BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeal of	)	Hearing Examiner File:
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DENNIS SAXMAN, et al.	)	**W-13-008**
	)	
From a SEPA Determination by the Director, Department of Planning and Development	)	**Appellants' Final Brief**
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I. INTRODUCTION

Appellants respectfully request that the Hearing Examiner either remand for additional analysis the SEPA Determination of Nonsignificance issued by Seattle'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 will be outlined in the following brief, the exhibits submitted by the Appellants and by DPD, and through the testimony of witnesses, together show that the information considered and the analysis conducted by DPD were not reasonably sufficient to evaluate the legislation's environmental impacts. Consequently, DPD's issuance of the DNS was clearly erroneous and does not meet the standards that SEPA requires for issuance of a DNS.

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 find 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 and Checklist Ignore Adverse Environmental Impacts on Grounds that the Proposed Ordinance Does Not Confer a Permit. This Legal Position is Contrary to SEPA's and the City's Own SEPA Ordinance's Requirement for Substantive Analysis of the Results of Non-Project Actions.

In the DNS and the Environmental Checklist, DPD does not attempt to assess this proposed legislation's environmental impacts. Its argument for not doing so is stated on page 3 of the DNS:

> 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, in its Checklist part B, "Environmental Elements," to 74 questions about environmental impacts, DPD gives the same answer 74 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 DPD 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 checklist items, DPD might well have claimed less probable adverse environmental impact than the Appellants believe they should have; but if DPD had done so, then DPD would have afforded itself the opportunity to show a substantive basis for its estimate of the environmental impacts, such as the Jan. 7 and 9 hearing. But because DPD did not undertake substantive analysis or offer a substantive judgment in the Checklist, it could not offer such evidence in response to Appellants' discovery request, not in its testimony at the hearing.

DPD'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 DPD 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." The Handbook also states [Section 7.2, GMA Nonproject Review]: "Impacts associated with later planning stages may also be addressed to the extent that sufficient information is known for the analysis to be meaningful."

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 (1993) 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, stating 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 this important case, the court further argued:

> 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.

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 Wn.2nd 856, 867 586 P.2d 470 (1993). "The burden is upon an agency subject to SEPA to show that it actually considered environmental matters in a threshold determination."
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> *Boehm vs. City of Vancouver* 111 Wn.App. 711, 47 P.2d 137 (2002). "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)."
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> *Hayden vs. Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980). "Under our rule, to reach a valid negative threshold determination, environmental factors must have been evaluated to such an extent as to constitute prima facie compliance with SEPA procedural requirements."
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> *Sisley vs. San Juan County* 89 Wn.2d 78, 569 P.2d 712(1977), "In considering whether "major actions" significantly affect the environment, we have held that an EIS is required "whenever more than a moderate effect on the quality of the environment is a reasonable probability."
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> *Klickitat County Citizens Against Imported Waste v Klickitat County*, 122 Wn. 2d 619, 642-644, 860 P.2d 390 (1993). A non-project plan EIS need only analyze

environmental impacts at a highly generalized level of detail, but cursory superficial discussion will not suffice.

Norway Hill v. King County Council, 87 Wn.2d 267, 275, 552 P.2d 343 (1975). "We review a threshold determination that an EIS is not required under the 'clearly erroneous' standard. 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).

Juanita Bay Valley Community Ass'n v. Kirkland, 9 Wn.App. 59, 73, 510 P.2d 1140(1973). "[W]e have held that the record of a negative threshold determination by a governmental agency must "demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA. ... With this in mind we are compelled to comment on the inadequacy of the Board's record. It is filled with many assertions, numerous unanswered questions and a paucity of information."

C. The value of full and integrated analysis

The failure of DPD's DNS and Checklist to offer any substantive analysis of probably adverse 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 the proposed legislation's probable impact on residential density and its consequences.

In the DNS and Checklist offered by DPD, there is no substantive 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. In fact, the DPD decision documents are devoid of as reasoning, explanation, or findings 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. DPD Is Unable to Identify Specific, Substantive Information and Analysis That it Used in Developing Its Checklist and in Reaching Its Determination of Nonsignificance

At the beginning of this case [Oct. 31 letter], the Appellants pressed DPD with a Discovery request for "all documents used to prepare the SEPA Analysis for the Determination of Nonsignificance (DNS) and the SEPA Checklist ... documents that show you generally considered the environmental impacts of factors discussed in the DNS and enumerated on the SEPA Checklist [and] information re the evaluation of environmental impacts on specific issues." We were assured by DPD that the documents we received represented the entirety of those that had been used to prepare the Checklist and DNS.

We spent precious hours of the Jan. 7 hearing going through each DPD document with DPD witness Geoffrey Wentlandt, asking him to identify whether and how each document had contributed to formulation of the Checklist and DNS. We were not impressed. Mr. Wentlandt was not able to draw connections between any document and the policy outcome except in the most general terms. We were left with the impression that something more was present in DPD's thought processes--a preconception that there were no adverse environmental consequences, and that serious environmental analysis was unnecessary.

Policy makers are certainly not unknown to have preconceived ideas, but with a strong and specific law like SEPA they are very much required to seek out and carefully analyze relevant information, and to consider this information fully and fairly in making an environmental determination. Unfortunately, through the testimony of witnesses and in our many exhibits, we the Appellants have identified many opportunities the DPD missed to seek and use information (much of it in DPD's own files) that would have been more relevant to its decision and that would have led it to a decision other than that the proposed microhousing legislation would not have a significant adverse environmental impact.

Given the presence in Seattle of 58 completed and proposed microhousing projects, DPD had sufficient information about these projects to produce a meaningful analysis of the environmental impacts associated with future microhousing projects. However, DPD failed to make use this information that was in its own files in developing the Checklist and Determination of Nonsignificance. Indeed, throughout this proceeding, the DPD has chosen to argue that existing and proposed projects are irrelevant to environmental assessment. Seemingly as a matter of doctrine or ideology, DPD has chosen altogether to ignore relevant information that was staring it in the face.

E. Instability and Constant Change in DPD interpretation of the Land Use Code and the Building Code Regarding Micro Housing Projects Preclude a Reliable Baseline to Verify DPD's Claims That Its Legislative Proposals Pose No Significant Environmental Harm

In defense of the failure of its Checklist and Determination of Non-significance to substantively consider and respond to environmental concerns DPD states in the DNS [p. 5] that

> the existing regulatory framework, i.e., the Land Use Code, the Shoreline Master Program, Environmentally Critical Areas ordinance, and the City's SEPA ordinance, will address impacts during review of development proposals on a project-specific basis.

