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 SEATTLE DEPARTMENT OF CONSTRUCTION AND INSPECTIONS AND TREEPAC'S REPLY ON JOINT MOTION TO DISMISS

ARGUMENT

A. The Appeal Must be Dismissed for Lack of Standing

1. The two-part injury-in-fact/zone of interests test for standing applies to administrative appeals

In their response brief, Developers argue that they are not required to meet the two-part standing test that has been consistently applied to SEPA appeals by Washington State courts. Response to Joint Motion to Dismiss of TreePAC and Seattle Department of Construction and Inspection (May 18, 2022) (hereinafter "Resp. Br."). That is not correct.

The two-part standing test is not a "judicial" test, but rather a test that is rooted in the language of SEPA itself. As the *Trepanier* court said, the language in RCW 43.21C.075(4) provides the basis for the two-part standing test. *See Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524

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(1992). The key language in RCW 43.21C.075(4) that provides the basis for the standing test is its reference to a "person aggrieved."

The term "person aggrieved" in RCW 43.21C.075(4) refers not just to people filing judicial appeals under SEPA, but also to people filing administrative appeals under SEPA.

That provision states:

> **If a person aggrieved** by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, **such person** shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.

RCW 43.21C.075(4) (emphasis added).

Based on this provision, an "aggrieved" person must use an administrative appeal procedure first, if one is available, before filing a judicial appeal. In either scenario, the person must be "aggrieved" before filing an administrative appeal or a judicial appeal. *See* RCW 43.21C.075(4).

And, as the court explained in *Trepanier*, a "person aggrieved" is a person that has suffered an actual or imminent injury-in-fact that is concrete and particularized and that is within the zone of interest of SEPA. *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992).

The City of Seattle Code's reference to "interested persons" does not override or erase the "aggrieved person" requirement in RCW 43.21C.075. In fact, the Hearing Examiner has used the term "interested person" and "aggrieved" person seemingly interchangeably in the past. *In the Matter of the Appeal of Margaret Schulz,* HE File No. MUP-90-096 (January 11, 1991). Moreover, SMC 25.05.680 (the source of the "interested person" language) states that if there are inconsistencies between that provision and SEPA, the SEPA provisions control. *See* SMC 25.05.680. To add to that, SMC 25.05.680 instructs people who are considering filing an administrative appeal of any decision that involves SEPA to read RCW 43.21C.075 before filing their appeal (among other provisions). *Id.*

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This tells us that the authors of the Seattle code provision intended that the "aggrieved person" language be relevant and applicable to SEPA appeals in Seattle.

Respondents have attempted to research the City of Seattle Hearing Examiner's past decisions on standing to discern whether the Hearing Examiner has required appellants to meet the injury-in-fact and zone of interest requirements for standing in SEPA appeals, but it appears that decisions on motions to dismiss are not available for research (only final decisions). To the extent that the Examiner had deemed it appropriate to require a showing of injury-in-fact and zone of interest in past cases, that same standard should be applied here.

2. Developers did not demonstrate that they meet the injury-in-fact and/or zone of interest requirements for standing

Developers did not present any evidence or argument to demonstrate that they meet the injury-in-fact or zone of interest requirements for standing. *See* Resp. Br. at 4, fn 2. ("Appellants … need not and will not present arguments to demonstrate standing in this Response, as such issues are not relevant to this administrative proceeding."). As they admitted in footnote 2, they did not provide any facts or evidence to show that they will be directly and adversely affected by SDCI's decision to issue a DNS. They implicitly admit that economic interests are not within the zone of interests protected by SEPA.

Based on their claim that the applicable test is whether they are "significantly affected by" or "interested" in the matter, they present conjectural and hypothetical claims that the new ordinance will reduce the availability of affordable housing in the future. They don't even attempt to demonstrate a direct connection between the Tree Ordinance and lack of affordable housing. And their claim that this supposed reduction in housing (which wasn't demonstrated) will adversely impact their business operations is based on pure speculation.

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Because the two-part test applies in this setting and because Developers did not even attempt to argue or demonstrate that they meet either prong of that test, the appeal must be dismissed for lack of standing.

B. Developers have not stated a claim for which relief can be granted

1. Allegations of economic impacts should be dismissed for failure to state a claim

Respondents did not mischaracterize the basis of the appeal issues contained in C.1 and C.2 of the Notice of Appeal. That paragraph in the Notice of Appeal is focused on SDCI's alleged failure to consider economic impacts, such as the impacts of the Tree Ordinance on the "cost" of housing, the "cost" of development, and impacts on "developers." Notice of Appeal at 5. The Appeal complains that the code will "increase the time and costs of development." *Id*. at 5 and 8. The Appeal complains that provisions in the Ordinance will increase the number of lots where "development will be more expensive, uncertain, and problematic…" *Id.* at 6. Respondents request that the Examiner make it clear that SDCI is not required to analyze and assess economic impacts of the Tree Ordinance under SEPA.

