Deputy Hearing Examiner Susan Drummond

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: TreePAC Environmental Impact Review (TEIR) and Greenwood Exceptional Trees (GET) of the November 15, 2021 Determination of Non-Significance by Brennon Staley, Office of Planning and Community Development (OPCD).	Hearing Examiner File: **W-21-007** APPELLANT'S RESPONSE in OPPOSITION to PARTIAL MOTION TO DISMISS and for PARTIAL SUMMARY JUDGEMENT

The appellants TreePAC Environmental Impact Review and Greenwood Exceptional Tree request that the Department's Motion for Partial Dismissal by Summary Judgement is appropriately denied allowing the evidence to be provided during the scheduled February 28 to March 2 proceedings relative to the city-wide appeal matter described in the header. In summary, this response includes several parts:

I. Introduction

II. Issues of the Appeal

III. Authority

IV. Statement of Facts

V. Inadequacy of the Items in the Motion to Dismiss

VI. Inadequacy of the Motion to Summary Judgement.

VII. Requested Relief

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I. INTRODUCTION

The Office of Planning and Community Development (hereafter 'OPCD') has issued a Determination of Non-Significance ("DNS"), noting that the non-project action would not have a significant adverse impact on the environment by claiming that "a thorough environmental review of the proposal" was conducted by the "OPCD's responsible SEPA official". OPCD issued a notice lacking description regarding their proposal on November 15, 2021 within the public bulletin to subscribers. It included a comment period and a deadline to appeal within three-weeks on December 6, 2021[1]. Without a subscription to the bulletin[2], TreePAC Environmental Impact Review and Greenwood Exceptional Tree as well as the vast majority of Seattle residents would have no knowledge of the proposed OCPD townhouse density reform. Even those who do subscribe to the Bulletin would have been unlikely to understand the intent of the OPCD to avoid an environmental impact study on this proposed city-wide land-use action. Being exposed within the recent years to hundreds of large and Exceptional trees being removed with only a very few trees being retained as a consequence of townhouse and rowhouse development, TreePAC Environmental Impact Review and Greenwood Exceptional Tree (hereafter the 'Appellants') submitted a timely appeal with the Seattle Office of the Hearing Examiner. The Notice of Appeal included attachments that conveyed the city-issued context of current and recent townhouse land-use zones limitations within Seattle[3], and the city-issued 2016 Seattle Tree Canopy Assessment as a significant benchmark to the environmental significance of the proposal within low-

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[1] Comment period included 4-day Thanksgiving weekend in the midst of a resurging pandemic.
[2] Each year, the bulletin unsubscribes automatically demoting public access a reoccurring problem.
[3] Exhibit 1 2016 Seattle Tree Canopy Assessment (TreePAC) 12/6/2021
Exhibit 2 - Seattle's LR MF Zones, Jan 2016 12/6/2021 3:18:44 PM
Exhibit 3 - Seattle LR MF Zones, Feb 2020 12/6/2021 3:18:44 PM

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rise multifamily zones. Reference these appeal notice attachments as Exhibits 1, 2 and 3.

Following the pre-hearing the City's Attorney, on behalf of the OPCD, moved for a partial dismissal and partial summary judgement to the Appellant's Notice of Appeal. The four appendixes included with their motion were (1) the 3-page Proposal Summary, (2) the 26-page Draft Legislation, (3) the SEPA Environmental Checklist (21-page template form updated 2014), and (4) Geoffrey Wentlandt's 8-page 'Analysis and Decision of the Director of the Office of Planning and Community Development: 'SEPA Threshold Determination for Townhouse Reforms Legislation' (OPCD Exhibit 4).[4] The author of the summary is not identified; but the other two documents have been prepared by OPCD's Brennon Staley, who is also a Party to the appeal. As published, it is the opinion of these two OPCD staff that this Seattle citywide proposal has been determined to not have a significant adverse impact upon the environment, which assumes that an EIS is not required under RCW 43.21C.030(2)(c).

II. ISSUES

TreePAC Environmental Impact Review (TEIR) and Greenwood Exceptional Trees (GET) jointly appealed the proposed notice for townhouse legislation reform. Of the twelve (12) main issues of the appeal, at least six (6) issues remain as they have not been moved for dismissal by the City Attorney for the Examiner's consideration. Issues A, B, D, F, I and J will be continued into the hearings scheduled between February 28 and March 2, 2022:

A. Increased lot coverage resulting from more unstacked townhouse units.

B. Decreased area for tree canopy.

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[4] City Ex. 01 - Appendix No. 2 - Proposal Summary.pdf
City Ex. 02 - Appendix No. 1 - Draft Legislation.pdf
City Ex. 03 - Appendix No. 3 - SEPA Environmental Checklist.pdf
City Ex. 04 - Appendix No. 4 - SEPA DNS.pdf

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D. Transportation Access

F. Increased city infrastructure demands for stormwater and sanitary

I. Limiting solar access

J. Historic Preservation and Cultural Resources

Thus, the above are nonissues relative to the Department's motion and will not be responded to further until the scheduled hearing.

