Deputy Hearing Examiner Susan Drummond

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File:
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).	**W-21-007** APPELLANTS' RESPONSE TO OPCD'S CLOSING BRIEF

The Office of Planning and Community Development (hereafter the "Department" or "OPCD") has not adequately justified its DNS decision. Contrary to the OPCD's closing brief, the appellants have provided the burden of proof that environmental impacts from incremental decreases in canopy cover and permeable surfaces will alter the physical environment. OPCD's closing brief does not indicate any quantitative analysis within its exhibits and witness testimony that would support a DNS. Instead it depends on "opinion" and "qualitative" inner-department assessment[1]. Accordingly, the appellants requests that the DNS be remanded back to OPCD to complete an Environmental Impact Statement. The OPCD's closing brief dated the 16th of March 2022 is laden with misleading false claims and references to non-existent Seattle Environmental (SMC 25) and Land Use (SMC 23) codes. The OPCD Closing Brief fails as noted:

(1) False claim: "Townhouses and rowhouses tend to provide an opportunity for home ownership that is less expensive than detached homes." (OCPD Closing Brief Page 2 line 20-21.)

[1] SMC 25.05.926 states when "an agency initiates a proposal, it is the lead agency for that proposal and that whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal."

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To the contrary there is no significant change in affordability per OPCD Exhibit No. 15, Figure 4.1, as testified by Mr. Kaplan. The Seattle average sales value published for a detached house was $795,000 compared to a townhouse at near equivalent average value of $730,000.

(2) False claim: "The amendments to the density limit in LR1 zone would continue to allow development consistent with what is already occurring today but would reduce complexity and delay on the permitting process. Id." (OPCD Brief Page 3 line 16-17.) To the contrary, referenced H.E. Exhibit 17 has no provision that would allow such development. If there was, the Proposal SEPA review would be unnecessary and extraneous if pursued as an Omnibus. Furthermore, the administrative convenience of the Department and of developers, to whom this "reduced complexity" apparently pertains, cannot contribute to a DNS. The SEPA checklist does not consider "administrative convenience," or "reducing complexity and delay" and the possibility of reduced Department work does not justify a SEPA determination.

(3) False claim: "The Proposal would establish a density limit in the LR1 zone for both townhouses and rowhouses on an interior lot at one unit per 1,150 square feet, a density similar to what can be achieved currently when a lot is developed with rowhouses or a combination of rowhouses and townhouses. Id." (Page 2 lines 11-15) To the contrary, the referenced Exhibit 17 identifies nothing less than 1 dwelling unit per 1,300 square feet of lot area for townhouses and for rowhouses on interior lots less than 3,000 sq. feet.

(4) False Claim: "Mr. Staley also reviewed a sample of project permits and confirmed that a common *development practice* allowed under current code, especially for larger lots, was to subdivide a lot, or go through a lot boundary adjustment, to build rowhouses on the front adjacent to the street and townhouses on the lot behind. Staley Testimony, Volume 1. By doing so, developments involving a combination of rowhouses and townhouses on separate interior lots are

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currently achieving levels of density that exceed the current density limit of 1 dwelling per 1,300 square feet per lot that might be achieved with only one lot." (OPCD Brief Page 4 lines 13-19). Similar claims about what is already acceptable within the Code are found within the OPCD's Closing Brief page 7, lines 11-14; and page 9, line 15; and page 11, line 18. In contrast, the exhibit clearly states "each rowhouse directly faces the street with no other principal housing units behind the rowhouses." This requirement was omitted from the OPCD's argument. Conveniently, the OPCD Closing Brief ignores SDCI witness Ms. Neuman who testified that both townhouses and rowhouses are *not allowed* within the parent plat. (emphasis added)[2]. Furthermore, she testified in lot subdivisions that "The *development as a whole* (emphasis added) shall meet development standards applicable at the time of the permit application accepted." SEPA Code Title 25 also requires require the functionally-related development must be considered as a whole.[3]

The OPCD closing brief ignores that the SEPA process must follow a level of scrutiny, reasoned thought, and analysis. The Department's process did not meet this code requirement.[4] Literally nothing in Brief's repeated references to OPCD Exhibit 17 supports a supposition that the Proposal simply continues an existing practice and as a result there is no incremental change being proposed for the Code. The Seattle Municipal Code clearly indicates the requirements as summarized within H.E. Exhibit 17, yet the OPCD Brief suggests the exhibit says more or different

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[2] Transcript Volume II, page 220, lines 22-24 and Id., page 219, lines 21-22.

