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, Department of Planning and Development	)	**Appellants' Response to City's Motion for Partial Dismissal and Clarification**
	)	
	)	

The Appellants respectfully request that the Hearing Examiner deny the City's Motion for Partial Dismissal and Clarification. To clarify, this is the Appellants' Appeal, not Dennis Saxman's.

An appeal may be dismissed by the Hearing Examiner for the following reasons: (1) fails to state a claim for which the Hearing Examiner has jurisdiction; (2) is without merit on its face; (3) is frivolous; or (4) brought merely to secure delay. In its Motion for Partial Dismissal, the DPD pleads the first two of these reasons as the basis of its request for dismissal.

As to the claim that the Appellants fail to state a claim for which the Examiner has jurisdiction to grant relief, the Hearing Examiner has jurisdiction pursuant to Seattle Municipal Code 23.76.022 and 25.05.680(A)(2)(a)(i) to hear appeals from a determination of nonsignificance, so the Department of Planning and Development's (DPD) assertion that the Appellants fail to state a claim for which the Hearing Examiner has jurisdiction to grant relief is itself without merit. The Appellants' claims are not without merit on their face: the Appellants have pled the relevant legal standards drawn from relevant cases and used the language from cases that have considered the requirements for SEPA review of nonproject proposals, the Appellants have legal and factual bases for the Appeal, and the parties to the Appeal clearly disagree about the adequacy of the DPD's SEPA review. Notwithstanding the lack of merit of the DPD's broad assertions about jurisdiction and merit, Appellants will respond to the Motion so that the DPD may not later plead that any of its statements were uncontroverted.

The DPD's has failed to cite any legal authority for its assertion that "evaluation of the impacts of the ordinance under SEPA should be limited to consideration of the potential impacts of the proposal solely relative to changes made to existing regulations." In response to a request for clarification, William Mills explained that the proposed changes that were evaluated were changes from "the current Code [that] establishes a baseline for regulation of micro-housing." While they can acknowledge that this is the DPD's position, the Appellants cannot state they unequivocally agree with it, or that the current Code establishes a baseline for regulation of microhousing. The Appellants assume this is an attempt by the DPD to narrow the range of discussion during the Appeal, but the phrase "consideration of the potential impacts" has the effect of allowing for a broad discussion. The Washington Supreme Court has held that "the fact that a proposed action will not cause an immediate land use change or that there is no specific

proposal for development does not vitiate the need for an EIS. Instead, an EIS is required if, based on the totality of the circumstances, future development is probable following the action and if that development will have a significant adverse effect upon the environment." *King County v. Washington State Boundary Review Board for King County, et al*, 122 Wn.2d 648, 860 P.2d 1024 (1993).

Appellants do not understand why the DPD would object to citing items drawn solely point by point from the SEPA Checklist. After all, the SEPA Checklist is a key part of assessing environmental impacts of a proposed action. The DPD, in response to most of the items on the SEPA Checklist, simply and repeatedly made the following statements: "Not applicable. This is a non-project action. There is no specific project or site location. No construction is proposed." Given the lack of any plausible factual information in its response to items on the Checklist, it is truly bold and hypocritical of the DPD to accuse the Appellants of failing to provide plausible factual information. The Hearing Examiner should accord no weight to this assertion by the DPD.

The DPD's statement that "[t]o have merit, a SEPA appeal should provide some plausible factual information showing how the proposal might have a probable significant adverse environmental impact" offers no legal citation as its basis. Further, it is not at this stage of the Appeal that such an allegation has relevance: The DPD presumes that the purpose of the Appeal Document or prehearing motions is to set forth the arguments that are to be made in prehearing briefs and evidence to be presented at the hearing itself. HER 3.01 requires only "a brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed," not a full-fledged argument and presentation of Appellants' evidence. Given the DPD's resistance to Appellants' Discovery Request, the DPD can hardly expect full-fledged arguments and evidence at this point in the proceedings. Appellants have complied with the requirements of HER 3.01 and the DPD's argument should be dismissed.

