BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of

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

of a Determination of Nonsignificance issued by the Director, Seattle Department of Construction and Inspections

Hearing Examiner Files:
W-22-003

Department Reference:
000268-22PN

ORDER ON MOTION TO DISMISS

Respondent Seattle Department of Construction and Inspections ("Department") and Intervenor TreePAC ("Intervenor") (collectively herein "Movants") moved to dismiss this appeal on May 4, 2022. Appellants MBAKS, Legacy Group, Blueprint Capital, et. al., (collectively "Appellants"), filed a response to the motion on May 18, 2022. The Movants filed a reply on May 24, 2022. The Hearing Examiner has reviewed the file in this matter including the motion documents.

The appeal challenges the issuance of a State Environmental Policy Act ("SEPA") threshold determination of nonsignificance ("DNS") in support of the Department's proposal to amend Title 23 (Land Use Code), and Chapter 25.11 (Tree Protection) of the Seattle Municipal Code ("SMC" or "Code") and adopt two related Director's Rules to increase tree protection ("Proposed Action").

Hearing Examiner Rule ("HER") 3.02 provides:

> An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay.

The Movants argue in the motion that the Appellants do not have standing to bring their appeals. The Movants argue that the Appellants have failed the two-part test for standing to challenge actions under SEPA: (1) the interest sought to be protected must fall within the zone of interests protected by SEPA; and (2) the party must allege an injury in fact. *Lands Council v. Washington State Parks Recreation Com'n,* 176 Wn.App. 787,799, 309 P.3d 734, 740 (2013), citing *Kucera v. State,Dep't of Transportation,* 140 Wn.2d 200, 212, 995 P.2d 63 (2000).

Appellants respond that the judicial two-part test does not apply, and that only the Code sets criteria for achieving standing of a City SEPA determination.

This raises what appears to be an original issue for the Seattle Office of Hearing Examiner. The Office of Hearing Examiner has applied the two-part test for standing in past matters, however in those cases no party challenged the applicability of the two-part standing test.[1] [2]

The parties also presented opposing arguments concerning dismissal of several issues raised in the notice of appeal.

I. Judicial Standing for DNS Appeal

Movants indicate that the Code incorporates the SEPA statute by reference (and at any rate due to its statutory origin must be controlled by that statute), and argue that this includes RCW 43.21C.075(4), which 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.

Movants argue that 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. They argue that the person must be "aggrieved" before filing an administrative appeal or a judicial appeal. RCW 43.21C.075(4). However, this reading does not comport with the language of that section, or the statutory construction. RCW 43.21C.075(4) on its face only concerns the path to a judicial appeal, and does not explicitly require that a person be "aggrieved" prior to filing an administrative appeal. Further, the structure of RCW 43.21C.075 proceeds from general requirements concerning appeals (RCW 43.21C.075(1) and (2)), to controls on administrative appeals (RCW 43.21C.075(3)), and then moves on to controls on the transition from administrative appeals to judicial appeals (RCW 43.21C.075(4)), and then on to judicial appeals (RCW 43.21C.075(5) and (6)). RCW 43.21C.075(6)(a) specifically relegates the decision of an administrative appeal to the administrative appeal process in RCW 43.21C.075(3). If the legislature had intended the "aggrieved" person standard to be applied to administrative appeals allowed by this statute, it would have included this threshold requirement in RCW 43.21C.075(2).

None of the cases cited by the Movants demonstrate that a court has required that the two-part test for standing should be applied at the administrative level.

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[1] See e.g. W-17-002 (Order on Motion to Dismiss), W-18-012, W-18-013, MUP-17-023, MUP-17-024, and MUP-21-002.

[2] Movants argue that "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)" However, (setting aside that this decision was issued by a Deputy Hearing Examiner over thirty years ago, and that previous Examiner decisions do not hold precedent for current cases) the decision equates the two terms in passing with no associated analysis and should be considered dicta.

II. Right to Appeal Under Ch. 25.05 SMC

Where the Code sets a standard for a right to appeal that standard must be applied. Under SMC 25.05.680(B), any "interested person" can appeal a Determination of Nonsignificance of a decision that is not related to a master use permit or a Council land use decision. An "interested party" is defined in SMC 25.05.755 as:

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

(emphasis added)

While it is possible to read this standard as creating two mutually exclusive rights to appeal for persons "significantly affected by" **or** "interested in proceedings," to allow persons to appeal based on the extremely broad standard of having mere "interest" in a proceeding would render the provision "significantly affected" meaningless, as virtually anyone could meet the standard of being interested. As such, the term "significantly affected by or interested in proceedings before an agency" should be read as a single provision to determine a person's right to appeal a DNS under the Code.

In this case, Appellants argue that they are both significantly affected by and interested in the subject of the DNS. Appellants state in their response to the motion:

> Appellants . . . will be substantially affected by the adoption of the proposed action. Appellants are housing developers or represent members who are housing developers. Even the DNS recognizes (although fails to adequately analyze) that the Proposed Action will impact the factors considered when developers decide when and where to undertake development of housing and other projects. The increased uncertainty and time involved in working through the revised tree preservation regulatory process that will result from the Proposed Action undoubtedly will have significant effects on the business operations of Appellants or their members.

And,

> Appellants make clear in their Notice of Appeal, that they are interested in the impact of the Proposed Action on the future availability of affordable housing in Seattle sufficient to meet the demands of a growing population. *See, e.g.,* Notice of Appeal, pg. 3, ln 20-21. In particular, they are interested in having the City analyze the impact of the Proposed Action on the ability of the City to attain the housing related goals contained in the current Comprehensive Plan. Id., pp. 7-8. Such analysis was required under the SEPA Rules. Furthermore, the developer appellants work extensively with and are subject to the City's land use

> regulations, including the tree protection requirements, and the membership organization Appellant represents many developers and others who also work with and are subject to those regulations. For a variety of reasons, Appellants have a keen interest in the provisions of and environmental review of the Proposed Action.

These assertions were not refuted by the Movants.

The motion to dismiss is **DENIED** as to standing.

The Hearing Examiner will make a ruling concerning issue preclusion at the outset of the hearing on June 14, 2022. Preliminarily, any issues concerning economic impacts will be dismissed, and Appellants are limited to the specific objections to the decision or action being appealed identified in their Notice of Appeal in accordance with HER 3.01.

Entered June 9, 2022.

____/s/Ryan Vancil_______________________
Ryan Vancil, Hearing Examiner
Office of Hearing Examiner

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CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matter of **MBAKS, LEGACY GROUP, BLUEPRINT CAPITAL** Hearing Examiner File: **W-22-003** in the manner indicated.

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Dated: June 10, 2022

/s/Patricia Cole____________
Patricia Cole,
Executive Assistant