

BEFORE THE HEARING EXAMINER

City of Seattle

In the Matter of the Appeal of	)	Hearing Examiner File:
	)	
SMART GROWTH SEATTLE	)	W-14-001
from a determination of non-significance	)	
by the Director, Department of Planning and	)	DPD CLOSING STATEMENT
Development	)	

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 to Lowrise multi-family zoning standards that would modify and clarify various regulations, particularly certain exceptions to building height limits, certain exemptions from the calculation of maximum floor area ratio (FAR), and rounding regulations for density limits in lowrise zones. The code amendments would add a side setback requirement for rowhouse development and add a density limit for rowhouses in the Lowrise 1 zone. The sole question before the Hearing Examiner is whether DPD's Determination of Non-Significance (DNS), concluding 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 and imposition of mitigation conditions allegedly necessary to mitigate impacts or, alternatively, require an Environmental Impact Statement (EIS). The fundamental flaw in the appellants' case is that no probable significant adverse environmental impacts have been demonstrated by their evidence. The legislation is quite limited in scope, proposing only to adopt clarifications and improvements to the Lowrise zoning regulations to address well documented issues with the current regulations.

Burden of Proof

Seattle Municipal Code (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 or failure to collect sufficient information and to potentially undertake an EIS, as discussed in their opening statement. However, the record at hearing shows clearly that

it is the appellants who have failed to offer sufficient information to justify a remand of the DPD Determination of Non-Significance (DNS) under SEPA.

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. The appellants have failed to demonstrate by the evidence in the record that the proposed legislation would have a probable significant adverse environmental impact under SEPA.

1. The appellants' analysis of the numbers of housing units that might not be built if the proposed legislation is adopted is flawed and must be disregarded.

The appellants' primary basis for remand is that DPD failed to adequately assess the numbers of dwelling units that the proposed amendments might eliminate from the Lowrise zones, when compared to the existing regulations, and thus impacts to housing and transportation were incorrectly assessed. However, the appellants' theory of the number of dwelling units that might not be built is based on a faulty analysis and incorrect assumption about the development potential of property in the Lowrise zones.

The analysis consists of a series of Excel spreadsheets compiled by real estate broker Dustin Van Wyk and entered as Exhibits 2-4. While the sheer amount of information compiled in the spreadsheets looks impressive, the calculations do not make sense. According to his testimony, Mr. Van Wyk gathered information about the lot size of every parcel in all the Lowrise zones, except for lots less than 2400 square feet, lots occupied by condominiums, and lots developed with non-residential uses such as parks or schools. The result was 15,444 parcels. However, no research was conducted to determine what types of residential development already existed on these parcels, other than year of construction as far back as 1900. The amount of existing development on a lot is a critical factor in determining the likelihood of redevelopment of the lot, but this was not considered in the appellant's analysis. The spreadsheets also do not reflect consideration of any possible limitations to development of some listed sites, such as the presence of Environmentally Critical Areas, ownership by public agencies (other than parks or schools lands), or Landmark status.

Instead, the spreadsheet presents a raw calculation of land area and then divides that by the applicable density standard (for example 1 unit per 1600 square feet in the LR1 zones) and then calculates how many units would be "lost" if rounding up was only allowed from a fraction of 0.85, as proposed by the legislation, rather than 0.5 as is currently allowed. This methodology ignores current development and what the current unit count on each site might be, making the incorrect assumption that all eligible lots are likely to be redeveloped. Most of the sites listed are already developed, and structures built prior to 1957, when density standards were first imposed in Seattle, could contain any number of existing units.¹ Even after density standards were imposed, the number of units could be radically different than what is currently allowed, since density standards under historic Seattle zoning Codes varied greatly from the current

¹ Compare Seattle City Ordinance 45382, effective June 28, 1923, to Seattle City Ordinance 86300, effective July 24, 1957.

regulations.² Further, existing Land Use Code standards allow rebuilding and replacement of existing residential structures, even if nonconforming to current standards.³ Thus, for example, there could be a ten or even twenty unit apartment building on a 5000-square-foot lot in what is currently an LR1 zone. Three, or perhaps four, dwelling units could be constructed on that lot under current regulations. The existing density of housing on such a lot would be grossly undercounted in the appellants' survey in Exhibits 2-4. This would result in a major over-estimation of the number of lots likely to be affected by the proposed legislation. Since the numbers in these exhibits were not verified, they cannot be relied on for accuracy, and the entire analysis is flawed. There is simply no way to verify that up to 6,000 units could be "lost" if the proposed new rounding standards are imposed.

