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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of )  
TreePac Environmental Impact Review ) Hearing Examiner File:  
(TEIR) and Greenwood Exceptional ) **W-21-007**  
Trees (GET) of the November 15, 2021 )  
Determination of Non-Significance by Brennon ) MOTION FOR PARTIAL DISMISSAL  
Staley, Office of Planning and Community ) AND/OR PARTIAL SUMMARY  
Development. ) JUDGMENT

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**I. INTRODUCTION AND RELIEF REQUESTED**

The Seattle Office of Planning and Community Development (“OPCD”) is entitled to dismissal of and/or summary judgment of several of the claims raised in the Notice of Appeal (“Appeal”). The Hearing Examiner should dismiss those claims because they are outside the scope of SEPA review, either because they challenge the wisdom of the underlying proposal instead of the environmental review of the proposal, or because they assert impacts not covered under SEPA or are outside the jurisdiction of the Hearing Examiner.

## II. STATEMENT OF FACTS

### A. Proposal

OPCD proposed amendments to the Seattle land use code intended to encourage the incremental development of more rowhouses and townhouses (“Proposal”).<sup>1</sup>

The Proposal was developed on the recommendations of the Affordable Middle Income Housing Advisory Council to support more “missing middle” housing such as townhouses and rowhouses.<sup>2</sup> Townhouses and rowhouses tend to provide an opportunity for home ownership that is less expensive than detached homes. Id.

The Proposal would modify the density limit that applies to townhomes and rowhouses in Lowrise 1 (LR1) zone. Currently in LR1 zones, townhomes have a density limit of 1 unit per 1,300 square feet and rowhouses do not have any density limit if located on interior lots greater than 3,000 square feet. The Proposal would establish a density limit for both townhouses and rowhouses at 1 unit per 1,150 square feet of lot, a density similar to what is currently achieved when the lot is subdivided. Id.

The amendments to the density limit would continue to allow development consistent with what is already occurring today but would substantially reduce complexity and delay in the permitting process. Id.

The Proposal will also amend bike parking requirements for townhouses and rowhouses to make it easier to accommodate long-term bike parking as well as implement other minor modifications and clarifications pertaining to surface parking. Id.

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<sup>1</sup> The Proposal is City Exhibit No. 2, attached here for convenience as Appendix No. 1.

<sup>2</sup> The Proposal Summary is City Exhibit No. 1, attached here for convenience as Appendix No. 2.

## B. SEPA Environmental Review

OPCD prepared an environmental checklist that considered the environmental impacts of the non-project Proposal.<sup>3</sup>

After a thorough environmental review of the proposal, OPCD's responsible SEPA official issued a Determination of Non-Significance ("DNS"), determining that the non-project action would not have a significant adverse impact on the environment.<sup>4</sup>

### C. SEPA Appeal

TreePac Environmental Impact Review (“TEIR”) and Greenwood Exceptional Trees (“GET”), hereafter referred to together as “Appellant,” filed an appeal (“Appeal”) of the DNS.<sup>5</sup>

This motion (“Motion”) asks the Hearing Examiner to dismiss some of the issues raised in the appeal that are not within the scope of this SEPA or outside the jurisdiction of the Hearing Examiner.

### III. STATEMENT OF ISSUES

Whether the Hearing Examiner should dismiss Appellants' issues that are outside the scope of a SEPA appeal either because: (1) they challenge the wisdom of the Proposal rather than the environmental review of the Proposal, or (2) they assert impacts not covered under SEPA or are outside the scope of the Hearing Examiner's jurisdiction?

#### IV. EVIDENCE RELIED UPON

This Motion relies on the papers and pleadings in this matter, including the Notice of Appeal and its attachments, and the core documents attached as appendices to this Motion.

<sup>3</sup> The environmental checklist is City Exhibit No. 3, attached here for convenience as Appendix No. 3.

<sup>4</sup> The DNS is City Exhibit No. 4, attached here for convenience as Appendix No. 4.

<sup>5</sup> See the Notice of Appeal already on file.

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## V. AUTHORITY

**A. The Examiner may dismiss a claim over which the Examiner lacks jurisdiction or that is without merit on its face and may grant summary judgment as a matter of law.**

Pursuant to HER 3.02(a), “[a]n appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face . . . .” HER 3.02(b) allows any party to request dismissal of all or part of an appeal by motion.

“Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact.” *Appeal of Wallingford Community Council, et al.*, HE File Nos. W-17-006 – W-17-014, Preliminary Order on Prehearing Motions (June 8, 2018, at 2. “A party may move for judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case.” *Id.* (quoting *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70 170 P.3d 10 (2007). “Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact.” *Id.* (citations and quotation marks omitted)(emphasis in original). “The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.” *Id.* (quoting *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 956, 421 P.2d 674 (1966).

1           **B.     Because SEPA is primarily a “procedural statute,” the reviewing body rules**  
2           **only on the adequacy of the analysis and is without jurisdiction to rule on**  
3           **challenges to the wisdom of the proposal.”**

4           In this SEPA appeal, the Examiner and the courts do not “rule on the wisdom of the  
5           proposed development,” but only on whether the environmental review and resulting DNS should  
6           be upheld on appeal. *See Citizens All. To Protect Our Wetlands v. City of Auburn (“CAPOW”),*  
7           126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

8           Appellant’s **Issue E** and **Issue G** should be dismissed as they challenge the wisdom of the  
9           Proposal rather than the adequacy of the environmental review of the Proposal, focusing on policy  
10          objections to OPCDs encouragement of the incremental development of slightly smaller sized  
11          townhomes and rowhouses.

12          In **Issue E.a**, the Appellant complains that the Proposal “does not provide an option to  
13          households seeking appropriately sized and configured dwellings.” Notice of Appeal, page 11, line  
14          3-4.

15          In **Issue E.b.**, the Appellant complains that the Proposal promotes “smaller townhouses  
16          and rowhouses over apartments and cottages” and “is an outright denial of housing to families with  
17          children and to those with disabilities.”

18          In **Issue E.c**, the Appellant complains that “OPCD decision promotes real estate investment  
19          potential and ignores local or Department of Housing and Urban Development (HUD) regulations  
20          and guidance to fair housing within LR1 multifamily zones.” Appellant also complains that  
21          apartment buildings, not townhouses or rowhouses, bring in more money through the Multifamily  
22          Tax Credit, Mandatory Housing Affordability Program, and the Incentive Zoning programs which  
23

1 is irrelevant considering that development of apartment buildings are not achievable in the LR1  
2 zone.

3 In **Issue E.d**, the Appellant complains that “OPCD has deliberately ignored other housing  
4 types available to LR1 zones and published a DNS to promote townhouses which are almost  
5 exclusively three-story walk-up dwellings.” Notice of Appeal, page 12, line 9.

6 **Issue E.e** provides objections to the underlying wisdom of the Proposal in pointing out it  
7 is “contrary to affordable housing needs. . .” Notice of Appeal, page 12, line 11.

8 Finally, **Issue E.f** erroneously asserts that the Proposal is contrary to city goals, specifically  
9 LU 8.7 to encourage multifamily developments with units that have direct access to residential  
10 amenities, such as ground-level open space, to increase their appeal for families with children.

11 Each of these subparts of Issue E focuses not on challenges to the environmental review of  
12 the Proposal, but rather on challenging the underlying wisdom of the Proposal.

13 Likewise, **Issue G** asserts it was an erroneous objective of OPCD to reduce unnecessary  
14 permits. Again, this is a challenge to the underlying wisdom of the Proposal and is not a challenge  
15 to the environmental review of the Proposal.

16 **C. Issue C should be dismissed because it asserts impacts that are not required to**  
17 **be analyzed under SEPA.**

18 The Hearing Examiner has previously held that economic displacement is not required to  
19 be analyzed in an environmental review because it is not identified as an element of the built or  
20 natural environment requiring consideration under SEPA. *Appeal of Wallingford Community*  
21 *Council, et. al.*, HE File Nos. W-17-006 – W-17-014, Revised Findings and Decision (December  
22 6, 2018, at page 32, Conclusion #35).  
23

1 Here, though OPCD is sympathetic to environmental justice issues, Issue 3.a, 3.b, and 3.c  
2 should be dismissed because the impacts asserted (economic displacement/socioeconomic  
3 affordability) are not required to be analyzed in an environmental review because it is not identified  
4 as an element of the environment requiring consideration under SEPA.

