FINDINGS AND DECISION OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

SMART GROWTH SEATTLE

Hearing Examiner File:
W-14-001

From a Determination of Non-significance issued
by the Director, Department of Planning and Development

Introduction

The Director of the Department of Planning and Development issued a Determination of Non-significance (DNS) for a proposal to amend the Land Use Code. The Appellants timely filed an appeal of the DNS.

The appeal hearing was held on September 24 and 26, 2014, before the undersigned Deputy Hearing Examiner. Parties represented at the proceeding were: the Appellant Smart Growth Seattle, by Nancy Bainbridge Rogers, attorney at law; and the Director, by William Mills, Senior Land Use Planner. The record was held open through October 7, 2014, for submission of closing statements. DPD and the Appellants submitted closing statements by that date, and the statements were added to the record.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. After considering the evidence in the record, the Examiner enters the following findings of fact, conclusions and decision on this appeal.

Findings of Fact

1. On May 29, 2014, the Department of Planning and Development issued a SEPA Determination of Nonsignificance on a proposal to amend the Land Use Code.

2. The proposed Code amendments are shown in Ex. 20. The proposal would amend certain zoning standards for Lowrise Multifamily Residential zones. The proposed Code amendments would:

- Eliminate a floor area exemption from the floor area ratio (FAR) calculation for the portion of buildings in a partially below-grade story, for apartment developments;

- Eliminate a height allowance of up to an additional four feet above the base height limit for apartment housing type developments which include a partially-below grade story;

- Reduce the maximum height limit for street-facing façade for development on sloping sites from (from 44 to 40, or 34 feet to 30);

- Place a 30 percent coverage limit for rooftop clerestory architectural features;

- Require the area of unenclosed exterior stairs, hallways and breezeways to be included as chargeable floor area in FAR calculations;

- Include the floor area of loft spaces that are less than full ceiling heights in the FAR calculation;

- Add a side setback requirement for rowhouse developments that are next to other types of housing;

- Change the rounding up threshold for the density limits in Lowrise zones, from 0.5 to 0.85;

- Add a density limit of one dwelling unit per 1,600 square feet of lot area for rowhouse development on small lots in the Lowrise 1 zone.

3. Lowrise zones cover 3,489 acres, 10 percent of Seattle's total gross acres. About half of the lowrise zones are within urban villages and urban centers. Lowrise 1 zones total 825 acres (21.8% of all LR zones). LR2 zones total 1,124 acres (29.7% of all LR zones) and LR3 zones total 1,833 acres (48.5% of all LR zones).

4. In 2010, the City Council approved Ordinance 123495, which amended the Lowrise Multifamily Code. As part of the SEPA review for those amendments, the Director considered the development capacity for the City and concluded that the proposed Code amendments would result in an estimated 10 percent increase in the capacity that could be achieved under the existing code.

5. The Director's Report at Ex. 18 includes an analysis comparing the 2010 "expected" development capacity with observed densities of post-2010 development in the LR1, LR2 and LR3 zones. As part of the analysis, DPD examined building permit applications within the Lowrise zones between September 2011 (five months after the 2010 amendments went into effect) and September 2013.

6. The Director's report concluded that observed densities of projects permitted under the 2010 amendments appeared to be substantially higher than the assumed densities for the LR1 zone and LR3 growth area (urban villages, urban centers and station areas). DPD concluded that, based on the observed development, the eventual build-out in the LR1 zone and LR3 growth areas would push the total capacity beyond that predicted in the review of the 2010 Code amendment.

7. As part of its analysis, DPD reviewed a dozen projects that it believed illustrated "key issues and unexpected outcomes" from the 2010 Code amendments; Ex. 18, page 15. The projects are identified in Figure 6 of the Report. The DPD report examined how certain incentives and exemptions were being utilized by the sampled projects: the additional four feet of height for certain buildings which included a partially below-grade story; the FAR exemption for exterior stairs and breezeways; the additional height allowance for clerestory rooftop features; the exclusion of loft space from the calculation of FAR; the zero-foot side setback allowed for rowhouses; the density rounding threshold of 0.5 as applied within the LR1 zone.

8. In its report, DPD discussed the impacts of the proposed Code amendments, comparing the impacts of the proposal with the expected development capacity and impacts that had been analyzed in the SEPA review of the 2010 Multifamily Code Amendments. DPD concluded that the proposed Code amendments for the LR1 zone would change density of infill development on a standard 5,000 square foot lot to one unit per 1,666 square feet of lot area assuming maximum lot utilization, which was not likely in every case. For the LR3 growth areas, DPD determined that the proposed amendments would likely reduce maximum building floor area by approximately 15 to 20 percent, with a corresponding decrease in density. DPD considered the Citywide development capacity analyzed as part of the 2010 environmental review, and determined that the proposed amendments would slow the uptake rate of development capacity in the LR zones to match more closely what was expected in 2010.

