearing, and *Your Snoqualmie*
5 analogizes and extends that requirement to a SEPA review comment period.¹¹

6 *Your Snoqualmie* also cites to *Mount Vernon*, stating that the comment need not be
7 “technical, legal arguments with the specificity and to the satisfaction of a trained land use
8 attorney.”¹² Nevertheless commenting is required. The State Supreme Court determined that the
9 issues raised during the comment period and the issues on appeal need not be related, meaning
10 that requiring comment during the SEPA comment period before allowing an appeal does not
11 stand at odds with the code allowing new issues on appeal:¹³

12 [Raising an issue] must be more than simply a hint or a slight reference to the
13 issue in the record. [But where] citizens participated in all aspects of the
14 administrative process and raised the appropriate project approval issues,
15 individual citizens did not have to raise technical, legal arguments with the
16 specificity and to the satisfaction of a trained land use attorney during a public
17 hearing.¹⁴

18 *Mount Vernon* addresses the determination by the Examiner in W-14-001 that allowing
19 appeals to raise issues not identified in the comment period obviates the need to comment during
20 the SEPA comment period in order to file a SEPA appeal.¹⁵ The Examiner’s determination was
21 incorrect.

22 ⁹ *Citizens v. Mount Vernon*, 133 Wn.2d at 869.

23 ¹⁰ *Thun v. City of Bonney Lake*, 164 Wash.App 755 at 214.

¹¹ *Citizens v. Mount Vernon* at 869, *Your Snoqualmie v. Snoqualmie* at 8.

¹² *Your Snoqualmie v. Snoqualmie*, citing *Citizens v. Mount Vernon*, 133 Wn.2d at 869-870.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Appellant’s Opposition at 3, citing Case W-16-001.

1 Although Ms. Campbell asserts *Spokane Rock* is insufficient authority standing alone,¹⁶
2 *Snohomish Cty Farm Bureau v. Wash. Dep't of Trans. & Wash. Dep't of Fish and Wildlife*
3 affirms *Spokane Rock's* decision that the member of the public's failure to comment during the
4 SEPA review process will prevent them from raising appeal following a DNS.¹⁷ The Pollution
5 Control Hearings Board in *Snohomish Cty Farm Bureau* concluded that WAC 197-11-545(2)
6 considers the comment period closing without comment from the Appellants to bar appeal—the
7 comment period itself comprising an important element of the administrative remedies available
8 to the general public. Specifically, they note that:

9 The appellants in the present case also failed to comment to the lead agency
10 during the designated SEPA comment period. Under the Board's analysis in
11 *Spokane Rock* this oversight prevents them from bringing SEPA issues before the
12 Board in this appeal. The appellants failed to exhaust administrative remedies and
13 lack standing to contest the environmental review and DNS.¹⁸

14 Further undercutting the W-14-001 decision, *Snohomish Farm Bureau* addresses the
15 timing issue that Deputy Hearing Examiner cited; “While the timing issues are different
16 between this case and the *Spokane Rock* case, the basic principle is equally applicable.”¹⁹ This is
17 to say that unlike W-14-001 and W-16-003, where the Examiner erroneously determined those
18 appellants adequately exhausted their administrative remedies, the Appellants here have not
19 done so.²⁰ Their failure to exhaust their administrative remedies bars them from appeal.

20 Commenting on a DNS is an administrative remedy; failure to comment is a failure to
21 exhaust available remedies; failure to exhaust available remedies will bar an appeal. Under the

22 ¹⁶ Appellant's Opposition at 4.

23 ¹⁷ *Snohomish County Farm Bureau, Washington Waterfowl Association, and Camano Water Systems Association v. State of Washington Department of Transportation and State of Washington Department of Fish and Wildlife*, 2011 WL 4469763, at 6.

¹⁸ *Snohomish Cty Farm v. Wash. Dep't of Transp.* at 7.

¹⁹ *Id.* at 6.

²⁰ *Citizens v. Mount Vernon*, 133 Wn.2d 869-870.

1 weight of authority cited here, the Appellants failure to comment and exhaust their
2 administrative remedy bars them from appealing the DNS.

3 **B. It is irrelevant that the WAC and SMC contain different language.**

4 The Examiner should consider the plain language of the code. In W-14-001, the
5 Examiner correctly identifies that the language of SMC 25.05.545.A is different than B.²¹

6 The language differs between subsections to address different categories of commenters
7 to a DNS; consulted agencies on the one hand, and everyone else including the general public on
8 the other hand.²² *Mount Vernon* identifies that as it pertains to commenting before appeal, the
9 standard for consulted agencies is higher than the standard for non-consulting agencies and the
10 public.²³

11 However, the Examiner erroneously uses the differing language to conclude that the
12 drafters intended to allow appeal by the public after failing to comment.²⁴ In *Your Snoqualmie*,
13 the board correctly identifies that the responsibilities of commenting as a consulted agency differ
14 from that of the general public; citing *Mount Vernon*, the board determines that while a citizen's
15 SEPA comment need not include all legal issues to be raised in a potential appeal, the citizen
16 must comment during the comment period to avoid their appeal being barred.²⁵

17 The Examiner should not read additional language into the statute.²⁶ Numerous
18 examinations of WAC 197-11-545(2) have identified that "members of the public" were
19 specifically identified in the code as needing to comment in order to register an objection to the
20

21 ²¹ Appellant's Opposition at 2.

22 ²² SMC 25.05.545.

23 ²³ *Citizens v. Mount Vernon* at 869-870.

24 Appellant's Opposition at 2.

25 *Your Snoqualmie v. Snoqualmie* at 9, citing *Mount Vernon*.

26 *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec. Contractors Ass'n v. Riverland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)).

1 DNS,²⁷ and failing to comment is sufficient to bar an appeal of that DNS.²⁸ The theory that
2 additional language in the SMC subsection B somehow undermines the requirements for the
3 public to register comment is not backed by law, as the State Supreme Court in *Mount Vernon*
4 illustrated—that the Examiner hears appeals de novo with no limitation on issues named in the
5 comment is of no consequence when there was no comment at all.²⁹

6 II. CONCLUSION

7 *Your Snoqualmie* and *Shoreline v. Snohomish* cite the Supreme Court’s determination in
8 *Mount Vernon* that failure to comment during the comment period of SEPA environmental
9 review is a failure to exhaust an administrative remedy and bars appeal.³⁰ The weight of
10 authority supports that a lack of comment on a DNS will result in being barred from appeal. The
11 Examiner should dismiss the appeal for lack of comment by the appellants during the specified
12 comment period.

13 DATED this 10th day of October 2019.

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22 ²⁷ *Brown v. Snohomish, Spokane Rock v. Spokane County Air Pollution Control Authority, Snohomish Farm Bureau*
v. Wash. Dep’t of Transp., Shoreline v. Snohomish, Your Snoqualmie v. Snoqualmie.

23 ²⁸ *Your Snoqualmie* at 9, citing *Mount Vernon*.

²⁹ *Id.*

³⁰ *Your Snoqualmie, Shoreline v. Snohomish* citing *Mount Vernon*.

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the City’s Reply with the Seattle
3 Hearing Examiner using its e-filing system.

4 I also certify that on this date, a copy of the same document was served on the following
5 party listed below via email:

6 Elizabeth A. Campbell
7 neighborhoodwarrior@gmail.com
8 *Authorized Representative for Appellants*

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

10 Dated this 10th day of October 2019, at Seattle, Washington.

11 *s/Alicia Reise*
12 ALICIA REISE, Legal Assistant