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	)	**Department Reference:** SEPA DNS Decision Published October 7, 2013
	)	
	)	**CITY'S CLOSING STATEMENT**
	)	

Summary

The appeal is of a decision by the Director of the Department of Planning and Development (DPD) under the State Environmental Policy Act (SEPA) of proposed Land Use Code amendments by the City Council to establish a definition for micro-housing, apply design review thresholds to micro-housing and congregate residences, and modify certain development standards. The sole question before the Hearing Examiner is whether DPD's decision that adoption of the proposed legislation is unlikely to cause significant adverse environmental impacts is clearly erroneous. The appellants ask that the Hearing Examiner either remand the DPD decision for further analysis of alleged impacts or require an Environmental Impact Statement (EIS). The fundamental flaw in the appellants' case is that the legislation is quite limited in scope, yet the appellants believe it is very broad and has a variety of alleged "impacts" that they apparently view as significantly adverse. Their entire argument is based on a parade of potential impacts that they claim DPD failed to evaluate but that, even if true, are based entirely on testimony and documentation of existing development that is being proposed and built under existing Code. The legislation is actually intended to address a variety of issues raised by current practice. As DPD's testimony at the hearing showed, the proposed legislation clarifies current Code and places procedural controls and substantive standards on both micro-housing and congregate residence development that are not in place currently.

Burden of Proof

SMC Section 25.05.680.B sets forth the standard of review for administrative appeals of a SEPA determination of non-significance that is not related to a Master Use Permit or Council land use decision. The DPD SEPA determination shall be given substantial weight, per SMC Section 25.05.680.B.3. Thus, the appellants have the burden of proof to show that the subject DPD decision is clearly erroneous. Under this standard, the Hearing Examiner must be left with the definite and firm conviction that a mistake has been committed by DPD in its analysis and decision. As is clear from a review of the facts and analysis presented by DPD at the hearing on this matter, the appellants have failed to meet this burden. The remedy sought by appellants is a remand for further review of supposedly inadequate analysis and to potentially undertake an EIS, as discussed in their opening statement. However, the record at hearing shows only that the

appellants have offered argument of real or potential impacts of current development. They have not shown any evidence, either in documentation or testimony, that DPD has incorrectly analyzed *the impacts of the legislation under appeal*. Instead, they have engaged in a public debate about micro-housing and whether it is good policy. Regardless of the merits of their arguments, they are outside the scope of a review of environmental impacts of a non-project decision under SEPA and are appropriately directed to City Council. Accordingly, there is no basis for a remand of the DNS for further analysis.

Argument

A review of the testimony and record submitted at the hearing shows that the DPD SEPA decision was properly analyzed and should be affirmed by the Hearing Examiner.

1. Comparison of Current Land Use Code standards and Proposed Legislation shows that the proposal has no significant impacts under SEPA

The current Land Use Code regulations clearly define and allow congregate residences in a variety of zones including multifamily and commercial zones and, while micro-housing is not defined in current regulations, the current Code is flexible in its definitions of multifamily residential uses and are appropriately interpreted to allow micro-housing as a use conforming to the design and arrangement of rooms within a dwelling unit. Under the definitions of "residential use" found in Section 23.84A.032, congregate residences are specifically defined as a type of multifamily residential use. Under that definition, any arrangement of rooms or lodging for "nine or more non-transient persons not constituting a single household" qualifies as a congregate residence. The definition allows for wide flexibility in housing arrangements of nine or more persons and does not impose any specific requirements on numbers of other features required for dwelling units, such as food preparation areas or bathrooms. Instead, overall size of congregate residences are controlled in the various zones where they are permitted, primarily multifamily and commercial zones, by development standards for structures such as height limits, setback standards, amenity area requirements, floor area limits and other similar performance standards.[1]

As previously noted, the term "micro-housing" is undefined in the current Code, but the existing definitions of "dwelling unit" (SMC Section 23.84A.008) and "household" (Section 23.84A.016) clearly allow up to eight non-related persons to be a household and to occupy a single residential dwelling unit designed, arranged, occupied or intended to be occupied by one household. These definitions, based on numbers of residents that form a household, distinguish a structure comprised of one or more dwelling units, including single family residences and multifamily apartment houses, from congregate housing. The Code then further defines various residential uses in Section 23.84A.032. In particular, a "multifamily residential use" is defined to include

[1] Appellants suggested in their testimony, particularly the testimony of Greg Hill, that current designs for congregate residences represent something different from "traditional" boarding houses or dormitories. However, the Land Use Code does not define such terms. Various types of congregate housing, ranging from small "boarding houses" that appear similar in design to single family residences or small apartment houses, to multistory college or university dormitories with hundreds of residents, have been permitted and developed by current Code. The current standards also allow for other congregate designs such as single room occupancy (SRO) "hotels" and cooperative housing.

