BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of: **FRIENDS OF MADISON PARK, et al.** from a Final Environmental Impact Statement issued by the Director, Office of Planning and Community Development	Hearing Examiner File: **W-25-001, -002, -003, -004, -005, & -006** **ORDER ON MOTION TO DISMISS**

The Director of the Seattle Office of Planning and Community Development ("Department") issued a Final Environmental Impact Statement ("FEIS") for a proposed Comprehensive Plan amendment. Appellants Friends of Madison Park, Trevor Cox and Jake Weyerhaeuser, Hawthorne Hills Community Council, Chris R. Youtz, John M. Cary, and Jennifer Godfrey filed timely appeals of the FEIS (collectively herein "Appellants"). The Department filed a Motion to Dismiss ("Motion") against the appeals. Of the Appellants, all but Hawthorne Hills Community Council filed responses to the Motion. The Department filed a reply to the Appellants' responses.

The Hearing Examiner has reviewed the file in this matter, including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

A preliminary order on the Motion was issued on March 27, 2025. A hearing on the Motion was held April 2, 2025, at which additional oral rulings were issued.

The Motion seeks dismissal of the appeals or in the alternative dismissal of issues raised in the appeals on various grounds.

The Department moves to dismiss all six appeals in full based on state law SEPA exemptions. The Department variously indicated that the FEIS is not subject to appeal under RCW 36.70A.070(2), RCW 36.70A.600(3), and RCW 36.70A.680(3). The Department also moved for the dismissal of all appeals except that of Jennifer Godfrey (W-25-006), for failure of the Appellants to comment on the Draft Environmental Impact Statement ("DEIS"). The Department also moved for issue preclusion regarding various issues raised by Appellants.

I. Case No. W-24-003

Appellant Hawthorne Hills Community Council (W-25-003) did not respond to the Motion and did not appear at the hearing on the Motion. Pursuant to HER 3.17(b) "[f]ailure of a party to file a timely response may be considered as evidence of that party's consent to the motion," and under HER 5.15 "[t]he Examiner may dismiss an appeal

without a hearing by an order of default where, without good cause, the appellant fails to appear, is unprepared to proceed at a scheduled and properly noticed hearing, or otherwise fails to pursue their case in a timely manner." As indicated in the Preliminary Order on the Motion, the appeal of the Hawthorne Hills Community Council should be dismissed.

II. Comment on the DEIS

At the April 2, 2025, hearing on the Motion the Examiner orally indicated dismissal of case numbers W-25-001, W-25-002, and W-25-005 for failure of the Appellants to comment on the Draft Environmental Impact Statement ("DEIS").

Washington courts and state boards have dismissed SEPA appeals when appellants failed to submit timely public comment. See e.g. *Kitsap County. v. State Dep't of Nat. Res*., 99 Wn.2d 386 (1983); *Canyon Park Business Center Owners' Association v. Washington State Department of Transportation*, et. al., SHB Case No. 21-006, Order on Summary Judgment (Feb. 13, 2023); *Asbjornsen v. City of Puyallup*, CPSGMHB Case No. 21-3-0004, Order on Motion for Partial Summary Judgment (April 13, 2021); and *Snohomish County Farm Bureau, et al. v. State of Washington Department of Transportation*, et al., PCHB Case Nos. 10-124, 10-135, 10-138, Order Granting Partial Summary Judgment on Jurisdictional Issues (Sept. 21, 2011).

SMC 25.05.545.B provides "[l]ack 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, if the requirements of Section 25.05.510 (public notice) are met." No party demonstrated that the Department did not meet the requirements of public notice.

SMC 25.05 establishes deadlines to provide comments on the DEIS and allows the lead agency to consider those comments. Based on comments, the lead agency could take various actions if the comments lead to new information the agency had not considered. The comment period on an environmental document serves as a gateway, preceding any right to appeal such document. This gives procedural credence and value to the comments submitted. A lead agency proceeds at its peril where it chooses to ignore the legitimate issues raised concerning an environmental review that was submitted during the comment period. Similarly, parties that do not comment in a timely manner within the comment period cannot not be rewarded with a right to proceed with an appeal when their concerns could have been addressed earlier in the process.

