

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

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**

from a SEPA Determination by the Director,  
Department of Planning and Development

Hearing Examiner Files:

**MUP-15-010 (W)  
MUP-15-011 (W)  
MUP-15-012 (W)  
MUP-15-013 (W)  
MUP-15-014 (W)  
MUP-15-015 (W)**

Department Reference:  
3012953

**ORDER ON  
RESPONDENTS' JOINT  
MOTION TO DISMISS**

The Respondents, Swedish Medical Center, Sabey Corporation, and the Director of the Department of Planning and Development, filed a joint motion to dismiss Washington CAN's appeal and certain issues raised by all six Appellants in this consolidated SEPA appeal. The Appellants filed responses to the motion, and the Respondents filed a joint reply memorandum.

**Standing – Washington CAN**

The motion sought dismissal of the appeal filed by Washington Community Action Network ("Washington CAN"), contending that Washington CAN lacked standing to bring it. Following Washington CAN's submittal of declarations from two of its members, the Movants agreed that Washington CAN has established standing to challenge, on behalf of its members, only certain specific issues that are within the "zone of interests" protected by SEPA. SMC 23.76.022 states that "appeals may be initiated by any person significantly affected by or interested in the permit." However, SEPA is a state law that is administered at the local level by local jurisdictions. The applicable state statute, RCW 43.21C.075(4), authorizes appeals by persons "aggrieved by agency action" and is controlling.

SEPA grants an aggrieved person the right to judicial review of an agency's compliance with its terms. *Harris v. Pierce County* 84 Wn. App. 222, 232, 928 P.2d 1111 (1996) ... "A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within

the zone of interests SEPA protects, and (2) the party must allege an injury in fact."<sup>1</sup>

The zone of interests protected by SEPA is extensive, and the first part of the standing test "is easily met in environmental suits because of the abundance of laws affecting use of our natural resources."<sup>2</sup> The appeal states that Washington CAN includes members who reside in the neighborhoods adjacent to or near the proposal site and drive on roads that will be impacted by traffic generated by the proposal.<sup>3</sup> Therefore, Washington CAN is raising member interests that are within the zone of interests protected by SEPA. The "injury in fact" element of the SEPA standing test is satisfied when a plaintiff alleges the challenged action will cause 'specific and perceptible harm.'<sup>4</sup> "A sufficient injury in fact is properly pleaded when a property owner alleges 'immediate, concrete and specific' damage to property, even though the allegation may be 'speculative and undocumented.'<sup>5</sup> The appeal, together with the declarations of Dixie Mitchell and Chris Genese, allege that Washington CAN members will be "directly and adversely impacted" by land use; height, bulk and scale; view; and transportation impacts from the proposal. Washington CAN has met the injury in fact requirement and has standing to bring this appeal.

#### Lack of Clarity – Washington CAN Appeal

The motion seeks dismissal of Washington CAN's appeal for vagueness. The final paragraph of Washington CAN's statement of appeal issues reads as follows:

This appeal incorporates the contents of the letter from Claudia M Newman to Stephanie Haynes dated July 3, 2014, which is attached hereto as Attachment B. That letter provides more detail about Appellant's issues on review. While that letter was focused on the DEIS, many of the issues raised therein are still relevant and applicable to the FEIS because the FEIS did not adequately respond to or address those issues. To the extent that the project has changed, that the analysis in the DEIS was amended by the FEIS, and/or that the conclusions in the FEIS different from those in the DEIS, appellant will address those discrepancies at the hearing.<sup>6</sup>

At the prehearing conference, the Movants expressed concern about the lack of clarity created by this part of the appeal, and the Examiner stated that Washington CAN would be given the

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<sup>1</sup> *Lands Council v. Washington State Parks and Recreation Com'n.*, 176 Wn. App. 787, 799, 309 P.3d 734 (2013) quoting *Kucera v. State Dep't of Transp.*, 140 Wn. 2d 200, 212, 995 P.2d 63 (2000).

<sup>2</sup> *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn. 2d 862, 866, 576 P.2d 401 (1978).

<sup>3</sup> Washington CAN's Notice of Appeal at 2.

<sup>4</sup> *Kucera v. Department of Transp. supra* at 213 quoting *Leavitt v. Jefferson Cnty.*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994).

