BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of **SMART GROWTH SEATTLE** from a determination of non-significance by the Director, Department of Planning and Development	HEARING EXAMINER FILE NO.: W-14-001 APPELLANTS' OPPOSITION TO DPD'S MOTION TO DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

Appellant Smart Growth Seattle ("Smart Growth") requests the Hearing Examiner deny the Motion to Dismiss brought by the Department of Planning and Development ("DPD").

II. FACTS

Smart Growth is a non-profit membership organization that advocates for policies to increase housing supply and meet demand for housing created by new jobs. Declaration of Roger Valdez ¶ 2 ("Valdez Dec."). Smart Growth objects to the current proposal to adopt the Lowrise Multifamily Zoning Code Adjustments, noting the amendments themselves and the environmental impacts of the proposal are antithetical to principles of smart growth, the Growth Management Act ("GMA"), and the City's own Comprehensive Plan. *See,* Smart Growth's Appeal letter challenging DPD's State Environmental Policy Act ("SEPA") Determination of Nonsignificance ("DNS").

Smart Growth participated in public meetings and provided comment on the proposed Lowrise Multifamily Zoning Code Adjustments, including written correspondence to the City.

Valdez Dec. ¶ 3, Exhibit A. One member of Smart Growth also filed a comment letter on the DPD SEPA DNS. Declaration of Bruce Harris ("Harris Dec.") ¶ 4 and Attachment A. Mr. Harris supports the Smart Growth SEPA Appeal. Harris Dec. ¶ 5. DPD accepted the Harris SEPA comment and provided it with all other comments in response to a records request. Declaration of Nancy Bainbridge Rogers ("Rogers Dec.") ¶ 3, Exhibit A.

III. ARGUMENT

DPD seeks to dismiss the Smart Growth appeal, asserting that Smart Growth did not comment on the SEPA DNS, and failure to do so was somehow fatal to the appeal under City code. The DPD motion should be denied. One member of Smart Growth did file a public comment on the DNS. In addition, even if that member's comment was somehow deemed to be insufficient, Smart Growth had earlier commented on the proposal. In the alternative, DPD's interpretation of the City's SEPA regulations is erroneous, and all other legal authorities cited are inapplicable.

A. SEPA comments were filed and the DPD Motion must be denied.

As alleged by DPD itself: "the appeal … is fatally defective for lack of compliance with SMC 25.05.545.B, since neither the appellant party nor any of its members or representatives filed a public comment during the public comment period." DPD Motion, p. 1 (emphasis added). As demonstrated by the Harris Declaration and the Rogers Declaration filed herewith, a member of Smart Growth did file a comment on the SEPA DNS and the City accepted that as a "SEPA Comment." Smart Growth Seattle also commented on the proposal, in January 2014. Valdez Dec. ¶ 3, Exhibit A. That comment was received well before the close of the SEPA DNS comment period, albeit before the DNS itself was issued. Accordingly, under DPD's own analysis, the DPD motion must be denied.

To the extent DPD attempts to back away from its statement that the comment of a single member of Smart Growth is sufficient to sustain the appeal, we note that the law of Washington is replete with authority establishing that a group, like Smart Growth, has standing to appeal land

use and SEPA issues, so long as one or more of its members has standing. *See, e.g., SAVE v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978) (holding that a non-profit corporation or association which shows that one or more of its members have standing, may represent those members); *East Gig Harbor Improvement Ass'n v. Pierce Cy.*, 106 Wn.2d 707, 710-12, 724 P.2d 1009 (1986) (citing *SAVE v. Bothell*, for the principal that an association had standing "as long as one of its members has standing," and holding that since two members plainly had standing, so did the Association); and *Anderson v. Pierce Cy.*, 86 Wash.App. 290, 299-300, 936 P.2d 432 (1997) (holding that where one member of a coalition had standing to challenge a SEPA MDNS, so did the coalition). Because Smart Growth Seattle filed a comment on the SEPA DNS, the DPD motion to dismiss Smart Growth's appeal must be denied.

B. In the alternative, the DPD Motion must be denied because it is based on an erroneous reading of City Code and inapplicable legal authority.

Smart Growth suggested to DPD that DPD withdraw its Motion in light of the Harris Declaration. Because DPD has not withdrawn, Smart Growth assumes DPD may plan to argue that Mr. Harris's SEPA comment is somehow defective. Assuming *arguendo* that Mr. Harris's SEPA comment does not end the inquiry, and require denial of the DPD motion, Smart Growth offers the following argument in further support of why the DPD motion must be denied. This argument is offered only in the alternative.

The legal authority cited by DPD in support of its motion to dismiss is either incomplete or inapposite. The relevant regulations must be read as a whole, not in the excerpted form presented by DPD. Indeed, SMC 25.05.020.C provides "the provisions of these rules, Chapter 197-11 WAC and State Environmental Policy Act must be read together as a whole in order to comply with the spirit and letter of the law."

