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' REPLY BRIEF IN SUPPORT OF JOINT MOTION TO DISMISS**

The moving parties[1] do not doubt Appellants' sincerity, nor their passion for the issues they seek to argue to the Examiner. Nevertheless, many, if not the majority, of issues they have presented do not belong in an administrative appeal of EIS adequacy. If a question raised in an appeal statement goes to whether the FEIS adequately discloses and analyzes *environmental* impacts, it is properly before the Examiner in the SEPA appeal. Otherwise, it is appropriate only for the public comment portion of the hearing on the merits of the MIMP.

The distinction is not merely pedantic, as Washington CAN suggests. At this consolidated hearing, Appellants enjoy the status of "appellant"—and by extension, "party"—only in the environmental appeal, not the pre-decisional hearing on the MIMP. The Major Institutions Code does not subject a Type IV decision like the MIMP to a contested hearing, including legal argument, cross-examination by Appellants, and re-direct, and for good reason. Doing so would result in a hearing that needlessly consumes weeks rather than days, wasting the

[1] Some confusion results from the fact that the Respondents in these appeals—which include the Applicant (Swedish), property owner (Sabey), and the City—are also the moving party on this Motion to Dismiss. To allay any confusion, this rest of this brief refers to the moving parties as "Movants."

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Examiner's time and all parties' resources. The Hearing Examiner's recommendation on the Type IV decision, which itself may be appealed to the City Council, does not require, and would not benefit from, subjecting the MIMP to an adversarial process that is not prescribed by Code.

Rather, by the plain language of the Seattle Municipal Code as guided by state law, these appeals extend to one issue, and one issue only: the Type II decision of whether or not the FEIS adequately disclosed the environmental impacts of the final MIMP. The other issues raised in the various Notices of Appeal go to the questions of whether the MIMP satisfies the Major Institutions Code at Ch. 23.69 SMC, or whether the Council should alter the MIMP under its police power, or whether the Council should impose certain mitigation measures as an exercise of its substantive SEPA authority. Any member of the public may address any of these topics during the years-long public process preceding this hearing, as all of these Appellants have to great effect. And any member of the public may present evidence and testimony of any of these issues at the pre-decisional hearing on the merits. But their environmental appeals do not grant Appellants any additional rights to insert non-environmental issues into the SEPA portion of the consolidated hearing. The SEPA hearing is properly limited to the adequacy of the environmental analysis of the EIS.

I. LEGAL AUTHORITY AND ARGUMENT

Movants respectfully request that the Examiner grant the relief requested in their Motion, as modified by the reply arguments below. In particular, while the declarations submitted by Washington CAN appear to establish standing to challenge the adequacy of the EIS discussion of transportation and land use impacts, that standing extends only to environmental issues, and not, for example, the MIMP's consistency with the Health and Human Development element of the Comprehensive Plan or access-to-healthcare issues. Second, Washington CAN's Notice of Appeal remains inadequate due to its reliance on a dated and irrelevant comment letter for its substance. Third, while the adequacy of an EIS discussion of mitigation measures may be part of

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

a procedural SEPA appeal if properly pleaded, substantive SEPA, including citation to or discussion of policies at SMC 25.05.675 as well as the efficacy of mitigation measures, forms no part of a procedural appeal. Finally, issues going to the merits of the MIMP or the Director's Report should be excluded from the SEPA hearing.

A. Washington CAN Lacks Standing to Assert any Interest Outside of SEPA's "Zone Of Interests"

While Washington CAN's petition did not include facts establishing standing, the declarations submitted in support of the Washington CAN Response address elements of the standing questions raised in the Motion, but only as to those elements of the environment properly before the Examiner. Specifically, based on their declarations, Movants concede that Washington CAN has established standing to challenge the adequacy of the FEIS analysis of traffic impacts, and land use impacts such as height, bulk, and scale. However, as discussed in more detail below, Washington CAN does not have standing to assert any non-environmental issues.