Would that it were true! Unfortunately, DPD consideration of microhousing proposals has been a chaotic and tawdry interplay of chance and power most underserving of naming itself a "regulatory framework."

At the end of the hearing, the Hearing Examiner wisely asked the parties to address in their briefs the current practices in DPD's permitting of micro housing. We endeavor to comply with this request in the present section, but in so doing, are handicapped by the Hearing Examiner's sustaining of DPD's campaign to suppress some of the Appellants' exhibits that document the very practices that she asks us to describe and assess.

The successive two Authorized Representatives who have led this appeal are first, one trained and practiced in the law; and second, a political science Ph.D. and researcher. Their intellectual inheritance is a decisive finding of the most recent half century of public law and the social sciences, documenting that the decisions of bureaucracies are not fully predicted by the laws and regulations that ostensibly govern them. Rather, bureaucracies enjoy a major degree of discretion whose processes and outcomes vary from place to place but everywhere and often bear little resemblance to the laws and regulations that supposedly apply to them.

Decision-making by Seattle's Department of Planning and Development regarding micro housing is certainly one such case. Toward understanding how this process works, we are fortunate that the Hearing Examiner has not (yet?) disallowed many of our exhibits that, we are proud to say, provide the best empirical research base we know of for understanding how a big-city land use department actually handles its permitting decisions.

The record we have established in our exhibits (even omitting those that were regrettably disallowed) does not bear out the image that DPD makes its decisions consistently and without fear or favor. One can understand why DPD has repeatedly asserted that this evidence is irrelevant to the matter of this appeal and why it has sought to have the Hearing Examiner protect it from having to address this evidence. For that the record we have assembled is decisively at variance with the assumption that environmental concerns can safely be deflected at the stage of legislation because they will be addressed consistently and faithfully through the "existing regulatory framework."

To understand the current practice of DPD in permitting micro housing, the Hearing Examiner must study the appellants' exhibits. These exhibits show that for a great many of the micro projects that have been either built, permitted, or are under consideration, DPD's approach is a patchwork of exemptions, departures, exemptions, and the waiving of building code requirements and development standards. By their sheer scope, the exhibits establish that the there is no consistent practice within DPD that can be relied on for any certainty on how the existing laws and regulations will be applied to microhousing. Irregularity is DPD's norm .Exceptions are not exceptional, they are DPD's mode of operation.

The Appellants entreat the Hearing Examiner to recognize the clearly erroneous character in DPD's bland and insubstantial assurances, when pressed about the environmental risks of its proposed microhousing legislation, that future projects' environmental impacts "would be addressed by current codes and regulations." In the DNS and at the hearing, DPD asserted,

without citation to any code section, that micro housing, boarding houses, and rooming houses, were authorized under current codes. This assertion is contrary to statements made even the DPD director Diane Sugimura in her Director's Report that micro housing was a new type of development.

On Jan. 7 [2:28:48], witness Dennis Saxman presented an overview of the Appellants' Exhibit 25 [pages 216-342]. The exhibits consist of dozens of instances printed out from the DPD's EDMS website in which exceptions and special arrangements are made to permit micro housing projects, adding up to a situation that, in his words, "invariably existing codes and regulations are excused." Saxman explained that "Because the DPD said in its analysis, that environmental concerns would be addressed by existing code and regulations, he had assembled these exhibits "in order to show, that is not a true representation of what happens. The environment is not protected by existing code and regulations." He continued that even though these exhibits refer to existing projects, "they go to the issue of whether or not the DPD will actually enforce the code or regulations and environmental protections." And he concluded: "...they are only a small portion of what was there because I was getting tired of working on all these exhibits quite frankly."

An illustration of the endemic confusion regarding the laws and regulations about microhousing project is something so basic as whether congregate housing sleeping rooms are allowed a kitchen or second sink (i.e. a sink in the sleeping room, in addition to the one in the bathroom). At the Jan. 9 hearing the DPD representatives surprised the Appellants with the assertion that there is no limit on the number of sleeping rooms in congregate housing that may have kitchens. It has been our understanding that there is a limit, or a prohibition, on kitchens or sinks being in the sleeping rooms of congregate housing projects (DPD requires sinks in kitchens). And so we filed a motion on Jan. 22 to add an exhibit. This exhibit (dated Dec. 5, 2013) is a DPD zoning examiner's direction to the project applicant for the congregate housing project proposed for 2820 Eastlake Avenue. It appears to contradict this Jan. 9 DPD assertion by stating that the 2820 Eastlake Avenue project cannot be regulated as congregate housing unless all sinks in the sleeping rooms are removed from the plans. The key part reads as follows:

> As currently proposed, each sleeping room has an associated bathroom including a sink, and a separate sink outside the bathroom. We have concluded that spaces configured in this way are designed and arranged as separate dwelling units, and the building, as proposed, is subject to review as a 115-unit apartment building. In order for DPD to regulate the proposal as a congregate residence, one of the sinks associated with each sleeping room must be eliminated.

Emblematic of the difficulty of pinning down the laws and policies regarding microhousing projects is the almost unlimited merry go round of names and definitions. Applicants' Exhibit 28 [pp. 351-358] is, as Denis Saxman stated as a Jan. 7 witness, "a compilation of definitions I prepared, also for purposes of talking with councilmembers, and which was presented to them as part of a package." [2:30:00] The document has a list of

> definitions taken directly from the code, directors' rules and DPD regulations verbatim to illustrate the variety of definitions in dwelling units, families and households. And I felt it

was relevant to the field because one of the things the proposed ordinance plans to do is to define dwelling unit, but as dwelling unit has many various definitions across many various codes, giving it a new definition in one place will not solve the confusion.

F. Code Interpretations Potentially Could Stabilize Microhousing policies somewhat, but currently are not fully heeded by DPD

The Seattle Municipal Code gives the Director of DPD the power to issue Land Use Code Interpretations: "An interpretation decision by the Director may affirm, reverse, or modify all or any portion of a Type I or Type II land use decision" [SMC 23.88.020.A]. The law also provides that such interpretations may be appealed either to the Hearing Examiner or the courts. Included in Appellants' exhibits are documents on some Code Interpretation requests, including one on Harvard Avenue which led the DPD Code Interpretation staff to rule that DPD was undercounting dwelling units. The developer has taken the City to court, and the case is set for trial on May 5, 2014 in King County Superior Court.

