BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal by FRIENDS OF MADISON PARK, et al., Appellants, From the Office of Planning and Community Development's Final Environmental Impact Statement on the One Seattle Plan.	Nos. W-25-001, W-25-002, W-25-003, W-25-004, W-25-005, W-25-006 (Consolidated by Order of the Hearing Examiner) REPLY IN SUPPORT OF THE DEPARTMENT'S COMBINED MOTIONS

I. INTRODUCTION

The Office of Planning and Community Development ("Department") moves to dismiss all six appeals in full. Appellants' Responses fail to counter the arguments in the Department's Combined Motion to Dismiss ("Motion") or to establish any legal basis on which these appeals can continue.[1]

All appeals should be dismissed under any of the four statutory prohibitions on administrative and judicial appeals of SEPA decisions: RCW 36.70A.070(2), RCW 36.70A.600(3), RCW 36.70A.680(3), and RCW 43.21C.095. Each of these prohibitions was enacted specifically to address the problems presented by these SEPA appeals—the appeals will obstruct or delay government action to increase housing. Appellants fail to provide any facts contrary to those laid out in the

[1] The Cox Appellants admit that when they spoke to potential legal counsel about their appeal, they were advised they "would lose the appeal for a variety of reasons, and our money would be better spent focused on political activism towards the fall election than fighting a losing legal battle." Cox Response at 2.

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Department's Motion, thus conceding to the Department's facts supporting the applicability of the SEPA appeal prohibitions. Appellants' legal argument that the prohibitions do not apply because the Final Environmental Impact Statement ("FEIS") is not a "nonproject action" is based on an incorrect reading of the statutes and is contrary to the legislative intent of the prohibitions. Appellants do not, and cannot, counter the Department's argument. The Examiner should dismiss all six appeals on this basis.

Additionally, all Appellants, except Godfrey, fail to provide an adequate legal basis to support their standing in this appeal. Appellants concede they did not comment on the Draft Environmental Impact Statement ("DEIS"). Appellants argue on response, without any legal citation, that their lack of comment is excused because the One Seattle Proposal supposedly changed significantly after the DEIS was issued. This allegation is incorrect—the Proposal has not changed significantly. Further, Friends of Ravenna-Cowen ("FORC") fails to show how the FORC appeal is consistent with HER 5.01(d)(2), (3). Larry Johnson's declaration, submitted with the Youtz Response, supports the Department's argument. The Examiner should dismiss FORC as an additional party.

Appellants also concede to dismissal of many individual issues—waiving them or agreeing with the Department—including NOAA guideline noncompliance; interference with contractual rights or alleged takings; constitutional due process violations; adequacy of conditions or rezones; and claims about parking and economic value. Additionally, Appellants do not provide any legal basis for Examiner jurisdiction over GMA compliance, policy issues, and private restrictive covenants. Instead, they attempt to repackage these issues under SEPA. The Examiner's jurisdiction is limited to what is granted by ordinance or other City Council action. The adequacy of the FEIS is limited to the SEPA standards, not compliance with other laws or guidelines. All of these claims must be dismissed.

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Appellant Godfrey fails to provide any basis upon which her Issue Clarification must be accepted by the Examiner. The Clarification attempts to add new issues. The Examiner should reject the Clarification for violating HER 5.07 and SMC 25.05.680.A.2.b.

Lastly, Appellants agree to issue consolidation. If the Examiner denies full dismissal, the Department looks forward to receiving Appellants' proposed issue consolidation.

II. AUTHORITY

A. Dismissal is required under multiple provisions of the Hearing Examiner Rules.

The Department primarily seeks dismissal under HER 3.17(j)(3) for lack of Examiner jurisdiction and under HER 3.17(j)(5), which allows dismissal on "[o]ther grounds established by law." The Department also seeks dismissal under HER 3.17(j)(4) (that "the appeal is frivolous or without merit on its face,") for three of Appellants' issues: 1) inadequate FEIS conditions, 2) parking impacts, and 3) business and property value impacts. *See* Motion at 24–26. Appellants' Responses do not contest the Department's requests for dismissal of those three issues.

The Youtz Appellants argue the Examiner must apply Civil Rule 12(b)(6)'s standard of review to the entirety of the City's motion, which is incorrect. CR 12(b)(6)—which allows dismissal for "failure to state a claim upon which relief can be granted"—is inapplicable to HER 3.17(j)(3) (dismissal for lack of jurisdiction) and HER 3.17(j)(5) (dismissal on other grounds established by law).

Even if the CR 12(b)(6) standard applies to the three issues for which the Department moves to dismiss under HER 3.17(j)(4), the Appellants fail to address the issues in their Responses, thereby abandoning them. *See* HER 3.17(b) ("failure to respond to an issue raised in the motion shall constitute abandonment of that issue."). Regardless, under no set of hypothetical facts can the Appellants state a claim for relief that the FEIS should have analyzed impacts to parking, business, and property values—those are not elements of the environment required to be analyzed under SEPA. *See* Motion at 24–26.

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Likewise, no facts would entitle Appellants to relief for their claim that the FEIS imposes inadequate conditions. Unlike a permit decision, which may include permit conditions, an FEIS does not need to impose conditions. *Moss v. City of Bellingham*, 109 Wn. App. 6, 14 (2001) (SEPA ensures that environmental values are considered by a government, it does not require a particular result of the government's decision making). CR 12(b)(6)'s standard does not apply here. Even if it did, the limited issues the standard would apply to must be dismissed.

B. The Examiner lacks jurisdiction over these appeals.

In the Motion, the Department explained why the Examiner lacks jurisdiction over Appellant's claims under RCW 36.70A.070(2), RCW 36.70A.600(3), RCW 36.70A.680, and RCW 43.21C.495.

1. Appellants wrongly argue the SEPA appeal prohibitions do not apply to the FEIS.

Appellants dispute this argument on three grounds, none of which can succeed. First, Appellants argue that the FEIS appeals are not barred because the statutes bar SEPA appeals of only nonproject "actions," and the FEIS is not an action.[2] Appellants' interpretation is wrong. An FEIS is the evaluation of the likely significant environmental impacts of an action. Under SEPA, appeals of the environmental review and the action go hand-in-hand; thus, prohibiting SEPA appeals of nonproject actions also prohibits appeals of nonproject FEISs.

