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HEARING EXAMINER

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE WASHINGTON

In the matter of the application of

SWEDISH MEDICAL CENTER  
CHERRY HILL

CF 311936

for approval of a Major Institution Master  
Plan for property located at 500 17<sup>th</sup>  
Avenue

FILE NOS.

MUP-15-010 (W)

MUP 15-011 (W)

MUP 15-012(W)

MUP 15-013(W)

MUP 15-014(W)

MUP 15-015(W)

In the matter of the appeals of:

WASHINGTON COMMUNITY  
ACTION NETWORK; 19<sup>TH</sup> AVE  
BLOCK WATCH; CHERRY HILL  
COMMUNITY COUNCIL; SQUIRE  
PARK COMMUNITY COUNCIL;  
PATRICK ANGUS, et al.; and  
CONCERNED NEIGHBORS OF  
SWEDISH CHERRY HILL

DPD # 3012953

WASHINGTON COMMUNITY  
ACTION NETWORK'S RESPONSE  
TO RESPONDENTS' JOINT MOTION  
TO DISMISS

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

I. INTRODUCTION

Swedish Medical Center, Sabey Corporation, and the City of Seattle Department of Planning and Development (altogether referred to as "respondents") have filed a motion to dismiss Washington Community Action Network's (Washington CAN) appeal that was filed

1 pursuant to SMC 25.05.680 and SMC 23.76.052(d) with the Hearing Examiner. Washington  
2 CAN filed an appeal of the Director of the Department of Planning and Development's (DPD)  
3 determination that the Final Environmental Impact Statement (FEIS) for the Swedish Cherry Hill  
4 Medical Center Major Institution Master Plan (MIMP) is adequate.

5 Washington CAN respectfully requests that the Hearing Examiner deny respondents'  
6 motion to dismiss. First, Washington CAN is significantly interested in and affected by the  
7 Swedish Cherry Hill MIMP and FEIS and the organization easily meets the requirements for  
8 standing to bring this SEPA appeal. Second, respondents' accusation that Washington CAN  
9 failed to follow an order of the Examiner to file a "more definite statement" is incorrect and  
10 unwarranted and their characterization of the statement of Washington CAN's issues on appeal as  
11 "vague" is unsupported and incorrect. Third, respondents' suggestion that Washington CAN  
12 cannot challenge issues (1) related to the proposal's consistency with the Human Development  
13 Element of the Comprehensive Plan or (2) related to the City's SEPA policies in its SEPA appeal  
14 is simply wrong. Those issues were analyzed and discussed in the FEIS and those issues are  
15 within the scope of an appeal of the adequacy of the FEIS.

## 16 II. STATEMENT OF FACTS

17 Swedish Cherry Hill Medical Center is proposing an expansion that would approximately  
18 double the size of its Cherry Hill campus in the City of Seattle. Declaration of Claudia M.  
19 Newman, Ex. A (FEIS at 3.7-39). Swedish proposes intensification of hospital/medical office  
20 uses on campus, more intensive use of existing buildings, and the modification of existing  
21 parking areas. *Id.* at 3.3-17.

1 The FEIS for the proposal considered three alternatives, Alternatives 8, 11, and 12, all of  
2 which propose significant changes in the height, bulk, and scale of the buildings on the campus.  
3 The traffic, land use, and aesthetic changes in the neighborhood will be massive.

4 Alternatives 11 and 12 analyzed by the FEIS would include the development of  
5 approximately 2.75 million gross square feet. *Id.* at 3.7-39. The build-out of Alternatives 11 and  
6 12 will increase trip generation of cars by 5,503 net new daily trips inbound and outbound from  
7 the proposal site. *Id.* at 3.7-42. Among other significant impacts, the 14<sup>th</sup> Avenue/E. Jefferson  
8 Street and the 16<sup>th</sup> Avenue/E. Cherry Street intersections would both operate at LOS F due to  
9 anticipated increases in traffic volumes from the proposal in future years. *Id.* at 3.7-43.

11 DPD issued an Analysis, Recommendation and Determination for the Swedish Medical  
12 Center Cherry Hill Major Institution Master Plan (MIMP) on March 19, 2015. The Notice of the  
13 Recommendation indicated that the DPD Director had determined that the "FEIS adequately  
14 described and assessed the adverse impacts of the Master Plan" and that "the Master Plan had  
15 been adequately conditioned to mitigate identified adverse impacts." Newman Dec., Ex. B. Six  
16 appeals of the Director of DPD's SEPA determination were filed with the City of Seattle Hearing  
17 Examiner at or around April 2, 2015, including an appeal filed by Washington CAN.

19 Swedish Medical Center, Sabey Corporation, and DPD filed a Joint Motion to Dismiss  
20 Non-SEPA Issues and Appellant Washington CAN on May 8, 2015. This response is filed to  
21 respond to that motion.

### 23 III. STATEMENT OF ISSUES

24 1. Whether Washington CAN is significantly interested in or affected by the Type IV  
25 Land Use Decision under consideration and, therefore, has standing pursuant to SMC 23.76.052  
26 to appeal the Director's procedural environmental determination.

2. Whether respondents' factual assertions regarding Washington CAN's Notice of Appeal and Washington CAN's response to the Examiner's pre-hearing order are false and whether their request for dismissal of the appeal on those false grounds is unwarranted and should be denied.

3. Whether Washington CAN should be allowed to challenge the FEIS analysis of the proposal's consistency with the Human Development Element of the Comprehensive Plan as part of its SEPA appeal because that analysis was required by scoping and because it is within the element of the environment, "relationship to existing land use plans," which is listed in WAC 197-11-444.

