BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeal of	)	Hearing Examiner File:
	)	
Citizens for Livability in Ballard	)	**W-16-003**
	)	
Adequacy of Draft and Final EIS for the Seattle Comprehensive Plan Update, released on May 4, 2015 and May 5, 2016 respectively.	)	**Appellants' Response to City's Motion for Dismissal**
	)	
_____	)	

The Appellants respectfully request that the Hearing Examiner deny the City's Motion Dismissal.

The Appellant also objects to Request for Dismissal as being intended to distract or mislead because the major substantive issues raised, particularly appellants comment on the Draft EIS, have been previously raised by the city and dismissed by the Hearing Examiner in Case W-14-001.

RESPONSE TO APPEAL

Despite the fact that the major substantive issues have been previously ruled on in similar cases, and notwithstanding the lack of merit of the DPD's request, Appellants will respond to the Motion so that the DPD may not later plead that any of its statements were uncontroverted.

I. STATEMENT OF RELEVANT FACTS

No response required. The alleged facts are addressed in this subsection are neither agreed to nor denied.

II ISSUES PRESENTED

A. Is citizen comment on the Draft EIS required?
B. Is demonstration of "injury in fact" required?
C. Are issues raised beyond the Hearing Examiner's subject matter jurisdiction?

All these issues must be answered in the negative and the request denied by the Hearing Examiner, based on specific provisions of the Seattle Municipal Code, most specifically SMC 25.05.680.B 1.b., 2, and 3 as cited below

SMC 25.05.680 - Appeals

B. Decisions Not Related to Master Use Permits or Council Land Use Decisions

1. The following agency decisions on proposals not requiring a Master Use Permit shall be subject to appeal to the Hearing Examiner by any interested person as provided in this subsection:

b. Adequacy of the final EIS as filed in the SEPA Public Information Center. Notice of all decisions described in this subsection shall be filed promptly by the responsible official in the City's SEPA Public Information Center.

2. An appeal shall be commenced by the filing of a notice of appeal with the office of the Hearing Examiner no later than the fifteenth day following the filing of the decision in the SEPA Public Information Center or publication of the decision in the City official newspaper, whichever is later; provided that when a 14 day DNS comment period is required pursuant to this Chapter 25.05, appeals may be filed no later than the twenty-first day following such filing or publication. The appeal notice shall set forth in a clear and concise manner the alleged errors in the decision. Upon timely notice of appeal the Hearing Examiner shall set a date for hearing and send notice to the parties. Filing fees for appeals to the Hearing Examiner are established in Section 3.02.125.

3. Appeals shall be considered de novo and limited to the issues cited in the notice of appeal. The determination appealed from shall be accorded substantial weight and the burden of establishing the contrary shall be upon the appealing party. The Hearing Examiner shall have authority to affirm or reverse the administrative decisions below, to remand cases to the appropriate department with directions for further proceedings, and to grant other appropriate relief in the circumstances. Within 15 days after the hearing, the Hearing Examiner shall file and transmit to the parties' written findings of fact, conclusions of law, and a decision.

IV. EVIDENCE RELIED UPON

The Declaration of Gordon Clowers should be simply disregarded, since, as discussed below, whether or not the appellants previously commented on the DEIS is irrelevant.

V. ARGUMENT AND LEGAL AUTHORITY

The City's motion to dismiss should be denied because the City is relying on criteria other than that provided by the Seattle Municipal Code.

5.1. Timeliness and Authority for Motion

No response required. The alleged facts are addressed in this subsection are neither agreed to nor denied.

5.2 City Appeal Argument 1 - Citizens have waived any objection to the Seattle 2035 FEIS by failing to comment on the Previous DEIS

1. The criteria for standing to appeal is established in SMC 25.05.680.B.1 as "any interested person" as provided in this subsection."

   The definition of "interested person" is provided in SMC 25.05.755

   > "Interested person" means any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before an agency, and shall include any party in a contested case.

   This is the sole criteria provided in the relevant city code for standing.

2. The City's reference to WAC 197-11-455 and WAC 197-11-502, and similar provisions in SMC 20.25.545 are irrelevant. The issue was previously raised and denied by the Hearing Examiner in Case W-14-001 and W-14-004.