In general, an appeal of an environmental determination under SEPA (such as an FEIS) must be raised in conjunction with an appeal of the underlying governmental action. RCW 43.21C.075(2)(a); RCW 43.21C.075(1) ("[SEPA] is not intended to create a cause of action unrelated to a specific governmental action."); RCW 43.21C.075(6)(c) ("Judicial review under [SEPA] shall without

[2] Appellants Youtz and Cary affirmatively make this argument in their respective Responses. Youtz Response at 6–8; Cary Response at 1. Appellants Cox and Godfrey incorporate Youtz's argument. Cox Response at 3; Godfrey Response at 1. Appellant FOMP fails to address RCW 36.70A.070(2), .600(3), and .680(3). Instead, FOMP discusses other statutes not at issue here. FOMP Response at 1–2. Appellant Hawthorne Hills Community Club failed to file a Response.

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exception be of the governmental action together with its accompanying environmental determinations."). There are, however, a few exceptions to the general rule in administrative appeals. RCW 43.21C.075(3)(b)(i) to (iv).

One exception is an appeal of an environmental determination made by an agency on a nonproject action. RCW 43.21C.075(3)(b)(iii). Rather than being heard together, an FEIS administrative appeal "may occur prior to an agency's final decision on a proposed action." WAC 197-11-680(3)(a)(iii). Still, the statutory prohibitions on administrative and judicial SEPA appeals apply to all administrative and judicial actions challenging a SEPA decision and must apply to the present appeals. Once an FEIS is administratively appealed, the agency cannot entertain successive administrative appeals on these issues before the same agency. *See* WAC 197-11-680(3)(a)(iv). The Youtz Appellants acknowledge this fact, stating that the "only appeal route provided" in the Seattle Municipal Code "is through a challenge to the adequacy[3] of the FEIS itself (SMC 25.05.680)." Youtz Response at 13. Accordingly, appealing a nonproject FEIS is the equivalent of appealing the nonproject action under SEPA. Because RCW 36.70A.070(2), .600(3), and .680(3) bar SEPA appeals of nonproject actions, they also bar appeals of nonproject FEISs.

To read those statutes any other way would defeat the legislature's goal of limiting all administrative and judicial SEPA appeals for nonproject proposals—like the One Seattle Proposal—that will increase housing, regardless of whether the SEPA appeal occurs prior to the City Council taking final action.

[3] This does not foreclose appeals to other tribunals. As a general matter, a nonproject action—together with the environmental determination—may be appealed to Growth Management Hearings Board after the agency makes its final decision on the action. RCW 36.70A.280(1)(a). But that option is not available here because of RCW 36.70A.070(2), .600(3), and .680(3).

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Appellants' interpretation would create an enormous loophole, undermining clear legislative intent by allowing parties to use SEPA appeals to obstruct or delay government action meant to increase housing.[4] As explained in the Motion, the statutory prohibitions are deliberately broad. The legislature recognized that more houses are needed to address Washington's housing crisis and that SEPA appeals—like those here—can obstruct or delay housing production. *See e.g.*, Laws of 2023, ch. 334; Laws of 2022, ch. 246. Therefore, the legislature has "clear[ly] . . . . decided to shield [from appeal] ordinances that increase residential building capacity." *City of Olympia v. W. Washington Growth Mgmt. Hearings Bd.*, 27 Wn. App. 2d 77, 85 (2023); *see also In re Belltown Livability Coalition*, HE File No. W-24-001, Order on Motion to Dismiss, at 2 (September 30, 2024) Appellants' interpretation conflicts with the clear purpose of RCW 36.70A.070(2), .600(3), and .680(3) to limit obstructions and delays of nonproject actions that increase housing capacity and production. The fact that Appellants' notices of appeal and their Responses focus on the impacts of residential upzoning underscores the need to dismiss their appeals.[5]

Second, the Youtz Appellants advance a corollary argument—that RCW 36.70A.070(2), .600(3), and .680(3) only bar SEPA appeals of *adopted* nonproject actions. *See* Youtz Response at 7-8. This argument fails for the reasons stated above. This is true even if the underlying nonproject action

[4] Here, the appeals will, at minimum, delay the City's proposed action to increase housing because the Council cannot act on One Seattle Proposal until the appeals are complete. SMC 23.76.062.D; SMC 25.05.070.

[5] The statutes' clear language requires full dismissal of the appeals. But if the Examiner declines to entirely dismiss the appeals under these statutes, the Examiner should at least dismiss appeal *issues* that are clearly shielded from appeal by those statutes. So, under RCW 36.70A.070(2), the Examiner should dismiss any issue, or bar any argument, that relates to the City's proposed increases to housing capacity, increases to housing affordability, and displacement mitigation to the extent those actions occur outside of critical areas and do not cause significant adverse impacts to fish habitat. Also, under RCW 36.70A.600, the Examiner should dismiss any issues, or bar any argument, that relates to the City's proposal to authorize fourplexes and sixplexes where they are not currently allowed. And under RCW 36.70A.680, the Examiner should dismiss any issues, or bar any argument, that relates to the City's proposal to allow two accessory dwelling units on residential lots in compliance with HB 1337. As a result, the scope of Appellants' appeals should be very narrow. (This convoluted process of dismissing certain issues under RCW 36.70A.070, .600, and .680 highlights the need to dismiss the appeals in their entirety.)

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has not been adopted yet. The Youtz Appellants' argument misinterprets the language of the appeal prohibitions. RCW 36.70A.070(2), RCW 36.70A.600(3), and applicable sections of RCW 43.21C.495 state that it is the "adoption of . . . nonproject actions" that is exempt from appeal. The "adoption of . . . nonproject actions" is much broader than *adopted* nonproject actions. The "adoption of" refers to the entire process of adopting the nonproject action, including preparing and issuing an FEIS. Similarly, RCW 36.70A.680(3) is very broad and includes "[a]ny action taken by a city . . . to comply with the requirements of this section . . . ."[6] Issuing an FEIS is a state required part of the action proposed to be taken by Seattle to comply with RCW 36.70A.680 and .681. It clearly falls under this language. To hold otherwise would contradict clear statutory language and legislative purpose.

