BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeal of **MARTIN HENRY KAPLAN, ARCHITECT AIA (QUEEN ANNE COMMUNITY COUNCIL)** from a Determination of Non-Significance by the Director, Office of Planning and Community Development, regarding amendments to the Land Use Code	Hearing Examiner File: **W-16-004** **OPCD MOTION TO DISMISS**

The Office of Planning and Community Development (OPCD) respectfully requests that, pursuant to Hearing Examiner Rules (HER) 2.16 and 3.02, the Hearing Examiner (Examiner) dismiss the appeal by Martin Henry Kaplan in the above-captioned matter. Under HER 3.02, the Examiner may dismiss an appeal without a hearing if the appellant fails to state a claim for which the Examiner has jurisdiction to grant relief or the appeal is without merit on its face. The appeal should be dismissed for both reasons.

Background

The decision appealed is a review under the State Environmental Policy Act (SEPA) of proposed Land Use Code amendments by the City Council related to attached accessory dwelling units (ADUs) and detached accessory dwelling units (DADUs), also called backyard cottages. The proposal would:

- Modify certain development standards for siting, designing, and constructing ADUs and DADUs;
- Remove the requirement for one off-street parking space when an ADU or DADU is established;
- Allow an ADU and a DADU on the same lot; and
- Require owner-occupancy for a period of 12 months after an ADU and/or DADU is established.

Copies of the proposed legislation, the OPCD Director's Report, the SEPA checklist, the SEPA determination decision, and the public notice of the legislation are attached to this motion for reference.

Current regulations allow ADUs and DADUs in single-family zones subject to certain development standards. The proposed legislation is intended to remove identified barriers that have constrained the production of ADUs and DADUs. SEPA review of legislation

proposals is required of proposals that "…contain standards controlling use or modification of the environment," per Section 25.05.704.B.2.a.

Argument

Mr. Kaplan's appeal raises four issues with the Determination of Non-Significance (DNS). First, the appellant alleges that Councilmember Mike O'Brien did not adequately solicit public input in developing the proposal. Second, the appeal restates the proposed amendments to the Land Use Code and makes an unsubstantiated argument that the proposal will have significant impacts. Third, the appeal invokes previous statements by elected officials about potential land use policy changes that are irrelevant under the scope of SEPA. Fourth, the appellant asserts that the responses in Part B of the SEPA checklist, which is for project-specific actions, are evidence that OPCD has not accurately completed the SEPA checklist. OPCD submits that all of these arguments are subject to dismissal for the following reasons:

1. **OPCD followed all required pubic notice procedures pursuant to SMC 23.76.020.C, and additional public involvement conducted by Councilmember O'Brien is outside the scope of interest under SEPA.**

The appellant argues that Councilmember Mike O'Brien has failed to include the majority of Seattle residents in seeking public input. This argument is irrelevant to the SEPA determination, is without merit, and should be dismissed. Neither the number of public meetings held nor the public input collected at these meetings affects the adequacy of the SEPA determination under appeal. The public notice published in the Land Use Information Bulletin (LUIB) and the Daily Journal of Commerce (DJC) attached to this motion demonstrates that OPCD followed all codified procedural requirements for public notice of the legislation pursuant to SMC 23.76.020.C. The appellant does not dispute that OPCD followed all required procedures for public notice of the proposed legislation. The appellant merely objects to the format and/or number of public meetings held in January and February 2016, during the phase of proposal development, which is irrelevant to the SEPA determination on the proposed legislation.

Regarding the merits of this argument, the appeal admits that members of the Queen Anne Community Council attended two public meetings about the proposed legislation in January and February 2016. During these meetings, OPCD received several hundred comments and questions from the public. The appellant's claim that "these two meetings…did not include public input" is demonstrably false, as evidenced in the Summary of Public Input report cited in the appeal, which summarizes the responses of the several hundred people that attended these meetings. Regardless, this line of argument is entirely outside the scope of interest under SEPA. Accordingly, it should be dismissed.

2. **The appellant provides no information about alleged errors in the decision and no specific objection to the decision being appealed.**

OPCD acknowledges that the appeal correctly states that the proposal would modify the regulations in SMC 23.44.041 for accessory dwelling units. However, the appeal notice fails to provide any information whatsoever about any alleged errors in OPCD's determination, which could result in significant adverse impacts that would be likely to result from this legislation.