The DPD mischaracterizes what it describes as the Appellants' three main focuses. First, the DPD narrowly characterizes the Appellants' main issue as the DPD's improper failure to consider the environmental impact of existing microhousing projects. However, this assertion by the Appellants is simply a portion of Appellants much broader claims, readily apparent on the face of the Appeal, that the DPD failed to consider information reasonably sufficient to evaluate the environmental impact of the proposal, that the DPD failed to follow the appropriate standards when it issued its determination of nonsignificance, that the DPD used standards other than those established by statute, case law and regulations to prepare the DNS, that the DPD did not give adequate consideration to the policy behind SEPA, that the DPD gives numerous excuses as to why a more thorough environmental impact analysis is not required, that the DPD failed to consider numerous probable impacts – some particular to micro-housing and others based on the SEPA checklist, and that the DPD failed to comply with the requirements of Seattle Municipal Code §25.05.330**.**

The DPD sets up the straw man argument that "[t]he purpose of the SEPA appeal is not to have a debate about City land use policy with respect to microhousing and whether it is a good idea or a valid housing type permitted by the Land Use Code." There is no such statement in the Appellant's brief. This straw man argument appears to be offered in support of the DPD's previous statement that "the appellant confuses consideration of policy issues with analysis of environmental impacts." Given its placement in the DPD's Motion to Dismiss, it appears to be

related to Appellants' statement regarding the necessity to consider SEPA Policy and that the DPD failed to do so. A Washington Court of Appeal has held that:

> We review a threshold determination that an EIS is not required under the "clearly erroneous" standard. *Norway*, 87 Wn.2d at 275. When applying this standard, we do more than merely determine whether substantial evidence supports the decision; we are also required to consider the public policy and environmental values of SEPA. *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977). *Boehm v. City of Vancouver,* 111 Wn. App. 711, 47 P.3d. 137.

Consequently, any discussion of environmental impacts must include a discussion of SEPA policy – they are not mutually exclusive as the DPD appears to think.

Finally, the DPD asserts that this is not the appropriate time to assess probable environmental impacts of future projects. The DPD's understanding is contrary to the Department of Ecology's guidance and the decisions of Washington State courts. According to the Department of Ecology's SEPA Handbook, Section 4.1:

> If the nonproject action is a comprehensive plan or similar proposal that will govern future project development, the probable impacts need to be considered of the future development that would be allowed.

Washington State SEPA Regulations and Washington State Court decisions require the consideration of probable impacts at the earliest time. "Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." *WAC 197-11-055(2).*This regulation does not require statement of a remedy. Any remedy would be included in a finding that the DNS is insufficient, its reversal, and a requirement that the DPD perform a meaningful threshold determination or an EIS.

The requirement to consider environmental impacts at the earliest point has been cited and upheld by multiple Washington State Courts:

> One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. Stempel v. Department of Water Resources, 82 Wn.2d 109, 118, 508 P.2d 166 (1973); Loveless v. Yantis, 82 Wn.2d 754, 765-66, 513 P.2d 1023 (1973). Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. See Rodgers, The Washington Environmental Policy Act, 60 Wash. L. Rev. 33, 54 (1984) (the risk of postponing environmental review is "a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds"). … 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. «10»

Footnote «10» states:

> Even where an EIS is required, a lead agency may still employ the "nonproject proposal" provisions of the SEPA Rules. Under these provisions, agencies can limit the scope of an EIS to "the level of detail appropriate to the scope of the nonproject proposal". WAC 197-11-442(2). Uncertainties in development plans can thereby be dealt with by the lead agency without violating the mandate of SEPA.

King County v. Washington State Boundary Review Board for King County, et al, 122 Wn.2d 648, 860 P.2d 1024 (1993).