Finally, the Youtz Appellants complain that the Department's interpretation of the SEPA appeal prohibitions would immunize "an inadequate, misleading, or incomplete EIS" from review. Youtz Response at 4. They claim this "contradicts SEPA's fundamental purpose: ensuring informed decision-making by requiring environmental review before adopting policies or plans with significant environmental impacts." *Id.* These complaints are misdirected and irrelevant. SEPA is a statutory creature. What the legislature giveth, it may taketh away—there is no constitutional right to an appeal under SEPA. Here, the legislature decided to prohibit SEPA appeals of government actions that increase housing. That is the legislature's prerogative. Appellants' appeals must be dismissed.

2. Appellants concede to all facts regarding the SEPA appeal prohibitions.

None of Appellants' Responses dispute that the One Seattle Proposal increases housing, increases affordability, and mitigates displacement consistent with RCW 36.70A.070(2). And no

[6] While SEPA has a specific definition of "action" the use of the term here is in the GMA context and is undefined. According to rules of statutory construction, the dictionary definition of action applies here. *Matter of Det. of J.N.*, 200 Wn. App. 279, 286 (2017) ("Where the legislature has not defined a term, we may look to dictionary definitions, as well as the statute's context, to determine the plain meaning of the term.")

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Appellant Response alleges that the Proposal falls within RCW 36.70A.070(2)'s exceptions for critical areas and fish habitat.[7] Appellants have now abandoned or waived their opportunity to do so. *See* HER 3.17(b) ("failure to respond to an issue raised in the motion shall constitute abandonment of that issue."); *Holder v. City of Vancouver*, 136 Wn. App. 104, 107 (2006). The Examiner must dismiss all appeals under RCW 36.70A.070(2) and RCW 43.21C.495(1).

Second, no Appellant disputes that the One Seattle Proposal will authorize fourplexes and sixplexes in zones where they are not currently allowed, in accordance with RCW 36.70A.600(1)(c) and (d). Thus, Appellants concede that issue, and the Examiner must dismiss the appeals under RCW 36.70A.600(3) and RCW 43.21C.495(1).

Third, no Appellant disputes that the Proposal is an action taken to comply with RCW 36.70A.680 and .681. Thus, Appellants concede that issue, and the Examiner must dismiss the appeals under RCW 36.70A.680(3) and RCW 43.21C.495(3).

RCW 36.70A.070, 36.70A.600, and 36.70A.680 are all jurisdictional in nature in the context of an administrative SEPA appeal, and these statutes do not allow for the pendency of an appeal that conflicts with any of these exemptions. For these reasons, the Examiner must dismiss all six appeals.

C. Appellants' arguments that the One Seattle Proposal significantly changed are based on a misunderstanding of the Proposal.

Appellants spend much of their respective Responses arguing that the Department allegedly expanded or significantly changed the One Seattle Proposal after the DEIS was issued. Friends of Madison Park ("FOMP") Response at 3; Cox Response at 4; Cary Response at 1–3; Youtz Response at 2–4, 10–12, 15. This is false, and Appellants' arguments based on this premise should be disregarded by the Examiner. Appellants misunderstand the difference between housing capacity and anticipated

[7] The FOMP Response mentions beach closures in the Madison Park neighborhood. FOMP Response at 2. However, FOMP does not argue that the One Seattle Proposal is within RCW 36.70A.070(2)'s exception.

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growth as well as the relationship between the various growth strategies in the action alternatives and the implementing development regulations—including the zoning maps.

Appellants state that the One Seattle Proposal changed from an anticipated growth of 120,000 housing units to 330,000 housing units after the DEIS comment period closed. However, 330,000 housing units is the total housing capacity based on methodology that follows the Washington Department of Commerce guidelines for buildable lands, not the anticipated growth within the 20-year planning horizon (2024–2044) or a housing goal. *See* Core Docs. at SEA000691. The FEIS shows the housing capacity for the Preferred and No Action Alternatives in tables. *Id.* at SEA000691–92. The Preferred Alternative's housing capacity table is as follows:

Exhibit 3.8-40. Proposed Zoning Compared to Needs by Income Band

Income Level (% AMI) & Special Housing Needs	Projected Housing Need (2019-2044)*	Zone Categories Serving These Needs**	Aggregated Housing Needs	Total Capacity	Discrete Capacity Surplus/Deficit	Cumulative Capacity Surplus
0 - 30%, PSH***	15,024	Zones with 50 to 85 ft. height limits	70,726	188,004	+117,278	+117,278
0 - 30%, Non-PSH	28,572					
> 30 - 50%	19,144					
> 50 - 80%	7,986					
> 80 - 100%	5,422	Zones with < 50 ft. height limits	11,572	2,459	-9,113	+108,165
> 100% - 120%	6,150					
> 120%	29,702	Zones with > 85 ft. height limits, Neighborhood Residential, Residential Small Lot, Lowrise 1 and 2, ADUs	29,702	140,470	+110,768	+218,933
Total	**112,000**		**112,000**	**330,933**	**+218,933**	**+218,933**

Notes: This exhibit is new since the Draft EIS.
*Projected housing needs reflect the period of 2019 through 2044.
**Housing capacity in Industrial zones, primarily limited to caretaker units, not included in affordability analysis.
***PSH = Permanent Supportive Housing. Source: City of Seattle 2024 Source: City of Seattle, 2024.