Appellant parties argued in briefing and at the hearing on the Motion that significant changes were made to the proposal following the DEIS, such that commenting on the DEIS was not required for appealing the FEIS. The record does not demonstrate significant changes to the proposal, it is anticipated under SEPA that changes will occur between the DEIS and a Final Environmental Impact Statement ("FEIS").

Case numbers W-25-001, W-25-002, and W-25-005, and Appellants Chris Youtz, Nancy Dabney Youtz, John M. Cary, and Ronald Suter should be dismissed for failure to comment on the DEIS.

The parties stipulated that Appellant Jennifer Godfrey (W-25-006) submitted a timely comment on the DEIS. The record further reflected that a member (or members) of Friends of Ravenna-Cowen (W-25-004) also commented on the DEIS. Therefore, the Motion should be denied as to this issue regarding these Appellants.

III. SEPA Appeal Exemptions

The Motion argued that the FEIS is exempt from appeal under RCW 36.70A.070, RCW 36.70A.600, and RCW 36.70A.680.

These statutes provide:

> The adoption of ordinances, development regulations and amendments to such regulations, and other nonproject actions taken by a city that is required or chooses to plan under RCW 36.70A.040 that increase housing capacity, increase housing affordability, and mitigate displacement as required under this subsection (2) and that apply outside of critical areas are not subject to administrative or judicial appeal under chapter 43.21C RCW unless the adoption of such ordinances, development regulations and amendments to such regulations, or other nonproject actions has a probable significant adverse impact on fish habitat.

RCW 36.70A.070(2).

> The adoption of ordinances, development regulations and amendments to such regulations, and other nonproject actions taken by a city to implement the actions specified in subsection (1) of this section, with the exception of the action specified in subsection (1)(f) of this section, are not subject to administrative or judicial appeal under chapter 43.21C RCW.

RCW 36.70A.600(3).

> Any action taken by a city or county to comply with the requirements of this section or RCW 36.70A.681 is not subject to legal challenge under this chapter or chapter 43.21C RCW.

RCW 36.70A.680(3).

Appellants argued that none of these exemptions apply to the appeal of the FEIS because the FEIS is not an *action* within the meaning of the statutes (e.g. it is not a development

regulation, amendments to such regulation, or other nonproject action in and of itself). This argument is based on the plain language of the statutes. *See e.g. Sligar v. Odell*, 156 Wn.App. 720, 727 (2010) ("Statutory interpretation begins with the statute's plain meaning. Plain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'").[1] However, statutory construction also requires that, "[s]tatutes should be construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided. Additionally, all language in a statute must be given effect, with no portion rendered meaningless or superfluous." *State v. Richter*, 24 Wn.App. 920, 929 (2022) (internal quotes omitted).

In this case, if the Appellants' interpretation of the statutes were correct then there would likely be no statutory exemption to administrative or judicial appeals under chapter 43.21C RCW as provided in the statutes, and these portions of the statutes would be rendered meaningless. If as Appellants argue, only final *actions* are subject to exemption from chapter 43.21C RCW appeals and not a FEIS that is part of the process to take such action, then the statutes must be indicating that the specified actions could be appealed under chapter 43.21C RCW. However, there is no right of appeal of "ordinances, development regulations and amendments to such regulations, and other nonproject actions" under 43.21C RCW. 43.21C RCW only provides for appeals of SEPA determinations such as a DNS or FEIS. Thus, Appellants' interpretation would require a conclusion that the legislature adopted statutes referencing an exemption that was meaningless, a result that if not absurd is certainly a strained consequence.

A. RCW 36.70A.070.

It is difficult to see how applying the exemption from SEPA appeal identified in RCW 36.70A.070 will not commonly be proceeded by some type of disputed hearing on facts necessary to qualify for the exemption. RCW 36.70A.070 provides for the appeal exemption only when the subject action increases housing capacity, increases housing affordability, and mitigates displacement and only if the action applies outside of critical areas and does not have "a probable significant adverse impact on fish habitat." RCW 36.70A.070(2).[2] These are all fact intensive conclusions, and in the appeal setting, can only be determined by evidence properly admitted to consideration of the Examiner. Where such facts are in dispute, a hearing to weigh the evidence is required.[3]

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[1] Municipal ordinances are interpreted using the same rules as state statutes. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643 (2007).