[3] Per SMC 25.05.300 The proposal is not exempt if it is a segment of a proposal that includes: a. A series of actions, physically or *functionally related* to each other, some of which are categorically exempt and some of which are not, or b. A series of exempt actions that are physically or functionally related to each other, and *that together may have a probable significant adverse environmental impact* in the judgment of an agency with jurisdiction. If so, that agency shall be the lead agency, unless the agencies with jurisdiction agree that another agency should be the lead agency.

[4] "For the MDNS to survive judicial scrutiny, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal's environmental impact." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000) (citations omitted)," and the DNS must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335; WAC 197-11-330; *Anderson v. Pierce County*, 86 Wn. App. 290, 301(1997). *See also Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 276 (1976); *Spokane County v. E. Wash. Growth Management Hr'gs Bd.*, 176 Wn. App 555, 579, 309 P.3d 673 (2013), *review denied* 179 Wn. 2d 1015, 318 P.3d 279 (2014)."

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–than what SMC Title 23 delineates. The Examiner will focus on what the Code indicates and not the what OPCD purports the exhibit reflects. Lot subdivisions are allowed, but adjustments to density limits through a lot segregation 'development technique' within a functionally related development is not explicitly allowed in the Code or the referenced summary exhibit. The policy remains environmentally unstudied and this Proposal seeks to exploit circumventing the density and rowhouse provisions of the Code[5]. The definition of rowhouse, which is defined differently from townhouses by SMC 23.84a.032.R.22.f, limits rowhouses to face the street with no other principal housing units behind the rowhouses. Mr. Moehring testified to the intent of rowhouses allowing more density along the street so that remaining land area is available for parking and permeable surfaces with planting. The fact is that the Department has been using a "development technique", a term introduced by Mr. Mitchell, does *not* elevate the procedure as a code provision. There has been no prior review to the proposed density approximating 1 dwelling to 1,150 sq. ft. of lot area within LR1 zones, and this Proposal also fails to study the environmental consequences. The Department is in error stating the Proposal merely continues an existing practice; what the Proposal is attempting is to codify an existing policy or practice.

Contrary to the Department's claim that the SEPA checklist was "complete, accurate, and detailed," neither the testimony of Mr. Staley nor Mr. Wentlandt demonstrated that their SEPA checklist and inquiries leading up to it met an acceptable level of scrutiny and analysis.[6] Mr.

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[5] Case laws establishing that a statute is not altered by prior erroneous enforcement (reference last page of this Response).

[6] Mr. Staley testified that he reached his conclusion after considering "the permit analysis, GIS analysis, consultation with other [Department] staff and others outside the [Department], his own expertise, and his knowledge of previous SEPA analysis." Mr. Wentlandt testified that he used Mr. Staley's checklist, his own knowledge, the proposal itself, the Seattle's Comprehensive Plan, and some previous EIS's. Mr. Staley testified that his analysis was "qualitative." On the subject of tree canopy cover, which is a prima facie environmental issue and is the prima facie interest of the appellants, Mr. Staley could provide no quantitative analysis. When examined on H.E. and OPCD's Exhibit 7 of six townhouse/rowhouse projects, there were no tabulations of environmental issues including plants, habitat, stormwater, and FAR. In response, H.E. Exhibit 19 prepared by TEIR/GET supplemented columns to include tree removal, retention, and replacement, and incremental increases in dwellings per lot area. The Department's witnesses could not describe the proposal's potential environmental impact on the Department's tree canopy cover because they did not look at it. They could not determine the magnitude of impact resulting in a DNS based on insufficient analysis.