<sup>5</sup> *Id.*

<sup>6</sup> Washington CAN's Notice of Appeal at 4.

opportunity to clarify the appeal “by going through and actually picking out from [the] letter anything you see that should be in [the] appeal that is in the letter and not in the appeal now.”<sup>7</sup>

The prehearing order in this case noted that the parties discussed “the need for clarification of the issues in Washington CAN’s appeal,”<sup>8</sup> and stated that Washington CAN had until May 5 to “file and serve any clarifications required to its ‘Statement of Issues on Appeal’ in light of the content of the July 3, 2014 letter attached to the appeal.”<sup>9</sup> On May 5, 2013, counsel for Washington CAN filed a letter stating that she had reviewed the July 3, 2014 comment letter and

concluded that the portion of that letter that contains comments on the draft EIS is simply elaborating on the SEPA issues that are stated in Washington Can’s Notice of Appeal in 4(a), 4(b), 4(c), and 4(d). I do not believe that the letter adds any new or additional SEPA issues beyond those that were stated in the Notice of Appeal.

With this clarification, I want to be clear that we do not intend to abandon the SEPA issues presented in the July 3, 2014 letter. Rather, I believe that all of the SEPA issues that were presented in that letter are covered by the specific issues stated in 4(a)-(d) in the Notice of Appeal. If Swedish Medical Center Cherry Hill or Sabey Corporation disagree and believe that there are legal issues presented in our July 3, 2014 letter regarding the SEPA review that are separate and distinct and/or cannot be characterized as sub-issues of the issues stated in the Notice of Appeal 4(a)-(d), then we request that Swedish and/or Sabey identify those issues.

SMC 23.76.052 requires that an appeal of an EIS for a Type IV action “state specific objections to the environmental determination”.<sup>10</sup> Washington CAN’s appeal issues 4(a) through 4(d) are sufficiently specific for a notice of appeal. The Movants could have requested a more definite statement of the issues but did not do so. However, Washington CAN’s incorporating a DEIS comment letter on a proposal that has since been revised into the appeal of the FEIS makes the appeal issues unclear. It is not the Movants’ responsibility to clarify Washington CAN’s appeal issues, and Washington CAN has chosen not to do so. However, rather than dismissing the appeal, as the Movants request, the July 3, 2014 letter is **STRICKEN** from the appeal.

#### Appeal Issues Related to Merits of the Major Institution Master Plan

Major institution master plans (“MIMPs”) are Type IV quasi-judicial land use decisions that are made by the City Council based upon the Hearing Examiner’s record and recommendation.<sup>11</sup> The determination that an EIS is adequate is a Type II land use decision made by the Director of the Department of Planning and Development (“Department”) that may be appealed to the Hearing Examiner.<sup>12</sup> The Department prepares a written report on a Type IV application/MIMP

<sup>7</sup> Declaration of Peggy S. Cahill in support of Washington CAN’s Response to Joint Motion to Dismiss.

<sup>8</sup> Prehearing Order at 1.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> See also HER 3.01(d).

<sup>11</sup> SMC 23.76.004.C.

<sup>12</sup> SMC 23.76.004.B.

and the associated Type II EIS. The report includes a recommendation on the MIMP, and a decision on the adequacy of the EIS that was prepared for the MIMP.<sup>13</sup>

SEPA and the Land Use Code both require that the Examiner combine the hearing on the MIMP with the hearing on any appeal of the Department's EIS decision.<sup>14</sup> The evidentiary hearing on the EIS appeals in this case will provide a record for the Examiner to make a decision on the appeals of EIS adequacy. The MIMP portion of the hearing will make a record that includes a detailed presentation of the MIMP and public comment on it. The Examiner will use the record in making a recommendation on the MIMP to the Council, and the Council will use the record as part of its decision-making process on the MIMP.

The MIMP cannot be appealed at this point in the process because there has not yet been a decision on the MIMP. Further, nothing in the Code gives the Examiner authority to hear an appeal of a MIMP or a Director's report and recommendation. Accordingly, the motion asks that appeal issues related to the merits of the MIMP be dismissed and identifies such issues in each of the EIS appeals. Rule 3.02 of the Hearing Examiner Rules of Practice and Procedure provides that an "appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay."