[2] The Department argued that a nonproject action is subject to the exemption in RCW 36.70A.070 if it increases housing capacity, increases housing affordability, *or* mitigates displacement (e.g. only one of these three elements must be demonstrated for the action to qualify). However, the Department's reading is inconsistent with the plain language of the statute which reads "increase housing capacity, increase housing affordability, **and** mitigate displacement." RCW 36.70A.070(2)(emphasis added).

[3] In contrast RCW 36.70A.600(3) allows for appeal exemption where the specified actions *authorize* the desired outcome (e.g. duplexes, triplexes, quadplexes etc.) which likely only requires an examination of the plain language of the proposed ordinances, development regulations and amendments to such regulations, or other nonproject actions, and a much less fact intensive exercise is not necessary.

Here the Department introduced evidence at the hearing (after all parties stipulated to the authenticity of the FEIS core documents submitted by the Department) that the One Seattle Proposal – the subject nonproject action – would increase housing and this was not challenged or countered by testimony or other evidence by the Appellants, thus the Department established that the nonproject action would increase housing capacity. The evidence included analysis indicating that the One Seattle Proposal is expected to add 40,000 more housing units to the city. Motion at 15 (SEA000038). The Department referenced various polices to support its argument that the One Seattle Proposal would increase housing affordability and mitigate displacement (*Id*.), but these policies only indicate goals or the intent to achieve such outcomes and do not demonstrate that an actual increase in housing affordability will occur or that displacement will be mitigated. Concerning critical areas, the Department referenced statements in the record and statutes that demonstrate the One Seattle Proposal is likely applied outside of critical areas. Id. To support its contention that the One Seattle Proposal will not have "a probable significant adverse impact on fish habitat," the Department referenced a section of the FEIS that stated as much. *Id*. At hearing, Appellants expressed that they believed that the Proposal would have probable significant adverse impacts on fish habitat. Neither the conclusory statements in the FEIS, nor the testimony of Appellants, provide adequate evidence to support a finding either way whether the One Seattle Proposal will or will not have probable significant adverse impacts on fish habitat, but they do demonstrate that there remains an issue of material fact between the parties as to this element of the statute. Based on the above, the Department did not demonstrate that the exemption identified in RCW 36.70A.070(2) applies to the One Seattle Proposal FEIS appeals. Therefore, the Motion should be denied as to RCW 36.70A.070.

B. RCW 36.70A.600.

RCW 36.70A.600(1) specifies the following nonproject actions (among others):

> (c) Authorize at least one duplex, triplex, quadplex, sixplex, stacked flat, townhouse, or courtyard apartment on each parcel in one or more zoning districts that permit single-family residences unless a city documents a specific infrastructure of physical constraint that would make this requirement unfeasible for a particular parcel;
> (d) Authorize a duplex, triplex, quadplex, sixplex, stacked flat, townhouse, or courtyard apartment on one or more parcels for which they are not currently authorized;

RCW 36.70A.600(1)(c) and (d).

The SEPA appeal exemption identified in RCW 36.70A.600(3) applies to nonproject actions that *authorize* certain development outcomes that the Legislature desired to exempt from appeal. The record demonstrates that the One Seattle Proposal will authorize fourplexes and sixplexes in zones where they are not currently allowed, in accordance with RCW 36.70A.600(1)(c) and (d), and no Appellant disputed this. Thus,

there is no issue of material fact regarding this issue, and the appeals should be dismissed pursuant to RCW 36.70A.600(3) and RCW 43.21C.495(1).

C. RCW 36.70A.680.

The record demonstrates that the One Seattle Proposal is an action taken (in part) to comply with RCW 36.70A.680 and .681, and no Appellant disputed this. Thus, there is no issue of material fact concerning this issue, and the appeals should be dismissed pursuant to RCW 36.70A.680(3) and RCW 43.21C.495(3).

ORDER

The Department's Motion to Dismiss is **GRANTED** in part and **DENIED** in part. Consistent with this decision the appeals identified under Case Nos. W-25-001, W-25-002, W-25-003, W-25-004, W-25-005, and W-25-006 are **DISMISSED**, and the hearing scheduled for April 28, 2025, is cancelled.

Entered April 11, 2025.

/s/Ryan Vancil
Ryan Vancil, Hearing Examiner