

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of
WALLINGFORD COMMUNITY COUNCIL, ET AL.
of adequacy of the FEIS issued by the Director, Office of Planning and Community Development.

Hearing Examiner File:
W-17-006 through W-17-014

WALLINGFORD COMMUNITY COUNCIL'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Wallingford Community Council files this Reply to the Office of Planning and Community Development's Response to WCC's Cross-motion for Summary Judgment.

A. Scope of response.

The City of Seattle's Reply In Support of Its Motion for Partial Dismissal and Response to Appellants' Cross Motions dated May 8, 2018 again addresses motions brought by several appellants at the same time in the same document. By the same token and to avoid repetitive pleadings, WCC once again adopts and incorporates by reference authorities cited by other appellants addressing common issues and basic rules of law such as summary judgment requirements, standards for the Hearing Examiner's review, and general SEPA

1 requirements, as well as statements of fact such as those contained in SCALE's Motion for
2 Summary Judgment.

3 Not all sections of OPCD's Response to appellants' summary judgment motions are
4 directed to all of appellants' motions. The argument sections OPCD apparently applies to
5 WCC's motion are: C1, C2 and D. This response will address only those sections unless
6 OPCD claims otherwise.

7 **B. Summary of response.**

8 OPCD's Response to WCC's motion continues to acknowledge that the EIS did not
9 consider alternatives to the proposal designated as MHA-R to reach the City's objectives
10 concerning affordable housing. As described in WCC's cross-motion for summary
11 judgment, OPCD's Response continues to solely rely on a single subsection of one
12 regulation: WAC 197-11-442(4). Once again, OPCD misrepresents the language and
13 application of that subsection. OPCD noticeably ignores the clear, overriding mandates of
14 SEPA requiring consideration of reasonable alternatives to a proposal for achieving stated
15 objectives. As a result the EIS falls short of the law's requirements and it should be
16 remanded with direction to the OPCD Director to comply.

17 **II. DISCUSSION & AUTHORITIES**

18 **A. Question of issues of fact: (OPCD Response § II.C.)**

19 OPCD claims that "appellants have not demonstrated a genuine issue of material
20 fact." WCC does not claim there are any material factual issues. WCC claims it is entitled to
21 summary judgment because no such questions exist regarding the issues it presented.
22
23
24

1 **B. OPCD asserts it is not required to consider reasonable alternatives to**
2 **MHA: (OPCD Response § II.C.1.)**

3 OPCD argues that “SEPA expressly allows the City to limit its alternatives to those
4 that achieve a proposal that was ‘formally proposed.’” This proposition is incorrect as a
5 matter of law and as applied to the MHA EIS.

6 1. OPCD’s argument forces it to ignore basic SEPA requirements.

7 To support its argument, OPCD must ignore and remove from consideration the
8 touchstone of SEPA review and law. In its discussion of the requirements to consider
9 alternatives, OPCD never mentions the basic dictates of SEPA. The law’s requirement to
10 consider alternatives ways to meet objectives is central to the law. The basic requirements of
11 the law are set out in RCW 43.21C.030, a statute not mentioned by OPCD in its motion to
12 dismiss or its response to WCC’s motion.

13 The legislature authorizes and directs that, to the fullest extent possible: (1) The
14 policies, regulations, and laws of the state of Washington shall be interpreted and
15 administered in accordance with the policies set forth in this chapter, and (2) all
16 branches of government of this state, including state agencies, municipal and public
17 corporations, and counties shall:...

18 (c) Include in every recommendation or report on proposals for legislation and other
19 major actions significantly affecting the quality of the environment, a detailed
20 statement by the responsible official on: ...

21 **(iii) alternatives to the proposed action;**

22 RCW 43.21C.030 (c)(iii).

23 The question before the Hearing Examiner is whether OPCD is excused from
24 meeting the law’s requirements in pushing proposals which will drastically and permanently
25 change Seattle’s physical and human environment in numerous respects.

1 3. OPCD is limited to the misapplication and misstatement of a single
2 SEPA subsection, SMC 25.05.442.B, to support its arguments.

3 As pointed out in WCC’s response to OPCD’s motion, the City had to misquote and
4 substitute language to make SMC 25.05.442.B (WAC 197-11-442(4)) fit its argument.

5 OPCD’s section heading on page 6 of its response states, “SEPA expressly allows
6 the City to limit its alternatives to those that achieve a proposal that was ‘formally
7 proposed.’” This argument both ignores and misreads the language of the regulation in many
8 respects.