Washington CAN asserts that the City Code automatically affords standing to appeal the Director's environmental determination to all those who are significantly interested. *See* Washington CAN Response[2] at 5 (citing SMC 23.76.052). This Code, however, merely authorizes a challenge. An appellant must still establish standing to challenge the City's environmental determination, and asserting interests protected by non-environmental plans and policies such as the Health and Human Development Element of the Comprehensive Plan does not suffice.

City Code provisions concerning standing must be interpreted in accordance with the two-part standing test established by state law, as outlined in *Trepanier v. City of Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992). *Accord* Examiner's Order on Motions to Dismiss/Cross Motion for Summary Judgment, *In the Matter of the Appeal of Laurelhurst Community Club and Seattle*

[2] For convenience, this brief refers to the response brief filed by each party as the "Washington CAN Response," the "Squire Park Response," and so on.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Community Council Federation from a DNS by DPD, Hearing Examiner File W-11-007, p. 2 (2011). Even though the Code provides that an environmental determination is subject to appeal "by any interested person," appeal provisions must be consistent with state SEPA law and its implementing rules. *Id.* (referencing SMC 25.05.680.B.1). In other words, the City's Code cannot be used to bypass standing requirements established by state law. *Id.* ("Although RCW 43.21C.075 authorizes a local government to allow administrative appeals of SEPA decisions, there is nothing in this section or other cited state laws indicated that the administrative process is to be governed by different standing requirements."). Accordingly, Washington CAN must still satisfy the state requirements for standing; namely, it must establish that the interests sought to be protected are within the zone of interests to be protected or regulated by SEPA and that the petition alleges an "injury in fact." *Trepanier*, 64 Wn. App. 380.

Because non-environmental issues are outside the "zone of interests" protected by SEPA, they continue to be irrelevant to the matters before the Examiner, and SEPA standing cannot be created by establishing, for example, economic or emotional harm arising from lack of access to healthcare. While providing quality healthcare to all is Swedish's *raison d'etre*, issues such as access to healthcare, availability of charity care, household finances, customer service, and the like are simply not within the zone of *environmental* issues protected by SEPA. *See County Alliance v. Snohomish Cy.,* 76 Wn. App. 44, 52-53, 882 P.2d 807 (1994) ("SEPA is concerned with 'broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources.'"). Certainly, access to healthcare is an extraordinarily important issue, and Ms. Mitchell's story is compelling. But SEPA standing does not depend on the importance of an issue, it depends on whether an issue pertains to the environment. These issues are legally indistinguishable from the race and social justice issues that motivated the appellants in *In re International Community Health Services and Capitol Hill Housing*—issues the Examiner dismissed from that SEPA appeal. Hearing Examiner Files W-

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

15-002 and W-15-003, Order on Motion to Dismiss (March 18, 2015). Neither Washington CAN nor any other Appellant attempted to distinguish their claims from those that were dismissed in *In re International Community Health Services and Capitol Hill Housing*. Indeed, there is no distinction.

For these reasons and those discussed below, issues relating to the alleged human development and other non-environmental impacts fall outside the zone of interests protected by SEPA and cannot be used to establish standing.

B. The Examiner Should Dismiss the Washington CAN Appeal for Vagueness

Washington CAN accuses Movants of misrepresenting the Examiner's order, and insofar as Movants misunderstood the Examiner's intentions when they asked for dismissal for failure to comply with the order to provide a more definite statement, they withdraw that portion of their requested relief. However, the more important, fundamental issue remains: The letter supporting the appeal statement submitted by Washington CAN analyzed a draft EIS, which in turn analyzed a proposal that no longer exists and is not before the Examiner. Conversely, the preferred alternative that actually is before the Examiner did not exist at the time Washington CAN submitted its comment letter. The comment letter is irrelevant to this appeal (not to mention the pre-decisional hearing on the merits) and should be disregarded, yet without it, Washington CAN's appeal statement inadequately states the issues on appeal and should be dismissed.

