BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner File: **W-19-006**
SAFE AND AFFORDABLE SEATTLE, ET AL.,	Department Reference: 001456-19PN
from a Determination of Non- Significance issued by the Seattle City Council	**ORDER ON MOTION TO DISMISS**

On October 1, 2019, the Seattle City Council ("City") filed a motion to dismiss this appeal. The Appellants, Safe and Affordable Seattle, Magnolia Neighborhood Planning Council, and Elizabeth Campbell (collectively "Appellants"), filed its response to the motion on October 8, 2019. The City filed a reply on October 10, 2019. The Deputy Hearing Examiner ("Examiner") has reviewed the motion, response, and reply along with all supporting documents.

Background

On August 7, 2019, the City issued a Determination of Non-significance ("DNS") under the State Environmental Policy Act ("SEPA") for a nonproject legislative action. The proposal would amend sections of the Seattle Municipal Code for the following purposes:

(1) To provide that transitional encampments for homeless individuals are allowed on any property owned or controlled by a religious organization without approval of a permit under the Seattle Land Use Code;
(2) To permit transitional encampments for homeless individuals as an interim use on all public or private property within the City of Seattle;
(3) To increase to 40 the maximum number of authorized interim transitional encampments that are not associated with a religious organization; and,
(4) To provide for renewal of temporary use permits for transitional encampments as a Type 1 decision by the Director of Construction and Inspections.

On August 29, 2019, the Appellants filed their appeal of the DNS. It is undisputed that the Appellants did not comment on the DNS prior to filing the appeal.[1] The City's motion to dismiss argues that since the Appellants did not comment on the DNS during the required filing period, they have not exhausted their administrative remedies and therefore the appeal must be dismissed. The City cites to WAC 197-11-545(2), which states in part that "[l]ack 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 a lack of objection to the environmental analysis."

The Appellants make two arguments. First, they argue that they have standing to appeal, under the criteria established in SMC 25.05.680.B.1. Specifically, the code grants standing to any

[1] *Appellants' Opposition to City's Motion to Dismiss* at 1-5 (October 8, 2019).

"interested person," which is defined by Seattle Municipal Code as "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." Second, the Appellants argue that in two other cases before the Hearing Examiner, the City unsuccessfully moved to dismiss on the same basis. In both cases, the motions were denied on the basis that there is no requirement to comment on a DNS as a prerequisite of filing an appeal.[2]

The City does not challenge the Appellants' status as "interested persons." Instead, they argue that Appellants have waived their right to appeal by failing to exhaust their administrative remedies by commenting on the DNS. The question in this case is whether SMC 25.05.545.B is an administrative remedy that Appellants must exercise as a prerequisite to appeal.

SMC 25.05.545 states:

> Effect of no comment.
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> 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.
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> 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.B.3)

(Emphases added).

SMC 25.05.545 closely tracks the Department of Ecology's Administrative Rules governing SEPA.

> **Effect of no comment.**
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> (1) **Consulted agencies.** If a consulted agency does not respond with written comments within the time periods for commenting on environmental

[2] *In the Matter of the Appeal of Smart Growth Seattle,* W-14-001 Order on Motion to Dismiss (Sept. 2, 2014); *In the Matter of the Appeal of Citizens for Livability in Ballard,* W-16-003 Order on Motion to Dismiss (July 29, 2016).

> 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.
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> (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.

The Seattle counterpart differs from its companion in the state administrative code, WAC 197-11-545(2), in that the Seattle code adds the last three sentences, which are underlined in the text above.

