BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

CITIZENS FOR LIVABILITY IN BALLARD

From a Determination of Adequacy by the Director,
Seattle Department of Construction and Inspections

Hearing Examiner File:
W-16-003

ORDER ON MOTION TO DISMISS

1. The Office of Planning and Community Development[1] filed a motion to dismiss the above-referenced appeal on July 7, 2016. The Appellant, Citizens for Livability in Ballard (Citizens), filed a response on July 19, 2016. OPCD filed a reply on July 22, 2016. Hearing Examiner Rule 3.02(a) allows for dismissal of an appeal without a hearing if 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."*

2. OPCD's motion to dismiss asserts that Citizens' appeal should be dismissed because (1) Citizens failed to comment on the DEIS; (2) Citizens fails to allege injury-in-fact necessary to confer SEPA standing; and (3) various issues raised in the appeal are beyond the Hearing Examiner's jurisdiction.

3. OPCD argues that under WAC 197-11-545, Citizens' failure to comment on the DEIS means that Citizens has waived its right to appeal the FEIS. It is not disputed that Citizens as an organization did not submit comments on the DEIS. It is also not disputed that Steve Cohn, one of Citizens' members, did submit a timely written comment on the DEIS. As both parties note, WAC 197-11-545 and SMC 25.05.545 have been considered in previous cases before the Hearing Examiner. SMC 25.05.545 addresses the effect of no comment by consulted agencies, other agencies and the public. Under SMC 25.05.545.A, a "consulted agency" which fails to submit "substantive information" to a lead agency in response to a draft EIS is "barred from alleging any defects in the lead agency's compliance" with Subchapter VI of Chapter 25.05 SMC. SMC 25.05.545.B refers to "lack of comment by other agencies or members of the public on environmental documents," and says that the lack of comment may be "construed as lack of objection to the environmental analysis." No bar on appeals is mentioned; indeed, the subsection goes on to state that appeals to the Hearing Examiner are de novo and that the only limitation is that the issues on appeal are those cited in the notice of appeal. Even if it were assumed that Mr. Cohn's earlier comment could not be attributed to Citizens, SMC 25.05.545 does not require a member of the public to comment on a DEIS before he or she may appeal the FEIS.

[1] The Determination of Adequacy which is the subject of this appeal was issued by the Department of Construction and Inspections. The Final EIS was issued by Office of Planning and Community Development (OPCD), which appeared at the prehearing conference and is acting as the respondent in this matter.

4. OPCD also argues that Citizens has failed to demonstrate an injury in fact. The two-part test for standing to challenge actions under SEPA provides that: (1) the interest sought to be protected must fall within the zone of interests protected by SEPA; and (2) the party must allege an injury in fact. *Lands Council v. Washington State Parks Recreation Com'n*, 176 Wash. App. 787, 799, 309 P.3d 734, 740 (2013), citing *Kucera v. State Dep't of Transportation*, 140 Wash.2d 200, 212, 995 P.2d 63 (2000). To show an injury in fact, a petitioner must demonstrate that he or she will be adversely affected by the decision; if an injury is merely conjectural or hypothetical, there can be no standing. *Trepanier v. City of Everett*, 64 Wash.App. 380, 383, 824 P.2d 524, 526 (1992), *rev. denied*, 119 Wash.2d 1012 (1992). The injury in fact element is satisfied when a plaintiff alleges the challenged action will cause specific and perceptible harm; *Kucera* at 213. In *Leavitt v. Jefferson County*, 74 Wash.App. 668, 875 P.2d 681 (1994), a property owner's claim that impacts were "possible, not necessary, impacts of the Board's adoption of the Code" was deemed sufficient to establish standing; 74 Wash.App. at 679. By contrast, in *Trepanier,* the Court noted that the petitioner had failed to present any evidentiary facts to show that he would be injured by a new zoning code. The only injury alleged was that the new code would reduce allowable densities and development potential within the City of Everett and that this would in turn transfer growth to unincorporated Snohomish County and cause serious adverse impacts; but there was no factual support in the record to support this assertion. *Id.* at 384.

5. In response to the motion, Citizens has submitted declarations from its members, stating that they reside and own property in Ballard; two of the three members own property in or near an area mapped for inclusion in an expanded Crown Hill Residential Urban Village and the Ballard Hub Urban Village. The declarants state that they will be affected by increased traffic and congestion, loss of parking, impacts to parks and public schools, and pollution which will result, directly or indirectly, from the proposal's impacts which are not adequately analyzed by the FEIS.

6. OPCD argues that Citizens has not identified concrete and specific injuries, and that the claimed impacts are speculative and conjectural. The proposed Comprehensive Plan amendments appear to rely largely on future actions, e.g. enactment of development standards, to have any effect. However, Citizens has identified plan amendments that they claim have impacts that are not adequately analyzed in the FEIS, and which would cause direct injury to themselves as homeowners and residents of Ballard; Citizens Response at page 5. OPCD's reply argues that the identified changes to the parking policies make no "net" change to the existing policies, but this is disputed by Citizens and goes to the merits of the appeal rather than whether Citizens has adequately pled injury. Citizens has made a sufficient showing of injury in fact to be granted standing.

7. OPCD also moved to dismiss claims presented in Paragraph E of the Appeal Statement (page 15). Those claims argue that the EIS "deprives the appellant, and the general public, of due process, substantive due process and the rights recognized in 43.21C.020" and that EIS "abrogates the applicant's and the public's right to participation" under RCW 36.70A.070. Paragraph E does not state a claim for which the Hearing Examiner has jurisdiction to grant relief. The Hearing Examiner does not have authority to review Citizens' claims that its constitutional rights have been violated, or that public participation required by RCW 36.70A.070 has not occurred. These claims are dismissed.

8. OPCD's motion also asserts that the appeal improperly attempts to challenge the DEIS. The appeal is from the determination of adequacy for the FEIS; that is the only decision before the Hearing Examiner. The FEIS of course references the analyses and other content in the DEIS, and it is assumed that the appeal statement's references to the DEIS reflect this fact, rather than an attempt to appeal the adequacy of DEIS as a separate appeal.

9. The motion also seeks dismissal of Paragraph D in the appeal statement, on the grounds that this would represent an untimely challenge to the screenline methodology used by the City in its existing Comprehensive Plan. But the appeal does not challenge the existing Comprehensive Plan's reliance on this methodology; it instead argues that the FEIS is inadequate because this method by itself does not accurately measure congestion impacts. The motion is therefore denied as to Paragraph D.

10. As noted above, the motion is granted as to Paragraph E of the appeal, but otherwise denied.

Entered this 29th day of July, 2016.

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