

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**NEIGHBORS ENCOURAGING
REASONABLE DEVELOPMENT**

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

Hearing Examiner Files:

MUP-15-022(W)

S-15-003

(DPD Files 3014342 and 3015697
Interpretation No. 13-005)

**APPELLANT'S RESPONSE TO DPD'S AND
APPLICANT'S MOTION TO DISMISS THE
APPEAL, MOTION TO DISMISS THE
INTERPRETATION AND MOTION TO
PARTIALLY DISMISS ISSUES 4.1.15 AND
4.1.15**

Neighbors Encouraging Reasonable Development ("Appellant" or "NERD") respectfully requests that the Hearing Examiner deny the Motion to Dismiss the Appeal, deny the Motion to Dismiss the Interpretation and deny the Motion to Partially Dismiss Issue 4.1.15.

- I. DPD's and Applicant's Motion to Dismiss the Appeal are based on arguments that contradict the Department of Planning and Development ("DPD") Decision of a State Environmental Protection Act ("SEPA") Determination of Non Significance ("DNS") on August 6, 2015.

The DPD gave notice of the project as if it were NOT categorically exempt (as evidenced in the Revised Notices of Applications, Exhibit 1), ran a comment period as if it were not categorically exempt (Exhibit 1) AND published a Decision that explicitly checked the SEPA Determination DNS box (Exhibit 2).

The published Notice of Decision on the DPD website

<http://web6.seattle.gov/DPD/LUIB/Notice.aspx?BID=1056&NID=20205> states explicitly under Conditions: "The following appealable decisions have been made based on submitted plans: Determination of Non-Significance (no environmental impact statement required)."

A DNS decision is a Type II decision under Seattle Municipal Code ("SMC") 23.76.006.C.1.a.

Our appeal, timely filed under the guidelines as stipulated in SMC 23.76.022.C.3, is an appeal of this decision. The DPD's and Applicant's Motion to Dismiss the Appeal has no merit and must be denied.

Lastly, both the DPD and Applicant continually argue that NERD did not appeal the "Environmentally Critical Area ("ECA")-only SEPA Determination" - that argument is completely irrelevant in the current situation of a DNS Decision. Perhaps it would have applied had the SEPA Determination been Exempt, which both the DPD and Applicant assert, yet is completely unfounded and contradicts the ACTUAL DPD DECISION, which NERD relied on. Had the SEPA Determination been Exempt, with only the ECA component up for appeal, NERD would have filed an appeal relating specifically to that issue, as the building's construction involving height, bulk, & scale were directly a function of how the project is

constructed on a steep slope. However, that was not necessary given NERD's reliance on the ACTUAL DPD DECISION, requiring only an appeal.

As common citizens not versed in the intricacies and complex laws relating to Land Use, it is unreasonable to assume that non-Land Use professionals, who rely solely on filed documents provided by the DPD, should have known and interpreted a DPD filed SEPA Determination of DNS, as actually meaning an "ECA-only SEPA Determination" – an assumption imposed on NERD by both the DPD and Applicant.

If this was simply incompetence on the part of DPD, and reliance by NERD of the DPD filed SEPA Determination of DNS was unreasonable, NERD believes this further reinforces the core reasons for this appeal and the core reasons behind the appeal of the Interpretation, in which case there is now greater evidence to deny the Motion to Dismiss both. The DPD's and Applicant's Motion to Dismiss the Appeal on these arguments have no merit and must be denied.

- II. DPD's and Applicant's Motion to Dismiss the Interpretation misapply the clear and unambiguous language in SMC 23.88.020.F.3 relating to appealing an interpretation.

As noted above, the DNS decision is a Type II decision under SMC 23.76.006.C.1.a.

The NERD interpretation No. 13-005 relates directly to this Type II Master Use Permit and is explicitly available for appeal under SMC 23.88.020.F.3.

Our appeal was timely filed under the guidelines as stipulated in SMC 23.88.020.G.

On those grounds alone, the DPD's and Applicant's Motion to Dismiss our Interpretation Appeal has no merit and must be denied.

SMC 23.88.020.F.3 states in clear and unambiguous language that "An interpretation...may be appealed only if that project decision is appealed." It does not mention anywhere in the SMC, nor is implied in the SMC, that the project appeal has to be winning. It just states that one has to attach an Interpretation appeal to a project appeal. We did that here and paid the filing fee and appealed the Type II DNS Decision and the Interpretation. Any negative ruling by the Hearing Examiner on the DNS Appeal does not also automatically require dismissal of the associated appeal of interpretation properly filed with the Type II appeal.

The DPD reference to Hearing Examiner File S-10-001 is completely irrelevant in this hearing – in the referenced Hearing Examiner File, an appeal of the interpretation was filed, but the Type II MUP decision was not appealed. Those are not the facts in our case because we clearly stated that we were appealing the Type II Decision. Therefore, even if the Motion to Dismiss the DNS Appeal were upheld, that does not require dismissal of our Interpretation Appeal.

