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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:

WASHINGTON COMMUNITY ACTION
NETWORK, et al.

Of a decision by the Director of the Department
of Planning and Development

File No. MUP 15-010-MUP 15-015

DPD # 3012953

**RESPONDENTS' JOINT MOTION TO
DISMISS NON-SEPA ISSUES AND
APPELLANT WASHINGTON CAN**

Applicant Swedish Medical Center ("Swedish") and property owner the Sabey Corporation ("Sabey") have proposed a new Major Institution Master Plan ("MIMP") for the Swedish Cherry Hill campus (the "Proposal"). On March 19, 2015, the City of Seattle Department of Planning and Development ("DPD" or "City") issued the Report of the Director of DPD containing recommendations on the MIMP, and a determination of adequacy of the Environmental Impact Statement ("EIS") under the State Environmental Policy Act ("SEPA"). The Appellants Washington Community Action Network ("Washington CAN"), 19th Avenue Block Watch/Squire Park Neighbors ("Block Watch"), Cherry Hill Community Council ("Cherry Hill"), Squire Park Community Council ("Squire Park"), Concerned Neighbors of Swedish Cherry Hill ("Concerned Neighbors"), and the Citizens Advisory Committee ("Citizens") (collectively, "Appellants") filed six separate appeals challenging the City's SEPA decision. Swedish, Sabey, and the City (collectively, "Respondents") jointly move to dismiss the following:

- Appellant Washington CAN for failure to demonstrate standing;

JOINT MOTION TO DISMISS - 1

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- The Washington CAN Appeal Statement for vagueness or failure to provide a more definite statement;
- Issues relating to the MIMP that are outside of the jurisdiction of the Hearing Examiner;
- Issues related to substantive SEPA; and
- Non-environmental issues.

I. STATEMENT OF FACTS

Swedish Cherry Hill is located on an approximately 13.33-acre site in the Squire Park neighborhood at 500 17th Avenue. The campus is located between E Cherry Street to the north, E Jefferson Street to the south, and 15th Avenue to the west. The eastern boundary is mid-block between 18th and 19th Avenues. *See* Analysis, Recommendation, and Determination of the Director of the Department of Planning and Development ("Director's Report").¹

Swedish's prior MIMP for the Cherry Hill campus was adopted by Ordinance #117238 in 1994, which expired in 2011. When the MIMP expired in 2011, four buildings totaling 434,002 square feet had been constructed. The new MIMP proposal is intended to replace the expired 1994 MIMP. The goal of the MIMP is to balance Swedish Cherry Hill's programmatic need to grow with the need to protect the livability and vitality of adjacent neighborhoods. In accordance with the underlying bargain of the Major Institutions Code, the MIMP proposes to prevent outward expansion and maintain the current MIO boundaries in exchange for more development capacity than would otherwise be allowed by the underlying zoning. The MIMP provides increased heights in four areas of the campus and decreases the heights in three areas of the Central Campus, as described in the MIMP and the Director's Report. The planned uses

¹ The Director's Report is 118 pages long and already part of the Hearing Examiner's file. It is also available at the City's website, at http://www.seattle.gov/dpd/LUIB/AttachmentProject3012953ID63803012953%20Swedish%20CH_MIMP_Final_Dir_Rpt.pdf. In the interest of conserving resources, Respondents do not attach it to this brief. Respondents will be happy to provide an additional copy of the Director's Report if necessary.

1 include hospital beds, clinic, research, education, long-term care, parking, lab, medical offices,
2 and other institutional uses supporting Swedish Cherry Hill's campus functions. *Id.*

3 Swedish submitted the formal Notice of Intent to prepare a new Master Plan to DPD on
4 November 11, 2011. Since that time, Swedish and Sabey have engaged with the City and the
5 community on the Master Plan process. In 2012, Swedish Cherry Hill began to work with the
6 Department of Neighborhoods ("DON") to assist with the formation of a Citizens Advisory
7 Committee ("CAC"), which met regularly throughout the planning process. *Id.*

8 Swedish submitted a Concept Plan in February 2013. DPD then solicited public input
9 during the EIS scoping period from March to April 2013, and held a public scoping meeting on
10 March 21, 2013. Upon accepting public comment, DPD prepared a Scoping Document dated
11 June 2013 and revised August 2013. *Id.*