4. Whether the FEIS analysis, discussions, and conclusions regarding the City of Seattle's SEPA policies, mitigation, and adequacy of the project are appropriately included in a SEPA appeal and, therefore, should not be dismissed from the appeal.

#### IV. EVIDENCE RELIED UPON

This response relies upon the pleadings and papers that have already been filed with the Hearing Examiner in this matter and on the attached Declaration of Claudia M. Newman (May 15, 2015), Declaration of Peggy S. Cahill (May 15, 2015), Declaration of Dixie Mitchell (May 14, 2015), and Declaration of Chris Genese (May 14, 2015).

## V. LEGAL AUTHORITY AND ARGUMENT

### A. Washington CAN Has Standing to Bring its SEPA Appeal

Washington CAN has standing to file an appeal of the Director of DPD's determination regarding the Swedish Cherry Hill MIMP FEIS with the Hearing Examiner. Washington CAN and members of the organization are significantly interested in and affected by the decision to

1 approve or deny the Swedish Cherry Hill MIMP as well as the analysis and conclusions in the  
2 FEIS prepared for that decision.

3 The Seattle City Code sets forth the standing requirement for filing this appeal. The Code  
4 states:

5  
6 D. Appeal of Environmental Determination. Any person  
7 *significantly interested in or affected by the Type IV land use*  
8 *decision under consideration* may appeal the Director's procedural  
9 environmental determination . . .

10 SMC 23.76.052 (emphasis supplied). To have standing, this provision requires that a party be  
11 "significantly interested in" or "affected by" the land use decision for which the FEIS was  
12 prepared. It does not require that the person show "concrete and immediate harm," or that the  
13 person's issues presented be within the "zone of interest" of the State Environmental Policy Act  
14 (SEPA). See Joint Motion to Dismiss at 7 (arguing that these elements are required for standing).

15 Furthermore, to have standing, the code doesn't require that the appellant have an interest  
16 within the SEPA zone of interests, rather, the appellant must be "interested in the Type IV land  
17 use decision." SMC 23.76.052. In other words, any person significantly interested in the merits  
18 of the Swedish Cherry Hill MIMP decision has standing to appeal the procedural environmental  
19 determination made by DPD in conjunction with that decision.

20 In their Motion to Dismiss, respondents rely on a different legal standard for standing.  
21 They suggest that the legal standard for standing for judicial review in the State Superior Court  
22 applies to this administrative appeal.<sup>1</sup> To the contrary: the Seattle City Code dictates the  
23 standing requirements for an administrative appeal to the Hearing Examiner.

24  
25 <sup>1</sup> The Washington State Land Use Petition Act (LUPA), ch. 36.70C RCW, provides a four part test  
26 for standing. The test is set forth in the statute as follows:

1 Respondents contend that the appeal statement submitted by Washington CAN "failed to  
2 establish with any substantive facts that it or any of its members has standing to challenge the  
3 Director's environmental determination." Joint Motion to Dismiss at 8. The Hearing Examiner  
4 rules require that the Notice of Appeal contain "a *brief statement* as to how the appellant is  
5 significantly affected by or interested in the matter appealed." HE Rule 3.01 (emphasis  
6 supplied). Washington CAN met that requirement. Washington CAN's Notice of Appeal stated:

8 Washington CAN is significantly affected by and interested in the  
9 Swedish Medical Center Cherry Hill Campus Master Plan  
10 Proposals and in the significant adverse environmental impacts  
11 caused by that proposal. Members of Washington CAN live in the  
12 residentially zoned neighborhoods that are either adjacent to or near  
13 the proposed site, and they will be directly and adversely impacted  
14 by the land use, aesthetic (height, bulk, and scale), human  
15 development, and transportation impacts of the proposal. Those  
16 members drive frequently on the roads that will be impacted by  
17 increased traffic to and from the development and they have direct  
18 views of the development while either driving in the areas or from  
19 their homes.

20 Washington CAN and its members are significantly affected by and  
21 interested in the vision statement and the goals and policies of the

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22 A person is aggrieved or adversely affected within the meaning of this  
23 section only when all of the following conditions are present:

24 (a) The land use decision has prejudiced or is likely to prejudice  
25 that person;

26 (b) That person's asserted interests are among those that the local  
jurisdiction was required to consider when it made the land use decision;

(c) A judgment in favor of that person would substantially  
eliminate or redress the prejudice to that person caused or likely to be caused by  
the land use decision; and

(d) The petitioner has exhausted his or her administrative remedies  
to the extent required by law.

RCW 36.70C.060. These issues are relevant only for the question of whether Washington CAN has standing  
under the Land Use Petition Act to file an appeal in State Superior Court, not whether Washington CAN has standing  
to file an appeal before the City of Seattle Hearing Examiner.

1 Human Development Element of the City of Seattle  
2 Comprehensive Plan and, therefore, have an interest in the  
3 disclosure, analysis and mitigation related to those policies in the  
4 FEIS. For example, Washington CAN and its members seek to  
5 improve access to healthcare and are impacted by and interested in  
6 ensuring that Swedish strengthens its healthcare accessibility and  
7 affordability at the Cherry Hill campus as part of the expansion.  
8 The institution's lack of investment in local schools, lack of  
9 partnership with neighborhood groups to strengthen youth  
10 programs, and failure to adequately reach out to communities of  
11 color for its educational offerings are all issues that affect  
12 Washington CAN. Members of Washington CAN will be directly  
13 and adversely impacted by the responsible official's failure to  
14 adequately analyze, disclose and mitigate the human development  
15 impacts of the proposal.