The appeal item challenged by the City's Motion that the Appellants will not further argue include Issue 'G' and this item may be dismissed:

G. OPCD erroneously advocates reduced review times over the purpose of codes which is the safety and welfare of the occupants and public.

The remaining differences between the Appellants (with prejudice) and the Department (who moved for dismissal without prejudice), are matters of argument between the Appellants and the Department about the relevancy of the appeal items to State environmental policy and Seattle Municipal Code (hereafter "SMC") Title 25. The five (5) remaining issues are C, E, H, K, and L; and these issues are all within the Hearing Examiner's Authority relative to the adequacy of the SEPA DNS decision. With prejudice to the appellant and merit to the extensive appeal document and supporting documents, the scheduled hearings between February 28 and March 2, 2022 cannot be denied by the Department's request for Summary Judgement. These items of argument include:

C. Compounding environmental injustice within Seattle's underserved multifamily neighborhoods[5] ; and

[5] Department's reason for motion to dismiss was stated that environmental injustices within underserved multifamily neighborhoods and access to fair housing are not Environmental Impacts that may be appealed. TreePAC Environmental Impact Review will argue that logic.

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E. Access to diverse and fair housing [6]; and

H. Misrepresenting the intent and purpose and density of townhouse development [7]; and

K. Failure to adequately consider the public interests[8]; and

L. Failure to adequately consider cumulative impacts[9].

III. AUTHORITY

The Seattle Municipal Code SMC 25.05.444 and 25.05.502 identify the elements of the environment which encompasses the argued appeal Items C, E, H, K, and L .

SMC 25.05.444 Section B. Built Environment, Item 2-'Land and shoreline' is the basis for the appeal to the inadequacy of the DNS addressed within appeal item 'C' "Compounding Environmental Injustice within Seattle's underserved multifamily neighborhoods." The scope of this matter includes both (a) Relationship to existing land use plans and to estimated population; and (b) housing. Therefore, this appeal items remains within the authority of the Hearing Examiner relative to the discretionary DNS of the Department. This section of the code also encompasses appeal item 'E'. Access to Diverse and Fair Housing.

In addition, Section B. Built Environment, Item 4.- "Public services and utilities' is the basis for the appeal to the inadequacy of the DNS addressed within item L. (Failure to adequately consider) "L. Cumulative Impacts" of recent townhouse and rowhouse legislative changes implemented by the city recently in Spring 2019. The results of this legislation has very minimally surfaced as constructed projects during the durations to prepare master use and constriction

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[6] Reference the above footnote.

[7] Department erroneously suggesting that the appeal is trying to change the code. In fact, the appeal has specifically identified where and how the Seattle Municipal Code has consistently not been enforced for the Core Document examples.

[8] Department suggested the timing of prior 2019 MHA and ADU decisions and out of date and irrelevant.

[9] Refence the prior footnote.

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permits, construct, and occupy these structures. In fact, several of the OPCD's Core Document examples started their permit applications prior to the MHA legislation which is why the Appellants have requested application information to be added to the Department's Core Document Exhibit 7. The cumulative impacts include evaluation of (a) Fire; (c) Schools; (d) Parks or other recreational facilities; (e) Maintenance; (g) Water/storm water; and (h) Sewer/solid waste (when combined as a street utility with storm water.

SMC 25.05.502 "Inviting comment" covers appeal item K. 'Failure to adequately consider the public interests. This section Part 'A' requires the Department to "Involving Other Agencies and the Public. Agency efforts to involve other agencies and the public in the SEPA process should be commensurate with the type and scope of the environmental document." In lieu of providing notice and engaging the general public of Seattle, the OPCD's proposal has engaged only a selected group of stakeholders which is far from meeting the requirements of this SEPA environmental code. Moreover, the response to Interrogatory No. 1 has demonstrated only four city staff from OPCD and SDCI agencies have been engaged. Part 'B'. "Agency Response" of SMC 25.05.502 requires consulted agencies have a responsibility to respond in a timely and specific manner to requests for comments (Sections 25.05.545, 25.05.550 and 25.05.724).

Moreover, the Department has failed to provide a notice of availability of environmental documents and providing SEPA public hearings pursuant to Chapter 23.76. The Department has not provided that burden of proof and the Appellants have no record of public engagement. This motion to dismiss item "K" must be denied accordingly.

Finally, and perhaps most extensively relative to evidence and witnesses gathered by the Appellants, the Appeal Item 'H'. Misrepresenting the intent and

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purpose and density of townhouse development. The relevance is covered extensively within the appeal and the following section 'Statement of Facts.' The authority falls within SMC 25.05.545.B. 'Other Agencies and the Public' which states: "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.)"