SMC 25.05.545 and WAC 197-11-545 provide, in full, as follows (emphasis added):

25.05.545 Effect of no comment.

A. Consulted Agencies. If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the

consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with Subchapter IV of these rules.

B. Other Agencies and the Public. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of Section 25.05.510 (public notice) are met. Other agencies and the public shall comment in the manner specified in Section 25.05.550. Each commenting citizen need not raise all possible issues independently. Appeals to the Hearing Examiner are considered de novo; the only limitation is that the issues on appeal shall be limited to those cited in the notice of appeal. (See Section 25.05.680 B3.)

WAC 197-11-545
Effect of no comment.

(1) **Consulted agencies**. If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with Part Four of these rules.

(2) **Other agencies and the public**. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of WAC 197-11-510 are met.

Here, the environmental document at issue was a Determination of Nonsignificance ("DNS"), and not an Environmental Impact Statement ("EIS"), and the Appellant Smart Growth Seattle is not a consulted agency, but rather a group of the general public. These are important distinctions. Under the plain language of both SMC 25.05.545.A and WAC 197-11-545(1), it is clear that a consulted agency that fails to provide comments on a draft EIS is later barred from alleging any defects with the preparation of an environmental impact statement under Part Four of the rules. But the SEPA document at issue in this case is not an EIS, and Smart Growth is not a consulted agency. Nothing in SMC 25.05.545 or WAC 197-11-545 "bars" a later SEPA appeal from the public for failure to make an earlier comment on a DNS.

In addition, SMC 25.05.545 falls within Subchapter V of the City's SEPA regulations. The express purpose of Subchapter V is to provide rules for notice, public availability, and public comment on environmental documents, "especially environmental impact statements." SMC 25.05.500(A). The City's code plainly provides that the "focal point" of SEPA's commenting process is "review, comment, and responsiveness to comments on a draft [Environmental Impact Statement] EIS" because the "DEIS is developed as a result of scoping and serves as the basis for the final statement." SMC 25.05.500. In this case, because the environmental document at issue is not an EIS, the import of WAC 197-11-545 and SMC 25.05.545 is lessened.

As support for its Motion, DPD has cited a Seattle Hearing Examiner decision, *In the Matter of the Institute for Transportation and the Environment*, Hearing Examiner file no. MUP 91-079(W). There is no analysis provided in the Examiner's decision for the *Institute for Transportation* case; but the limited facts provided show that the case involved an appellant who failed to comment on an EIS, not a DNS. This is an important distinction, because as noted above, the City's regulations in subpart V are focused on EIS issues, not DNSs, and because, like in this case, the City of Seattle's DNS comment period is followed just one week later by an appeal deadline. In sharp contrast, where a DEIS is published, a minimum 30 to 45 day comment period is provided, and all comments must be responded to in a separately and later-prepared final EIS. SMC 25.05.455 and .560. That means that failure to comment on a DEIS leaves the City unable to evaluate and respond to those comments during the lengthy and expensive process of preparing a final EIS. But a DNS is final when issued, and is not followed by any mandatory or complicated final review and evaluation process. Thus, with a DNS there is no risk that an appellant might "lay in the weeds" failing to comment, and then challenge the subsequent analysis later after the City has spent time and effort preparing a final EIS. The facts

of *Institute for Transportation* case are distinguishable, and the case has no application or bearing on the status of the Smart Growth appeal.[1]

For the same reasons, the City's citation to the *Kitsap County v. State Department of Natural Resources*, 99 Wn.2d 386, 622 P.2d 381 (1983), is inapposite. In *Kitsap*, Kitsap County was a consulted agency provided with a copy of the draft EIS. *Kitsap*, 99 Wn.2d at 391-92. Kitsap County failed to file comments on the Draft EIS. *Id.* Under the plain language of WAC 197-11-545, because Kitsap County was a consulted agency and failed to submit substantive information to the State in response to the draft EIS, Kitsap County was thereafter barred from appeal. Here, unlike *Kitsap*, Smart Growth Seattle is not a consulted agency. Furthermore, Smart Growth Seattle is not appealing for the first time to a superior court but is attempting to exhaust its administrative remedies by appealing to the Hearing Examiner. Even the philosophy of *Kitsap* (*See Kitsap,* at 391) does not apply to an appeal of a DNS; because a DNS appeal is due just one week following the close of the DNS comment period, failure to comment cannot frustrate the purposes of SEPA. The *Kitsap* case simply has no bearing on this matter, and cannot be relied upon to support dismissal of the Smart Growth appeal.

