FINDINGS AND DECISION OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

DENNIS SAXMAN, et al.,

Hearing Examiner File:
W-13-008

From a Determination of Non-significance issued
by the Director, Department of Planning and Development

Introduction

The Director of the Department of Planning and Development issued a Determination of Non-significance (DNS) for a proposal to amend the Land Use Code. The Appellants timely filed an appeal of the DNS.

The appeal hearing was held on January 7 and 9, 2014, before the undersigned Deputy Hearing Examiner. Parties represented at the proceeding were: the Appellants, Dennis Saxman, et al., by Chris Lehman; and the Director, by William Mills, Senior Land Use Planner. The record was held open through January 23, 2014, for submission of closing statements. DPD and the Appellants submitted closing statements on that date. On January 22, 2014, the Appellants offered an additional exhibit which they wished to add to the record, apparently to contradict statements made by a DPD witness at hearing. DPD filed an objection on January 23, 2014 to the exhibit. The record was held open for the purpose of receiving written closing statements, and no good cause was shown to re-open the record to receive more exhibits.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. After considering the evidence in the record, the Examiner enters the following findings of fact, conclusions and decision on this appeal.

Findings of Fact

1. On October 7, 2013, the Department issued a Determination of Nonsignificance (DNS) for a proposal to amend the Land Use Code.

2. The proposal consists of proposed Code amendments shown in App. Ex. 2/DPD Ex. 5. The proposed amendments would: add definitions for "micro-housing and "micro;" create a design review threshold for developments with micro-housing and congregate residences based on the size of the building, rather than the units; amend certain development standards to require a minimum size for common shared kitchens within micro-housing and apply limits on the location of food preparation facilities outside of the common kitchen within micro-housing units; amend the development

standards to require a quantity of common shared space in congregate residence developments; increase the amount of required secured bicycle parking in micro-housing and congregate residence development to one space for each four micros or sleeping rooms; and increase the amount of required vehicle off-street parking in locations where otherwise required, to one space per four micros. The proposal would also increase required affordability levels for participation in incentive zoning for affordable housing requirements, such that any micro-housing used to participate in the incentive program, or sleeping room in a congregate residence, is available to persons earning forty percent of the Area Median Income or less.

3. In an October 1, 2013 "SEPA Draft" report, DPD included information concerning the number and location of micro-housing units in the City as of May 2013. DPD reviewed construction permit records and concluded that, as of May 2013, 2,089 micro-apartments units within 268 dwelling units had either been permitted or were within the permit processing stage. Of the total dwelling units in the City that were actually permitted, approximately 1.2 percent of the total dwelling units produced included micro-housing; 1.8 percent of new construction permits were for development with micro-housing; and production of micros as a percentage of all dwelling units produced was 9.9 percent.

4. The record contains photographs and construction plans for existing structures which contain micro-housing, and other information which shows the current design and interior layouts of such housing.

5. The October 1, 2013 DPD report includes an appendix discussing micro-housing units constructed from 2010 to May of 2013 as a percentage of the City's development capacity in the lowrise zones. The report uses the development capacity figures for the lowrise zones which were calculated (using DPD's development capacity model) for the updates to the zoning code for multifamily zones in 2009 and 2010. The existing micro-housing units are reported to range from zero percent to 0.75 percent of the development capacity in the LR1, LR2, and LR3 zones.

6. The Appellants have also calculated the existing micro-housing units in the City and the location of the units. The Appellants counted a larger number of dwelling units, fewer sleeping rooms, and determined that the average square footage of the existing micro-housing was smaller than that calculated by DPD. The Appellants based their calculations on permitting records, including information from permits issued prior to 2010. The Appellants also obtained information from advertisements which indicated the monthly rent for various micro-housing units.

7. SMC 25.05.330 provides the following:

> *Threshold determination process.*
> *An EIS is required for proposals for legislation and other major actions significantly affecting the quality of the environment. The lead agency*

decides whether an EIS is required in the threshold determination process, as described below.

A. In making a threshold determination, the responsible official shall:
1. Review the environmental checklist, if used:
a. Independently evaluating the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist, and
b. Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant;
2. Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (Section 25.05.960), and any additional information furnished under Section 25.05.335 (Additional information) and Section 25.05.350 (Mitigated DNS); and
3. Consider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by the City's development regulations or other existing environmental rules or laws.

