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' Pre-hearing Brief**
	)	
	)	
_____	)	

I. INTRODUCTION

Appellants respectfully request that the Hearing Examiner either remand for additional analysis the SEPA Determination of Nonsignificance issued by the City's Department of Planning and Development regarding the proposed microhousing legislation; or that the Hearing Examiner reverse the DNS and require an Environmental Impact Statement. As the Appellants will show at the hearing, the information considered and analysis conducted by DPD was not reasonably sufficient to evaluate the legislation's environmental impacts. Consequently, DPD's issuance of the DNS was clearly erroneous.

II. ARGUMENT

A. Standard of Review

As a procedural matter, the DNS must be remanded for further analysis unless it is "based upon information reasonably sufficient to evaluate the environmental impact of the proposal." [SMC 25.05.33] As a substantive matter, the DNS must be reversed and an EIS required if there is "a reasonable likelihood of more than a moderate adverse impact on environmental quality." [SMC 25.05.794.A; SMC 25.05.330.C] We ask the Hearing Examiner to consider our case below and at the hearing that DPD has failed both tests.

The DNS is reviewed under the "clearly erroneous" standard. [*King County v Washington State Boundary Review Board for King County*, 122. Wn2d 648, 661-62,860 P.2d (1993). The DNS must be overturned when "although there is evidence to support it, the [Hearing Examiner] on the entire evidence is left with the definite and firm conviction that a mistake has been committed."]

B. The DNS Ignores Adverse Environmental Impacts On Grounds that the Proposed Ordinance, in Itself, Does Not Confer a Permit. This Legal position is

contrary to SEPA's and the City's Own SEPA Ordinance's Requirement for Such Analysis with Non-Project Actions.

The DNS and Environmental Checklist do not attempt to assess this proposed legislation's environmental impacts, based on the following argument:

> The proposed changes would result in no direct impacts, and are unlikely to result in significant indirect or cumulative adverse impacts.... At the non-project stage, it is not possible to meaningfully assess the potential impacts on the natural environment from these modifications, in the absence of a known proposed micro-housing or congregate residence project.

Accordingly, the Checklist gives, in response to 77 questions (almost all of them about environmental impacts), the same answer 77 times—"Not applicable. This is a non-project action."

It is undeniable that amending the ordinance does not, in itself, grant a master user permit for a microhousing project; that is an administrative decision that would come after the variance process was legislated. But a clear error by the City in this case was to assume that as a non-project action, the ordinance amendments did not need to be specifically assessed for their impacts on the environment. In answering the 77 checklist items, DPD might well have claimed less environmental impact than the Appellants would have wanted them to do; but if DPD had done so, then DPD could have defended their claim with evidence at the hearing. But because DPD did not undertake substantive analysis or offer a substantive judgment in the Checklist, no such exchange is possible.

The City's position seems to be that likely significant adverse environmental impacts are a SEPA concern only when specific projects are proposed--and are not a SEPA concern if they stem from legislation that makes these adverse environmental impacts possible.

But the City could not be more mistaken. It is a bedrock principle of SEPA that the review of environmental impacts is not limited to project proposals, but is mandatory as well for non-project proposals, and indeed for all non-exempt actions. As the Washington State SEPA Handbook states (sec. 4.1): "Environmental review starts as early in the process as possible when there is sufficient information to analyze the probable environmental impacts of the proposal." A non-project action like the proposed ordinance is a golden opportunity to early analysis of the environmental consequences that may come.

Several court cases emphasize that non-project decisions must examine the full range of possible impacts. In *Lassila v. City of Wenatchee* 89 Wn 2d at 814, the court stated:

> Before a court may uphold a determination of "no significant impact," it must be presented with a record sufficient to demonstrate that actual consideration was given to the environmental impact of the proposed action or recommendation.

And in *King County v. Boundary Review Bd.* 122 WN.2d at 663, the Washington Supreme Court ruled that

> The absence of specific development plans should not be conclusive of whether an adverse environmental impact is likely.

In that case, the Court reversed a DNS and remanded for further proceedings including the issuance of an EIS, and stated at page 664:

> 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. 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.

In short, environmental review under SEPA must include the impacts of future decisions made probable by a proposed nonproject action. Other court cases which make clear the importance of serious nonproject analysis include the following: *Bellevue vs. King County Boundary Review Board* 90 WA 2nd 856; *Boehm vs. City of Vancouver* 111 WA Appellate 711; *Carpenter vs. Island County* 89 Wn.2d 881; *Harden vs. Port Townsend* 93 WA 2nd 870; *Sisley vs. San Juan County* 89 WA 2nd 78; and *Citizens vs. Klickitat County* 122 WA 2nd 619.

