**BEFORE THE HEARING EXAMINER**
**City of Seattle**

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| In the Matter of the Appeal of<br><br>**DENNIS SAXMAN, et al.,**<br><br>from a SEPA Determination by the Director, Department of Planning and Development | Hearing Examiner File:<br><br>**W-13-008**<br><br>**CITY'S RESPONSE TO APPELLANTS' MOTION FOR RECONSIDERATION OF EXAMINER'S ORDER OF PARTIAL DISMISSAL AND RESPONSE TO STATEMENT OF ADDITIONAL EXHIBITS** |

The Department of Planning and Development (DPD) submits the following single response to the appellants' motion for reconsideration of the Hearing Examiner's Order for Partial Dismissal dated December 11, 2013 and their separate statement proposing to add two more exhibits. Both documents from appellants are dated December 23, 2013. Both the request for reconsideration and the proposal to add exhibits should be denied by the Examiner.

**Argument – Request for Reconsideration**

DPD does not dispute the application of Hearing Examiner Rule (HER) 3.20 to a Hearing Examiner order dismissing all or part of an appeal. However, the motion for reconsideration is without merit and should be denied. The Hearing Examiner should consider the following points:

<u>The request for reconsideration does not appear to have been timely.</u>

HER 3.20(b) requires motions for reconsideration to be filed no later than 10 days after the date of the Hearing Examiner's decision. In this case, the Order of Partial Dismissal was issued on Wednesday December 11. Under HER 2.04, computation of the 10 day period would begin on Thursday December 12, and excluding weekends and holidays in accordance with the rule, the 10-day period ended on Monday December 23. However, at close of business on December 23 (5:00 p.m.), DPD had not received a copy of the appellants' motion, nor was any copy posted to the Hearing Examiner's e-file system at that time. DPD received its copy of the motion by e-mail from the appellants' representative, Mr. Leman, at 6:10 p.m. The Office of Hearing Examiner did not post a copy of the motion in the e-file system until the morning of December 24. If the motion was not received by the Examiner prior to close of business on December 23, it would not be timely. See HER 2.05(b). Therefore, DPD asks that the Office of Hearing Examiner check its records and determine if the appellants' motion was timely received and, if not, deny it on that basis.

Even if the motion for reconsideration is timely, it reiterates arguments already made by appellants and does not present a persuasive case for irregularity in the proceedings or a clear mistake as to a material fact.

HER 3.20(a) (1) and (4), cited by the appellants in their motion, are stringent standards that do not allow reconsideration of a decision simply because the appellants disagree with the outcome. As DPD has pointed out in prior motions and responses, it did not seek dismissal of the appellant's entire appeal but rather has sought to ensure that the hearing is of appropriate scope and focused on the issues that are legitimately arguable under the SEPA regulations. The appellants are in no way prevented by the Examiner's order from presenting a relevant case. The interests of justice, referred to by the appellants on page 5 of their motion, require not only that appellants be allowed to present their case, but that the respondent party be assured that the evidence presented is of proper scope and relevant to issues that the Hearing Examiner can decide.

The scope of appeal in this matter is narrow. DPD has proposed legislation that is intended to clarify existing practice with respect to regulation of micro-housing and congregate residences, establish new development standards, define terminology, and require closer review of micro-housing projects through the City's design review program. The legislation does not establish or prohibit any new uses. Micro-housing and congregate residences are being developed under existing Code. The environmental impacts of existing Code and structures built under existing regulations are not within the scope of the SEPA review under appeal. The evaluation of the environmental impacts of the proposed ordinance under SEPA should be limited to consideration of the potential impacts of the proposal.

As noted in the DPD Reply statement filed December 9, 2013, current regulations in the Land Use Code establish a "baseline" for regulation of micro-housing. The review of potential 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 every item of proposed legislation regulating development in some way. The micro-housing proposal is no different. Given the proper scope of appeal, the Examiner's paragraph 2 in her Order of Partial Dismissal is correct.

Paragraph 3 of the Order is also correct. The appellants cannot simply quote portions of the SEPA regulations and assign error to the DPD analysis. If DPD did not consider environmental factors "at the earliest possible stage" in a SEPA review of proposed legislation, it is not clear how much earlier it could have done the review.

Paragraph 4 of the Order is correct. The appellants are not foreclosed by the Examiner's Order from arguing about how the proposed legislation may be interpreted, but "developer creativity," as such, is not an environmental impact that can be analyzed. It raises an issue that is remote and speculative under SEPA, and thus not within the scope of review. In fact, this sort of concern shows that the appellants are in fact seeking a

review of the city's policy and practice with respect to micro-housing, which is an issue outside the scope of SEPA review that must be brought before City Council.

Paragraphs 6 and 9 of the Order are correct. In fact, the motion for reconsideration concedes that these conclusions are mostly correct by not arguing the bulk of the Examiner's conclusions in these paragraphs. To the extent that the argument is that impacts on density should be considered, the Examiner did not dismiss that particular point. However, again the issue of "developer creativity" in potentially circumventing density, if that is the issue of concern to appellants, is too vague and remote to be relevant in this appeal. This is not an environmental impact. If the appellants believe that the proposed regulations will be subverted by developer creativity, they are free to suggest amendments to the proposal for Council to consider, but the SEPA hearing is not the forum for that argument.

**Argument – Statement or Listing of Additional Exhibits**

The Examiner's Prehearing Order of November 13, 2013, set a deadline of December 16 for the appellants to submit their list of exhibits and witnesses. Absent some reasonable showing that exhibits could not have been listed at that time, the appellants should not now be allowed to add exhibits to their list. DPD does not object to the listing of the audio recording of the City Neighborhood Council meeting of June 18, 2013 or the photos of space and access allocated to waste bins at an existing micro-housing project (although DPD reserves the right to object on relevancy grounds at the hearing), as these items were timely listed by appellants on December 16, but DPD does object to listing of the exhibit showing RPZ data for completed micro projects and a second exhibit showing "density impact on Lowrise zones." There is no information suggesting that these documents, created by appellants, could not have been listed as exhibits by December 16.

**Conclusion**

For the reasons cited above, DPD asks that the Examiner deny the appellants motion for reconsideration of her Order of Partial Dismissal and deny the appellants listing of two new exhibits after the deadline for submittal of the appellants' witness and exhibit list.

Entered this 30th day of December, 2013.

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cc. Chris Leman, appellants' representative