In contrast, DPD analyzed the potential reduction in numbers of dwelling units if the legislation were adopted in the context of its development capacity model, which estimates the amount of development expected to occur in Lowrise zones citywide pursuant to the city's Comprehensive Plan to accommodate growth. (See Mr. Wentlandt's testimony and also Exhibit 18, Director's Report, Exhibit 19, SEPA checklist, Exhibit 24, Capacity assumptions Comparisons and General assumptions for building types, and Exhibit 15, Seattle 2035 Development Capacity Report). DPD considered and analyzed the largest possible reductions in floor area or density that could occur in individual projects stemming from the proposed code changes using a review of real examples. (See Director's Report Sections 3.3, 3.4, and 5). Then DPD considered likely limitations on how broadly these maximum reduction scenarios would be applied, due to differentiation of the various LR zone standards, alternative options for a variety of housing types, and other factors. This analysis was sufficient to conclude that the proposed code changes would not be likely to impact the ability of the lowrise zones to accommodate expected and planned growth.

DPD acknowledges on page 13 of the SEPA checklist that there could be a "minor reduction in the amount of developable floor area or allowable density that may be achieved" in LR3 zones within urban villages and urban centers, and in LR1 zones. However, it is clear that the effects do not rise to the level of a "probable significant adverse environmental impact." The proposed legislation does not directly change density limits by restricting the number of units that can be built on a site except for rowhouse housing types in the LR1 zone. Instead, it changes floor area limits in ways that will reduce total floor area in some development and change the rounding of fractional units in LR1 zones from 0.5 or more to 0.85 or more. The floor area limits may require some choice between building smaller units or fewer units in a structure, while the change in rounding in LR1 zones could effectively reduce the number of units on a lot from 4 to 3, or by 25 percent, as DPD acknowledges. This scenario assumes that every 5000-square-foot lot capable of being subdivided is built out to the maximum. It is highly unlikely that degree of development will occur. Even if it did, DPD's research clearly shows that the density levels in LR3 and LR1 zones being achieved under current regulations are substantially higher than intended or projected by the analysis of development capacity done for the existing regulations

² See, e.g., Seattle City Ordinance 110570, effective June 11, 1982, which removed density limits from Seattle Lowrise zones for a period of several years in the 1980's.

³ See Seattle Municipal Code (SMC) Section 23.42.112.B.

when adopted in 2010.⁴ In any case, DPD's analysis correctly focuses on the potential effect of limiting floor area and changing the rounding of fractional numbers of units by comparing the potential reductions to the original 2010 capacity estimates, which were thoroughly vetted as a matter of policy adopted by the City Council and consistent with the Comprehensive Plan, rather than broadly projecting an unsubstantiated number of units lost, as the appellants do in their numerical projections.

2. Since the numbers of housing units that could be lost if the amendments are adopted is based on faulty analysis, the assessment of alleged impacts to transportation based on these numbers is also faulty.

Although DPD's transportation planner John Shaw testified that he had never observed the type of methodology used by appellants' traffic consultant Brad Lincoln in estimating numbers of vehicle commute trips that the supposed loss of units within the City of Seattle could create, it is unnecessary to decide if the methodology has merit. All of this testimony is based on the use of the suspect numbers compiled by Mr. Van Wyk and should be disregarded on that basis. Mr. Lincoln testified that his figures of total numbers of trips were based entirely on multiplication from the total number of some 6000 units that the appellants estimate, without valid evidence, may be built in various jurisdictions outside the City limits.

