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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

MBAKS, LEGACY GROUP, BLUEPRINT
CAPITAL, *ET AL.*

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

Hearing Examiner File:
W-22-003

Department Reference: 00268-22PN

RESPONSE TO JOINT MOTION TO
DISMISS OF TREEPAC AND
SEATTLE DEPARTMENT OF
CONSTRUCTION AND
INSPECTION

I. INTRODUCTION

This proceeding is an appeal of the issuance of a SEPA threshold determination of nonsignificance (“DNS”) in support of SDCI’s proposal to amend Title 23 (Land Use Code) and Ch. 25.11 (Tree Protection) of the Seattle Municipal Code and adopt two related Director’s Rules to increase tree protection (“Proposed Action”). SDCI and intervenor TreePAC (collectively, “Respondents”) have filed a Joint Motion to Dismiss. Respondents seek to have the Appeal dismissed in its entirety based on an allegation that Appellants lack standing under SEPA to appeal the DNS. Alternatively, Respondents move to have Appeal Issues C.1 and C.2 dismissed for lack of jurisdiction or failure to state a claim and Appeal Issue C.3 dismissed for some unspecified reason. Respondents bases for this requested

1 relief reveal Respondents’ misconception of the Appeal Issues and the law concerning
2 SEPA.

3 While Appellants certainly have an economic interest at stake, as do many appellants
4 of environmental reviews under SEPA, the Appeal concerns SDCI’s failure to adequately
5 analyze the impact of the Proposed Actions on the built environment, namely, the future
6 housing stock and the ability of the City to achieve the City’s land use goals regarding
7 housing. In addition, despite Respondents’ claim to the contrary, SDCI was required to
8 assess the ”future housing impacts” since, for the purposes of an environmental review
9 under SEPA, housing is an element of the environment . In a variety of ways, Respondent’s
10 motion exhibits a fundamental misunderstanding of who can administratively appeal a
11 SEPA determination and the required scope of environmental review under SEPA.
12 Respondent’s motion also reinforces the appearance of SDCI’s bias, as shown in the DNS,
13 towards conducting the environmental review in a manner that aims to support the adoption
14 of the Proposed Actions. More importantly, Respondents have failed to present a legitimate
15 basis to support their Motion to Dismiss and it should be dismissed.
16

17 II. STATEMENT OF FACTS

18 As described in their Notice of Appeal, Appellants consist of a membership
19 organization that represents the interests of its members related to land use and development
20 regulations, among other issues, and of local developers that build a variety of housing and
21 other types of projects in the City of Seattle. The Appellants’ interest in the Tree Protections
22 Update proposed by SDCI (“Proposed Action”) is set forth in the Section III.A. of their
23 Notice to Appeal as required by H.E.R. 3.01(d)(2). This appeal is of the SEPA Threshold
24 Determination (the “DNS”) dated February 17, 2022. The DNS was informed by the
25

1 environmental checklist dated February 10, 2022 (the “Checklist”). Declaration of Scott
2 Johnson in Support of Appellants Response to Motion to Dismiss, Exhibit A.

3
4 III. ARGUMENT

5 A. Right to Appeal Under Ch. 25.05 SMC

6 Respondents misstate the legal standard for analyzing Appellants’ right to have this
7 Appeal heard and establishing the Hearing Examiner’s jurisdiction over this Appeal.
8 Respondents cite to the law regarding *judicial* appeals of SEPA actions, apparently failing to
9 appreciate this proceeding is an *administrative* appeal. Local jurisdictions are allowed to
10 establish their own process for administrative appeals of SEPA determinations. RCW
11 43.21C.075. Procedures for administrative appeal of SEPA decisions in the City of Seattle
12 are found in Ch. 25.05 SMC. Per SMC 25.05.680(B), any “interested person” can appeal a
13 Determination of Nonsignificance of a decision that is not related to a master use permit or a
14 Council land use decision. An “interested party” is defined in SMC 25.05.755 as:

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16 ...any individual, partnership, corporation, association, or public or private
17 organization of any character, significantly affected by or interested in proceedings
18 before an agency, and shall include any party in a contested case.¹

19 Respondents mistakenly cite to cases that address standing for judicial appeals under
20 SEPA. SEPA allows *judicial* appeals for those who are “aggrieved” by an agency action.
21 RCW 43.21C.075(4). In determining who is sufficiently aggrieved, courts have borrowed
22 from principles of standing that address the right to pursue private actions to compel
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24
25 ¹ The definition of Interested Party in SMC 25.05.755 is similar to the definition of “interested person” in H.E.R. 2.02(o). Neither limit persons “significantly affected” to those without an economic interest in the outcome of the proceeding.