9 As justification for its refusal to consider alternatives to MHA, the department cites
10 SMC 25.05.442.B. However, that subsection requires a “discussion of the impacts of
11 alternate proposals” for the policies of the plans. (emphasis added) It is not limited to
12 consideration of a single proposal as claimed by OPCD’s statement.

13 OPCD further modifies the language of the provision to fit its needs by arguing that
14 for the subsection to apply, a proposal need only “involve” or “include” changes to zoning
15 or the comprehensive plan. (City Response, pg. 8, ln. 8) However, SMC 25.05.442.D. refers
16 to “EIS's discussion of alternatives for a comprehensive plan, community plan, or other area
17 wide zoning or for shoreline or land use plans...” The section is limited to such plans. If it
18 included every action that “involved” or “included” a change to zoning, there would be little
19 left of SEPA requirements for considering alternatives to a proposal. MHA by its terms and
20 objectives goes far beyond just changes to zoning. The proposed program doesn’t fit within
21 the subsection.
22

23 WAC 197-11-442(4) also provides that “The lead agency is not required under
24

1 SEPA to examine all conceivable policies, designations, or implementation measures but
2 should cover a range of such topics.” (emphasis added) OPCD misinterprets that to say it
3 need not consider any alternative “policies, designations, or implementation measures.”
4 OPCD also evades the requirement in the regulation to examine “a range of such topics,”
5 primarily arguing that it is not required to do so.

6 OPCD argues that EIS content may be limited to a discussion of alternatives which
7 have been “formally proposed.” This argument ignores the rest of the language of the
8 subsection and other SEPA requirements which mandate consideration of alternatives. EIS
9 does not even fall under the definitions of the exception.

10 What about consideration of alternatives not formally proposed but related to the
11 proposed plan as provided in the same sentence? OPCD mentions none.

12 OPCD does not define what constitutes being “formally proposed” arguing without
13 citation that some actions of the mayor, OPCD and the City Council all met some such
14 characterization. Would this exception apply to every proposal, idea or scheme suggested by
15 a mayor, city department or council member? Again, if so, what would be left of SEPA?
16

17 The only authority beyond the regulation itself cited by OPCD to support its theory
18 is *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 365 (1995).
19 If the opinion applies to the current situation at all, it supports appellants’ arguments. The
20 Supreme Court did not say that only the proposal need be considered. The court held that the
21 city’s consideration of off-site alternatives beyond the scope of the proposal was required by
22 SEPA for the non-project portion of the legislation, and found Auburn had adequately done
23 so.
24

1 Instead, nonproject actions pose *separate* obligations under SEPA which a lead
2 agency must satisfy. The environmental significance of the nonproject action creates
3 the obligation to examine alternatives to the nonproject action. Here, the project and
4 nonproject actions are intertwined, and Auburn decided to examine the significance
5 of both in the same EIS. Under these circumstances, SEPA requires an examination
6 of reasonable alternatives to the nonproject action, *i.e.*, the text amendment. In
7 practice, Auburn had to look at reasonable, feasible off-site alternatives to the
8 building of a racetrack on lands zoned heavy industrial.

9 *Citizens* at 366, 1306. The Supreme Court did not limit SEPA consideration of a nonproject
10 action (even one which was “formally proposed” and was limited to a specific project and
11 site) to a single proposal as OPCD argues here.

12 The few opinions which have addressed WAC 197-11-442(4) [SMC 25.05.442.D]
13 reject OPCD’s argument that the only consideration under this subsection of SEPA is the
14 proposal itself. In *Blair et. al. v. City of Monroe*, CPSMHB 14-3-0006c, Final Decision and
15 Order (Sept. 19, 2014) ², the Central Puget Sound Region Growth Management Hearings
16 Board considered the scope of review under WAC 197-11-442(4). There the Board found
17 that the City of Monroe failed to adequately comply with SEPA review requirements,
18 entered a determination of invalidity, and remanded the ordinances to the City. The Board
19 stated,

20 Thus, when a county or city amends its CP or changes zoning, a detailed and
21 comprehensive SEPA environmental review is required. SEPA is to function “as an
22 environmental full disclosure law,” and the City must demonstrate environmental
23 impacts were considered in a manner sufficient to show “compliance with the
24 procedural requirements of SEPA.” [footnotes not included]

25 *Blair* at 22. Specifically applying WAC 197-1-442(4) the Board said,

26 ² Link: <http://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=3644>

1 An EIS for a project action may be limited to “actions which could feasibly attain or
2 approximate a proposal”’s objectives, but at a lower environmental cost or decreased
3 level of environmental degradation.” WAC 197-11-440(5). By contrast, for a
4 nonproject action the discussion of alternatives may be limited to “a general
5 discussion of the impacts of alternative proposals for . . . land use or shoreline
6 designations. . . .” WAC 197-11-442(4). In either case, “[t]he range of alternatives
7 considered in an EIS must be sufficient to permit a reasoned choice.” *SWAP v.*
8 *Okanogan County*, 66 Wn. App. 439, 444, 832 P.2d 503 (1992). For the FEIS to be
9 adequate, the City must consider alternative designations for the Property and/or
10 alternative locations within the City for additional GC development. *Citizens*
11 *Alliance v City of Auburn*, 126 Wn.2d 356, 365, 894 P.2d 1300 (1995).