In addition, Mr. Shaw testified that some individuals unable to find a living unit in one of the Lowrise zones could easily decide to live in another zone within Seattle. The alternative scenario of trips originating from other Seattle zones (such as Commercial, Seattle Mixed, Single Family, or Midrise which all allow housing and could provide equal or better access to transportation), was not evaluated by the appellants – calling into question the validity of the analysis.

Further, the additional effects assumed by Mr. Lincoln from cuts to Metro service are subject to many variables and simply too speculative to be given much credence. The cuts are to routes on which ridership may be low, and these cuts are subject to change in the future as Metro budgets change. Similarly, appellants traffic flow map, Exhibit 10, is probative only of the well-known fact that Seattle's freeways are congested at rush hour. The assumption that this would get worse if the proposed modest changes to Lowrise regulations are made is the essence of remote and speculative analysis that is to be disregarded under SEPA. This analysis makes a false assumption that commuters will abandon the freeways for surface streets, without any analysis of the capacity of those streets, and disregards possible improvements to traffic flow in the future (more light rail, additional roads, more buses, monorail service, etc.).

3. Potential future impacts to housing from this proposed legislation is not clearly an environmental impact requiring evaluation under SEPA.

Even if the proposed legislation would in some fashion reduce the numbers of dwelling units in certain Lowrise zones, the only questions about impacts to housing appear in Part B.9 of the SEPA checklist. Part B of the checklist is for project level actions and is not filled out for non-project actions such as proposed legislation (WAC 197-11-315). Since the proposal is legislation

⁴ See pages 68 – 70 of Director's Report.

only, it is not possible to predict specific numbers of housing units that may be provided or may be eliminated, since the legislation in and of itself will not cause either effect, as would demolition of a building and construction of a new one. The appellant suggests that evaluation should occur anyway, on the theory that failure to build units in Seattle will cause them to be built elsewhere, with resulting effects on housing cost. This “chain of causation” argument is simply too remote to be evaluated as a SEPA impact. Nothing in Subsection D of the checklist required such evaluation. Similarly, housing affordability is not even a question that appears in the checklist, so testimony about it is not clearly relevant. However, DPD exhibits in the record such as the Dupre and Scott apartment vacancy report (Exhibit 22) specifically show that newly produced housing is generally not affordable. In fact, it may well result in demolition of older more affordable housing and replacement with new units featuring modern amenities that will rent or sell for higher rates in the near term.

4. The appellants’ contention that DPD should consider alleged environmental impacts outside of City limits is incorrect.

In its opening statement, the appellant cites SAVE v. City of Bothell, 89 Wn.2d 862, 576 P.2d 401 (1979) for the proposition that an agency must consider environmental effects outside of its boundaries. This case is inapposite with respect to a non-project action such as the proposed legislation. The case involved construction of a shopping center in the Snoqualmie Valley, with clearly measurable impacts outside the limits of the City of Bothell. A better precedent for the current appeal of this proposed legislation is the decision in Boehm v. City of Vancouver, 111 Wn. App. 711 (2002), which holds that cumulative impact analysis is inappropriate unless “(1) there is some evidence that the project will facilitate future action that will result in additional impacts or (2) the project is dependent on subsequent proposed development. A project's cumulative impacts that are merely speculative need not be considered.” With respect to the proposed legislation, no direct chain of causation has been demonstrated by the appellant to show that the legislation will have any impacts outside the limits of the City of Seattle. The alleged impacts are all remote and speculative and must therefore be disregarded.

5. The issues of building design are not relevant to issues of SEPA impact, but even if they are relevant, the effects are speculative.

The testimony of architect David Neiman regarding building design and showing how a design under current standards might be different and potentially less attractive under the proposed new legislation is simply not relevant to whether there is a probable significant adverse impact on the environment. Appellants did not argue that the proposed legislation will reduce height, bulk and scale impacts of building designs. Rather, Mr. Neiman in particular testified that these reductions will be minimal compared to alleged impacts in “other areas.” Yet, as noted above, the impacts asserted by the appellants in terms of housing and transportation are based on highly suspect numbers and, at best, speculative. The proposal will reduce overall building height by up to four feet, which is a considerable height reduction. Further, Exhibit 6 and the exhibit prepared by Mr. Weyand (Exhibit 7) make a number of design assumptions that are not true of all sites.

