

BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeal of)	Hearing Examiner File:
)	
DENNIS SAXMAN, et al.)	W-13-008
)	
From a SEPA Determination by the Director,)	Appellants' Response to
Department of Planning and Development)	City's Motion to Limit
)	Discovery; Proposed Order
_____)	

The Appellants respectfully request that the Hearing Examiner deny the City's Motion to Limit Discovery.

Argument

Despite the Hearing Examiner's explanation to the DPD at the prehearing conference that the scope of discovery was very broad, including documents and information that are relevant to the subject matter of the appeal, or are reasonably calculated to lead to documents and information that are relevant to the subject matter of the appeal, (HER 3.11) the City continues to partially refuse Appellants' request for documents and responses to a series of questions, and forces the Appellants to make arguments the Appellants have made before regarding the same issues, and which the City has ignored, which the Appellants find unduly burdensome and harassing.

The Appellants respond to the City's arguments as follows, and in the order presented by the City:

The Appellants' original request was for documents which show consideration of and evaluation of fire hazards, and other safety concerns, and their impact on Police and Fire services. I am particularly interested in any documents that consider the environmental impact of a single fire exit in five to six story buildings.

Life safety issues are not outside the scope of SEPA Review. Item 15a of the SEPA Checklist asks: Would the project result in an increased need for public services (for example: fire protection, police protection, health care, schools, other)? If so, generally describe. Item 7a of the SEPA Checklist asks: Are there

any environmental health hazards, including exposure to toxic chemicals, risk of fire and explosion, spill or hazardous waste that could occur as a result of this proposal? As the City is well aware, the DPD itself, included an Appendix to the Director's Report and Recommendations titled "Micro-Housing – Fire Safety Provisions In The Building Code." The presence of this Appendix suggests that the Department of Planning and Development (DPD) did consider fire safety relevant to its SEPA analysis, so the Hearing Examiner should not entertain the City's argument that life safety issues are outside the scope of SEPA Review. The City pleads that the "Director's Report does not bring every issue into an appeal of a SEPA decision." However, the DNS itself states the Director's Report and Recommendations was one of the documents that "form the basis for this analysis and decision." At the minimum, police and fire protection relate to life safety issues, and are relevant to the subject matter of the appeal. The City's objection should be denied.

The Appellants' original request was for documents recognizing and discussing that micro-housing has been and is being proposed in a variety of configurations, and considering how that variation determines environmental impacts and affects the analysis of environmental impacts, and which show that variation was actually considered in the environmental impact analysis. The variety of configurations affects the number of residents. The greater the number of residents and by implication, density, the greater the environmental impacts. These documents would therefore be relevant to the scope of an appeal that is about the adequacy of the analysis of environmental impacts. The City's objection should be denied.

The Appellant's original request was for documents that reflect consideration and evaluation of the potential environmental impact of prohibiting construction of micro-housing in the Lowrise 1, Lowrise 2, and Neighborhood Commercial 1 zones. Why this should need clarification escapes the Appellants. In its DNS, the City states "Potential environmental impacts for the following actions were also evaluated as a part of the proposal, although the draft ordinance does not include these items as part of the legislation...Prohibit construction of micro-housing in the Lowrise 1, Lowrise 2, and Neighborhood Commercial 1 zones," and concludes "[t]he potential to prohibit location of Micro-Housing and Congregate Residences from Lowrise 1 and Lowrise 2 zones, and Neighborhood Commercial 1 zones would have minimal cumulative effect because very few projects are located in those zones under existing regulations." Since the City evaluated the potential impacts of this matter, it is reasonable of the Appellants to presume that there are some documents that reflect the consideration and evaluation. They would clearly be relevant to the Appeal as the City states it evaluated the potential environmental

impacts of this matter. The City's request for clarification is in bad faith and designed to burden and harass Appellants. The City's objection should be denied.

The Appellants' original request was for documents which show consideration of and evaluation of fire hazards, and other safety concerns, and their impact on Police and Fire services. I am particularly interested in any documents that consider the environmental impact of a single fire exit in five to six story buildings.

As regards this matter, see Appellants discussion above regarding life safety matters. The City's objection should be denied.

The Appellants' original request was for documents that are the basis for the DPD's touting of micro-housing as an affordable housing option, especially any which show a detailed, comparative analysis and consideration of the issue of affordability, including any contribution micro-housing might make to increased rents overall as other landlords increase their rents because of the high square footage rental rates received by developers and owners of micro-housing projects. The potential impact on affordability and general effects on rents is not remote and speculative. It is common knowledge to the residents of Seattle that rents have skyrocketed on Capitol Hill, which has a significant percentage of microhousing projects. Appellants will offer testimony at the hearing of this matter that landlords have significantly increased or are considering increasing their rents in response to the rents that landlords are receiving on microhousing units, which are much smaller in comparison to their units. The City's objection should be denied.