9. At page 71 of the Director's report, the Director observed that even if the potential 25 percent reduction in allowable density in the LR1 and the 20 percent reduction in the LR3 growth areas were considered to apply across LR zones Citywide, the "resulting reductions [in density] are minor," citing the fact that LR1 and LR3 growth areas make up 21.8 percent and 25.3 percent, respectively, of the total LR-zoned lands.

10. DPD issued a Determination of Non-significance on the proposal on May 29, 2014.

11. Exhibits 2-4 are spreadsheets created by the Appellant's witness Mr. Van Wyk, a real estate broker. The exhibits identify 15,444 parcels located in the Lowrise zones (lots less than 2400 square feet, lots developed with schools, parks or condominiums and lots with structures built after 2000 were excluded). Most of the lots are developed.

12. Mr. Van Wyk divided the lot areas by the density standard for the zone and then determined how many fewer units would be allowed by the density standard if the "rounding up" standard of 0.5 were changed to 0.85. Mr. Van Wyk thus arrived at the following totals of "lost" units in each of the affected zones: LR1 would lose 1,643 units; LR 2 would lose 1,978 units; and LR3 would lose 2,362 units, for a total of 5,983 units.

13. Mr. Van Wyk's calculations did not differentiate between vacant lots and those with existing development, including those with existing structures built prior to current

density standards. The presence of environmentally critical areas or other constraints on developable area and site design were not factored into the calculations.

14. The Appellant's transportation consultant, Mr. Lincoln, reviewed Mr. Van Wyk's calculations, and calculated trips that might be made if residents who might have resided in a "lost" unit instead chose to live outside City limits and commuted into the City by various surface streets, assuming that there would be no capacity on freeways. Mr. Lincoln then estimated new added peak hour trips on surface streets in the north, south, east and west portions of the City, as shown in Ex. 9. Mr. Lincoln also looked at Metro's planned service cuts announced in February, and predicted that this would further exacerbate commuter traffic in and out of Seattle.

15. DPD's transportation planner disagreed with the assumption that, even if any units were "lost" in the Lowrise zones, the loss could be equated with commuter vehicle trips into and out of the City. Mr. Shaw noted that people might decide to live in other zones, e.g., in Commercial or Seattle Mixed, rather than residing in another city and commuting by vehicle.

16. Apartment rental prices as well as vacancies and trends in rents are set out in the Dupre and Scott reports shown in Ex. 16 and 22, and are referenced in the news article at Ex. 17.

17. "Seattle 2035" is the Development Capacity Report used by DPD as part of the Comprehensive Plan Update process. At page 2, the Summary to the document states:

> "Seattle's development capacity analysis does not predict market demand, or how much or how quickly development will occur in coming years. The analysis only evaluates the supply that could eventually be produced. Based on current zoning, DPD estimates that the city has development capacity to add about 224,000 housing units and 232,000 jobs, a sufficient amount to accommodate the 70,000 households and 115,000 jobs the Countywide Planning Policies assign to Seattle for the next 20 years."

18. SMC 25.05.330 provides the following:

> *Threshold determination process.*
> *An EIS is required for proposals for legislation and other major actions significantly affecting the quality of the environment. The lead agency decides whether an EIS is required in the threshold determination process, as described below.*
>
> *A. In making a threshold determination, the responsible official shall:*
> *1. Review the environmental checklist, if used:*
> *a. Independently evaluating the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist, and*

b. Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant;
2. Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (Section 25.05.960), and any additional information furnished under Section 25.05.335 (Additional information) and Section 25.05.350 (Mitigated DNS); and
3. Consider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by the City's development regulations or other existing environmental rules or laws.

19. SMC 25.05.782 states: *"Probable" means likely or reasonably likely to occur, as in "a reasonable probability of more than a moderate effect on the quality of the environment" (see Section 25.05.794 (Significant)). "Probable" is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.*

20. SMC 25.05.794 defines "significant" to mean *"a reasonable likelihood of more than a moderate adverse impact on environmental quality."*

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 25.05.680. The Code directs the Examiner to accord "substantial weight" to the Director's SEPA decisions. A party appealing the Director's decision bears the burden of proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn.App 762, 637 P.2d 1005 (1981). The decision is clearly erroneous if the Hearing Examiner, on review of the entire record, is "left with a definite and firm conviction that a mistake has been committed." *Norway Hill Preservation and Protection Ass'n. v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). On appeal, the lead agency must demonstrate that it actually considered relevant environmental factors before issuing the DNS, and that the DNS was based on information reasonably sufficient to evaluate the proposal's environmental impacts; *Boehm v. City of Vancouver*, 111 Wn.App.711, 718, 47 P.3d 137 (2002) (citations omitted).