C. The value of full and integrated analysis

The failure of the DNS and Checklist to fully consider potential environmental impacts has clear consequences not only for their legal sufficiency but also for their decision-making value. As it stands, there is no way to ascertain residential density and its consequences. Current and proposed micro-housing projects are designed in a variety of configurations, with a wide range as to the number of residents in a project, which despite their variety are all referred to as micro-housing or congregate residences. A lack of clarity in the proposed Code amendments' definitions only exacerbates this situation.

In the current DNS and Checklist, there is almost no substantial evidence or critical analysis in or behind the claims for non-significance regarding the proposed legislation. There is no evidence of extensive review, consideration, or evaluation of specific probable impacts based on substantial evidence. And there is little in the documents that could be characterized as reasoning, explanation, or a finding of fact.

An environmental impact statement is nothing to be afraid of. For decades, DPD routinely prepared environmental impact statements regarding changes in the Land Use Code, and its decisions were better for having done so. An EIS is a valuable means by which environmental implications of a proposed ordinance can be studied. An EIS is conducted with public outreach and comment far superior to the marginal levels of input sought and obtained by DPD in this case. In its stewardship of the environment, the City

benefits from public input—some of it quite expert, and all of it free--that it receives during scoping and review of an EIS.

An EIS has other benefits not present in a DNS. Unlike a DNS, an EIS is required to compare a proposal with its reasonably available alternatives--always an aid to wise decisions whether at DPD or everyday life. And an EIS is required to look at environmental equity (differential impacts on people of different demographic groups). In refusing to conduct an EIS on this land use code amendment such as it once did, DPD has deprived itself, and thereby the public interest, of an examination of reasonably available alternatives and of the environmental equity impacts of the proposed ordinance.

D. The Checklist's Nonproject Supplement is Disconnected from Its Main Part

A notable failure in the Checklist to meet the SEPA standard is that in answering the "Supplemental Sheet for Nonproject Actions," DPD failed to heed the instructions which state: "Because these questions are very general, it may be helpful to read them in conjunction with the list of the elements of the environment." The lack of integration between the supplemental sheet and the many elements of the environment in the Checklist's main part renders the effort worse than useless, in that the supplemental sheet claims positive impacts from microhousing, while not even considering negative impacts.

E. The DNS fails to consider environmental impacts that are cumulative, or geographically specific, or of the proposed legislation in its interaction with other City programs

The DNS fails to comply with the requirements of Seattle Municipal Code §25.05.330 by not considering (1) whether the same proposal may have a significant adverse impact in one location but not in another location; (2) the absolute quantitative effects of the proposal, which may result in a significant adverse impact regardless of the nature of the existing environment; and (3) whether several marginal impacts when considered together may result in a significant adverse impact.

F. The DNS Does Not Examine Reasonably Possible Implementations and Interpretations That Would Have Significant Adverse Environmental Impacts

The DNS appears to assume for the proposed legislation only scenarios of implementation and interpretation scenarios which would be least likely to have a significant adverse impact, ignoring those whose impact would be significant enough to warrant an EIS. Some of these reasonable scenarios would involve how DPD could use (or misuse) its own discretion; other scenarios would involve how builders could exploit loopholes in the law. The reasonable expected result could be construction well above the density levels upon which DPD premises its DNS.

Current and proposed micro-housing projects are designed in a variety of configurations, with a wide range as to the number of residents in a project, which despite their variety

are all referred to as micro-housing or congregate residences. A lack of clarity in the proposed Code amendments' definitions only exacerbates this situation.

G. The DNS Relegates the Adverse Environmental Impacts to being classified as Less than Significant by Counterbalancing Them with What it Portrays as Positive Impacts

The SEPA regulations [WAC 197-11-330.5 and Seattle's SEPA ordinance [SMC 25.05.330E] both declare in identical language that

> A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section.

In short, SEPA does not allow an agency to disregard significant adverse impacts because it believes them to be balanced with environmental benefits. Unfortunately, such balancing is just what DPD did. Consider p. 13 of the Checklist, where it is stated regarding the design review aspects of the legislation: "On balance, the indirect, long-term cumulative impacts on land uses would be positive in that the proposed land use code changes further the preferred land use pattern as expressed in Comprehensive Plans, Transportation plans and various policies and goals of the City of Seattle."