5 Also, Issue 3.d should be dismissed because “there is nothing under SEPA that compels  
6 the urban village level of analysis called for by the Appellants.” *Appeal of Wallingford Community*  
7 *Council, et. al.*, HE File Nos. W-17-006 – W-17-014, Revised Findings and Decision (December  
8 6, 2018, at page 25, Conclusion #8).

9 **D. Appellant Issues G, H, and L that challenge the adequacy of existing code**  
10 **provisions or previous legislative actions unrelated to the Proposal are outside**  
11 **the scope of this SEPA appeal and must be dismissed.**

12 The scope of the SEPA appeal of the DNS is limited to challenges regarding the  
13 environmental review of the Proposal. The Notice of Appeal raises challenges to existing code  
14 provisions that must be dismissed as they are outside the jurisdiction of the Hearing Examiner  
15 because they are outside the scope of the SEPA appeal.

16 **Issue G** provides that “OPCD should evaluate the effectiveness of the existing codes to  
17 planning objectives compromised during enforcement.” Notice of Appeal, p. 13, line 13-14. So far  
18 as the Appellant is asserting that OPCD erred when it issued the DNS by not evaluating the  
19 effectiveness of existing codes not amended as part of the Proposal, Issue G should be dismissed.

20 Likewise, **Issue H** should be dismissed because Issue H is not a challenge to the  
21 environmental review of the Proposal. Rather, Issue H challenges existing code provisions related  
22 to short subdivisions, lot boundary adjustments, and unit lot subdivisions and Seattle Department  
23 of Construction and Inspection’s application of them during the permit process. A challenge to the

1 City's interpretation and application of existing code provisions is outside the scope of this SEPA  
2 appeal and must be dismissed.

3 Finally, **Issue L** should be dismissed because the challenge is not to the adequacy of the  
4 environmental review of the current Proposal, but rather is a statement that the cumulative impacts  
5 of the MHA and AADU/DADU legislation from 2019 should be analyzed. These legislative  
6 actions from more than three years ago are unrelated to this Proposal and outside the scope of this  
7 SEPA appeal.

8 As a general proposition, the nature of cumulative impacts is prospective and not  
9 retrospective, to be analyzed when there is some evidence that the project under review will  
10 facilitate future action that will result in future impacts.” *Boehm v. City of Vancouver*, 111 Wn.  
11 App. 713, 720, 47 P.3d 137 (2002).

12 **E. To the extent Issue K asserts error as to the timing of the DNS, that part of**  
13 **Issue K should be dismissed.**

14 Appellant asserts in **Issue K** that “[W]ith haste, OPCD has issued a DNS even before the  
15 City of Seattle has completed updating the City’s Comprehensive Plan.” Notice of Appeal, p. 15,  
16 lines 4-5.

17 The Appellant’s argument fails for two main reasons. First, the City’s ongoing effort to  
18 update the Comprehensive Plan for the next update cycle is unrelated to OPCD’s Proposal. Second,  
19 OPCD fully complied with SEPA’s timing rules.

20 SMC 25.05.055.B provides that the lead agency shall provide its threshold determination  
21 “**at the earliest possible point in the planning and decisionmaking process**, when the principal  
22 features of a proposal and its environmental impacts can be reasonably identified.” (emphasis  
23



1 added). Had OPCD waited for the unrelated comprehensive plan update cycle to complete, it  
2 would have violated the SEPA timing provision in SMC 25.05.055.B.

### 3 **VI. CONCLUSION**

4 The Hearing Examiner should dismiss Issues E and G because they challenge the wisdom of  
5 the Proposal rather than the adequacy of the environmental review. Issue C should be dismissed  
6 because the asserted impacts are not required to be analyzed under SEPA. Further, Issues G, H and  
7 L should be dismissed because they challenge existing code provisions or prior legislative adoptions  
8 that are outside the scope of this SEPA DNS appeal. Finally, to the extent Issue K challenges the  
9 timing of this SEPA decision, Issue K should be dismissed.

10  
11 DATED this 14th day of January, 2022.

12 ANN DAVISON  
13 Seattle City Attorney

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I also certify that on this date, a copy of the same document was sent via email to the following parties:

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DATED this 14<sup>th</sup> day of January 2022, in Puyallup, Washington.

s/ Lisë M.H. Kim  
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