BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeal of **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 REVISED MOTION TO DISMISS AND/OR LIMIT ISSUES** **AND** **REPLY TO APPELLANT'S OPPOSITION PLEADING**

I. Introduction

The Office of Planning and Community Development (OPCD) respectfully requests that under Hearing Examiner Rules (HER) 2.16 and 3.02 the Hearing Examiner (Examiner) dismiss the appeal by Queen Anne Community Council (the Appellant). Under HER 3.02, the Examiner may dismiss an appeal without a hearing if an 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.

II. Argument

On July 8, 2016, OPCD filed a motion to dismiss the appeal. Following the Prehearing Order of July 15, the Appellant submitted a Clarification of Issues on July 22. This "clarification" identifies three issues and references citations included in the Appellant's Opposition pleading dated July 14. Each issue should be dismissed for the following reasons:

1. The record demonstrates compliance with SEPA's procedural requirements.

The first issue raised in the Clarification of Issues contains six sub-issues. Issue 1.a concerns the public outreach that OPCD conducted prior to issuing the determination. The Appellant alleges a lack of full public participation. Compliance with the GMA's procedural notice requirement in preparation of the proposed legislation is a procedural question that is not within the scope of a SEPA appeal before the Examiner. Moreover, as stated in OPCD's original motion, OPCD complied fully with all SEPA notice requirements, a fact the Appellant does not dispute. Even if the GMA's public notice requirement were relevant to the SEPA determination (it is not), the allegation lacks merit on its face because, in part 2.a of the appeal, the Appellant acknowledged the public participation process and the participation of QACC members.

Issue 1.b alleges that OPCD's responses to questions in Part B of the SEPA checklist would have contributed meaningfully to the analysis. OPCD analyzed the proposal in Part D of the SEPA checklist because this is a non-project action. Responses to questions in Part B are not relevant to the proposal and would not have contributed meaningfully to the analysis because the proposal at issue is a non-project action. The appeal did not allege any error in OPCD's responses to Part D of the SEPA checklist. Finally, the Examiner has previously ruled on this argument and rejected the same claim. Hearing

Examiner File W-13-008 ([T]he 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.").

Issue 1.c asks if OPCD considered the maximum potential development allowed by the proposal. This issue was not included in the original appeal statement and must be rejected on this basis alone.

Issues 1.d and 1.e question the record on which the determination was based. Issue 1.d was not included in the original appeal and must again be rejected on this basis. OPCD acknowledges the need for evidence that actual consideration of environmental factors occurred in preparing the determination. The existing record contains the evidence needed. The Appellant's claim that this motion would deprive the Appellant of an opportunity to examine the record necessary to determine that OPCD considered environmental factors is flawed and should be rejected. Evidence of OPCD considering environmental factors that is in the record and that has been available to the Appellant includes the SEPA checklist, the SEPA decision, and the five report documents cited on pages 1 and 2 of the checklist. This record is sufficient to establish OPCD's SEPA compliance by considering environmental factors. *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703, 712 (2001). The Appellant's contention in its Opposition pleading that the threshold determination was not based on "actual consideration of environmental factors" fails because an examination of the documents referenced in the SEPA checklist demonstrates that environmental factors were considered in making the threshold determination.

Furthermore, OPCD maintains its position that the appeal notice contained no viable allegation of error to its environmental determination. While the case cited by the Appellant, *Citizens for Mount Vernon v. City of Mount Vernon* establishes that individual citizens' technical and legal arguments do not need the specificity of a trained land use attorney, this case does not absolve the Appellant of filing a SEPA appeal with specificity before the Examiner. Under HER 3.01(d)(3), an appeal must contain the "appellant's specific objections to the decision or action being appealed" (emphasis added). While part 2.b of the appeal is exhaustive in summarizing the proposed Land Use Code amendments, it does not identify any specific objection to the proposal or articulate a single specific significant adverse environmental impact likely to result from the proposal. The appeal is inadequate in this regard. While its original author, Martin Kaplan of the QACC, is not a trained land use attorney, he is an experienced architect familiar with the SEPA appeal process and the need for specificity in identifying the appeal issues. Instead of filing an appeal containing specific objections, the Appellant hired counsel to introduce new issues not present in the original appeal. The Examiner has previously rejected this attempt to introduce new issues by holding that issue clarification cannot raise new issues. *See* Order on Motion to Dismiss or Limit Issues and Motion to Exclude, Hearing Examiner File MUP 16 005 (W)/S 16 003 ("The questions raised in the April 14, 2016 letter do not simply clarify the original request, they raise new issues that are not timely.").

