**BEFORE THE HEARING EXAMINER**
**CITY OF SEATTLE**

In the Matter of the Appeal of **W-14-001**

**SMART GROWTH SEATTLE**

From a SEPA Determination by the Director,
Department of Planning and Development

**ORDER ON MOTION TO DISMISS**

The Department of Planning and Development (DPD) filed a motion to dismiss this appeal on the grounds that the Appellant Smart Growth Seattle (Smart Growth) failed to submit comments on the Determination of Non-Significance (DNS) during the public comment period. Smart Growth filed its Opposition to DPD's Motion to Dismiss on August 15, 2014. DPD filed a Reply on August 21, 2014. Having reviewed the filings in this matter, the Hearing Examiner enters the following order, and denies the motion.

1. On May 29, 2014, DPD issued a DNS for a proposal to amend the Land Use Code. On that day, DPD also published a Notice of Environmental Determination stating that DPD had issued the DNS, and that comments regarding the DNS or potential environmental impacts could be submitted through June 12, 2014. Between May 29, 2014 and June 12, 2014, DPD received no comments which identified the commenters as being members of Smart Growth or representing Smart Growth. However, a letter was submitted by Bruce Harris to DPD on June 16, 2014, which is shown in the filings. A letter dated January 15, 2014, was sent by Smart Growth to City Councilmember O'Brien, and is also shown in the filings.

DPD's motion asserts that SMC 25.05.545 and WAC 197-11-545 require the appeal to be dismissed for failure to submit public comments during the SEPA comment period.

SMC 25.05.545 states:

> *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 states:

*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.*

Whether Smart Growth failed to comment on the DNS.
Smart Growth asserts that it filed SEPA comments, and therefore there has not been a "lack of comment" within the meaning of SMC 25.05.545.B. Smart Growth points to its the January 2014 letter to Councilmember O'Brien, and the June 16, 2014 letter from Mr. Harris to DPD, as constituting SEPA comments. DPD argues that these communications do not constitute comments "by members of the public on environmental documents, within the time periods specified by these rules" under SMC 25.05.545.B. The January 2014 letter was not made within the time period for SEPA comments; the June 16 letter does not mention Smart Growth or SEPA, and there is nothing on the face of the letter or even Mr. Harris's Declaration to show that he was actually a member of Smart Growth at the time he wrote the letter. It appears from the filings, that Smart Growth therefore did not file comments within "the time periods specified." Nevertheless, as noted below, this is not a bar to its appeal.

The effect of "no comment."
DPD argues that Smart Growth is barred from this appeal for failure to submit comments during the SEPA comment period. WAC 197-11-545(1) and SMC 25.05.545.A specify that *"any consulted agency"* which fails to submit substantive information to a lead agency on a draft EIS is "thereafter barred from alleging any defects" in the EIS. But that language is absent from the next subsection regarding other agencies and the public. Instead, the lack of comment by the public is to be construed as "lack of objection to the environmental analysis." The question is whether this phrase means that a member of the public who fails to comment during the SEPA comment period is barred from appealing a DNS.

The language of 25.05.545.A is very different from that in subsection B. Subsection A refers specifically to consulted agencies who fail to comment on a draft EIS, and it plainly states that these agencies are "barred from alleging defects" in the final EIS. But subsection B only states that the lack of comments on environmental documents is to be construed as a "lack of objection" to the analysis. This phrase is general in nature, and could be interpreted to mean that an agency may move forward by issuing its environmental analysis. Presumably if the drafters had intended to bar the public and non-consulted agencies from appealing a DNS, they would have used the same language as appears in subsection A, but that language is absent.

However, in support of its argument, DPD cites *Kitsap County v. State Department of Natural Resources*, 99 Wn.2d 386, 622 P.2d 381 (1983). That case involved a consulted agency which failed to comment on a draft EIS, and was therefore barred from the appealing the FEIS, pursuant to WAC 197-11-545(1). The decision did not address whether a member of the public should be barred from an administrative appeal of a DNS for lack of comment during the comment period. DPD also cites a treatise, Settle, The Washington State Environmental Policy Act, and its reference to a 1991 Hearing Examiner decision, in support of its motion. The Settle treatise refers to *In the Matter of the Institute for Transportation and the Environment*, MUP-91-079(W), in which the Hearing Examiner dismissed a challenge to an EIS, and referred to the Appellant's failure to comment. That decision is not controlling, and it is not clear from the filings that the analysis there is relevant in this DNS appeal; the Settle treatise also merely comments that failure to comment may preclude administrative appeal.

DPD also cites decisions of the State Pollution Control Hearings Board (PCHB) and the Shoreline Hearings Board (SHB) construing WAC 197-11-545. Those decisions are not binding on the Hearing Examiner, but in any event, the analyses in the cited decisions turn on facts and a SEPA administrative appeal framework not present here. In the cited PCHB case, *Spokane Rock Products v. Spokane County Air Pollution Control Authority*, PCHB 05-127, the Board determined that Appellants lacked standing to challenge an MDNS. The PCHB noted that the Appellants had filed their comments not only after the end of the comment period, but after a permit was issued by the lead agency, and the Board construed this action as a failure to exhaust available administrative remedies. The Board noted that exhaustion of local administrative remedies was required prior to bringing a procedural SEPA claim to the Board; PCHB 05-127 Order at page 9. In *Brown v. Snohomish County*, SHB 06-035, the SHB dismissed Appellant's SEPA appeal for lack of standing, where the Appellant indicated that he was actually challenging a shoreline decision, not a SEPA decision; the SHB also cited *Spokane Rock*, and noted that the Appellant had failed to show that he had commented during the SEPA comment period.

In contrast to the timeframes and administrative appeal framework presented in the above state board decisions, the City's SEPA Code adds language to that found in WAC 197-11-545(2). SMC 25.05.545.B includes a statement that appeals to the Hearing Examiner are considered de novo, and that the only limitation on appeal issues is that they are limited to those cited in the notice of appeal. The state Board decisions were concerned with appellants' failure to exhaust administrative remedies, but no such concern is presented here. By appealing to the Hearing Examiner, an appellant exhausts the available administrative remedy, and it is the Hearing Examiner's decision, not DPD's, which is the final City SEPA decision. Thus, unlike the situation before the Board in *Spokane Rock*, the decision maker for the underlying proposal

(here, the City Council) will not be deprived of the opportunity to review potential environmental concerns before making its decision. Furthermore, the notion the public must provide comments before appealing a DNS, is at odds with the fact that the Code allows appeals to raise issues that were never identified during the comment period. A citizen may, e.g., comment on water quality impacts during the comment period, but is allowed to raise completely different issues in a subsequent appeal of the DNS. Requiring all appellants to have submitted public comments would therefore serve little purpose (at least in terms of early notice to DPD of environmental concerns), since the Code does not limit the appeal issues to those identified in public comments. Thus, no frustration of SEPA's purposes occurs by allowing appeals to be filed by those who did not submit public comments.

SMC 25.05.545 does not require that a member of the public comment on a DNS in order to appeal that DNS. The motion is therefore denied.

Entered this 2nd day of September, 2014.

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