IV. STATEMENT OF FACTS

This city-wide proposal has failed to provide Core Document examples that fully comply with the SMC 23.24 unit lot subdivision criteria[i], and 5 of 6 examples fail to comply with the SMC 23.84A.032.R.22 rowhouse development rules. This DNS proposes that there are no environmental impacts resulting from the longer-term implementation of the combined use of rowhouses and townhouses within the same development. In fact, these Core Document examples reveals a Department policy that contradicts density limits established for each of the LR-zones. Interestingly, King County Land Use Title 19 is explicit about not using lot segregation as a mechanism to allow exceptions from other Seattle Municipal Codes.[10]

This appeal does not seek to change the code as the City Attorney suggests. The Hearing Examiner must consider such statements in the light of actual evidence. The appellants have introduced the lack of code enforcement within the appeal and have not argued to change the code with this appeal. As the Core Documents exhibits of example project has provided an opportunity to examine these projects

[10] Reference King County Title 19A.08.180 which states "Circumvention of zoning density prohibited. A legal lot, which has been subject to a boundary line adjustment or created through a legally recognized land segregation process and is of sufficient land area to be subdivided at the density applicable to the lot, may be further segregated. However, such further segregation of the lot shall not be permitted if the **total number of lots contained within the external boundaries of the lots subject to the original boundary line adjustment or the total number of lots contained within the external boundary of the parcel subject to the original land segregation, exceed the density allowed under current zoning**. (Ord. 13694 § 53, 1999)." http://www.kingcounty.gov/council/legislation/kc_code/22_Title_19A.

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relative to their environmental impacts if these non-code complying models were to be set forward throughout Seattle's multifamily zones where nine percent of Seattle's tree canopy existed back in 2016. The environmental significance of a healthy tree canopy has been well documented especially in combating climate change and mitigating local heat island effects. The pending interrogatory on environmental evaluation of the six Core Document example locations will show that only 1 of 33 trees have been retained within the properties, and physical space for replacing the lost canopy within low-rise multifamily is substantially inadequate, relying on features like ground cover as part of a Green Factor. Except for trees, none of the Green Factor substitutes can provide shade nor accommodate natural habitats for animals.

Page 2, line 16 of the proposed OPCD Townhouse Reform code further augments the unlimited number of and use of rowhouses on every lot beyond that modeled in the six Core Document examples. The Core Document Exhibits 8 to 13 all used a minimum lot size of 3,000 square feet, whereas the proposed code draft states: "In LR1 zones, rowhouse development on interior lots ~~((less than 16 3,000 square feet in size))".~~ (Strikeout shown from the referenced OPCD document). This particular OPCD proposal would even further increase the number of dwellings and further substantiate the need for an EIS to be prepared by the OPCD.

With a clear understanding to the significant environmental impacts, the Department must examine how and to what degree the code infringements have increased environmental demands beyond the code-established density limits. Attached Exhibit B has been included to expand the OPCD's Core Document Exhibit No. 7 in regard to the code verse-built count of dwellings. The fact is that at least the first three examples[11] provided by OPCD do not meet at least three of the Title 23 codes

[11] OPCD's Core Document Exhibits 8, 9 and 10.

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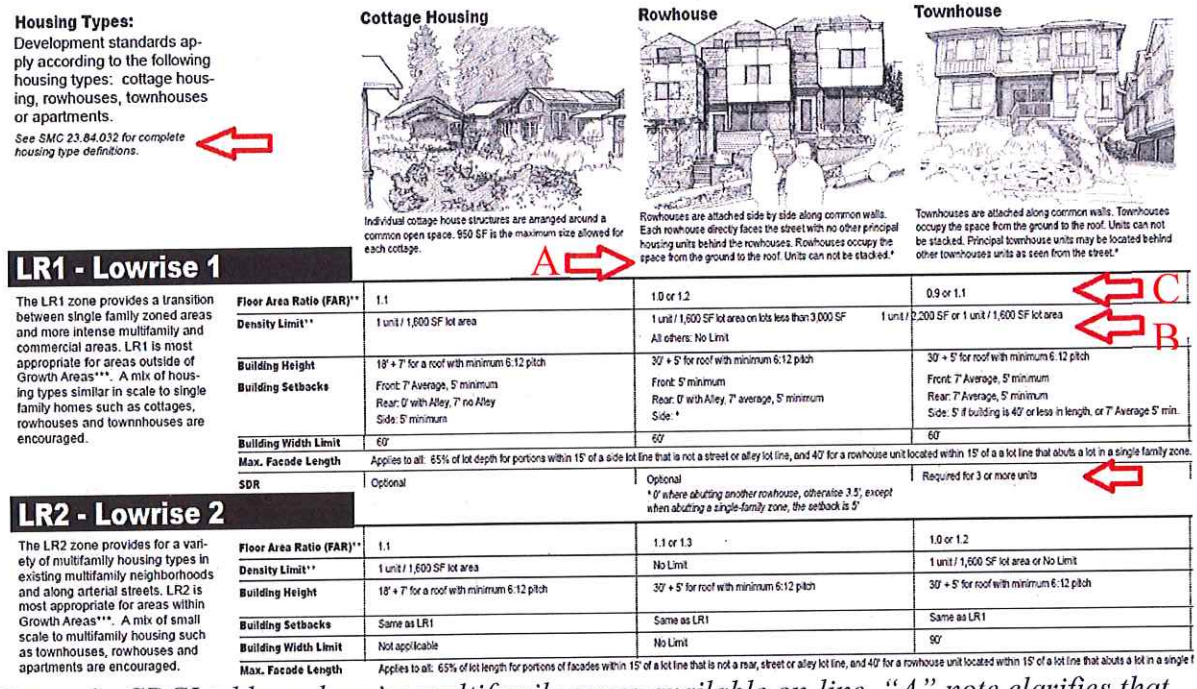
as well as SMC 25.11 for the tree canopy. Yet the Department – without conducting an adequate and researched environmental impact review – are referring to these built examples as the basis of forthcoming land-use policy. In general, we know that that the MHA FEIS did not examine the use of lot segregation as a means of increasing the density beyond 1 dwelling per 1,300 square feet of lot area[12].