Issue 1.f alleges that OPCD must demonstrate actual consideration of environmental factors. The Opposition pleading refers to *City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978) to argue that OPCD has the burden to show that the threshold determination demonstrates consideration of environmental factors sufficient to be *prima facie* compliance with SEPA procedural requirements. As stated above, the record is sufficient on its face to demonstrate SEPA compliance. If the Appellant disagrees, then the Appellant needs to articulate a specific objection to the record and the analysis of impacts. HER 3.01(d)(3) places the burden on the Appellant to articulate a specific objection. The Appellant, however, has not done so.

2. The action was properly defined and considered in the DNS.

Issue 2 alleges that making a determination without considering the proposal in conjunction with other recommendations in the Housing Affordability and Livability Agenda (HALA) and the Comprehensive Plan update constitutes improper segmentation. This is a new issue not originally raised in the appeal and should be dismissed. While the part 2.c of the appeal statement refers to statements from elected officials related to HALA, it did not allege improper segmentation per se, or make any allegation that the ADU/DADU proposal should have been *analyzed* in conjunction with any other proposal. The original appeal merely objected to the proposed legislation in itself.

Further, the Appellant's claim that the proposal is related sufficiently closely to HALA to require environmental review in one SEPA document and threshold determination is without merit. SMC 25.05.060.C.2 provides:

> 2. Proposals or parts of proposals that are **related to each other closely enough to be, in effect, a single course of action** shall be evaluated in the same environmental document, **if they**:
> a. Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> b. Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

See San Juan County v. Department of Natural Resources, 28 Wn. App. 796, 802, 626 P.2d 995 (1981). The proposed legislation does not depend on HALA for its justification or implementation. Piecemeal review is impermissible where a "series of interrelated steps [constitutes] an integrated plan" and the current project is *dependent upon* subsequent phases. *Murden Cove Pres. Ass'n v. Kitsap Cty.*, 41 Wn. App. 515, 526, 704 P.2d 1242, 1249 (1985) *citing Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976) (emphasis added). The Appellant has not shown the ADU/DADU ordinance to be dependent upon HALA. Further, any assessment of the environmental consequences of future plans to implement other HALA recommendations can and should be deferred until they are presented in a specific form for requested governmental action. *Murden Cove Pres. Ass'n v. Kitsap Cty.*, 41 Wn. App. 515, 526-27, 704 P.2d 1242, 1249 (1985) *citing 527 Short v. Clallam Cy.*, 22 Wn. App. 825, 835, 593 P.2d 821 (1979). Because the action was properly defined and considered in the DNS, this claim should be dismissed.

3. Alternatives need not be analyzed for a DNS.

Issue 3 alleges that OPCD failed to consider alternatives. This claim must be rejected because it was not included in the original appeal statement and cannot be introduced now. The claim is also without merit. While an EIS must include reasonable alternatives to the proposed action, alternatives need not be analyzed under an agency's DNS. RCW 43.21C.030(2)(c); 43.21.031(1); and WAC 197-11-340(1). Because the City issued a DNS for the subject drainage improvements project, alternatives are not required to be analyzed as a matter of law. *Chuckanut Conservancy v. Washington State Dep't of Natural Resources*, 156 Wn. App. 274, at 1163, 232 P.3d 1154 ("Threshold determinations do not examine alternatives…."); *Murden Cove Preservation Association v. Kitsap County*, 41 Wn. App. 515, at 525, 704 P.2d 1242 (Div. I, 1985) ("…where a declaration of nonsignificance is not clearly erroneous, no consideration of alternative sites is required under RCW 43.21C.030(2)(c)(iii)); and *San Juan County v.*

Department of Natural Resources, 28 Wn. App. 796, at 801, 626 P.2d 995 (1981). The Examiner has repeatedly followed this case law. *See, e.g., In re The Ballard Business Appellants*, W-08-007, Order on Second Motion for Reconsideration and Motions to Strike Declaration; *Appeal of Fremont Neighborhood Council, et al.*, W-08-005, Order; *In re Aurora Avenue Merchants Association*, W-07-001, Order of November 30, 2007; *In re Donnelly*, W-05-007 *et seq.*, Findings and Decision; *In re Marino*, MUP-01-014, Findings and Decision. As a matter of law, this claim must be rejected.

III. Conclusion

OPCD complied in full with all SEPA procedural requirements. The record demonstrates that actual consideration of environmental factors occurred in preparing the determination. As stated in its original motion, OPCD maintains that the appeal notice contained no viable allegation of error. Further, as a matter of law, new issues not originally present in the appeal cannot be established through issue clarification. For the reasons stated above, this appeal should be dismissed.

Entered this 22nd day of July, 2016.

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