BEFORE THE HEARING EXAMINER

FOR THE CITY OF SEATTLE

In the Matter of the Appeals of: END PRISON INDUSTRIAL COMPLEX, et al. From a decision by the Director, Department of Construction and Inspections, on a Master Use Permit	)	Hearing Examiner File No.: **MUP-17-001** DCI Project No. 3020845 APPELLANTS' RESPONSE TO MOTION TO DISMISS

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I. INTRODUCTION

EPIC and over 60 social justice organizations and faith leaders ("Appellants") respectfully request the Hearing Examiner to deny the Motion to Dismiss filed by King County[1] and the City of Seattle ("Respondents"). The City's decision is reviewable, appellants have standing, have complied with all applicable rules in bringing this appeal, and have alleged claims that once proven will require reversal of the City's Master Use Permit.

II. SUMMARY OF ARGUMENT

This is an appeal of Master Use Permit 3020845, issued by the City of Seattle to King County on December 22, 2016 ("MUP Decision"), which authorizes the County to demolish the current Youth Service Center located at 12th and Alder in Seattle and build a new courthouse, a 156-cell jail to house children, and associated parking.

As the Examiner is aware, the proposal to build a new 156-child jail is extremely controversial. Politicians who previously strongly supported the project are scrambling to distance themselves from it. In light of recent developments, it is undeniable that King County has no need for a new youth jail of such size; cannot afford it; and, if built, the new youth jail will undermine the City and County's goals

[1] King County's architect and agent purports to join this motion, but Appellants contend he is not a proper party and have moved to dismiss him from this proceeding.

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of reducing juvenile incarceration, particularly the over-incarceration of Black and Brown children. Mayor Murray and City and County council members have called for rethinking the project. Declaration of Knoll Lowney, Ex. A.

The City of Seattle recently passed a formal resolution committing itself and its agencies to ending the incarceration of children. *Id.* Ex. B. King County Executive Constantine, the chief proponent of the jail project, has announced that the County too will move towards ***eliminating youth detention*** – an achievable goal because new information shows that locking up children is counterproductive and juvenile justice reforms have dramatically reduced the need to detain youth. As Executive Constantine has acknowledged:

> ***Much has happened in our region and in our nation since the people voted to replace the aging Youth Services Center in 2012. Community conversations about policing and racial inequity helped spur important, innovative reforms*** in juvenile justice to keep young people out of the system and on track to healthy, productive lives…. ***As we pause for the city Hearing Examiner to review the Children and Family Justice Center, a process that should take at least until summer, I am taking steps*** to build bridges to anyone who wants better outcomes for youth. … Now, in consultation with judges and members of the King County Council, ***I will ask that the county adopt a goal of Zero Youth Detention***, with the mission of creating a community where detention for young people is no longer needed.

Declaration of Knoll Lowney, Ex. C. (emphasis added). Constantine says that he will develop alternative proposals for housing youth during the "pause" caused by this proceeding. *Id.* EPIC and other Appellants will continue to pressure officials to live up to their promises to further reduce the youth jail population.

While King County rethinks its proposed jail, Appellants and their counsel

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will prove in this proceeding that the City of Seattle erred in granting the MUP for the project because it suffers from fatal procedural and substantive defects.

Respondents' motion provides no basis for dismissing this appeal in total or in part. Respondents' arguments for dismissing the entire appeal border on frivolous, since the City Council has explicitly made the MUP appealable. Appellants obviously have standing by virtue of their members that work within and live around the project site, and the failure of each Appellants to sign the appeal is certainly not jurisdictional.

Respondents' shotgun attack on distinct claims on appeal should also be denied. Throughout their motion, Respondents prematurely assert Appellants must be prepared to litigate permit deficiencies now, at this very early, preliminary stage, before Appellants have conducted discovery sufficient to understand which of many permutations of the project proposal the City actually approved. Respondents have not met their burden of proving that issues must be dismissed at this preliminary stage. Moreover, dismissal is inappropriate and would not streamline this proceeding because all of the issues (those Respondents seek to dismiss and those they do not) are factually interrelated.

The perception of many is that the City and King County's motion is just the latest attempt to close the land use process to the communities of color and neighbors who have the most at stake – to silence people of color on one of the most important issues facing their communities. This motion to dismiss comes after the

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City chose to issue the MUP on December 22nd, triggering a 14-day appeal window over the holidays, when many people are unavailable. Given that the permit had been under review for 14 months, the timing of the City's decision was viewed by many as an effort to exclude communities of color from this process. Respondents' attempt to make bad faith and hyper-technical arguments to deny impacted communities their day in court is equally disheartening. Appellants represent critical communities in our City and have a right to be heard in this process.

III. STATEMENT OF FACTS[2]

A. The youth jail proposal.

While some of the buildings in the Youth Services Center are decrepit and beyond their useful life, this is not true of the existing youth detention center on the site. It was built in 1994 and requires only minor repairs. Indeed, the County recently built a new "FIRS" center within the detention building, designed to keep some justice-involved youth out of detention.

The FIRS center is just the latest of the many programs that have dramatically reduced child detention in King County. Whereas the population in youth detention has been as high as 200 in the recent past, in recent months King County has locked up fewer than 30 children a night at the detention center.

Martin Luther King County, like much of our Nation, has moved away from a

[2] Because this is a response to a motion to dismiss, Appellants are reciting the allegations they intend to prove in these proceedings, without providing evidence at this time.

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detention model because overwhelming evidence shows that youth detention harms youth, their families and communities. New commitments of King County, Seattle, and their public officials, and the on-going pressure of interested stakeholders will ensure that the number of detained youth will continue to plummet.

Unfortunately, these tremendous gains are tempered by increasing racial disparities. King County is locking up fewer children, but more of those they jail are Brown or Black. Over 77% of the children locked up in King County's youth detention center in 2016 were Black, Latino, or Native American.

Through the work of EPIC and other anti-racist, community-based organizations, King County's over incarceration of youth of color is receiving more attention. Seattle and King County both officially recognize that eliminating racial injustice and promoting racial equity are governmental imperatives.[3] These two trends – one toward reducing youth detention and the other toward creating a more equitable juvenile justice system –will continue to reduce the need for detention.

The County acknowledges that its current, 156-child jail design is far larger than any current or future need. It has therefore begun to shift its public messaging on the youth jail. It now argues that the cells, concrete walls, locked doors and steel sallyports necessary to lock away 156 children can be repurposed to some other,

[3] Seattle and King County both have equity initiatives. *See* King County Equity and Social Justice Strategic Plan 2016-2022; City of Seattle Race and Social Justice Initiative Vision and Strategy 2015-2017) ("The…RSJI is the City's commitment to eliminate racial disparities and achieve racial equity in Seattle").

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unexplained, benign use; rendering the SDCI-approved proposal obsolete.

The facts will show that King County now detains fewer than 30 children a night and the County is taking steps to reduce this number further to address the racist and counter-productive impacts of detention. At the evidentiary hearing in this matter, the evidence will show that the 156-child jail proposal that the City is too large, unnecessary and will inflict grave injury on children and families for decades into the future. These facts will support Appellants' challenge to the waiver of development standards and also their allegations that the City was required to conduct a new SEPA evaluation and impose additional mitigation in light of project changes and new information.

B. MUP 3020845.

In 2013, the County issued a Mitigated Determination of Non-Significance ("MDNS") for this proposal. *See* Kaylor Decl. Ex. A. In 2015, the County asked the Seattle Department of Construction and Inspections ("SDCI") to issue the MUP.

