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 RESPONSE OPPOSING REQUEST TO INTERVENE BY WALLINGORD COMMUNITY COUNCIL**

The Department of Planning and Development (DPD) respectfully requests that the motion by Wallingford Community Council to intervene in the above-captioned matter be denied, for two reasons. First, SEPA rules and case law prohibit a potential party from filing an administrative appeal if the party failed to comment regarding the challenged document (e.g., DNS). Second, Hearing Examiner rule 3.09 (a) states that "[i]ntervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so." That is the case here. Because the Wallingford Community Council failed to comment on the DNS and failed to appeal the DNS by the deadlines established in SMC Sections 25.05.680.A.1 and 23.76.022.C.3, though it could have, its motion to intervene must be denied.

Argument

1. WCC is barred because it failed to comment on the DNS.

WAC 197-11-545 states that

> "Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, *shall* be construed as lack of objection to the environmental analysis, if the requirements of Section 25.05.510 (public notice) are met."(emphasis added)[1]

Washington court decisions and decisions of the Seattle Hearing Examiner apply this rule to prohibit a potential party from appealing a DNS or EIS if the party failed to comment on the environmental determination.

In *Kitsap County vs. Department of Natural Resources*, the county was barred under the state SEPA comment requirement provision from challenging the adequacy of an EIS

[1] The counterpart to this WAC in SMC 25.05.545 B contains the same provision.

when it failed to comment on the DEIS.[2] The need for an EIS arose when the Department of Natural Resources ("DNR") leased aquatic tracts to private individuals for clam dredging.[3] DNR applied for a substantial development permit and prepared an EIS for the clam harvesting program. DNR sent a copy of its DEIS to the county for review and comment but the county did not comment.[4]

In reaching its decision, the State Supreme Court noted SEPA is structured to require consulted agencies participate in the SEPA process when it would be meaningful and contribute to the environmental assessment at the earliest possible opportunity.[5] The court concluded that where "the objection to an EIS is saved until the parties receive an unfavorable decision, the purposes of SEPA are frustrated."[6]

In the matter of the Appeal of The Institute for Transportation and the Environment, MUP-91-079(W), the Seattle Hearing Examiner dismissed a DNS appeal based upon the SEPA rules and case law, because the appellant failed to comment on the DNS. The Examiner should make the same decision here.

Although *Kitsap County* did not address applying the comment requirement provision to members of the public,[7] multiple state hearing board decisions have.

The Pollution Control Hearings Board (PCHB) addressed applying case law and the comment requirement provision to members of the public in *Spokane Rock v. Spokane County Air Pollution Control Authority*.[8] This decision became a foundation for later board decisions addressing similar failure-to-comment circumstances. In *Spokane Rock*, Spokane Rock Products and Larry and Jeanne Rees challenged a mitigated determination of nonsignificance ("MDNS") issued relating to a temporary asphalt plant in Spokane. But the Reese's did not submit comment until after the comment period ended.[9] The board concluded the couple could not appeal the MDNS because SEPA required the board to construe failing to comment as a lack of objection to the MDNS. The board determined the appellants lacked standing to pursue their SEPA appeal.[10]

In *Snohomish County Farm Bureau v. State of Washington Department of Transportation,* the Farm Bureau submitted comments in the months before WSDOT

---

[2] *Kitsap County v. Department of Natural Resources*, 99 Wn. 2d 386, 392, 662 P. 2d 381 (1983) (citing WAC 197-11-545(1)).

[3] *Id.* at 389.

[4] *Id.* at 392.

[5] *Id.* at 391.

[6] *Id.*

[7] WAC 197-11-545(2).

[8] *Spokane Rock Products, Inc., Larry J. Rees and Jeanne A. Rees v. Spokane County Air Pollution Control Authority and Inland Asphalt Company*, PCHB No. 05-127 (2006); WAC 197-11-545(2).

[9] *Id.* Order Granting Summary Judgment and Denying Petition for Reconsideration at 10.

[10] *Id.* at 12.

issued a DNS for a road-armoring project. The Bureau also participated in meetings, wrote letters, and contacted federal agencies. Still, the board concluded the Farm Bureau lacked standing to appeal the DNS because comments "made outside the context of the SEPA determination process cannot be used to meet the exhaustion of administrative remedies requirement in WAC 197-11-545(2)."[11] Because the group failed to submit comments during the comment period they could not appeal the DNS.