"two or more dwelling units in a structure or portion of a structure . . ." These definitions effectively allow design and arrangements of rooms as single dwelling units if they include sleeping rooms or bedrooms grouped around at least a common food preparation area, and sometimes other common areas. Again, as with congregate housing, the Code is flexible, so long as the arrangement does not exceed eight bedrooms or sleeping rooms. This Code flexibility, read together with the Seattle Building Code and Housing and Building Maintenance Code[2] standards for minimum size of habitable spaces, already allows for arrangements of units that have been referred to as "micro-housing".

As summarized in the DPD exhibits, particularly the Director's Report and SEPA Checklist, and in the testimony of DPD planner Geoffrey Wentlandt, the proposed legislation will add some specific requirements for both micro-housing and congregate residences that are not now included in the Land Use Code. The effect of the changes is to tighten current regulations, require additional process for some proposals, particularly design review, and reduce, at least to some extent, the current flexibility with respect to design and arrangement of these uses, for example by including standards for kitchen size and placement in congregate residences and limits to food preparation areas in micro-housing. Therefore, it is difficult to understand how the proposed legislation will cause any environmental impacts different or beyond what is occurring under current Code. The following specific changes are included:

- Establish new definitions for Micro-Housing, and Micro, within the Land Use Code. (SMC 23.84A).
- Modify design review thresholds to apply design review to any development with Micro-Housing or to Congregate Residences based on the amount of non-exempt gross square footage (GSF) in the building.
- Add a size minimum to the shared kitchen/common areas in a Micro-Housing dwelling unit, and a minimum size requirement for common areas in Congregate Residences.
- Add certain development standards for Micro-Housing and Congregate Residences limiting the configuration of kitchen features.
- Prohibit new developments with Micro-Housing in Single Family zones.
- Adjust refuse collection area standards for buildings with Micro-Housing and for Congregate Residences. (SMC 23.54)
- Adjust required vehicle and bicycle parking quantities for Micro Housing and for Congregate Residences. (SMC 23.54)
- Increase the required affordability levels for participation in incentive zoning for affordable housing for projects with micro-housing or congregate residences, and for small studio apartments. (SMC 23.58A)

The proposed legislation thus clarifies existing practice with respect to regulation of these uses, establishes new development standards, defines terminology, and requires closer review of micro-housing projects through the City's design review program. SEPA review of legislative proposals is required if those proposals ". . . contain standards controlling use or modification of

[2] The standard for minimum habitable space is 70 square feet and no dimension less than 7 feet for a room used for sleeping.

the environment," per Section 25.05.704.B.2.a. While the proposed legislation does contain such standards, the evaluation of the impacts of the ordinance under SEPA must be limited to consideration of the potential impacts of the proposal solely relative to the changes made to existing regulations. These changes have minimal implications under SEPA.

2. **The proposed legislation clearly improves regulation of both micro-housing and congregate residences, and does not create further regulatory issues as appellants suggest.**

Much of appellants' case is predicated on the misplaced contention that the proposed legislation adds to alleged "confusion" over how to regulate congregate residences and micro-housing, and that the City has imposed a variety of interpretations to these housing types. In actuality, the regulation under current Code has been consistent under the definitions noted above, with the analysis focused on numbers of persons living within the housing and a design and arrangement reflecting a single dwelling unit or congregate housing. The proposed legislation (appellants' Exhibit 2 and DPD Exhibit 5) is a modest set of changes to the current scheme that clarifies the different housing types without making major changes to the structure of the Code. Definitions are added for "micro" and "micro-housing" under the broader definition category of "residential use" that will benefit developers and the public, as well as DPD plan reviewers, to better distinguish micro-housing from standard apartment units while maintaining the limit of 8 rooms (and no more than 8 non-related persons in a single household) for each dwelling unit.