Over a year into the review process, SDCI asked the County to justify its request that the Director waive certain development standards, including setback and maximum width standards. The County responded with only a series of uncorroborated platitudes. It provided no actual evidence to support its waiver request or to justify the immense size of the proposed youth jail that supposedly necessitated the waivers. The City does not appear to have followed up or requested more information from the County.

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The County submitted numerous sets of plans during the MUP review period that were internally inconsistent and did not reflect the County's public statements about changes begin made to the project. After a 14-month review period, the City issued the MUP on December 22, 2016. The Director's decision described the precise proposal that was being approved in only general terms, but instead stated that the Director was approving the project as reflected by the documents on file. Thus, it is unclear from the decision precisely which project was approved, which is critically important to this appeal because the challenged waiver of development standards was granted based upon the County's claim that a specific building layout was necessary. The Director's decision did not contain any analysis of such necessity.

The City relied upon the MDNS issued in 2013 without taking into consideration the events that have since occurred. The MUP decision reflected the City's exercise of its substantive SEPA authority and required certain mitigation.

C. Overview of Appellants' case.

As this proceeding moves forward, the Appellants will prove that the City erred in granting waivers from setback and maximum width standards. Those waivers were only required because the County seeks to build a 156-cell jail, which has been proven unnecessary by long-term policy changes that have already reduced the detention population to below 30 kids per night and that promise significant future reductions. The evidence will prove that there is no objective need for a new facility at all, much less one that is five times larger than any

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current detention need.

In addition, Appellants will prove other procedural and substantive errors. All of evidence proving these claims is admissible and relevant in this proceeding.

The Appellants will demonstrate that the City should have required an environmental impact statement or at the very least a new Mitigated Determination of Non-Significance given the substantial changes and new information, including ongoing reduction in detention populations and new evidence regarding the serious injuries that detention causes children. Appellants will also show that the City failed to require adequate mitigation to address many environmental impacts; it did not even require the basic mitigation for contaminated soil that was explicitly required in the MDNS.

The Director's decision also suffered from numerous other procedural and substantive errors, including inadequate notice and the approval of plans that are internally inconsistent and show violations of substantive criteria in SMC 23.76. Appellants now ask the Examiner to reverse the City's MUP decision.

D. Appellants' standing.

Appellants' notice of appeal contained a sufficient allegation of Appellants' standing. With this brief, EPIC is also submitting a detailed declaration of Senait Brown discussing the harm that the project will cause to EPIC's members who live near the proposed project, members who work within the existing Youth Services Center, and members whose families are threatened by the project. The County

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and City have recognized that EPIC and other coalition members represent communities impacted by the jail and have recognized EPIC's valuable role in challenging this project proposal.

E. Summary of Respondents' Motion.

Respondents' Motion, while scattershot, is limited in scope.

First, Respondents make several broad jurisdictional challenges, seeking to dismiss the entire appeal or certain appellants based upon the allegations of non-appelability of the MUP; lack of standing; failure to follow appeal procedures, and a challenge to certain Appellants' SEPA standing for failure to comment.

Next, Respondents seek dismissal of certain discrete claims that they consider to be too broad and/or require further clarification.

Finally, Respondents seek dismissal of discrete claims based upon various jurisdictional and other arguments. Importantly, this part of the motion ***does not*** challenge many key issues in this case, including Appellants' the challenge to the City's grant of a Type II waiver of development standards or its exercise of substantive SEPA authority.

IV. ARGUMENT

King County and Seattle move to dismiss Appellants and their issues under HER 3.02, which allows the Examiner to dismiss an appeal that "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." These circumstances

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do not apply so the motion should be denied.

Apart from their broad swipes at jurisdiction, Respondents' motion really seeks dismissal on the merits of Appellants' claims, without producing a record in support of its decision or allowing Appellants the opportunity to present evidence in support of its claims. Respondents' motion lies beyond the scope of HER 3.02. The issues presented in the appeal are intensely factual and would not even be amenable to resolution on summary judgment.

A. The Hearing Examiner has jurisdiction over the MUP appeal.

The City's argument that the MUP is not appealable to the Hearing Examiner is cynical and disheartening in light of the clear language of the Seattle Municipal Code, the language of the MUP, and the Notice of Decision, which each explicitly state that the MUP is appealable to this tribunal.

SMC 23.76.020(D)(1)[4] required SDCI to inform the public how to appeal the MUP. Accordingly, the MUP states that it is an "appealable land use decision." MUP Decision at 17. It states that "[i[f your decision is appealed, it will be considered 'approved for issuance' on the fourth day following the City Hearing Examiner's decision." MUP Decision at 17. The Notice of Decision also explicitly sets out that the MUP is appealable to the City Hearing Examiner by January 5, 2017. Seattle Department of Construction and Inspections, Notice of Decision for

[4] The decision must "state that the decision is subject to administrative appeal or administrative review and shall describe the appropriate administrative appeal procedure."

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Project No. 3020845, dated December 22, 2016 ("Notice of Decision"); *Lowney Decl.* Ex. D.

Even absent these statements, there can be no serious question that the MUP is a Type II decision appealable to the Hearing Examiner. SMC 23.51A.004.B.6 reads:

> ***For youth service centers, the development standards … relating to structure width and setbacks may be waived or modified by the Director as a Type II decision.*** The Director's decision to waive or modify standards shall be based on a finding that the waiver or modification is needed to accommodate unique programming, public service delivery, or structural needs of the facility and that the following urban design objectives are met. The Director's decision shall include conditions to mitigate all substantial impacts caused by such a waiver or modification.

SMC 23.51A.004.B.6 (emphasis added). Type II decisions are "discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner." SMC 23.76.004(B). The legislative history shows the intent of the ordinance was to make the waiver decision "appealable to the Hearing Examiner."[5] The Examiner has jurisdiction to hear this appeal.[6]

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[5] DPD Director's Report, July 1, 2014, on Ordinance 118202, contained in Ordinance Clerks File (excerpt). *Lowney Decl. Exhibit E.* (emphasis added). This was also stated in the fiscal report. *Id.*
[6] SMC 23.76.006.C does not help Respondents. SMC 23.76.004 provides that Type II decisions are subject to appeal to the Examiner. However, Type II decisions that are appealable to the Examiner are not limited to this list, but may include "[o]ther Type II decisions that are identified as such in the Land Use Code" as appealable decisions. SMC 23.76.004, Table A.

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B. EPIC has standing to appeal.

Appellants' notice of appeal adequately plead interests and injuries that are sufficient to confer standing, as recognized by the City's decision not to challenge standing. Especially EPIC's standing should be beyond dispute given its leadership role in the community and its representation of members who work within and live nearby the facility. EPIC even leads a Freedom School within the detention center. Nevertheless, Appellants provide a detailed discussion of standing and are submitting a detailed declaration on EPIC's standing. *See* Declaration of Senait Brown.

Because EPIC clearly has standing, the Examiner does not need to examine the standing of other Appellants.

1. Appellants Appropriately Plead Interests and Injury in Their Appeal.

Under SMC 25.05.755, anyone "significantly affected by ***or*** interested in proceedings before the agency" has the legal right to challenge the City's decision to the Hearing Examiner. (emphasis added). *Accord* HER 2.02 (o) (defining "Interested person"). HER 3.01(d) required Appellants' appeal to include only "A ***brief statement*** as to how the appellant is significantly affected by or interested in the matter appealed… " (emphasis added). Thus, the City Code extends standing in this administrative process beyond just those who are injured.[7] Here, as confirmed

[7] *See, e.g., Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) ("We look first to the plain meaning of the statutory language, and we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.").