Although the case above relates to an EIS and not a nonproject proposal, the reasoning still applies, especially in light of the regulation's reference to threshold determinations. Further, the flexibility provided by the nonproject provisions is premised on the concept that there is normally less detailed information available. *WAC 197-11-442(1)*. That is not the case here. In this case, the DPD is not dealing with uncertainties, but with certainties created by the records related to existing and proposed developments. Further, among the documents listed in an email as responsive to the Appellants' Discovery Request, which in a nutshell, was a request for all documents the DPD considered in preparing the DNS and the SEPA Checklist were; "Building Permit plan sets (59) from applications to DPD for the development projects on the Micro-Housing tracking list. Tracking list includes project numbers and the plan sets are viewable at the DPD offices through the EDMS system." Fifty-nine projects existing and proposed projects have been reviewed by the DPD, providing plenty of detailed information on the potential environmental impacts of subsequent project proposals - that significant information that should be used in the evaluation of environmental impacts.

Although Section 4.1 of the SEPA handbook refers to the probable impacts of future development, it is clear that the DPD has information from existing projects that could reasonably and should be used to evaluate the probable impacts of future development. In Section 7.2, which deals with GMA Nonproject Review, the SEPA Handbook states "[i]mpacts associated with later planning stages may also be addressed to the extent that sufficient information is known for the analysis to be meaningful." The existing projects contain sufficient information to make a meaningful analysis of future projects, and should therefore, be used in determining the environmental impacts of future projects.

If, as the DPD asserts, the legislation has nothing to do with "existing development approved or vested under existing regulations", then why does the DPD provide so much information about existing development approved or existing under existing regulations as attachments to its DNS? Further, among the documents listed in an email as responsive to the Appellants' Discovery Request, which in a nutshell was a request for all documents the DPD considered in preparing the DNS and the SEPA Checklist were; "Building Permit plan sets (59) from applications to

DPD for the development projects on the Micro-Housing tracking list. Tracking list includes project numbers and the plan sets are viewable at the DPD offices through the EDMS system." Further, the DPD's assertion is disingenuous as the purpose of the legislation is to address concerns created by existing and proposed development. Indeed, there would be no legislative proposal absent such concerns. The DPD even states in its Motion for Partial Dismissal that it "considered current projects in terms of drafting new Code requirements proposed in the legislation." For all of the above reasons, current existing and proposed projects should have been considered and were actually considered in the DPD's analysis of environmental impacts. Therefore, the Appellants can discuss those projects in this Appeal. The DPD's argument to the contrary is without merit.

The DPD offers no legal basis for stating that the failure to consider environmental factors at the earliest possible stage does not affects the adequacy of the SEPA determination under appeal. Indeed, as noted above, numerous Washington State courts, including the Supreme Court, have concluded otherwise. It is sufficient that any remedy sought is sought as part of the overall appeal. This issue should not be dismissed. One of the chief points and arguments of the Appellants is that every environmental factor was not given sufficient consideration. Most of the responses to the elements in the SEPA Checklist consist of: "Not applicable. This is a non-project action. There is no specific project or site location. No construction is proposed." Simply stating repeatedly that this is a nonproject proposal does not constitute consideration of environmental factors. In fact, it suggests just the opposite: that no consideration was given because it is a nonproject proposal. So the relief requested in Paragraph 2 of the Motion for Partial Dismissal should not be granted.

Appellants do not agree that microhousing is permitted by existing Codes. As the Director of the DPD stated in her Report, at page 2, "We recognize that the evolution of micro-housing and congregate residence production in Seattle over the last several years was not fully anticipated by existing land use regulations. The format is an innovation in housing design, development and operation in response to market conditions." The DPD has been making up justifications for microhousing as it goes along.

The DPD's assertion that Appellants' Concern about creativity in developer design is remote and speculative is simply not true. The DPD itself has recognized it as a phenomenon and made Councilmembers Richard Conlin and Sally Clark aware of this as early as July 2012. See the email strings in Attachment D to this Motion.

The DPD simply asserts that the three issues raised at the top of page 8 are remote and speculative without any explanation as to why they are. Contrary to their being remote, all three issues have arisen regarding current projects, and it is common knowledge that rezones and upzones occur all the time in Seattle, especially for the DPD. Therefore, these issues should not be dismissed. The legislation is as notable for what it fails to address as for what it addresses.

