Hearing Examiner Ryan Vancil

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 THE CITY'S AND TREEPAC'S CLOSING BRIEFS

I. ARGUMENT

A. Overview.

As the City and TreePAC correctly point out, a "clearly erroneous" standard applies to an appeal of a DNS, which can be established if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed even if there is evidence to support the DNS. *Norway Hill v. King County Council*, 87 Wn.2d 267, at 275, 552 P.2d 674 (1976) (Citations omitted.) The City and TreePAC further correctly identify that, as a threshold matter, the agency (SDCI in this case) must present evidence that demonstrates that environmental factors were considered in a matter sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision is based on information sufficient to evaluate the proposal's environmental impact.

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

The City and TreePAC then depart from settled law regarding a challenge to a DNS by erroneously asserting that in order to establish that the DNS is clearly erroneous, the appellant has the burden of providing evidence that probable significant adverse environmental impacts will result from the Proposed Action.[1] While the City accurately recites the excerpt from the Hearing Examiner's decision in *Save Madison Valley*, MUP 18-20 (DR, W) & S-18-011, the Deputy Hearing Examiner in that case misstated the appropriate standard of review of a DNS. The Deputy Hearing Examiner in *Save Madison Valley* failed to mention the requirement that the City must establish prima facie compliance with the procedural requirements of SEPA, including the requirement that the decision be based on information sufficient to evaluate the proposal's environmental impact. The incorrect standard for review of a DNS articulated in *Save Madison Valley* – or, at least, the City's and TreePAC's interpretation of the decision – is inconsistent with the firmly-established standard of review for a DNS that places the initial burden on the agency issuing the DNS to show prima facie compliance with SEPA procedural requirements.[2]

Also, the holdings in the cases cited in support of the proposition asserted by the City and TreePAC were misapplied by the Deputy Hearing Examiner in *Save Madison Valley*. Both *Boehm* and *Moss* set forth the accepted standards for review of a DNS at the outset of those opinions, not the standard asserted by the City and TreePAC. In both cases, the appellate court's findings imply that the requisite prima facie case was presented by the agencies. In *Boehm*, the relevant appeal issue was whether the agency was required to consider cumulative impacts and the court found the appellant failed to provide the necessary proof that the project

[1] City Brief, pg. 22-23.
[2] The other Hearing Examiner decisions cited by TreePAC in fn. 17 of its Closing Brief does not reference this alleged requirement.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

under review will facilitate future actions that will result in additional impacts. *Boehm v. City of Vancouve*r, 111 Wn. App. 711, 47 P.3d 137, 142 (Div. II 2002). In *Moss*, the court noted the appellants failed to "cite" any facts or evidence on the record pointing to significant environmental impacts from the subject proposal as one basis for rejecting the appeal. *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 716 (Div. I 2001). Despite the City's and TreePAC's attempt to represent otherwise, the decisions in *Boehm* and *Moss* do not establish a legal principle that an appellant must provide evidence of probable significant adverse environmental impacts when challenging a DNS.

Instead, the City must meet its threshold burden of showing that the record establishes that the City considered environmental factors in a manner sufficient to amount to prima facie compliance with SEPA procedural requirements. The record demonstrates that the City failed to comply with various SEPA procedural requirements, such as:

1) Consider the impacts of the lifetime of the Proposed Action; WAC 197-11-060(4)(c) and SMC 25.05.060.D.3;

2) Base the threshold determination on information reasonably sufficient to evaluate the environmental impact of the Proposed Action; WAC 197-11-335 and SMC 25.05.335;

3) Not balance the beneficial aspect of the Proposed Action against adverse impacts of the Proposed action in making its threshold determination. WAC 197-11-330(5) and SMC 25.05.330.E; and

4) Not have the same agency people carrying out the SEPA review process and the environmental review. SMC 25.05.926.

As a result, the DNS is clearly erroneous and, at the very least, must be remanded back to

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

SDCI to perform a threshold determination that complies with the procedural requirements of SEPA.