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by years of engagement in this project, letters and comments to the City and County as well as the assertions in the Appeal, Appellants are unquestionably interested in the project broadly and the MUP specifically.

EPIC and the listed organizations included a 'brief statement' as to how they are "significantly affected by or interested in" the modification to structure width and side setback standards as well as the imposition of conditions under SEPA. Appellant organizations allege various harms that their members would suffer if the project goes forward, consistent with *SAVE v. City of Bothell*, 89 Wn.2d 862, 866 (1978) (standing of nonprofit organizations is typically shown by injury to its members).

The County is plain wrong in asserting that none of the interests Appellants identified in their appeal "relate to the decision to modify or waive structure width and side setback standards" and that EPIC did not assert any interests within SEPA's zone of interests. Motion to Dismiss ("Motion") at 9, 13. The waiver of structure width and side setback standards allows the construction of oversized building closer to the street and additional construction impacts. Construction of an excessively large jail complex is precisely what will affect members of Appellant organizations, including: "people living nearby the project" who will "suffer impacts from the construction and operation of the proposed facility," such as noise, parking, traffic, toxins and hazardous materials; "taxpayers who would be required to fund" the oversized, unnecessary facility; and "kids of color [who] would be placed at risk

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through the construction and operation" of the facility as Appellants stated in their appeal. Appellants Notice of Appeal, Statement of Interest. Moreover, such construction, traffic, and parking impacts are addressed by the MUP's SEPA conditions. Motion, at 12.

This is more than sufficient to deny Respondents' HER 3.02 motion on standing.

2. EPIC's standing confers standing on all Appellants.

Because the standing doctrine serves to establish jurisdiction, the establishment of standing by EPIC would suffice to establish jurisdiction for the other Appellants as well. *See Doe v. Bolton*, 410 U.S. 179, 189 (1973) (A finding of standing for one plaintiff dispenses with the need to separately establish standing for other parties.) *See also, Rumsfeld v. Forum for Academic & Instit. Rights, Inc.,* 547 U.S. 47 n.2, 126 S. Ct. 1297 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Bd. of Natural Res. of the State of Wash. v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993) ("If any of these [plaintiffs] has standing, we may reach the merits without considering whether the other two also have standing.").

3. Plaintiffs Have Suffered and Will Continue to Suffer Injury in Fact.

Although not required by the pleading standards for an administrative appeal, Appellants meet judicial standing requirements as well: they have suffered, or will suffer, an injury that is specific and perceptible, or a non-conjectural

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threatened injury. *Suquamish Tribe v. Kitsap Cnty.*, 92 Wn. App. 816, 828-29 (Ct. App. Div. 1 1998). Further, appellants meet the zone of interest test, because their asserted interests (including public need, noise, parking, traffic, toxins and hazardous materials…etc.) were among those required to be considered by the City when it made the land use decision. *Asche v. Bloomquist*, 132 Wn. App. 784, 792 (Ct. App. Div. 2 2006).

The showing required under both injury-in-fact and zone of interest prongs is minimal. Courts have repeatedly explained that the zone of interests test "is not intended to be especially demanding." *Id.*; *Chelan Cnty. v. Nykreim*, 146 Wn.2d 904 at 937 (2002).

Moreover, where, as here, a party is injured by the depravation of procedural rights, the standing requirements are "relaxed." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 303 (2011). In *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 793 (1996), the Washington Supreme Court explained that the U.S. Supreme Court "routinely grants standing to a party despite the fact that any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative." *Id.* at 793-94 (quotations omitted).[8] The Court continued by quoting the following dicta from the U.S. Supreme Court's seminal decision cited also by Respondents:

[8] The Supreme Court explained that Washington courts rely on federal cases when addressing standing under the APA. *Id.*

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> There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standings for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot established with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.
> *Seattle Bldg. & Constr. Trades Council,* 129 Wn.2d at 794-95, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n. 7 (1992).

Appellants' procedural interests, as noted in the Appeal, have been harmed by the City and County's failure to provide sufficient and legally required notice. Even if Appellants' injuries from the proposed development were not immediate, or "the fact that the decision of the [City] would be no different" had the proper procedures been applied, "is not dispositive of the standing question" as long as Appellants concrete interests are protectable by the procedures that were denied. *Id.* at 795.

However, in this case, Appellants indeed possess concrete interests in the proposed development area that are protected by the requirements governing the proposed project, meeting standing tests under *Seattle Bldg. & Constr. Trades Council,* 129 Wn.2d at 795. Even under the more stringent federal test for standing, appellants need not prove that the specific modification and waiver complained of would be the very cause of their injuries; rather, it is sufficient for appellants to show that the there is a "a fairly traceable connection between the

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alleged injury in fact and the alleged conduct of the defendant." [9] Appellants are interested in and are being specifically affected by the approved modification to structure width and side setback standards. The City's failure to give proper notice and the City's granting of waivers, modifications, and conditions which fail to comply with substantive criteria affect members of Appellant organizations who are not only interested in the project, but who live, work, shop, and travel in or around the project site.

Members of Appellant organizations include neighbors of the facility, people who travel the streets and sidewalks that will be impacted by the construction, and people who work in the facility. Appellants are reasonably concerned that this massive project, including specifically the waivers, modifications and lack of necessary mitigation, will not only restrict members' access to the area, but also cause aesthetically disturbing and environmentally destructive construction which in and of itself is sufficient to confer standing. *See Suquamish Tribe*, 92 Wn. App. at 829-31 (finding standing where members of petitioning organization alleged they would be affected by increased traffic expected to result from proposed project); *and see Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App. 787, 800 (Ct. App. Div. 2 2013) (finding standing for members of petitioner organization

[9] As observed by the court in *Comer v. Murphy Oil USA,* 585 F.3d 855, 864 (5th Cir., 2009): "[T]he Article III traceability requirement 'need not be as close as the proximate causation needed to succeed on the merits of a tort claim. Rather, an indirect causal relationship will suffice, so long as there is 'a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.' " (internal citations omitted)

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whose use of the proposed development area would be limited or prevented by proposed development). Appellants' concerns about threatened harm are routinely recognized injuries. *Ocean Advocates v. U.S. Army Corps of Engineers,* 402 F.3d 846, 860 (9th Cir. 2004).

The County's argument that there is "no document before the Examiner" that states whether people living near the project site are members of Appellant organizations, is spurious. Motion, at 10. Appellants' appeal explicitly states "Appellant organizations represent individuals who will be negatively impacted by the proposed project, including (1) people living nearby the project . . ." "Represent" in this context means that the individuals are members of one or more appellant organizations.[10] In addition, appellants MEChA - Seattle University, and Seattle University Professor Rose Ernst have obvious ties to the project site, which is just blocks from Seattle University. Appellant Pipsqueak is likewise located two blocks from the construction site. The County's argument is also disingenuous. In recent litigation, the County has engaged with EPIC in a variety of manners and is aware that EPIC's members live in the immediate vicinity of the proposed youth jail.

Appellants have no requirement at the application stage to submit affidavits

[10] To the extent the County seeks Appellants' membership lists and the home addresses of their members, that information is not discoverable much less required to establish standing. *See, e.g., Nat'l Assoc. for the Advancement of Colored People v. Ala.*, 357 U.S. 449, 460-67 (1958); and *see Nat'l Assoc. for the Advancement of Colored People v. Button*, 371 U.S. 415, 428-29 (1963); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1135 (9th Cir. 2010).

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and evidence as Respondents claim.[11] Their efforts to impose a double standard of pleading on these community members should be rejected.

