BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

IN THE MATTER OF THE:	MASTER FILE NO. 11-0139
SEPA APPEAL AND CONDITIONAL USE PERMIT OF QUIXOTE VILLAGE	MOTION FOR RECONSIDERATION

COMES NOW the Industrial Zoning Preservation Association ("IZPA"), the SEPA Appellant and a participant in the public hearing for the above-referenced application, by and through its attorneys, Phillips Wesch Burgess PLLC and Heather L. Burgess and Matthew R. Kernutt, and moves for reconsideration pursuant to Olympia Municipal Code ("OMC") 18.75.060 of the Hearing Examiner's Findings, Conclusions and Decision ("Decision") denying the IZPA's SEPA appeal and granting the Conditional Use Permit for Quixote Village, issued May 2, 2012. The IZPA seeks reconsideration under OMC 18.75.060(B) on the grounds that the Hearing Examiner misinterpreted fact or law in a manner material to the IZPA as detailed below.

I. BASES FOR RECONSIDERATION

A. The Growth Management Hearings Board has Found that the Permanent Homeless Encampment is Inconsistent with the City's Comprehensive Plan for the Light Industrial Zone

On May 4, 2012, just two days after the Hearing Examiner issued his Decision in this case, the Growth Management Hearings Board ("GMHB") for the Western Washington Region issued its Final Decision and Order ("FDO") in the matter of *Peranzi v. City of Olympia*, Case

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No. 11-2-0011. The IZPA has moved separately to supplement the record with a copy of this newly issued Decision for the Hearing Examiner's consideration in deciding this Motion for Reconsideration.

In the *Peranzi* case, the GMHB considered a Petition for Review by Petitioner John Peranzi, an IZPA member, which alleged that the City of Olympia failed to comply with the Growth Management Act ("GMA") in adopting Ordinance No. 6771. Ordinance No. 6771 amended City development regulations to allow the permanent County homeless encampment as a conditional use in the City's Light Industrial zoning district. The Hearing Examiner approved the above-referenced Conditional Use Permit for Quixote Village based on the proposal's conformity with development regulations challenged in the *Peranzi* case. Decision at 9, Conclusion No. 18.

Through counsel, the IZPA submitted written public comment on the Conditional Use Permit, which was admitted as Exhibit P-2. The IZPA public comment included legal argument that the Hearing Examiner should deny the Conditional Use Permit pursuant to OMC 18.02.100 because the permanent homeless encampment use was inconsistent with various elements of the City's Comprehensive Plan for the Light Industrial zoning district. Ex. P-2 at 7-8. The argument also included specific reference to the pending GMHB decision in the *Peranzi* case.

In the Decision, the Hearing Examiner rejected the IZPA's legal argument regarding the proposed use's lack of compliance with the Comprehensive Plan, with reference to the pending *Peranzi* case:

> The new County Homeless Encampment ordinance expressly contemplates approval by Conditional Use of such a facility owned by Thurston County and located in a Light Industrial/Commercial zoning district. The appellant urges the Examiner to, in effect, invalidate the ordinance on grounds that it conflicts with the Comprehensive Plan. This matter is currently before the Growth Management Hearings Board. The Examiner's role is to apply the City's ordinances as he finds them. He has no authority to determine their validity.

Decision at 9, Conclusion No. 17. In its later-issued decision, the GMHB held that the City violated the GMA in adopting Ordinance No. 6771 because allowing the type of residential use

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contemplated by the permanent homeless encampment within a Light Industrial/Commercial zoning district conflicted with two provisions of the City's Comprehensive Plan, LU 18.4 and LU 18.5. FDO at 20-22.

The IZPA's legal argument to the Hearing Examiner pursuant to OMC 18.02.100 specifically alleged the proposed use's inconsistency with LU 18.4 and LU 18.5 of the City's Comprehensive Plan, among other provisions. Ex. P-2 at 7-8. The ordinance allowing the permanent homeless encampment in the Light Industrial zone was the subject of Mr. Peranzi's timely Petition for Review to the GMHB, which has now issued a decision finding that the ordinance allowing the permanent homeless encampment violates the GMA because the use is in fact inconsistent with LU 18.4 and LU 18.5. FDO at 20-22. The GMHB has further directed the City to bring the ordinance into compliance with the GMA. FDO at 30.

The plain language of OMC 18.02.100 states that "no land shall be...developed for any purpose which is not in conformance with the Comprehensive Plan." The GMHB has now found that the proposed permanent homeless encampment is not in conformance with the City's Comprehensive Plan. FDO at 20-22. The IZPA respectfully requests that the Hearing Examiner reconsider Conclusion No. 17 of the Decision effectively declining to reach the issue of Comprehensive Plan consistency in light of the newly issued FDO, and instead deny the Conditional Use Permit for Quixote Village based on the plain language of OMC 18.02.100.[1]

B. The Decision Gives Improper and Undue Deference to City Staff Opinions and Interpretations on Noise and Traffic Issues

The second basis for reconsideration is that the Hearing Examiner gave improper deference to the opinions of comparatively unqualified City staff over the opinions of the IZPA's properly qualified, offered, and accepted expert witnesses on the issues of noise and traffic impacts. While the Hearing Examiner is required pursuant to OMC 18.75.040(F) to give "substantial deference to the expertise and experience of staff" in considering a SEPA appeal,

[1] In making this request, the IZPA expressly incorporates all supporting legal arguments made in Exhibit P-2 by reference.