The DNS gives unjustified priority to claimed positive impacts while underplaying the possibility of negative impacts. P. 13 of the Checklist states that "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." Well, are there actual negative impacts, or is DPD just going to leave this question to speculation? Clearly, DPD is loathe to say that there are any probably environmental impacts, even though in the next paragraph on p. 13 of the Checklist it is quick to say that there are positive impacts.

DPD's resistance to acknowledging actual negative impacts is understandable, because to acknowledge them would require it to ascertain their significance and possibly undermine its "declaration of non-significance." But if DPD is genuinely uncertain whether the negative impacts are significant, it certainly should conduct an environmental impact statement in order to ascertain whether these negative impacts are in fact significant.

In violating SEPA's prohibition against balancing significant adverse impacts with claimed beneficial ones in its review of the Noise Ordinance changes, DPD distracted itself from recognizing that the likely negative impacts (or the uncertainly about them) are more than sufficient to require preparation of an EIS. As the SEPA Handbook [Chapter 2] states: "Even one significant impact is sufficient to require an environmental impact statement."

H. The DNS Is Based On Numbers that Seriously Underestimate the Square Footage and Unit Numbers that the Legislative Proposals are Likely to Facilitate

As DPD acknowledged in the 2011 Hearing Examiner case *Tom Gibbon for Fred Meyer and Gary Brunt for Greenwood Shopping Center* [W-11-003], DPD's own Zoned Capacity Model seriously underestimates the residential units and square footage likely to result from changes in land use laws and regulations [paragraphs 10-11 of the *Findings and Decision of the Hearing Examiner*]. This Zoned Capacity Model was also used in the current case, and we will show at the hearing that the model contributed erroneously to DPD's finding that the proposed microhousing legislation would not result in square footage or unit number increases that would be adversely significant under SEPA.

Another problem with the DNS is that its analysis of past impacts and its projection of future ones are based on numbers that seriously undercount the dwelling units per microhousing building and the number of residents per dwelling unit. As a result, the significant probable adverse environmental impacts are seriously underestimated.

I. The DNS Fails To Recognize the Significant Adverse Impact on Fire Safety Services from Dangers in the Design of Microhousing under the New Legislation

As will be shown at the hearing, DPD's own documents and personnel reflect an awareness that the microhousing to be fostered by the proposed legislation embodies serious fire safety issues that will place new demands on the indicate that resources of the Seattle Fire Department. These demands are partly because of the unsafe proximity to one another of microhousing buildings on the same site; and partly because certain fire egress and other safety requirements that apply to apartment buildings would not apply microhousing buildings under this proposed legislation.

J. The DNS Fails to Recognize the Significant Adverse Impact on Parking and Transportation Conditions from Microhousing that Would be Built Under the New Legislation

At the hearing, we will demonstrate the significant adverse impacts on parking, bicycling, pedestrians, and vehicular traffic that are probable from microhousing that the legislation will make possible; these conditions are adverse not only for those traveling but also for those who wish to serve them, such as local business. Unfortunately, none of these probable consequences are adequately recognized in the DNS.

K. The DNS Fails To Recognize The Significant Adverse Impact On People With Disabilities Or Who Are On Low Incomes From The Proposed Legislation.

As proposed, the legislation would not require five- and six-story microhousing projects to have elevators, in contrast to other multifamily projects in which buildings that size are required to have elevators. Unfortunately, the DNS does not recognize this limitation as an impact on housing choices or the rights of people who are disabled.

Also not addressed in the DNS is the displacement of people on low incomes from buildings that would be replaced by the new microhousing buildings made possible by the new legislation. The DNS seems to regard that probable significant adverse impact as being not worth registering because of microhousing projects would supposedly provide them a low income alternate. However, as outlined below, SEPA does not allow an adverse impact to be disregarded because it is regarded as counterbalanced by an impact that is regarded as being positive.

L. The DNS Fails To Recognize the Significant Adverse Impact on Utility Services from Microhousing That Would Be Built Under the New Legislation

At the hearing, we will demonstrate the significant adverse impacts on solid waste and sewer services and the delivery water and other utilities from microhousing that the legislation will make possible. Unfortunately, these consequences are not recognized in the DNS.

III. CONCLUSION

For the reasons stated throughout the above document, Appellants respectfully request the Hearing Examiner to remand the DNS to DPD for additional analysis that will address the weaknesses identified here and as we will identify them at the hearing. We also respectfully entreat the Hearing Examiner to require DPD to undertake the Environmental Impact Statement that we believe is required.

Respectfully submitted,

Chris Leman, Authorized Representative for Appellants -- January 3, 2013