The significance of the Code Interpretations (Original and Supplemental) in this case is that DPD found that project that the developer argued contained only eight dwelling units (the typical arrangement in microhousing/congregate residences of a single dwelling unit composed of a common kitchen or amenity associated with 8/9 sleeping rooms/micro-units) was, in fact, a 57 unit apartment building, subject to the development standards for apartment buildings with a unit count of 57.

When the developer changed the project drawings to try to avoid the implications and impact of this Interpretation, DPD issued a Supplemental Interpretation, finding that the modifications were insufficient "basis for a conclusion that the individual rooms are not designed or intended to be used as a separate dwelling unit." [AE-375] DPD stated that its original decision remained the same, adding that the project would be subject to Design Review. Unless reversed on appeal, these Interpretations would have broad application to all future microhousing projects, and has the potential to fundamentally alter the way the projects are regulated.

Although it could be argued that these Interpretations are beyond the Hearing Examiner's jurisdiction, that the matter is currently before the King County Superior Court does not mean that the Hearing Examiner should not accord them significant weight as provided for in the Seattle Municipal Code governing appeals to the Hearing Examiner, which states "The Director's decisions made on a Type II Master Use Permit shall be given substantial weight…." [SMC 23.76.22.C.7]. A Land Use Code Interpretation is just another form of Director's decision. These Interpretations should be considered the law until they are reversed on appeal (if they ever are reversed).

G. The Checklist and DNS Do Not Examine Reasonably Possible Implementations and Interpretations That Would Have Significant Adverse Environmental Impacts

With the benefit of the analysis in the previous section, one can see that the laws and rules that apply to microhousing leave a huge area for administrative discretion, in their interpretation and how they are implemented. Contrary to DPD's statement in the DNS [p. 5] that "the existing

regulatory framework...will address impacts during review of development proposals on a project-specific basis," that is only one possible outcome; just as possible (and one we regard as more probable) is that the policy process will work as dysfunctionally as it has in the past, to the detriment of the environment.

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 reasonably 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.

Our experiences with two witnesses during the hearing illustrate the lack of any existing legislation or clear code language governing microhousing. The first had to do with lapses by Jon Siu, who stated that he had worked as an engineer for the City of Seattle for 30 years and led DPD's enforcement of the Building Code for the last twelve years. During the Jan. 9 cross examination, we asked him to explain the difference between R2 and R3 housing as defined by the Building Code. After a moment of dithering he replied that he could not remember. After creating the interpretations upon which the entire micro housing 'regulations' hang, in particular his own decision regarding whether or not (not!) to use tables within the code in defining the difference between R2 and R3 to allow micro housing to have a single stair, after issuing letters and statements [Applicant Exhibits 47 and 48] to explain the difference, after explaining at public meetings the difference, he is suddenly unable to recall the difference under oath.

In a separate exchange, we asked Siu about the distinction in the Building Code between transients and non-transients. Siu testified that the word "transient" was not defined in the Code. [3:13:30] He was mistaken. "Transient" is defined in the Building Code [Chapter 2, Definitions, Section 202, Definitions (arranged in alphabetical order)] as "occupancy of a dwelling unit or a sleeping unit for not more than 30 days." This is not just a technical question. Sustainable and environmental development will benefit from continuity of residency. Were microhousing projects to become largely for transient residents, they would have very much more negative environmental impacts than if their residents were non-transient. Unfortunately for the environmental impacts, developers are designing and marketing their microhousing to appeal to transient customers; we can expect DPD to be seeking ways to accommodate them.

The slipperiness of laws and regulations regulating microhousing also emerged during the testimony of Greg Hill, who used plans from the now-occupied 4516 Meridian Avenue North to show how each unit's single stair empties out into the kitchen, forcing all residents to exit through the kitchen during a fire or other emergency. During cross examination, DPD Authorized Representative William Mills was handed a cell phone with a text message, presumably from John Siu. Mills then asked Hill if he was aware that the Building Code does not allow a single exit to pass through a kitchen. DPD apparently was seeking to impugn Mr. Hill's discussion of a

built condition, permitted by DPD, by asking if Mr. Hill understands that this condition is not allowed in the Building Code.

That is exactly the problem. Rather than follow the strict rule of the code, or develop simple code changes that would protect the public safety from clear threats, DPD continues to evolve a series of interpretations and pocket variances to allow developers to build what they choose. How can we have any confidence that DPD's interpretation and implementation of laws and regulations will ensure that microhousing projects will not cause significant adverse environmental harm?

H. The Checklist and DNS Fail To Watch For Unexpected Trends and Impacts such as Those That Have Marked Microhousing in Recent Years.

City officials and planners were flatfooted by the spread of microhousing. The October 1, 2013 DPD Director's Report on Micro Housing admits 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. In fact, the Director's Report states that DPD "has been tracking micro-housing production in Seattle for roughly two years...."

The DPD witnesses acknowledged that they could cite no mention of microhousing in Seattle's Comprehensive Plan, a document regularly updated by the Mayor and City council with DPD's help. The Plan has a time horizon of 25 years and is supposed to be the City's most far-seeing look into the future.

Give the failure of DPD and the Comprehensive Plan to anticipate microhousing and its impacts, it is surprising that DPD did not put more effort into exploring its probable future. The Checklist and DNS contain little or no effort to forecast the trend and identify the environmental issues it poses.

I. The Checklist and DNS Fail to Recognize the Environmental Impacts of Proposed Removal of Design Review Requirements from Some Micro Projects and the Reduction of Design Review Requirements for Others

A serious environmental setback from the proposed microhousing legislation would be its removal or relaxation of design review requirements that currently apply to proposed microhousing projects. Under the existing Land Use Code, microhousing projects are required to go through design review if they have the following number of dwelling units: 8 in the LR3 zone; 20 in the MR zone; and 4 in the Neighborhood Commercial Zones. The proposed legislation [pp. 2-5] would, for all micro and congregate project proposals, completely eliminate these unit number thresholds. Instead, the applicability of design review to these projects would be based on gross floor area, as follows:

- Projects under 6000 square feet -- no design review
- Projects with 6000 to 11,999 square feet -- Streamlined Design review
- Projects with 12,000 to 19,999 square feet -- Administrative Design Review
- Projects with 20,000+ square feet -- full Design Review

DPD's DNS [p. 8] describes these changes as "adding a threshold for design review." DPD's Checklist [p. 12] describes the change as "some increased permit process requirement of design

review for some projects." In both documents, DPD fails to describe the change accurately. A more accurate way to describe the changes would be that they "replace the existing design review threshold with another that will reduce the design review received by projects of a certain size."