All of these examples feature dwellings behind rowhouses which are otherwise prohibited by SMC 23.84A.032.R.22.f [13] and the description provided for rowhouses within attached Exhibits 2 and 3 included within the original appeal. To clarify what this means, the Department has issued a guide for multi-family zones as cropped in Figure 1 below. The note therein marked by "A" within the Rowhouse



Housing Types:
Development standards apply according to the following housing types: cottage housing, rowhouses, townhouses or apartments.
See SMC 23.84.032 for complete housing type definitions.

Cottage Housing
Individual cottage house structures are arranged around a common open space. 950 SF is the maximum size allowed for each cottage.

Rowhouse
Rowhouses are attached side by side along common walls. Each rowhouse directly faces the street with no other principal housing units behind the rowhouses. Rowhouses occupy the space from the ground to the roof. Units can not be stacked.*

Townhouse
Townhouses are attached along common walls. Townhouses occupy the space from the ground to the roof. Units can not be stacked. Principal townhouse units may be located behind other townhouses units as seen from the street.*

A

C

B

LR1 - Lowrise 1

The LR1 zone provides a transition between single family zoned areas and more intense multifamily and commercial areas. LR1 is most appropriate for areas outside of Growth Areas***. A mix of housing types similar in scale to single family homes such as cottages, rowhouses and townnhouses are encouraged.

Floor Area Ratio (FAR)**	1.1	1.0 or 1.2	0.9 or 1.1
Density Limit**	1 unit / 1,600 SF lot area	1 unit / 1,600 SF lot area on lots less than 3,000 SF All others: No Limit	1 unit / 2,200 SF or 1 unit / 1,600 SF lot area
Building Height	18' + 7' for a roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch
Building Setbacks	Front: 7' Average, 5' minimum Rear: 0' with Alley, 7' no Alley Side: 5' minimum	Front: 5' minimum Rear: 0' with Alley, 7' average, 5' minimum Side: *	Front: 7' Average, 5' minimum Rear: 7' Average, 5' minimum Side: 5' if building is 40' or less in length, or 7' Average 5' min.
Building Width Limit	60'	60'	60'
Max. Facade Length	Applies to all: 65% of lot depth for portions within 15' of a side lot line that is not a street or alley lot line, and 40' for a rowhouse unit located within 15' of a a lot line that abuts a lot in a single family zone.		
SDR	Optional	Optional * *0' where abutting another rowhouse, otherwise 3.5', except when abutting a single-family zone, the setback is 5'*	Required for 3 or more units

LR2 - Lowrise 2

The LR2 zone provides for a variety of multifamily housing types in existing multifamily neighborhoods and along arterial streets. LR2 is most appropriate for areas within Growth Areas***. A mix of small scale to multifamily housing such as townhouses, rowhouses and apartments are encouraged.

Floor Area Ratio (FAR)**	1.1	1.1 or 1.3	1.0 or 1.2
Density Limit**	1 unit / 1,600 SF lot area	No Limit	1 unit / 1,600 SF lot area or No Limit
Building Height	18' + 7' for a roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch
Building Setbacks	Same as LR1	Same as LR1	Same as LR1
Building Width Limit	Not applicable	No Limit	90'
Max. Facade Length	Applies to all: 65% of lot length for portions of facades within 15' of a lot line that is not a rear, street or alley lot line, and 40' for a rowhouse unit located within 15' of a lot line that abuts a lot in a single f		

Figure 1 - SDCI table on lowrise multifamily zones available on-line. "A" note clarifies that dwellings may not be built behind rowhouses. "B" note indicates the maximum number of dwellings for townhouses is 1 dwelling for every 1,600 square feet of lot area if the conditions of SMC 23.45.510.C are met.

[12] Note, the number of dwellings is rounded up when the calculated denominator is 0.85 or more.
[13] and In addition to the Code is the City of Seattle layperson guide for multifamily zones included as exhibits 2 and 3 of the original appeal. The description provided for rowhouses within these exhibits clearly explain that dwellings are allowed behind townhouse structures, but other swellings are not allowed behind rowhouses.

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column rephrases the requirement by stating "Each rowhouse directly faces the street with no other principal housing units behind the rowhouses."[14]

These examples from the Core Documents all exceed the SMC 23.45.512 allowable number of dwellings within the parent lot. The OPCD's examples all exceed current code calculated dwelling limits by one to two dwellings per development as a whole[15]. To demonstrate, the attached Exhibit 'B' has compared the actual number of dwellings built verses the SMC Title 23 code-compliant number of dwellings per lot; and the results which may be summarized as follows:

[a] OPCD Exhibit 8 from 704 & 712 W Bertona St has 8 dwellings on a LR1-zoned lot area of 8,308 sq. ft., which exceeds the 2019 MHA-allowable density limit by three (3) dwellings (calculation of 8,308 / 1,300) and circumvented the SMC 23.45.512.