Appellants also have provided evidence of probable significant adverse environmental impacts resulting from the Proposed Action that require the City to undertake an environmental impact statement in order to further study those probable impacts. Despite the City's double speak about impacts to housing production and other elements of the built environment from the existing tree protection ordinance, even the City recognizes that a particular lot with a regulated tree will be less likely to be developed. By virtue of at least tripling the number of lots with a regulated tree, it's reasonably likely the Proposed Action will have more than moderate adverse environmental impacts thereby necessitating preparation of an environmental impact statement.

B. <u>The City's Threshold Determination did to follow SEPA's procedural requirements.</u>

1. The City clearly did not adequately consider the impacts during the lifetime of the proposal in conducting its threshold determination. Mr. Clowers, Mr. Spears, and all of the other City witness admitted that they did not consider the effect of tree growth in their evaluation of the potential impacts of the Proposed Action. They essentially based all their analysis on old 2016 data without adjusting it to reflect what they should have known would occur over the lifetime of the Proposed Action – tree growth.

2. In addition to failing to consider growth, the information the City used to evaluate the environmental impact of the Proposed action was not reasonably sufficient. The City relied on limited and deficient data instead of insisting on complete and accurate data from SDCI, some of which could have been produced by analyzing information available in Accela. This information included such factors as the time necessary to go through tree review

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

to remove a regulated tree during development [3] and the frequency that permits go through that process. Given the insufficiency of the available data regarding the distribution of trees by width in Seattle, Mr. Clowers also should have required that SDCI bolster the data by arranging for the City to conduct a tree survey of its own - by sampling trees, not counting every one as suggested in the City's Closing Brief.

To distract from its failure to base the DNS on reasonably sufficient information, SDCI tries to dress up Table 5 of the Director's Report as an effort to "quantify the impacts" of the Proposed Action.[4] It was no such thing. It was simply a count of trees that would be regulated under the Proposed Action and the number of lots that would contain such trees. If the tree count had been performed correctly, it could have been a valuable piece of information the City could have used along with other information available to it to actually attempt to quantify the impacts of the Proposed Ordinance. Instead, Mr. Clowers, the designated Responsible Official, rendered the information irrelevant when he assumed that the existing tree protection ordinance has no significant impact on housing production (or, apparently, affordable housing or any other element of the built environment), and that the Proposed Action would result in no significant impacts because the text of the Proposed Action is "on net" no different than the existing ordinance. Mr. Clowers did not use the information in Table 5 to reach this conclusion, and, once he came to this conclusion, neither Table 5 nor any other information Mr. Clowers should have utilized in his analysis mattered. In other words, Mr. Clowers assumptions closed off all other inquiry.

As Appellants described in detail in their Closing Brief, the Responsible Official came

[3] This would include the additional time before submitting a permit application necessary to prepare a design with "sensitivity" regarding the protection of exceptional trees. See City Closing Brief, pg. 11, ln 17-20.
[4] City's Closing Brief, pg. 9.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

to these conclusions without requesting any information that might shed some light on the impacts of the current ordinance on housing production - that could have readily been gleaned from Accela - other than past housing production data.[5] The information Mr. Clowers appeared to rely on the most, past housing production data, has little probative value regarding whether or not the existing ordinance has or the Proposed Action will have a substantial adverse impact on housing production. The data is a gross look at production numbers, not the factors that lead to them. Without more analysis, they can't tell you how housing production was impacted by one factor or another nor whether changing a factor may impact outcomes in the future. Also, impacts of a factor may not be apparent under certain conditions, but may be significant under other conditions – especially if the factor is magnified by 300%.

Even when the Responsible Official identified a potential impact (e.g. increase in the probability that prospective applicants for new development might evaluate the effect of the tree protection requirements (relative cost of mitigation) and decide against submitting a development proposal at that site), he made no effort to quantify it. Again, Mr. Clowers' analysis appears to have ended once he assumed there was no impact on housing production or land use patterns from the existing Tree Protection Ordinance.