Moreover, the City Code adds language to the State SEPA Rules, and by including the final sentence of SMC 25.05.545.B regarding appeals, treats appeals as a form of comment. SMC 25.05.545.B expressly provides that any appeal to the Hearing Examiner is "considered *de novo*; the only limitation is that the issues on appeal shall be limited to those cited in the notice of appeal." In the City of Seattle, public comment on a DNS is not required to authorize an appeal of a DNS brought by a member of the public. This position is supported by other sections of the City's SEPA Rules. For example, SMC 25.05.502, addresses how the City is to invite comment from agencies and the public. This section, too, imposes a "responsibility" to comment only on consulted agencies and not on the public (SMC 25.05.502.B), and does not tie appeals to

[1] Even the Settle Treatise does not direct that failure to comment on a DNS bars the public from later appeal. Rather, it acknowledges that the SEPA Rules of Chapter 197-11 construe silence as a lack of objection, and states only that failure to comment "may" preclude administrative appeal. R.L. Settle, *The Washington State Environmental Policy Act*, §19.01[1] at 19-6.

any prior comment (SMC 25.05.502.I). The "only limitation" on an appeal is that the appeal must be limited to the issues stated in the notice of appeal. There is no requirement to have previously commented. The DPD Motion to Dismiss must be denied.

Next, assuming *arguendo* that DPD objects to the content of the public comments provided by Smart Growth, we note that public comments under SMC 25.05.545 are to be made "in the manner specified in Section 25.05.550." SMC 25.05.550 expressly authorizes comments to be either on the DNS or the proposal; here, the proposal is the Lowrise Multifamily Zoning Code Adjustments. Specifically SMC 25.05.550 states that "comments on an EIS, DNS, scoping notice or proposal shall be as specific as possible and may address either the adequacy of the environmental document or the merits of the alternatives discussed or both." (emphasis added). Notably, Smart Growth Seattle did comment on the proposal, in January 2014. Valdez Dec. ¶ 3, Exhibit A. Likewise, the Harris comment focused on the merits of the proposal versus the alternative of leaving the code alone, which is appropriate and expressly allowed.

All of these provisions of Seattle Municipal Code authorizing an appeal of a DNS without need to have previously file comments are consistent with SMC 25.05.680, WAC 197-11-680 and RCW 43.21C.075, none of which dictate that public comments must be filed to maintain a right to appeal. Indeed, SMC 25.05.680 opens with the direction that persons considering an administrative appeal involving SEPA consult specified sections of the SEPA regulations and statute without reference to any of the commenting procedures. Similarly, SMC 25.05.680.B.1 authorizes "any interested person" to file an appeal, not just someone who filed comments, and subsection B.3 repeats that appeals "shall be considered *de novo* and limited to the issues cited in the notice of appeal."

DPD's citations to a decision of the Shorelines Hearing Board's (SHB) and a decision of the Pollution Control Hearing Board's (PCHB) also are inapplicable. Neither are binding authority on the City of Seattle Hearing Examiner. In addition, *Spokane Rock Products Inc. v. Spokane County Air Pollution Control Authority*, Pollution Control Hearing Board 05-127 (2006), involved a situation in which the PCHB found that the Appellants had waited to voice

their objections until after a project was underway and a Notice of Construction had been issued. Here, there is no project. Smart Growth Seattle is attempting to voice its objections through the appeals process well before a change is made in Code. And, in the case of *Brown v. Snohomish County*, SHB 06-035, there was no evaluation of the issue raised in the DPD Motion, because there, the appellant "acknowledge[d] that he is not challenging SEPA in this case." Again, DPD's motion must be denied.

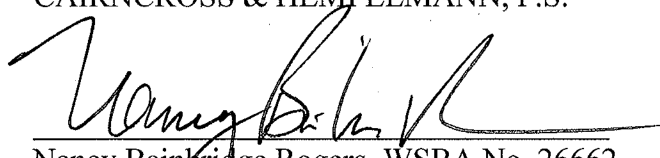
Finally, if DPD wanted to force the public, as well as consulted agencies, to comment even on a DNS prior to filing an appeal, then DPD must re-word its notices so that they are not misleading to the public.[2] Nothing in the DPD notice is crafted to alert a citizen to the now asserted need to file comments in order to preserve the right to appeal.

IV. CONCLUSION

Smart Growth filed SEPA comments on the DPD DNS and the proposal and, on that basis alone, the DPD Motion to Dismiss must be denied. In the event that DPD somehow convinces the Examiner to ignore the Smart Growth comments, then DPD's motion still must be denied for failure to be supported by the law.

DATED this 15th day of August, 2014.

CAIRNCROSS & HEMPELMANN, P.S.



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[2] Undersigned counsel was formally engaged by Smart Growth after the comment period had expired.

Certificate of Service

I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on August 15, 2014, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

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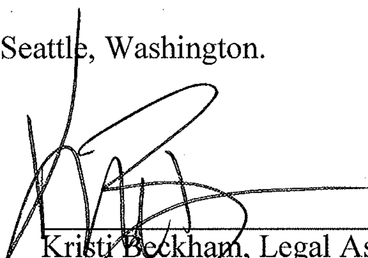
DATED this 15th day of August, 2014, at Seattle, Washington.



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