Attachment 5

BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

IN RE:	NO. 20-3136
WEST BAY YARDS DEVELOPMENT AGREEMENT	APPLICANT'S RESPONSE AND CROSS-MOTION FOR SUMMARY JUDGMENT

The Appellant, Olympia Coalition for Ecosystems Preservation, ("OCEP" or "Appellant") has appealed the City of Olympia's (the "City") issuance of a threshold Determination of Nonsignificance ("DNS") for the West Bay Yards Development Agreement, File No. 20-3136, under the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA") (the "Appeal"). On January 15, 2021, the Appellant filed a Motion for Summary Judgment on its Appeal seeking an order vacating the DNS, requiring the City to prepare an Environmental Impact Statement ("EIS"), or, in the alternative, requiring resubmittal of the SEPA Checklist. Appellant's Mot. for Summ. J. at 18.

For the reasons detailed below, the Applicant respectfully requests that the Hearing Examiner deny the Appellant's Motion for Summary Judgment in its entirety. In addition, the Applicant hereby cross-moves for Summary Judgment upholding the City's DNS for the Development Agreement as a matter of law. The Applicant also joins in the City's Response as filed.

The Applicant's Response and Cross-Motion for Summary Judgment relies upon the attached Declarations of L. Brandon Smith and Heather L. Burgess, the exhibits thereto, as well

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as the records identified and included as Attachments "A" through "F" to the Appellant's Motion for Summary Judgment.[1]

I. STATEMENT OF FACTS[2]

A. The Property

The Applicant is under contract to purchase the real property located at 1210 West Bay Drive, NW in Olympia (the "Property") for purposes of developing a future mixed-use project to be known as "West Bay Yards" (or the "Project"). Declaration of L. Brandon Smith ("Smith Decl.") at ¶ 4. The Property, located on West Bay along Budd Inlet, is the site of the former Hardel Mutual Plywood facility and has a lengthy history of environmental contamination from legacy industrial uses. Agreement at 1; Smith Decl. at ¶ 5; SEPA Checklist at 7-8. Indeed, the Applicant applied for and received a grant from the City's U.S. Environmental Protection Act "Brownfield Initiative," which was used to complete a Phase 2 environmental assessment of the Property for purposes of future re-development. Smith Decl. at ¶ 6.

B. Land Use Regulations Applicable to the Property

1. Zoning and Comprehensive Plan

The Property is located within the City's Urban Waterfront ("UW") zoning district. *See* City of Olympia, 2020 Zoning Map (eff. May 12, 2020), *available at* https://olympiawa.gov/~/media/Files/CPD/Maps%20Official%20Updates%202017/Zoning%20

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[1] For ease of reference, Attachments "A" through "F" consist of the following documents:
Attachment A: SEPA DNS for the West Bay Yards Development Agreement dated November 10, 2020 (the "DNS")
Attachment B: SEPA Checklist for the West Bay Yards Development Agreement dated October 9, 2020 (the "SEPA Checklist")
Attachment C: Draft Development Agreement (the "Agreement")
Attachment D: Draft Development Agreement Exhibits A-F (the "Exhibits")
Attachment E: West Bay Environmental Restoration Assessment dated February 26, 2016 (the "West Bay Assessment")
Attachment F: OlyEcosystems Letter to City, November 24, 2020

[2] The Appellant characterizes the facts presented in its Motion for Summary Judgment as "Undisputed." Appellant's Mot. for Summ. J. at 3. However, the Appellant's counsel did not solicit, nor did the Applicant provide, consent to any stipulation or statement of undisputed facts prior to filing of the Appellant's Motion for Summary Judgment. Declaration of Heather L. Burgess ("Burgess Decl.") at ¶ 4. For purposes of the Hearing Examiner's consideration of the Appellant's motion, the Applicant accepts as "undisputed" only those facts which are directly cited to referenced source documents, and not the Appellant's descriptions, characterizations, or restatement of those documents presented as "facts" in the Appellant's briefing.

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Map%20Official.pdf?la=en.[3] The UW District permits a wide range of residential and commercial uses outright. Olympia Municipal Code ("OMC") 18.06.040, Table 6.01. The intent of the UW District includes the following:

> a. Integrate multiple land uses in the waterfront area of downtown and the West Bay in a way that improves the City's appeal and identity as the Capital City on Budd Inlet.
>
> b. Encourage high-amenity recreation, tourist-oriented, and commercial development which will enhance public access and use of the shoreline.
>
> …
>
> e. Provide shoreline public access to significant numbers of the population, which is a major goal of the Shoreline Master Program for the Thurston Region. …

OMC 18.06.020(B)(4).

