BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeal of **SMART GROWTH SEATTLE** from a determination of non-significance by the Director, Department of Planning and Development	Hearing Examiner File: **W-14-001** **DPD REPLY TO APPELLANTS' RESPONSE TO MOTION TO DISMISS**

As provided for by the Hearing Examiner's Prehearing Order of July 16, 2014, the Department of Planning and Development (DPD) respectfully submits this reply to the appellant response of August 15, 2014. DPD stands by its motion to dismiss this matter due to appellants' failure to comment on the Determination of Non-significance (DNS) filed as part of its proposal of legislation to amend various standards of the Land Use Code regulations for Lowrise multifamily zones. This is a failure by the appellant to exhaust its administrative remedies and is a threshold test for eligibility to appeal an environmental determination under the State Environmental Policy Act (SEPA). The appellant bears the burden of proving that it met its responsibility to comment on the subject environmental document (DNS) pursuant to SMC Section 25.05.545.B. This burden has not been met, as demonstrated below, and therefore the appeal must be dismissed.

Argument

Although a comment letter was filed by Seattle property owner Bruce Harris, there is no evidence that Mr. Harris was a member of appellant Smart Growth Seattle at the time that he filed the comment letter, and the comment letter itself does not include a representation that Mr. Harris was a member of Smart Growth Seattle or contain any comments related to SEPA.

In its response to the motion to dismiss, the appellant includes a declaration from Mr. Harris as an attachment stating at point no. 3 that he is a member of Smart Growth Seattle. The declaration is signed August 7, 2014. Significantly, this declaration does not contain any representation of when Mr. Harris joined Smart Growth Seattle or assert that Mr. Harris was in fact a member at the time he filed his comment letter. A copy of Mr. Harris' comment letter to DPD on the proposed Lowrise amendments is also included with the response. This comment letter, filed as an e-mail comment on June 16,

2014, does not indicate or represent that Mr. Harris was a member of Smart Growth Seattle.

Further, the scope of the letter is limited to one very narrow issue, a change to Code language concerning rounding of fractional measurements, and does not tie this topic to SEPA impacts in any way, or indeed even mention SEPA. The issues Mr. Harris raises in his letter and declaration are interests in the economic effect of the proposed legislation on the development capacity of his property and his ability to maximize his return on investment, which is an economic interest that does not confer SEPA standing.

Section 25.05.545.B requires comment on environmental documents, as follows:

> "Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, ..."

Mr. Harris letter was limited to commenting on the proposed legislation but did not actually comment or address the environmental documents (DNS and SEPA checklist) now under appeal by Smart Growth Seattle.

It is also worth noting that Mr. Harris' comment letter was filed after the stated comment period in the public notice of the DNS had expired.[1] Although the letter was filed within the appeal period ending June 19, Mr. Harris did not file an appeal of the DNS with the Hearing Examiner, and his letter does not indicate intent to appeal. For all of the above reasons, there is no evidence that Mr. Harris was a member of Smart Growth Seattle in June 2014, or indeed had even heard of Smart Growth Seattle in June 2014. Even if he was a member at that time, his letter provides no connection to Smart Growth Seattle and, for that matter, the appeal filed by Smart Growth Seattle on June 19, 2014, makes no mention of Mr. Harris' membership or interest in that organization. In fact, the letter purports only to be an appeal by Smart Growth Seattle and its Director, Roger Valdez. Therefore, DPD stands by its statement in its motion to dismiss that "neither the appellant party nor any of its members or representatives filed a public comment during the public comment period," as related to SEPA. DPD does not dispute that Mr. Harris' letter was a comment letter. However, receipt of a "public comment" after the public comment period closed but prior to close of the appeal period is insufficient to satisfy Section 25.05.545.B if it does not relate to environmental documents.

If, despite the above arguments and facts, the Examiner is inclined to consider this issue further, DPD asks that its motion to dismiss be scheduled for an oral argument in the first week of September, 2014, or later in September as practical, and that Mr. Harris be

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[1] The comment period on the SEPA analysis of the proposed Code amendments began on May 29, 2014 and ran through June 12, 2014. The period for filing of an appeal ran through June 19, 2014. A copy of the DPD notice filed in the Land Use Information Bulletin was included as an attachment to DPD's motion to dismiss.

available at the time that argument is scheduled to present testimony, subject to cross-examination, on the topic of his membership in Smart Growth Seattle.

The letter provided by Smart Growth Seattle to City Councilmember Mike O'Brien dated January 15, 2014 and signed by Mr. Valdez does not qualify as a comment letter for purposes of Section 25.05.545.B or WAC 197-11-545.

The appellant suggests that its January 15 letter to Councilmember O'Brien, included as an attachment to its response, should also count as a comment letter for purposes of sustaining its right to appeal the DNS. This argument fails to meet the test of Section 25.05.505.B, which requires comments to be filed within the time periods specified by the rules in Chapter 25.05. The O'Brien letter was filed well before any legislative proposal had been prepared by DPD, and well before any SEPA documents had been drafted or published. It was thus filed before any public comment or appeal period commenced on the legislative proposal or related environmental documents. See the LUIB notice of the proposed legislation and DNS.