In contrast to the capacity estimate, the Department estimates the actual future growth over the 20-year planning horizon to be 120,000 units. *Id.* at SEA000693 ("The Preferred Alternative would increase

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total supply by 120,000 units."). The anticipated growth stayed the same from the DEIS to the FEIS, with the FEIS adding the Preferred Alternative:

Exhibit 3.8-41. Projected Net New Housing Units by Housing Type

	Alternative 1	Alternative 2	Alternative 3	Alternative 4	Alternative 5	Preferred
Stacked Housing						
Condominiums	2,261	2,977	3,730	3,127	3,626	3,322
Apartments	73,109	93,815	76,652	88,662	110,079	91,106
Attached and Detached Housing						
>2,000 sq. ft.	1,389	698	1,111	1,111	1,111	4,132
>1,200 – 2,000 sq. ft.	648	533	4,260	1,578	1,128	14,766
≤1,200 sq. ft.	2,593	1,977	14,247	5,522	4,056	6,675
Total Net New Housing	**80,000**	**100,000**	**100,000**	**100,000**	**120,000**	**120,000**

Note: Attached and detached housing refers primarily to unit types expected to be built in urban neighborhood areas. These include detached homes, attached, or detached accessory dwelling units, townhomes, or other low- to moderate-density formats that may be created through unit lot subdivision. All of these units could be sold separately or as condominiums to support homeownership opportunities. The Preferred Alternative was added to this exhibit since the Draft EIS—no edits were made to Alternatives 1–5.
Sources: City of Seattle, 2024; BERK, 2024.

Id. at SEA000693.

Using the housing capacity number for the FEIS would create issues in the analysis because it is not an estimate of growth within the 20-year planning horizon. Instead, it is more accurate to use the anticipated growth number to better assess the impacts of the One Seattle Proposal.

Also tied into this misunderstanding is the relationship between the action alternatives' growth strategies studied in the DEIS and the implementing development regulations, including the zoning maps. Development regulations implement the comprehensive plan, including its proposed land use map and corresponding growth strategy. RCW 36.70A.040(3); WAC 365-196-800(1). Here the zoning maps implement the Preferred Alternative's growth strategy and are within the scope of the DEIS and FEIS's analysis of the action alternatives. The DEIS included four action alternatives that studied a variety of potential upzones through four growth strategies, and the FEIS analyzed the same four action alternatives as well as a Preferred Alternative. Each action alternative's growth strategy was narratively described as

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well as accompanied by a map. Core Docs. at SEA000046–52. Alternatives 2 and 5 show neighborhood centers in both Madison Park and Mt. Baker. *Id.* at SEA000046, 49. Alternatives 4 and 5 show the corridors of upzoning that Appellants are concerned about. *Id.* at SEA000048–49.

The zoning maps released after the DEIS implement the Preferred Alternative's growth strategy, which is within the scope of the other action alternatives. The Future Land Use Map in the One Seattle Plan shows the place types the zoning must implement. *Id.* at SEA002890. Each place type has polices detailing the various uses and expected heights of buildings. *Id.* at SEA002892–2900. Neighborhood centers, for example, allow a variety of residential and nonresidential uses and the implementing zoning should allow "buildings of 3 to 6 stories." *Id.* at SEA002896. The zoning maps show what the parcel level zoning would be if the Council adopts the Preferred Alternative and proposed development regulations. *See e.g.*, *id.* at SEA003475–76 (detailed zoning maps for Madison Park and Mt. Baker neighborhood centers). They do not amend the growth strategy or significantly change what was analyzed in the DEIS. Thus, Appellants' claims that the One Seattle Proposal was significantly changed necessitating a revision to the FEIS or a Supplemental EIS is based on either a misunderstanding or a mischaracterization about the One Seattle Proposal and should be disregarded by the Examiner.

D. In the alternative, all but Godfrey's appeal should be dismissed due to lack of standing.

1. Appellants concede they did not comment on the DEIS and fail to distinguish the administrative decisions supporting dismissal.

All Appellants, except Godfrey and "additional appellant" FORC, concede that they did not comment on the DEIS. Further, none of the Appellants distinguish the caselaw and administrative decisions cited by the Department in support of dismissal for failure to comment. Instead, Appellants advance irrelevant and false arguments that there was a perceived lack of individual notice to justify their nonparticipation and that alleged changes in the One Seattle Proposal negate the requirement to comment. Their arguments fail.

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SMC 25.05.545.B and WAC 197-11-545(2) both clearly state that a lack of comment is a lack of objection to the environmental analysis, if the provisions of SMC 25.05.510 or WAC 197-11-510 are met. All Appellants, except Godfrey and FORC, admit they did not comment on the DEIS.[8] Appellants do not provide any evidence or other potential facts showing the Department did not meet the notice provisions of SMC 25.05.510 or WAC 197-11-510.

Appellant FOMP argues that the Department should have provided individualized notice or at least direct notice to FOMP.[9] FOMP Response at 3. There is no legal requirement for the Department to individually notify every resident of Seattle when issuing a DEIS for a comprehensive plan update. Additionally, nothing legally requires the Department to track down each neighborhood group and provide individual notice to them. FOMP's argument that the Department did not provide individualized notice is irrelevant. The Department met the legally required notice provisions of SMC 25.05.545.B and WAC 197-11-545(2).

The Youtz Appellants' argument focuses on the difference in language between SMC 25.05.545.A and .B. However, their argument does not address the Shoreline Hearings Board, the Growth Management Hearings Board, and the Pollution Control Hearings Board decisions cited by the Department that apply the equivalent language in WAC 197-11-545(2) to bar appeals when parties fail to comment.

The Youtz Appellants' attempt to distinguish *In re Friends of Cheasty,* Seattle Hearing

[8] FOMP states it contacted the Department about the One Seattle Proposal but does not claim to have commented on the DEIS. FOMP Response at 3–4. "Comments about a project made outside the context of the SEPA determination process cannot be used to meet the exhaustion of administrative remedies requirement in WAC 197-11-545(2)." *Snohomish County Farm Bureau, et al. v. State of Washington Department of Transportation, et al.*, PCHB Case Nos. 10-124, 10-135, 10-138, Order Granting Partial Summary Judgment on Jurisdictional Issues (Sept. 21, 2011). The Cox Appellants did not directly contest that they failed to comment on the DEIS. Instead, they allege they contacted Department staff and City Council staff, but they do not specify when or how that occurred. Cox Response at 2.

[9] FOMP also admitted that members of the group had knowledge of the Draft One Seattle Plan and DEIS as early as April 2024 and thus had time to comment prior to the deadline of May 6.