The City has adopted detailed development regulations and standards for the UW District. OMC 18.06.040, Table 6.02. With respect to West Bay Drive, where the Property is located, the UW District regulations include provisions linking allowed building height to limits on horizontal view blockage and development of additional public amenities, including waterfront trails and parks. OMC 18.06.100(A)(2)(c).

The City's adopted Comprehensive Plan, which underwent a comprehensive periodic update in 2014, identifies West Bay Drive as a "Focus Area" in its Land Use and Urban Design Chapter, which envisions the area's transition to a "mix of uses [forming] … a vibrant mix of light-industrial, office, restaurant, commercial, recreational, and residential uses, that also provides improved habitat for fish and wildlife." The City issued a Supplemental EIS for the 2014 Comprehensive Plan Update. Ex. A to Declaration of Heather L. Burgess ("Burgess Decl.").

[3] Applicant respectfully requests that the Hearing Examiner take judicial notice of the adopted rules, ordinances, standards, plans, regulations, maps, and policies of the City and other public agencies referenced in the Applicant's present Response and Cross-Motion for Summary Judgment as authorized by Olympia Municipal Code ("OMC") 18.82.100. *Rules of Procedure for Proceedings Before the Hearing Examiner of Olympia* at 9.

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2. Shoreline Regulation

The Property includes regulated shorelines within the jurisdiction of the state Shoreline Management Act ("SMA") (RCW 90.58) and the City's corresponding Shoreline Master Program ("SMP"). The Property is located within Reach Budd 3A in the "Urban Intensity" ("UI") Shoreline Environmental Designation ("SED"). OMC 18.20.330. The SMP describes the purpose of the UI SED as providing for:

> … high-intensity water-oriented commercial, transportation, industrial, recreation, and residential uses while protecting existing ecological functions and restoring ecological functions in areas that have been previously degraded, and to provide public access and recreational uses oriented toward the waterfront.

OMC 18.20.330. Residential as well as commercial water related, and water enjoyment uses are permitted outright in the UI SED. OMC 18.20, Table 6.1. Mixed use buildings are also permitted but can require a Shoreline Conditional Use Permit depending upon location relative to the Ordinary High Water Mark. *Id*. The adopted SMP also includes specific provisions governing shoreline mitigation (OMC 18.20.410), restoration and enhancement projects (OMC 18.20.850 and .855), and the placement of fill waterward of the ordinary high watermark (OMC 18.20.237) which will be applicable to any future development of the Property.

The City completed a comprehensive update of its SMP in 2015. The City's website describes the 2015 update as a "major rewrite of the SMP that took several years to complete." *See* http://olympiawa.gov/smp. The City issued a SEPA DNS for the 2015 SMP update. *See* Exs. B and C to Burgess Decl. (January 4, 2013 SEPA DNS and SEPA Checklist).

C. The Applicant's Proposal

Although the Appellant's Motion for Summary Judgment repeatedly characterizes and describes the Applicant's "proposal" subject to the challenged SEPA determination as if it were the entire Project, the SEPA Checklist[4] makes quite clear that the "proposal" subject to SEPA

[4] The Applicant notes for clarity of the record that the Appellant's Motion for Summary Judgment refers to the City having prepared or answered questions on the SEPA checklist for the Development Agreement. *See, e.g.*, Appellant's Mot. for Summ. J. at 8, 10. In fact, the Applicant prepared, signed, and submitted the SEPA Checklist. SEPA Checklist at 4 (identifying Applicant), 13 (Signature).

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review is in fact limited to the Applicant's proposed Development Agreement for future development of the Project. SEPA Checklist at 2 (Question 11).

The terms of the proposed Development Agreement reflect the Applicant's intended future development of the Project, which will consist of approximately 478 market-rate rental housing units in five mixed-use buildings and approximately 20,500 square feet of retail, restaurant and recreation uses. Smith Decl. at ¶ 7; Agreement at 2. The Project will also provide public access amenities, including a waterfront trail, as well as vegetation conservation areas required by the City's SMP and applicable development regulations for the UW District. *Id*. In addition to these required elements, and in consideration for the vesting and phasing allowed in the Development Agreement, the Applicant proposes to complete shoreline restoration along the Property boundary consistent with the recommendations identified in the West Bay Assessment for "Reach 5 – Hardel Plywood". Smith Decl. at ¶ 8; Agreement at 2.