8. SMC 25.05.782 states: *"Probable" means likely or reasonably likely to occur, as in "a reasonable probability of more than a moderate effect on the quality of the environment" (see Section 25.05.794 (Significant)). "Probable" is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.*

9. SMC 25.05.794 defines "significant" to mean *"a reasonable likelihood of more than a moderate adverse impact on environmental quality."*

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 25.05.680. The Code directs the Examiner to accord "substantial weight" to the Director's SEPA decisions. A party appealing the Director's decision bears the burden of proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn.App 762, 637 P.2d 1005 (1981). The decision is clearly erroneous if the Hearing Examiner, on review of the entire record, is "left with a definite and firm conviction that a mistake has been committed." *Norway Hill Preservation and Protection Ass'n. v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). On appeal, the lead agency must demonstrate that it actually considered relevant environmental factors before issuing the DNS, and that the DNS was based on information reasonably sufficient to evaluate the proposal's environmental impacts; *Boehm v. City of Vancouver*, 111 Wn.App.711, 718, 47 P.3d 137 (2002) (citations omitted).

2. The Appellants identified several issues in their appeal of the DNS. The appeal claims that the proposed legislation would have a number of significant adverse environmental impacts, and that DPD failed to consider relevant environmental factors and lacked sufficient information upon which to base its decision.

3. At hearing, DPD objected to Appellants' Exhibit 25, which included correction notices issued by DPD for projects subject to existing City Codes. The Examiner advised the parties that she would review the exhibit and determine its admissibility as part of the decision. In order to evaluate the probable impacts of the proposed legislation, it is necessary to consider the existing environment, including how micro-housing and congregate residences are currently regulated, and to consider whether the new legislation would have impacts relative to the existing regulation. For the purpose of establishing how micro-housing projects and congregate residences are regulated under current City Codes (including technical codes), the correction notices offered by the Appellants have been included in the record for this matter. However, this evidence actually shows the broad flexibility accorded this type of housing under existing codes, which contain no explicit definition for "micro-housing," and confirms DPD's assertion that the proposed Code amendments will have minor impacts relative to existing conditions allowed by current codes.

4. The proposed legislation is alleged to have probable significant environmental impacts related to public services, because of increased demand for emergency services on account of fire safety issues. The current interpretation and application of fire and building codes to micro-housing and congregate residences was of particular concern to Appellants, e.g., the number of exits or their location, or the occupancy classification assigned to structures. But their evidence does not show that the proposed Code amendments would change the way the building and fire codes are applied to micro-housing or congregate residences. The proposed Land Use Code change would establish a limit on kitchen facilities in sleeping rooms in congregate residences (the Code currently does not regulate placement or size), but the evidence does not show that this change or the rest of the proposal would change the demand for public services, including provision of fire and safety services. The Appellants may desire different or additional regulations for congregate and micro-housing structures than those which exist or which are proposed by DPD, but that is a policy matter outside the scope of the SEPA appeal.

5. The appeal contends that, because the proposed legislation makes explicit that micro-housing is not a permitted use in single-family zones, lowrise multifamily zones will be disproportionately affected by the development of new micro-housing projects. The evidence fails to show that the proposed legislation would spur new development of micro-housing or congregate residences, compared with what occurs under existing regulation of micro-housing. Clearly, the Appellants fear that this will occur, but the record does not demonstrate that this impact would likely occur. If anything, as DPD notes, it would seem more likely that the proposal's addition of new requirements, such as design review for certain projects which are currently not required to undergo design review, or the new standards concerning the size and location of kitchens, would tend to

discourage new development. But in any event, the record does not show that the proposed legislation would have probable significant environmental impacts by causing more development or increased development in lowrise zones over what currently occurs under existing codes.

6. The Appellants allege that the proposal will cause impacts related to solid waste storage. The proposed legislation retains the current minimum areas of storage space required, but for buildings with micro-housing or for congregate residences, DPD would have discretion to increase or reduce the amount of space required. Appellants argue that this grants too broad an authority to DPD, but the Code under SMC 23.54.040 already allows DPD to grant departures from the storage space requirement in consultation with Seattle Public Utilities. While as a policy matter it may be appropriate to consider whether other standards should be adopted, the evidence here falls short of showing that the proposed legislation would likely cause any probable significant impacts on account of shared storage space for solid waste containers.