In addition to being something other than the "quantification" of the *impacts* from the Proposed Ordinance, the tree count was of limited value because SDCI's methodology in developing the count was deeply flawed.[6] Most troublesome is the City's abject failure to

[5] The City and TreePAC imply that information from a listening session with developers and builders was information used in the threshold determination. City's Closing Brief, pg. 6, ln 10-11; TreePAC Closing Brief, pg. 5, ln. 19. However, Mr. Clowers testified that he did not consider stakeholder input other than from the UFC.

[6] City claims Vermont Spatial Analysis Laboratory ("the Lab") came up with the number of large trees. Pg. 9, ln 16-17. This is not true. The Lab was only hired to provide information regarding the tree canopy in Seattle. Mr. Spears testified that SDCI developed the methodology for the tree count and ran the calculations, only consulting with the Lab about the methodology.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

consider tree growth in calculating the number of new trees that will be regulated. The 2016 data was out of date by 2021 and SDCI failed to estimate the increase in numbers of affected lots over the life of the Proposed Action. Other deficiencies in the tree count are set forth in Appellants' Closing Brief.

Given the insufficiency of the information on which the SDCI based the DNS, the City and TreePAC are left to rely on unsupported hyperbole and misrepresentations to undermine Appellants' arguments. For instance, neither Appellants nor their witnesses at any point claimed "development will cease" on sites with regulated trees as a result of the Proposed Ordinance as alleged by the City.[7] The City also misstates the number of lots that will contain regulated trees under the Proposed Action.[8] The City only includes lots with "exceptional trees". Since there is no difference between the process and requirements for removing a significant tree over 12-inches during development and the process and requirements for removing an exceptional tree, there will be far fewer lots unaffected by the Proposed Action than claimed by the City.[9]

As further explained in the Appellants' Closing Brief, the information relied on by the Responsible Official in rendering his threshold determination is insufficient to evaluate the impacts on housing projection, affordable housing, land use, parking, traffic, utilities, and other infrastructure. This failure warrants a remand so the City can collect sufficient information on which to base its threshold determination and appropriately assess potential impacts to these environmental elements in compliance with SEPA requirements.

[7] City's Closing Brief at pg. 23, ln 16.
[8] City's Closing Brief at pg. 23, ln. 18-19.
[9] TreePAC claims that SDCI concluded that the number of new affected lots would be a "moderate" number. TreePAC Closing Brief, pg. 9, ln 10-12. Mr. Clowers did not testify to having reached such a conclusion.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

3. The City improperly balanced beneficial aspects of the Proposed Action against its adverse impacts. The City begins its brief by extoling the virtues of protecting trees and listing out the positive benefits to elements of the natural environment.[10] It further counterposes any mention of possible adverse impacts of the Proposed Action to the built environment by referencing those benefits.[11] By balancing the environmental impacts of the Proposed Action, the City is unabashedly conflating SEPA review with the process for developing and approving legislation and violating SEPA as a result.[12] A threshold determination does not involve balancing positive impacts to one element of the environment against adverse impacts to another element when determining if there are significant adverse impacts. WAC 19711-330(5) and SMC 25.05.330.E; see also *Alpine Lakes Protection Society v. Washington State Dept. of Natural Resources*, 102 Wn. App. 1, 979 P.2d 929, 936 (Div. 1 1999) ("…even proposals intended to protect or improve the environment may require an EIS."). SEPA is intended simply to disclose effects of a proposed major action on environmental factors. The balancing of impacts in the DNS and the City's and TreePAC's closing briefs should be left to the City Council in this case.