12 Swedish submitted a Preliminary Draft Master Plan in November 2013, and a revised
13 Preliminary Draft Master Plan was submitted February 2014. It subsequently submitted its
14 Draft Master Plan in May 2014. DPD published a Notice of Availability of the Draft EIS, Draft
15 Master Plan and Public Hearing on May 22, 2014. A joint public hearing on the Draft EIS and
16 Draft Master Plan was held on June 12, 2014. DPD received written comments during the public
17 review of the Draft EIS from May 22 through July 6, 2014 (45 days) and court reporters
18 transcribed comments from the public hearing on June 12, 2014. On July 3, 2014, Washington
19 CAN submitted a letter commenting on this draft Master Plan and DEIS. Based upon comments
20 received by the City, the CAC, Washington CAN, and the community, Swedish revised its
21 MIMP to eliminate previously proposed alternatives and to include a new Alternative 12.
22 Swedish submitted its Final MIMP on December 11, 2014 and DPD updated its FEIS. DPD
23 published a Notice of Availability of the Final EIS and Final MIMP on the same day. *Id.*

24 The Director of DPD issued the Director's Report on the MIMP and a Final EIS on
25 March 19, 2015. The Director's Report found that the FEIS adequately analyzed the
26 environmental impacts of the MIMP.

1 On April 2, 2015, six SEPA appeals were filed. The Hearing Examiner consolidated the
2 appeals into this matter per SMC 23.76.022.A. The Hearing Examiner scheduled a SEPA appeal
3 hearing date to coincide with the MIMP public hearing for the week of July 13, 2015. In its
4 Prehearing Order, the Hearing Examiner determined that the public hearing for the MIMP will
5 be held first, followed by the SEPA appeal. Although the hearing on the merits of the MIMP and
6 the SEPA appeals will be heard in a consolidated hearing, they are separate issues and appellants
7 are only "parties" to the SEPA appeals.

8 The substance of the Washington CAN appeal statement depended entirely on its July 3,
9 2014 letter that commented on the draft MIMP and DEIS. At the pre-hearing conference, the
10 Hearing Examiner granted Respondents' motion for a more definite statement regarding the
11 Washington CAN appeal. Instead, Washington CAN sent a letter declining to submit a more
12 definite statement and inviting Respondents to identify issues in the July letter that exceeded the
13 scope of its issue statements.

14 This motion seeks to dismiss Washington CAN as a party for lack of standing, and
15 requests that the Examiner dismiss the appeal statement of Washington CAN as excessively
16 vague and for failure to comply with the Examiner's order to file a more definite statement. In
17 the alternative, this motion seeks to dismiss several issues in the appeals.

18 II. STATEMENT OF ISSUES

19 The issues raised by this motion are as follows:

- 20 1. Should the Hearing Examiner dismiss Washington CAN as a party because it lacks
21 standing and has failed to allege any immediate, concrete, specific, and non-economic
injury-in-fact as required by SEPA?
- 22 2. Should the Hearing Examiner dismiss the appeal statement filed by Washington CAN
23 because it does not address the FEIS before the Examiner, and because Washington CAN
disregarded the Examiner's order to file a more definite statement?
- 24 3. Should the Hearing Examiner dismiss Appellants' challenges to the merits of the MIMP
25 that are outside the jurisdiction of the Hearing Examiner in this SEPA appeal?
- 26 4. Should the Hearing Examiner dismiss Appellants' SEPA issues to the extent they depend
on substantive SEPA policies and authority that the City has not yet exercised?

- 1 5. Should the Hearing Examiner dismiss Appellants' SEPA issues to the extent they depend
2 on non-environmental considerations?

3 **III. EVIDENCE RELIED UPON**

4 This motion relies on the pleadings and papers on file in this matter.

5 **IV. LEGAL AUTHORITY AND ARGUMENT**

6 Washington CAN has not set forth specific facts supporting its conclusory allegation that
7 it has standing to appeal the SEPA determination. Without such facts, Washington CAN lacks
8 standing and should be dismissed as an appellant. In addition, Washington CAN's appeal
9 statement addresses the draft MIMP and DEIS, complaining of a draft analysis of impacts from a
10 proposal that has been replaced by a new, smaller preferred alternative. Because its appeal
11 statement is vague and Washington CAN did not comply with the Examiner's order to provide a
12 more definite statement, its appeal statement should be dismissed.

13 In the alternative, should the Examiner decline to dismiss Washington CAN,
14 Respondents respectfully request that the Examiner dismiss several of the issues asserted by
15 Washington CAN and the other Appellants because they either go to the merits of the MIMP,
16 raise substantive SEPA issues, or assert non-environmental issues. More detailed analysis is
17 provided in the sections that follow, but to summarize, the Examiner should dismiss the
18 following elements of each appeal statement for the reasons listed in parentheses:

19 **Concerned Neighbors of Swedish Cherry Hill**

- 20 • The ten sub-paragraphs of Issue A (MIMP merits or substantive SEPA).
21 • Issue B (MIMP merits)

22 **Squire Park Community Council**

- 23 • Issue B (MIMP merits)
24 • Issue C (MIMP merits)

25 **Citizens Advisory Committee**

- 26 • The five sub-paragraphs of Issue A (MIMP merits or substantive SEPA)

- Issue B (MIMP merits)

