BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

In the Matter of the Appeal of **West Bay Yards Development Agreement** OLYMPIA COALITION FOR ECOSYSTEMS PRESERVATION Appellant, v. CITY OF OLYMPIA COMMUNITY PLANNING AND DEVELOPMENT DEPARTMENT; WEST BAY DEVELOPMENT GROUP LLC and HARDEL PLYWOOD CORPORATION, Respondents,	**NO. 20-3136** **RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The issue presented in this appeal is whether the City erred in issuing a Determination of Non-Significance ("DNS") for a proposed Development Agreement between the City and a developer to set the parameters, phasing and development standards applicable to a future redevelopment of the Hardel Plywood Mill site. Because Appellant Olympia Coalition for Ecosystems Preservation ("Appellant") conflates the impacts of the present proposal to enter into a Development Agreement with those of a future proposal to redevelop the Hardel site, Appellant misses the mark by aiming at the wrong target. The City did not err in issuing the DNS for the proposed Development Agreement and will conduct a new separate project level SEPA process for the proposed redevelopment during project review.

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II. STATEMENT OF FACTS

The proposal under consideration here is the City's adoption of a proposed Development Agreement with the developer, West Bay Development Group LLC, and the current owner of the former Hardel site, Hardel Mutual Plywood Corporation. The proposal is articulated on the face of the DNS as follows:

> This non-project action is known as the West Bay Yards Development Agreement. The proposal is an agreement between the City of Olympia and the property owner establishing parameters and a phasing schedule for future development on the property.

Plaintiff Attachment A.

The DNS was issued for the proposed Development Agreement based on a non-project SEPA checklist (Plaintiff Attachment B) that assessed the impacts of the Development Agreement, not the project itself, recognizing that future SEPA review will be required as part of project review once the developer submits an application. This is expressly recognized by the proposed Development Agreement which states:

> The Project will require review under the State Environmental Policy Act ("SEPA") (RCW 43.21C) as well as a shoreline substantial development permit, site plan approval, design review and issuance of construction, engineering, and building permits. The shoreline restoration component of the project will also require approval and issuance of various federal and state permits.

Plaintiff Attachment C, at 2.

The proposed Development Agreement provides that the Project will be governed by the City's "Existing Land Use Regulations," which will be the development standards, including shoreline regulations in the Shoreline Master Program and sets forth an expected phasing to accomplish the redevelopment of the Hardel site over a 15 year term. It commits the City to applying the current land use designations and regulations and vests the development to these standards which will govern future

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development decisions. DA, Section 7. It also identifies what specific standards and fees may be modified in the future, such as application fees (*id. Section 10)* or impact fees *(id. Section 11.4).*

Critically, the Development Agreement does not make or dictate any project permitting decisions or authorize modification of the environment. As required by the City's code, such determinations are left to project review, including environmental review after submittal of the applications for the redevelopment of the Hardel site. Under the City's code, the hearing and adoption of this Development Agreement is required to precede consideration of project applications. 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.

Thus, the proposed Development Agreement does not commit the City to approval of permits for the underlying redevelopment project. It cannot do so under its own code. Moreover, it does not commit the City to any particular threshold determination as part of the project proposal's SEPA process, which is the focus of the Appellant's entire argument.

The Development Agreement defines the parameters and phasing for consideration under the City's existing development regulations over the next 15 years. Appellant incorrectly argues that it commits the City to approval of the redevelopment project. However, the Development Agreement is clear that it only sets the standards for future review, and that the underlying redevelopment project is "subject to approval of all required shoreline, land use, and construction permit." Development Agreement, Section 11.1. Likewise, the building phase proposed in the Development Agreement is "subject to approval of all required shoreline, land use and building permits." Development Agreement Section 11.2.

Since the applications for these approvals are required to be considered after the Development Agreement is approved under OMC 18.53.040, the Appellant's factual assertion that this action commits

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the City to approve any of the project, much less "commit the City to accept a significant shoreline fill and specified public benefits in exchange" or immutably fix the "location of the shoreline trail" (MSJ at 6) is wrong. Appellant's assertion that it is an "undisputed" fact that the Development Agreement commits to approval of any of the proposed redevelopment project is simply inaccurate. It commits to a process to review future applications, nothing more.