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such deference should not elevate the expertise and experience of staff without professional credentials and qualifications over the testimony and opinions of experts with superior expert credentials. Here, the IZPA offered testimony and written reports from qualified experts in acoustics and traffic engineering, Mr. Burt and Mr. Sabnekar, regarding the noise and traffic impacts of the Quixote Village project. In response to Mr. Burt's testimony, the City offered staff opinions from two City planners, a building official, and a code enforcement officer. The City offered no otherwise qualified acoustics expert to rebut Mr. Burt's opinion. In response to Mr. Sabnekar's testimony, the City offered the live testimony of an engineering plans reviewer, who was not a qualified traffic engineer. The City traffic engineer provided a short memorandum included for the record, but did not testify at the hearing. The IZPA believes that the Hearing Examiner erred in failing to give appropriate weight to the opinions of its qualified experts in favor of deference to comparatively unqualified City staff, and should reconsider the Decision denying the SEPA appeal and approving the Conditional Use Permit to the extent based on such improper deference.

C. The Conditions of Approval do not Adequately Address Pedestrian Safety

The Hearing Examiner concluded that the City's proposed condition to "require a widened asphalt shoulder separated from the main roadway by rumble strips" would safely accommodate walkers and bike riders and would "effectively meet the intent of the improvements suggested" by the IZPA's traffic engineer. Decision at 8, Conclusion No. 9. The Hearing Examiner should reconsider this conclusion as it directly contradicts Mr. Sabnekar's written report and hearing testimony. The widened shoulder and rumble strips the City recommended would extend only to R.W. Johnson and do not provide room for bicycles and pedestrians along Mottman Road, which undisputed evidence established is a heavily truck traveled route. Mr. Sabnekar's opinion was that safety concerns could only be addressed through installation of sidewalks and bicycle lanes between the encampment and both R.W. Johnson (the weekday bus route) and South Puget Sound Community College (the night and weekend bus

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route). The Hearing Examiner's conclusion that the asphalt widening alone is consistent with Mr. Sabnekar's opinion is in error and should be reconsidered.

D. The Hearing Examiner Failed to Address the Application of the City of Tumwater's Noise Ordinance to Adjacent Properties

The Hearing Examiner determined that the City is unlikely to enforce its noise regulations against members of the IZPA. Decision at 8. Even if true, the Hearing Examiner failed to address the legitimate and unrebutted concern raised by the IZPA's noise expert regarding the City of Tumwater's noise regulations. The Hearing Examiner properly found that most of the property within the Mottman Industrial Park is located within Tumwater. Decision at 4-5. As such, the City's interpretation of its own noise standards is largely irrelevant. As the IZPA presented at the hearing, Tumwater's noise ordinance mirrors state law. Tumwater Municipal Code 18.40.030. The Applicant and the City failed to present any Tumwater staff testimony regarding enforcement of Tumwater's noise regulations. The State noise regulation, Chapter 173-60 WAC, applies to the use of the property, not by its zone. Olympia's "promise" to not enforce its own noise regulations against the IZPA members is not adequate mitigation to meet the legitimate concerns of the IZPA with respect to the City of Tumwater. The Hearing Examiner should reconsider his decision on this basis.

E. The Hearing Examiner Erred as a Matter of Law Regarding Procedural Compliance with SEPA

The Hearing Examiner should also reconsider Conclusions 10-14 regarding SEPA procedural compliance. Decision at 8-9. Taken to its logical conclusion, the Hearing Examiner's approach would permit jurisdictions to ignore their procedural obligation under SEPA to consider reasonably sufficient information about a project *prior to issuance of a threshold determination* and simply wait to perform such review until if and when an appeal is filed, at least in the case where a Conditional Use Permit is also required. This approach improperly shifts the burden of ensuring SEPA compliance on potential appellants rather than the project applicant, in defiance of SEPA's purposes.

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Here, the testimony and evidence at the hearing showed that the City utterly lacked any specific information regarding the noise and traffic impacts of the Project when it issued the DNS, nor did it seek to obtain such information in any meaningful form except in response to the IZPA appeal. While the City's decision to issue a DNS is accorded substantial weight, the City must still demonstrate that it actually considered relevant environmental factors in a manner sufficient to establish prima facie compliance with SEPA and that the decision to issue a DNS was based on information sufficient to evaluate the Project's environmental impacts. *Boehm v. City of Vancouver,* 111 Wn. App. 718, 720, 47 P.3d 137 (2002); *Anderson v. Pierce Cnty*, 86 Wn. App. 290, 302 (citations omitted); *see also Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). The Hearing Examiner's conclusion that "it is irrelevant that the City developed information after the DNS was issued" is directly contrary to the case law and ignores the requirements that the City have information sufficient to evaluate the Project's environmental impacts prior to making a threshold determination. Decision at 8, Conclusion No. 11. This conclusion is in error and the IZPA respectfully requests that the Hearing Examiner reconsider his decision on this basis.

V. CONCLUSION

For all the above reasons, the IZPA respectfully requests that the Hearing Examiner reconsider the Decision pursuant to OMC 18.75.060 to deny the SEPA Appeal and grant the Conditional Use Permit for Quixote Village.

DATED this 14th day of May, 2012.

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By: _____
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DECLARATION OF SERVICE

I, Deanna L. Gonzalez, declare as follows:

I am a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Phillips Wesch Burgess PLLC, whose address is 724 Columbia Street NW, Suite 140, Olympia, Washington 98501.

On May 11, I sent out for service upon the below-listed parties at the addresses and in the manner described below, the following appended document:

- Motion for Reconsideration

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I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED at Olympia, Washington this 14th day of May, 2012.

DEANNA L. GONZALEZ

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