SMC 23.05.680.A establishes procedures for SEPA appeals of Master Use Permits and Council land use decisions. Subsection 2.b states:

> "… The appeal notice shall set forth in a clear and concise manner the alleged errors in the decision…"

Section 3 of the Hearing Examiner Rules of Practice and Procedure addresses appeal filings. Subsection (d)(3) states:

> "(d) Contents. An appeal must be in writing and contain the following:
> …
> (3) A brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed;"

Merely restating the proposal in question, as the appeal does on page 2, and then suggesting that "we will demonstrate the considerable number of significant impacts from overturning the existing code," is not sufficient to set forth the alleged errors, and it does not note any specific objections to the decision. Part C.2.b of the appeal provides no specific information on any topics or elements of the environment that the appellant alleges were inadequately considered or evaluated erroneously. This makes it impossible for OPCD to know what errors are alleged, and it is impossible to respond to any alleged deficiency in the determination.

The appellant states that the proposed legislation seeks to overturn existing regulations governing accessory dwelling units. This is incorrect and mischaracterizes the proposal. Accessory dwelling units are already allowed by existing zoning in all single family zones. Contrary to the appellant's assertion, this proposal retains many existing development standards that regulate development on single-family zoned lots, including for accessory dwelling units. First, the proposal retains the existing definitions of a "household" and a "single-family dwelling unit." Together, these definitions effectively limit the number of unrelated persons that can live on a single-family zoned lot to eight, regardless of any accessory dwelling units on the lot.[1] Second, the proposal makes no change to the maximum lot coverage limit for single-family zoned lots, which regulates the footprint of all structures on a single-family zoned lot, including accessory structures.[2] Third, the proposed amendments retain the existing requirement that a

[1] There is no limit for related persons under current or proposed regulations.
[2] The maximum lot coverage limit for lots 5,000 square feet and larger is 35 percent of the lot area. The maximum lot coverage limit for lots under 5,000 square feet is 1,000 square feet plus 15 percent of the lot area.

property owner establishing an accessory dwelling unit must occupy either the principal dwelling unit or the accessory dwelling; the proposed legislation modifies but does not eliminate the owner-occupancy requirement.

The SEPA checklist is required to evaluate only the environmental impacts resulting from the proposed amendments. The proposal makes no changes to the number of people that can live on a single-family zoned lot, and no changes to the total amount of area on a single-family zoned lot that can be covered with one or more structures, relative to what is allowed under current regulations. The appeal fails to articulate any basis for why the modest changes in development standards, when compared to the current Code standards, would have any probable significant adverse impacts. The appeal simply describes the proposed legislation but fails to present any specific topic of error in or objection to the decision.

The appellant refers to previous legislation that allowed development of ADUs and DADUs. But the SEPA determination in question is an evaluation of probable environmental impacts stemming only from the proposed legislation. It is not a discussion of current policy options or past policy decisions. While the proposal may represent a minor shift in policy direction, that is a matter for the City Council to decide and not within the scope of a SEPA determination.

Because the allegations in part C.2.b of the appeal lack any specificity and are entirely unsubstantiated, they should be dismissed.

3. Statements by elected officials are irrelevant and outside the scope of interest under SEPA.

The appellant raises two spurious arguments in part C.2.c. of the appeal that are irrelevant to the adequacy of the SEPA determination. The first argument concerns public statements by Mayor Murray about the Housing Affordability and Livability Agenda (HALA). Statements from elected officials are immaterial to the DNS on the proposed legislation and are completely outside the scope of interest under SEPA. The SEPA analysis concerns only the proposed legislation or action at hand, and therefore a statement made by an elected official is not material to the SEPA determination. Discussion of the HALA recommendations, or other HALA-related legislative proposals other than the proposed modifications to development standards for ADUs and DADUs is completely irrelevant to the SEPA determination in question.

The appellant argues that Mayor Murray made assurances that "there would be no upzones and changes to any single-family zoned land in Seattle." Even if public statements were relevant to a SEPA determination of probable environmental impacts, which they are not, the appellant's assertion that the proposal contradicts Mayor Murray's assurances is incorrect. The proposed legislation does not change the zoning of any land. The proposal modifies development standards for ADUs and DADUs, which are already allowed by right on single-family zoned lots in Seattle.