As described in the SEPA Checklist, the proposed Development Agreement "establish[es] parameters and phasing schedule for future development of the [P]roperty." *Id*. The scope of the Development Agreement is comparatively limited, establishing the following standards and requirements specific to the future Project:

- Vesting. Sections 6 and 7 of the Agreement vest the Applicant to Existing Land Use Regulations (as defined elsewhere in the Agreement) for a period of fifteen (15) years from the date of City Council approval of the adopting resolution.
- Phased Development. Section 11 of the Agreement authorizes the phased development of site improvements (including frontage improvements, shoreline restoration, waterfront trail construction, public utility infrastructure) and buildings over the term of the Agreement. This section also allows the Applicant to vest to the City's impact fee schedule and ordinance by building phase.

While the Agreement is binding on the City if approved, the terms and conditions of the Agreement cannot take effect unless and until all required Project permits and approvals are

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issued and Project SEPA review is complete. Agreement at 2 (describing expected permitting requirements and expressly referencing SEPA review). Moreover, contrary to the Appellant's contention, the Agreement does not legally obligate the City to "accept a significant shoreline fill" nor does it fix the "location for the shoreline trail." Appellant's Mot. for Summ. J. at 6. These improvements, like the rest of the Project, are subject to review, approval, and permitting under UW District development standards and SMP regulations governing the same. *See, e.g.,* OMC 18.06.100 (UW and West Bay Development Regulations) and OMC 18.20.237, .410, .850, and .855 (SMP provisions addressing mitigation, restoration and enhancement projects, and placement of fill).

The Applicant's estimated total cost to develop the Project is in excess of $200 million. Smith Decl. at ¶ 9. The Applicant expects to invest over $13 million in permitting, site development, shoreline restoration, public access, and infrastructure improvements before vertical construction of the buildings in Phase 1 of the Project as described in the Development Agreement can even begin. *Id*. The Applicant's primary purpose in applying for the Development Agreement is to create reasonable predictability and certainty regarding the vesting of land use entitlements for the Project, if such entitlements are ultimately approved, in order to facilitate the significant Project financing that will be necessary to complete the proposed development. *Id*. at ¶ 10.

II. PROCEDURAL HISTORY

On May 13, 2020, the Applicant attended a virtual pre-submission conference for the West Bay Yards Project with the City of Olympia's Site Plan Review Committee ("SPRC"). Smith Decl. at ¶ 11. Subsequently, on October 9, 2020, the Applicant submitted an application to the City for the proposed Development Agreement together with the supporting SEPA Checklist. *Id*. at ¶ 12. City staff have repeatedly informed the Applicant, its consultants, and counsel, that under its municipal code, the City cannot accept further Project permit applications until after the City Council considers the proposed Development Agreement. *Id*. at ¶ 13. That has not yet occurred, and so no Project permit applications, supporting studies, or other Project

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information have been submitted to the City for review outside of the pre-submission conference request and the information provided with the proposed Development Agreement. *Id*.

On November 10, 2020, the City's SEPA Responsible Official issued the SEPA DNS for the West Bay Yards Development Agreement. The Appellant submitted written comments on the SEPA DNS (Att. F to Appellant's Mot. for Summ. J.) and timely filed an Appeal on December 1, 2020.

III. ARGUMENT

A. Standard of Review

1. Standard for Granting Summary Judgment

Any party may move for summary judgment on all or any parts of the claims at issue. CR 56. If the moving party demonstrates that there is no genuine issue of material fact, as a matter of law, the moving party is entitled to a decision in its favor. CR 56(c); *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 408, 282 P. 3d 1069 (2012). Olympia's Hearing Examiner Rules of Procedure authorize the Examiner to hear and decide motions for summary judgment. *See Rules of Procedure for Proceedings Before the Hearing Examiner of Olympia* at 17.

2. Standard of Review for SEPA Threshold Determinations

SEPA threshold determinations are reviewed under the "clearly erroneous" standard of review. *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976); *King County v. Boundary Review Board*, 122 Wn.2d 648, 661, 860 P.2d 1024 (1993). The challenged threshold determination by the governmental agency is "clearly erroneous" only if the Hearing Examiner, when considering the entire administrative record and public policy underlying the statutory standard, is left with "the definite and firm conviction that a mistake has been committed." *Norway Hill*, 87 Wn.2d at 274 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)) (internal quotations omitted); *Boundary Review Board*, 122 Wn.2d at 664-65, 666-67.