To be clear, the proposal under appeal does **not** determine any of the following:

1. SEPA threshold determinations for the redevelopment project.
2. Permit decisions necessary for the redevelopment project.
3. Mitigation which may be necessary for the redevelopment project.
4. Whether fill will be allowed as part of the restoration component of the redevelopment project.

III. LEGAL ARGUMENT

A. STANDARD OF REVIEW

SEPA Threshold Decisions are reviewed under the clearly erroneous standard. *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn. 2d 267, 274, 552 P.2d 674 (1976). The 'clearly erroneous' standard mandates a review of the entire record and all the evidence in light of the goals and requirements of the Act. *Id*. citing *Ancheta v. Daly*, supra, 77 Wn.2d at 259, 260, 461 P.2d 531 (1969); *Department of Ecology v. Kirkland*, 8 Wn.App. 576, 580, 508 P.2d 1030 (1973), Aff'd on other grounds, 84 Wn.2d 25, 523 P.2d 1181 (1974); *Williams v. Young*, 6 Wn.App. 494, 497, 494 P.2d 508 (1972).

The Examiner must accord "substantial weight" to the Responsible Official's decision to issue a DNS. RCW 43.21C.090; *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 432 (1997). Agencies must "…make a showing that 'environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirement of SEPA.'" The Examiner may not

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substitute their judgment for that of the Responsible Official, rather any procedural determination by the Responsible Official must be given substantial weight. OMC 14.04.160(5) The Examiner must accord due deference to the expertise and experience of the staff. OMC 18.75.040(F). .

B. THE CITY PROPERLY IDENTIFIED THE DEVELOPMENT AGREEMENT AS THE PROPOSAL SUBJECT TO SEPA.

Appellant is correct that the City, at this stage, did not seek to make an environmental determination on the underlying development project, but only made a determination on the proposed Development Agreement. It did so because the proposal is to enter into the Development Agreement, as clearly stated on the DNS itself. The City did so because the Development Agreement is a separate application and action which the law requires precede consideration of project review. As such, the City's DNS was proper.

In WAC 197-11-784, SEPA defines a "proposal" as follows:

> "Proposal" means a proposed action. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants. A proposal exists at that stage in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated. (See WAC 197-11-055 and 197-11-060(3).) A proposal may therefore be a particular or preferred course of action or several alternatives. For this reason, these rules use the phrase "alternatives including the proposed action." The term "proposal" may therefore include "other reasonable courses of action," if there is no preferred alternative and if it is appropriate to do so in the particular context.

The only proposal before the City at present is the adoption of the Development Agreement. The developer, pursuant to OMC 18.53.030, filed an application for a Development Agreement. By contrast, there has been no application filed for the redevelopment project itself. The Development Agreement application will be decided by different decisionmaker (the City Council) than the officers who will decide project permit applications under the City's codes. The decision to enter into a Development Agreement does not commit the City to approval of the redevelopment project, and as such, is distinct

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from that proposal, which will be considered, with full environmental review under SEPA and rejected or approved separately from the Development Agreement.

"A proposal exists at that stage in the development of an action when an agency is presented with an application....". *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 562, 166 P.3d 813, 824–25 (2007). As stated in WAC 197-11-784:

> A proposal exists at that stage in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated.

City of Puyallup v. Pierce Cty., 8 Wn. App. 2d 323, 336, 438 P.3d 174, 180, *review denied*, 193 Wn.2d 1030, 447 P.3d 164 (2019)

The "proposal" here is based on the application for a Development Agreement submitted by the developer and site owner pursuant to OMC 18.53.030. That section provides:

> Consideration of a development agreement may be initiated by City Council or council committee, or requested by the planning commission, City Staff, or applicant. Any person may personally, or through an agent, propose a development agreement regarding property the person owns. The applicant shall file a complete development agreement application on forms provided by the Department. At minimum, such application shall include a copy of the proposed agreement, applicable fee, names and address of all current owners of real property, and all real property within 300 feet of each boundary of the subject property as shown in the records of the county assessor, and a vicinity map showing the subject property with enough information to locate the property within the larger area. In addition, the applicant may be required to submit any additional information or material that the Director determines is reasonably necessary for a decision on the matter.