Washington CAN argues that the letter was unnecessary and its appeal statement stands on its own. Response at 14:15-20. Yet, as Washington CAN correctly notes, the Notice of Appeal must note the "**specific objections**" to the EIS. Washington CAN Response at 15:11 (citing HER 3.01). If the Examiner disregards the letter, as Washington CAN implicitly invites, Washington CAN's appeal statement is devoid of any specific objection. Issues 4.a and 4.b, for example, essentially announce that Washington CAN's EIS adequacy appeal seeks to challenge the adequacy of the EIS. Tautology cannot satisfy the Code or the Hearing Examiner Rules, only

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

alleging specific objections can. Washington CAN's notice of appeal does not meet the requirements.

C. An EIS Cannot be Ruled Inadequate for Non-Environmental Reasons

Contrary to SEPA law, Washington CAN asserts that an EIS can be ruled inadequate if its discussion of any topic—whether environmental or otherwise—fails to meet some standard of adequacy. Washington CAN Response at 18:20-21 ("Those issues were analyzed and discussed in the FEIS – therefore, obviously those issues are appropriate for an appeal of the adequacy of the FEIS."). The authority cited in the Motion directly contradicts this assertion:

> The lead agency may at its option include, in an EIS or appendix, the analysis of any impact relevant to the agency's decision, whether or not environmental. The inclusion of such analysis may be based upon comments received during the scoping process. . . . The decision whether to include such information and **the adequacy of any such additional analysis shall not be used in determining whether an EIS meets the requirements of SEPA**.

SMC 25.05.440.G (emphasis added, cited in the Motion at 15:17-19 & 18:21-23). An EIS may discuss any topic the SEPA Responsible Official wants, *see id.*, and the City may consider other documents that address non-environmental issues when evaluating a proposal on its merits, SMC 25.05.448.A.[3] The adequacy of an EIS, however, is judged only by its analysis of environmental impacts. SMC 25.05.440.G. This conclusion does not change because a non-environmental issue, such as consistency with the Health and Human Development section of the Comprehensive Plan, was identified in the scoping process. The language quoted above specifically anticipates such as situation: "The inclusion of such [non-environmental] analysis may be based upon comments received during the scoping process." SMC 25.05.440.G. Yet Washington CAN's Response asserts, without citation to authority: "Whether or not [discussion of non-environmental issues] was required, they [sic] did it, and Washington CAN should be

[3] "[T]he environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decisionmakers. Rather, an environmental impact statement analyzes environmental impacts and must be used by agency decisionmakers, along with other relevant considerations or documents, in making final decisions on a proposal."

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

allowed to challenge that analysis and those conclusions." Washington CAN Response at 19:1-2.

Neither does this conclusion change because the Health and Human Development section of the Comprehensive Plan is an adopted plan. Washington CAN's own brief properly states the relevant element of the environment: "Relationship to existing **land use** plans." Washington CAN Response at 19:9-10 (emphasis added) (quoting WAC 197-11-444(2)(b)(i)); *see also* SMC 25.05.444.B.2.a. Yet, Washington CAN does not (and could not) establish that the Health and Human Development Element is an "existing land use plan." It may be an existing plan, but it is not an existing land use plan, and is therefore not part of the relevant element of the environment. As the SMC sections quoted above make clear, the EIS cannot be ruled inadequate for a deficient discussion of the Health and Human Development Element, or any other non-environmental analysis. Accordingly, the Examiner should dismiss such non-environmental claims from the Washington CAN appeal.

D. Substantive SEPA Forms No Part of A Procedural Appeal

By its terms, Washington CAN's appeal statement challenged the City's exercise of substantive SEPA. It asserted that the FEIS is inadequate because "DPD also erred when it determined that the Master Plan **has been adequately conditioned** to mitigate identified adverse impacts." Issue 4.a. It asserted that the "FEIS failed to **adequately** . . . **mitigate** the significant adverse impacts" of the MIMP. Issue 4.b. In its Response, Washington CAN concedes that the City has not exercised substantive SEPA and retreats from these statements, clarifying that it intended only to challenge the adequacy of the FEIS's discussion of mitigation. Washington CAN Response at 22:8-15. As limited by this concession, these issues are properly before the

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Examiner,[4] provided the challenge may extend only to the adequacy of the mitigation discussion, and not the substantive question of the efficacy of mitigation measures.