Cherry Hill Community Council

- All issues from p. 1 through the first three lines of p. 5 (MIMP merits)
- Arguments in the second full paragraph of p. 5 that go to the policy of locating a major institution outside an urban village (non-environmental issue);
- Issue of the effectiveness of mitigation measures listed in § 3.4.1.4 (substantive SEPA)

19th Avenue Block Watch²

- The following bullet points of Issue 2.A³ (MIMP merits):
 - Need for expansion;
 - Conflicts of interest;
 - Description of history of issues;
 - Discussion of Swedish actions vs. Swedish Cherry Hill;
 - Inclusion of “irrelevant facts and issues” (also, if intended to say the EIS includes more than it should, immaterial to an adequacy challenge); and
 - “Non-binding language”
- Issue 2.B (pages 2-7) (MIMP merits)
- Issue 2.C (substantive SEPA)
- Issue 2.D (MIMP merits)
- Issue 2.E (MIMP merits)

Washington CAN

Insofar as the Examiner declines to dismiss Washington CAN as a party, or its appeal statement

² Section 2.D of Block Watch’s Issues on Appeal reference an attached comment letter from Bob Cooper, dated January 5, 2015. Certain pages of the attachment are duplicated and others are missing. To the extent missing pages raise MIMP claims, the Respondents seek to dismiss those claims for lack of jurisdiction.

³ Block Watch’s claims in Section 2.A are vague and it is unclear whether these claims are referencing the EIS or the MIMP. To the extent Block Watch is raising MIMP claims, the Respondents seek to dismiss those claims for lack of jurisdiction.

1 for failing to comply with the Examiner's order to provide a more definite statement, the
2 following issues:

- 3 • Issue 4a, second sentence (MIMP merits and substantive SEPA)
- 4 • Issue 4b, second sentence: whether the FEIS "adequately mitigate[s]" impacts
5 (substantive SEPA)
- 6 • Issue 4b, second sentence: whether the FEIS includes adequate treatment of the
7 Human Development element of the Comprehensive Plan (non-environmental issue)
- 8 • Issue 4c (substantive SEPA)
- 9 • Issue 4d, second sentence, consistency with Human Development Element of
10 Comprehensive Plan (non-environmental issue)
- 11 • Attachment B (July 3, 2014 letter), to the extent it informs the enumerated issues
12 above (non-environmental issue, substantive SEPA)

13 **A. Washington CAN Failed to Assert Substantive Facts Establishing Standing to**
14 **Challenge the Director's Environmental Determination.**

15 Washington CAN lacks standing under SEPA. Courts apply a two-part test to determine
16 whether a petitioner has SEPA standing. *See, e.g., Trepanier v. City of Everett*, 64 Wn. App.
17 380, 382-83, 824 P.2d 524 (1992), *rev. denied*, 119 Wn.2d 1012 (1992). First, the interest that
18 the petitioner is seeking to protect must be arguably within the zone of interests protected by
19 SEPA, that is, environmental interests, as opposed to economic or social justice interests, for
20 example. *Id.* at 382. Second, the petitioner must allege an injury in fact—that the petitioner will
21 be "specifically and perceptibly harmed" by the proposed action. *Id.* at 382-83. "Further, when
22 a person alleges a threatened injury, as opposed to an existing injury, he or she must show an
23 immediate, concrete, and specific injury to him or herself. If the injury is merely conjectural or
24 hypothetical, there can be no standing." *Id.* at 383 (internal citations omitted); *accord In re*
25
26

1 *Appeal of Laurelhurst Community Club and Seattle Community Council Federation from a DNS*
2 *by DPD, Hearing Examiner File W-11-007, Order on Motions to Dismiss/Cross Motion for*
3 *Summary Judgment at 2 (2011).*

4 Washington CAN has not established that its interests are within the “zone of interests”
5 protected by SEPA, and has further not established that it will suffer an “injury-in-fact” as a
6 result of the implementation of the Swedish Cherry Hill MIMP. As a result, Washington CAN
7 lacks standing and the Hearing Examiner must dismiss its appeal.

8 The appeal statement submitted by Washington CAN failed to establish with any
9 substantive facts that it or any of its members has standing to challenge the Director’s
10 environmental determination. As described in Washington CAN’s Notice of Appeal, “[h]ealth
11 care access and affordability” and “medical debt and inadequate charity care policies of
12 hospitals” are central concerns to the organization. Washington CAN Notice of Appeal, p. 2.
13 Washington CAN claims its members are affected by the “failure to adequately analyze, disclose
14 and mitigate the human development impacts of the proposal.” *Id.*, at p. 3. However, these
15 interests and its alleged concerns regarding the human development impact of the proposal are
16 not environmental concerns that are within the “zone of interests” protected by SEPA. Indeed,
17 “SEPA is concerned with ‘broad questions of environmental impact, identification of
18 unavoidable adverse environmental effects, choices between long and short term environmental
19 uses, and identification of the commitment of environmental resources.’” *County Alliance v.*
20 *Snohomish Cy.*, 76 Wn. App. 44, 52-53, 882 P.2d 807 (1994) (holding that economic interests
21 are not within the zone of interests protected by SEPA) (quoting *DeWeese v. Port Townsend*, 39
22 Wn. App. 369, 375, 693 P.2d 726 (1984)). As discussed *infra*, the Human Development Element
23 of the Comprehensive Plan is not an environmental matter that requires consideration under
24 SEPA. Accordingly, this allegation is not within SEPA’s zone of interest and cannot form a
25 basis for standing under SEPA.
26