   > "..the City's SEPA Code adds language to that found in WAC 19-11-545(2). SMC 20.05.545B includes a statement that appeals to the Hearing Examiner are consider de novo, and the only limitation on appeal issues is that they are limited to those cited in the notice of appeal." (W-14-001)
   >
   > "The language of 25.05.545.A is very different from that in subsection B. Subsection A refers specifically to consulted agencies who fail to comment on a draft EIS, and it plainly states that these agencies are "barred from alleging defects" in the final EIS. But subsection B only states that the lack of comments on environmental document is to be construed as a "lack of objection to the analysis. This phrase is general and nature, and could be interpreted to mean that an agency may move forward by issuing its environmental analysis. Presumably if the drafters had intended to bar the public and non-consulted agencies from appealing a DNS they would have used the same language as appears in subsection A, but that language is absent." (W-14-001)

3. The City's reference to "exhaustion of administrative remedies" is irrelevant because the Hearing Examiner's consideration of the appeal is part of the process of administrative remedies as addressed by the Hearing Examiner in Cases W-14-001:

   "The state Board decisions referenced by the City in its motion were concerned with appellant's failure to exhaust administrative remedies, but no such concern is presented here. By appealing the issue of EIS adequacy to the Hearing Examiner, an appellant exhausts the available administrative remedy. At that point, it is the Hearing Examiner's decision, not DPD's, which is the final SEPA decision." (W-14-001)

4. In addition, it would have been impossible for the appellant to comment in the DEIS on many the issues raised in this appeal because the DEIS did not include discussion of these issues, including, but not limited to:
   - Policy T 9.1 Define arterial and transit LOS to be the share of drive-alone trips made during the late-afternoon peak period (3:00 to 6:00 p.m.).
   - Parks and Open Space Goals. Discontinue the quantitatively-expressed goals
   - Policies LU 6.1, LU 6.2 and LU 6.1 addressing parking requirements

5.3. City Appeal Argument 2 - Citizens lacks SEPA Standing Because It Has Failed to Identify an Injury-In-Fact.

1. The criteria for standing to appeal is established in SMC 25.05.680.B.1 as "any interested person as provided in this subsection."

   The definition of "interested person" is provided in SMC 25.05.755

   > "Interested person" means any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before an agency, and shall include any party in a contested case.

   This is the sole criteria provided in the relevant city code for standing.

2. The City's reference to Growth Management Hearings Board decisions is irrelevant. The Board decisions and criteria are not relevant to proceedings before the Hearing Examiner which are governed by Seattle's city codes.

3. The City's reference to economic concerns are irrelevant. The appeal is not based on property rights, property values, property taxes and restrictions on use affecting property value.

4. Although we believe it is not relevant, given the very specific provisions for standing in SMC 25.05.680.B.1 specified as "any interested person" and the specific definition of "affected by or interested in," provided in SMC 25.05.755, it is nonetheless clear that Citizens for Livability in Ballard has standing from a long precedent of Washington courts cases that have recognized the standing of community organizations in raising land use and SEPA issues as long as one or more of its members has standing. See: SAVE v. City of Bothell, 89 Wn.2d (1978); East Gig Harbor Improvement Ass'n v. Pierce Co. 106Wn.2d (1986); Anderson v. Pierce Co. 86 Wn. App (1997). The Hearing Examiner has disposed of similar arguments in W-15-001

   > The courts have noted that a non-profit corporation has standing to bring suit on behalf of its members if it can show: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members.

5. Although the very specific criteria for standing in SMC 25.05.680.B.1. and SMC 25.05.755 do not require it, it is nonetheless clear that Citizens for Livability in Ballard has standing based on "injury, " including damage done to a person's rights (Black's Law Dictionary).

   As a matter of context, it is relevant to note that in *Trepanier v Everett* the court reviewed specific information provided in environmental documents and the court found Trepanier's argument to be "fatally flawed because his bare assertion that the new code will likely create serious adverse impacts on unincorporated Snohomish County has absolutely no factual support in the record." Similarly in *Harris v. Pierce County* the

issue related to whether a particular property would be subject to imminent domain which would be determined by a future specific plan.

In both those cases, facts on the record were sufficient to inquire into injury. In this case, however, whether the facts in the record are adequate to determine environment impacts, and therefore injury to the rights of the appellants, is the very issue the Hearing Examiner is mandated to address. Non-disclosure of impacts by the city in preparing an incomplete and inadequate EIS analysis means that the appellants can't know, at this point, the full extent to which they may be injured.