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Examiner, File No. W-23-002, Order on Motion to Dismiss, at 2 (July 24, 2023) is based on an incorrect understanding of the One Seattle Proposal. As explained in Section C above, the Department did not significantly change or amend the Proposal after issuance of the DEIS.[10] Just like in *Cheasty,* Youtz and other Appellants had the information they needed to comment, yet they chose not to. *In re Citizens for Livability in Ballard,* Seattle Hearing Examiner, File No. W-16-003, Order on Motion to Dismiss (July 29, 2016) is irrelevant to this appeal because the Examiner found that a member of the appealing organization had in fact commented on the DEIS.

The Department acknowledges that the Examiner has been inconsistent in dismissing appeals for lack of comment. *In re Smart Growth Seattle,* Seattle Hearing Examiner, File No. W-14-001, Order on Motion to Dismiss (Sept. 2, 2014) is inconsistent with the more recent *In re Friends of Cheasty*, Seattle Hearing Examiner, File No. W-23-002, Order on Motion to Dismiss, at 2 (July 24, 2023) and with previous Examiner decisions, such as regarding a master use permit from 1991. *See In re Smart Growth Seattle,* at 3 (admitting that the Examiner has previously dismissed a challenge to an EIS based on lack of comment). However, the Examiner's previous inconsistency should not determine this case.

The purpose of public comment is to provide the lead agency an opportunity to learn of, respond to, and, where needed, address outstanding issues. Commenting on a DEIS is a focal point of the SEPA process because it helps inform the final analysis. WAC 197-11-500(4). Comments help a lead agency, in this case the Department, to correct errors, add mitigation, and improve the analysis in the FEIS. *See e.g.* SMC 25.05.560.A (possible responses to comments include modifying the alternatives, supplementing or improving the analysis, or making factual corrections); *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife,* 198 Wn. 2d 846, 853 (2022) (agency imposed seven additional

[10] The Cary Appellants also allege that publication of "zoning maps in October 2024" is the reason comment was not required on the DEIS. Cary Response at 1–2.

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mitigation measures to the issued steelhead permit in response to comments). When an appellant fails to comment, the lead agency is left without an opportunity to address an alleged deficiency or error prior to issuance of the FEIS, akin to a failure to exhaust administrative remedies. *Spokane Rock Products, Inc. et al. v. Spokane County Air Pollution Control Authority, et al.* PCHB No. 05-127, Order Granting Motion for Summary Judgment and Denying Petition for Reconsideration (Feb. 13, 2006) ("By saving their objections until the unfavorable action . . . the Reeses . . . deprived the decision maker . . . of any opportunity to review potential environmental concerns of the citizens or consider environmental consequences of the project before it was underway."). Allowing appeal without comment incentivizes an appellant who disagrees with the underlying action to find an alleged error in the DEIS, deliberately not comment, then appeal to delay the final action.

2. FORC's failure to appeal is more than a "technicality" and allowing FORC to remain in the appeal would prejudice the Department.

FORC failed to follow HER 5.01(d) and should be dismissed pursuant to HER 5.01(a). The only reason given for FORC's failure to properly file an appeal is that it did not have counsel representing it. Youtz Response at 9; Johnson Decl. at 6–7, ¶12. This is not a valid reason. Every other Appellant in this case filed a notice of appeal that complied with HER 5.01(d) without representation by legal counsel.[11] The Rules require appellants to file a notice of appeal that meets specific requirements for a reason. Failure to submit a notice of appeal prejudices the Department. Instead of six appeals, the Department essentially has to defend against seven, but without the benefit of a notice of appeal to guide and limit the issues or establish the interests of the appellants. Holding FORC to the same standard as every other Appellant is not a "technicality," nor is it "petty," as the Youtz Appellants allege. *See* Youtz Response at 4, 10. Rather, it ensures fairness to all other Appellants and the

[11] Appellant Godfrey obtained representation after the notice of appeal was filed.

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Department, and it ensures administrative efficiency.

Appellants' argument that FORC's inclusion in the list of additional appellants meets HER 5.01(d)(2)'s requirement is meritless. While true that the notice of appeal states that FORC "[j]oins in objections 1 and 2 as also applicable to the Ravenna-Cowen North National Historic District," it does provide any information about FORC or its members' interests. Johnson's Declaration, filed concurrently with the Youtz Response, provides the details that were missing in the notice of appeal to meet HER 5.01(d)(2)—notably the purpose of the organization, its members, and its specific interest in the appeal. Johnson Decl. at 3, ¶4; 5–6, ¶¶ 8-12. The fact that FORC needed to submit this declaration shows that the original notice of appeal did not meet HER 5.01(d)(2). Importantly, complying with HER 5.01(d)(2) is also necessary to demonstrate a party's interest in a decision and goes to an appellant's standing to bring an administrative appeal.

Additionally, HER 5.01(d)(3)'s requirement that appellants state specific objections shapes the scope of the appeal. Without a statement of issues, the Department and the Examiner don't have clarity on what is being appealed and by whom. Unlike the other additional appellants listed in the notice of appeal, FORC is only joining for two issues. This shows that FORC is not fully aligned with the other members of the appeal and is, in practice, creating a seventh appeal of the FEIS. The Youtz Appellants claim there is no requirement for FORC to duplicate similar objections in a separate appeal. They are wrong. There is a clear requirement: HER 5.01. And its reasoning is, in part, to ensure the Department is on notice and has an opportunity to respond to appeal issues. FORC's take on the Youtz issues are unknown, and until Johnson's Declaration, its interests unstated.

Lastly, Appellants' argument effectively means that all residents of Seattle should be able to join as additional appellants in an appeal; this would lead to an absurd result. Following this argument, thousands of appellants from all across Seattle with different interests and reasons could join in some,

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or all, of a single appeal. Appeals to the Examiner are not class action lawsuits. The administrative process is purposefully limited to expediate decisions, and compliance with the Rules ensures fairness to all parties. The Examiner should dismiss FORC for lack of compliance with HER 5.01(d) pursuant to HER 5.01(a).

E. The Hearing Examiner must dismiss issues over which the Examiner lacks jurisdiction.

1. The Examiner lacks jurisdiction over alleged Growth Management Act claims.

The Cox, Cary, and Youtz Responses all argue that the Examiner hear their alleged GMA claims because they are tied to the adequacy of the EIS. This charade should be rejected by the Examiner. No Appellant cites to any legal basis for the Examiner's jurisdiction. All three responsive arguments fail.