16 Washington CAN Notice of Appeal at 2-3.

17 As stated in the appeal, Washington CAN and members of the organization are  
18 significantly interested in and affected by the decision to approve or deny the Swedish Cherry  
19 Hill MIMP as well as the analysis and conclusions in the FEIS for that decision. Declaration of  
20 Chris Genese (May 14, 2015, ¶ 2). Washington CAN has many members who live in the  
21 neighborhoods that immediately surround the Swedish Medical Center MIMP proposal site and  
22 several of those members live and/or own homes just a few blocks away from the site. *Id.*, ¶4.

23 For example, Dixie Mitchell is a member of Washington CAN and lives at 927 21<sup>st</sup> Ave,  
24 Seattle, Washington. Declaration of Dixie Mitchell (May 14, 2015), ¶ 2. Her house is  
25 approximately five blocks from the Swedish Cherry Hill Medical Center. *Id.* If Swedish builds  
26 what they are proposing, Ms. Mitchell will have to live with increased traffic, density, and height,  
bulk and scale of these buildings that don't fit at all in her residential neighborhood. *Id.* The  
parking is already a major problem for her. *Id.* Sometimes Ms. Mitchell can't leave her  
driveway because someone is blocking it. *Id.* It is very hard to find parking in the neighborhood.  
*Id.* The expansion of Swedish will make that much worse. *Id.*

1 Washington CAN members also walk and/or drive on the portions of E. Cherry Street,  
2 James Street, and the numbered avenues, 13<sup>th</sup> through 18<sup>th</sup> Avenue, 23<sup>rd</sup> Avenue, and other streets  
3 that nearby and that will be directly impacted by traffic generated by the proposal. Genese Dec.,  
4 ¶ 4. For example, Ms. Mitchell walks in her neighborhood, including by Swedish. Mitchell  
5 Dec., ¶ 3. She also frequently drives on the streets adjacent to and near the site, such as East  
6 Cherry Street, James Street, and the numbered avenues, 13<sup>th</sup> through 18<sup>th</sup> Avenue, 23<sup>rd</sup> Avenue,  
7 and other streets nearby. The traffic congestion is already very bad and will be much worse if  
8 Swedish is allowed to expand.

10 Washington CAN members have the same interest in and will suffer the same impacts and  
11 injury as those that the other appellants in this matter have asserted in their appeals. Genese Dec.,  
12 ¶ 5. Namely, the increased traffic, density, height, bulk and scale of the buildings for a residential  
13 neighborhood, lack of meaningful setbacks and transition to the neighborhood all impact the  
14 safety and livability of Washington CAN members' neighborhoods. *Id.*

16 Washington CAN and its members also seek to improve access to healthcare and are  
17 interested in ensuring that Swedish strengthens its healthcare accessibility and affordability at the  
18 Cherry Hill campus as part of the expansion. Genese Dec., ¶ 6. The institution's lack of  
19 investment in local schools, lack of partnership with neighborhood groups to strengthen youth  
20 programs, and failure to adequately reach out to communities of color for its educational  
21 offerings are all issues that affect Washington CAN and its members. *Id.* Washington CAN and  
22 its members will be directly and adversely impacted by the responsible official's failure to  
23 adequately analyze and disclose the human development impacts of the proposal in the FEIS. *Id.*

25 Many members of Washington CAN have health care bills from Swedish that are beyond  
26 what they can afford. *Id.* For example, Ms. Mitchell was diagnosed with cancer and received



1 treatment at Swedish. Mitchell Dec., ¶ 4. She has debt outstanding to Swedish right now and  
2 they have made it very difficult for her to receive help. *Id.* She receives calls from collectors  
3 demanding payment and she has to choose between buying food and paying her mortgage or  
4 paying her other bills. *Id.* Ms. Mitchell should get a check-up to make sure her cancer is still in  
5 remission but she knows that she cannot afford the bill. *Id.* Ms. Mitchell's husband had a stroke  
6 and cancer, so now she helps him with many of his daily living tasks, such as bathing. *Id.* The  
7 added stress of being harassed by bill collectors and avoiding the doctor out of fear of accruing  
8 more medical debt makes it even harder to care for her family. *Id.* Ms. Mitchell just wants to  
9 keep her home, be able to eat, and be able to get the health care and medicine that she needs. *Id.*  
10 But, it's an uphill battle and Swedish is not making it easy for her. *Id.*

11  
12 Ms. Mitchell has filed an application for charity care three times and Swedish didn't  
13 respond to any of them. *Id.*, ¶ 5. When she calls to figure out what's going on, they tell her that  
14 they didn't get her application. *Id.* Ms. Mitchell has not been able to get any help from them  
15 with this bill and they certainly aren't making it easy to get the help that she needs. *Id.*

16  
17 The Final EIS provides a brief and inadequate summary and analysis of this issue. They  
18 fail to note what is specifically attributable to the Cherry Hill campus, they fail to note the total  
19 operating and net revenues of Swedish (and therefore the percentage of charity care provided),  
20 and fail to note that Swedish can afford to do far more for the local community in charity care in  
21 conjunction with this proposed expansion of their facilities. Genese Dec., ¶ 8. The Final EIS  
22 incorrectly concludes that the Final MIMP is consistent with the Human Health and Development  
23 goals and policies in the Comprehensive Plan. *Id.* Washington CAN will provide specific  
24 evidence and arguments to demonstrate the inadequacy and inaccuracies in the FEIS discussion  
25 of this issue. *Id.*  
26

1 While it is not required for this proceeding, Washington CAN also has standing for  
2 judicial review in State court even if that legal standard were applied here. In State Court, an  
3 organization has standing when at least one of its members has standing as an individual.  
4 *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 830, 965 P.2d 636 (1998). To  
5 establish standing under the Land Use Petition Act (LUPA), ch. 36.70C RCW, Washington CAN  
6 must demonstrate that it has at least one member who is “aggrieved or adversely affected by the  
7 land use decision.” RCW 36.70C.060(2). To satisfy this requirement, Washington CAN must  
8 allege facts showing that at least one member would suffer an “injury-in-fact” as the result of the  
9 land use decision. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 47-  
10 48, 52 P.3d 522 (2002); *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. at 829. A party  
11 need not show a particular level of injury to establish standing, rather the party must show some  
12 specific or perceptible harm by alleged impacts of the proposed action. *Suquamish Indian Tribe*  
13 *v. Kitsap County*, 92 Wn. App. at 829.