4. The City's inability to distinguish between the process for developing proposed legislation and the threshold determination process is further exemplified in the multiple roles filled by Mr. Clowers in both processes. He is not only the Responsible Official, but also assisted with the drafting of the environmental checklist (that the proponent of the proposal is to complete) as well as consulted on the proposed legislation itself. The resulting bias imbued in the DNS illustrates the need for SMC 25.05.926.B and its preference for having

[10] TreePAC also devotes a significant its brief to describing the benefits of protecting trees. Appellants do not dispute the benefits to the natural environment from protecting exceptional trees.
[11] *See*, *e.g.*, City's Closing Brief, pg. 15, ln 10-13.
[12] City's Closing Brief, pg. 21, ln. 12-16.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

a different people in and agency undertake the SEPA review than the ones that developed the proposal.

C. The Proposed Action will result in probable substantial adverse environmental impacts.

While proof of probable substantial adverse environmental impacts is not required for a DNS to be found noncompliant with SEPA and this appeal is focused on the City's failure to comply with SEPA procedure, the record contains compelling proof that such impacts from the Proposed Action are probable. Even the City recognizes effects on the housing development process from the current Tree Protection Ordinance (despite, inconsistently, finding no impact when it came time to consider the effects of a three-fold increase in the number of regulated trees under the Proposed Action). In addition, Mr. Deherrera, Mr. Pollard, and Mr. Britsch testified regarding the adverse impacts to housing production from the added time, cost, and uncertainty of the process removing an exceptional tree under the existing ordinance and how requiring three times as many lots to go through that process will exacerbate those impacts, even if the process is categorized as an administrative review instead of a streamlined design review. A significant impact is one that has more than a moderate effect on an element of the environment. The hearing record contains sufficient evidence that the Proposed Action will have more than a moderate adverse impact on housing development (and other elements of the built environment) as a result of tripling (at least) the number of regulated trees in Seattle.

By citing to *Chuckanut Conservancy*, the City seems to be implying that the Proposed Action doesn't change current uses of land.[13] That representation reveals the City's profound

[13] City Closing Brief, pg. 21-22.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

lack of understanding of the Proposed Action's impact. By subjecting three times as many lots to an existing regulatory scheme, the Proposed Action will significantly impact how land in Seattle is used. Saying otherwise is simply wishful thinking or purposeful ignorance. Furthermore, the fact that some lots with exceptional trees have been developed and some exceptional trees removed under the current Tree Protection Ordinance[14] is not inconsistent with the testimony of the Appellants' witnesses or with a finding that it is reasonably likely the Proposed Action will result in significant adverse impacts to the built environment.

II. CONCLUSION

While the City offers some evidence in support of its threshold determination process, one is left with the definite and firm conviction that a mistake has been committed in issuing the DNS. In performing its threshold determination, the City committed clear error by failing to comply with the procedural requirements of SEPA in a number of ways. In doing so, it failed to recognize probable significant adverse environmental impacts. Therefore, the DNS should be remanded for development of an EIS or, at least, the completion of a threshold determination process in compliance with SEPA.

DATED: this 19th day of July, 2022.

HELSELL FETTERMAN LLP

By: _____

Brandon S. Gribben, WSBA No. 47638
Scott D. Johnson, WSBA No. 22956
Attorneys for Appellants

[14] TreePAC implies that three SDCI employees spend all their time reviewing applications for tree removal. TreePAC Closing Brief, pg. 13, ln 9-12. What the record actually shows is that three employees spend only part of their time on reviews of applications that may propose either to protect or to remove an exceptional tree.

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 19, 2022, the foregoing document was sent for delivery on the following party in the manner indicated:

Attorney for City Daniel Mitchell City Attorney's Office	☐ Via first class U. S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☒ Via Email to Daniel.mitchell@seattle.gov
SDCI: Gordon Clowers Chanda Emery	☐ Via first class U. S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☒ Via Email to Gordon.clowers@seattle.gov Chanda.emery@seattle.gov
Seattle City Attorney's Office: Eric Nygren	☐ Via first class U. S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☒ Via Email to Eric.nygren@seattle.gov
Peggy Cahill Bricklyn and Newman	☐ Via first class U. S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☒ Via Email to cahill@bnd-law.com

s/Kyna Gonzalez
Kyna Gonzalez, Legal Assistant

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**