[b] OPCD Exhibit 9 of 5030 & 5036 Sand Point Place NE has 7 dwellings on a LR1-zoned lot area of 7,418 sq. ft. which exceeds the allowable by two (2) dwellings (calculation of 7,418 / 1,300) and circumvented the Code.

[c] OPCD Exhibit 10 of 8322-8326, 8328, 8332-8350 13th Ave NW has a total of 16 townhouse and rowhouse dwellings on a LR-1 zoned lot area of 19,044 sq. ft., which exceeds the 2019 MHA-allowable density limit by two (2) dwellings (calculation of 19,044 / 1,300) and circumvented the Code.

As one can easily identify, the loss of at least 32 significant trees without remediation is evident when established land-use codes are circumvented as demonstrated in these example sites.

One such example of Rowhouse and Townhouse requirements not being enforced for several years involves 'Vehicle Access Easement Standards'. The built

[14] http://www.seattle.gov/Documents/Departments/SDCI/Codes/MultifamilyZoningSummary.pdf
[15] Term 'development as a whole' per SMC 23.24

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examples that violate this code requirement currently exists all over the City of Seattle. This standards limited overhead obstructions restricting safe emergency vehicle access to the townhouse dwellings located at the rear of the lot. In a memorandum issued by the Seattle Department of Constructions and Inspections on October 31, 2017 (Attached Exhibit A), they issue a notice that the Department will being enforcing a townhouse code associated with lot separation. The memorandum begins "SDCI receives many multifamily and commercial short plat and lot boundary adjustment applications proposing ten-foot-wide vehicle access easements for lots with no street frontage."[16] SDCI communicated that they would begin to enforce the matter in an October 2017 directive[17], which implemented the ordinance's language about the requirements for egress and ingress for emergency and other vehicles to access the property via an easement. The fact that SDCI violated its own rules or ordinances in the past does not give it authority to continue to violate the rules and ordinances. If SDCI authorized otherwise illegal conduct, the beneficiary of the permit has a claim that SDCI or others are estopped from undoing it because the beneficiary acted in good faith and reliance. SDCI has violated its own rules and ordinances, whether deliberately or negligently. The remedy is for the Examiner to remand the DNS and either (a) require the Department to provide Core Document that are in compliance with the rules/ordinances, or (b) for the City to conduct an EIS in order to change the ordinances.

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[16] The memo continues with the requirement it had neglected to enforce: "Please keep in mind that when an easement serves fewer than 10 residential units and crosses a residentially zoned lot, portions of structures may be above the easement. Those portions of the structure must have a minimum vertical clearance of 16 ½ feet above the surface of the easement roadway." Then it continues to offer an apology and alerts their 'customers' that enforcement for emergency access vehicles will begin the following day, stating: "Our customers have expressed confusion over how the easement standards apply to projects with little or no parking. SDCI will continue to process applications that we have already accepted. However, beginning November 1, 2017, all proposed development must be designed to meet the easement widths as indicated above."

[17] https://buildingconnections.seattle.gov/2017/10/31/vehicle-access-easement-standards/

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V. INADEQUACY OF THE ITEMS IN THE MOTION TO DISMISS

The Appellants object to the Department's motion for partial dismissal relative to argued points[ii] of the appeal including the above and the following reasons:

1. In its objection to Appeal Issue E, the City attacks specific language as irrelevant without recognizing the basic issues set forth in our appeal.

2. The City acknowledges that the proposed code changes will likely alter the mix of housing types within the affected zones. The Appellants agree, but The Appellants assert that the City has not shown its work in how it considered how the housing types would be altered, to what extent, and with what impacts.

3. Our appeal identifies how the proposal would negatively affect the availability of housing for families with children and for persons with disabilities. Our appeal also identifies how the proposal may actually result in less affordable housing for everyone. Both of these impacts are appropriate to review in a SEPA context, but the City's SEPA review is lacking any actual analysis of these impacts.

4. The Appellants are entitled to challenge at Hearing the City's unsubstantiated statements and assumptions that housing affordability would be enhanced, and the City should be required to provide the level of analysis that is necessary to back up their statements.

5. The Appellants are also entitled to bring forth information that documents how certain populations would be disproportionately and negatively impacted in their ability to secure appropriate housing. The City clearly never considered these impacts, and a hearing on this subject will serve all of the parties and the decision makers.

6. Dismissing our appeal issue because portions of our backup text don't fit narrowly into a SEPA context would mean that a central issue of our appeal, namely that the proposal would have negative impacts on the availability and

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affordability of housing types for certain populations, would be deleted from the record. This is not consistent with the goal of creating a full and complete record.

7. In its objection to Appeal Issues 3.a, b and c, the City describes our appeal issues as "economic displacement" and then attempts to cite precedence that economic displacement is not a SEPA issue.