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On appeal, the City's threshold determination "is accorded substantial weight." *Moss v. City of Bellingham*, 109 Wn. App. 6, 13-14, 31 P.3d 703 (2001) (citing RCW 43.21C.090; *Indian Trail Property Owner's Ass'n. v. City of Spokane,* 76 Wn. App. 430, 442, 886 P.2d 209 (1994)); *see* Olympia Municipal Code ("OMC") 14.06.160(A)(5) ("Any procedural determination by the City's responsible official shall be given substantial weight in any appeal proceeding"); *see also* WAC 197-11-680(3)(a)(viii). The Hearing Examiner may not substitute his or her judgment for that of the City but must examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision. *Moss*, 109 Wn. App. at 13; *Rural Residents v. Kitsap County*, 141 Wn.2d 185, 196-197, 4 P.3d 115 (2000).

B. State and City Standards Applicable to Development Agreements

1. State Law – RCW 36.70B

State law both authorizes and sets minimum standards for Development Agreements. *See* RCW 36.70B.170-210. RCW 36.70B.170(1) specifically provides as follows:

> … A development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement. A development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW.

The statute provides specific examples of "development standards" which can be included in a Development Agreement. Authorized development standards include, but are not limited to, mitigation measures, project phasing, and build-out or vesting periods for applicable standards, as found in the Development Agreement at issue in this Appeal. RCW 36.70B.170(3)(c), (g), and (i).

The Legislature adopted the Development Agreement provisions found in RCW 36.70B in 1995, in order to replace a range of land use agreements such as contract rezones, concomitant agreements, and annexation agreements commonly used prior to adoption of the GMA. RCW

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36.70B.170(2). The Legislature's findings supporting enactment of the Development Agreement provisions pursuant to the GMA provide, in part, as follows:

> The legislature finds that the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate housing costs for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public. *Assurance to a development project applicant that upon government approval the project may proceed in accordance with existing policies and regulations, and subject to conditions of approval, all as set forth in a development agreement, will strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development*. …

RCW 36.70B.170 Findings—Intent—1995 c 347 §§ 502-506 (emphasis added).

2. City Code – OMC Ch. 18.53

While state law authorizes development agreements, unlike other types of land use actions, local governments are not legally obligated to enter into development agreements, which are a form of contract. In Olympia, the City chose to adopt specific code provisions governing the City's acceptance and consideration of development agreements in OMC Ch. 18.53. The City first adopted the implementing ordinance (Ord. 6273 §2) for OMC Ch. 18.53 in 2003, and it has not been subsequently amended.

Relevant to the issue presented in this Appeal regarding the timing of the SEPA process, OMC 18.53.040 provides:

> Any development agreement associated with a specific project or development plan shall be heard by the City Council *prior to consideration of any related project application*.

(emphasis added). The City has interpreted OMC 18.53.040 to preclude the Applicant from submitting *any* applications for Project permits and associated SEPA review until after the City Council acts on the proposed Development Agreement. Smith Decl. at ¶ 13. Therefore, it would appear that if the Applicant were to submit applications for Project permits before the City Council acts, the Applicant would forever waive its ability to secure the benefits of a Development Agreement for its Project.

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C. The Responsible Official Did Not Err as a Matter of Law in Issuing the DNS for the Proposed Development Agreement

The narrow legal issue which this Appeal presents is the appropriate timing and scope of SEPA review for a Development Agreement which – due to City code requirements – must be completed and reviewed prior to acceptance and consideration of the Project permit application. OMC 18.53.040. The SEPA Checklist describes the Applicant's Development Agreement proposal as a non-project action (a characterization which the Appellant appears to accept[5]) and on that basis, defers most detailed analysis of environmental impacts to later Project review, when the application materials and supporting analyses of specific Project impacts will be submitted. The City's SEPA Responsible Official accepted the SEPA Checklist and issued the DNS. Because the Appellant cannot establish that the City committed clear error in issuing the DNS for the Development Agreement as a matter of law, the Hearing Examiner should deny the Appellant's Motion for Summary Judgment. *Norway Hill*, 87 Wn.2d at 274-75.