2. Appeal issue C.3 should be dismissed because SDCI was not required to consider future housing impacts and Developers provide no evidence to support their claim of additional stresses on the environment

Based on Developers' response and setting aside the allegations of economic impacts, it is evident that the remainder of their appeal is focused entirely on the proposed action's alleged impacts on future housing availability, particularly affordable housing. The City acknowledges that is a topic worthy of consideration, but such consideration is not required under SEPA. The "Built Environment" is the only environmental element that refers to housing impacts, and a review of the questions in B.8 and B.9 on the Checklist make clear that the analysis is limited to how a proposal will impact the built environment, *i.e.*, existing housing, either through demolition of housing, or the conversion of housing

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to other uses, and the resulting displacement from either the demolition or conversion of existing housing. This is consistent with the City's SEPA housing policies provided in SMC 25.05.675.I.

The City's Environmental Checklist and DNS, together, demonstrate clearly that the City did in fact adequately study the direct, indirect and cumulative impacts to the environment in this regard. That was the entire purpose of those documents. Developers' response fails to provide any evidence or plausible argument to support its Issue C.3.

Developers erroneously claim that the City failed to study the displacement and destruction of affordable housing or the displacement of populations. This argument ignores the statements in the Checklist that no structures would be demolished, and no housing units would be eliminated by the Proposal. *See* Declaration of Scott D. Johnson in Support of Appellants' Response to Motion to Dismiss (May 18, 2022), Ex. A (Checklist 8.d, 9.b). The Proposal does not impact existing structures or housing, including structures providing affordable housing, nor does it have anything to do with the conversion of such housing to a different use. Similarly, the proposal is not likely to contribute to the displacement of existing populations, because the proposal does not involve the demolition, or conversion, of any existing housing.

Developers are wrong when they claim that the City failed to study the change in neighborhood character. The DNS provides:

> Depending on the location of a regulated tree on the development site, such trees could in some cases lead to differences in how future new housing units (including detached accessory dwelling units) could be situated on existing lots.
>
> This could potentially be viewed as creating competing interests between land use regulations and tree protection regulations, **but would not fundamentally reshape the typical prevailing land use and development pattern within any given zoning designation or neighborhood.** Development would still be possible in many or most cases, and protecting regulated trees, as proposed, would not

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> prohibit development, but rather would require sensitivity in site design. Property owners may need to factor trees into site plans and design considerations in more future development proposals, to build structures that may accommodate regulated trees to remain on-site even after development.
>
> It should be noted that these aspects of the proposal do not alter the existing nature of the competing interests that are already present by virtue of the City's existing policies, codes, and practices regarding regulated trees. With respect to reasonably accommodating new development, these interests are partly addressed by accommodating flexibility in application of development standards and similar considerations regarding the development capacity in individual developments; the proposal would continue to implement these principles in its regulations.

Notice of Appeal, Ex. A at 11.

Accordingly, Developers' claim that the City failed to study the proposal's impact on neighborhood character is wrong on its face. The City, in analyzing the proposal, recognized the proposal would not reshape the typical prevailing land use and development pattern within any given zoning designation or neighborhood.

Developers wrongly allege that the City failed to study "stresses on existing utilities;" "stresses on existing infrastructure;" "stresses on the amount of available street parking;" and "ability of residents and emergency vehicles to navigate through the neighborhoods." Again, these claims are erroneous on its face. The DNS directly addressed these types of impacts on page 15 and 16 of the DNS under the heading "Transportation, Public Services and Utilities":

> This non-project proposed action would not be likely to increase demands or impacts on transportation or public services and utilities systems in a significant adverse manner. This is due to a lack of significant material relationship of the contents of the proposal to these environmental elements. In other words, this analysis does not identify outcomes that would generate probable adverse or significant adverse impacts upon the functioning of transportation systems, electrical, water or sewer utility systems, police, fire/emergency public services, schools, or other similar public

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> utilities and services. This includes with respect to direct, indirect, and cumulative impacts.

Notice of Appeal, Ex. A at 15-16.

The SEPA responsible official properly recognized that the tree protection ordinance did not have a material relationship with transportation, public services, or utilities. Developers make no credible argument that the proposal would have any impacts on utilities, services, or transportation greater than or less than the existing baseline or current conditions.

CONCLUSION

For the reasons stated above, Respondents SDCI and TreePAC request that the Examiner dismiss all of the issues presented by the appeal in this matter.

Dated this 24th day of May, 2022.

Respectfully submitted,

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