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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of

MBAKS, LEGACY GROUP,
BLUEPRINT CAPITAL

from a Determination of Non-Significance
issued by the Director, Seattle Department
of Construction and Inspections.

NO. W-22-003

Department Reference: 000268-22PN

JOINT MOTION TO DISMISS OF
INTERVENOR TREEPAC AND
SEATTLE DEPARTMENT OF
CONSTRUCTION AND
INSPECTIONS

I. INTRODUCTION

Respondent Seattle Department of Construction and Inspections (SDCI) and Intervenor TreePAC respectfully request that the Hearing Examiner dismiss the Master Builders Association of King and Snohomish County (MBAKS), et al.’s appeal of the SEPA threshold Determination of Non-Significance (DNS) for the Tree Protections Update because the appellants lack standing. In the alternative, TreePAC and SDCI respectfully request that the Hearing Examiner dismiss each of appellants’ issues that are outside of the scope of the Hearing Examiner’s jurisdiction and SEPA review pursuant to HER 3.02. Developers have failed to state a claim and the appeal, brought as a delay tactic, is without merit. In addition, their challenges to a failure of SDCI to consider economic impacts as part of its SEPA review should be dismissed outright.

1 **II. STATEMENT OF FACTS**

2 SDCI, in consultation with the Office of Sustainability and Environment (OSE), is proposing
3 updates to the Land Use and Tree Protection Codes that would implement strategies to increase tree
4 protection in the City of Seattle. Notice of Appeal, Ex. A (SEPA Threshold Determination) at 1. The
5 “Tree Protections Update” is a non-project legislative action proposing amendments to Titles 23 (Land
6 Use Code) and 25 (Tree Protection Code). *Id.* The amendments will, among other things, expand the
7 types and sizes of trees that are regulated and support tracking of tree preservation, removal, and
8 replacement. *Id.* at 2.

9
10 After a lengthy public process, SDCI issued a DNS pursuant to the State Environmental Policy
11 Act, ch. 43.21C RCW for the Tree Protections Update. *Id.* at 16.

12
13 The Master Builders Association of King and Snohomish County, Legacy Group Capital,
14 LLC, Blueprint Capital Services, LLC, AA Ashworth Development, LLC, Blackwood Builders
15 Group, LLC, and Build Sound, LLC (hereinafter collectively referred to as “Developers”) filed an
16 appeal of the DNS for the Tree Protections Update on March 10, 2022. *See* Notice of Appeal. MBAKS
17 is a membership organization that represents the interests of developers. *Id.* at 3. Legacy Group
18 Capital, LLC; Blueprint Capital Services, LLC; AA Ashworth Development, LLC; Blackwood
19 Builders Group, LLC; and Build Sound, LLC are local developers that build a variety of housing and
20 other types of projects in the City of Seattle. *Id.* A hearing on the appeal has been scheduled for June
21 14, 2022, with June 15 and 22 reserved for continuation of the hearing if needed.

22 **III. ARGUMENT**

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24 Under the Hearing Examiner rules, an appeal may be dismissed without a hearing if the
25 Hearing Examiner determines that it fails to state a claim for which the hearing examiner has
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1 jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay.
2 HER 3.02. Based on that rule, Developers’ appeal should be dismissed for the reasons provided below.

3 **A. The Hearing Examiner lacks jurisdiction because developers failed to**
4 **demonstrate standing.**

5 The Hearing Examiner lacks jurisdiction over this appeal because Developers failed to
6 demonstrate standing to challenge the DNS. Developers have the burden of proof to demonstrate that
7 they have standing to bring this appeal. *Trepanier v. City of Everett*, 64 Wn. App. 380, 382–84, 824
8 P.2d 524, review denied, 119 Wn.2d 1012, 833 P.2d 386 (1992). To demonstrate standing under
9 SEPA, a party must show: (1) that the appellant has suffered an actual or imminent “injury in fact”
10 that is concrete and particularized; and (2) that the appellant’s injury is within the “zone of interest”
11 protected by SEPA. *Id. See also Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829,
12 965 P.2d 636 (1998).