1 compliance with or enforcement of state statutes. *See, e.g., Trepanier v. City of Everett*, 64
2 Wn.App. 380, 382 (Div. 1 1992). However, this proceeding is an administrative appeal
3 governed by the rules of procedure adopted by the City for appealing SEPA determinations.
4 Those rules require only that the appellant is either “significantly affected by” or “interested
5 in” the matter.²

6 Appellants clearly meet this standard. Appellants make clear in their Notice of
7 Appeal, that they are interested in the impact of the Proposed Action on the future availability
8 of affordable housing in Seattle sufficient to meet the demands of a growing population. *See,*
9 *e.g.,* Notice of Appeal, pg. 3, ln 20-21. In particular, they are interested in having the City
10 analyze the impact of the Proposed Action on the ability of the City to attain the housing-
11 related goals contained in the current Comprehensive Plan. *Id.*, pp. 7-8. Such analysis was
12 required under the SEPA Rules. Furthermore, the developer appellants work extensively with
13 and are subject to the City’s land use regulations, including the tree protection requirements,
14 and the membership organization Appellant represents many developers and others who also
15 work with and are subject to those regulations. For a variety of reasons, Appellants have a
16 keen interest in the provisions of and environmental review of the Proposed Action.
17

18 As stated in the Notice of Appeal, Appellants also will be substantially affected the
19 adoption of the proposed action. Appellants are housing developers or represent members
20 who are housing developers. Even the DNS recognizes (although fails to adequately analyze)
21 that the Proposed Action will impact the factors considered when developers decide when and
22 where to undertake development of housing and other projects. The increased uncertainty and
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24 _____
25 ² Appellants do have standing under the rulings applicable to judicial review, but need not and will not present arguments to demonstrate that standing in this Response, as such issues are not relevant to this administrative proceeding

1 time involved in working through the revised tree preservation regulatory process that will
2 result from the Proposed Action undoubtedly will have significant effects on the business
3 operations of Appellants or their members.

4 Either due to Appellants' interest in the Proposed Action and environmental review
5 thereof, or due to being significantly affected by the adoption of the Proposed Action, the
6 Appellants are interested persons entitled to bring this appeal and the Hearing Examiner has
7 jurisdiction to hear it.
8

9 B. The Hearing Examiner has Jurisdiction over the Subject Matter of the Appeal and
10 Appellants have stated a claim for which relief can be granted.

11 Appellants are challenging the adequacy of the DNS issued for the Proposed Action.
12 “When a governmental agency makes an initial threshold determination, it must consider the
13 various environmental factors even if it concludes that the action does not significantly affect
14 the environment and therefore does not require an EIS.” *Sisley v. San Juan County*, 89 Wn.2d
15 78, 83-84. 569 P.2d 712 (1977) (Citing to *Juanita Bay Valley Com. v. Kirkland*, 9 Wn.App.
16 59, 73, 510 P.2d 1140 (1973)). "The policy of the act, which is simply to insure via a 'detailed
17 statement' the full disclosure of environmental information so that environmental matters can
18 be given proper consideration during decision making, is thwarted whenever an incorrect
19 'threshold determination' is made." *Norway Hill v. King County Council*, 87 Wash.2d 267, at
20 273, 552 P.2d 674 (1976). “If after considering the cumulative effects of the entire project,
21 the government agency makes a determination of no significant impact under SEPA, i. e., a
22 negative threshold determination, it must show that environmental factors were considered in
23 a manner sufficient to amount to prima facie compliance with the procedural requirements of
24 SEPA.” *Sisley*, 89 Wn.2d at 84 (internal quotations omitted). As a general matter, SDCI failed
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1 to adequately consider whether or not impacts to each element of the environment will result
2 from the Proposed Action and, if so, to what extent, as required by SEPA and the SEPA Rules
3 Furthermore, the decision to issue the DNS was not based on information sufficient to evaluate
4 those impact and SDCI will be unable to establish prima facie compliance with SEPA.