Potential areas of injury are referred to in the appeal include:

a) Performance of the transportation system as specified in RCW 36.70a.070(6)(iii). Increased traffic congestion may be experienced by the appellants, and the general public as a degradation of the system's ability to move people and goods, the extent of which is unknown since it was not analyzed in the EIS.
b) The change in the land use designations used for urban villages includes the potential for future upzoning and results a range of related impacts on traffic, parking, parks and other infrastructure, the extent of which is unknown since it was not analyzed in the EIS.
c) Elimination of Policies LU59 and LU60 containing criteria for rezones of single-family properties has the potential for replacing single family use with "a greater variety of residential uses" that also would have a range of related impacts on traffic, parking, parks and other infrastructure, the extent of which is unknown since it was not analyzed in the EIS.
d) Revisions to UVG8, LU-11and LU-95 all have the potential for substantially changing the density and character of urban villages which also would have a range of related impacts on traffic, parking, parks and other infrastructure, the extent of which is unknown since it was not analyzed in the EIS.
e) Elimination of quantitatively-expressed goals for parks/open space in view of additional projected growth will place additional demand on parks in the area with potential impacts on existing resident's use, including potential overcrowding, the extent of which is unknown since it was not analyzed in the EIS.
f) The impacts of policies LU 6.1, LU 6.2 and LU 6.1 that propose to rely on market forces to determine the amount of parking needed would potentially result in parking spillover with adverse impacts not only on the quality of life of surrounding areas where parties to the appeal live but also on the viability of businesses which is a key quality of life issue for those who depend on the full range of services a neighborhood provides.

The fact that this is a non-project action does not change the fact that future concrete actions and activities would necessarily flow from adoption of the specific policies in the plan. The plan would be meaningless if it did not result in future actions. There would be no reason to amend the plan if the results were the same as the existing plan. Even though it is a non-project action, a reasonable projection can be made of the different future concrete actions that may be reasonably occur in terms of likely trends in terms of regulatory framework that necessarily flows from specific proposed policies. The city is

obligated to assess these impacts, at least in terms of the general magnitude of change. Simply asserting, as the city has done, both in the EIS and in the Request for Dismissal that there would be no impact, and hence no injury, is the very matter that must be assessed by the Hearing Examiner in the course of consideration of this appeal and may not simply be presumed.

If a demonstration of a specific injury at a specific time and place were to be required in order to have standing to appeal the SEPA review for a non-project action such as a Comprehensive Plan which covers the entire city, then there likely never could be a basis for an appellant to challenge adequacy of a non-project EIS and therefore no means to ensure that the city has met the mandate in SEPA to prepare an adequate EIS. Eliminating an appeal opportunity specifically provided by SMC 25.05.680.B.1. through a narrow definition of "injury" in a case where the record needed to show the specific extent of the injury is not available, because the city has failed its responsibility to provide an adequate assessment of impacts, is clearly a legally absurd result as provided in *United States v. Kirby* and an extensive body of other court decisions.

In this case, however, the Hearing Examiner need not embark on an inquiry into this legal "Catch 22" because the relevant criteria provided in SMC 25.05.755 is not "injury" but is specifically defined as "affected by or interested in," which criteria the appellants clearly meet (as well as meeting the criteria of "injury" as discussed above).

6. The Hearing Examiner may wish to take note of the single reference in the State Environmental Policy Act to "standing" for appeal found in RCW 43.21C.420(4)(e), which references subarea plans, but may be generally construed to provide an indication of intent:

> Any person that has standing to appeal the adoption of this subarea plan or the implementing regulations under RCW 36.70A.280 has standing to bring an appeal of the nonproject environmental impact statement required by this subsection.

Examining the intent of the State Environmental Policy Act (SEPA) as a whole, it is clear that this enactment fits into the general intent of the act recognizing "that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment" (RCW 43.21C.020(3)); by assuring the adequacy of the "detailed statement by the responsible official on …the environmental impact of the proposed action (RCW 43.21C.030(2)(c)); and ensuring that agencies actually prepare an "impartial discussion of significant environmental impacts and … inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality (WAC 197-11-400(2)).