DPD (such as in the Director's report [p. x] makes a strong argument that design review helps to reduce the environmental impacts of building projects. Thus in the DNS section on land and shoreline use, DPD states [p. 13]:

> Design Review provides an opportunity for evaluation of specific projects according to citywide and neighborhood design guidelines, which can help ensure consistency with local plans and provide additional opportunity for local residents to provide comment on specific development projects. 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.

To be consistent in its argument that design review reduces environmental impacts, DPD must also acknowledge that diminishing the design review required of some microhousing proposals will have an adverse environmental impact. Yet in its Checklist and DNS, DPD nowhere acknowledges this implication of its legislative proposal, nor does it make any effort to estimate the adverse environmental impacts.

The *Microhousing Tracking List -- September 19, 2013* is an exhibit for both DPD and the Appellants [AE-1, p. 60]. It was posted on the DPD web site along with the DNS and SEPA Checklist when DPD first sent out its notice of decision and the opportunity to appeal. An examination of this list reveals many projects that under the current Land Use Code are subject to full design review but which under the proposed legislation will not be. Of the 57 projects listed, 14 of them (about one quarter, with three having their units unknown) have eight dwelling units or more and thus would be subject to design review under the current Land Use Code.

Unfortunately, DPD failed to acknowledge in its DNS and Checklist that many of these very projects would receive less design review under the proposed legislation. Only six of these projects have 20,000 square feet or more and thus would be subject to full Design Review, while only three are between 12,000 and 19,999 square feet and thus would be subject to Administrative Design Review. The remaining six are between 6000 and 12,000 square feet and thus would be subject only to Streamlined Design Review. [Note: DPD list does not have square footage for one of these projects.]

It is already a serious departure from SEPA that DPD failed to mention or analyze the adverse environmental impact from its legislative proposal to release more micro housing projects from design review. The gravity of DPD's failure to meet the requirements of SEPA is increased when one consults DPD's own evaluation of Streamlined Design Review [DPD and Appellant Exhibit 1, pp. 69-75], where DPD concluded that "project designs were not substantially altered through the process [p. 4]."

The above discussion establishes that a significant impact of the proposed legislation is to relieve microhousing projects of full Design Review (which DPD declares makes a major contribution to environmental quality) and to relegate them to Streamlined Design Review, the most lax form of design review, in which DPD acknowledges that projects are "not substantially altered." There are undeniable adverse environmental impacts from dropping a requirement that protects and improves the environment--and yet DPD does not analyze or even mention in the DNS or Checklist this clear impact of its legislative proposals.

J. The Checklist and DNS Fail To Recognize the Environmental Impacts from Prohibiting Microhousing Projects in Single Family Zones

Microhousing projects are currently allowed in single family zones, and three have been built there [documented in a later section]. The proposed legislation [p. 5] would reverse that situation, prohibiting microhousing projects in single family zones. In the DNS, DPD wrongly implies that the Land Use Code already prohibits microhousing projects in single family zones, by stating [p. 1] that the proposal is to "clarify prohibition of micro-housing in single family zones."

The inescapable result of the proposal to prohibit new microhousing projects in single family zones would be to concentrate them in the multifamily zones more than they are at present. A change in the Land Use Code that causes development to be more concentrated in certain zones has the strong probability of significant adverse impact across a wide range of the environment--traffic, parking, public services, air, water, noise, and so on. And yet, in its DNS and its SEPA checklist, DPD failed to mention, let alone consider, these probable environmental impacts. In fact, DPD erroneously states in the DNS [p. 5] that "The proposed regulations do not substantially alter the size, scale or location of microhousing or congregate residence projects that could be built when compared with existing regulations."

K. The Checklist and DNS Fail to Recognize the Environmental Impacts from Relaxing Requirements for Shared Space for Solid Waste Containers

In a way that DPD neither acknowledges nor assesses in the DNS or Checklist, the proposed legislation weakens the existing regulation of the space allocated to solid waste containers in microhousing projects. The existing Land Use Code in SMC 23.54.040, Table A requires in square feet the minimum shared storage space for solid waste containers for projects with different numbers of dwelling units. The proposed microhousing legislation does not increase the minimum space required. In fact, it gives the Director the authority to decrease this space requirement, in the following addition to Table A [p. 17 of the proposed legislation]:

> For residential uses containing micro-housing, or for congregate residences, the Director has discretion to increase or decrease the amount of shared storage space that is required based upon the number of micros or sleeping rooms within the use or other characteristics of the proposed development.

At the Jan. 7 hearing, DPD witness Geoffrey Wentlandt admitted under questioning that until being shown the above sentence at the hearing, he had been unaware that the proposed legislation had this language granting the DPD Director "discretion to increase or decrease the amount of shared storage space." As Mr. Wentlandt was the official who actually filled out and signed the

SEPA checklist, it can be stated with certainty that DPD did not consider this portion of the proposed legislation as to its probable adverse environmental impacts.

The consequences of inadequate shared storage space for solid waste containers were seen in the photos of a microhousing project at 422 11th Ave E [Appellants' Exhibit 56 pp. 430-1]. The photos showed solid waste containers blocking the sidewalk, blocking side access on the property between the street and the alley, and blocking the building's emergency electricity shutoff panels. These photos dramatize several environmental impacts of the solid waste section of proposed microhousing legislation that DPD by its own admission wholly failed to consider. Had DPD tried to assess them, it would have found that these probable adverse environmental impacts include: (1) barriers to firefighters and police in quickly accessing the building and its safety systems as well as in aiding the residents in exiting during a fire; (2) barriers to solid waste removal personnel in accessing the solid waste containers; and (3) barriers and risks to pedestrians who wish to use the public sidewalks.