4. Plaintiffs' Meet Lenient Zone of Interests Test.

Both the statute allowing waivers of development standards and SEPA have broad zones of interest. Courts ask whether a party's interests fall within the zone protected by the law that was allegedly required to be followed. *See, e.g., Lands Council*, 176 Wn. App. at 802; *Asche*, 132 Wn. App. at 792.

Under SMC 23.51A.004.B.6, the City was clearly required to consider interests of the public in deciding whether to waive development standards – looking at issues such as bulk and scale, pedestrian amenities, and aesthetics – as also reflected on the Council's decision to make this a Type II decision.

SEPA zone of interest is also extremely broad. *DeWeese v. City of Port Townsend*, 39 Wn. App 369, 375, 693 P.2d 726 (1984) (SEPA is concerned with "broad questions of environmental impact. . ." SEPA applies broadly to actions which potentially affect the environment.

[11] Where, as here, the movant has not supported its motion to dismiss with evidence outside the pleadings, much less met its burden to show the absence of a material factual dispute as to standing, there is no burden on the non-movant to provide any evidence whatsoever. *Hallum v. Mullins*, 16 Wn. App. 511, 557 P.2d 864 (1976) (A motion for judgment on an opening statement cannot be converted into a motion for summary judgment absent the invitation of the parties or absent a situation in which the motion amounts to a motion for judgment on the pleadings); *Hansen v. Friend*, 59 Wash. App. 236, 239, 797 P.2d 521, 522 (1990) reversed on other grounds, 118 Wn.2d 476 (1993) (a motion to dismiss on the pleadings is only converted to a motion for summary judgment when the movant supports the motion with evidentiary materials outside the pleadings).

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Appellants' concerns over social policy do not form the only basis for their claims in this action. Appellant organizations and their members have stated interests that are "elements of the environment," including the "built environment" listed under SMC 25.05.444. See Notice of Appeal. Appellants asserted a brief list of examples of their serious concerns that clearly fall within the zone of interests under SMC 23.51A.004.B.6 and SEPA, including aesthetics and height bulk and scale, release of toxins and hazardous materials, traffic, pedestrian access, parking, and noise. *See* Appeal. Therefore, Appellants pass the standing tests and the County's motion to dismiss on standing grounds must be denied.

5. Appellants also have taxpayer standing.

EPIC and Listed Organizations also have taxpayer standing because their members own property in the County and pay property taxes which are funding the Project. If the challenged waiver is overturned, the 156-cell jail will not be built and the taxpayers' interests will be protected. Appellants challenge the City's granting of the MUP as unlawful and therefore have taxpayer standing. See *Friends of N. Spokane Cty. Parks v. Spokane Cty.,* 184 Wn. App. 105, 120, 336 P.3d 632, 638 (2014) ("When it comes to taxpayer plaintiffs challenging the legality of a governmental act, however, Washington courts have repeatedly held that no special injury need be shown. And the reasoning of those decisions reveals an appreciation of the role that taxpayer suits play in correcting government transgressions and that no nexus is required between the type of taxes paid by the taxpayer plaintiff

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and the challenged act.")[12]

6. The Examiner need not consider Appellants' declaration on standing.

The County has not met its burden of seeking dismissal for lack of standing. Not only have Appellants plead sufficient interests and injury at this stage to survive the County's motion to dismiss, but it would also be inappropriate for the Hearing Examiner to dispose of this issue summarily as if there where there is no genuine issue of material fact. *ASARCO Inc.* v. *Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979).

However, to assist the Hearing Examiner, Appellants are submitting a declaration by EPIC member and organizer Sanait Brown which details some of the significant interests and impacts members of the organization have and will experience as a result of the project. Appellants believe that the Examiner should deny the motion on CR 12 standards rather than relying upon additional evidence.

C. Appellants cannot be dismissed because they filed a coordinated appeal.

Respondents seek dismissal of many appellants for filing a collective appeal and relying upon the signature and contact information of their joint counsel. Clearly, this trifling objection is not a basis to dismiss this appeal or any of the

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[12] Washington courts have long recognized the right of an individual or entity "to challenge governmental acts based solely upon the litigant's status as a taxpayer." See *Friends of N. Spokane Cty. Parks v. Spokane Cty.*, 184 Wash. App. 105, 116-17 (2014) citing *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281 (1997) (plurality opinion); *accord State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614 (1985); *Wash. Pub. Tr. Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn. App. 178, 182 (2003); *Robinson v. City of* Seattle, 102 Wn. App. 795, 804-05 (2000).

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Appellants. Rather, this is another example of the County and City attempting to deprive impacted communities of their rights to participate.

As discussed in the accompanying declaration of Richard Stolz, Executive Director of OneAmerica, the City's decision to issue the MUP over the holidays significantly prejudiced the ability of community members to participate in this appeal. *Stolz Decl.* Nonetheless, over 60 social justice organizations were able to jump through the internal hoops (getting their boards' approval, etc.) over the holidays to join this appeal. *Id.* They authorized Smith & Lowney to lodge the appeal and to serve as their representative and contact for purposes of the appeal. *Id.*[13] Appellants complied with the appeal form, which has only a single line for a signature and asks for additional appellants to be identified in an attached sheet. *See* Land Use /SEPA Decision Appeal Form.[14]

Procedures about who signs the appeal form and whose contact information is provided are certainly not jurisdictional. *See Graham Thrift Group v. Pierce County*, 75 Wn. App. 263 (1994) ("the modern preference of courts to interpret their procedural rules to allow creditable appeals to be addressed on the merits absent serious prejudice to other parties"); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366 (2009) (14 day limit for filing appeal to hearing examiner was not

[13] The Hearing Examiner Rules define "representative" as "the individual or firm designated by a party to be the official contact person and to speak for the party." HER 2.02(w).
[14] *Public Guide to Appeals and Hearings before the Hearing Examiner*, Seattle Hearing Examiner's Office (Apr. 23, 2014), http://www.seattle.gov/examiner/docs/Public-Guide-Revised-2016.pdf

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jurisdictional because "[t]he hearing examiner rules do not indicate that the time limit for appeals to the hearing examiner is jurisdictional."). [15] There is nothing in the Seattle Code or the Hearing Examiner Rules to elevate this formality into a jurisdictional requirement.

Because the signature and contact information procedures are not jurisdictional and Respondents claim no prejudice, they have no good faith argument for seek dismissal on this ground. *See Conom v. Snohomish County*, 155 Wn.2d 154, 162-163 (2005) (Land Use Petition Act procedure deemed not jurisdictional because failure to follow it causes no prejudice).

