

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

QUEEN ANNE COMMUNITY COUNCIL

from a Determination of Non-significance
issued by the Director, Office of Planning
and Community Development

Hearing Examiner File:
W-16-004

**ORDER ON OPCD
MOTION TO DISMISS**

The Appellant, Queen Anne Community Council, appealed a Determination of Non-significance (“DNS”) issued by the Office of Planning and Community Development (“OPCD”). The DNS was issued for proposed legislation that would amend the Land Use Code regulations governing accessory dwelling units (“ADUs”) and detached accessory dwelling units (“DADUs”) to remove the off-street parking requirement, reduce the owner-occupancy requirement from permanent to a period of 12 months after the ADU or DADU is established, allow both an ADU and a DADU on the same lot, and modify development standards for siting, designing and constructing ADUs and DADUs.

OPCD filed a motion asking that the appeal be dismissed or, if it was not dismissed, for an order requiring the Appellant to clarify the appeal issues. The Appellant filed a response opposing the motion. Following the prehearing conference in the case on July 15, 2016, the Examiner issued an order setting the case schedule, which included dates for the Appellant to file a clarification of the appeal issues, and for the parties’ supplemental briefing on the motion to dismiss. The final brief was filed on July 27, 2016.

Standard of Review

Rule 3.02(a) of the Hearing Examiner Rules of Practice and Procedure (“HER”) 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." A motion to dismiss is treated as a motion for summary judgment when matters outside the pleadings are included with the motion and considered by the decision maker. *Sea-Pac v. United Food and Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985). OPCD’s motion includes a Director’s Report dated May, 2016 and entitled “Removing Barriers to Backyard Cottages and Accessory Dwelling Units,” a copy of the completed SEPA Environmental Checklist for the proposed ordinance, the DNS, the notice of the proposed ordinance and DNS, and a copy of the proposed ordinance. The parts of the motion that reference these documents will therefore be treated as a motion for summary judgment.

Quasi-judicial bodies, such as the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 658, 696-97, 601 P.2d 501 (1979); *Kettle Range Conserv. Grp. v. Department of Natural Res.*, 120 Wn.App. 434, 456, 85 P.3d 894 (2003). HER 1.03(c) states that for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule ("CR") 56(c) provides that a motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." The moving party must demonstrate the absence of a factual dispute, and all facts and reasonable inferences must be considered "in a light most favorable to the nonmoving party." *City of Lakewood v. Pierce Cy.*, 144 Wn.2d 118, 125, 30 P.2d 446 (2001)(citations omitted). Once the moving party demonstrates the absence of an issue of material fact, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for [hearing]." CR 56(e).

OPCD's Motion

OPCD contends that the entire appeal should be dismissed because the original appeal "contained no viable allegations of error." and points to HER 3.01(d)(3), which requires "specific objections to the decision or action being appealed." The Office of Hearing Examiner functions as a quasi-judicial administrative tribunal. This appeal, like many others, was not filed by an attorney. In such cases, it is common for appeal issues not to line up nicely with Code requirements, and it is not unusual for the Examiner (and often the opposing party) to thoroughly search the appeal to determine whether there are any viable issues and, on occasion, to request a clarification of issues from the appellant. OPCD is correct that the clarification cannot raise new issues, as addressed below. But again, it is necessary to thoroughly search an appeal filed by a non-attorney to determine whether an issue is really new or just clarified. This approach is consistent with the court's statement in *Citizens for Mount Vernon v. City of Mount Vernon*,¹ cited by the Appellant, that "[i]ndividual citizens [do] not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney".² Further, this case is easily distinguished from the one cited by OPCD, *In re the Appeal of Michael McQuaid*.³ In *McQuaid*, the attorney representing the appellants filed a request for a Land Use Code Interpretation and after the interpretation was issued, sent a letter "clarifying" an issue the attorney himself had raised in the interpretation request, and seeking a revised interpretation. The Examiner determined that the letter raised new issues rather than simply clarifying those raised in the original request. In this case, a non-attorney filed the appeal and later retained an attorney, who filed a clarification of the issues raised in the appeal. As discussed below, the Examiner has determined that some of the clarifications are actually new issues, but OPCD's request that the entire appeal be dismissed is **DENIED**.

¹ 113 Wn.2d 851, 870, 947 P.2d 1208 (1997).

² *Id.*

³ MUP-16-005/S-16-003.