5 1. Appeal Issue in Section C.1 of the Notice of Appeal

6 The Respondents mischaracterize the basis of the appeal issue contained in Section
7 C.1 of the Notice of Appeal (“Appeal Issue C.1”). The question raised in this issue is whether
8 or not the City adequately disclosed, discussed, and analyzed the direct and indirect impacts
9 on the environment from the Proposed Action. Notice of Appeal, p. 5. Appellants provide
10 examples to support their charge that SDCI failed to properly conduct the environmental
11 review in this way. Those examples include, but are not limited to, failing to thoroughly
12 complete Part B of the Checklist, using an outdated study regarding the City’s tree canopy,
13 and failing to adequately consider the effects of specific components of the Proposed Action
14 on the environment. As Appellants explain, these failures prevented SDCI from adequately,
15 analyzing the impacts of the Proposed Action on “...housing and the housing market” in
16 particular. *Id.*, p. 5.

17
18 Respondents ignore Appellants clear statements about the likely impacts on housing
19 and the housing market and the resulting effects on “...Seattleites, developers, and, most
20 importantly, the environment.” *Id.* Without referring to a specific statement in the Notice
21 of Appeal, Respondents characterize Appellants’ concerns as being only for the impact “...on
22 the properties they want to develop.” Nowhere in the Notice of Appeal do the Appellants
23 mention how the City’s failure to adequately perform the environmental review of the
24 Proposed Action will impact specific properties they might develop as a basis for appealing
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1 the DNS. While Appellants obviously will be significantly affected by the Proposed Action,
2 the Notice of Appeal only raises deficiencies in the DNS that could affect the public in general,
3 which, of course, includes Appellants. Respondents' mischaracterization is the only way they
4 can justify their allegation that Appeal Issue C.1 concerns evaluation of economic impacts,
5 not environmental impacts.

6
7 Despite Respondents assertions, the Appeal Issue C.1 concerns the SDCI's failure to
8 analyze environmental impacts in the manner required by SEPA. As discussed below,
9 housing is an element of the environment per SEPA regulations and the City's SEPA Rules.
10 WAC 197-11-444 and SMC 25.05.444. It also is an explicit component of the Checklist.
11 WAC 197-11-960. Impacts to the availability of affordable housing are inextricably linked to
12 impacts to economic factors. In order to adequately review impacts to housing from the
13 Proposed Action, SDCI should have made an effort to evaluate its effect on the factors,
14 economic or otherwise, that will result in those impacts. Respondents claim that appeal issue
15 C.1 does not concern environmental impacts, is without merit and should be denied.

16
17 2. The appeal issue in Section C.2 of the Notice of Appeal

18 The appeal issue in Section C.2 of the Notice of Appeal ("Appeal Issue C.2") concerns
19 consideration in the City's environmental review of the Proposed Action's impact on the
20 ability of the City to achieve the housing goals included in its Comprehensive Plan.
21 Respondents claim Appeal Issue C.2 involves only "economic impacts". It is difficult to
22 comprehend the logic behind Respondents' apparent claim that whether or not SDCI properly
23 assessed the impact of the Proposed Action on the attainability of the housing goals in the
24 Comprehensive Plan is not within the Hearing Examiners jurisdiction or "fails to state a
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1 claim”. Again, housing is an element of the environment. It’s a subset of Land and Shoreline
2 Use, as is the “relationship to existing land use plans and to estimated population”. SMC
3 25.05.444. Furthermore, Section D of the Checklist contains the following question:

4 How would the proposal be likely to affect land and shoreline use, including
5 whether it would allow or encourage land or shoreline uses incompatible with existing
6 plans?

7 Appeal Issue C.2 gets at the whether the Proposed Action is consistent with the City’s
8 plan to promote the availability of housing in Seattle and other housing-related goals. SDCI’s
9 failure to even identify the Comprehensive Plan’s housing goals in the Checklist or in the
10 DNS is compelling evidence in itself to support Appellants claim that SDCI failed to conduct
11 the environmental review in accordance with SEPA. And, without question, reviewing
12 SDCI’s compliance with the requirement to include a thorough analysis of impacts to the
13 City’s ability to achieve its land use goals are within the jurisdiction of the Hearing Examiner
14 and Respondents’ motion concerning Appeal Issue C.2 should be denied.
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16
17 3. SDCI was required to look at future housing impacts.

18 Respondents move to dismiss the appeal issue found in Section C.3 of Appellants
19 Notice of Appeal (“Appeal Issue C.3) without specifying a legal basis for dismissal. In Appeal
20 Issue C.3, Appellants address the City’s failure to make a reasonable effort to identify all
21 probable adverse impact to the environment from the Proposed Action. Appellants cite to
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1 several examples of probable adverse impacts that SDCI failed to even mention in the DNS
2 or the Checklist.