D. Appellants did not need to submit comments to bring SEPA claims.

Respondents' effort to deny a SEPA appeal of many organizations and individuals' who didn't submit comments has no basis in law. The Hearing Examiner has rejected the same argument in the past because "no frustration of SEPA's purposes occurs by allowing appeals to be filed by those who did not submit public comments." *In re: Smart Growth Seattle*, W-14-001 (Order on Motion to

[15] *See also Hoirup v. Empire Airways, Inc.*, 69 Wn. App. 479, 483, 848 P.2d 1337 (1993) (service of notice is not a jurisdictional element under MAR 7.1); *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (filing fee nonjurisdictional because RAP 18.8(b) does not list failure to pay filing fee as error leading to dismissal); *Davidson v. Thomas*, 55 Wn. App. 794, 798-99, 780 P.2d 910 (1989) (RALJ 10.2(a) does not list the failure to immediately serve notice on the other parties or the failure to pay the filing fee as reasons for a dismissal of the appeal – requirements were deemed nonjurisdictional)." To the extent that the Examiner feels that the notice of appeal was insufficient, the remedy is providing an opportunity to amend the notice rather than dismissal of the appeal. *See Rydman v. Martinolich Shipbuilding Corp.*, 13 Wn. App. 150, 152–53, 534 P.2d 62, 63 (1975) (appellants granted leave to amend notice of appeal where original notice did not include one of appealing parties). The Appellants are happy to amend their notice of appeal in any manner should the Hearing Examiner deem it necessary. *See Stolz Decl.*

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Dismiss, September 2, 2014). In reaching this decision, the Examiner noted that under the SEPA Rules and Seattle Municipal Code, SEPA appeal are ***not*** limited to those issues raised in comments. *Id.*

Nor are Respondents correct in arguing that the groups it seeks to dismiss did not submit comments. For example, Respondents seek dismissal of European Dissent's claims because it didn't submit comment, but numerous of its members including Rose Ernst did. That is enough for European Dissent's standing. *SAVE v. City of Bothell*, 89 Wn.2d at 866. Finally, because Appellants are presenting a unified appeal, dismissing the claims of *some of them* will not streamline the case.

E. Dissatisfaction with Appellants' clarification cannot justify dismissal.

Respondents inflame this proceeding by claiming that the Appellants "defied" the Examiner's order to clarify issues. The Hearing Examiner issued no such order. Appellants complied with the prehearing order, which merely set a date for responding to Patrick Donnelly's motion for clarification. *See* Prehearing Order p. 2.

Despite moving to dismiss Donnelly as an improper party and to strike his pleadings, Appellants responded as requested and provided a good faith clarification of their issues to the extent that it is possible given the major ambiguity in the decision under review and the great amount of information currently held only by the Respondents.[16] Appellants have begun discovery to allow them to identify the

[16] Neither the County nor the City joined in the motion to clarify, so they cannot claim prejudice even if they are dissatisfied with the clarification.

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details of the approved project, develop the facts, and work with their experts. These are not circumstances that justify the dismissal of any claims.

Respondents are responsible for the ambiguity in the plans and decision. The City's decision provides only the vaguest description of the project and the notice of decision says the appealable decisions have been made "based on submitted plans." Neither document identifies which plans the City actually approved, among the dozens of inconsistent plans the County submitted. *See* Lowney Decl. Exs. D and F. Meanwhile, throughout the process the County has regularly touted changes that it alleges have been made to the project without providing sufficient information for any other party to determine the nature and extent of any such changes. Just by way of example, the County's website currently states "10,200 square feet initially part of detention has been converted to non-detention youth program space because of reductions in the juvenile detention population,"[17] but this change does not appear to be reflected in any of the plans. Such a layout change is obviously critical to the appeal, since the grant of the waiver was specifically based upon the "required layout of uses" within the facility. MUP Decision at 4, Lowney Decl. Ex. F.

Unlike Appellants, Respondents fully understand the proposal, changes that have been made to it, and the inconsistencies of their plans. Because they hold all

[17] *Design and Construction*, King County Children and Family Justice Center (Dec. 21, 2016), http://www.kingcounty.gov/depts/facilities-management/major-projects-capital-planning/current-projects/children-family-justice-center/design-construction.aspx

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relevant information, they cannot claim prejudice from Appellants' need to access that project information before they fully litigate this case. *See Conom*, 155 Wn.2d at 163 ("A trial court resorts to dismissal when a party shows it is substantially prejudiced by another party's actions."). The civil rules and case law acknowledge that plaintiffs don't need to tell defendants what they already know and plaintiffs must be given time to conduct discovery before litigating their case.[18] Appellants provided a good faith clarification and cannot be required to narrow their appeal issues at this preliminary stage.

F. The Court should deny the request to dismiss particular claims.[19]

Dismissing specific claims at this point will merely confuse the case, as the claims Respondents seek to dismiss are factually and legally entwined with other claims in the case. Judicial efficiency would be served by delaying a ruling on the legal and factual merits of particular claims until Appellants have had the

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[18] Where the defendant has "superior access to information about its own activities," courts take that into account when assessing whether the defendant "understood or reasonably should have understood the alleged violations." *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 651 (9th Cir. 2015) (discussing strict statutory pre-suit notice letter requirements under various federal environmental statutes) quoting *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002). And see *Waterkeepers N. Cal. v. AG Industrial Mfg., Inc.*, 375 F.3d 913, 917 (9th Cir. 2004) (a citizen plaintiff is not required to "list every specific aspect or detail of every alleged violation" or every ramification of every violation to provide adequate notice; the focus of the inquiry is whether sufficient information has been provided to permit the defendant to identify its violations). *See also* CR 26(a)(1)(A) (a party is not required to produce materials that are "obtainable from some other source that is more convenient, less burdensome, or less expensive."

[19] Appellants disagree with, but respect, the Examiner's decision, stated in the prehearing conference, to dismiss the claims on constitutional issues (Issue 1) and regarding the applicable standard of review (Issue 5). They therefore rely on their prior arguments on these points and do not recite them again here.

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opportunity to conduct discovery and argue the merits to the Examiner.

This part of Respondents' motion is limited and attacks only discrete issues. Attached hereto is a numbered list of the appeal issues and the argument below refers back to these numbers. Respondents do not seek dismissal of many of the central issues in this case.

1. The SEPA piecemealing claims cannot be dismissed (Issues 8 and 10).

Respondents have sought to dismiss the SEPA piecemealing claims (Issues 8 and 10) on two grounds. Both lack merit.

a. The notice of action has no impact on this administrative appeal.

Respondents argue that the SEPA piecemealing claim must be dismissed because a "notice of action" was supposedly published in 2013 to "'smoke out' and resolve procedural SEPA challenges early."[20] But the notice of action only impacts judicial appeals and does not apply here, where there is an underlying action (the MUP issuance) that is subject to appeal. RCW 43.21C.075 makes this clear:

> (5) Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use approvals (the "underlying governmental action"). ***RCW 43.21C.080 establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter***. This subsection does not modify any such time periods. ***In this subsection, the term "appeal" refers to a judicial appeal only.***

[20] The County and City have not even shown that the notice of action was properly published under RCW 43.21C.080(1), and Appellants have not had an opportunity to conduct discovery on such compliance. *See Waterford Place Ass'n. v. Seattle*, 58 Wn.App. 39, fn. 1 (1990) (notice of action did not comply with statutory criteria so was not given effect).

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> (a) *If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within such time period. The agency shall give official notice stating the date and place for commencing an appeal.*
>
> (b) *If there is no time period for appealing the underlying governmental action, and a notice of action under RCW 43.21C.080 is used, appeals shall be commenced within the time period specified by RCW 43.21C.080.*

RCW 43.21C.075 (emphasis added). *Accord* WAC 197-11-680(4) (notice of action only limits judicial appeals); WAC 197-11-680(4)(d) (If notice of action procedure is used "then the time limits for judicial appeal specified in RCW 43.21C.080 shall apply, ***unless there is a time limit established by statute or ordinance for appealing the underlying governmental action***.") (emphasis added).

b. The notice of action has no impact on post-2013 compliance.

In addition, a notice of action can have no impact on Appellants' claims that the City needed to issue a new threshold determination due to new information and that the City failed to properly mitigate the project. Under WAC 197-11-600, the City of Seattle was ***not*** able to simply rely upon the County's 2013 environmental checklist and DNS.

> **When to use existing environmental documents.**
>
> (1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.
>
> (2) An agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents.