At the hearing, DPD attempted to blunt the force of this proposal's damage to their case by arguing that SMC 23.54.040(I) already gives the DPD Director the discretion to waive or weaken the required space for solid waste containers. But that part of the law has many more protections for the public interest:

> The Director, in consultation with the Director of Seattle Public Utilities, has the discretion to grant departures from the requirements of this Section 23.534.040 if the applicant proposes alternative, workable measures that meet the intent of this Section 23.54.040 and if either: (1) the applicant can demonstrate difficulty in meeting any of the requirements of this Section 23.54.040; or (2) The applicant proposes to construct or expand a structure, and the requirements of this Section 23.54.040 conflict with opportunities to increase residential densities and/or retain ground-level retail uses.

Safeguards that are in the above provision that are not in the proposed microhousing legislation include: (1) the DPD director must consult with the SPU Director; (2) the applicable must propose a "alternative, workable" alternative; and (3) the applicant must demonstrate either difficulty in meeting requirements or a resulting increase in residential density or retention of ground-level uses. None of these safeguards are present in the microhousing legislation's grant of authority to the DPD Director to reduce the space required for solid waste containers in microhousing projects.

L. The Checklist and DNS Fail To Recognize the Environmental Impacts from the Proposed Prohibition in Micro Units of a Kitchen or a Sink that is Not Located in the Bathroom; and its Limitation of Kitchens in Congregate Housing Projects

Another way that the proposed microhousing legislation would impose probable significant adverse environmental impacts that DPD neither acknowledges nor assesses in the DNS or Checklist, is in amending the Land Use Code to (1) prohibit micro units from having their own kitchens (that is, not one shared with other micro units) or from having a sink that is not located in the bathroom [p. 24 of the proposed legislation]; and (2) to prohibit congregate housing projects from having kitchens in more than 25 percent of their sleeping rooms (except in certain circumstances, when the kitchens would be limited to 75 percent of the sleeping rooms) [pp. 9-10 of the proposed legislation].

These changes are misleadingly described as follows in the DNS [p. 2]: "apply certain limits to the location of food preparation facilities outside of the common kitchen within micro-housing units." A more accurate description would have been something like: "prohibit kitchens and sinks from being in in sleeping rooms, so that food preparation that requires a sink will need to be done in the bathroom."

Under current law, micro units are allowed to have a kitchen (defined by DPD as including a range), and whether or not they have an officially defined kitchen, they are allowed to have a sink in the sleeping room, thus in effect encouraging a portion of the sleeping room to be used as a kitchen. As can be clearly seen in ten of the photos from DPD's own micro housing tour, many of the micro units visited had a sink in the sleeping room [photos 133405, 140228, 1060380, 1060388, 1060390, 1060391, 1060395, 1060396, 1060410, and 1060412].

Under current law, congregate housing projects are allowed to have kitchens in all of the sleeping rooms. The proposed microhousing legislation would limit this option, so that a congregate housing project could outright have a kitchen in no more than 25 percent of its sleeping rooms, with this ceiling to be raised to 75 percent only at the discretion of the Director, and only (1) if the project is affiliated with a college or university; or (2) if the project has characteristics "clearly identifying it as a congregate or communal living arrangement wherein residents regularly and customarily engage in aspects of group or co-dependent living...."

In its DNS and its SEPA checklist, DPD failed to mention, let alone consider, that these Land Use Code changes that would eliminate or reduce the kitchens or food preparation facilities in the sleeping rooms of micro units and congregate units, could have significant adverse environmental impacts such as: (1) increased demand on fire services from the risk in residents attempting to cook in facilities not designed for booking; (2) increased demand on public health services from the increased use of bathroom sinks for food preparation; and (3) changes in the relative proportions of micro units and apartments that will be built in the future because of the changed financial incentives from the new policy against kitchens or sinks in micro or congregate unit sleeping rooms.

M. Answers in Checklist Part D are Not Integrated With Answers in Part B

A notable failure to meet the SEPA standard is that in answering the Checklist's Part D, 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 Part B, "Environmental Elements," renders the effort worse than useless, in that the supplemental sheet claims positive impacts from microhousing which it balances against negative impacts that it fails to describe. As explained below in section X, such balancing is directly contrary to SEPA law.

N. The Checklist and DNS are Based on Numbers that Underestimate the Square Footage and Unit Numbers that the Proposed Legislation is Likely to Facilitate

Nothing could be more central to an assessment of the proposed microhousing legislation's environmental impacts than accurate figures on the number and size of micro units now in existence, under construction, and in permitting, and the number and size considered possible or

likely in the future within existing zoning. Unfortunately, the figures that DPD used in preparing its Checklist and DNS were dramatically at variance with actual figures in its own files or easily available to the agency; and at variance with the projections using made by methods more reasonable than those which DPD chose.

DPD's counting of the number and size of micro units was clearly erroneous in several ways which compounded each other, yielding a significant undercount of the micro units now in existence, under construction or permitting, and expected or possible in the future. DPD's errors are capsulized here, then explained in detail below:

(1) DPD overestimated the average square footage of micro units,
(2) DPD underestimated the number of micro units
(3) DPD undercounted the average number of residents per micro unit

Because of these undercounts, the significant probable adverse environmental impacts are seriously underestimated.

DPD overestimated the average square footage of micro units. DPD's methods for estimating the average size of micro units were discussed at the Jan. 7 hearing by witnesses Geoffrey Wentlandt and Dennis Saxman. In questioning we referred them to two Appellants' Exhibits: AE 37, p. 381, a Nov. 5, 2012 DPD "Microhousing Review and Tracking" report which has the following footnote: "estimated micro units are calculated based on 250 s.f. per micro unit, an estimated average size in Seattle's current market." And AE 46, p. 409, a footnote of an April 15, 2003 spread sheet which Saxman testified appeared to have been prepared by Wentlandt; the footnote states: "Estimated micro units are calculated based on 260 s.f. per micro unit, an estimated average size in Seattle's current market."

Under questioning, DPD's Wentlandt acknowledged that these two figures from 2012 and 2013 (250 and 260 square feet, respectively) significantly overestimated the size of the units because they were derived by dividing the gross square footage of projects by the number of units that DPD believed to be in the projects. One can easily see the error in this method. Gross square footage includes many other spaces besides living units--it includes common areas, hallways, vestibules, stairways, elevators, storerooms, laundry rooms, mail rooms, offices, and many other spaces that are not part of a no one would consider living spaces. To lump all of these spaces together with separately leased sleeping rooms with bathrooms and then to divide this total by the number of units will quite dramatically increase the estimated size of the micro units, far above their actual size.