OPCD seeks dismissal of appeal issue 1.a⁴ which, in essence, states that the DNS was issued without actual consideration of environmental factors because, in light of the magnitude of the changes that would be effected by the proposal, the two public information meetings held on it were not sufficient to allow OPCD to give actual consideration to the proposal's impacts. The documents attached to motion demonstrate that OPCD complied with SEPA's procedural notice requirements for the proposed ordinance. The Appellant does not contend otherwise and has not shown that SEPA requires more. There is no genuine issue of any material fact concerning appeal issue 1.a, and judgment is **GRANTED** to OPCD on this issue as a matter of law.

Appeal issue 1.b can be summarized as stating that the DNS was issued without actual consideration of environmental factors because OPCD failed to respond to the questions within Part B of the SEPA Checklist without showing that the responses would not contribute meaningfully to analysis of the proposed ordinance. OPCD's motion states only the Office's collective opinion that responses to the questions in Part B of the Checklist are not relevant to the proposal, a non-project action, and would not have contributed meaningfully to analysis of it. Nothing is provided in support of the opinion. OPCD has not shown that issue 1.b lacks merit on its face, and the motion to dismiss it is **DENIED**.

Appeal issue 1.c states, in essence, that the DNS was issued without actual consideration of environmental factors because OPCD failed to consider the maximum potential development allowed by the proposed ordinance. OPCD asserts that this issue exceeds the scope of the issues originally raised in the appeal and must therefore be dismissed. However, this issue underlies much of the appeal and is unmistakably part of original appeal issue C.2.d. The motion to dismiss appeal issue 1.c is **DENIED**.

OPCD seeks dismissal of appeal issue 1.d, arguing that it, too, was not included within the scope of the appeal. The issue states, in essence, that the DNS was issued without actual consideration of environmental factors because OPCD's analysis of the proposal's potential impacts is not "substantiated by supportive opinion and data". But again, this issue is touched upon throughout the appeal and is unmistakably part of original appeal issue C.2.d. The motion to dismiss appeal issue 1.d is **DENIED**.

Appeal issue 1.e states, in essence, that the DNS was issued without actual consideration of environmental factors because the record underlying the DNS is not sufficient "to demonstrate prima facie compliance with SEPA's procedural requirements". In its motion to dismiss this issue, OPCD states that the record, "which includes the SEPA checklist, the SEPA decision, and the five report documents cited on pages 1 and 2 of the checklist," is sufficient to demonstrate the required compliance. However, the "five report documents" were not included with the motion, and the motion does not incorporate any relevant passages from them or demonstrate OPCD's consideration of environmental factors. There is not sufficient evidence before the Examiner to determine the validity of appeal issue 1.e, and the motion to dismiss it is therefore **DENIED**.

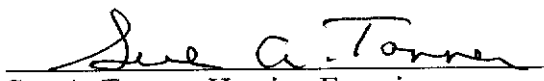
⁴ All issues refer to the appeal issues as clarified in the Appellant's Clarification of Issues unless specified otherwise.

Appeal issue 1.f simply states that OPCD cannot show, based on the record for the DNS, that it gave actual consideration to environmental factors. Regardless of how it is presented, this is an argument, not an appeal issue. The motion to dismiss it is moot.

OPCD seeks dismissal of appeal issue 2, which states that SEPA review of the ADU/DADU legislation was improper because it was not conducted in conjunction with review of the other actions proposed to implement the recommendations from the Housing Affordability and Livability Report (“HALA”). OPCD argues that this issue was not raised in the original appeal. The Appellant responds that the issue of the ADU/DADU legislation’s being part of the larger proposal is raised in original appeal issue C(2)(c). That issue addresses the fact that the proposal flows from the HALA recommendations, but it does not include any language that could be construed to be a claim of improper segmentation, or “piecemealing,” under SEPA. The motion is **GRANTED** as to appeal issue 2, and it is **DISMISSED**. The Appellant argued that it should, at the least, be allowed to present evidence on this issue at hearing. That will not be permitted, but the Appellant will be allowed to make an offer of proof on the record. And the Appellant will be allowed to address housing-related impacts raised in original issue C(2)(c) in conjunction with other appeal issues, if desired.

OPCD asks that appeal issue 3 be dismissed, arguing that it was not included within the original appeal statement. Issue 3 states that the DNS violated RCW 43.21C.030(2)(e) in failing to “study, develop and describe alternatives to the proposed” ADU/DADU legislation. The Appellant points out that original appeal issue C(2)(c) questions whether the proposal would accomplish the City’s objective of removing barriers to affordable housing. That is true, but original appeal issue C(2)(c) does not even suggest a need to develop and study alternatives to the proposal. The motion is **GRANTED** as to appeal issue 3, and it is **DISMISSED**. Again, the Appellant will be allowed to make an offer of proof on the issue, and to address the housing-related impacts raised in original issue C(2)(c) in conjunction with other appeal issues, if desired.

Entered this 29th day of July, 2016.


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