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Staley looked only at a single quantitative measure which was the number of developable unit lots, which he testified as 5,532 (Day 1, Page 51, lines 16-20) – a significant number of parcels undergoing incremental density increases. The OPCD has failed to measure and analyze with a "reasonable" level of scrutiny the incremental potential environmental impacts. The Appellants' evaluated the six projects the Department provided as their basis to increase density in all LR-1 zoned areas. With H.E. Exhibit 19, multiple witnesses testified to the tree canopy impact from just those six core examples, projects the Department exemplified as a 'development technique' to exceed density limits and circumvent rowhouse development standards. The appellants' discovered that at least 30 significant trees were removed from just the six projects which comes to an average of five trees removed per project without equitable replacement. Multiplied by the testified 5,532 developable lot potential could result in the permanent loss of over 27,500 trees and the equitable benefits of the canopy as testified by Dr. Wolf, Mr. Ellison, and Mr. Wheeler. Mr. Moehring and Mr. Oxman further testified that this Proposal adding density severely limits building siting options, and with the additional dwelling(s) increases impervious surfaces for parking access, and consumes other potential tree area for trash containers, bikes, and stormwater structures leaving no plant area for an equitable percentage of the estimated significant and Exceptional 27,500 trees. In contrast to the Department's claim[7], TEIR has established the burden of proof across over fifty exhibits via expert witness testimony. Mr. Kaplan testified the Hearing Examiner's concurrence to this standard with the citywide appeal W-16-004 from a SEPA determination of non-significance issued by OPCD. Likewise, this record demonstrates that the challenged DNS was not based on information sufficient to evaluate the proposal's impacts. It is

[7] OPCD references lesser project-specific case of "[T]he Appellant bears the burden of proving that the Director's Decision was clearly erroneous." Appeal of Escala Owners Association, HE File No. MUP-17-035 (OPCD Closing Brief, Page 8, lines 5–6).

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therefore clearly erroneous and must be reversed. The appellants presented at least 10 exhibits which collectively contain photos of 27 projects clearly showing the impact to tree canopy that will be exasperated by the OPCD proposal.[8] Within the exhibits Appellants presented were multiple before-and-after images, and photos of unviable efforts to plant or retain trees too close to building walls and foundations. As the Department claims the proposal will simply continue what is already in practice through its "development technique," then these exhibits show a clear account of the OPCD's proposal environmental impacts. The Department failed entirely acknowledge these exhibits in their closing argument. The Department tries to argue that the appellants are simply expressing "dissatisfaction"[9] with past projects. The Appellants' evidence has proven the Department's reluctance and inability to assure appropriate canopy cover within rowhouse/townhouse multifamily zones. The Department erroneously suggests that the Proposal purportedly continues current practice, and it will not create any more units on each parcel. This is belied by the Department's own tally of units per parcel, provided in discovery, H.E. Exhibit 23. Based on the Department's account, of the 38 parcel sizes listed, 27 parcel sizes are eligible for one more unit, and 2 parcel sizes eligible for two more units.

The OPCD Closing Brief failed to acknowledge the detailed scrutiny provided by the appellants' architect expert witness, Mr. Moehring, who thoroughly walked through the details of the Department's proposal with regard to the actual amount of land area required for each dwelling – accounting for each dwelling's vehicle access and turnaround requirements, parking, trash/recycling containers, outdoor amenities areas, bike requirements, and stormwater retention, each provision adding demands on the limited space within townhouse/rowhouse developments

[8] HE Exhibits 42, 43, 44, 48, 48B, 49, 49A, 51 and Appellant exhibits 48 and 79.
[9] Page 2 line 3-4; Page 11, line 14 and 16.

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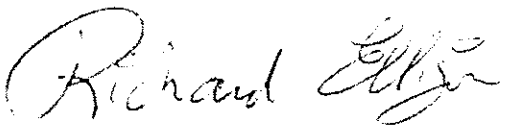
when additional units are provided. Contrary to the Department's claim that the Proposal has no or insignificant environmental impact, increasing the number of townhouses on each lot leaves no contiguous land area of adequate geometry to support significant tree growth. Mr. Moehring effectively demonstrated with site plans that development projects with rowhouses in front/townhouses in back cannot provide space for trees. The end result is the incontrovertible inability of the Proposal to support any functional tree canopy whatsoever with the slight exception of street trees, which, per the testimony of arborist Mr. Oxman, generally results in only two trees for every 50' length of parking strip, and possibly reduced further with vehicle access from street.