However, that does not mean that an EIS must cite or discuss substantive SEPA policies. Even if the EIS does so, it cannot be deemed inadequate because the discussion does not rise to the level of specificity a challenger would prefer. Subchapter Four of the SEPA Rules, SMC 25.05.650–.680, sets forth the required content of an EIS, and that required content does not include the substantive SEPA policies of Subchapter Seven. *See* SMC 25.05.440.E (listing required elements of EIS). Washington CAN simply contradicts this code provision when it writes: "[t]he FEIS must include analysis disclosure, and conclusions related to the City's SEPA policies in SMC 25.05.675." Washington CAN Response at 24:23-24. As with non-environmental considerations, the fact that the SEPA responsible official chose to include some discussion of substantive SEPA policies in the EIS does not expose the EIS to an adequacy challenge based on such discussion. *See* SMC 25.05.440.G ("The decision whether to include such information and the adequacy of any such additional analysis shall not be used in determining whether an EIS meets the requirements of SEPA.").

Washington CAN's policy argument that it should be able to challenge the adequacy of any topic included in the EIS, Washington CAN Response at 24:12-17, should be directed to the legislature and City Council in their legislative capacities, not to a quasi-judicial officer. On this appeal, the issues are limited to whether the EIS adequately analyzes environmental impacts.

E. Issues that Go to the Merits of the MIMP Should be Dismissed

Any claims challenging the Director's recommendations on the MIMP are not properly part of this SEPA appeal and are accordingly outside the jurisdiction of the Hearing Examiner. SMC 23.76.050.D. Below, Movants address the arguments raised in each Appellant's response brief. To the extent Appellants attempt to convert their MIMP objections into procedural SEPA

[4] Or, more precisely, they would be properly before the Examiner if Washington CAN had pleaded them in its Notice of Appeal. In reality, Washington CAN seeks to amend its pleading through its Response brief, a procedure not found in the Hearing Examiner's Rules.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

claims, their respective arguments fail for the reasons stated below. For the most part, the responsive arguments did not meet the substance of the requests made in the Motion, and for the reasons discussed there and here, the improperly presented arguments should be dismissed.

1. Concerned Citizens and Citizens Advisory Committee

By their plain language, the numbered sub-paragraphs in each of these Notices of Appeal state either substantive SEPA challenges or challenges to the merits of the MIMP. EIS adequacy is not judged by the degree to which elements of a proposed plan are "reasonably compatible with policies of the City of Seattle and the Environmental Protection Act [sic]." Adequacy has nothing to do with policy or the merits of the proposal. It depends exclusively on whether the EIS adequately discloses the impacts of the alternatives, including the preferred alternative. Neither of these Appellants meaningfully addressed the argument advanced in the Motion, and the numbered sub-paragraphs of both appeal statements are not properly before the Examiner.

2. Squire Park Community Council's Argument Misunderstands Code

In support of its Issue B, the Squire Park Response asks the Examiner to read SMC 23.76.052.D.4 out of context, in a way that suggests that a challenge to the adequacy of an EIS—the only SEPA appeal state law permits here, WAC 197-11-600(3)(a)(iii)—may also include a challenge to the procedures the Director of DPD used under City Code to draft her recommendation on the MIMP. This is incorrect. Read in context, this Code provision, while perhaps inartfully worded, simply authorizes appeal of the Director's determination of adequacy. The lead sentence of SMC 23.76.052.D announces that the scope of the subsection extends to "the Director's procedural environmental determination." The sub-sub-section cited by Squire Park does not create an independent appeal path of a portion of the Type IV process (i.e., the merits of the Director's analysis of the MIMP), devoid of direction from any other section of Code, to be appended to the properly stated Type II appeal permitted by City Code and state law. Neither Squire Park's notice of appeal nor its response brief allege any procedural violations, and

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

no reading of 23.76.052.D authorizes the challenge to the substance of the Director's Report Squire Park advances.