2. The Appellant argues that DPD's decision is not based on reasonably sufficient information, specifically, information concerning impacts on development capacity. The Appellant also argues that the proposal would have more than a moderate adverse impact on the environment, because of its impacts on transportation, housing affordability, and its cumulative impacts when combined with Code amendments concerning microhousing and other potential legislation affecting development.

3. Regarding the proposal's impact on development capacity, the Appellant points to the data compiled by Mr. Van Wick as evidence that thousands of potentially future residential units will be lost, and information that DPD should have considered before issuing its decision. But as the Director points out, the calculations do not take into consideration the amount, type or density of existing development on a lot. The calculations also do not consider the constraints on lots posed by environmentally critical areas, or other physical features of the lots. The testimony of Mr. Wentlandt and Mr. Kaplan also underscored how the development of Lowrise sites in Seattle is subject to variables that are not captured by the methodology used by the Appellants. Absent consideration of existing development on the sites and their potential to be redeveloped for greater floor areas and higher densities, the mathematical calculation of units "lost" cannot be relied upon for purposes of measuring the proposal's impacts on development capacity.

4. DPD relied on its case studies of actual projects to determine the proposal's potential impacts on floor area and density; these were projects which were able to utilize a 40-foot height limit, exceptions or incentives related to allowable height or allowable FAR, or setback limits for rowhouses. Presumably, these were larger projects, and the Appellant argued that DPD's analysis was flawed because it focused controversial projects. But even if it assumed that those projects were unpopular, it is difficult to see how their inclusion rendered DPD's analysis unreliable or unreasonable. By excluding projects that did not utilize the height limits or exceptions/incentives for FAR, DPD's case study, if anything, overstated the impacts of the proposed legislation in terms of potential reductions on developable floor area or allowable densities.

5. DPD also compared its observations of newer development projects with the information developed for the 2010 Code amendments, to draw conclusions about impacts on development capacity. The methodology and the information relied upon by DPD was reasonably sufficient for purposes of evaluating the proposal's impacts.

6. The Appellant asserted that the proposal would have probable significant adverse transportation impacts within the region. The Appellant argues that because of the proposed legislation, people moving to the Seattle area will live in areas outside City limits and commute into the City, creating congestion. But as noted above, the Appellant's assumption that nearly six thousand units will be "lost" because of the proposal is not supported by the evidence. Further, it would have to be assumed that all potential residents of lost units would choose to live outside the City and commute by vehicle on surface streets. The evidence in this record is not sufficient to support such assumptions, or to show that the proposal would have probable significant adverse impacts on transportation.

7. The Appellant asserts that there would be cumulative impacts from the proposed legislation, pointing to recent legislative proposals affecting other types of housing the City, in particular, microhousing. But the record lacks evidence to show the impacts from the proposed legislation in combination with regulation of microhousing, would

have probable significant environmental impacts. Whether the legislation is redundant or overlaps with the policy objectives of the City's microhousing regulations is a policy consideration for City Council.

8. The Appellant also alleged that there would be significant impacts on the availability of affordable housing. Even if impacts to housing affordability were a consideration in the Director's SEPA decision, the evidence in this record at most shows a correlation between the age of housing and rental rates, with newer housing appearing to have higher rental rates than those in older buildings. The evidence fails to establish a relationship between the proposed legislation and housing affordability. DPD's decision is not in error on account of the proposal's potential impacts on housing affordability.

9. The Appellant also argued that the proposal will fail to address the design concerns that led to the proposed legislation in the first place, and will have unintended consequences on the design of new structures in the affected zones. But the evidence does not show that the proposal would likely cause significant environmental impacts on account of height, bulk and scale.

10. The evidence shows that the proposal would have no probable significant environmental impacts, and that DPD's decision complied with the procedural requirements of SEPA and was based on information which was sufficient to evaluate the proposal's environmental impact. DPD's decision was not clearly erroneous and should be affirmed.

Decision

The Director's Determination of Non-significance is affirmed.

Entered this 21st day of October, 2014.

Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final SEPA decision for the City of Seattle. Judicial review under SEPA must be of the decision on the underlying governmental action together with its accompanying environmental determination. Consult applicable local and state laws for further information.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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