The Department mischaracterized or misconstrued the testimony of Appellant witnesses Wolf, Lider, Ellison, Oxman, Wheeler, and Grant, overlooking the relevance of each and what lessons are attributed directly to the OPCD proposal[10]. Without the careful assessment of the environmental impact of tree loss due to "affordable" housing development, and of how the Department will meet its tree canopy goals in multifamily zones, the DNS must be remanded for required analysis to the proposed significant incremental proposal changes. The Department is obligated to goals of housing, plants, animals, stormwater, and access, and a careful environmental impact study is essential to proceed.

Signed this 23RD day of March 2022 in Seattle, Washington.



Richard Ellison, appellant pro se representative

[10] Dr. Wolf, a U.W. professor and researcher, and Mr. Lider , a local experienced engineer, spoke in detail on the researched necessity of trees in an urban environment and the lack of capacity of Seattle's infrastructure. Biologist Mr. Ellison discussed estimations of the number of lost trees using the Department's own data in TEIR Exhibit 20, a modification of City Exhibit 7.Mr. Wheeler provided five detailed analysis needed in the Proposal to reduce or avoid environmental impacts.

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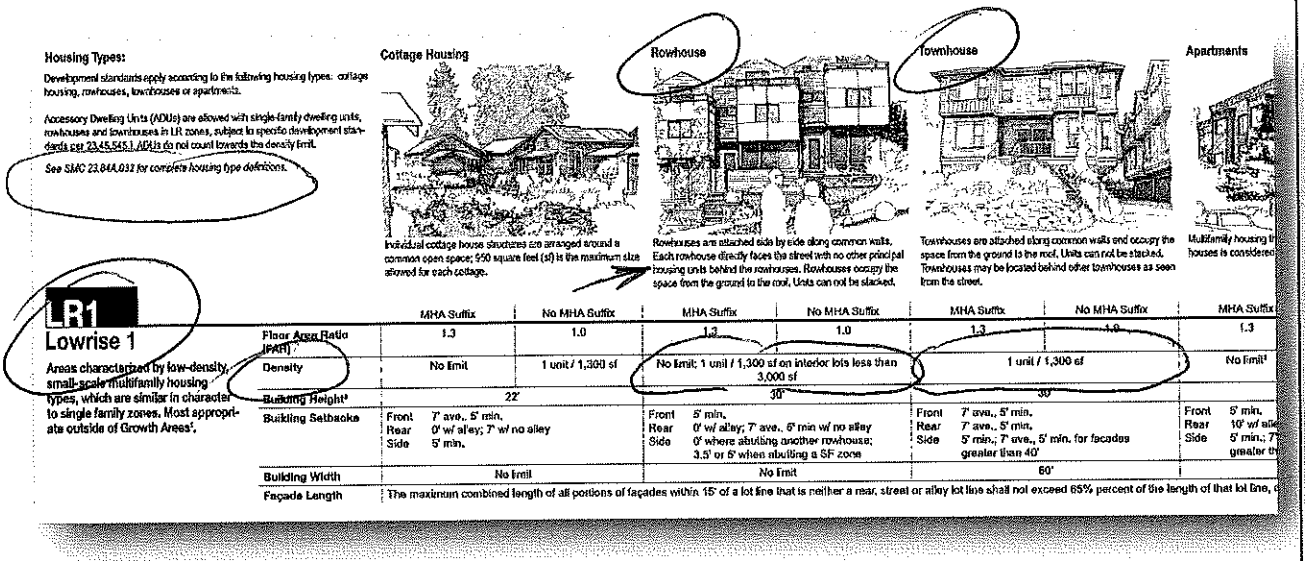
Figure 1- (below) Portion of Exhibit 17 for LR1 zones. No portion of the Exhibit allows density increases or allows circumventing rowhouse standards by lot segregation as suggested in the OPCD Closing Brief..