13 Developers have not suffered an actual or imminent “injury in fact” that is concrete and
14 particularized. To survive dismissal, appellants must set forth specific facts demonstrating that they
15 will be specifically and perceptibly harmed by the proposed action. *Snohomish County Property*
16 *Rights Alliance v. Snohomish County*, 76 Wn. App 44, 53, 882 P.2d 807 (1994), *review denied*, 125
17 Wn.2d 1025 (1995); *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992). The
18 “injury in fact” test requires that the “party seeking review be himself (or herself) among the injured.”
19 *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. at 829. No standing is conferred to a party
20 alleging a conjectural or hypothetical injury. *Id.*, *citing Snohomish County Property Rights Alliance v.*
21 *Snohomish County*, 76 Wn. App at 53.

22 Developers have not and cannot demonstrate that they have an immediate, concrete, and
23 specific injury as a result of the City’s decision to issue a DNS for the Tree Protections Update. In
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1 their Notice of Appeal, Developers claim “the provisions in the proposed Tree Protection Update will
2 significantly affect them, including, without limitation, causing uncertainty and increasing the cost of
3 development and, ultimately, housing and decreasing the lots available for reasonable development or
4 redevelopment.” Notice of Appeal at 3. This allegation does not assert the immediate, concrete, and
5 specific injury that is required for standing.
6

7 In addition, Developers’ injury is not within the “zone of interest” protected by SEPA. To the
8 extent that Developers have or will suffer any injury from the decision to issue a DNS for the Tree
9 Protections Update, it is an economic injury. Indeed, Developers admit this in their Notice of Appeal.
10 In the Notice of Appeal, Developers claim that the DNS will “cause uncertainty and increase the cost
11 of development” and “decreasing the lots available for reasonable development or redevelopment.”
12 Those interests are clearly economic interests. It is well established that economic interests are not
13 within the zone of interests protected by SEPA. *See* RCW 43.21C.010, .020; *Kucera v. State Dept. of*
14 *Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000) (en banc); *Harris v. Pierce County*, 84 Wn. App
15 222, 231, 928 P.2d 1111 (1996); *Snohomish County Property Rights Alliance v. Snohomish County*,
16 76 Wn. App at 52. Because economic interests are not within the zone of interests protected by SEPA,
17 Developers do not have standing to challenge the DNS for the Tree Protections Update.
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19 Because Developers did not allege a specific and concrete injury in fact within the zone of
20 interests of SEPA, the appeal must be dismissed. Alternatively, if Developers provide evidence of
21 alleged standing in response to this motion, TreePAC and SDCI reserve the right to present rebuttal
22 evidence in their reply.
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1 **B. Appeal Issues C.1 and C.2 should be dismissed for lack of jurisdiction or failure**
2 **to state a claim because SEPA does not require consideration of economic**
3 **impacts.**

4 If the appeal moves forward, SDCI and TreePAC request that the Hearing Examiner dismiss
5 the issues presented in the Notice of Appeal that present a challenge to a failure of SDCI to consider
6 economic impacts as part of its SEPA review.

7 SEPA requires review of *environmental impacts*, not economic impacts. SEPA does not
8 provide for consideration of economic impacts as part of environmental review. WAC 197-11-444;
9 *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App at 52; *Town of*
10 *Concrete v. Skagit Co.*, SHB No. 96-18 (1996); *Valero Logistics Operation, Lp, Et.al. v. City of*
11 *Tacoma and Pioneer Cay Developing, LLC*, 2006 WL 2129664, at *11).

12 We first request that Issue C.1 be dismissed in its entirety. In section C.1 of the Notice of
13 Appeal, Developers complain that SDCI failed to analyze “impacts on development and the cost of
14 housing.” Notice of Appeal at 5. They claim: “The proposed amendments absolutely affect the cost of
15 development, will introduce more uncertainty into the development process and will make the process
16 more problematic and as a result will have a significant impact on housing and the housing market.”
17 *Id.* In the next paragraph, Developers state that “SDCI has proposed significant amendments to the
18 code, that if adopted, will increase the time and costs of development.” *Id.* Their concerns are about
19 increased restrictions on the removal of trees on properties that they want to develop. *Id.* Complaining
20 about another aspect of the Update, they state: “This change will greatly increase the number of trees
21 that are considered exceptional and the number of lots, including residential lots, where development
22 will be more expensive, uncertain, and problematic and on which fewer residential units will be
23 developed.” *Id.* at 6. All of their complaints about faulty analysis of the number of lots affected are
24 rooted in economic impacts of increased protection of trees, not the environmental impacts of
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1 increased protection of trees. *Id.* SDCI was not required by law to consider economic impacts in its
2 SEPA analysis.