14  
15  
16 In this case, Washington CAN members will be specifically and perceptibly harmed by  
17 the proposed action. The interests they allege are personal injuries – they are more than simply  
18 the abstract interest of the general public in having others comply with the law. As mentioned  
19 above, Dixie Mitchell lives approximately five blocks away from the proposal site. The  
20 increased traffic, density, and height, bulk and scale of the buildings will directly impact her and  
21 the livability and aesthetics of her neighborhood. Mitchell Dec., ¶ 2. Washington CAN has  
22 many members who live in that neighborhood and will be similarly impacted by Swedish’s  
23 proposal to nearly double the size of its existing campus. Genese Dec., ¶ 4. With respect to  
24 traffic, also as mentioned above, Dixie Mitchell frequently drives on the streets adjacent to and  
25 near the site and is adversely impacted by parking problems. The traffic that will be introduced  
26

1 into the area by Swedish's significant expansion will have direct, concrete, and immediate injury  
2 to Dixie Mitchell. As Chris Genese's declaration points out, other members will be impacted by  
3 the traffic as well. Genese Dec., ¶¶ 4, 5.

4       Regarding the human development impacts, Washington CAN and its members seek to  
5 improve access to health care and are directly and adversely impacted by the responsible  
6 official's failure to adequately analyze and disclose the human development impacts of the  
7 proposal in the FEIS. Genese Dec., ¶ 6. The FEIS analysis of the human development goals and  
8 policies show that the responsible official failed to collect detail on how the expansion at Cherry  
9 Hill will specifically address those goals and policies with programs, clinics, and outreach to low  
10 income people in the neighborhood. The analysis should disclose the concerns of neighbors who  
11 have complained that the process to receive financial assistance is not well advertised and is very  
12 cumbersome. *See* Notice of Appeal, Attachment B at 12-13. These two challenges in addition to  
13 their applications being lost, have led to patients' bills being sent to collections and all of the  
14 related negative consequences on their well-being, financial stability, and future, and likelihood  
15 to return to Swedish for care. *Id.* The FEIS misrepresents what classes and resources are  
16 available at the Cherry Hill campus, they do not make it clear on how Swedish's work on  
17 research and medication addresses the goal of lifelong learning opportunities for community  
18 members. *Id.* Washington CAN is seeking disclosure and analysis that recognizes that Swedish  
19 must specify the charity care and community benefit that will actually be provided by the  
20 applicant in conjunction with its expansion, specifically those community benefits offered to  
21 neighbors and nearby community organizations.

22       The second condition of standing under LUPA is referred to as the "zone of interest test."  
23  
24  
25  
26 *Chelan County v. Nykreim*, 146 Wn.2d 904, 937, 52 P.3d 1 (2002). Although the zone of interest

1 test serves as an additional filter for limiting who can obtain judicial review of an agency  
2 decision, the test is not meant to be especially demanding.” *Id.*, citing *Seattle Building and*  
3 *Construction Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 797, 920  
4 P.2d 581 (1996). The test focuses on whether the authors of the provisions at issue intended the  
5 agency to protect the type of interests alleged when taking the action at issue.  
6

7 Washington CAN’s SEPA appeal focuses specifically on impacts related to land use, the  
8 proposal’s relationship to plans/policies/regulations, aesthetics (height, bulk, and scale), human  
9 development, and traffic/transportation. In requesting that Washington CAN’s entire appeal be  
10 dismissed because the issues raised are outside of the “zone of interest” of SEPA, respondents  
11 completely ignore that Washington CAN asserted interests beyond just those related to human  
12 health and development. The appeal asserts interests related to land use, aesthetics, and  
13 transportation impacts of the proposal as well. Considering that traffic, land use, and aesthetics  
14 are listed as “elements of the environment” in WAC 197-11-444, it makes no sense to suggest  
15 that Washington CAN’s entire appeal should be dismissed because it is outside of the SEPA  
16 “zone of interest.”  
17

18 Regarding the human development interests, respondents suggest that Washington CAN  
19 cannot challenge the FEIS analysis of and conclusions about the Human Development Element of  
20 the Comprehensive Plan because those issues are not within the “zone of interests” protected by  
21 SEPA. This argument fails because the FEIS analysis of “consistency with the Human  
22 Development Element of the Comprehensive Plan” was done as part of the analysis of the  
23 MIMP’s relationship to existing land use plans, which is within the zone of interest for SEPA.  
24 See Newman Dec., Ex. A (FEIS at 3.3-52). In fact, the EIS itself states that the scoping process  
25 required that the Section B of the Land Use Element goals and applicable policies under  
26

1 Education, Employability, and Health and Human Development Element “shall” be addressed.

2 *Id.* (FEIS at 3.3-1). This analysis was identified as required through the scoping process.