Further, the definition of "micro" sets a maximum size of 285 square feet for a room or rooms, limits the micro to one sink in the bathroom, and prohibits a "food preparation area" or kitchen in the micro. These definitions respond to and support the analysis in DPD formal interpretation No. 13-002, 741 Harvard Avenue E (see appellants exhibits 22 and 35). Formal interpretations of the Land Use Code are site specific decisions, dependent on specific facts, and are not necessarily binding on other sites.[3] Even so, the Supplemental Analysis for Interpretation No. 13-002 concluded that a specific development proposal (DPD Project 6343656) consisted of 57 dwelling units (57 small apartments) instead of a maximum of 8 dwelling units consisting of 8 or fewer bedrooms or sleeping rooms, where the design and arrangement of the units clearly showed: individual "kitchenette" areas within each unit; very small common kitchens (52-56 square feet in area); and each unit having a sink outside the units' bathroom, within the larger room. The proposed legislation essentially incorporates the analysis of this interpretation into the Code, with its proposed limits on food preparation areas, sink locations, maximum size limits for micros, and minimum size of common kitchens.[4] Thus, the legislation will codify and clarify standards for design and arrangement of dwelling units that are now subject to more general Code definitions and individual project and site analysis. Even if appellants are correct in their view that current Code has led to confusion about design and arrangement of dwelling units, it is not credible to conclude that clarifying legislation will somehow add to environmental impacts

[3] See SMC Section 23.88.020.A.

[4] It must be noted that Interpretation No. 13-002 is the subject of ongoing litigation and thus its conclusions may be subject to further change. Since it is site-specific and dependent on the facts presented by the related building project, its analysis is not binding on other projects being analyzed under current Code.

already occurring under existing regulations. It should be noted that SEPA often is inapplicable to development under the current regulations, since the SEPA review threshold is dependent on the number of dwelling units within a structure, and many current developments of 8 or fewer dwelling units are exempt.[5] The proposed legislation will not change any SEPA thresholds for the subject types of development, but it does contain proposed changes to regulations such as design review thresholds, basing them on square footage of structures rather than numbers of dwelling units, that will increase public notice and comment opportunities, and opportunities for administrative appeal, of proposed developments of both micro-housing and congregate residences.

3. The proposed legislation has no effect or impact on public safety as compared to application of existing regulations

As with the rest of appellants' case, their arguments about impacts to public safety, including alleged problems with Building and Fire Code regulations of development under existing regulations, is all predicated on analysis of structures that either have been built or are now under permit, or are under review, based on existing Codes or even regulations predating current regulations and requirements.[6] To equate impacts under current Codes with impacts that may occur as a result of the proposed legislation is a colossal red herring. Appellants, including their witness Mr. Hill, could point to no changes to Building Code, Fire Code, Housing and Building Maintenance Code, or any other life safety or technical code in the proposed legislation, because there are none proposed. Further, the legislation will not change any basic design of multifamily structures, so it is a mystery how any environmental impacts to public safety will occur. In fact, the legislation tightens the current relative lack of standards concerning placement of kitchens in congregate housing and clarifies definitions of micro-housing to limit food preparation areas within individual micros while at the same time making common kitchen areas larger and presumably more useable.

Since the appellants have no basis for attacking life safety regulation under the proposed legislation, they resort to a critique of current regulations, as with Mr. Hill's testimony regarding the development at 4516 Meridian Avenue North. As with other policy arguments raised by appellants, this line of argument should be offered to City Council in public comment on the legislation but is out of place in a hearing to determine if potential environmental impacts of a non-project proposal have been sufficiently evaluated by DPD. Mr. Hill stated in testimony that the proposal somehow "muddies the water" with respect to regulation of apartment buildings versus congregate housing, but this argument is simply incorrect. He misinterprets the proposed changes to congregate residences in subsections 23.45.575 and 23.47A.034 (pages 7-10 of the proposed legislation, DPD exhibit 5) as allowing more kitchens in sleeping rooms than allowed by current Code. But this thinking, also reflected in some of the questions posed to Mr. Wentlandt by appellants' representative Mr. Leman, is incorrect.

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[5] See DPD Director's Rule 12-2012, State Environmental Policy Act (SEPA) Exemptions from Environmental Review When Establishing, Changing or Expanding a Use, effective January 14, 2013.

[6] For example, some permitted projects predate DPD Director's Rule 6-2012, Building, Mechanical and Energy Code Requirements for Boarding Houses Having 8 or Fewer Bedrooms and Less than 2000 Square Feet of Floor Area, effective June 8, 2012.

