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	**CITY'S REPLY TO APPELLANTS' RESPONSE TO MOTION FOR PARTIAL DISMISSAL AND CLARIFICATION**

As provided for by the Hearing Examiner's Prehearing Order of November 13, 2013, the Department of Planning and Development (DPD) respectfully submits this reply to the appellant response of December 4, 2013. DPD stands by its motion for partial dismissal. The subject appeal is overbroad and contains numerous issues not within the scope of a properly focused SEPA appeal of the subject legislation or that are clearly not within the Hearing Examiner's jurisdiction to decide. As DPD has previously stated in other documents filed as part of this appeal, DPD does not seek outright dismissal of the appeal but it is reasonable to ask that the hearing be limited to the relevant issues considered by the SEPA decision under appeal. DPD is pleased to address any issue or question the Examiner may have about its position and answer any questions either prior to or at the hearing on this matter. The important points are highlighted below.

Argument

The appellants are seeking specificity in the SEPA review that is not appropriate or required for a non-project proposal

In his response document, the appellants' representative suggests that DPD's SEPA checklist is inadequate, apparently due to the limited responses supplied in Part B. Part B of the checklist is focused on project specific SEPA review. Appellants' arguments ignore the complete answers provided in Part D of the checklist, which is for non-project actions such as legislation. Washington Administrative Code (WAC) 197-11-315 says, in part:

"Environmental Checklist.
(1) Agencies shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals, except for:
(a) Public proposals on which the lead agency has decided to prepare its own EIS; or
(b) Proposals on which the lead agency and applicant agree an EIS will be prepared; or
(c) Projects which are proposed as planned actions (see subsection (2) of this section); or

(d) Projects where questions on the checklist are adequately covered by existing legal authorities (see subsection (6) of this section); or
(e) Nonproject proposals where the lead agency determines that questions in Part B do not contribute meaningfully to the analysis of the proposal. In such cases, Parts A, C, and D at a minimum shall be completed." [Emphasis added.]

The WAC therefore allows the lead agency to determine that no answers are required for Part B of the checklist.[1] However, DPD has nonetheless considered Part B and provided a reasonable reply to each of these items for a non-project proposal such as the subject legislation. It is not possible, for example, to meaningfully evaluate various items such as drainage, presence of animals on a site, noise, or health impacts at a non-project stage of SEPA review.

The appellants' arguments about the checklist, both on page 2 and page 5, reflect misunderstanding of the function of the checklist. It is one tool in the process of the required environmental analysis, but is not itself the total analysis. The DPD threshold determination of a non-project action may be upheld even if not every checklist item is given a detailed answer.

The appellants' appear to argue that DPD's knowledge of and review of existing projects somehow opens up the subject appeal to wider discussion of environmental impacts. However, the environmental impact of existing projects under current Code is not relevant to the review of potential impacts of the proposed legislation. The current regulations in the Land Use Code establish a "baseline" for regulation of micro-housing. The review of impacts under SEPA must be limited to consideration of the changes that the proposed legislation would cause when compared to the existing regulations. Of course DPD reviewed existing development and how the current Code applies to such development in preparing proposed new regulations, but that is the case with virtually every item of proposed legislation. This micro-housing proposal is no different.

Appellants' confuse SEPA policy with the City's general "policy" with respect to micro-housing and how to regulate it

The Appellants' response at the bottom of page 2 and top of page 3 suggests that DPD has failed to consider SEPA policies. This is incorrect. However, appellants suggest that DPD should have considered the substantive SEPA policies of Section 25.05.675 at this non-project stage of review. This, too, is incorrect. DPD is not required to consider substantive SEPA policies at the procedural SEPA stage. The case law quoted by the appellants does not stand for consideration of substantive SEPA policies in a non-project SEPA review. The subject appeal is also not the venue for discussing "policy" with respect to whether micro-units should be allowed under current Code or allowed in general. Of course the appellants

[1] See also Washington State Department of Ecology Publication No. 12-06-021, Final Cost-Benefit and Least Burdensome Alternative Analyses, chapter 197-11 WAC, SEPA Rules (State Environmental Policy Act)(December 2012), at page 15, in which the Department of Ecology has considered rule changes so those with non-project proposals will avoid unnecessary effort in completing irrelevant parts of the environmental checklist.

do not specifically state this in their appeal, as such an argument is so clearly not related to SEPA, but it is obvious from the scope of the appeal that a policy debate about micro-units is contemplated, and DPD is asking that the Examiner clarify the relatively narrow scope of the appeal. General policy arguments should be taken to the City Council.

Hypothetical "probable" impacts of future development are not relevant to or appropriate for review in this appeal

The appellants quote from the Department of Ecology SEPA handbook in contending that DPD should evaluate the "probable impacts of future development." The SEPA handbook provides detailed guidance on the State Environmental Policy Act, as noted by Department of Ecology on its website, but it is nevertheless simply a publication of the Department of Ecology with no legal effect and no status as administrative rules or law. Appellants' reliance on it is misplaced. DPD is not required to speculate about what types of future projects may be constructed if the legislation under review is adopted, or what the unknowable impacts of such hypothetical projects may be. Again, current projects under current Code are not relevant to future impacts either. The Examiner should clarify the limited scope of the current SEPA appeal.

The specific items of appeal identified by DPD in its motion for partial dismissal are irrelevant and beyond the scope of this appeal, notwithstanding appellants' arguments to the contrary

DPD seeks the dismissal of some obvious items that are irrelevant or remote and speculative, and therefore beyond the scope of the appeal. These items do not constitute the bulk of appellants' points but are identified with deliberate care. For example, item 13 of the list provided on page 8 of the appeal document, respecting alleged impact on public health, is clearly beyond the scope of the appeal of SEPA review of this legislation. Essentially, DPD is being asked to speculate about whether the legislation, as opposed to micro-housing development already allowed by existing Code, may increase the need for public health care due to the potential possibility that disease will spread in "dense populations that live in close proximity to each other." Such an argument demonstrates how broad based the appellants wish to make this appeal as well as how speculative such an analysis would be. There is simply no basis for entertaining such issues within the scope of the subject appeal. Similar responses apply to all of the arguments that appellants make for keeping their items 9, 13, 16, 17, 18, 28, 29, 49, 51 and 52 in this appeal. DPD has stated its case for dismissal in its motion.

Appellants' argument notwithstanding, the Hearing Examiner lacks jurisdiction to issue injunctions

The argument offered by the appellants' on page 8 of their appeal proves, rather than refutes, DPD's case for dismissal of the argument that the Hearing Examiner should enjoin permitting of micro-housing projects. The appellants' representative cites court cases, which are simply inapposite to an administrative review. Of course a court can consider injunctive relief, but this is not a court action.

Conclusion

DPD stands by its motion for partial dismissal. The Hearing Examiner should dismiss the items requested in the motion from this appeal. Further, as noted previously and in other documents, the Examiner should provide guidance as to the proper scope of the hearing in this matter.

Entered this 9th day of December, 2013.

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cc. Dennis Saxman, Appellants' representative