1. The Proposal Subject to SEPA Review is Limited to the Development Agreement, Which Does Not Result in or Guarantee Future Project Approval

The SEPA rules define a "proposal" as "a proposed action." WAC 197-11-784. "A proposal exists at that stage in the development of an action when an agency is presented with an application…and the environmental effects can be meaningfully evaluated." *Id*. Here, the specific "proposal" subject to SEPA review is limited to the Applicant's proposed Development Agreement for future development of the Project, which was the application presented. SEPA Checklist at 2 (Question 11). Importantly, the Development Agreement not only contemplates, but requires, that the Applicant complete Project SEPA level review and submit and receive approval of all required Project permits and approvals in order to receive the benefit of vesting and phased development. Agreement at 2. The Development Agreement itself does not authorize future development of the Project, nor does it guarantee approval of any future City permits.

[5] *See, e.g.*, Appellant's Mot. for Summ. J. at 14 (describing the decisions made in the Development Agreement as "nonproject decisions").

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2. The Applicant has Followed the Requirements of OMC Ch. 18.53, and the Appeal is an Untimely Collateral Attack on Adopted City Development Agreement Procedures

The Appellant cannot dispute that the Applicant must comply with the adopted procedures outlined OMC Ch. 18.53 for review and approval of the proposed Development Agreement. These procedures, in turn, specifically require that the City Council act on the Development Agreement "prior to consideration of *any related project application*." OMC 18.53.040. The City's code therefore effectively mandates that SEPA review of any proposed Development Agreement take place prior to submittal and review of project permit application materials and the project-level SEPA checklist. *Id*. The Applicant has specifically deferred submitting Project permit applications to date in compliance with OMC 18.53.040 in order to preserve its ability to obtain a Development Agreement. Smith Decl. at ¶ 13.

Notably, the Appellant's legal argument regarding the timing and scope of the SEPA process omits any discussion of the very specific requirements of OMC 18.53.040 governing the Applicant's proposal. However, if the Appellant's interpretation of SEPA is correct, then the City's prohibition on consideration of project related applications in OMC 18.53.040 pending City Council action on the Development Agreement precludes, or at the very least frustrates, SEPA compliance. As a result, the Appeal is, in effect, a collateral challenge to the City's adopted development agreement codes in OMC Ch. 18.53.

Development regulations are presumed valid upon adoption, RCW 36.70A.320(1), and are conclusively deemed legally compliant if not timely challenged. *Thurston Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 345, 190 P.3d 38 (2008). Here, OMC Ch. 18.53 has been in effect since at least 2003, without challenge. To the extent the Appellant contends that in order to comply with SEPA, the Applicant is required to submit – and the City Responsible Official must consider – additional information regarding the environmental impacts of the Project prior to City Council action on the Development Agreement, the Appeal presents a direct and untimely challenge to the very specific requirements of OMC 18.53.040.

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3. The Appellant's Interpretation of SEPA Contravenes Statutory Mandates for Integrated Project and Environmental Review

The Appellant identifies aspects of the future Project – "issues stemming from the number of units, square footage, location of buildings, impervious surfaces, location and construction of the shoreline trail, and fill of the bay" – as ripe for SEPA review in conjunction with the Development Agreement. Appellant's Mot. for Summ. J. at 14. The Hearing Examiner should also reject this argument, as it contravenes the very specific statutory mandates found in RCW 43.21C and RCW 36.70B governing local project and environmental review in Growth Management Act ("GMA") (RCW 36.70A) jurisdictions.

Each and every one of the future Project elements which the Appellant contends should be included within SEPA review for the Development Agreement prior to Council consideration is governed by the City's adopted plans, codes, and standards. *See* Section B, *supra* (identifying a portion of the zoning, development, and shoreline regulations applicable to the Property and Project). These standards will, in turn, be applied at the time of future Project review, as described in the SEPA Checklist, and required by the Development Agreement. At that point, SEPA allows, and indeed encourages, the City to rely upon those existing plans, laws, and regulations to determine that the requirements for environmental analysis, protection, and mitigation of projects under SEPA are met. RCW 43.21C.240(1); RCW 36.70B.030(4); WAC 197-11-158. Requiring consideration of future Project elements addressed within City plans, codes, and standards now, prior to and entirely separate from later Project review, contravenes the plain language as well as the intent of these statutory provisions.

4. Case Law Neither Commands Nor Mandates a Different Result

The Applicant's legal research has identified no reported cases specifically addressing the timing and scope of SEPA review for development agreements where review occurs prior to the submittal of project permit applications. While the Appellant cites to various cases in support of its arguments, none of the cases cited is directly on point. Moreover, the foundational cases the Appellant relies upon are entirely distinguishable.