The appellant further argues that Councilmember Mike O'Brien has claimed that the proposed legislation will lead to construction of affordable housing but contends there are no professional or expert studies to support that claim. This argument should be dismissed because statements by Councilmember O'Brien are immaterial to the SEPA determination. Only the material in the proposed legislation, the SEPA checklist, and the SEPA determination can serve as the basis for appeal. The appellant argues that "experts agree that removing the barriers [to the development of accessory dwelling units] will in fact produce market rate housing." This claim is not substantiated, and no specific experts are identified. The appellant also claims that, under the proposed legislation, "current single family homes on single-family zoned lots will become duplexes and triplexes." This argument should be dismissed because duplexes and triplexes are forms of multifamily housing that are not allowed in single-family zones currently or under the proposed legislation. In any case, there is nothing in the appeal statement that relates any of these concerns to a probable significant adverse environmental impact.

Nothing in the SEPA materials claims that the proposed legislation will produce rent-restricted affordable housing. Data and observation suggest that ADUs and DADUs produced to date generally rent at market-rate prices. However, due to their smaller size, accessory dwelling units tend to offer a housing option that is affordable to a wider range of households and income levels relative to single-family houses in the same neighborhood. This fact does not mean that ADUs and DADUs provide a form of housing for low- or very low-income households, nor that the City ever made such a claim. This argument should be dismissed because it is without merit and unsubstantiated and has no bearing on environmental impacts.

4. Because the proposed legislation is a nonproject action under SMC 25.05.704 and 25.05.774, completion of Part B of the SEPA checklist is not required.

The appeal asserts in part C.2.d that OPCD completed the SEPA checklist without accuracy because questions in the checklist are answered with "Not applicable." The proposed legislation is a nonproject action as described in SMC 25.05.704.B.2 and 25.05.0774. Part B of the SEPA checklist, which applies to project-specific actions, is therefore not applicable. OPCD did not commit an error in answering Part B questions with "Not applicable." WAC 197-11-315 provides for the lead agency to determine that questions in Part B do not contribute meaningfully to the analysis of the proposal. Part D of the SEPA checklist, which applies to nonproject actions, was completed entirely and accurately, a fact that the appellant does not dispute.

The Hearing Examiner has previously ruled on this argument. In Hearing Examiner File W-13-008, Matter of the Appeal of Dennis Saxman (2014), the Hearing Examiner concludes that:

> "…the proposed legislation is a nonproject action under SMC 25.05.705 and 25.05.774; and WAC 197-11-315 does not require that Part B be completed if the lead agency determines that the questions in Part B do not contribute meaningfully

> to the analysis of the proposal. In this case, the questions in Part B to which DPD has responded 'not applicable' do not contribute meaningfully to the analysis of the proposal, because there is no specific site or construction project which has been proposed. There is no evidence to show that DPD's evaluation of the proposal as a nonproject proposal was in error or that the proposal's impacts were not disclosed because the proposal was evaluated as a nonproject proposal."

Hearing Examiner decision W-13-008 concerned an appeal of a DNS issued by the Department of Planning and Development (DPD) for a proposal to amend the Land Use Code to modify development standards, design review thresholds, and definitions related to micro-housing. The micro-housing proposal, like the current proposed amendments to regulations for ADUs and DADUs, did not involve a specific site or construction project. The current proposal would affect the regulations for single-family zoned parcels, of which there are more than 125,000 citywide, and is thus exactly like the nonproject proposal considered in W-13-008. The appellant's argument with respect to completion of the SEPA checklist is without merit and should be dismissed as it was in Hearing Examiner File W-13-008.

Conclusion

For the reasons stated above, this appeal should be dismissed. Short of complete dismissal, DPD requests that the Hearing Examiner order the appellant to supplement the appeal with specific statements of error so that OPCD may determine how to respond in any scheduled hearing.

Entered this 8th day of July, 2016.

Geoff Wentlandt, Strategic Advisor
Office of Planning and Community Development

Attachments: Proposed legislation, OPCD Director's Report, SEPA checklist, SEPA decision, public notice

cc. Martin Henry Kaplan, appellant
Jeff Eustis, appellant legal counsel