While DPD's method for calculating the average size of micro units was transparently faulty and sure to overestimate their size, Saxman testified [3:17:00] on his careful research to calculate the average size of micro units through actual collection in the DPD files of square footage for each of the many units in many different buildings. In further testimony, DPD's Wentlandt [3:27:44] acknowledged that when DPD finally began to base its average square footage figures of micro units on the actual plans in its own files, it found that their size was much lower, and "really largely consistent with a lot of numbers that Dennis found." [3:27:54].

At 2:32:25, Saxman described Appellants' Exhibit 51, page 424, a chart that is an excerpt from an Excel spreadsheet he had created based on repeated visits to the DPD's microfilm library to examine building drawings. He was able to find on microfiche the square footage of some of the older units which DPD had not included on its list. "I went down a second time to confirm them, and where I found there still remained existing discrepancies between my figures in the DPD's, I went down a third time, and I looked at each sheet, and a tallied units for each building, but putting a stroke mark by each square footage size, for each one of these buildings. This is a product of weeks of research."

At 2:35:52, the Hearing Examiner asked Saxman how he had identified the older projects as microhousing for his statistical analysis. He responded that they were on the DPD micro housing tracking list as places DPD could not find information about. "They were on microfiche. The database that is available for viewing at the DPD's microfilm library only goes I believe from May 2007 to the present. So anything before May 2007 is on microfiche and in some cases those projects had incorrect addresses but through diligent research I was able to uncover the correct addresses, which I did provide to Mr. Podowski. I told him I found them all on microfiche, and I even gave him the correction for one of the addresses."

Saxman also testified about Appellants' Exhibit 3 [p. 149], which shows the distribution in sizes of micro units. Prepared by Bill Bradburd presented by Saxman at a panel convened by a City Council Committee, it is based on Saxman's research on drawings in the DPD microfilms Library. The table shows that of 690 units reviewed, fully 22 percent are 140 square feet or less, 35 percent are between 141 and 180 square feet, 23 percent are 181 to 220 square feet, and only 21 percent are 221 square feet or more.

DPD underestimated the number of micro units. Witness Dennis Saxman testified [2:46:02] on the deficiencies of DPD's citywide counts of the number of micro units, and on how he had compiled his own, more accurate, counts. Appellants' Exhibit 30 [pp. 360- 361] is a chart comparing Saxman's unit counts with DPD's unit counts for 58 microhousing projects. Following is a summary of those results.

	Dwelling units	Sleeping rooms
DPD count	303	2802
Appellant count	316	2791

In dwelling units, Saxman (Appellant count) found 13 more than DPD. In sleeping rooms, Saxman (Appellant count) found 11 less than DPD. As Saxman explained the numbers:

> I took the DPD's most recent micro housing tracking list used in the appendices to the Director's Report and I entered their number of units into a spreadsheet--the number of dwelling units in the numbers of micros and sleeping rooms. This was from a list compiled by the DPD. I then added a list of dwelling units and micros or sleeping units compiled by the appellants. Where the gray zone is on the spreadsheet, that is actually yellow highlighting. That shows every case where the Appellants and the DPD disagree as to the correctness of the count. But those counts are based on my months of research and repeatedly looking at drawings and tabulating the numbers of units [2:47:43]. And what it shows is that the DPD

cannot even count units correctly, let alone how they are defined or how they are counted. But I think it shows clear error. I think it's 33 or 34% of the projects that the DPD is incorrect unit totals, which are relevant to the accuracy and the sufficiency of the information they considered in preparing their DNS. And that's all I have say about that at this point [2:48:32].

The Hearing Examiner engaged Saxman: "I'm looking at page 361 where there is 8512 20th Ave. NE. There is a pretty big discrepancy, though it goes the other way where you apparently found fewer. So how is that? I need to know if there was some interpretation you brought to the process of deciding." Saxman replied that his decisions were objective, not subjective. The Hearing Examiner pressed as to whether there was interpretation in "what was a unit?" Saxman explained how he distinguished what was a unit, explaining that in the plans he scrutinized,
... many of the units had unit numbers on them. ... there was originally a very large project. I think the DPD's numbers may come from that project but the project changed drastically [2:50:56]. ... later the decision was made to develop the lot in two portions: there's going to be a boarding house/micro housing development of 80 units and the remaining portion of the lot will be developed later into a more typical apartment building. [2:51:37. That I think explains that discrepancy but if I was aware of that why wasn't the DPD? I'm not paid to do this stuff. Same with Yesler Way, 1414, is a big discrepancy there too, those units were very difficult to count, it was a problematic building but I stand by my figure of 158. [2:52:02].

Should we conclude that the errors in DPD's micro unit counts don't matter because DPD undercounted dwelling units while it overcounted sleeping rooms? Quite the contrary. In both cases, DPD was wrong in its counts, placing in question any inferences it made from these figures regarding potential adverse environmental impact from the projects. Another look at Exhibit 30 reveals that DPD counted wrong in 30 percent of the microhousing projects it considered. DPD's figures were clearly erroneous, and should be redone before it bases a SEPA determination on them.

DPD undercounted the average number of residents per micro unit. A notorious part of Seattle's microhousing program is its intentional undercounting of dwelling units properly. A microhousing project with 48 sleeping rooms is likely to be classified as having only 4 dwelling units, through the fiction that it contains 4 boarding houses with 8 residents each. The effect of this sophistry has been to exempt microhousing projects from the public interest protections of SEPA and design review. Were they classified as apartments with the same number of sleeping rooms, projects of that size would require an environmental determination between a DNS and EIS; but because they are classified as microhousing, their much fewer dwelling units exempt them from any environmental determination. An example of a project (one of many) which that thus escaped an environmental determination or design review is the microhousing project at 2371 Franklin Ave. E. whose floor plan is portrayed in a DPD exhibit and of which photos are shown in Appellants' Exhibit 36 [p.p. 377-80].