The Growth Management Hearings Board (GMHB) has exclusive jurisdiction to review allegations that the City did not comply with the Growth Management Act ("GMA") in amending its development regulations.[12] Likewise, the GMHB reviews associated challenges that the City did not comply with SEPA in amending its development regulations.[13]An appeal of the Examiner's decision that a failure to comment on the Pike/Pine district DNS precludes an appeal of the DNS would be heard by the GMHB if the proposed legislation is challenged as well.

The GMHB, like the PCHB, has ruled that a failure to comment on a DNS precludes an appeal. In *City of Shoreline v. Snohomish County*, the appellants challenged the county's amendments to its comprehensive plan and development regulations issued for the Point Wells redevelopment.[14] The board denied the SEPA appeal of one party, Save Richmond Beach, because it failed to comment during the SEPA review process.[15] *City of Shoreline v. Snohomish County* involved two coordinated cases, one centered on a DSEIS and one centered on a DNS.[16] The board did not draw any distinction between the environmental documents, and applied the comment requirement provision to both situations.

In *Your Snoqualmie Valley v. City of Snoqualmie*, the SEPA appeal was in response to a DNS issued for a city's pre-annexation zoning agreement.[17] Petitioner Your Snoqualmie Valley submitted a comment letter before the city issued its DNS, but did not submit a comment during the DNS comment period. Petitioners Warren Rose and Dave Eiffert did not submit comments. The Board construed the lack of comment from these parties as a

---

[11] *Snohomish County Farm Bureau, et al. v. State of Washington Department of Transportation, et al.*, PCHB Nos. 10-124, 10-135, 10-138, Order Granting Partial Summary Judgment on Jurisdictional Issues at 6 (2011).

[12] RCW 36.70A.280(1)(a); former RCW 36.70A.290(2)(1995); *Somers v. Snohomish County*, 105 Wn. App. 937, 945 21 P.3d 1165 (2001).

[13] RCW 36.70A.280(1)(a); former RCW 36.70A.290(2); *Somers v. Snohomish County*, 105 Wn. App. 937, 945, 21 P.3d 1165 (2001); *Kittitas County v. Kittitas County Conservation and Futurewise*, 2013 WL 4080953, p. 3, citing *Woods v. Kittitas County*, 162 Wn. 2d 597, 610, 174 P.3d 25 (2007).

[14] *City of Shoreline, Town of Woodway, Save Richmond Beach, et al. v. Snohomish County*, Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 1 (2011).

[15] *Id.* at 7.

[16] *City of Shoreline, Town of Woodway, Save Richmond Beach, et al. v. Snohomish County*, Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions at 3-4 (2010).

[17] *Your Snoqualmie Valley, et al. v. City of Snoqualmie*, Case No. 11-3-0012, Final Decision and Order at 13 (2012).

lack of objection to the DNS, stating they "failed to exhaust their administrative remedies under SEPA or have waived objections . . . ."[18]

Like the boards discussed above, the State Shorelines Hearings Board (SHB) has also reached the same result that failing to comment on a DNS precludes an appeal. In *Brown v. Snohomish County*, Brown challenged a shoreline substantial development permit issued by Snohomish County.[19] Brown initially raised a SEPA issue but ultimately conceded it.[20] Still, the board reasoned that he would have been precluded from bringing a SEPA claim because he failed to "comment within the applicable SEPA timeframe."[21]

2. WCC is barred because it failed to comply with HER 3.09(a).

Hearing Examiner rule 3.09 states that "[i]ntervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so." The deadline for filing an appeal of the DNS was October 21, 2013. However WCC did not try to perfect an appeal, through the guise of intervention, until nearly two months later, on December 13, 2013. WCC's motion fails to present any explanation why it was unable to comply with the appeal deadline prescribed in SMC Sections Sections 25.05.680.A.1 and 23.76.022.C.3. Other parties to this appeal were able to comply with the law and file timely appeals, and there is no apparent reason why WCC could not have done so too. Limitations periods in City regulations and the Examiner's rules of practice should have meaning. If persons are to be treated fairly and equally under the law, then laws should not be waived at the request and caprice of those wishing to avoid their application.

Conclusion

WCC's motion to intervene should be denied because 1) WCC failed to comment on the DNS, and 2) WCC could have filed a timely appeal but failed to do so.

Dated December 18, 2013

William K. Mills, Senior Land Use Planner
Department of Planning and Development

cc. Dennis Saxman, appellant's representative
Lee Raaen, President, Wallingford Community Council

---

[18] *Id.* at 17.

[19] *Brown v. Snohomish County*, SHB No. 06-035 at 1 (2007).

[20] *Id.* at 11-12.

[21] *Id.* at 12.