The Youtz Appellants argue, without any legal citation, that the Examiner has jurisdiction to hear GMA claims. Youtz Response at 14. Appellants fail to identify any code provision that provides a basis for the Examiner to hear a GMA claim. As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc. v. Pierce County,* 148 Wn.2d 451, 471 (2003). The Examiner's jurisdiction is limited to matters arising under the City Code. SMC 3.02.115. The scope of the Examiner's review of SEPA issues concerns the following environmental determinations: "1) Determination of nonsignificance (DNSs); 2) adequacy of the Final EIS as filed in the SEPA Public Information Center." SMC 25.05.680.A.2.a. The Youtz Appellants identify no basis in code for the Examiner to adjudicate GMA claims because none exists.

In addition, the Cox and Cary Responses acknowledge that they have no intention "for the Examiner to rule that there have been violations of the GMA, electric vehicles, tree protection, and other related issues brought up by appellants, but that these laws should be a guide to understanding what an adequate FEIS should look like." Cox Response at 4; *see also* Cary Response at 2 ("Appellants'

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references to provisions of GMA create a list of subject appropriate for EIS consideration [*sic*] Appellants do not ask the Examiner to make any policy decisions on these subjects. Instead, Appellants ask the Examiner to determine whether the FEIS provides an adequate analysis of these subjects."). The Examiner's authority over an FEIS adequacy challenge is limited to compliance with SEPA. RCW 43.21C.075(1), (2); WAC 197-11-680; SMC 25.05.680. GMA compliance is not an element of the environment under SEPA and is not grounds to challenge FEIS adequacy. *See* SMC 25.05.444; WAC 197-11-444. None of Appellants identify any legal basis in code for the Examiner to hear claims over the GMA, electric vehicles, tree protection, and other related issues raised by Appellants. The claims that the FEIS violates the GMA must be dismissed.

2. Appellants provide no legal support showing the Examiner has jurisdiction over the electrical vehicle mandate.

The Cox Appellants state that the electric vehicle laws "should be a guide to understanding what an adequate FEIS should look like." Cox at 4. However, Appellants provide no code citation or authority granting the Examiner jurisdiction over Washington vehicle standards in an FEIS adequacy challenge. Rather, the code provides the Examiner jurisdiction over the adequacy of an FEIS, based on SEPA alone. The Examiner lacks jurisdiction over this claim related to an electric vehicle mandate, and it must be dismissed.

3. Appellant Godfrey abandoned her claim that City regulations should be more aligned with NOAA Guidelines, and the claim must therefore be dismissed.

The Department moved to dismiss Appellant Godfrey's claim that City regulations should be more aligned with NOAA guidelines. Godfrey does not address this in her Response. Thus, Godfrey has abandoned this claim. HER 3.17(b); *Holder*, 136 Wn. App. at 107. The Examiner lacks jurisdiction to evaluate whether the City's tree protection regulations—or any regulations—comport with NOAA Guidelines. This objection should be dismissed.

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4. Claims regarding enforcement of private restrictive covenants, interference with contractual rights, or alleged takings must be dismissed.

The Department moved to dismiss claims regarding enforcement of private restrictive covenants, interference with contractual rights, or alleged takings. Motion at 7–8.[12] As noted in the Motion, the FEIS acknowledges that the "City is not responsible for enforcement or mapping preexisting private covenants, easements, or deed restrictions; however, the City is aware that some preexisting private covenants, easements, CC&Rs, and other deed restrictions may prevent developing to the maximum density allowed by proposed zoning controls even if not included in the various maps, Comprehensive Plan, or development regulations." Core Docs. at SEA001170.

Rather than providing a code provision granting the Examiner jurisdiction over private covenant issues, the Youtz Appellants now seem to argue the restrictive covenant issue relates to projected housing units and placement, noting that "the October 2024 plan assumes that five-story buildings and other multiple housing units can be built throughout [Mt. Baker]. That means . . . housing must be placed into other areas, but this is not recognized by any study done under the FEIS." Youtz at 15. This issue was not mentioned in the Youtz notice of appeal and relies on a fundamental misunderstanding or mischaracterization of the One Seattle Proposal and FEIS analysis. *See* Section C above. This new argument, based on an unsupported hypothetical, fails to respond to the Department's argument, and fails to provide any basis for Examiner jurisdiction over the "October 2024 plan" or restrictive covenants. Appellants identify no basis in code that grants the Examiner jurisdiction over the scope of the Proposal. The claim fails. Moreover, no Appellants mention interference with contractual rights or alleged takings. These claims are abandoned as well. All three claims should be dismissed.

[12] Citing the Youtz appeal, Exhibit B at 6–7 (objection 5); *see also* Cary appeal at 2 (interest 1.F) ("City's disregard of deed covenants . . . . This amounts of interference with contractual rights, a taking of property without compensation and an inducement to developers to violate such covenants . . . .").

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5. Appellants' due process claims must be dismissed.

As explained in the Motion, the Examiner lacks jurisdiction over constitutional due process claims. Appellant FOMP, which alleged a due process issue in its notice of appeal, does not address the issue in its Response. FOMP has abandoned the issue. HER 3.17(b).

While the Cox Response discusses the due process issue, it does not make any legal argument or cite any law that would grant the Examiner jurisdiction over constitutional due process claims. *See* Cox Response at 4. In fact, the Cox Appellants admit that the "issue may or may not be an issue for the Examiner." *Id.* Instead, Appellants remarkably claim that "the City should take the 'win' that there are so few appellants, settle with appellants now, and move to adopting the One Seattle Plan." *Id.* That is not a basis for a legal claim. The due process claims must be dismissed.

6. The Examiner lacks jurisdiction over policy decisions and the scope of the One Seattle Proposal.

The Department moved to dismiss claims related to the One Seattle Proposal, the scope of the Proposal, and other claims regarding policy decisions. Motion at 23–24. The Youtz Appellants argue they have not made such a request, but their notice of appeal states otherwise. *See* Youtz appeal, Exhibit B at 8 ("a housing plan that does not look at closely at individual neighborhoods to determine what can and should be accomplished in those neighborhoods instead of simply declaring a cookie-cutter sitewide plan is unworkable and meaningless"). The Youtz Appellants argue that the Examiner should not "edit statements or objections we have in our appeal simply because they may also question whether a proposal in the plan makes sense or not." Youtz Response at 15; *see also* Godfrey Response at 1 (incorporating this Youtz argument without any additional citation or legal basis). The Youtz and Godfrey Appellants provide no code basis or other legal support for this argument.