The current Land Use Code has no regulations for placement of kitchens in congregate residences. Placement of kitchens must be consistent with design and arrangement of the structure as a congregate residence with nine or more non-transient residents not constituting a single household. Similarly, there are no regulations for placement of bathrooms. The plan review of such structures is therefore focused on determining whether nine or more residents will occupy the structure and on whether the design and arrangement is not comprised of individual small apartment units with individual bathrooms, kitchens and living areas. The current standards do not prevent individual living/sleeping rooms within a congregate residence from having some amenities, even a full kitchen for example, if the bathroom is located outside that living/sleeping room or, more commonly, a full bath may be provided within the living/sleeping area if food preparation is in a common kitchen located outside the living/sleeping room. The proposed legislation clarifies the current Code by limiting kitchens in congregate residences to no more than 25 percent of sleeping rooms or up to 75 percent under specific conditions. This represents a narrowing of the current standards and will help DPD reviewers better distinguish congregate residences from micro-housing or small apartment units. While appellants may disagree with these standards, that is a policy concern and it is inaccurate to contend that the proposed regulations will increase environmental impacts compared to current Code.

The testimony of DPD's Principal Engineer and Building Official, Jon Siu, as well as the letter he wrote to Mr. Hill dated May 17, 2013 and the e-mail from Fire Marshal John Nelsen (DPD exhibit 26) all make clear that congregate residences and apartment developments (including existing micro-housing analyzed and reviewed as apartment units under the Land Use Code and as "boarding houses" under the Building Code) are protected by numerous and redundant life safety systems. These systems include sprinkler systems,[7] fire and smoke alarms, one-hour fire walls between dwelling units in apartments, one-hour fire walls between sleeping units within boarding houses,[8] and reinforced structural protection in all cases to slow or prevent structural collapse, as well as egress standards for these uses.[9] There was no credible evidence offered at the hearing to suggest that these buildings are unsafe and, even if there were, appellants failed to relate such evidence to any probable significant adverse impact to the environment that may result to life safety from the proposed legislation.[10]

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[7] Mr. Hill noted on cross examination that sprinkler systems alone were 90-95% effective in controlling fires.

[8] The Building Code classifies congregate residences and some micro-housing as boarding houses, a term not used in the Land Use Code, and distinguishes them from apartment houses.

[9] Egress from congregate residences allows a single exit plus an emergency escape and rescue window from each sleeping unit, while apartment structures must have two exits per floor, but again these standards are not changed by the proposed legislation.

[10] Appellants offered a series of DPD Building Code "correction letters" in their exhibit 25 in an apparent attempt to demonstrate inconsistency in application of various Code requirements to micro-housing and congregate residences. First, correction letters are common and occur with nearly every project of moderate complexity analyzed by DPD, so merely collecting such letters in quantity is a simple matter. Second, the Codes offer a degree of discretion, so slight differences in approach between reviewers is contemplated by the regulatory scheme. Third, the correction letters are all drafted under current Code and thus are essentially irrelevant to the proposed legislation. In any case, no explanation was offered by appellants to show how these notices were in error and no other facts or information about the projects reviewed was offered. Since every project and site is different, there is no basis for saying that any of these letters deserve further consideration by the Examiner.

In contrast, the testimony of Mr. Hill is subject to a number of caveats. There is nothing in the record to demonstrate the extent of design experience that Mr. Hill has with the Seattle Building Code. He appears to misread and misapply code provisions in referring to regulations that do not apply to R-3 (low-hazard residential) occupancies. The Building Code allows "congregate living facilities" with up to 16 people to be classified as R-3 (low hazard residential) occupancies. These types of structures are allowed to be provided with single exits under the code. For smaller micro-housing projects, Director's Rule 6-2012 (see appellants Exhibit 41) limits the number to 8 people. On larger apartment-style projects, they are classified as R-2 occupancies, and the full Building Code applies—one exit is generally permitted within the "boarding house" (depends on size and layout of the individual "unit"), but 2 exits are required once one leaves the "unit." Fire sprinklers are recognized to be very effective at reducing hazards. Therefore, both the Fire and Building codes allow many reductions in other code requirements if sprinklers are installed. Mr. Hill's allegations that the Fire Marshal was not completely briefed on the regulations prior to the request for the memo discussed above are incorrect. The Fire Marshal's staff does not make policy decisions such as how the codes are being applied without his involvement—they may make recommendations, but decisions are ultimately his. The Fire Marshal's office was involved from the beginning as DPD was developing the DR 6-2012. DR 6-2012 prohibits exiting through kitchens. Projects alluded to by Mr. Hill that have exits through kitchens pre-date the Rule.