3 SDCI's reveals its fundamental misunderstanding of what is required as part of an
4 environmental review and threshold determination under SEPA and the City's SEPA Rules
5 for this type of nonproject action by claiming that the SEPA Rules limit the scope of an
6 environmental review to the contents of the policies found in SMC 25.05.675. SMC
7 25.05.060 lays out the content of an environmental review. Nowhere does it limit review to
8 the policies articulated in SMC 25.05.675.³ Furthermore, SMC 25.05.060(D) requires
9 consideration of all environmental impacts, whether direct or indirect. What elements
10 comprise the "environment" are found in SMC 25.05.444 and include aspects of the "Built
11 Environment", such as land and shoreline use (including housing and relationship to existing
12 land use plans and **population growth**) and transportation (including parking and circulation
13 of people and goods), as well as public services and utilities.

14
15 In addition, SMC 25.05.330 provides instructions for rendering the threshold
16 determination. The City is required to use the checklist form found at WAC 197-11-960.
17 SMC. 25.05.330(A); *see also* SMC 25.05.060.B.2. That checklist requires the proponent to
18 consider impacts to land use, housing, transportation and public services among other
19 elements of the environment. While the checklist form includes Part D, Supplemental Sheet
20 for Nonproject Actions, there is no exemption in the SEPA Rules from completing the entire
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25 ³ SMC 25.05.665, .670 and .675 contain the policies the City can use in exercising its substantive SEPA
authority to condition or deny a proposed action. SMC 25.05.660. They don't define the scope of an
environmental review.

1 checklist for the purposes of reviewing the environmental impacts from a proposed nonproject
2 action.

3 SDCI's failure to follow the SEPA Rules and assess the impacts to all elements of the
4 environment is an appropriate appeal issue and is supported by the dearth of such analysis in
5 the DNS as well as in the Checklist. While the SDCI gave a nod to the potential for adverse
6 impacts from the Proposed Action to the availability of adequate affordable housing, it made
7 no attempt to quantify that impact. If it had, SDCI would have found that the impact was
8 probable, adverse, and significant. Instead, SDCI focused on building its case for the
9 Proposed Action by focusing its review almost exclusively on how the Proposed Action will
10 protect more trees.
11

12 Respondents also seem to claim that future impacts need not be considered because
13 they are, by nature, remote and speculative. Motion, p. 7. This is a curious position for
14 Respondents to take since impacts from proposed actions, particularly nonproject actions,
15 always will be in the future. Also, SDCI failed to adequately analyze the impacts of the
16 Proposed Action on existing lots from existing trees and to existing infrastructure and existing
17 Comprehensive Plan goals regarding housing, land use, and other elements of the built
18 environment. Also, why future beneficial impacts of the Proposed Action are readily
19 discernable and quantifiable, but adverse impacts to other elements of the environment are not
20 is not clear. Regardless of the reason, failing to acquire the information necessary to analyze
21 these impacts renders the DNS noncompliant with SEPA.
22

23 The arguments in Respondents' motion reinforce the unavoidable impression from the
24 DNS and the Checklist that the goal of SDCI's environmental review of the Proposed Action
25 was not to fully analyze the impacts to the environment from the Proposed Action, but simply


1 to support the adoption of the Proposed Action by highlighting the salutary environmental
2 impacts and downplaying the adverse impacts to the environment. Regardless of SDCI's goal,
3 Appeal Issue C.3 states a claim within the Hearing Examiner's jurisdiction and is meritorious
4 on its face. Therefore, Respondents' request to dismiss Appeal Issue C.3 should be denied.
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6 IV. Conclusion

7 Appellants are entitled to bring this appeal. The DNS issued by SDCI regarding the
8 Proposed Action is based on an inadequate environmental review that failed to collect and
9 consider sufficient information to identify all impacts the environment, including the probable
10 significant adverse impact, including, without limitation, to the availability of adequate
11 affordable housing in Seattle. Appellants were entitled to appeal the DNS, the issues
12 presented by the Appellants have merit on their face, and they are within the Hearing
13 Examiner's jurisdiction. Therefore, Respondents Motion to Dismiss should be denied in its
14 entirety.
15

16 DATED: this 18th day of May, 2022.

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18
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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on May 18th, 2022, the foregoing document was
3 sent for delivery on the following party in the manner indicated:
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