It is well established that the Examiner does not have jurisdiction to evaluate policy choices such as the scope of the housing plan that Appellants take issues with. It is well recognized that the

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choice of proposals is a policy decision, not an environmental decision. *SWAP v. Okanogan County*, 66 Wn. App. 439, 445 (1992); *see also Citizens Alliance to Protect Our Wetlands v. Auburn*, 126 Wn.2d 356, 362 (1995) (finding that a court reviewing the adequacy of an EIS does not rule on the wisdom of a proposed development, but rather on whether the EIS gave the local decision-maker sufficient information about the environmental impacts of a proposal to make a reasoned decision.).

The FOMP, Cox, and Cary Appellants fail to respond to the Department's Motion on this point and, therefore, they have abandoned any claim related to policy choices. Discussion about policy choices should be directed to the City Council as part of legislative process.

7. Appellants attempt to challenge the adequacy of conditions or rezones lacked merit and must be dismissed.

The Department next moved to dismiss Appellants attempt to challenge the "adequacy of conditions" of the FEIS or "rezone." Motion at 24. Appellants failed to address this is their collective responses. These claims must therefore be dismissed. *See* HER 3.17(b).

8. Appellants concede that parking and economic values are not environmental elements under SEPA.

The Department moved to dismiss Appellants' claims that the FEIS failed to address impacts to parking or business or property values. Motion at 24–25. Appellants do not to address the Department's argument in their Responses. Thus, issues related to impacts to parking, businesses, and property values have been abandoned and must be dismissed. *See* HER 3.17(b).

F. Claims not asserted in the notices of appeal must be dismissed.

The Department moved to deny Appellant Jennifer Godfrey's Issue Clarification ("Clarification") because it raises new appeal issues in violation of HER 5.07 and SMC 25.05.680.A.2.b. Godfrey's Response provides no legal basis to allow new appeal issues to be added after the appeal deadline passed.

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The Examiner should reject the Clarification as an improper attempt to amend Godfrey's notice of appeal under HER 5.07 because it untimely adds appeal issues not identified in the notice of appeal. This would be consistent with other Examiner decisions.[13]

Godfrey's Response attempts to tie her Clarification to claims in her notice of appeal; however, her attempt fails. All of Godfrey's "clarifications," except A.1, try to expand her appeal issues. A.1 simply repeats the language in her notice of appeal so it is not a clarification at all. The Examiner should deny Godfrey's clarification in total: A.1 need not be clarified, and the remainder of her "clarifications" must be denied as untimely, previously unarticulated issues that she is attempting to now add. *See In re Seattle Parks and Recreation*, Seattle Hearing Examiner, File No. R-24-001, Order on Motion to Dismiss, at 2–4 (March 28, 2024).

In particular, the following clarifications must be denied because they add new appeal issues:

- Clarified A.2. Godfrey attempts to expand her original objection contained in her notice of appeal from "No plan to protect and retain trees… no plan to protect and retain the most powerful bio-remediators and bio retainers, large trees" to challenging the adequacy of the FEIS analysis of plants and trees. *See* Godfrey Response at 2.
- Clarified A.3. Godfrey attempts to convert her original objections in her notice of appeal from "impacts of increased stormwater from tree removals on SRKWs" to a challenge of the adequacy of the FEIS analysis on stormwater and the water qualify therefore, including

[13] As the Examiner observed in *Moehring*, HE File No. MUP-18-001, Order on Motion to Dismiss (March 15, 2018), at 3: "[A]ny issue not raised in the Notice of Appeal, may not be raised later in the hearing process." In *Moehring*, the Examiner rejected an appellant's "attempt[] to introduce new issues in his response [to a motion] that were not identified in the Notice of Appeal" and declared those issues "dismissed." *Id.* In another case, an appellant sought to expand the scope of one of its claims through an argument in a response to a motion to dismiss. *See Durslag*, HE File No. MUP-17-022, Order on Applicant's Motion to Dismiss (Aug. 21, 2017), at 3. The appellant asserted that its notice of appeal, which alleged only that a proposal failed to serve the public interest, also "involve[d] the question of whether the staff correctly determined that the public interest is served because the proposal 'creates the potential for additional housing opportunities within the City.'" *Id.* The Examiner rejected this attempt as well.

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pollution impacts on Lakes Washington and Union and Puget Sound, impact of that pollution on numerous species of anadromous fish and other lacustrine and marine fish and wildlife. *See* Godfrey Response at 2. There is no claim in her notice of appeal related to water pollution impacts on Lakes Union or Washington or an expansion beyond SRKWs to include anadromous fish and other lacustrine and marine fish and wildlife.

- Clarified A.4. Godfrey's claim that the "FEIS contains many inaccuracies including incorrectly assessing Elliott Bay Water Quality, identify ESA listed species and states it's not feasible to maintain past species population" cannot be expanded to a claim that the FEIS failed to "identify and mitigate the probable significant adverse impact of proposed development regulations including zoning, on the natural and built environment due to the likely reduction in the quantity and quality of the City's' urban forest, impacts on stormwater quantity and quality (Pollution)." *See* Godfrey's Response at 2. Such an expansion of appeal issues would eviscerate the Hearing Examiner Rules that require identification of appeal issues with specificity.
- Godfrey's attempt to add "Phased SEPA Review" as an issue is improper. Phased SEPA review was never mentioned in Godfrey's original notice of appeal and cannot be added now. Her Response does not identify any language in the notice of appeal that alleges inadequacy on the basis of phased review.
- Godfrey's attempt to add new elements of the environment must also be denied. *See* Godfrey Response at 3. Adding new elements of the environment is clearly beyond the scope of her notice of appeal.

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G. Appellants' agree to consolidate issues and do not provide compelling argument that the issues should not be clarified.