1 To the extent Washington CAN nominally alleges environmental concerns, it has failed
2 to allege or demonstrate injury-in-fact that satisfies standing requirements. In order for
3 Washington CAN to show injury-in-fact, it must present affirmative evidence through the
4 submittal of affidavits or other means that its members will be specifically and adversely affected
5 by the City's environmental determination. *Anderson v. Pierce County*, 86 Wn. App. 290, 299,
6 936 P.2d 432 (1997). A bald assertion of injury without supporting evidentiary facts is
7 insufficient to support standing. *CORE v. Olympia*, 33 Wn. App. 677, 682-83, 657 P.2d 790
8 (1983).

9 Here, the statements of standing given by Washington CAN allege potential impacts of
10 the Project, but do not make the connection of how any potential impacts would specifically,
11 concretely, and adversely injure the members of the organization. Washington CAN does not
12 provide any information regarding what members, if any, live near the Swedish Cherry Hill
13 campus and whether and how such members are directly and adversely impacted by
14 environmental impacts caused by the proposal. Its broad conclusions that members will be
15 affected by land use, aesthetic, and transportation impacts of the proposal are not supported by
16 facts; Appellant Washington CAN must show that any alleged direct impacts cause an
17 "immediate, concrete and specific" injury to the members of its organization. *Trepanier*, 64 Wn.
18 App. at 383. Washington CAN alleges that its "members drive frequently on the roads that will
19 be impacted by increased traffic to and from the development and they have direct views of the
20 development either while driving in the area or from their homes." Washington CAN Notice of
21 Appeal, p. 2. However, this unsupported and conclusory statement is insufficient to show the
22 requisite direct connection between the harm alleged and the injury to the members of
23 Washington CAN. Because Washington CAN has failed to state how these alleged impacts
24 cause direct harm to its members, the Examiner must dismiss the appeal by Appellant
25 Washington CAN.

1 **B. The Examiner Should Dismiss the Washington CAN Appeal for Vagueness and**
2 **Failure to Comply with the Examiner's Order for a More Definite Statement**

3 Washington CAN's appeal statement depends entirely on a letter it submitted nine
4 months before the appeal deadline, analyzing a draft environmental review of the probable
5 impacts of an outdated proposal that is no longer under consideration and is not before the
6 Hearing Examiner. The preferred alternative did not even exist at the time Washington CAN
7 submitted its comment letter. Indeed, the proposal evolved to address concerns of Washington
8 CAN and others, and is now dramatically different from the one Washington CAN's appeal
9 addresses. Washington CAN acknowledged this possibility when it wrote: "To the extent that
10 the project has changed, that the analysis in the DEIS was amended by the FEIS, and/or that the
11 conclusions in the FEIS differed from those in the DEIS, appellant will address those
12 discrepancies at the hearing." Washington CAN appeal at 4 (emphasis added). But this shirks
13 the appellant's duty to provide a clear statement of the issues being appealed *before* the hearing,
14 so the respondents have a meaningful opportunity to prepare. The Examiner ordered
15 Washington CAN to provide a more definite statement, but rather than take the opportunity to
16 cure the deficiency in its appeal statement, on the date it was to submit its more definite
17 statement, Washington CAN instead submitted a letter declining to do so.

18 Respondents are prejudiced in their preparation for the hearing by having to guess at
19 which elements of Washington CAN's appeal statement still apply to the current, updated MIMP
20 and the final EIS. It should not be the Respondents' burden to parse an appeal statement to
21 determine which portions of the appeal statement have been mooted by changes to the proposal
22 or otherwise addressed as the environmental review advanced to the FEIS. Washington CAN
23 will have to do that work as it prepares for the hearing, but has elected to delay and has thus
24 gained an unfair tactical advantage.