Concerned Neighbors of Swedish Cherry Hill. The motion identifies the "10 subparagraphs of Issue A" as well as Issue B in this appeal as raising issues concerning the merits of the MIMP or "substantive SEPA".<sup>15</sup> Issue A states that the Department's EIS adequacy decision is erroneous in that the EIS failed to adequately present and analyze significant adverse environmental impacts and reasonable alternatives that would mitigate these impacts "in areas, including". The appeal then lists 10 areas in which the "proposed plan is not reasonably compatible with policies of the City of Seattle and the Environmental Protection Act." Although the subparagraphs may be expressed unartfully, most of them list impacts that are clearly environmental in nature and, when read together with Issue A, the intent appears to be to appeal the adequacy of the *EIS's discussion* of these impacts, not the proposed MIMP. Read in that context, the only impact that clearly goes to the merits of the MIMP is "use," and subparagraph 2 is therefore **DISMISSED**. Concerned Neighbors may speak to the impacts in the remaining subparagraphs of Issue A at hearing only in the context of whether they are adequately addressed in the EIS. Issue B is **DISMISSED** because it relates only to the merits of the MIMP.

Citizens Advisory Committee. The motion identifies Issue B as raising issues concerning the merits of the MIMP, and the five subparagraphs of Issue A as raising issues concerning the merits of the MIMP or "substantive SEPA". Like Concerned Neighbors' appeal, Issue A of this appeal can be read as challenging the adequacy of the EIS with respect to its discussion of the environmental impacts listed in the five subparagraphs that follow Issue A. Citizens Advisory Committee may speak to the listed impacts at hearing only in the context of whether they are

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<sup>13</sup> SMC 23.76.050.

<sup>14</sup> See SMC 23.76.052.A.

<sup>15</sup> Substantive SEPA is addressed below.

adequately addressed in the EIS. Issue B is **DISMISSED** because it relates only to the merits of the MIMP.

Squire Park Community Council. The motion identifies Issues B and C as raising issues concerning the merits of the MIMP. These two issues clearly relate only to the merits of the MIMP. Squire Park's response suggests that the issues were intended to relate to "compliance with the procedures for Type IV Council land use decisions," which would be proper subjects for appeal under SMC 23.76.052.D.4. The argument is that such procedures include the Director's preparation of a written report and recommendation, and that Issues B and C were intended to convey that the report and recommendation did not comply with those procedures. However, alternative language offered by Squire Park confirms that what is actually intended is a collateral attack on the substantive content of the Department's report and recommendation, a matter over which the Examiner has no jurisdiction. Further, the time allowed for a motion to amend an appeal has expired. See HER 3.05. Issues B and C are **DISMISSED**.

Cherry Hill Community Council. The motion identifies all issues from page 1 through the first three lines of page 5 of the appeal as raising issues concerning the merits of the MIMP. The Examiner has confirmed that they do so. Pages 1 through the first three lines of page 5 of the appeal are **DISMISSED**.

19<sup>th</sup> Avenue Block Watch. The motion identifies five bullet points under Issue 2.A, and all of Issues 2.B, 2.D, and 2.E as raising issues relating to the merits of the MIMP. Issue A states that the appeal includes examples "where there are errors, omissions and other problems with the inadequacies of the EIS, the MIMP, and the Director's Decision" and lists 11 bullet points as specific inadequacies. (Emphasis added.) The following bullet points in Issue A are **DISMISSED** for failure to "state specific objections to the environmental determination" as required by SMC 23.76.052 and HER 3.01(d): 1) Failure to establish need ...; 2) Errors of fact; 3) Assertions not supported by facts; 4) Failure to properly describe the history of the issues; 5) Conflating over all Swedish actions and performance with Cherry Hill specific issues; 6) Inclusion of irrelevant facts and issues; and 7) Non-binding language .... To the extent that the remaining bullet points relate to the MIMP, or to the Director's report and recommendation, they are also **DISMISSED**. The bullet point under Issue A that reads, "Conflicts of interest" is **DISMISSED** because it raises an issue that is not within the jurisdiction of the Examiner in determining the adequacy of an EIS.

Although Issue 2.B starts with language that, in part, addresses the adequacy of the EIS, the entire discussion of sub-issues within Issue 2.B is directed to the merits of the MIMP. Issue 2.B is therefore **DISMISSED**. Issues 2.D and 2.E also address the merits of the MIMP and are **DISMISSED**.

All issues that relate to the MIMP may be addressed during the public hearing portion of the scheduled hearing on the MIMP and EIS appeals.