Even if the O'Brien letter had been filed during the public comment period on the DNS, it is like the Harris letter in that it fails to mention any "environmental documents," particularly the DNS under appeal, and indeed fails to mention SEPA at all. The failure to mention SEPA should be construed as lack of objection to the subject environmental documents per 25.05.545.B. In the face of the plain language of Section 25.05.545.B, there is also no basis for arguing, as appellant does near the top of page 7 of their response, that comments on the "proposal" may substitute for comments on environmental documents. Section 25.05.545.B is more specific than the requirements in Section 25.05.550. Even if Section 25.05.550 does apply, subsection 25.05.550.G clearly indicates that citizen comments should relate to SEPA issues concerning methodology, additional information, and mitigation measures. The O'Brien letter, like the Harris letter, simply comments on what legislative policy should be. Both Mr. Valdez and Mr. Harris should voice these concerns at a public hearing on the legislation rather than attempt to inject policy discussion into a SEPA appeal. Finally, even if the Examiner were to conclude that both the O'Brien letter and the Harris letter were SEPA comments[2], they simply were not timely, as neither was filed during the public comment period on the DNS. One letter was too early and the other letter was too late.

[2] The apparent purpose of the declaration filed by Ms. Rogers and attached to the response is to suggest that an e-mail from William Mills to Roger Valdez and Ms. Rogers on July 9 is somehow an admission by DPD that the Harris letter, at least, was a SEPA comment. The terminology of that e-mail, particularly the embedded comment by DPD Senior Planner Geoff Wentlandt, stating in part that "attached are all of the SEPA comments I received," is simply DPD shorthand for referencing the comments received, not a technical determination that the letters received pertain to SEPA. Further, item 4 of Ms. Rogers declaration is simply her opinion, rather than a declaration of facts. Since she is counsel for the appellant, that opinion has limited credibility.

There is no evidence that Smart Growth Seattle has any policy or practice aimed at recruiting members or that it has any kind of corporate structure, meetings, or membership activity of any kind. Nor did Smart Growth Seattle itself file a comment letter during the official comment period.

In his declaration accompanying this motion, Mr. Mills of DPD states that he visited the website of Smart Growth Seattle and found no obvious way to join that organization. Further, the website contains no information about membership or corporate structure. It appears that the website is more like a personal blog for Roger Valdez to air his views on urban planning issues. Smart Growth Seattle has not provided any information about its membership to DPD or even, at a minimum, a form showing that Mr. Harris has been enrolled as a member. Before the Examiner decides that Mr. Harris is a member of Smart Growth Seattle, the appellant should be asked to produce a membership list or some other reasonably persuasive documentation that Smart Growth Seattle is more than just Roger Valdez by another name.

DPD cannot determine from the available information whether Smart Growth Seattle is an organization with members or just a creature of the internet. However, it is very clear from the record that Smart Growth Seattle, as an entity, never filed a comment letter and that no comment letters received during the official comment period show any connection to Smart Growth Seattle.

Appellants' alternative argument that the DPD motion to dismiss is based on an erroneous reading of City Code and inapplicable legal authority is not correct and must be rejected by the Examiner.

Anticipating the likely failure of its arguments about membership in Smart Growth Seattle and whether comment letters addressing SEPA were actually filed, the appellant attempts to persuade the Examiner that Section 25.05.545.B does not apply to citizen comments or that there is a procedural defect because DPD's public notice does not specifically inform citizens that they must file a public comment in order to appeal. If appellant is correct, then any kind of remote public involvement with respect to a legislative proposal would be enough to confer a right to appeal the environmental determination that must precede legislative action. There is no evidence that such a broad appeal right is contemplated by state SEPA regulations.

On the substantive issue of whether 25.05.545 and WAC 191-11-545 apply only to EIS's or to agencies, Section 25.05.545.B specifically says that lack of comment by members of the public to any environmental document is construed as lack of objection. Because no comment letters were received from Smart Growth Seattle or any person purporting, at least during the comment period, to be a member, there was no objection to the environmental documents accompanying the DPD proposal and therefore no basis for filing an appeal a week later. Because of the plain language of subsection B, it is clear that the "effect of no comment" regulation does not apply just to an EIS or to agency failure to comment.

While the appellant has attempted to distinguish the cases cited in the DPD motion in support of the requirement to file a comment prior to appealing a SEPA decision, the appellant offers no case or other persuasive authority in which an administrative law judge has allowed a DNS appeal to proceed in the face of lack of comment by an appellant.

Further, there is no basis for appellants' argument at the bottom of page 6 of the response that other Code sections somehow remove the need to comment on a comment DNS in order to appeal it. Section 25.05.502 addresses the process for inviting comment. DPD did that with proper public notice. This appellant failed to take advantage of a very clearly stated process for comment and appeal until after the fact, and is therefore untimely.

There is also no merit to the appellants' argument on page 7 of the response about comments being valid if they address either SEPA or the merits of the proposal subject to SEPA review. There are various general SEPA rules that authorize comments about a proposal addition to comments about environmental documents, but WAC 197-11-545 (25.05.545.B) is specifically an exhaustion mechanism directed at the appeal of the adequacy of SEPA documents. Finally, the public notice is not defective merely because it does not specifically caution citizens that they must file a comment in order to appeal. Citizens are on notice to know the law, and DPD does not have to restate every aspect of the law each time it issues a public notice.

Conclusion

DPD's motion to dismiss in this matter is not based on a technicality. Rather, it is an attempt to maintain the integrity of the process for proper exhaustion of administrative remedies that is built into the WAC and, by extension, the local SEPA regulations. The appellant bears the burden to prove who its members are and that they were members in good standing at the time that comment letters on a legislative proposal were filed. If the Hearing Examiner allows a self-serving statement after the fact that someone belonged to an organization when a comment letter was submitted, without corroborating proof, then the door is opened to allow anyone to represent their status and file an appeal. DPD stands by its motion to dismiss.

Entered this 21st day of August, 2014.

William K. Mills

William K. Mills, Land Use Planner Supervisor
Department of Planning and Development

Attachments: Declaration of William K. Mills

cc. Nancy Bainbridge Rogers, for appellant Smart Growth Seattle