Appellants with overlapping and repetitive issues indicate they are willing to coordinate among themselves to resolve those issues. Cox Response at 4–5; Youtz at 18, FN 6; Cary at 3. If not otherwise dismissed, the Department anticipates seeing written confirmation of which Appellant is handling which matter, and which issues will be consolidated or dismissed.

1. FOMP (W-25-001)

FOMP agrees that its objections are limited to Madison Park. FOMP Response at 7. FOMP does not respond to the Department's request to clarify that objection 2 is limited to the alleged failure to provide adequate notice; objection 7 is limited to an alleged lack of detail for water pollution, lack of infrastructure, and transit in the Madison Park neighborhood; and objection 8 be limited to the height, bulk, and scale impacts to the historic business district of Madison Park. Evidence and witness testimony by FOMP should be limited accordingly.

2. Cox (W-25-002)

The Cox Appellants agree with the City's request for clarification limiting appeal issues B.1–.6 to impacts that apply to Madison Park neighborhood and issues C.1–.3 to 42nd Ave E between East Blaine Street and East Garfield Street. Cox Response at 5. The Cox Appellants also agree to consolidate issues B.2 and B.3. *Id.* And they agree to limit issue B.4 to transit impacts and B.6 to an alleged lack of detail for water pollution, lack of infrastructure, and transit in Madison Park. *Id.* They did not object to limiting issue A.1 to the alleged failure to provide adequate notice or that his request for relief regarding equity impacts is outside the scope of his appeal. *Id.* Evidence and witness testimony by the Cox Appellants should be limited accordingly.

3. Youtz (W-25-004)

The Youtz Appellants attempt to avoid HER 5.01(d)(3)'s requirement to provide "specific

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objections" to the adequacy of the FEIS by now arguing a large expansion of their objections. Except for objections 1 and 4, the notice of appeal is limited to impacts within Mt. Baker. So much so that FORC felt the need to clarify it was joining the appeal issues "as also applicable to the Ravenna-Cowen North National Historic District." Youtz appeal, Exhibit A. Further, all the relevant objections provide specific references to conditions in the Mt. Baker neighborhood and do not mention any other areas of Seattle with alleged undisclosed impacts. Appellants cannot expand their appeal to unreferenced alleged potential impacts across Seattle. That is prejudicial to the Department and does not allow the Department the notice required to defend against claims.

For objection 2, the Department requested clarification that the objection be limited to the specific issue alleged in the appeal, i.e., the potential contamination of the individual sites and debris/material in the historic homes. Now the Youtz Appellants claim that the issue is broader because their appeal included two partial phrases in the context of describing the proposal. Youtz Response at 16. The second highlighted phrase "[i]n addition to the adverse impact of removing historical and desirable homes from the neighborhood, the environmental issues are significant" supports the Department's position. The significant environmental issues Appellants are referencing are those they claim are "ignored" by the EIS: "[t]he FEIS ignores the environmental impact of that work [from demolition] when it involves older housing." Youtz appeal, Exhibit B at 3. This argument should be rejected by the Examiner.

The Youtz Appellants claim that objection 4 applies to mitigation efforts beyond the tree canopy. Youtz Response at 17. Yet they do not indicate which mitigation measures are being challenged. Without specific information on which mitigation measures are being challenged, the Department cannot prepare a defense. The Youtz Appellants should be limited to the mitigation measures discussed in the notice of appeal—those for tree canopy.

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4. Cary (W-25-005)

Like the Youtz Appellants, the Cary Appellants attempt to expand their appeal. HER 5.01(d)(3) requires that the notice of appeal provide "specific objections." This allows all parties notice and time to prepare in the short time given for administrative appeals. First, despite Cary's contention that title of his appeal "is an artifact of the form required for appeal," the title of the appeal is relevant to the content of the notice of appeal. Cary Response at Section 5.B. The other Appellants in this case do not have the same limiting title. Second, it is unclear whether the Cary Appellants' list of damages under section 1 of the notice of appeal is intended to also be a list of objections. Cary Notice of Appeal at 1-2. However, given Mr. Cary's statements in the prehearing conference that their appeal has over 20 issues, the Department is assuming they are. Those damages are specifically limited to the Mt. Baker area. Like the Youtz notice of appeal, no other area of Seattle is discussed. *Id.* at 1-3. The Examiner should disregard any evidence or witness testimony presented by the Cary Appellants about alleged impacts outside of the Mt. Baker neighborhood.

5. Godfrey (W-25-006)

Godfrey did not contest the Department's request to identify the specific "guidance and direction from agencies with expertise" as well as goals and policies in the One Seattle Plan. If Godfrey's Clarification is not rejected by the Examiner, the Department expects Godfrey to provide those clarifications.

H. Appellants may not add new issues to their notice of appeal via their Responses.

FOMP attempted to add a new appeal issue, that the One Seattle Proposal was significantly changed in October 2024 to add additional housing units. This issue was not included in its notice of appeal. Appeal issues are limited to the "specific objections" in the notice of appeal. HER 5.01(d)(3). A notice of appeal cannot be amended after the appeal deadline by expanding the scope of the identified

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issues. HER 5.07; SMC 25.05.680.A.2.b. The deadline for appeal has passed and FOMP is prevented from adding new issues to its notice of appeal in its response.

I. Hawthorne Hills Community Club's appeal should be dismissed for failure to respond to the Motion to Dismiss.

"Failure of a party to file a timely response may be considered as evidence of that party's consent to the motion . . . ." HER 3.17(b). Hawthorne Hills Community Club's appeal (W-25-003) should be dismissed because Appellant failed file a response to the Motion.

III. CONCLUSION

For the reasons stated in the Motion and in this Reply—none of which Appellants have successfully disputed—all appeals must be dismissed under the statutes that prohibit appeals of nonproject proposals that increase housing. In the alternative, all Appellants who failed to submit comments on the DEIS must be dismissed for failure to comment, and FORC must be dismissed for failing to properly appeal. If any appeals remain, numerous appeal issues must be dismissed, and Godfrey's Clarification must be rejected.

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DATED this March 26, 2025.

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CERTIFICATE OF SERVICE

I certify that on March 26, 2025, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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Dated this March 26, 2025.

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