Aside from the official, up-front undercounting of micro units, there are unofficial undercounts as well. Under the Seattle Building Code (and largely for fire reasons), the "occupancy load" of most microhousing projects is no more than one person per sleeping room. Landlords are expected to enforce this requirement on their tenants, whose leases often specify that only they, and not a rent-sharer, guest, or lover are allowed to sleep in their unit. But landlords rarely

enforce this occupancy load limit, knowing that more people sharing the rent makes rent increases more acceptable to the tenants. In fact, marketing of some microhousing projects features the lofts as a way to accommodate more people in one's unit. Meanwhile, DPD and the Fire Marshall regularly approve microhousing projects whose unit layout is clearly designed to accommodate a second or third resident. DPD's own May 31, 2013 "Micro-apartment Tour" included several such units with additional sleeping lofts, as can clearly be seen in the photos on the CD/ROM provided by DPD. And will not see DPD or the Fire Department inspecting micro units and citing the residents and the landlord for exceeding the occupancy limit.

The typical microhousing project has more residents than its occupancy load, making its environmental impacts more than probably greater than s similarly sized apartment building. However, DPD does not address or even acknowledge these higher unofficial occupancies, which are not allowed to trigger SEPA or design review thresholds.

Even officially higher resident numbers do not trigger environmental and design review. As a microhousing project has many more residents than a similarly sized apartment building, such review would seem needed moreso than for the apartment building. But environmental and design review is usually less for microhousing. The substantive, ethical, and political case for exempting microhousing from SEPA and design review through undercounting of their dwelling units was such that a City Council Central Staff member floated the idea of a moratorium on new microhousing permits until the exemption problem is solved [Appellants' Exhibit 18, p. 189]. As he pointed out, the City Council passed a moratorium to allow correction of the "small lot" situation in single family zoned neighborhoods, while more people were being affected by the lack of a micro moratorium in multifamily zoned neighborhoods.

The proposed microhousing ordinance that is at issue in the current appeal does nothing to correct the SEPA exemption problem, and in addressing exemptions from design review, it releases some micro project sizes from current review while extending design review to some other micro project sizes (see separate section below).

DPD underestimated the average number of residents in micro units. Appellants' Exhibit 53 pp. 427- 428, which covers all zones, was presented to the Jan. 7 hearing, where Dennis Saxman testified that the "Appellants believe that this is the most accurate list in the city. Both as to units and to zone and location." Although DPD had claimed that there were no microhousing projects in single family zones, Dennis Saxman's research found 3 of them, with 28 micro units. He testified that this result "contradicts the DPD's assertion that there are none of these in single-family zones." [2:44:47]

O. DPD's Zoned Development Capacity Model, Which Underestimates All Residential Capacity and Especially Underestimates Micro Units, Was Used Without Correction for Projections in the Checklist and DNS

In the 2010 *Seattle Community Council Federation* case (W-10-005), the Hearing Examiner did not uphold a SEPA challenge by 15 appellants (including three of the current ones) to the Multifamily Code revisions. The appellants in that case had challenged the use of the Zoned Development Capacity Model as producing an underestimate of residential zoned capacity that would stem from the Code revisions.

However, in the 2011 Hearing Examiner case *Tom Gibbon for Fred Meyer and Gary Brunt for Greenwood Shopping Center* [W-11-003], DPD witness Gordon Clowers testified that the Zoned Development 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*].

At the Jan. 7 hearing in the current case, appellants elicited from DPD witnesses Geoffrey Wentlandt and Jennifer Pettyjohn an admission that in estimating the potential impacts of the proposed microhousing legislation, DPD did not generate a new output from its Zoned Development Capacity Model, but rather used the old output that had been generated in 2009-10 for use in the Multifamily Code revision exercise.

DPD's Jennifer Pettyjohn testified that microhousing developments were not contemplated in the assumptions that went into DPD's Zone Development Capacity Model runs that analyzed the impacts of the proposed revisions to the Multifamily Code. In choosing to use a faulty model for analyzing the impacts of the microhousing legislation, DPD officials were assuming compounding that error. Because the model was not updated, it 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.

Although DPD stated at the hearing that a new computer run of the zoned development capacity model had not been done as part of the analysis for the DNS, they also acknowledged that earlier runs of the model whose output was already in existence had been used to produce documents that they had provided in response to the Appellants' discovery request for documents that had contributed to their DNS decision. These documents included one entitled "micro housing volumes and expected development capacity" [Appellants' Exhibit 1, pages 35-36]; documents titled "Capacity Assumptions Comparisons; and an untitled document regarding capacity analysis (which appears to be an explanation of figures used in a recent lowrise analysis approximately three years ago).

Through discovery, DPD also provided the Appellants with a document entitled Zoned Development Capacity (including Appendix) [Applicants' Exhibit 1, pp. 97-107]. The document's footer calls it the "Development Capacity Primer." This Primer shows on page AE-100 the formula use for calculating zoned residential development capacity which shows an equation for calculating potential housing by combining floor area with certain density assumptions. The number of "potential housing units" is reached by multiplying the "developable land area" by the "expected floor area ratio", yielding a number that is divided by the "expected square feet per unit," thus producing the number of potential housing units.

Unfortunately for the reliability of these DPD projections in estimating Seattle's zoned development capacity for microhousing, the estimates that DPD used in developing its Checklist and DNS are based on assumptions of square feet per residential unit which are dramatically higher than the actual square footage of microhousing units. At the hearing, DPD witness Jennifer Pettyjohn testified that the capacity analysis that DPD used had assumed densities for the LR3 zone of 1/960, 1/900, 1/800, 1/957 and 1/670. All of these density assumptions are far in excess (by multiples of from 3 to 6, depending on which amounts you choose to compare) of the density of micro housing projects which are more like 1/150 or 1/185.

In short, for its estimates of the zoned development capacity for microhousing, DPD relied on outdated Zoned Development Capacity Model runs that used unrealistic and inaccurate density assumptions that were belied by figures in their own files about the actual square footage per microhousing unit. Consequently, their Checklist and DNS analysis as to density capacity and impacts were clearly erroneous and should be redone before any decision is made between issuing a Determination of Nonsignificance versus doing an Environmental Impact Statement.

P. The Checklist and DNS Fail to Recognize the Significant Adverse Impact on Public Safety Services from Dangers in the Design of Microhousing under the Legislative Proposals

As demonstrated at the hearing and in the record, DPD's own documents and personnel reflect an awareness that decisions made in applying the Building and Land Use Codes to microhousing have implications for fire safety, but too often, the decisions made have weakened rather than strengthened fire safety, placing probable new demands on Fire, Police, and other first responders that should be but are not addressed the Checklist and DNS.