Appellants cite the two cases, decided by the Hearing Examiner, to argue that the addition of those sentences in the local code mean that Appellants are not required to comment on a DNS prior to appealing it. The first case, W-14-001, presents the very same issue presented here. In analyzing the issue, the Examiner first reviewed the language of SMC 25.05.545.A and compared it with SMC 25.05.545.B. The Examiner stated:

> 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.
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> 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. *. . . 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 the language is absent.*

(Emphasis added). After noting the language in SMC 25.05.545.A and .B are different, the Examiner turned to the language in the Seattle Municipal Code, specifically the underlined portion above in SMC 25.05.545.B (which does not appear in the State Administrative Code). She stated:

> 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. . . [T]he 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 in 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 purpose occurs by allowing appeals to be filed by those who did not submit public comments.

She concluded that "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."[3] The second case, *In the Matter of Appeal of Citizens for Livability in Ballard,* reached the same result.

Analysis

This matter is one of interpretation of the code and its companion WAC. The Examiner does not recognize the principle of *stare decisis* (past decisions as precedent), but previous analyses by other Examiners of similar issues are studied and considered.

The primary legislation at issue is SMC 25.05. 545.B. The question is whether it requires an Appellant to have first commented on the DNS prior to filing an appeal. In those cases, the Examiner relied on two different aspects of the code language to answer that question in the negative: 1) a comparison of SMC 25.05.545.B to SMC 25.05.545.A; and 2) a comparison of SMC 25.05.545.B to WAC 197-11-545 (2).

Comparison of SMC 25.05.545.B to SMC 25.05.545.A

Both of these subsections deal with the "effect of no comment." In SMC 25.05.545.A, the code is clear that if a consulting agency fails to submit timely written comments it is "thereafter barred from alleging any defects" in the environmental document. That would presumably mean that if it did not comment, the consulting agency could not "allege defects" in an EIS or other environmental document.

In contrast, SMC 25.05.545.B states that if other agencies (not consulting) and the public fail to timely comment on an environmental document, the lack of comment will be construed as a "lack of objection to the environmental analysis." In *Smart Growth Seattle,* the Examiner found the language of the two sections different enough to find that the drafters intended in subsection (A) to bar appeal but did not do the same in subsection (B).

The undersigned Examiner does not agree with the *Smart Growth Seattle* analysis. Under SEPA, a "consulted agency" is an agency with expertise in a certain subject or policy area that is requested by the lead agency to provide information in the SEPA process.[4] Given that the consulted agency was requested to provide comment, SMC 25.05.545 provides the consulted agency a deadline by which it

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[3] *Id.* at 4; *see also In the Matter of the Appeal of Citizens for Livability in Ballard,* W-16-003, Order on Motion to Dismiss at 1 (July 29, 2016) (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).

[4] SMC 25.05.724; WAC 197-11-724.

is required to comment. Confirming that interpretation, the section also states that "the lead agency may assume that the consulted agency has no information relating to the potential impacts of the proposal as it relates to the consulted agency's jurisdiction or special expertise." The section does not mention anything about appeals.

Subsection B uses different language, stating that a failure to comment is construed as a lack of objection to the environmental analysis. While the language is different, the intent is clear: if another agency or the public fails to comment, the lead agency may assume that entity has no objection to the environmental document. Presumably, if a member of the public had no objection to the environmental analysis, there would be no valid reason to appeal the DNS. In *Smart Growth Seattle,* the intent of that plain language in the code was not considered.

There are good policy reasons for this interpretation. The SEPA process is a series of procedural steps to conduct environmental review of an action, whether it is project or nonproject. It is a prerequisite to undertaking any action. SMC 25.05.545.B establishes a deadline to provide comments and allow the reviewers to consider those comments. Based on comments, the lead agency could withdraw the DNS if the comments lead to significant new information the agency had not considered. In the context of comments to a draft EIS, the comment period allows the lead agency an organized timeline on which to review comments, address them in the FEIS, or change the document in a manner which addresses the comments. Without meaningful deadlines for comment, the process would be chaotic and inefficient, and the purpose of SEPA would be frustrated.[5]

Comparison of SMC 25.05.545.B to WAC 197-11-545(2)

The second part of the analysis in *Smart Growth Seattle* reasoned that since SMC 25.05.545.B allows appellants to raise issues on appeal that were not contained within a comment letter, a comment letter requirement as a prerequisite to appeal would serve "little purpose." The undersigned Examiner reads this section differently.