3       The FEIS contains an entire chapter devoted to disclosure, analysis, and conclusions  
4 concerning the proposal’s relationship to adopted land use plans, policies, and regulations. *Id.*  
5 (FEIS, § 3.3.4). Within that section, as required by scoping, the FEIS analyzes the relationship of  
6 the proposal to the Seattle Comprehensive Plan Human Development Element Goals and  
7 Policies. The proposal’s “relationship to existing land use plans” is an element of the  
8 environment under SEPA. WAC 197-11-444. That discussion was therefore, clearly within the  
9 “zone of interests” of SEPA. And, as the authors of the FEIS stated, this discussion was within  
10 the scope of environmental review necessary and required under SEPA.  
11

12       Taken to its logical extreme, respondents’ argument would allow no one to have standing  
13 to challenge the analysis in the FEIS at 3.3-52 through 3.3-56. No one could challenge that part  
14 of the FEIS because, according to them, a challenge to that section is “outside of the zone of  
15 interests” of SEPA. This is despite that the analysis was conducted pursuant to SEPA and a  
16 SEPA appeal is the only avenue for challenging the FEIS. Their “zone of interest” argument  
17 would create a Catch 22 situation where the FEIS contains analysis and conclusions that no one  
18 can challenge.  
19

20       In sum, Washington CAN clearly has standing under the Seattle Code requirements for  
21 standing of an appeal to the City of Seattle Hearing Examiner. Indeed, even if the LUPA  
22 standard for standing were applied here, Washington CAN would easily meet that test.  
23  
24  
25  
26

1           B.     Respondents' Factual Assertions Regarding Washington CAN's Notice of Appeal  
2                     and Washington CAN's Response to the Examiner's Pre-Hearing Order Are False

3           In their motion, respondents request that the Examiner dismiss Washington CAN's entire  
4 appeal on the grounds that the issues stated in the Notice of Appeal were "vague." They claim  
5 that Washington CAN declined to follow an order of the Examiner to file a "more definite  
6 statement." Both assertions are false and unwarranted.

7           Washington CAN's statement of issues on appeal that are listed in the Notice of Appeal  
8 are not vague. The appeal lists four issues in 4(a) through 4(d). Washington CAN Notice of  
9 Appeal at 3-4. Those issues make it very clear that Washington CAN is challenging the analysis  
10 and discussion of impacts in the FEIS related to land use, traffic/transportation, the proposal's  
11 relationship to plans and policies in the comprehensive plan, human development and aesthetics.  
12 It didn't include stormwater, it didn't include noise, and it didn't include most other elements of  
13 the environment. The issues presented are straightforward and clear.

14           Contrary to the statement of respondents, Washington CAN's appeal statement does not  
15 "depend entirely" on the July 3, 2014 letter attached as Exhibit B to the Notice of Appeal. See  
16 Joint Motion to Dismiss at 4, 10. The Notice of Appeal identifies all of the issues presented –  
17 they are listed as issues 4(a) through 4(d). The listed issues challenge the FEIS. The Appeal  
18 states that the FEIS is inadequate for the reasons stated in 4(a) through 4(d). The July 3, 2014  
19 letter is like a brief that contains the legal argument in support of those issues. Frankly, that letter  
20 provides far more detail than any of the other appellants provided for their issue statements and  
21 Washington CAN did not anticipate being penalized for providing legal argument along with its  
22 appeal, which is above and beyond what the rules require.  
23  
24  
25  
26

1 If you look closely at respondents' argument, they are really contending that Washington  
2 CAN did not provide legal argument to demonstrate how the content of the argument in the July  
3 3, 2014 letter would change with the publication of the FEIS. That is not a request for a "more  
4 definite statement" of the issues, that is a request for legal argument on the issues presented as  
5 they relate to the FEIS.  
6

7 The rules do not require that legal argument be included in the Notice of Appeal. The  
8 Hearing Examiner rules require that the Notice of Appeal contain a brief statement of the issues.  
9 The notice must contain:

10 ... (3) A brief statement of the appellant's issues on appeal, noting  
11 appellant's specific objections to the decision or action being  
12 appealed; ...

13 HE Rule 3.01. Washington CAN's Notice of Appeal contained a brief statement of all of the  
14 issues presented.

15 Respondents' claim that Washington CAN declined to follow an order of the Examiner to  
16 file a "more definite statement" is unwarranted and completely off the mark. Respondents'  
17 characterization of a so-called "motion for a more definite statement" in the motion to dismiss is  
18 completely different from what Swedish actually requested at the pre-hearing conference. At the  
19 pre-hearing conference, Mr. Brogan did not state that the issues in the Notice of Appeal were  
20 "vague," nor did he request a "more definite statement" of the appeal issues.  
21

22 The following is a transcript of that conversation:

23 Mr. Brogan: Yes, good morning, Ms. Examiner. With respect to  
24 the notice of appeal filed by Washington Community Action  
25 Network, simply one question related to clarification and perhaps  
26 Ms. Newman can help us in this regard. The statement of issues on  
appeal begin on page 3 of that document and continue on to page 4.  
There is a reference in subsection (d) on page 4 that simply notes  
that attached to the appeal as Attachment B is a letter that provides

1 more "detail" about appellant's issues on review. It goes on to say  
2 that many of the issues raised are still relevant and applicable to the  
3 FEIS and the last sentence, the appellant will address those  
4 discrepancies at the hearing. I just perhaps wanted to clarify that  
5 whether or not the Community Action Network intends on adding  
6 additional issues to the issues identified in 4(a), (b), (c), and (d) or,  
7 in fact, is the intent that the information and discussions in the letter  
8 are simply solely related to the issues identified in 4(a) through (d)?