8. The City is inappropriately asserting precedence, but it is also over simplifying our appeal issue. The literature is replete with how the social process that is commonly called "gentrification" has social, physical, and community impacts that clearly fall within the purview of SEPA. At Hearing The Appellants will document these varied impacts.

9. The stated purpose of the proposed code changes centers around the issue of housing affordability and the assertions made by staff in this regard should not go unchallenged. Our appeal suggests how the proposed changes will not improve housing affordability for many of the City's residents, but that they will actually bring negative consequences to them. Those negative consequences are severe, they are personal, they affect whole communities, and they are covered by the broad definitions that have become commonly understood as SEPA impacts. At Hearing the parties will have an opportunity to brief this fact.

10. In its objection to Appeal Issue 3.d, the City somehow concludes that The Appellants are seeking an "urban village level of analysis" and then cites a prior decision that it thinks prohibits such analysis. The City is wrong on both counts. Our appeal simply asserts the obvious; the proposed changes will have different impacts to the natural and built environments in different areas within the affected zones and that these differences have not been considered. These impacts are exactly why SEPA reviews are required. At Hearing, The Appellants will demonstrate ways in which the proposed changes will have disparate negative

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impacts and how some of these impacts are significant, adverse, and are required to be analyzed in a SEPA context.

11. In its objection to Appeal Issue G, the City totally misses the point of our Appeal issue. The Appellants assert that the proposed changes to building permit review processes will result in reduced analysis of issues that affect the safety and welfare of the public. At Hearing, we will document how development project reviews are currently inadequate to protect the environment, and how the proposed changes will exacerbate this problem. This information falls clearly within the scope of SEPA review, and the public interest will be better served by a Hearing on the subject.

12. In its objections to Appeal Issue H, the City dismisses our assertion as irrelevant that the City isn't applying its existing code as intended. The Appellants assert that a systemic failure to apply its policies and code properly is proper evidence to be considered in a SEPA Hearing.

13. The City's complete body of SEPA documentation consists of a hierarchical construction that begins with the Comprehensive Plan and all of its Implementing Actions, including major changes to its Development Code. All of these actions have their own SEPA reviews, and were founded in part on previously adopted documents. They are, in a sense, all connected and interrelated. If any of these documents are determined to be inaccurate or deficient to the extent that new significant adverse environmental impacts are likely, then SEPA should be reopened to consider those impacts. If significant negative impacts have already been occurring that go beyond those that were previously analyzed, a SEPA gap in analysis exists that needs to be addressed in the current proceedings.

14. A pattern of misapplication of the city's code is relevant to SEPA in two ways. First, the prior misapplication of code has resulted in numerous

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development projects with negative impacts that have degraded the City's existing tree canopy and habitats. These impacts were not anticipated by the City nor were they considered under SEPA. Taken together, they constitute an "existing condition" that should have been considered. Second, the proposed code changes will likely be similarly abused by development proposals that will seek to evade tree retention and protection standards. A full hearing on this issue will inform the decision makers as to how the proposed code changes could be improved to better protect the City's tree canopy and habitats.

15. In its objection to Appeal Issue I, the City mischaracterizes our appeal issues. Our appeal asserts that prior actions by the City have reduced the City's tree canopy far beyond what was analyzed in prior SEPA documents. Thus, the current condition of the Tree Canopy is degraded and fragile. This condition should be evaluated now as the City considers an action that would further reduce its Tree Canopy. That reduction, taken together with existing degraded conditions, threatens the functions and values of the City's trees and habitats. These functions and values are well documented in the literature, and The Appellants intend to bring that information to hearing in order to properly inform the decision makers. This is an appropriate function for a SEPA Hearing.

16. In its objection to Appeal Issue I, the City improperly cites Boehm v. City of Vancouver: "we hold that SEPA review need not address cumulative impacts when speculative, and that when the Boehms can point to no specific impact, those impacts are speculative." Boehm v. City of Vancouver, 111 Wn. App. 711, 714 (Wash. Ct. App. 2002)

17. In this case, our appeal cites impacts that are specific and certainly not speculative. The Appellants cite prior actions not only to identify a SEPA

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analysis gap, but also to support our assertions that future degradation of the City's tree canopy is likely and will result in significant adverse environmental impacts.

18. If any of our appeal issues merit an analysis of cumulative impacts, it is this one. Even a casual observer will attest to the steady deterioration of the City's natural places and tree populations. The proposed action will greatly accelerate this trend, and this manifest fact demands a full and complete SEPA Hearing record.

19. In its objection to Appeal Issue K, the City mischaracterizes the intent of our appeal issue. The Appellants assert that the City should have considered the proposed code changes as part of its ongoing update to its Comprehensive Plan. Failing that, the City was obligated to take into consideration any environmental related analysis that was already underway. Previously the City argued that SEPA cumulative impacts are prospective, but here it argues that impacts of likely and imminent actions do not need to be considered.

20. At Hearing, we will have an opportunity to view the proposed changes in the context of related work on the Comprehensive Plan. This will enhance the SEPA review of both actions and will help identify cumulative impacts.