12 *Blair* at 23. As pointed out, WAC 197-11-442(4) does not validate a city’s refusal to
13 consider alternatives beyond the proposal itself.

14 A similar result in which the Growth Management Board applied WAC 197-11-
15 442(4) occurred in *City of Shoreline et. al. v. Snohomish County*, CPSMHB Coordinated
16 Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order (May 17,
17 2011).³ There the Board once again entered a determination of invalidity because of an
18 inadequate analysis of reasonable alternatives to a proposed action. After citing WAC 197-
19 11-442(4), the Board found that “The record provided in this case contains a number of
20 plans which, though not perhaps formally proposed, might have formed the basis for one or
21 more EIS alternatives resulting in lower environmental costs.” *City of Shoreline* at 56-57.
22 “[L]imiting the analysis only to (a) the land use and zoning requested by the Intervenor and
23 (b) the no action alternative, without considering any alternative scenarios, deprived County
24 officials of the information necessary to determine whether a reasonable change in use of
25 Point Wells could be achieved with less environmental impact.” *City of Shoreline* at 57.

³ Link: <http://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=3128>

1 The *Blair* and *City of Shoreline* opinions show that WAC 197-11-442(4) does not
2 excuse failing to consider alternatives beyond the proposal itself. OPCD offers no support
3 for its strained interpretation of the regulation.

4
5 **C. OPCD asserts there are no reasonable alternatives to MHA to consider:**
6 **(OPCD Response § II.C.2.)**

7 OPCD argues that it was not required to consider alternatives to the MHA proposal
8 and did not do so. Yet the department now complains that appellants have not demonstrated
9 there are reasonable alternatives to consider. Contrary to the suggestion of OPCD, it is not
10 the obligation of the appellants to define alternatives to MHA; that is the City’s
11 responsibility under the law.

12 The availability of alternatives for consideration has been demonstrated by WCC and
13 other appellants. For examples, see exhibits C and D of the Raaen Declaration in support of
14 WCC’s cross-motion for summary judgment, and the broad range of alternatives described
15 in SCALE’s motion. OPCD cannot in good faith claim there are no reasonable alternatives
16 which could have been considered to address the objectives of increased affordable housing,
17 the production of housing to meet projected demand, developing income restricted housing
18 units, and distributing the benefits and burdens of growth equitability. How can OPCD make
19 that claim if they reviewed no alternatives? How can OPCD claim for the purpose of its
20 motion that there are no issues of fact, and at the same time argue that the alternatives
21 offered are not “reasonable?” The “reasonableness” of an act is a question of fact.
22
23
24

1 **III. CONCLUSION: CONSIDERATION OF REASONABLE ALTERNATIVES IS REQUIRED.**


2 OPCD admits that it did not comply with SEPA requirements for the consideration
3 of alternatives. OPCD claims it does not have to comply with those dictates of SEPA. For
4 the reasons indicated in WCC's motion for summary judgment and those presented in this
5 reply to OPCD's Response to that motion, OPCD's position is wrong.

6 SEPA requires the consideration of reasonable alternatives so a decision maker can
7 make an informed decision. Such consideration is extremely important in this instance.

8 Families desperately needing affordable housing are entitled to good faith
9 consideration of all alternatives that might make that possible. The citizens of Seattle who
10 will forever bear the burdens and impacts of MHA also deserve such consideration. Before
11 alternatives for housing are explored and environmental costs are considered, everyone is
12 entitled to a consideration of options beyond those which fall within the limited four corners
13 of the secretly negotiated "Grand Bargain." Political devotion to the "Grand Bargain" should
14 not trump good faith compliance with SEPA.
15

16 The EIS should be remanded for the consideration of alternatives in relationship to
17 the objectives in the FEIS.

18 Respectfully submitted this 15th day of May, 2018.

19
20 
21 G. Lee Raaen, WSBA #6258
22 Attorney for Wallingford Community Council
23
24