Squire Park's proposed alternative paragraph B, at p. 2 of its response brief, does not cure the problem. The new language still challenges the substance of the Director's Report analysis of the MIMP, not the adequacy of the EIS. As such, it is not properly before the Examiner and should be dismissed.

3. Cherry Hill Community Council

The Response filed by the Cherry Hill Community Council asserts that SEPA requires both an EIS and a MIMP, but this misunderstands the nature of these proceedings. Without a MIMP, there would be no impacts for the EIS to analyze. The MIMP comes first, and the EIS exists solely to analyze the probable environmental impacts that would result from the MIMP (and alternatives). The merits of the MIMP form no part of the adequacy appeal; the only question before the Examiner is whether or not the EIS analyzes the MIMP's probable environmental impacts. These are substantive questions that go to the merits of the MIMP or the exercise of substantive SEPA, and either way, are not appropriate for this appeal.

4. 19th Avenue Block Watch

The Response brief filed by 19th Avenue Block Watch asks the Examiner to deny the Motion without providing substantive argument as to why. They write "[t]hese bullets are raised as errors, omissions and other problems with the EIS, which impact the MIMP and the Director's Decision, thereby leading to a conclusion of inadequacies for all three documents." Insofar as their appeal depends on the "adequacy" of the MIMP or the DPD Director's Report, it is not properly before the Examiner. 19th Avenue Block Watch does not explain, for example, how the institution's "need for expansion" implicates an *environmental* issue. Neither does it address how "conflicts of interest" could affect the environment. And so on. By their terms, the sections of the notice of appeal filed by 19th Avenue Block Watch challenged in the Motion go to the merits of the MIMP or substantive SEPA issues and should be dismissed.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

Issue 2.B provides an additional example. It reads "Further, the Director's Decision concerning the adequacy of the EIS, and therefore the MIMP, shows non-compliance with Seattle Municipal Code," then goes on to highlight all the alleged failures of the MIMP to comply with various provisions of the SMC. Yet compliance with SMC 23.44.022, 23.54.016, and Chapter 23.69 SMC, among others, does not implicate environmental issues and should be disregarded on this appeal. The only issue Appellants may challenge in the Director's Report is the determination of EIS adequacy, and all other issues—those identified in the Motion—should be dismissed.

5. Washington CAN

Washington CAN asserts that its appeal included no MIMP issues, but by its terms, more than half of its comment letter addressed exclusively MIMP issues. *See* Washington CAN Notice of Appeal, Attachment B (July 3, 2014 comment letter) § 1 (titled "Comments on the Swedish Cherry Hill Draft Major Institution Master Plan") at 1-9. Washington CAN does not provide any argument or explanation as to why that half of its comment letter actually addresses SEPA issues. If the Examiner is not inclined to disregard the entire letter as irrelevant to the issues properly in this hearing, the Examiner should disregard the portion of the letter that by its terms addresses MIMP issues.

II. CONCLUSION

This Motion seeks to clarify which issues should be allowed in the SEPA appeal and which are confined to the pre-decisional hearing on the MIMP. Appellants, in common with any member of the community, may make any argument they want during the public testimony at the pre-decisional hearing. The SEPA appeal, however, is different. It is an adversarial review of the Director's Type II decision, narrowly focused on whether that the EIS adequately analyzes environmental impacts. Movants respectfully request that the Examiner dismiss all other issues from the SEPA appeal.

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

DATED this 19th day of May, 2015.

FOSTER PEPPER PLLC

Joseph A. Brogan, WSBA #30664
Steven J. Gillespie, WSBA #39538
Attorneys for Swedish Medical Center Cherry Hill

McCULLOUGH HILL LEARY, P.S.

WSBA #39538

John C. McCullough, WSBA #12740
Courtney A. Kaylor, WSBA # 27519
Katie Kendall, WSBA # 48164 per e-mail authorization
Attorneys for Sabey Corporation

for

DEPARTMENT OF PLANNING AND DEVELOPMENT

WSBA #39538

Stephanie Haines
Senior Land Use Planner for City of Seattle
per e-mail authorization

for

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700