VI. INADEQUACY OF THE MOTION FOR SUMMARY JUDGEMENT

The Applicant seeks a Summary Judgement but has failed in meeting the conditions of Washington Civil Rules 56 in their request.

First, the Hearing Examiner Rules make no mention of Summary Judgment. This section HER 2.16 does cover motions to dismiss all or part of an appeal, other dispositive motions, and motions to exclude evidence – but is not explicit about Summary Judgements.

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Second, even if the Hearing Examiner was to allow summary judgment on a discretionary Determination of Non-Significance, the only attachments provided are the same documents that are being challenged for their adequacy. The OPCD's Appendix No. 1 - Draft Legislation.pdf Appendix, No. 2 - Proposal Summary, Appendix No. 3 - SEPA Environmental Checklist, and Appendix No. 4 - SEPA DNS have been created for public comment and review. There have not been adopted by ordinance, and are not a basis to determine Summary Judgement. As such, the Hearing Examiner should bear prejudice to the non-moving party, and not to the moving party who would be unable to provide the burden of proof necessary to validate that the content of their proposal will not have significant environmental impacts. It's as if a student or researcher would prepare their own reference materials to act as substantive support for a research report. The Department has not provided any acknowledged proof to support their motion for summary judgment, whereas the appeal notice filed with the Hearing Examiner is well documented with diagrams, charts, and references to external research including reports by Seattle agencies including prior reports by OPCD. In this case, the OPCD was ignored the research materials, such as the 2016 Tree Canopy Assessment provided by the Seattle OSE.

Third, per the CR 56, "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Again, the points of Summary Judgement have not been presented to be challenged with countering evidence. The only question that remains is the merit to challenge the City-motioned dismissal for five appeal items as summarized herein.

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Fourth per the CR 56. "When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Lastly, per the CR 56, "The Hearing Examiner has been presented with the appeal and attachments submitted with the appeal material facts that exist as public records and without substantial controversy." Therefore, the Hearing Examiner "shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or of relief that is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

VII. RELIEF REQUESTED

The administrative appeal process exists for the possibility that there has been an issue of impacts on the community and the environment that have not been addressed. The process works to prevent real harm, and that goal can be interfered with when using overly legalistic challenges. An administrative appeal should allow a full hearing where the evidence can be presented before applicable issues are discarded. We have demonstrated in this response that all appeal items less just one retracted appeal item (1) challenges the SMC 25[18] environmental

[18] Applicable ENVIRONMENTAL PROTECTION AND HISTORIC PRESERVATION:
25.05 Environmental Policies and Procedures
25.09 Regulations for Environmentally Critical Areas
25.11 Tree Protection
25.12 Landmarks Preservation
25.16 Ballard Avenue Landmark District

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review of the Proposal, or (2) the impacts are listed within SEPA and thereby within the scope of the Hearing Examiner's jurisdiction.

The City's motion contained aggressive technical legal arguments, including two court case citations that appear to impose an additional burden on appellants but which don't apply to Administrative Hearings. In many cases, the City's motion does not accurately portray the appeal, mischaracterizing information Appellants provided as evidence of adverse impacts, and calling this evidence a request for relief not available under SEPA.

The repercussions of a dismissal here place far too high of a standard on the administrative process, and on Appellants who are doing their best to navigate a very complicated field of law. The Appellants will show evidence at the Hearing that more accurately predicts the most likely impacts of the Comprehensive Plan changes, and why the City's predictions are inaccurate. This includes taking a fact- and evidence-based look at what the Comprehensive Plan changes will and won't do, then determining based on this proper understanding of the changes the actual impacts under SEPA.

The administrative appeal process is a public process to protect communities and resolve issues in an efficient way. Our appeal should receive its due process to present full evidence and testimony at the administrative appeal hearing before issues are dismissed.

In conclusion, the Hearing Examiner may dismiss Issues G as requested by the City. The Department's request to dismiss Appeal Issues C, E, H, K, and L should be denied because the asserted impacts are indeed required by Title 25 to be analyzed under the SEPA parameters. Issues G, H and L do not challenge

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25.20 Columbia City Landmark District
25.22 Harvard-Belmont Landmark District
25.32 Table of Historical Landmarks

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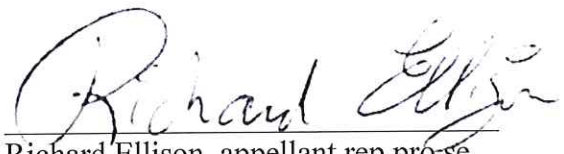
existing code provisions, but only address for the Examiner which Core Documents are not compliant with the existing Seattle land-use code and they should not be used as case studies knowing that their environmental impacts have not been previously considered. Item K does not challenge the timing of this SEPA DNS, but the required degree of public and agency engagement as required by the herein cited Title 25 sections."