Bottom of page – Applicable case law references from footnote 5 on page 4.



Housing Types:

Development standards apply according to the following housing types: cottage housing, rowhouses, townhouses or apartments.

Accessory Dwelling Units (ADUs) are allowed with single-family dwelling units, rowhouses and townhouses in LR zones, subject to specific development standards per 23.45.545.I. ADUs do not count towards the density limit.

See SMC 23.84A.032 for complete housing type definitions.

Cottage Housing

Individual cottage house structures are arranged around a common open space; 950 square feet (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 and occupy the space from the ground to the roof. Units can not be stacked. Townhouses may be located behind other townhouses as seen from the street.

Apartments

Multifamily housing [illegible] houses is considered

LR1

Lowrise 1

Areas characterized by low-density, small-scale multifamily housing types, which are similar in character to single family zones. Most appropriate outside of Growth Areas[4].

	MHA Suffix	No MHA Suffix	MHA Suffix	No MHA Suffix	MHA Suffix	No MHA Suffix	MHA Suffix
Floor Area Ratio (FAR)[1]	1.3	1.0	1.3	1.0	1.3	1.0	1.3
Density	No limit	1 unit / 1,300 sf	No limit; 1 unit / 1,300 sf on interior lots less than 3,000 sf		1 unit / 1,300 sf		No limit[3]
Building Height[2]	22'		30'		30'		
Building Setbacks	Front 7' ave., 5' min. Rear 0' w/ alley; 7' w/ no alley Side 5' min.		Front 5' min. Rear 0' w/ alley; 7' ave., 5' min w/ no alley Side 0' where abutting another rowhouse; 3.5' or 5' when abutting a SF zone		Front 7' ave., 5' min. Rear 7' ave., 5' min. Side 5' min.; 7' ave., 5' min. for facades greater than 40'		Front 5' min. Rear 10' w/ alle Side 5' min.; 7' greater th
Building Width	No limit		No limit		60'		
Façade Length	The maximum combined length of all portions of façades within 15' of a lot line that is neither a rear, street or alley lot line shall not exceed 65% percent of the length of that lot line,						

State, Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4, (2002), applying the plain meaning rule, citing with approval to:

> *Young v. Estate of Snell*, 134 Wash.2d 267, 279, 948 P.2d 1291 (1997) (the meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous)

Faben Point Neighbors v. City of Mercer Island, 102 Wn.App. 775, 11 P.3d 322, (Div. 1 2000):

> Because municipal ordinances are the equivalent of a statute, they are evaluated under the same rules of construction. ...
>
> ***
>
> Nor does the City's six-year history of erroneously interpreting its zoning code and interim critical areas regulations change our analysis. Misunderstanding or misinterpretation of a statute or ordinance by those charged with its enforcement does not alter its meaning or create a substitute enactment. Both the City and Pacific Properties are bound by the ordinances as written. See, e.g., *Dykstra v. Skagit County*, 97 Wn.App. 670, 677, 985 P.2d 424 (1999) (local government entity's prior erroneous enforcement of a land use regulation does not foreclose proper exercise of authority in subsequent cases), review denied, 140 Wn.2d 1016, 5 P.3d 8 (2000). [Emphasis added.]

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549, (1992):

> In construing statutes, the primary objective is to ascertain the intent of the Legislature. *Martin v. Meier*, 111 Wn.2d 471, 479, 760 P.2d 925 (1988). Clear language will be given effect. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985). If a term is defined in a statute, that definition is used. [Emphasis added.]

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Certificate of Service

I certify that on this date, I electronically filed a copy of the foregoing document **APPELLANT'S RESPONSE TO OPCD'S CLOSING BRIEF** with the Seattle Hearing Examiner using its e-filing system 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:

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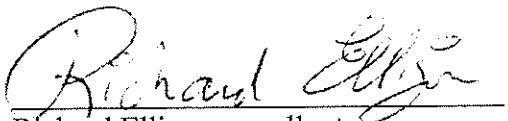
I declare under the penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct to the best of my knowledge and belief.
Signed this 23RD day of March 2022 in Seattle, Washington.



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