9 Ms. Newman: My intention was, or my understanding was that the  
10 letter addresses... the letter addresses both the MIMP and the DEIS  
11 and the second half of the letter that addresses the DEIS I believe  
12 raises the same issues that are stated in the appeal, essentially it  
13 provides more detail. To the extent that there is any disagreement  
14 on that I guess I would like to know if the applicant sees additional  
15 issues in my letter that were not raised in the appeal I would like to  
16 know what those are so I can clarify.

17 Mr. Brogan: Well, I think, perhaps a more efficient way of  
18 addressing it would be if Ms. Newman could agree that the issues  
19 identified in 4(a) through (d) are the scope of the issues in her  
20 appeal.

21 Ms. Newman: I wouldn't... since I included the letter with the  
22 appeal and the issues are very clearly stated in my letter, I wouldn't  
23 want to remove any of the issues in my letter. They are  
24 incorporated into the appeal so I don't think it's appropriate to ask  
25 that I...

26 Hearing Examiner: Okay. What we'll do is we will give you an  
opportunity to clarify the appeal by going through and actually  
picking out from your letter anything you see that should be in your  
appeal that is in the letter and not in the appeal now. So I'll  
consider them to be there, but what we need is having them further,  
more clearly identified. So we'll set a date for that.

Declaration of Peggy Cahill (May 15, 2015), Ex. A.

As is obvious from reading the above transcript of the prehearing conference, the request  
by Swedish was not for a "more definite statement" of the issue. Swedish's counsel requested  
that Washington CAN clarify that the issues identified in 4(a) through (d) were indeed the entire



1 scope of the issues in its appeal. Swedish did not say that the issues in the Notice of Appeal were  
2 “vague,” nor did their attorney mention the words: “more definite statement.”

3 In direct response to that conversation and pursuant to the prehearing order, Washington  
4 CAN’s counsel submitted a letter to the Hearing Examiner on May 5, 2015 that stated: “I believe  
5 that all of the SEPA issues that were presented in the letter are covered by the specific issues  
6 stated in 4(a)-(d) in the Notice of Appeal.” She stated, “I do not believe that the letter adds any  
7 new or additional SEPA issues beyond those that are stated in the Notice of Appeal.” Newman  
8 Dec., Ex. B.

10 That letter responded directly to the exact request made by Swedish’s counsel at the  
11 prehearing conference. Respondents’ accusation that Washington CAN failed to follow an order  
12 of the Examiner to file a “more definite statement” is not true. Moreover, it is unwarranted and  
13 unfair. Fortunately the transcript of the conference is available to clarify what Swedish actually  
14 requested and what the Examiner ordered. With the transcript, we can see that Swedish did not  
15 claim that the issues were “vague” and Swedish did not request a “more definite statement” and  
16 we can see that Washington CAN responded to the Examiner’s order.

18 If the Examiner concludes for any reason that the Notice of Appeal issues presented by  
19 Washington CAN are indeed vague, then Washington CAN will gladly provide any additional  
20 information that the Examiner deems warranted or necessary to clarify its issues stated in the  
21 Notice of Appeal. Washington CAN requests that the Examiner deny respondents’ request to  
22 dismiss Washington CAN’s entire appeal on those grounds not only because their request for  
23 dismissal is based on false grounds, but also because it would be an extreme and unfair remedy  
24 for this claim.  
25  
26

1 C. The Issues Presented by Washington CAN Are Properly Before the Hearing  
2 Examiner in this SEPA Appeal

3 1. Washington CAN's SEPA appeal does not include issues related to the  
4 merits of the MIMP

5 Respondents have moved to dismiss appeal issues that address the merits of the Final  
6 MIMP decision from the SEPA appeals. Frankly, this request seems to be rather pedantic  
7 considering that the two hearings are consolidated, the Hearing Examiner has jurisdiction over  
8 both decisions, and evidence and argument on the final MIMP is allowed outside of the SEPA  
9 appeal. Setting that commentary aside, however, Washington CAN did not include any issues on  
10 the merits of the final MIMP in its appeal. In other words, there are no issues to dismiss. Per the  
11 process set forth in the code, Washington CAN will present its argument and evidence regarding  
12 the merits of the MIMP at the upcoming MIMP open record hearing.

13  
14 2. The scope of permitted SEPA issues are defined by the scope of the FEIS  
15 itself

16 Remarkably, Swedish suggests that Washington CAN cannot challenge issues related to  
17 the proposal's consistency with the Human Development Element of the Comprehensive Plan in  
18 its SEPA appeal even though the FEIS contains nearly five pages of analysis called "consistency  
19 with the Human Development Element of the Comprehensive Plan." See Newman Dec., Ex. A  
20 (FEIS at 3.3-52 through 3.3-56). Those issues were analyzed and discussed in the FEIS –  
21 therefore, obviously those issues are appropriate for an appeal of the adequacy of the FEIS.

22 With no legal citation to support their argument, Swedish suggests that because the  
23 authors of the EIS were not *required* to discuss the Health and Human Development Element of  
24 the Comprehensive Plan, Washington CAN cannot challenge the analysis and conclusions made  
25  
26

1 in the FEIS. Whether or not it was required, they did it, and Washington CAN should be allowed  
2 to challenge that analysis and those conclusions.