3 Second, we request that Issue C.2 be dismissed to the extent that the ultimate impacts
4 complained of are economic impacts. Developers attempt to mask this as an argument about
5 inconsistency with the Comprehensive Plan, when in fact – the impacts that they complain of are
6 economic impacts. The Notice of Appeal states that the amendments’ impacts will be to “increase cost
7 burdens,” and raise the “cost of development” and increase “the cost of housing.” That issue should
8 be dismissed as outside of the scope of what SEPA requires.
9

10 **C. Appeal Issue C.3 should be dismissed because SDCI was not required to**
11 **consider the future housing impacts alleged by Developers, and Developers**
12 **provide no evidence to support their claim of any additional stresses on the**
13 **environment.**

14 Developers erroneously assert that SDCI should have considered certain impacts from the
15 proposal including the displacement and destruction of affordable housing and displacement of
16 populations, change to neighborhood character, as well as stresses on existing utilities and
17 infrastructure, street parking, and emergency vehicle navigation.

18 First, Seattle’s SEPA Ordinance limits a SEPA analysis of housing impacts to the housing
19 topics provided in SMC 25.05.675.I. Seattle’s SEPA housing policies “encourage preservation” of
20 housing, require disclosure of impacts of a proposed project “upon existing housing,” comply with
21 city ordinance provisions relating to “housing relocation, demolition, and conversion,” and the
22 importance of “housing preservation.” The policies provided in SMC 25.05.675.I all focus on
23 existing housing and look to the preservation of existing housing and the impacts that stem from
24 the relocation of current residents and the demolition or conversion of existing housing.
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1 To the contrary, Developers' claims regarding housing impacts focus on the future. Taking
2 their economic impacts argument one step further, Developers assert that the proposal will add
3 costs to development that will slow the pace of future development. Developers assert that SDCI
4 failed to consider the proposal's future impacts as to whether developers would decide to build
5 housing. Appellants' claims of "displacement and destruction of affordable housing" or
6 "displacement of populations" are not references to displacement of current residents or the
7 destruction of existing housing. The Appellants do not and cannot make that claim because the
8 proposal does not require the demolition of any existing housing or the conversion of any existing
9 housing.
10 housing.

11 Rather, Developers' claims are focused on future events and how the proposal might impact
12 future housing development. These types of socio-economic impacts are speculative and not
13 required to be analyzed under SEPA's housing policies. SEPA does not require consideration of
14 every remote and speculative consequence of an action. *Murden Cove Preservation Ass'n v. Kitsap*
15 *County*, 41 Wn. App. 515, 526, 704 P.2d 1242 (1985).
16

17 Under the same principle that SEPA does not require consideration of every remote and
18 speculative consequence of an action, Developers' claims that the City should have studied the
19 additional "stresses" on utilities and infrastructure, parking, emergency vehicle navigation, and
20 neighborhood character should also be dismissed. Appellants provide no evidence that the proposal
21 to amend the City's tree protection would have any additional environmental stresses and provide
22 no rationale why the City's environmental review was inadequate.
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24 Developers argue that the proposal will slow future housing development. For the sake of
25 argument, if this were true, then Developers' argument in relation to "stresses" is simply illogical
26 because the proposal would decrease the "stresses" on the environment. Also, the proposal seeks

1 to retain existing trees and require the replacement of certain existing trees. Therefore, the proposal
2 would not change the character of neighborhoods, instead it seeks to preserve the status quo of
3 neighborhood trees.

4 **IV. REQUEST FOR RELIEF**

5 For the reasons discussed above, SDCI and TreePAC respectfully request that the Hearing
6 Examiner dismiss the appeal in its entirety because appellants have failed to establish standing.
7 Alternatively, to the extent that the Hearing Examiner does not summarily dismiss the appeal based
8 on standing, SDCI and TreePAC request that the Hearing Examiner dismiss or limit the issues
9 presented on appeal as set forth herein.
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11 Dated this 4th day of May, 2022.

12 Respectfully submitted,

13 BRICKLIN & NEWMAN, LLP

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