Lastly, we believe the DPD erred in its Interpretation No. 13-005. There are several significant and material components within the Interpretation that when erroneously applied to the applicant's project application, did not subject the project to a "full" SEPA review. If the Hearing Examiner agreed that the DPD erred in its Interpretation, there are significant and adverse impacts relating to height, bulk, & scale (which is in part dependent on how the steep slope on the site is developed despite ECA restrictions), light & glare, parking, and traffic & transportation under SMC 25.05.675 and cumulative effects of prior,

simultaneous, proposed and possible developments under SMC 25.05.670, none of which have been considered and would be grounds for an appeal of the Decision of DNS. Therefore, it would be premature to uphold the Motion to Dismiss the Interpretation Appeal.

- III. The Appeal Grounds under 4.1.15 were meant to satisfy the requirements of SMC 23.88.020.C.3.c as an appeal of the Director's interpretation of SMC 23.54.015 Table B, section II, item M and SMC 23.84A.038 – "T", "Transit service, frequent" and the NERD Request of Interpretation included reference to parking.

As detailed in Hearing Examiner Decision MUP-14-006(DR,W)/S-14-001 (Exhibit 4), the DPD had been erroneously applying the Director's Rule 11-2012 as its interpretation of SMC 23.54.015 Table B, section II, item M and SMC 23.84A.038 – "T", "Transit service, frequent". Under the Hearing Examiner's Decision, the DPD was erroneously averaging transit route headways, instead of following the clear and unambiguous SMC definition of "Transit service, frequent". The Hearing Examiner Decision required headways be considered "the time interval between two vehicles traveling in the same direction on the same route" and that the SMC explicitly did not allow for the averaging or combining of routes.

The DPD, as the Respondent in that case before Hearing Examiner Tanner, was acutely aware of both the DPD's current practice and application of both SMC 23.54.015 Table B, section II, item M and SMC 23.84A.038 – "T", "Transit service, frequent" prior to the Decision and also acutely aware of the proper application of how the SMC should be applied after this decision.

Despite these facts, the DPD continued to allow the Applicant to utilize the erroneous Director's Rule application in the Applicant's submitted project application, despite repeated notifications and comments directed to the DPD Planner Seth Amrhein in the months following the Hearing Examiner's Decision. The DPD and Applicant were and are well aware and well versed in the Applicant's failure of legally following the applicable SMCs and Hearing Examiner Decision and explicitly understand both the Director's construction or application error in the applicable SMCs, and how the SMCs should be construed or applied, as evidenced by their Motions to Partially Dismiss. NERD can confirm this as based not only on the Hearing Examiner Decision, but on our direct communications with DPD personnel, which we provide here under oath (Exhibit 5).

In addition, the below was included in the NERD Request for Interpretation (Exhibit 3), paragraph four:

This practice of understating the actual number of dwelling units has allowed developers to evade oversight and review that would balance proposed development with existing neighborhoods via Design Review and SEPA Review with specific regard to (WAC 197-11-444) (2) Built Environments. Design Review and SEPA Review are intended to promote compatible development and in turn prevent development that would otherwise harm natural and built environments.

The WAC 197-11-444 specifically identifies the elements of the environment to be considered under SEPA, including Built Environment. This is the basis for the City's SEPA policy. In the elements of the environment under SEPA, section II Built Environment, vehicular traffic and parking are included. Under

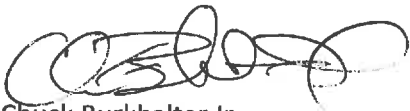
SMC 25.05.675, SEPA review specifically identifies parking and traffic & transportation as elements to mitigate. NERD expected the DPD to address our explicit concerns relating to WAC 197-11-444 and related SMC 25.05.675, which included parking. The DPD Interpretation did not address any of our explicit concerns under either WAC 197.11.444 and/or SMC 25.05.675. It did not even mention these provisions we had raised, but only acknowledged that "No parking is proposed on the site." under Finding of Fact 5, and that "the bicycle parking and trash storage area standards were appropriately applied based on the requirements for a 14-unit building." under Conclusions 8. If DPD did not understand what this was about it could and should have asked.

For these reasons, the Motion to Partially Dismiss Issue 4.1.15 must be denied.

Conclusion:

Based on the foregoing facts and reasons, NERD respectfully requests that the Hearing Examiner deny the Motion to Dismiss the Appeal, deny the Motion to Dismiss the Interpretation Appeal, and deny the Motion to Partially Dismiss Issue 4.1.15. NERD also requests that discovery relating to frequent transit service calculation be allowed, discovery relating to the Department's SEPA DNS decision be allowed, and that both Seth Armhein and Jerry Suder, identified in our witness list, be called as witnesses, as their involvement in the DPD DNS Decision was significant, particularly in continuing to allow the Applicant to violate both the SMC and a Hearing Examiner Decision in their application.

Respectfully,

A handwritten signature in black ink, appearing to read "CBurkhalter", with a stylized flourish at the end.

Chuck Burkhalter Jr.

On behalf of NERD

Dated this 1st day of October, 2015, at Seattle, Washington