25 For over a century, Washington courts have allowed judges to dismiss pleadings for
26 failure to comply with an order to provide a more definite statement. *Washington Dredging &*

1 *Improvement Co. v. Cannel Coal Co.*, 45 Wash. 462, 463, 88 P. 836 (1907) ("Appellant declined
2 to amend its complaint, and, having elected to stand thereupon, a judgment of dismissal was
3 entered against it"). Washington CAN is a sophisticated organization with a membership
4 more than 40,000 strong, represented by a well-known and highly experienced plaintiffs' land
5 use firm. It has the resources and ability to comply with the Examiner's order but instead elected
6 to stand on an appeal statement the Examiner has already found insufficient. By analogy to CR
7 12(e),⁴ which sets for the rule in Superior Court for motions for a more definite statement, the
8 Examiner should now strike Washington CAN's appeal statement.

9 **C. Several of Appellants' Claims Fail to State a Claim Upon Which Relief may be**
10 **Granted or are Without Merit on Their Face.**

11 The following sections seek dismissal of specific issues in each of the Appellants' notices
12 of appeal.⁵ "An appeal may be dismissed without a hearing if the Hearing Examiner determines
13 that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is
14 without merit on its face, frivolous, or brought merely to secure delay." Hearing Examiner Rules
15 of Practice and Procedure, Rule 3.02. "Any party may request dismissal of all **or part** of an
16 appeal by motion." *Id.* (emphasis added).

17 The improper issues fall into three categories, addressed in order below. First, issues that
18 go to the merits of the MIMP, rather than the adequacy of the FEIS, are not properly before the
19 Examiner in a SEPA appeal. Second, the appeals raise two types of improper SEPA arguments.
20 Substantive SEPA issues—both the use of substantive policies and the question of whether
21 mitigation measures discussed in the FEIS would or would not mitigate impacts if the City
22 Council elects to adopt them as conditions on the final approval—are not relevant to whether or

23
24 ⁴ "If the motion [for a more definite statement] is granted and the order of the court is not obeyed . . . , the court
may strike the pleading to which the motion was directed or make such order as it deems just." CR 12(e).

25 ⁵ As to the appeal statement offered by Washington CAN, the following arguments are offered in the alternative.
26 That is, Respondents seek dismissal of the Washington CAN appeal statement and dismissal of Washington CAN as
party to this appeal, but if the Examiner is disinclined to grant that relief, Respondents respectfully request that the
Examiner dismiss the specific issues identified below for the reasons explained below.

1 not the FEIS adequately disclosed the environmental impacts of the alternatives analyzed (the
2 only SEPA question properly before the Examiner). Finally, contrary to the premise of several
3 issues, the FEIS cannot be ruled inadequate because it does not discuss non-environmental
4 policies, plans, or considerations, nor because the discussion is not as thorough as Appellants
5 would like.

6 **1. The Hearing Examiner Lacks Jurisdiction to Consider Appellants' Claims**
7 **Regarding the MIMP**

8 In each of the six appeals, Appellants raise issues that relate to the merits of the MIMP
9 and not to the adequacy of the EIS. Any claims challenging the Director's recommendations on
10 the MIMP are not proper under this SEPA appeal and are accordingly outside the jurisdiction of
11 the Hearing Examiner. As the Examiner noted, any member of the public is free to submit their
12 comments on the merits of the MIMP at the hearing. But they do not enjoy the status of
13 "appellant" at the MIMP hearing simply because they appealed the adequacy of the FEIS.

14 The Hearing Examiner's jurisdiction is limited. The Hearing Examiner "has only the
15 authority granted it by statute or ordinance." *HJS Development, Inc. v. Pierce County*, 148
16 Wn.2d 451, 471, 61 P.3d 1141 (2003). Decisions on MIMPs are quasi-judicial Type IV
17 Decisions. SMC 23.76.036. Under the prescribed process for a Type IV Decision, the Director
18 submits its recommendation to the Hearing Examiner along with its environmental
19 determination. Only the Director's determination that the FEIS is adequate is subject to appeal
20 to the Hearing Examiner. SMC 23.76.050.D. Indeed, for an appeal challenging the Director's
21 environmental determination that runs concurrently with the public hearing for the MIMP, the
22 Hearing Examiner may only consider issues relating to compliance with the procedures found in
23 SMC 23.76 and "the adequacy of the environmental documentation upon which the
24 environmental determination was made." SMC 23.76.052.D; HER 2.03; SMC 3.02.110;
25 *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636-639, 689 P.2d 1084 (1984). The
26 Director's recommendation to the City Council on the Swedish Medical Center MIMP is

1 accordingly not appealable to the Hearing Examiner and all claims related to the Director's
2 recommendation on the MIMP, listed above at pages 5-7 must be dismissed.

3 **2. The Examiner Should Dismiss Those SEPA Arguments That Improperly**
4 **Raise Substantive SEPA or Non-Environmental Issues**

5 The preceding section seeks dismissal of non-SEPA issues that go to the merits of the
6 MIMP itself rather than to any SEPA question. This section addresses SEPA issues,
7 distinguishing between procedural and substantive and requesting dismissal of those issues that
8 pertain only to substantive SEPA. It also seeks dismissal of claims that the EIS did not
9 adequately analyze impacts to subjects that are not elements of the natural and built environment
10 identified in SMC 25.05.444. This section begins with a discussion of the relevant SEPA
11 standards, then it applies those standards to each issue alleged in each appeal statement.