For example, Exhibit 6 shows a structure on a level site, rather than one built on a hillside, and this is also true of the examples in Exhibit 7. The perceived height of a structure may actually be

considerably reduced on a sloping site by the proposed legislation, with relatively modest loss of floor area (since the proposed legislation continues to exempt completely underground floor area from FAR limits and only changes the exemption for areas four feet or less above grade. On a sloping site, the area four feet or less above grade may be very modest if the slope is sufficiently steep, as is common in Seattle.⁵ Mr. Neiman conceded this point on cross examination, while DPD's expert witness, Mr. Kaplan, testified that both the number of units in a structure and the way they are designed is dynamic and may differ from the single type of design shown in Exhibit 6.⁶ There is no evidence of a probably significant adverse environmental impact.

6. The DPD testimony on analysis of the effect of its proposal on issues of growth and development capacity is comprehensive and sound, and was not rebutted by appellants' testimony.

Mr. Wentlandt of DPD testified as to the depth of his review and analysis of all aspects of the legislation, and the preparation of a comprehensive Director's Report. Mr. Wentlandt has an extensive educational background in urban planning and several years of experience in drafting legislation for DPD, including the 2010 Lowrise amendments, as well as experience preparing environmental review for legislation. This analysis resulted in a defensible conclusion that the proposed changes would cause some reductions in overall floor area that might be built in the Lowrise zones, and potentially some reductions to total numbers of units, but that the development capacity that remains would not only be consistent with the estimates considered in the 2010 legislation but also well within the requirements of the State Growth Management Act.

As a counterpoint to Mr. Wentlandt's testimony, the appellant mainly offered the testimony of Roger Valdez. Mr. Valdez' alleged concerns about housing capacity and affordability appeared to be policy issues rather than environmental impacts, as DPD has previously addressed. Policy issues are not within the jurisdiction of a Hearing Examiner review of alleged environmental impacts under SEPA. The proposed legislation reflects a reasonable compromise for Council to consider, balancing the competing needs of development and developers, with legitimate neighborhood concerns. The legislation will have a public hearing before Council prior to any vote to approve, and this policy debate should not be encumbered by a process of further environmental review.

In his rebuttal testimony, Mr. Valdez testified that the projects DPD reviewed in its Director's Report were all "neighborhood controversies" and implied that DPD should have reviewed other projects that were not. However, neither Mr. Valdez nor any other witness for the appellant offered an example of alternate projects that benefitted from the current regulations and received acceptance from neighbors. It is significant that DPD's Director's Report analyzes twelve projects in detail when discussing the issues of the current legislation. The twelve projects are real examples that DPD identified as both: representative examples of specific recurring issues; and as being limited to certain types of development and circumstances. The fact that there are so

⁵ See, e.g., Exhibit B for 23.86.007.

⁶ Mr. Kaplan also noted that placement of HVAC systems on the roof, alleged to be an effect of reducing floor area in buildings, would not generally be required for smaller apartment buildings that mostly lack central HVAC systems.

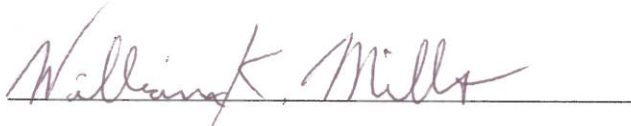
DPD Closing Statement
October 7, 2014

many examples of issues during the relatively short period of time the code has been effective is itself a reason to allow the legislation to proceed to debate in City Council.

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 7th day of October, 2014.

A handwritten signature in dark ink, reading "William K. Mills", is written over a horizontal line.

William K. Mills, Land Use Planner Supervisor
Department of Planning and Development

cc. Nancy Bainbridge Rogers, for appellant Smart Growth Seattle