#### Procedural and Substantive SEPA

SEPA ultimately strives to avoid environmental degradation, to preserve and even enhance environmental quality by requiring the actions of ... government

agencies to be based upon sufficient environmental information and to be in accord with SEPA's substantive policies. Since SEPA does not compel environmentally wise choices, an EIS does "not rule on the wisdom of the proposed development" but provides decision-makers with "sufficient information to make a reasoned decision." Obviously, SEPA's procedural and substantive mandates are intimately interrelated.<sup>16</sup>

"Procedural SEPA" generally refers to SEPA's procedural environmental analysis requirements, as reflected in Chapter 25.05 SMC. "Substantive SEPA" means "the various ways SEPA determines or influences the substance of agency action,"<sup>17</sup> in this case, as a supplement to the City's authority to condition a proposal to mitigate its adverse environmental impacts.

A challenge to the adequacy of an EIS is a challenge to a procedural environmental determination.<sup>18</sup> It claims that the EIS does not meet the procedural requirements of Chapter 25.05 SMC for an EIS, i.e., the requirements for *discussion and analysis* of both impacts and the "reasonable mitigation measures that would significantly mitigate" the impacts.<sup>19</sup> EIS adequacy is reviewed under the "rule of reason," which means it must present decision makers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision."<sup>20</sup>

The motion asks that all substantive SEPA issues in the various appeals be dismissed.

Cherry Hill Community Council. The motion identified the issue raised in this appeal on page 5, at the third full paragraph, as raising a substantive SEPA issue. The paragraph begins with the sentence, "The mitigation measures set out in section 3.4.1.4 are inadequate," and discusses the alleged inadequacies. Because it challenges the adequacy of mitigation measures addressed in the EIS, rather than the adequacy of the actual discussion of mitigation measures, the appeal raises a substantive SEPA issue rather than a procedural SEPA issue and is, therefore, outside the jurisdiction of the Hearing Examiner. If the City Council approves the MIMP, it will also decide what mitigation measures, including SEPA mitigation, to impose as conditions of the approval.<sup>21</sup> The third full paragraph on page 5 of this appeal is **DISMISSED**.

19<sup>th</sup> Avenue Block Watch. The motion identifies Issue 2.C as raising a substantive SEPA issue. This issue addresses, through an attachment, "specific examples where DPD's mitigations are inadequate to address the Major Institution impacts on the neighborhood identified in the EIS and MIMP." Again, the adequacy of the Department's proposed SEPA mitigation, as opposed to

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<sup>16</sup> R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, §14.01, supp. 2014 (internal citations omitted).

<sup>17</sup> *Id.* at §18.01.

<sup>18</sup> See SMC 23.76.052.D.

<sup>19</sup> SMC 25.05.440.E.1.

<sup>20</sup> *Cascade Bicycle Club v. Puget Sound Regional Council* 175 Wn.App. 494, 508-509, 306 P.3d 1031 (2013)(internal citations omitted).

<sup>21</sup> "An agency's ultimate substantive decision, after EIS preparation and consideration, is not required to adopt one of the alternatives or to incorporate only mitigation measures specifically identified and analyzed in the EIS." R. Settle, *supra* at §14.01[2][c][ii].

the EIS's discussion of mitigation measures, is not an issue within the Examiner's jurisdiction in these appeals. Issue 2.C is **DISMISSED**.

Washington CAN. The motion identifies Issue 4(a) as being vague and raising a substantive SEPA issue or a non-SEPA issue. The issue reads as follows: DPD erred when it determined that the FEIS adequately describes and assesses the adverse impacts of the Master Plan. DPD also erred when it determined that the Master Plan has been adequately conditioned to mitigate identified adverse impacts."<sup>22</sup> Washington CAN responds that issue 4(a) is "just a statement of error" and quotes the Notice of DPD Director's Master Plan Recommendation. As discussed above, regardless of the language used, the Department issues a "report and recommendation". The report includes an analysis of the Master Plan, including rezones; a SEPA analysis, including a determination of EIS adequacy and *recommended* SEPA conditions; and a recommendation on the Master Plan. The only "procedural environmental determination" that may be appealed to the Examiner under SMC 23.76.052 is the determination of adequacy. The first sentence of Issue 4(a) will stand as a general statement concerning EIS adequacy, rather than a statement of "specific objection to the environmental determination" on which evidence can be offered at hearing. The second sentence of Issue 4(a) is **DISMISSED**.