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 28th day of January, 2022 in Seattle, Washington



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[i] Endnotes
Within the Core Documents, the Code provisions have not been followed relative to the code-established criteria for lot subdivisions and unit lot subdivisions. The examples have violated five (5) of the required criteria to make a decision for Short Plat:
Decision is inadequate to Criteria 1: Lack of conformance with the Land Use Code rowhouse development rules provisions of SMC 23.84A.032.20(R) that have not been modified by any of the requirements of SMC 23.24. As appeal attachments C and G (from the SDCI EDMS records) shows, the application is violating this code requirement that "no portion of any other dwelling unit" (which is the street-facing rowhouses), "except for an attached dwelling unit, is located between any dwelling unit and the street faced by the front of that unit" (which includes the alley-facing duplex townhouses).
Specifically, SMC Table A 23.45.510 establishes the maximum floor area and SMC 23.45.512 established the maximum number of family-sized unit requirements within LR zones. These code sections were recently revised in 2019 with the passing of the MHA ordinance. The requirements applicable at the time of this application are summarized in Figure 1 with the lines marked as 'B' and 'C' for dwelling count and dwelling floor area respectively. By allowing a short subdivision after the developer has submitted a non-compliant mixture of con-compatible dwelling types of townhouses behind rowhouses to the contrary of SMC 23.84A.032.R.20 rowhouse development rules, the public's interests in following the law has been violated.

Decision is inadequate to Criteria 5: The Department has failed to demonstrate full conformance and apply conditions to the applicable provisions of Section 25.09.240, Short subdivisions and subdivisions, in environmentally critical areas. The assessment relative to this code section goes beyond the waiver of steep slope (or coded as ECA1). The appellants all live within Seattle's designated potential slide area (coded as ECA2). Each project within an ECA must complete 30-page ECA form for which the Department is to make an appealable discretionary decision on. This evaluation has not yet been completed. From the photos taken from the unimproved alley (found within the original Appeal Attachments) it is evident that the slope is substantial. The reason this is a concern on this subdivision is that despite receiving the waiver of the steep slope, the decision criteria is bound by the condition that the lower portion of the site is developed and that the soil is stabilized prior to the upper portion. The motion to dismiss and summary judgement excludes this consideration, nor does it provide the evidence that the imposed condition is supported by the yet-to-be-completed SEPA evaluation. Therefore, the Examiner does not have the authority at this time to consider dismissing this issue without review of the facts. The Appellant has subpoenaed the City engineers for this purpose (reference Figure 8 herein).

[ii] Endnote ARGUMENTS FROM THE DEPARTMENT (for reference)
The Department, represented by the City Attorney, make the following claims:
"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?
"Appellant's Issue E and Issue G should be dismissed as they challenge the wisdom of the Proposal rather than the adequacy of the environmental review of the Proposal, focusing on policy objections to OPCDs encouragement of the incremental development of slightly smaller sized townhomes and rowhouses.
"In Issue E.a, the Appellant complains that the Proposal "does not provide an option to households seeking appropriately sized and configured dwellings." Notice of Appeal, page 11, line 3-4.
"In Issue E.b., the Appellant complains that the Proposal promotes "smaller townhouses and rowhouses over apartments and cottages" and "is an outright denial of housing to families with children and to those with disabilities."
"In Issue E.c, the Appellant complains that "OPCD decision promotes real estate investment potential and ignores local or Department of Housing and Urban Development (HUD) regulations and guidance to fair housing within LR1 multifamily zones." Appellant also complains that apartment buildings, not townhouses or rowhouses, bring in more money through the Multifamily Tax Credit, Mandatory Housing Affordability

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Program, and the Incentive Zoning programs which is irrelevant considering that development of apartment buildings are not achievable in the LR1 zone.

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

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

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

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

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

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

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

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

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

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

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

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

"Likewise, Issue H should be dismissed because Issue H is not a challenge to the environmental review of the Proposal. Rather, Issue H challenges existing code provisions related to short subdivisions, lot boundary adjustments, and unit lot subdivisions and Seattle Department of Construction and Inspection's application of them during the permit process. A challenge to the City's interpretation and application of existing code provisions is outside the scope of this SEPA appeal and must be dismissed.

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

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

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

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

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

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"SMC 25.05.055.B provides that the lead agency shall provide its threshold determination "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." (emphasis added). Had OPCD waited for the unrelated comprehensive plan update cycle to complete, it would have violated the SEPA timing provision in SMC 25.05.055.B.

"VI. CONCLUSION

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

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Certificate of Service

I, Richard Ellison, certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies, via e-mail, of the **APPELLANTS' RESPONSE in OPPOSITION to PARTIAL MOTION TO DISMISS and for PARTIAL SUMMARY JUDGEMENT** to the person listed below, in the matter of the Determination of Non-Significance issued by the Director, Office of Planning and Community Development, Hearing Examiner File No. W-21-007. I also certify that on this date, a copy of the same document was sent via email to the following parties:

Department:
Geoffrey Wentlandt
Office of Planning and Community Development
Email: geoffrey.wentlandt@seattle.gov

Department Legal Counsel:
Daniel Mitchell
Seattle City Attorney's Office
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Co-Appellant:
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct to the best of my knowledge and belief.
Signed this 28th day of January 2022 in Seattle, Washington.

Richard Ellison, appellant rep pro se

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