Of greatest concern, as explained by witness Greg Hill, are exemptions and interpretations that are allowing microhousing buildings to avoid fire egress and other safety requirements that apply to apartment buildings, thus posing just one staircase for getting away from a fire, and moreover by a route that goes through a communal kitchen that is very likely to the source of the fire.

This issue of fire egress in microhousing projects was also fully discussed at a summer 2013 meeting of the City Neighborhood Council's Neighborhood Planning Committee attended by DPD staff Rick Lupton, John Siu, and Mike Podowski as well as by about half of the current Appellants. We appreciate the Hearing Examiner's commitment to listen to the entire meeting audio [Exhibit 57, p. 432], an eye-opening tracking of DPD's improvisation regarding something as momentous as fire safety. Of particular note is Lupton and Siu's acknowledgment that residents of the fifth and sixth floor of microhousing buildings who cannot safely exit by a single stairway will have to save themselves from a fire by jumping out of the windows.

Appellants hope that the Hearing Examiner is still open to our Flameguard installation photo (Exhibit 26) taken at 1728 E. Olive Street and the specifications regarding that fire sprinkler system (Exhibit 43 (pages 393-395). It is apposite because DPD, as is so common in the record, DPD failed to enforce its rules, and the system was installed in a now-occupied building that is one story too tall for what the manufacturer regards as a safe height for the system.

We regret that the Hearing Examiner chose to sustain DPD in its effort to suppress the Appellants' Exhibit 38 [p. 382] regarding a developer's successful effort to overturn a fire safety provision that had (rightly) been imposed by a DPD reviewer. The paper trail in that exhibit shows that the developer went over the reviewer's head to Rick Lupton, director of DPD's engineering services, who weakened the fire safety rule just so the developer could build what he wanted. Such interventions do not need to be done very often before underlings discover that they had better toe the mark. And as fire safety protections are weakened in more and more new buildings, the risk of fire and the demand for the City's emergency services grows and grows.

Q. The Checklist and DNS Fail to Recognize the Significant Adverse Impact on Parking and Transportation Conditions from Microhousing that Would Be Built Under the New Legislation

The proposed legislation's 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.

R. The Checklist and DNS Fail to Recognize the Significant Adverse Impact on People With Disabilities or Who Are On Low Incomes from the Proposed Legislation

Unfortunately, the DNS does not recognize the proposed legislation's impact on the housing choices and other rights of people who are disabled. For example, 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 argued in a section above, SEPA and case law explicitly prohibit disregarding an adverse impact because it is regarded as having been counterbalanced by an impact that is regarded as being positive.

The Appellants' Exhibit 52 at pp. 425-6 reports research by Dennis Saxman on the actual rents charged at existing microhousing projects. This is important because DPD has advocated for microhousing as a boon for people on lower-middle incomes, yet it turns out that many of the projects (including most of the buildings and units visited on DPD Microhousing Tour that is covered in Appellants' Exhibit 1, #91 and its accompanying CD of photos) have rents far higher than would be considered affordable to those on lower-middle incomes.

On Jan. 7 [2:42:19], witness Dennis Saxman discussed his research on the rents actually charted in microhousing projects, as shown in Appellant' Exhibit 52:

> Page 425 and 426, is a compilation of rents that I entered into an Excel spreadsheet. They are the alleged actual rents submitted to the Seattle Office of Housing for purposes of obtaining final certification of their qualification for the multifamily tax exemption. For example on the first column, Trovere, where I entered 425 three times that means there are three units in that building renting for $425, so on and so forth. Then I calculated the median and the average. I calculated the median, as the average is often misleading, and the median means that 50% are at that or below and 50% are above that. I think its relevancy is how affordable are these. If you look [at] the Alturra in the last column, on page 426, you'll see that some of these are renting for $1250 a month. [2:43:47] So I feel the department should have considered that information, that was available information that should've been considered in their DNS. And those are taken from documents I obtained through public records request from the Seattle Office of Housing.

S. The Checklist and DNS Consider Environmental Impacts that are Cumulative, Geographically Specific, or Which Interact with Other City Programs Only if it Sees Them as Being Positive, Failing to Consider Such Impacts if They are Adverse; And the Checklist

and DNS Relegate Classifies Environmental Impacts as Being Less than Significant by Counterbalancing Them with What it Sees as Positive Impacts.

The Checklist and DNS fail 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.

Indeed, DPD is responsive to SMC 25.05.330, but in the wrong way. As outlined below, DPD does consider environmental impacts with these unique profiles, but only if it sees them as being positive for the environment. DPD ignores equally probable but adverse environmental impacts. This is not responsive to the SMC requirement, which only refers to adverse impacts, not positive ones.

The SEPA regulations [WAC 197-11-330.5] and Seattle's SEPA ordinance [SMC 25.05.330E] 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.

Thus SEPA prohibits an agency from disregarding 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? (Wait! We know the answer.) Clearly, DPD is loathe to say that there are any adverse 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 Determination of Nonsignificance. 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 proposed microhousing ordinance, 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."

T. The DNS and SEPA Checklist Are Not Official Actions if They Were Not Signed by the Responsible DPD Officials

SEPA requires that the DNS and Checklist be signed by the responsible officials. At the Jan. 7 hearing, Appellants called the attention of the responsible officials in this instance (DPD's Geoffrey Wentlandt and William K. Mills) to the fact that the DNS and Checklist that Appellants and the Hearing Examiner have been provided in DPD's exhibits, do not contain their signatures as the responsible parties (for the DNS, it would be Mills; for the SEPA checklist it would be Wentlandt, with Mills in a second signature as the reviewer). Mills and Wentlandt responded at the hearing that signed copies exist somewhere in the files. Appellants request that the Hearing Examiner not take such an assurance on faith, but require DPD to produce the signed copies, in order to ascertain whether DPD actually filed the DNS and Checklist as legally required by SEPA.

III. CONCLUSION

For the reasons stated throughout the above document, Appellants respectfully request the Hearing Examiner to find that DPD failed to consider information reasonably sufficient to evaluate the environmental impact of the proposed microhousing legislation. We ask the Examiner to remand the DNS to DPD for additional analysis. We also 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 23, 2014