4. **There is no evidence that the proposed legislation will increase the number of micro-housing or congregate residence projects under development or that DPD estimates of the numbers of existing projects or existing micro-units are significantly in error.**

Appellants offered testimony by Dennis Saxman and attempted to question Mr. Wentlandt and DPD Senior Urban Planner Jennifer Pettyjohn about the accuracy of DPD estimates of existing congregate and micro-housing projects and about estimates of future development using the City's development capacity model. Mr. Saxman's figures are slightly different from DPD figures on total numbers of projects and total numbers of micro-housing units, or micros. Estimates of rental prices for these units also differ by small amounts. However, the differences are insignificant and, in some cases, were more conservative than DPD figures. (Compare appellants' Exhibits 3, 30, 51, 52, and 53 to DPD Exhibits 9, 12, 13, 14, 16, and 24). Rather than proving that the legislation creates impacts, as appellants' contend, the differing information provided, again based on application of current Code, shows the interpretive difficulty in applying existing regulations to determine how a congregate residence or micro-housing project is to be configured. Similarly, the development capacity model is not intended to predict the amount of future development of any specific type of housing including micro-housing or congregate residences, but is meant as a broad estimate of all development that could happen as a whole over a 20 year time horizon. There is no information in the record to support a conclusion that the proposed legislation will lead to greater emphasis on development of micro-units or congregate residences than is already occurring. As Mr. Wentlandt testified and as noted in the SEPA Checklist, if there is any effect on the quantity or pace of micro-housing or congregate housing development as a result of the legislation it is most likely to be a minor slowing, due to the addition of some development standards and the addition of a design review requirement for some projects.

5. **Proposed regulations amending storage space for solid waste containers in Section 23.54.040 are also clarification of existing Code and do not demonstrate that the proposal has additional impacts when compared to current Code.**

The proposed changes to regulation of solid waste containers should be read to give the Director of DPD discretion to increase or decrease the amount of shared storage space required above the minimum required for 2-8 dwelling units (84 square feet). The appellants, based on their questioning of Mr. Wentlandt, apparently believe that the proposed amendment would allow DPD to waive any requirement for solid waste container storage space. This argument does not make sense, as this is a base development standard and the amendments are clearly intended to allow DPD to consider flexible increases based on an assessment of the number of proposed micros or sleeping rooms within any proposed micro-housing or congregate residence project. In any case, Section 23.54.040.I already allows DPD to grant departures from any requirement in Section 23.54.040 in consultation with Seattle Public Utilities (SPU). Further, the appellants' own Exhibit 54, showing placement of garbage bins in an existing micro-housing development, illustrate the potential shortcomings of existing Code, yet their appeal of this legislation further delays DPD's attempt to rectify this issue with better Code language.

6. **The proposed legislation is consistent with the Comprehensive Plan.**

The current Seattle Comprehensive Plan does not specifically mention micro-housing as a use, but it is not necessary that every potential use of land be mentioned in the Comprehensive Plan, just as every use is not mentioned in the Land Use Code. As described in the Director's Report, DPD exhibit 3, on pages 1 and 2, there are a variety of Housing and Land Use Goals and Policies that support both non-traditional housing types and denser housing consistent with the urban village strategy in the Plan. In any case, the current Code, already determined to be consistent with the Comprehensive Plan, allows micro-housing and congregate residences.

7. **DPD conducted analysis appropriate for issuance of the determination.**

The SEPA Checklist, Decision, related documents, and testimony during the Hearing demonstrate DPD's analysis of a range of information, that in combination with professional judgment and past experience with similar Decisions, is sufficient and adequate for basing a determination on this matter. DPD considered the characteristics of micro-housing and congregate residences permitted or constructed under existing Code in order to establish an informed baseline for estimating how the proposed legislation would be likely to change outcomes when compared to existing practice. DPD considered possible environmental impacts that could stem from the changes, and made an informed judgment about their insignificance. The proposed legislation is a change to code that could have minor effects on a broad spectrum of currently unknown future development projects in many potential locations across the city over a long time horizon. As such it is necessary to consider impacts in a general and broad manner including broad cumulative impacts, as consistent with Section D. Supplemental Sheet for Non-Project Actions of the Environmental Checklist. Appellants claim that answers in Section B of the Checklist are not thorough enough, but fail to recognize that these questions are meant to address actions with a specific physical manifestation, and are mostly inappropriate for

evaluation of a broad non-project action. DPD's level of environmental review is commensurate with the nature of the proposed action.

Conclusion

The DPD DNS decision was correctly analyzed. There is nothing in the record to show that the decision is clearly erroneous, and therefore it should be affirmed.

Entered this 23rd day of January, 2014.

William K. Mills

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cc. Chris Leman, appellants' representative