The purpose of SEPA goes beyond the issue of injury to individual property; rather, addresses injury to the right to have environmental concerns integrated into the decision making process. The injury to the rights of the appellants results from an incomplete and biased record. Such a view (of the importance of access) to the appeal process is consistent with the policy of the City of Seattle in SMC 25.05.680.B.1. and SMC 25.05.755 to provide standing based on "affected by or interested in".

5.4. City Appeal Argument 3 - The Hearing Examiner Lacks Jurisdiction over Citizen's Due Process Arguments, GMA Claims, Previously Enacted Standards and Challenges to the Adequacy of the Seattle 2035 DEIS.

5.4.1 Due Process and GMA Claims

1. The city contends that the Hearing Examiner's subject matter jurisdiction extends only to the authority delegated to it by the Council.

2. The Hearing Examiner has the specific authority to determine the adequacy of the referenced EIS by the terms of SMC 25.05.680.B.

3. As indicated in numerous Washington Supreme Court decisions

> "SEPA recognizes the broad policy "that each person has a fundamental and inalienable right to a healthful environment . . . ." RCW 43.210.020(3). State agencies are required to use "all practicable means" to achieve the following goals:
>
> (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (b) Assure for all people of Washington safe, healthful, productive and aesthetically and culturally pleasing surroundings;
>
> (c) Attain the widest range of beneficial uses of the environment *(Kucera v. Dept. of Transportation* 140 Wn.2d 200) [Emphasis Added**]**

4. RCW 43.21C.020(2)(a)-(c). To further these objectives, SEPA requires that governmental agencies prepare environmental impact statements on "major actions having a probable significant, adverse environmental impact."

5. WAC 197-11-400. Purpose of EIS. Provides that:
   (1) The primary purpose of an environmental impact statement is to ensure that SEPA's policies are an integral part of the ongoing programs and actions of state and local government.
   (2) An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures that would avoid or minimize adverse impacts or enhance environmental quality.

Since SEPA recognizes "that each person has a fundamental and inalienable right to a healthful environment" an EIS that does not provide impartial discussion of significant impact, and does not inform decision makers and the public of reasonable alternatives or mitigating measures that would avoid adverse impact or enhance the environment, therefore does not further the "substance" of the "right to a healthful environment." (See Dernbach. 2014 file:///C:/Users/sherrdav/Downloads/-NR252000-sitesofinterest_files-robinson_v_commonwealth.pdf)

5.4.2. The Hearing Examiner's appellate jurisdiction extends only to the FEIS.

The distinction between the Draft EIS and the Final EIS in this case is irrelevant. The city did not issue a Final EIS that completely revised and replaced the Draft EIS, instead they added additional information, but continued to rely on the content of the Draft EIS for the majority of content. For example:

- The cover letter for the Final EIS states: "The Draft EIS and the Final EIS together compromise the full EIS for this proposal.
- Page 1-11, Section 1.6 Summary of Impacts and Mitigation Strategies includes the following statement: "Please see Chapter 3 in the Draft and Final EIS for a complete discussion of impacts and mitigation strategies for each element of the environment.

In order to determine the adequacy of the Final EIS, the Hearing Examiner must include the Draft EIS. The alternative – if only the text labeled "Final EIS" were considered - would result in a finding of even more substantive gaps in analysis of environmental impacts than are alleged in this appeal.

5.4.3. Challenges to Previously Adopted LOS Standards.

The City is in error; the appeal does not question the city's use of the current adopted screenline methodology for concurrency. The appeal states that "Although the city can use the screenline analysis methodology, it does not absolve the city of the responsibility for a "reality based" analysis of actual operation of facilities. The basis of the appeal is that additional/alternative methodologies must be employed in the EIS to fully apprise the legislative body of the actual impacts of what they are adopting. (The city's Footnote 6 must be disregarded at this phase of the proceedings because it goes beyond the question of dismissal of issues to arguing the substance of adequacy of analysis used in the EIS).

VI. CONCLUSION

The City's Motion to Dismiss should be denied in its entirity.

In none of the issues presented, has the City presented relevant information that substantiates its claims.

Respectfully submitted.

Steven Cohn, Authorized Representative for Appellants
July 18, 2016

Served on the Hearing Examiner and City as provided in the Prehearing Order.