Items 9, 13, 16, 17, 18, 28, 29, 49, 51 and 52

There are two general factors, increased density and discretion, that are directly related to the extent of the environmental impacts of the proposed legislation and are therefore relevant to this Appeal and SEPA analyses. They are relevant across the particular items that the DPD requests be dismissed from the Appeal. In its response to the Appellants' Discovery Request, the DPD

provided in an email, a copy of which is attached as Attachment A, a list of items it felt were responsive to Appellants' Discovery Request. One of the items included on that list was a Lowrise Code SEPA Capacity Analysis. A copy of the Lowrise Code SEPA Capacity Analysis was previously provided to the Hearing Examiner as part of the SEPA Micro-Housing Appendices Attachment to the DPD's Motion for Partial Dismissal. Its title alone makes it relevant to this Appeal, but it is also relevant for another reason: Zoning Capacity Analysis, as performed by the DPD uses future density assumptions to calculate estimated development capacity of a zone. A copy of the DPD's Development Capacity Primer, provided to the Appellants by the DPD, and has been attached as Attachment B. The relevant formula is on Pages 3 and 4 of the primer. The Zoned Development Capacity Primer is actually 11 pages long, but only pages relevant to this issue have been provided in the Attachment. The DPD also provided Appellants with documents that describe the assumptions used in capacity analysis of the Lowrise Zones. Those documents show that assumed densities were part of the analysis. A copy of three relevant pages illustrating this are attached as Attachment C. Therefore, any item in the Appeal Letter that relates to density is relevant to this Appeal. The DPD cannot be permitted to have it both ways, to provide documents in response to the discovery request that discuss density and use it as a basis of calculations, and then try to exclude density issues from the Appeal. Item 5 in Section D of the SEPA Checklist, Supplemental Sheet for Non-Project Actions, includes the following paragraph:

> However, some aspects of the proposal could be perceived by some to be incompatible with certain goals and policies in the Comprehensive Plan. For example Land Use Policy 80 (LU80) states: Provide for predictability about the allowed intensity of development with appropriate development standards and density limits for each zone to accommodate a range of housing types and achieve development that meets the policy intent for each zone. It could be posited that the proposal does not provide for predictability about the allowed density limit, or could lead to a level of density inappropriate for some of the lower density lowrise zones.

Clearly, the DPD considered density in its SEPA analysis. If the DPD considered it relevant, then the Appellants can consider it relevant. The DPD's argument to the contrary should not be entertained by the Hearing Examiner. The DPD has already used its discretion to allow for increased density and an increased number of units per microhousing project. The proposed legislation's failure to limit this discretion ensures that it will continue to be exercised and will lead to increased density and therefore, increased environmental impacts. It is common knowledge that the DPD and its allies always argue that increased density leads to lessened environmental impacts, so for the DPD to deny a connection between the two is not an honest statement of its position. Items that implicate density and discretion are relevant to this Appeal and should not be dismissed. The discussion of specific items below should be viewed in light of these comments of general application.

Item 9 of the Appeal Letter is privacy impacts on adjacent properties. This is closely related to the density issue which is discussed more fully below in the discussion of Items 16, 17, and 18, is relevant and should not be dismissed.

Item 13 of the Appeal Letter is impact on public health resulting from a large number of residents living in such compact housing. Item 13 should not be dismissed. One of the items to be considered on the SEPA Checklist, in Item 15, is whether the project would result in an

increased need for public health care. It is common knowledge that some diseases spread more rapidly in dense populations that live in close proximity to one another, so this is relevant to SEPA analysis.

Items 16, 17 and 18 of the Appeal Letter are respectively: The effect of counting only some of the units, rather than separately leased spaces, and its effect on lessening the amount of population growth recognized for planning purposes. This problem is only compounded by conflicting methods of counting units presently espoused by the DPD – a problem which the proposed amendments do not adequately address; The effect of calling differently designed and configured projects by a common name, making it impossible to adequately evaluate the environmental impacts of projects overall; and the use of project labels/characterizations originally meant to apply to projects of much lower density and size, such as boarding house, congregate residence, rowhouse, townhouse, to projects of much greater size, scale and density. Items 16, 17, and 18 should not be dismissed. These items are directly related to the density issue and are therefore relevant, and should not be dismissed.