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For example, the Appellant both cites to and quotes extensively from *Alpine Lakes Protection Society (ALPS) v. Washington State Dept. of Natural Resources*, 102 Wn. App. 1, 979 P. 2d 929 (1999) for the proposition that a development agreement "cannot evade SEPA review by deferring analysis until permit applications are submitted." Appellant's Mot. for Summ. J. at 12. The *Alpine Lakes* case involved the SEPA appeal of a DNS by the Department of Natural Resources ("DNR") for a non-project watershed analysis prepared by a timber company under specific provisions of the forest practices rules. *Alpine Lakes*, 102 Wn. App. at 7. The watershed analysis process under the rules resulted, in part, in adoption of a set of environmental performance standards (called "prescriptions") for forest practices applications which would then be applied to all future applications within that watershed, in addition to other uses as a "regulatory tool". *Id*. at 9-10. Importantly, one regulatory consequence of the watershed analysis was that some later forest practices within the watershed would become categorically exempt under SEPA. *Id.* at 11. The Court of Appeals did not hold that an EIS was required but remanded the matter back to the Forest Practices Appeal's Board. *Id*. at 18.

Although *Alpine Lakes* also involves a non-project action, even a cursory review of the case reveals that the nature and scope of the watershed analysis in that case bears no logical resemblance to the Applicant's proposed Development Agreement, as the Agreement does not result in the adoption of environmental performance standards for future SEPA review or exemptions. In fact, unlike *Alpine Lakes*, the SEPA Checklist and Development Agreement not only disclose, but expect, later Project permit and SEPA review.

The Appellant's reliance on *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 309 P.3d 734 (2013) is similarly misplaced. Appellant's Mot. for Summ. J. at 13. *Lands Council* involved a non-project action by the Washington State Parks and Recreation Commission ("Commission") classifying 279 undeveloped leased acres of Mount Spokane State Park for "Recreation" use. *Lands Council*, 176. Wn. App. at 790. The Commission issued an MDNS for the classification action which included a condition requiring future development to prepare an EIS and supplemental EIS at the time of detailed later

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development proposal. *Id*. at 792. The Court of Appeals ultimately concluded that the classification allowed the future use of the classified area by the tenant as a ski resort and that the Commission had therefore erred in failing to prepare an EIS. *Id*. at 738, 745.

The non-project action in *Lands Council* is entirely unlike the Applicant's proposed Development Agreement at in several material respects. Most importantly, the classification decision in *Lands Council* authorized the future development of the subject property with previously unauthorized uses through expansion of the recreational ski area, akin to the adoption of a comprehensive plan or zoning regulation in the land use context. *Id*. at 807. In stark contrast, the Applicant's proposed Development Agreement addresses terms, conditions, and standards applicable to development to be permitted under existing City plans, codes, and standards. Unlike the challenged classification decision in *Lands Council*, the Development Agreement does not, and indeed legally cannot, expand the scope of permitted uses or activities on the Property beyond what is allowed by City development regulations. RCW 36.70B.170(1) (requiring development agreement to be consistent with applicable development regulations; OMC 18.53.010 (same).

IV. CONCLUSION

The Appellant correctly notes in its briefing and SEPA comments that the City Council will have "only one opportunity to make a decision on this project,"[6] as under the City's development codes, the Council plays no role in future Project permit review or appeals. However, what the Appellant ignores is that City Council has already acted – multiple times, over decades – in its legislative capacity to approve the current Comprehensive Plan, the Shoreline Master Program, as well as implementing zoning and development regulations, each of which was supported by environmental review and involved robust public process. *See* Exs. A, B, and C to Burgess Decl. The City Council's actions approving these plans and regulations, in turn, imposed detailed standards for the use and development of the Property, which the Applicant must meet in order to ultimately receive any of the vesting and phasing benefits of the

[6] Appellant's Mot. for Summ. J. at 17 and Att. F thereto.

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Development Agreement. Despite the Appellant's protestations, SEPA review of the Applicant's proposed Development Agreement is not to be used as an opportunity for the City Council to revisit or reanalyze its prior legislative land use planning decisions.

For all of the foregoing reasons, the Applicant respectfully requests that the Hearing Examiner deny the Appellant's Motion for Summary Judgment, grant the Appellant's Cross-Motion for Summary Judgment, and enter an order dismissing the Appeal.

DATED: this 27th day of January, 2021.

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