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> (3) ***Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:***
>
> ..
>
> (b) ***For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:***
>
> > (i) ***Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts*** (or lack of significant adverse impacts, if a DS is being withdrawn); or
> >
> > (ii) ***New information indicating a proposal's probable significant adverse environmental impacts***. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents

WAC 197-11-600(3) (emphasis added); *accord* SMC 25.05.600(C); *see also Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (Wash. 2015) ("Even if the agency issues a DNS, though, it must create a supplemental EIS or prepare a new "determination" if "[n]ew information" indicates the proposed action may significantly affect environmental quality. WAC 197-11-600(3)(b)(ii).")[21]

While a properly issued notice of action could foreclose claims about the ***County's*** compliance with procedural SEPA compliance, it has no impact on Appellants' claim that the City was required to update SEPA documents because of changes in the project and new information since 2013. A notice of action can only

[21] "Under the SEPA Rules, therefore, nonlead agencies are not constrained to accept a lead agency DNS but instead may make an independent determination as to whether they are "dissatisfied" with the lead agency's decision. Boundary review boards and other agencies subject to SEPA requirements should use this authority to ensure proper compliance with SEPA." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (Wash. 1993)

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"smoke out" those claims that exist at the time and it has limited effect here. *See* RCW 43.21C.080(2)(b) (a notice of action bars "***claims under RCW 43.21C.030(2)(a) through (h) unless there has been a substantial change in the proposal*** between the time of the first governmental action and the subsequent governmental action that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed."). The City's failure to properly conduct this new analysis violated WAC 197-11-600(3) and SMC 25.05.600(C). In addition, the 2013 notice of action could have no impact on the County's exercise of its SEPA substantive authority in 2016. These issues are about events that occurred after the notice of action and, therefore, could not have been "smoked out" in 2013.

The issue of on-site contamination provides an example of a change in the project that required additional City environmental review under and also an error in the City's exercise of its substantive SEPA authority. When the County decided to proceed with its project, it issued an MDNS that generally required contaminated soils on and adjacent to the site to be properly removed. Kaylor Decl. Ex. A, p. 2.[22] Neither the County nor its architect appealed this MDNS. Yet, the City failed to require that the County comply with this mitigation requirement in the MUP. City

[22] The mitigation for "groundwater and/or soil contamination," applicable "On-site and area surrounding site," included compliance with certain statutes and a specific mitigation measure. Kaylor Decl.. Ex. A, p. 2 The "Mitigation Measure Required" included "[w]here practicable, contaminated soil will be excavated and removed from the site and taken to an appropriately permitted disposal or treatment facility. New buildings would be designed and constructed to incorporate protective measures to prevent the potential for vapors associated with groundwater contamination from migrating into building interior spaces." *Id.*

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of Seattle Analysis and Decision 3020845 ("MUP Decision"), at 13-14. The City is allowing the County to leave contaminated soil throughout the site, including immediately adjacent to where detained children and County staff will be spending their days. The City is also allowing the contaminated soil to be left on the site areas to be redeveloped as apartments – which the City failed to consider due to unlawful piecemealing.

As this appeal proceeds, Appellants will prove that the City's failure to require proper disposal of contaminated soil constitutes a change in project requiring new environmental review and a violation of the City's substantive SEPA authority.

c. Respondents have not met their burden of showing that SEPA piecemealing issues are subject to res judicata.

Respondents' second argument is that the Appellants' piecemealing claim (Issue 8) should be dismissed on res judicata grounds because EPIC appealed a lot boundary adjustment on the site. Respondents have not met their burden of proof of showing that res judicata applies. *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 172, 969 P.2d 474 (1999) (party claiming res judicata bears burden of proof).

The case to which they refer concerns a lot boundary adjustment only, not the MUP at issue in this case, so the subject matter of the case is distinct and res judicata does not apply. *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 763 (1995) ("For the doctrine to apply, a prior judgment must have a concurrence of identity with a

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subsequent action in (1) subject matter… .") The judge ruled that the LBA case was untimely, so the Court had no jurisdiction to opine about the substance of the case.

Moreover, because that decision involved a relatively insignificant LBA, not the MUP, EPIC had no motivation or reason to appeal. For these reasons, res judicata and collateral estoppel do not apply, and it would work an injustice to apply either doctrine. *See Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (Wash. 1983) (before applying doctrine, court must ask "[w]ill the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?")

In any event, other Appellants can bring that claim because they did not control the LBA litigation. *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 764 (1995) ("Privity [for res judicata] is established in cases where a person is in actual control of the litigation, or substantially participates in it even though not in actual control. Mere awareness of proceedings is not sufficient to place a person in privity with a party to the prior proceeding.") Respondents did not even try to meet their burden of proving the other groups are subject to res judicata.

2. Social justice and housing policies are subject to review[23] (Issue 9).

[23] Certain social justice issues will also be relevant to the challenge of the City's grant of the waiver of setback and maximum width requirements, which, as described above, is clearly within the Examiner's jurisdiction. The reductions in detention population and the County's and City's commitment to further reductions, are relevant to the layout of the project and the need for waivers, and are rooted in evidence showing youth incarceration to be counter-productive and institutionally racist. No matter how the Examiner rules on the SEPA claims, those arguments survive this motion to dismiss and evidence regarding these matters will be admissible in the future.

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The County's decision to construct a 156-child jail ensures that the County will continue to lock up predominately poor children of color for at least the next fifty years, injuring children held there and their families and communities. The Examiner can review that decision.[24]

a. Detention-based housing harms children.

It has been recognized for some time that detention injures children. *See Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403 (1984) (Marshall. J., dissenting) ("[F]airly viewed, pretrial detention of a juvenile… gives rise to injuries comparable to those associated with imprisonment of an adult"). However, the significance and seriousness of the injuries is just now becoming fully understood. Recent studies prove that incarceration causes children to recidivate at higher rates and damages their educational achievement and social structures. It tears them away from family members and subjects them to potential sexual, physical, and emotional abuse. Because it will increase the likelihood that children will recidivate, youth incarceration endangers families and communities and threatens public safety.

Until recently, secure detention-based housing was the default answer for most justice-involved youth. King County locked up more than 200 youth a night because of the lack of available alternatives. *See* Lynn Thompson, "New juvenile jail: fewer beds, more help keeping kids out," The Seattle Times, Mar. 31, 2015.

[24] Research proves that if the new youth jail is built it is a certainty that it will injure children locked up within its walls.

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However, because of newly created alternatives to detention, King County has experienced a significant reduction in the number of youth it locks up. In recent months, its detention center has held fewer than 30 children a night in its youth detention center. Ana Sofia Knauf, "Fact Check: How Many Kids Are Being Held at the Juvenile Detention Center?" The Stranger (Dec. 20, 2016).

However, in exercising its SEPA responsibilities, the City failed to consider new information (or any information) about the damage that this facility will do to kids and the community; and it failed to consider new evidence about available alternatives that have eliminated the need for this facility.[25]

b. City SEPA policies required evaluation of new information about youth incarceration, housing, and safety issues.

Respondents seem to argue that the dangers of the proposed jail cannot be SEPA issues because they are also social justice issues. This is not the case. As the Examiner knows from her decision in the Queen Anne Neighborhood Council case, sometimes legitimate SEPA issues also are social justice issues. Here, the City's SEPA code is sufficiently broad to consider the serious harm that the jail will cause to kids and communities. The City was required to take a new look at this project in light of new information indicating its long-term, negative impact on housing

[25] The existence of the current youth jail does not render environmental review of the new Jail unnecessary. Building a new Jail will ensure that King County pursues a detention based, housing model for youth for at least 50 years. As an older building, the current facility does not provide that level of long term commitment. Moreover, funds that will be required to build the new Youth Jail will be unavailable for other more beneficial purposes. The new youth jail's environmental impact is so significant because, unlike the current facility, those impacts will last for decades into the future.