12 First, many of Appellants' arguments exceed the scope of permitted SEPA appeals by
13 attempting to improperly advance substantive SEPA claims as part of a procedural SEPA
14 challenge to EIS adequacy. The ultimate decision to select a course of action and impose
15 conditions to mitigate impacts is unrelated to the procedural question of whether the EIS
16 provides the decisionmaker with adequate information to make an informed decision. Because
17 the City has not yet made any substantive decisions, there are no substantive SEPA decisions to
18 appeal at this time.

19 The purpose of an EIS is to disclose and analyze impacts so the permitting authority can
20 make an informed decision. WAC 197-11-400(2); SMC 25.05.400.B; *see also, e.g., Citizens*
21 *Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).
22 This informational purpose does not require citation, discussion, or analysis of substantive SEPA
23 policies. *See* WAC 197-11-440(6)(a); SMC 25.05.440.E.1 (list of items required for inclusion in
24 EIS does not include substantive policies). The substantive policies, described in Part Seven of
25 the SEPA Rules (SMC 25.05.650-.680) may be used by future decision-makers when deciding
26 whether to impose mitigation pursuant to SMC 25.05.660, but do not form any part of the EIS

1 described in Part Four of the SEPA Rules (SMC 25.05.400-.460). Any future challenge to a
2 future decision of whether or how to exercise substantive SEPA authority will be analytically
3 and theoretically distinct from the current procedural question of whether the EIS adequately
4 discloses significant environmental impacts.

5 Although an EIS must discuss potential mitigation, SMC 25.05.400.B, an EIS is not
6 inadequate simply because a challenger does not believe that the mitigation measures would
7 actually succeed in mitigating impacts below a certain level.⁶ SEPA does not compel a particular
8 substantive result. *See, e.g., Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363,
9 371, 662 P.2d 816 (1983). When the City Council makes the final decision on the MIMP, the
10 Council will not be limited to the mitigation measures discussed in the EIS, nor will it be
11 required to adopt any particular mitigation measure discussed in the EIS. SMC 25.05.655.C.2
12 (“[M]itigation measures adopted need not be identical to those discussed in the environmental
13 document.”). For example, in *Residents Opposed to Kittitas Turbines v. State Energy Facility*
14 *Site Evaluation Council*, the permitting authority’s decision to exercise substantive SEPA
15 authority to impose a condition requiring larger setbacks than those analyzed in the FEIS did not
16 render the FEIS inadequate, even where the decision to impose the condition depended on
17 information not included in the FEIS. 165 Wn.2d 275, 313, 197 P.3d 1153 (2008). In short, to
18 the extent the appeals purport to raise substantive SEPA issues, including the efficacy of
19 potential mitigation measures, those challenges should be dismissed.

20 Second, while an EIS may discuss non-environmental impacts, it is not required to do so
21 and the adequacy of the EIS does not depend on the thoroughness of such optional discussion.
22 The SEPA Rules expressly give the SEPA Responsible Official the option of including such
23 discussion while noting that there is no requirement:

24
25 ⁶ Indeed, whether impacts will remain “significant” after they are mitigated is irrelevant to any SEPA issue in either
26 this appeal or in a future appeal of the underlying action: significance is the standard for when an EIS must be
prepared, it is not a standard for EIS adequacy or for the underlying action.

1 SEPA contemplates that the general welfare, social, economic, and other
2 requirements and essential considerations of state policy will be taken into
3 account in weighing and balancing alternatives and in making final decisions.
4 However, the environmental impact statement is not required to evaluate and
5 document all of the possible effects and considerations of a decision or to contain
the balancing judgments that must ultimately be made by the decision makers.
Rather, an environmental impact statement analyzes *environmental* impacts and
must be used by agency decision makers, along with other relevant considerations
or documents, in making final decisions on a proposal.

6 WAC 197-11-448(1). Thus, an EIS may discuss, for example, non-environmental plans such as
7 the Health and Human Development Element of a comprehensive plan, but it is not required to.
8 Because such discussion is not required, an EIS cannot be deemed inadequate simply because a
9 challenger later argues that the proposed action does not comport with the policies of the non-
10 environmental plan. Indeed, the SEPA Rules specifically address social policy issues as
11 exemplars of the kind of analyses that need not be included in an EIS:

12 Examples of information that are not required to be discussed in an EIS are:
13 Methods of financing proposals, economic competition, profits and personal
14 income and wages, and social policy analysis such as fiscal and welfare policies
and nonconstruction aspects of education and communications.