3 Furthermore, respondents' assumption is incorrect. The FEIS was required to discuss this  
4 topic as part of the SEPA review. As mentioned above, the EIS itself specifically states that the  
5 consistency with the Human Development Element of the Comprehensive Plan was identified as  
6 a required issue for discussion in the FEIS through the scoping process. Newman Dec., Ex. A.  
7 Furthermore, environmental review under SEPA must include review of all of the "elements of  
8 the environment" that are applicable and that are listed in WAC 197-11-444. "Relationship to  
9 existing land use plans" is listed as one of the elements of the environment in WAC 197-11-  
10 444(2)(b)(i). It was in the context of that element of the environment that the FEIS reviewed the  
11 Human Development Element of the Comprehensive Plan.  
12

13  
14 If the Examiner rules that issues concerning the Human Development Element of the  
15 Comprehensive Plan are not within the scope of the SEPA appeal, then Washington CAN  
16 requests that the Examiner also rule that the analysis and conclusions that were made in the FEIS  
17 related to the Human Development Element in the Comprehensive Plan do not have any legal  
18 finality, nor are they binding in any way that would affect the City Council's ability to conclude  
19 that the Final MIMP is inconsistent with the Human Development Element of the Comprehensive  
20 Plan as it reviews the merits of the MIMP. Conclusions made in the FEIS should not and cannot  
21 be legally binding on the MIMP decision if Washington CAN is prohibited from challenging  
22 them.  
23

24 3. Issue 4(a) in Washington CAN's Notice of Appeal

25 Responding to respondents' commentary about Issue 4(a), that issue is just a statement of  
26 error. That issue quotes word for word from the Notice of DPD Director's Master Plan

1 Recommendation and Hearing Examiner Hearing, which was issued on March 19, 2015. That  
2 Notice summarized the determination that was made by the DPD Director regarding the FEIS as  
3 follows:

4           The DPD Director has determined that the FEIS adequately  
5 describes and assesses the adverse impacts of the Master Plan and  
6 that the Master Plan has been adequately conditioned to mitigate  
identified adverse impacts.

7 Declaration of Claudia M. Newman, Ex. B. Washington CAN believes that the DPD Director  
8 erred in those determinations and, therefore, began its appeal with a statement that simply  
9 claimed error in response to the quote above.

10           The second sentence of Issue 4(a) in the Notice of Appeal states “DPD also erred when it  
11 determined that the Master Plan had been adequately conditioned to mitigate identified adverse  
12 impacts.” Respondents complain about this statement in their motion as follows:

13           [The second sentence] either raises a substantive issue or it raises a  
14 non-SEPA issue going to the merits of the MIMP. In either case, it  
15 is not properly before the Examiner on a procedural SEPA appeal.  
16 It also confuses the nature of the actions DPD has taken. ***DPD has***  
17 ***made no determination that the MIMP has been adequately***  
***conditioned.***

18 Joint Motion to Dismiss at 16 (emphasis supplied).

19           Well, that last point certainly is not true. The notice says exactly the opposite. DPD has  
20 made that determination. To the extent required by law, Washington CAN is appealing the  
21 determination as quoted in the Notice pursuant to SEPA.

22           Respondents raise an issue regarding distinction between the “procedural” SEPA issues  
23 and the “substantive” SEPA issues. As background, the SEPA rules provide substantive  
24 authority to agencies allowing them to condition or deny a proposal pursuant to SEPA. WAC  
25 197-11-660. *See also* SMC 25.05.660. The substantive authority to condition a project is  
26

1 exercised by the ultimate decision maker on the project, which in this case, would be the Seattle  
2 City Council. In fact, the City Council may deny the project outright if reasonable mitigating  
3 measures are insufficient to mitigate significant adverse impacts identified in the EIS. SMC  
4 25.05.665.

5  
6 “Procedural” SEPA is everything else. SEPA is primarily a procedural statute that  
7 requires the disclosure of environmental information. The procedural requirements of SEPA  
8 relate to the EIS and the requirements for analysis, discussion, and disclosure within that EIS.

9 The section of the EIS addressing affected environment, significant impacts, and  
10 mitigation measures must “describe the existing environment that will be affected by the  
11 proposal, analyze significant impacts of alternatives, including the proposed action, and discuss  
12 reasonable mitigation measures that would significantly mitigate these impacts.” WAC 197-11-  
13 440(6)(a). This is “procedural” SEPA.

14  
15 The procedural rules require that the EIS “discuss reasonable mitigation measures that  
16 would significantly mitigate these impacts.” WAC 197-11-440(6). The EIS is required to clearly  
17 indicate those mitigation measures, if any, that could be implemented or might be required, as  
18 well as those, if any, that agencies or applicants are committed to implement.” WAC 197-11-  
19 440(6)(c)(iii). The EIS must indicate what the intended environmental benefits of mitigation  
20 measures are for significant impacts, whether they are technically feasible, and if there is a  
21 concern about whether mitigation measures are capable of being accomplished. *Id.* The EIS  
22 must summarize significant adverse impacts that cannot or will not be mitigated. WAC 197-11-  
23 440(6)(c)(v).

24  
25 In their motion, respondents state: “the question of whether [the environmental] impacts  
26 are adequately *mitigated* is substantive and should be dismissed.” Joint Motion to Dismiss at 17.

1 It is important to make it clear that the EIS *analysis and conclusions* related to mitigation and  
2 whether that mitigation is adequate is fair game for a SEPA appeal. This is emphasized by the  
3 fact that the Director of DPD relies heavily on that analysis in the Director's Recommendation.  
4 In the SEPA analysis portion of that Recommendation (which is substantive), the Director  
5 repeatedly refers to the discussion in the FEIS and relies on that discussion for her substantive  
6 analysis and conditions.  
7

8 While Washington CAN recognizes and agrees that the substantive decisions are not  
9 subject to a SEPA appeal, it is important to recognize that the procedural analysis, disclosure, and  
10 conclusions related to mitigation in the FEIS can be challenged on appeal. Appellants are  
11 allowed to challenge the analysis, disclosure, and conclusions made in the FEIS about the  
12 mitigation available for the proposal and about whether that mitigation is adequate to mitigate  
13 significant adverse impacts of the proposal. It is that aspect of the FEIS that Washington CAN is  
14 challenging with respect to the "mitigation" mentioned in its Notice of Appeal.  
15