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options for justice-involved youth and because it conflicts with the important goals enumerated in the land use element of Seattle's Comprehensive Plan.

The Washington legislature passed SEPA in order to "(a) [f]oster and promote the general welfare; (b) create and maintain conditions under which human beings and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens." RCW 43.21C.020. Accordingly, SEPA requires that:

> it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may: … (b) **Assure for all people of Washington safe, healthful, productive**, and aesthetically and culturally pleasing **surroundings**.

Id. (emphasis added); *see also id.* ("(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment").

Thorough environmental review is necessary to "stimulate the health and welfare of human beings." RCW 43.21C.010(3). Healthful housing is "a critical component of a healthful environment." SMC 25.05.675.I.2.b. Therefore, as part of its SEPA-required environmental review, the City requires a thorough analysis of how a project will affect available housing options. SMC 25.05.444.B.2.b. "It is the City's policy that all people have the right to safe, healthy, and affordable housing." SMC 25.05.675.I.2.f. Accordingly, SEPA requires scrutiny of any project that

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threatens the housing options of Seattle residents or that promotes unhealthy, unsafe housing. *Id.*

The evidence that jailing kids in this facility will actually harm public safety is also cognizable under SEPA. The City's SEPA Code requires the City to "take into account that… (5) [a] proposal may to a significant degree… (d) [e]stablish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or may affect public health or safety." SMC 25.05.330.C.5.d (emphasis added); *see also*, WAC 197-11-330(C)(5)(d); *cf.*, *W. 514, Inc. v. Cty. of Spokane*, 53 Wash. App. 838, 847, 770 P.2d 1065, 1070 (1989) (social costs that will likely result in urban blight must be considered as part of SEPA review).

As described herein, new information indicates that the youth jail will negatively affect public health and safety and will create unsafe and dangerous housing for youth. The County proposes to build detention-based housing for up to 156 children, housing that puts them behind locked gates, doors, and sallyports; completely removes them from their families and communities; prevents them from attending their own schools; and causes them physical and psychological harms.

If the new Youth Jail is built, the County will continue to injure children, particularly children of color, for decades to come, when other reasonable, cost-effective and less harmful alternatives exist. These new realities require that the County reevaluate whether its current detention-based housing proposal is

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appropriate and necessary. As Executive Constantine has recently acknowledged, the County sought approval of a 156-child jail before realizing the full harm of juvenile detention and the ability of the County to dramatically reduce or eliminate the need for youth detention.

c. The City needed to consider how the jail conflicts with housing policies in the Comprehensive Plan.

In addition, the new Youth Jail also directly conflicts with express goals set out in the land use element of Seattle's Comprehensive Plan. Under SEPA, the County has an obligation to evaluate those conflicts and propose ways to mitigate them. *See,* SMC 25.05.675.J.2.b (the City "may condition or deny any project to mitigate adverse land use impacts resulting from a proposed project or to achieve consistency with … the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan regarding Land Use Categories.")[26]

Land Use Goal 3 of Seattle's Comprehensive Plan states that the City shall "[e]ncourage … **development that protects the public's health** and maintains environmental quality[.]" LUG3 Sea. Comp. Plan (emphasis added). Appellants will show that the new youth jail will endanger the public health by directly injuring children incarcerated within it, their families and communities.

[26] *See also* SMC 25.05.675.J.2.a (the Youth Jail must be "[r]easonably compatible with surrounding uses and [be] consistent with … the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan regarding Land Use Categories";

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This project also conflicts with Section LUG32 which requires "the integration of institutional development with the function and character of surrounding communities in the overall planning for urban centers."[27] The fact that this Youth Jail will be utilized for at least the next 50 years to disproportionately incarcerate youth of color is particularly troubling given that its proposed location is directly within the historical heart of Seattle's Black community. The Black-led organizations that have appealed oppose the new youth jail and its detention-based housing model and instead support the myriad of community based alternatives. The youth jail will not "respect [these] community needs" or "provid[e] necessary services." *See* LUG14 Sea. Comp. Plan. Rather, it promotes precisely the opposite of what the community is pursuing and supporting. Seattle's land use code requires that King County reevaluate this project to determine how it will mitigate the adverse, significant environmental impacts of the proposed new youth jail.

d. The City had to consider racial discrimination.

The City and County's official policies addressing racial discrimination and race equity must be considered as part of the SEPA process. SMC 25.05.440(E)(5) explicitly requires that "the following social, cultural, and economic issues shall be included in every EIS… Regional, City, and neighborhood goals, objectives, and

[27] LUG14 of the Seattle Comprehensive Plan also requires consideration of community needs ("In recognition of the positive contribution many institutions and public facilities have made to the areas in which they are located, respecting community needs and providing necessary services, allow small institutions and public facilities that are determined to be compatible with the function, character and scale of the area in which they are located.").

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policies adopted or recognized by the appropriate local governmental authority prior to the time the proposal is initiated." Both the City and the County have formally recognized that ending racial discrimination and promoting race equity are factors that must be addressed when executing City and County policies and practices. Seattle and King County both have equity initiatives that predate the initiation of this effort. *See City of Seattle Race and Justice Initiative Three-Year Plan 2012-2014* (recognizing that "the City of Seattle [is commited] to: • End institutionalized racism in City government. • Promote inclusion and full participation of all residents in civic life. • Partner with the community to achieve racial equity across Seattle" and noting that this has been commitment since 2005); *see also*, "*King County Equity and Social Justice Strategic Plan 2016-2022*. As the facts to be presented through this process will demonstrate, neither the County nor City properly analyzed how the youth jail will impact racial equity in the City or the County. Seattle's Code requires that they do so.

3. **Claims about the project's non-compliance with substantive criteria are within the Examiner's jurisdiction (Issues 12, 13, 15).**

Respondents' efforts to dismiss issues 12, 13, and 15, presented at page 25-26 of the motion, must also be rejected.

Issues 12 and 13 (substantive criteria). The claims in Issues 12 and 13 fall within the Hearing Examiner's jurisdiction because they relate to compliance with substantive criteria. The Hearing Examiner has jurisdiction and "shall entertain issues cited in the appeal that relate to … compliance with substantive criteria."

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SMC 23.76.022(C)(6). SMC 23.76.020. A further provides that "The Director shall grant, deny, or conditionally grant approval of a Type II decision based on the applicant's compliance with the applicable SEPA policies pursuant to Section 25.05.660, and with the applicable substantive requirements of the Seattle Municipal Code pursuant to 23.76.026."

Most of the issues cited in Issues 12 and 13 overlap with other claims in the appeal, so there will be no benefit from attempting to dismiss them.[28] For example, in their appeal, the Appellants challenge violations of landscaping, screening, and green factor requirements. Compliance with these substantive requirements is necessary for a proper analysis of the modification and waivers to development standards (Issue 14), which Respondents don't seek to dismiss.[29]

Similarly, the director based his decision to grant the waiver upon the County's arguments about the needed layout of building uses. MUP Decision, at 4. The layout of the building is an issue in the challenge to the waiver (Issue 14), which necessarily requires a certain amount of analysis about what uses and building designs are permitted under the land use code. Issues relating to

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[28] For example, the claims that the MUP failed to provide required setback and comply with maximum building width are central issues in the challenge to the Director's grant of a waiver.