15 SMC 25.05.448.C (emphasis added). Furthermore, the SEPA Rules expressly prohibit review of
16 the adequacy of any such optional analysis as a basis for determining whether an EIS is
17 adequate. SMC 25.05.440.G ("The decision whether to include such information and the
18 adequacy of any such additional analysis shall not be used in determining whether an EIS meets
19 the requirements of SEPA."). The Hearing Examiner recently dismissed such a challenge based
20 upon this prohibition. *In re International Community Health Services and Capitol Hill Housing*,
21 Hearing Examiner Files W-15-002 and W-15-003, Order on Motion to Dismiss (March 18,
22 2015). Accordingly, the Examiner should dismiss all impact analysis claims that do not relate to
23 the elements of the natural and built environment identified in SMC 25.05.444.

24 With the foregoing analysis in mind, the remainder of this brief addresses the SEPA
25 appeals issues raised in each Petitioner's appeal statement and requests that the Examiner
26 dismiss the issues as follows.

1 **Washington CAN Appeal**

2 Paragraph 4 of the Washington CAN Appeal lists four issues on appeal, lettered a-d.
3 Insofar as the Examiner declines to dismiss Washington CAN's appeal statement for failing to
4 comply with the Examiner's order to provide a more definite statement, this brief addresses the
5 issues presented in order.

6 **Issue 4a:**

7 Issue 4a begins: "DPD erred when it determined that the FEIS adequately describes and
8 assesses the adverse impacts of the Master Plan." This appears to introduce a procedural appeal,
9 but as an issue statement, it is so vague that Respondents cannot meaningfully rebut it other than
10 to respond "no, it didn't." The letter Washington CAN submitted in support of this issue
11 provides comments on the *draft* EIS, which in turn reviewed an earlier version of the MIMP, so
12 it is unclear which (if any) of the issues discussed in the letter remain relevant to the FEIS. As
13 discussed above, Washington CAN's appeal should be dismissed, but in the alternative,
14 Respondents respectfully request that the Hearing Examiner again compel Washington CAN to
15 provide a more definite statement.

16 The second sentence of Issue 4a reads "DPD also erred when it determined that the
17 Master Plan has been adequately conditioned to mitigate identified adverse impacts." This either
18 raises a substantive SEPA issue or it raises a non-SEPA issue going to the merits of the MIMP.
19 In either case, it is not properly before the Examiner on a procedural SEPA appeal. It also
20 confuses the nature of the actions DPD has taken. DPD has made no determination that the
21 MIMP has been adequately conditioned. On a Type IV Council Land Use Decision, only the
22 Council, informed by the Examiner's recommendation and the FEIS, exercises the City's
23 substantive SEPA authority to impose conditions designed to mitigate impacts. If Washington
24 CAN is dissatisfied with the Council's eventual action, it can appeal from the Council's decision.
25 But at this stage, there are no "conditions" to appeal.

26 **Issue 4b:**

1 The first sentence of Issue 4b reads “The FEIS issued by the Department of Planning and
2 Development for the Swedish Medical Center Cherry Hill Campus Master Plan, Project No.
3 3012953 was inadequate.” This adds no relevant new information to the first sentence of Issue

4 4a. The second sentence reads:

5 Specifically, the FEIS failed to adequately disclose, analyze and mitigate the
6 significant adverse impacts related to land use, the proposal’s relationship to
7 plans/policies/regulations, aesthetics (height, bulk, and scale), human
development, and traffic/transportation.

8 This raises two procedural challenges that are properly before the Examiner—whether the FEIS
9 adequately discloses and analyzes environmental impacts. The question of whether those
10 impacts are adequately *mitigated* is substantive and should be dismissed.

11 This sentence also suggests that the FEIS inadequately analyzes the proposal’s
12 relationship with various “plans/policies/regulations.” Only policies, plans, and regulations
13 relevant to those elements of the environment identified in the scope of the Determination of
14 Significance (“DS”) are potentially relevant to a procedural SEPA appeal. The Human
15 Development Element of the Comprehensive Plan, for example, is not an element of the
16 environment and is not properly considered on a SEPA appeal. Non-environmental issues may
17 be discussed in the EIS, but the EIS is not required to discuss them and cannot be ruled
18 inadequate if an optional discussion does not address a non-environmental topic to a challenger’s
19 satisfaction. SMC 25.05.440.G.

20 While the City has a Comprehensive Plan, that does not mean that everything in it is
21 relevant to a SEPA appeal. Indeed, the City’s SEPA Rules direct the SEPA Responsible
22 Official, “when appropriate”, to include a summary of existing plans and discussion of “how the
23 proposal is consistent *and inconsistent* with them.” SMC 25.05.440(E)(4)(a) (emphasis added).
24 The notion that an EIS would be inadequate because the project is arguably inconsistent with
25 adopted plans is belied by the SEPA rule, which expressly anticipates the possibility of actual
26 inconsistency.