The motion identifies Washington CAN's Issue 4(b) as including a substantive SEPA issue in the second sentence, which states, in part, that the FEIS "failed to adequately mitigate" various "significant adverse impacts". As discussed above, the FEIS does not impose substantive mitigation on the proposal; it is limited to discussing and analyzing potential mitigation measures. Issue 4.b is **DISMISSED to the extent that it relates to substantive mitigation**.

The motion identifies Washington CAN's Issue 4(c) as raising a substantive SEPA issue in that it claims that the "FEIS is inconsistent with and does not contain the scope of analysis required by" certain SEPA policies. Although SEPA policies form the basis for the exercise of substantive SEPA authority, i.e., conditioning or deny a proposal, this issue does not concern that authority. It is addressing the EIS's discussion and analysis of the policies in relation to various elements of environment. The motion is **DENIED** as to Issue 4(c).

#### EIS Requirements - Non-environmental Issues

SMC 25.05.440.G provides that the "lead agency may at its option include, in an EIS ... the analysis of any impact relevant to the agency's decision, whether or not environmental ... 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." "Environment" is defined as the elements of the environment listed in SMC 15.05,444 and clarifies that "[e]nvironment ... refer[s] to the state of the environment and ... refer[s] basically to *physical environmental quality*."<sup>23</sup> (Emphasis added.)

Cherry Hill Community Council. The motion identifies the arguments in the second full paragraph on page 4 of the appeal, concerning policy issues about locating major institutions

<sup>22</sup> Washington CAN's Notice of Appeal at 3.

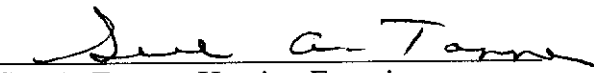
<sup>23</sup> SMC 25.05.740.

outside an urban village, as raising a non-environmental issue. The motion is **DENIED**. The issue addresses the relationship of the proposal to the City's Comprehensive Plan, specifically the Urban Villages Element.

Washington CAN. The motion identifies parts of Issues 4(d) and 4(b) as including non-environmental issues. Issue 4(d) alleges that the FEIS "incorrectly concludes that the Master Plan is consistent with certain goals in the Human Development Element goals and policies ... in the Comprehensive Plan. Issue 4(b) states that the FEIS failed to adequately disclose and analyze "significant adverse impacts related to ... human development".<sup>24</sup> Washington CAN responds that the FEIS included a discussion of the proposal's consistency with the Human Development Element of the Comprehensive Plan, and that the scope of a SEPA appeal is defined by the scope of the FEIS. However, SMC 25.05.440.G is to the contrary.

SEPA requires that an EIS analyze a proposal's relationship to "existing land use plans". SMC 25.05.444.B.1.c. But not all parts of the Comprehensive Plan are land use plans. The Plan is "designed to articulate a vision of how Seattle will grow in ways that sustain its citizens' values." It recites specific non-environmental "core values," such as "community," economic opportunity and security," and "social equity,"<sup>25</sup> and includes elements, such as the Human Development Element, that address social issues and can in no way be characterized as a "land use plan" or as relating to physical environmental quality. The analysis of the proposal's consistency with the Human Development Element of the Plan was not required in the EIS,<sup>26</sup> and the Department's decision to include it, as well as the adequacy of the analysis, "shall not be used in determining whether [the] EIS meets the requirements of SEPA."<sup>27</sup> All issues in Washington CAN's appeal that concern human development impacts are **DISMISSED**.

Entered this 21<sup>st</sup> day of May, 2015

  
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<sup>24</sup> Washington CAN's Notice of Appeal at 3.

<sup>25</sup> Comprehensive Plan Vision Statement

<sup>26</sup> SMC 25.05.448.C.

<sup>27</sup> SMC 25.05.440.G.



**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

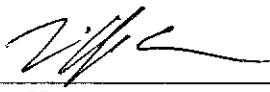
I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Respondents' Joint Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matter of **Washington Community Action 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.** Hearing Examiner Files: **MUP-15-010 (W), MUP-15-011 (W), MUP-15-012 (W), MUP-15-013 (W), MUP-15-014 (W), and MUP-15-015 (W).** in the manner indicated.

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Dated: May 21, 2015

  
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Tiffany Ku  
Legal Assistant