Items 16, 17 and 18 are also related to the following specific items in the SEPA checklist: item 6 (solar impacts), 7 (noise), 10 (aesthetic impacts) and 11 (light and glare), and they are relevant because they essentially go to how accurately the DPD has evaluated environmental impacts as greater densities and actual number of residents in these projects will generate greater environmental impacts, including aesthetics. The Lowrise Code SEPA Capacity Analysis discussed above shows the varying figures that result from counting microhousing projects in terms of "dwelling units" or individual "micros". As this is a legislative proposal that does not currently address the issues listed, because the DPD asserts it does not have to analyze these factors since it is a nonproject proposal, then it is valid to say the analysis is inadequate because of these failures. The second paragraph of Part D of the Environmental Checklist, Supplemental Sheet for Nonproject Actions counsels the DPD to "[w]hen answering these questions, be aware of the extent the proposal, or types of activities likely to result from the proposal, would affect the item at a faster rate than if the proposal were not implemented."

Item 28 of the Appeal Letter is increase in impacts due to future rezones of area that are not currently zoned multi-family residential to multi-family residential, thereby increasing the land area to which the proposed Code amendments would be applicable. Rezones happen all of the time, as the DPD knows, so this is not remote and speculative, and should not be dismissed.

Item 49 of the Appeal Letter is inaccurate counting of number of residents. The relevant discussion is the same discussion as for Items 16, 17, and 18 above. It will be a direct impact of the proposed legislation, relates to neighborhood density, is relevant and should be considered.

Item 51 of the Appeal Letter is increased environmental impacts due to changes in existing neighborhood contexts and environments. This item relates to density and is relevant due to changes in density that can have environmental impacts and Item 10 of the SEPA checklist deals with Aesthetic impacts, Item 11 deals with light and glare, Item 7 deals with noise, item 6 deals with solar impacts, so environmental impacts on neighborhood context is a relevant issue for this Appeal

Item 52 of the Appeal Letter is increased administrative discretion and new Director's Rules which may lessen the application of statutory or regulatory mitigation. 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 to the SEPA Checklist in Item 4 on Page 12, 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 DPD has made this assertion, and Appellants do not believe this assertion, and have evidence of this assertion not being true on many existing projects, and this statute will not in any way change that, then discretion and existing and proposed projects are valid subjects for the Appeal.

The DPD's analysis of the Hearing Examiner's power to enjoin is not a correct statement of current law. There are two main cases which have discussed injunctive powers in cases involving a DNS: *King County v. Washington State Boundary Review Board for King County, et al,* 122 Wn.2d 648, 860 P.2d 1024 (1993), and *Kucera v. Department of Transportation,* 140 Wn.2d 200,995 P.2d 93 (2000). The *King County* court held that: "In cases involving reversal of a DNS, it is necessary to remand to the agency for preparation of an EIS and enjoin the agency action until the statement is complete." While this case did not involve a discussion of Hearing Examiner jurisdiction, its broad holding would certainly be applicable to the Hearing Examiner. The *Kucera* court did not challenge this power to enjoin, but simply concluded in its case that the requirements for injunctive relief had not been met and that the Court had not found the action would be the cause of the alleged environmental harm: "We find it illogical to enjoin an action without first finding the action is the cause of the alleged environmental harm and further finding in a factually specific way that the criteria for injunctive relief have been met." and " Because the trial court did not consider whether the property owners have an adequate remedy at law, failed to find the high-speed operation of the Chinook causes actual and substantial injury, and refused to balance the relative interests of the parties and the public, the issuance of the injunction constitutes an abuse of discretion." The *Kucera* case in no way stands for the proposition that power to enjoin is outside of the Hearing Examiner's jurisdiction.

For the reasons stated above, the DPD's Motion for Partial Dismissal and Clarification should not be granted.

Respectfully submitted,

Dennis Saxman, Authorized Representative for Appellants
December 4, 2013

Cc: William Mills, Geoffrey Wentlandt, Mike Podowski
4 Attachments as specified in this Response