1 **Issue 4c**

2 This issue should be dismissed in its entirety. It reads:

3 The FEIS is inconsistent with and does not contain the scope of analysis required
4 by the City's SEPA policies in SMC 25.05.675 regarding land use, construction
impacts, height, bulk, and scale; land use; and traffic and transportation."

5 The Code section referenced, at SMC 25.05.675, contains the City's *substantive* SEPA policies.
6 They have no bearing on the adequacy of the FEIS. There is no requirement in SEPA to discuss
7 or even to cite substantive policies. *See* SMC 25.05.440.E (required elements of an EIS do not
8 include substantive SEPA policies). The purpose of the EIS is to inform the decisionmaker, and
9 the scope of the EIS is defined by the probable significant impacts identified in the DS, not by
10 the City's substantive SEPA policies. The substantive policies define the City's authority to
11 impose *conditions* on the action—here, Council approval of the MIMP. Issue 4c is untimely and
12 improper and should be dismissed.

13 **Issue 4d**

14 This issue contains some properly presented procedural arguments, but also alleges non-
15 environmental arguments:

16 The FEIS incorrectly concludes that the Master Plan is consistent with policies
17 and goals in the Comprehensive Plan. Specifically, the FEIS incorrectly
18 concludes that the Master Plan is consistent with certain goals in the Human
Development Element goals and policies, the Urban Villages Element goals and
policies, and the Land Use Element goals and policies in the Comprehensive Plan.

19 As discussed above, the Human Development Element is not an element of the environment and,
20 although it may be important to the Council's ultimate decision on the MIMP, is not properly
21 included in an appeal of EIS adequacy. *See* SMC 25.05.440.G ("The decision whether to include
22 such [non-environmental] information and the adequacy of any such additional analysis shall not
23 be used in determining whether an EIS meets the requirements of SEPA.").

24 **Squire Park Community Council**

25 This appeal statement does not implicate the arguments in this section, although, as
26 discussed above, Issues B and C go exclusively to the merits of the MIMP.

1 **CAC minority members**

2 Issue A properly states a procedural issue (i.e., "The EIS is not a complete and unbiased
3 document which analyzes alternatives that might avoid or mitigate the environmental impacts of
4 the actions proposed by the institution."). However, the five sub-paragraphs of Issue A either
5 state substantive SEPA issues or issues that go to the merits of the MIMP, neither of which are
6 appropriate for a procedural SEPA appeal, and they should be dismissed.

7 **Concerned Neighbors of Swedish Cherry Hill**

8 Issue A properly states a procedural issue. However, the ten sub-paragraphs of Issue A
9 either state substantive SEPA issues or issues that go to the merits of the MIMP, neither of which
10 are appropriate for a procedural SEPA appeal, and they should be dismissed.

11 **19th Avenue Block Watch/Squire Park Neighbors**

12 Issue C raises a substantive SEPA challenge that is unripe and not allowed in this forum
13 and should be dismissed.

14 Issue E raises no new issues and should be dismissed.

15 **Cherry Hill Community Council**

16 Of the issues raised regarding Section 3 of the EIS (beginning with the first full
17 paragraph of p. 5), the following raise substantive SEPA or MIMP merits issues and should be
18 dismissed:

- 19 1. Arguments regarding Section 3.4 disagreeing with policy of locating a major
20 institution outside an urban village;
21 2. Whether the mitigation measures listed in § 3.4.1.4 would actually reduce the impacts
22 below the level of significance is not a procedural challenge.

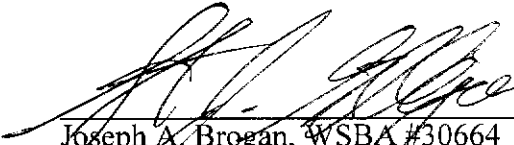
23 **V. CONCLUSION**

24 For all the reasons described above, Respondents respectfully request that the Examiner
25 dismiss the appeal of Washington CAN in its entirety, because it has not established standing
26 under SEPA and because it disregarded the Examiner's order to provide a more definite

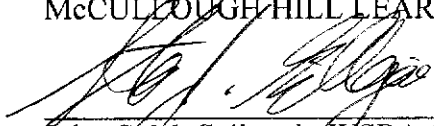
1 statement. In the alternative, the Examiner should dismiss those issues that (a) go exclusively to
2 the merits of the MIMP, (b) address the exercise of substantive SEPA authority, or (c) depend on
3 non-environmental considerations to establish the inadequacy of the FEIS.

4 DATED this 8th day of May, 2015.

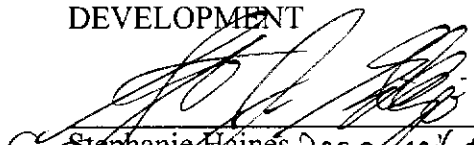
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