7. The appeal references increased impacts on parking, pedestrians, bicyclists and transportation impacts. Little evidence was presented to support these claims, and the record fails to show that the proposed Code amendments, compared with current regulations, would cause significant impacts related to parking, bicyclists, pedestrians or transportation.

8. The appeal asserts that DPD committed an error by failing to analyze the environmental impacts of the proposed nonproject action. The Appellants point to the SEPA checklist and the responses in Part B as evidence of this error. But the proposed legislation is a nonproject action under SMC 25.05.704 and 25.05.774; and WAC 197-11-315 does not require that Part B be completed if the lead agency determines that the questions in Part B do not contribute meaningfully to the analysis of the proposal. In this case, the questions in Part B to which DPD has responded "not applicable" do not contribute meaningfully to the analysis of the proposal, because there is no specific site or construction project which has been proposed. There is no evidence to show that DPD's evaluation of the proposal as a nonproject proposal was in error or that the proposal's impacts were not disclosed because the proposal was evaluated as a nonproject proposal.

9. The appeal contends that DPD relied upon erroneous or incomplete information in making its decision, and the Appellants argue that DPD's figures concerning existing micro-housing units, or those which are in the permitting stage, are wrong. Specifically, Appellants assert that DPD has underestimated the numbers of units, underestimated the numbers of residents, and overestimated the average square footage of units, and that its development capacity analysis is flawed. The Appellants have performed a painstaking analysis to determine numbers of micro-housing units and have attempted to ascertain the actual number of occupants (including "unofficial" tenants who may be exceeding the occupancy limits) in existing micro-housing projects. The differences in unit numbers and residents are not large, and the difference in square footage calculations is based on

Appellants' different method of calculating unit square footage. The evidence does not show that DPD's information was insufficient for purposes of the DNS.

10. The appeal also contends that the development capacity analysis employed by DPD led to a clear error in the DNS. The capacity analysis in the October 1, 2013 DPD report references the development capacity model that was developed for the recent multifamily residential Code amendments. The evidence in this record, including the testimony from Ms. Pettyjohn, discloses no errors in DPD's utilization of this model for purposes of analyzing the proposed legislation. The Appellants have not shown that the development capacity model used by DPD was unreasonable, or that the proposed legislation would actually cause probable significant impacts related to the effect on development capacity within the City.

11. The Appellants generally assert that the DNS should have considered the displacement of low-income or disabled residents caused by new micro-housing, and that DPD improperly balanced this impact by assuming the legislation would create affordable housing. Under SMC 25.05.330.E, the decisionmaker may not balance whether a proposal's beneficial aspects outweigh its adverse impacts, but is to consider whether the proposal has probable significant adverse impacts. Although the checklist identifies positive or negative impacts, and actually uses the word "balance," the evidence in the record fails to show that DPD weighed the proposal's positive and negative impacts in violation of SEPA, and instead shows that DPD did consider the proposed legislation's impacts. And as noted above, the proposed legislation has not been shown to have any probable significant impacts, including impacts on housing affordability.

12. The Appellants' closing statement also asserted that the DNS and checklist were not "official actions" because the copies of those documents presented at hearing were not signed. The Appellants did not raise any foundation objections to the exhibits consisting of unsigned copies of the DNS and checklist, and DPD at hearing represented that these were copies of signed versions that were in DPD's files. The exhibits were accepted as copies of the DNS and checklist. That the copies are not copies of the signed DNS and checklist, does not render the DNS and checklist invalid.

13. Other claims of error raised by the appeal or in hearing are not supported by the evidence in the record. Although there are presumably policy issues that remain to be debated regarding the future regulation of this form of housing, no error was shown as to DPD's SEPA decision. The evidence shows that the proposal would have no probable significant environmental impacts, and that DPD's decision complied with the procedural requirements of SEPA and was based on information which was sufficient to evaluate the proposal's environmental impact. DPD's decision was not clearly erroneous and should be affirmed.

Decision

The Director's Determination of Non-significance is affirmed.

Entered this 4th day of February, 2014.

Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final SEPA decision for the City of Seattle. Judicial review under SEPA must be of the decision on the underlying governmental action together with its accompanying environmental determination. Consult applicable local and state laws for further information.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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