16 4. Issue 4(b)

17 With respect to Issue 4(b), respondents argue yet again that the question of whether the  
18 impacts of the proposal have been adequately mitigated is a substantive issue that should be  
19 dismissed. As mentioned above, the Notice states the DPD Director "made a determination that  
20 the Master Plan had been adequately conditioned to mitigate identified adverse impacts."  
21 Newman Dec., Ex. B. To the extent that stands as a final decision, we are appealing that  
22 determination. If that is part of the recommendation in the MIMP and, therefore, substantive, we  
23 will address that at the MIMP open record hearing.  
24  
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26

1 In its discussion on Issue 4(b), Swedish repeats its argument about the human  
2 development goals and policies analysis. We refer the Examiner to the argument above on that  
3 issue.

4  
5 5. Issue 4(c)

6 Washington CAN disputes Swedish's contention that Issue 4(c) should be "dismissed in  
7 its entirety." Issue 4(c) reads:

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

11 Notice of Appeal at 4 (emphasis supplied).

12 It is impossible to imagine how an EIS can possibly contain an adequate discussion of  
13 reasonable mitigation measures that would significantly mitigate significant impacts without  
14 mentioning or analyzing the City of Seattle's specific environmental policies in SMC 25.05.675.  
15 As respondents themselves state: "The purpose of the EIS is to inform the decision maker . . ."  
16 Joint Motion to Dismiss at 18. Indeed, the purpose of the EIS is to inform the decision maker not  
17 only on the significant impacts, but on the proposal's consistency or inconsistency with policies,  
18 plans, rules, or regulations. The EIS is required to incorporate, when appropriate, a summary of  
19 existing plans and zoning regulations applicable to the proposal, and how the proposal is  
20 consistent and inconsistent with them. WAC 197-11-440(6)(d)(i). The purpose of an EIS is to  
21 discuss and analyze mitigation measures and the extent that those measures mitigate the  
22 significant impacts. The suggestion that an EIS for the City of Seattle need not mention or  
23 analyze the City's specific environmental SEPA policies is beyond comprehension.  
24  
25  
26

1        Apparently, the authors of the FEIS agree with Washington CAN on this. Almost every  
2 chapter for each of the elements of the environment in the FEIS begins with a section titled  
3 “Policy Context.” Relevant to this case, for example, is the land use chapter, which begins with a  
4 quote of the relevant specific environmental policies in SMC 25.05.675 for land use. Newman  
5 Dec., Ex. A (FEIS 3.3-1). Similarly, the transportation chapter begins the same way. The very  
6 first pages contain an entire section titled “Policy Context,” wherein they quote the entire specific  
7 environmental policy from SMC 25.05.675 on traffic and transportation. Newman Dec., Ex. A  
8 (FEIS 3.7-1 through 3.7-4).

10        We find ourselves again in a situation where respondents are attempting to bar  
11 Washington CAN and other appellants from challenging analysis and discussion that is in the  
12 FEIS on the grounds that it was not “required” to be there. Like the analysis of the human  
13 development goals, the analysis of the SEPA policies was incorporated in the FEIS, and therefore  
14 Washington CAN should be allowed to challenge that discussion and those conclusions.  
15 Respondents’ argument that appellants should not be allowed to challenge that discussion  
16 because it was not “required” to be included in the FEIS should be rejected.

18        There is an important distinction between the *scope of analysis, disclosure, and*  
19 *conclusions* related to the City’s SEPA policies in SMC 25.05.675 and the actual decision to  
20 attach conditions on the MIMP pursuant to the authority allowed in the SEPA policies. As  
21 Swedish says in its motion to dismiss, the purpose of the EIS is to inform the decision maker.  
22 The FEIS must include analysis, disclosure, and conclusions related to the City’s SEPA policies  
23 in SMC 25.05.675. Washington CAN is challenging that analysis and those conclusions. We  
24 recognize that the City Council will ultimately have authority to impose conditions on the action  
25  
26



1 itself pursuant to the authority in the Code under the SEPA policies, but we are now challenging  
2 the analysis and discussion of those policies in the FEIS.

3 In sum, Washington CAN is challenging the analysis, discussion, and conclusions in the  
4 FEIS regarding its consistency with the Comprehensive Plan provisions, regulations, and the  
5 SEPA policies. Washington CAN is not challenging the substantive application of those  
6 regulations, plans, or policies as part of its SEPA appeal. That will be addressed at the MIMP  
7 hearing.  
8

9 6. Issue 4(d)

10 Regarding Issue 4(d), Swedish repeats its argument that the Human Development Element  
11 is not an element of the environment. Washington CAN's response to that argument is stated  
12 above.  
13

14 VI. CONCLUSION

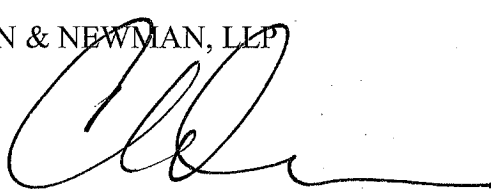
15 For the reasons stated above, Washington CAN respectfully requests that the Examiner  
16 deny the Motion to Dismiss filed by Swedish Medical Center, Sabey Corporation, and the City of  
17 Seattle Department of Planning and Development.

18 Dated this 15<sup>th</sup> day of May, 2015.

19 Respectfully submitted,

20 BRICKLIN & NEWMAN, LLP

21  
22  
23 By:

  
24 Claudia M. Newman, WSBA No. 24928  
25 Attorneys for Washington CAN  
26