[29] The analysis of the permissible structure width, usually "150' maximum (with min. Green Factor 0.5)," was modified for this project. To reach this modification, DCI had to assess the Green Factor Score to ensure it was in excess of 0.5.*MUP Decision, Analysis – Modification and waivers to development standards for youth service centers, Table A, "Modification."* This green factor analysis is only one example of how issues raised by Appellants relate to Type II decisions such as waiver of the structure width.

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unpermitted development in the L3 zone, failure to comply with height requirements, failure to comply with FAR requirements, and parking and loading requirements go directly to the building and site layout and influence the question of whether the proposed waivers and setbacks are necessary (Issue 14). Moreover, many of these issues are explicitly made part of the Director's analysis of the waiver. For example, the Director's analysis of the waiver proposal including analysis of certain policies and mitigation, including landscaping, setbacks, green space, height bulk and scale. MUP Decision, at 3-6.

Another claim cited in Issue 13 involves Appellants' claims about inadequate mitigation of toxics and hazardous materials. This is also a SEPA mitigation issue subject to the Type II appeal (Issues 6 7, 11), as discussed elsewhere in this brief.

Issue 15 (inadequate plans). Finally, Respondents seek to dismiss claims regarding the inadequate plans and documents submitted by King County to DCI, when such documents are inaccurate, inconsistent, and do not contain sufficient details to support the MUP approval. The Hearing Examiner "shall entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76." SMC 23.76.022(C)(6).[30] The submittal of proper plans is clearly part of the required Type II procedures. Indeed,

[30] To obtain a Type II Master Use Permit, an applicant must, under Chapter 23.76, submit information regarding the application. SMC 23.76.010(D). Additional information may be required or project modifications may be undertaken subsequently. SMC 23.76.010(E)(2). A Master Use permit may be revoked or suspended if the permittee has secured the permit with false or misleading information. SMC 23.76.034(A)(3).

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Appellants will show that the inconsistencies of the plan make it unclear what was proposed and what project and waivers the Director approved. The violation of these procedures has resulted in a decision based on erroneous information, resulting in a clearly erroneous decision.

4. Distinct SEPA claims cannot be dismissed (Issues 6, 7, 11, 15).

a. The City's mitigation decisions under SEPA are subject to review (Issue 7, 11).

The Notice of Decision states that SDCI's decision on "substantive conditions on the project pursuant to 25.05.660" is an "appealable decision." Notice of Decision, Lowney Decl. Ex. D. SMC 25.05.660 addresses substantive authority and the adequacy of mitigation under SEPA. As long as there is a Type II decision subject to appeal, the Examiner's jurisdiction extends to "determinations of nonsignificance (DNSs) [and] failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts." SMC 23.76.022(C)(6). While Respondents can seek to defend the adequacy of mitigation, that issue is plainly within the Examiner's jurisdiction.

As discussed, the notice of action does not apply here. In any event, the notice of action could not impact a challenge to the City's ***2016 decision*** about what mitigation is required under the City's SEPA policies.

Thus, SMC 25.05.660 required the City to exercise its substantive SEPA authority in issuing the MUP, and SMC 23.76.022(C)(6) makes that issue appealable to the Examiner.

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b. SEPA is broad enough to address Appellants' concerns (Issue 7).

As discussed above, the housing, health, and safety impacts of the proposed youth jail are directly relevant to the City's SEPA, environmental review. While fiscal and welfare policy analysis is excluded from SMC 25.05.448.C, that provision does not limit Appellants' ability to put on a case about the specific, significant environmental impacts from this development project.

c. SEPA recognizes non-compliance with other laws (Issues 6, 7).

This section of Respondents' motion provides an unintelligible scatter of arguments, but none appear to have merit. Pursuant to WAC 197-11-330(3)(e)(iii) and SMC 25.05.330.C.5.c, "A proposal may to a significant degree: Conflict with local, state, or federal laws or requirements for the protection of the environment." Thus, Appellants can argue that the project does not comply with other laws to a significant degree.

In this section, the County also claims that Appellants are not allowed to challenge a Type I decision but, as discussed above, the Examiner's jurisdiction specifically extends to substantive criteria of the project. SMC 23.76.022(C)(6). The City did not join in this issue because it understands that Appellants did not need to pay $2,500 for a land use interpretation to address the MUP's non-compliance with substantive criteria.

Next, Respondents repeat the claim that the City's non-compliance with the MDNS is outside of the Hearing Examiner's jurisdiction. However, the City was

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bound by the MDNS. SMC 25.05.390. The City's failure to require compliance with the MDNS, including the requirement to clean up contaminated soil on and off the site where practicable, is a change in circumstances requiring a new SEPA analysis. SMC 25.05.600. *Accord* King County Code 20.44.040.B.1 ("If the department issues a mitigated DNS, conditions requiring compliance with the mitigation measures which were specified in the application and environmental checklist shall be deemed conditions of any decision or recommendation of approval of the action.")

Finally, Respondents spend two pages reciting the City's decision on SEPA mitigation contained in the MUP. This just highlights that the MUP contains the City's exercise of substantive SEPA authority, which according to the notice of decision and SMC 23.76.022(C)(6) is an "appealable decision." Lowney Decl. Ex. D. The City may assert that additional mitigation was unnecessary because other laws provide mitigation under SMC 25.05.660(7), but this is a contested issue. Appellants will conduct discovery and ultimately prove that, even in light of other laws, the MUP failed to provide adequate mitigation. This issue is not subject to Respondent's shotgun motion to dismiss.

V. ALTERNATIVE CR 56(F) MOTION

This motion should be decided under HER 3.02. The motion is not brought as a summary judgment motion and it does not satisfy that rule.[31] But if the

[31] Respondents' motion would not satisfy the standards for the Examiner to resolve facts under CR 56. The moving party must make a prima facie showing of the absence of an issue of material fact before the burden shifts to the nonmoving party. *Washington Federal Savings and Loan Association*

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Examiner wishes to treat any part of it as a motion for summary judgment, Appellants request an opportunity to conduct discovery and provide affidavits in defense of such motion. Appellants have to date not even had the opportunity to review the record of decision. *See Coggle v. Snow,* 56 Wash. App. 499 ("court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case"); *Metabolife Int'l, Inc. v. Wornick,* 264 F.3d 832, 846 (9th Cir. 2001) (rule is liberally applied to require an opportunity to conduct discovery when such opportunity has not been provided). Factors favoring denial of a summary judgment motion under the federal analog to CR 56(f) include the timing of the motion before relevant discovery could be completed, involvement of complex facts requiring discovery, existence of material facts within the exclusive knowledge of the moving party, and existence of outstanding discovery requests seeking material information.[32]

Appellants' counsel required the entire briefing period to respond to the legal issues raised in the motion and because this is a motion to dismiss did not focus on obtaining new evidence. To obtain declarations on standing will require reviewing the record, which has been requested, and working with witnesses, and it would be an exhaustive process if the Examiner required proof of standing for all Appellants,

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v. *McNaughton,* 181 Wn.App. 281, 297, 325 P.3d 383 (2014) (citation omitted). All facts and reasonable inferences are considered "in a light most favorable to the nonmoving party." *City of Lakewood* v. *Pierce County,* 144 Wn.2d 118, 125,30 P.2d 446 (2001)(citations omitted).

[32] Federal Civil Procedure Before Trial (The Rutter Group, 2013) §14:115.

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despite the "standing for one is standing for all" caselaw.

If the Examiner requires Appellants to prove standing declarations from members of EPIC or any of the other 60+ Appellants, we request an additional 60 days to conduct discovery and obtain such declarations.

RESPECTFULLY SUBMITTED this 13th day of February, 2017.

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