Analyzing the plain language of Subsection B, there are four principal concepts: 1) a lack of comment by a member of the public is construed as "lack of objection to the environmental analysis;" 2) each "commenting citizen" need not raise all possible issues independently; 3) appeals to the Hearing Examiner are considered de novo; and 4) an appeal is limited to the issues cited in the appeal. It is a rule of statutory construction that all parts of a statute must stand *in pari materia,* or read together to constitute a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains all of the respective parts.[6] The most logical interpretation of all four parts of this subsection is that there is a requirement to comment on issues prior to appealing the environmental document, but a citizen who has commented ("commenting citizen") need not raise all possible issues. Otherwise, if there is no comment, it may be considered by the lead agency as a lack of objection to the environmental analysis.

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[5] *See Kitsap Cy. v. Dept. of Nat. Res.,* 99 Wn.2d 386, 391, 662 P.2d 381 (1983) ("The SEPA guidelines were structured in such a way as to require consulted agencies to participate in the SEPA process at a time when their participation is meaningful and contributes to the environmental assessment a the earliest possible opportunity. Where the objection to an EIS is saved until the parties receive an unfavorable decision, the purposes of SEPA are frustrated.").

[6] *Hallauer v. Spectrum Properties, Inc.,* 143 Wn.2d 126, 146, 18P.3d 540 (2001).

The Examiner's role is to interpret the words written in the code to determine legislative intent. In this instance, giving effect to the words in the SMC 25.05.545.B means that a SEPA appellant is required to exhaust administrative remedies by first commenting on the environmental document. He or she need not raise all the issues through the comment letter, but he or she must be a "commenting citizen."

As noted by the City, this interpretation of the code is also in line with state administrative case law.[7] While not controlling, it is persuasive that state administrative boards with expertise in SEPA, including the Pollution Control Hearings Board, the Shoreline Hearings Board, and the Growth Management Hearings Board, have all reached the conclusion that WAC 197-11-545(2) requires participation and objection to the environmental analysis, as a prerequisite to review of agency SEPA compliance.

Because the Appellants failed to comment, they waived their right to appeal. The City's motion to dismiss is **GRANTED**. The appeal is **DISMISSED**, and the appeal hearing scheduled for December 17, 2019 is **CANCELLED**.

Entered this 24th day of October, 2019.

Barbara Dykes Ehrlichman
Deputy Hearing Examiner

[7] *Your Snoqualmie, et al., v. City of Snoqualmie, et al.,* CPSGMHB Case No. 11-3-0012 at 11 (FDO, May 8, 2012); *Spokane Rock Products, Inc., et al. v. Spokane County Air Pollution Control Auth., et al.,* PCHB No. 05-127 at 10 (Order Granting Summary Judg., Feb. 13, 2006); *Brown v. Snohomish Cy., et al.,* SHB No. 06-035 (Order Granting Summary Judg., May 11, 2007); *Lowen Family Ltd. P'ship. v. City of Seattle,* CPSGMHB Case No. 13-3-0007 at 4 (Order of Dismissal, Sept. 30, 2013); *Pacificorp, et al., v. City of Walla Walla, et al.,* SHB 13-023 at 11 (Order on Motions, Feb. 12, 2014); *Snohomish Cy. Farm Bureau, et al. v. State Dept. of Transp.., et. al,* PCHB Nos. 10-124, 10-135, 10-138, at 7 (Order Granting Partial Summary Judg., Sept. 21, 2011).

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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 **Order on Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matters of **SAFE AND AFFORDABLE SEATTLE, ET AL.**, Hearing Examiner File: **W-19-006**, in the manner indicated.

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Dated: September 13, 2019

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