The Appellants' original request was for any documents that explain why the DPD did not consider the environmental impacts of a number of completed and leased projects and a large number of projects under construction.

If as the DPD asserts, completed projects and projects under construction are approved under existing regulations and are therefore, irrelevant to and outside the scope of SEPA review of the proposed legislation, then why does the DPD provide so much information about existing development approved or existing under existing regulations as attachments to its DNS? The City actually considered such projects and the existing regulations, so both are relevant to and within the scope of this appeal. Indeed, this legislation is being proposed because of the inadequacy of existing regulations, and can only be evaluated in light of how it responds to those regulations. "[F]uture County approval or environmental review of a site-specific plan does not preclude consideration of that proposal during the earlier, nonproject solid waste plan where that future activity is specific enough to allow some evaluation of its probable environmental impacts." *Citizens v. Klickitat County*,

122 Wn.2d 619, P.2d 390, 866 P.2d 1256 (1993). Given its experience on existing and proposed projects, the DPD has information specific enough to allow some evaluation of the legislation's probable environmental impacts. This objection should be denied.

The Appellants' original requests were for documents which consider the interaction of regulation and the growth of micro-housing development and how it would affect environmental impacts and documents which discuss the environmental impact of administrative discretion on the growth of micro-housing development. That a regulatory agency would find this very general and unclear is ironic given that the issue of the impact of regulations on the development climate is a topic of regular discussion in the City, and, it is reasonable to assume, in the Department of Planning and Development (DPD), and as with any administrative agency, the DPD regularly exercises discretion in the approval of projects in order to facilitate development.

Appellants assert increased discretion has already been a factor in increasing the number and density of these projects, and as density increases, the environmental impacts increase, so these are relevant to this Appeal and should not be dismissed. Discretion is part of any regulatory framework, and in the nonproject supplement, the DPD states "[t]he existing regulatory framework, i.e., the Land Use Code, The Shoreline Master Program, Environmentally Critical Areas Ordinance, Landmarks Preservation Ordinance and the City's SEPA ordinance will address impacts during review of development proposals on a project-specific basis." Since the Appellants do not believe this assertion, and have evidence of this assertion not being true on many existing projects, and the proposed legislation will not in any way change that, then this is information that is relevant to the Appeal. For the foregoing reasons, the City's request for clarification and exclusion of these requests is made in bad faith, is burdensome and harassing and should be denied.

The Appellants' original request was for documents which consider the environmental impacts of rezones, upzones and other land use changes that might allow for the spread of micro-housing and congregate residences to zones other than where it is currently located or proposed to be located. Upzones, rezones and land use changes are not remote and speculative, it is common knowledge that they occur all the time in Seattle. The DPD is particularly aware of this as the Department is involved in all of them. They are not beyond the scope of the appeal. Under Washington State law, the probability that land use changes will follow has been used to determine the extent of environmental analysis. *King County v. Boundary Review Board for King County and City of Black Diamond*, 122 Wn.2d

648, P.2d 1024 (1993). The Black Diamond court held that: “We therefore hold that a proposed land use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.” This holding was consistent with its holding in an earlier case: “future County approval or environmental review of a site-specific plan does not preclude consideration of that proposal during the earlier, nonproject solid waste plan where that future activity is specific enough to allow some evaluation of its probable environmental impacts.” *Citizens v. Klickitat County*, 122 Wn.2d 619, P.2d 390, 866 P.2d 1256 (1993). Given its experience on existing and proposed projects, the DPD has information specific enough to allow some evaluation of the legislation’s probable environmental impacts. Rezones and upzones allowing for increased density and environmental impacts will not only probably, but certainly, occur in response to this legislation. This objection should be denied.

As has been previously explained to the DPD in the Appellants’ Response to W-13-008 Letter, and as stated in HER 3.11, and as confirmed by the Hearing Examiner at the prehearing conference, the Appellants can include specific questions (i.e., interrogatories) as part of their discovery process. There is no rule stating that discovery involves only documents. This objection was made in bad faith with the intention of unduly burdening and harassing the Appellants and should be denied.

Conclusion

For all of the reasons stated above, Appellants do not believe that the DPD has made a complete response to the Appellants’ relevant discovery requests. Appellants request the Hearing Examiner to issue an Order denying, in its entirety, the City’s Motion to Limit Discovery.

Entered this 26th day of November, 2013



Dennis Saxman, Authorized Representative for Appellants

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This matter came before the Hearing Examiner on City's Motion to Limit Discovery. The Hearing Examiner, having considered the arguments of the City and the Appellants, and the relevant documents and law, finds that Appellants' discovery requests are both within the scope of the discovery permitted by HER 3.11, are relevant to the subject matter of the Appeal, or are reasonably calculated to lead to documents that are relevant to the subject matter of an appeal:

Ordered:

The City's Motion to Limit Discovery is denied.

Entered this _____ day of November/December

Anne Watanabe, Deputy Hearing Examiner