The consideration of a Development Agreement proposal under the City's code is required to precede the consideration of the underlying project proposal. OMC 18.53.040 recognizes the differences and separates consideration of the Development Agreement from the consideration of the land use approvals required to build a proposed project. OMC 18.53 does so by directing that:

> 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.

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The requirement for a separate and prior consideration of the Development Agreement before consideration of project review is consistent with and implements the intent of state laws providing for development agreements as a means to incentivize developers to invest and participate in lengthy and expensive permitting of projects. RCW 36.70B.170(1) authorizes local governments to enter into such agreements prior to project review, stating:

> (1) A local government may enter into a development agreement with a person having ownership or control of real property within its jurisdiction. A city may enter into a development agreement for real property outside its boundaries as part of a proposed annexation or a service agreement. 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 rationale behind providing for development agreements is to diminish the uncertainty that would come from undertaking projects without the assurance that development standards would not change and undercut the investment needed to even go through the permit process itself. This intent was stated by the Legislature when it adopted these provisions in 1995, stating:

> "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. Further, the lack of public facilities and services is a serious impediment to development of new housing and commercial uses. Project applicants and local governments may include provisions and agreements whereby applicants are reimbursed over time for financing public facilities. It is the intent of the legislature by RCW 36.70B.170 through 36.70B.210 to allow local governments and owners and developers of real property to enter into development agreements."

Laws of 1995, Ch. 347, Section 501.

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C. APPELLANT'S DEMAND TO COMBINE SEPA REVIEW OF THE DEVELOPMENT AGREEMENT AND PROJECT REVIEW DEFEATS THE LEGISLATIVE INTENT TOALLOW DEVELOPMENT AGREEMENTS TO ESTABLISH THE DEVELOPMENT STANDARDS PRIOR TO PROJECT REVIEW.

Unlike the sequencing envisioned by Olympia's code, Appellant demands that review of the Development Agreement be conflated with project review for shoreline and other land use approvals. In so doing, they advocate for a scheme that would defeat the legislative purpose of providing an incentive to developers to invest in a lengthy and expensive process by preventing them from the very assurance that a development agreement is intended to bring. This is an absurd consequence that cannot stand.

Statutes are to be construed so as to give effect to their underlying purpose and to avoid "unlikely, absurd or strained consequences" *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 49, 873 P.2d 498, 510 (1994) (J. Madsen, concurring). Courts must consider the language of the statute as a whole, its underlying policies, and the language and its underlying policies and give effect to all statutory language, considering statutory provisions in relation to each other and harmonizing them to ensure proper construction. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 142 Wn.2d 543, 560, 14 P.3d 133 (2000); *Pac. Topsoils, Inc. v. Washington State Dep't of Ecology*, 157 Wn. App. 629, 642, 238 P.3d 1201, 1207 (2010). The Examiner should similarly avoid construing SEPA in a manner that results in "unlikely, absurd, or strained consequences" and effectively precludes entry into a development agreement.

SEPA does not require completion of environmental review and submittal of environmental documents such as an EIS prior to even making an application. SEPA does not prevent preclude a developer and City from determining the rights and standards to which a pending project will be vested. *Adams v. Thurston Cty.*, 70 Wn. App. 471, 481, 855 P.2d 284, 290 (1993), *disapproved of on other grounds by Snohomish Cty. v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 386 P.3d 1064 (2016) It

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would therefore be logically absurd to require completion of SEPA review of the project as a component of a development agreement application. The Development Agreement has the effect of permitting vested rights to be determined prior to project review, as *Adams* required. By contrast, Appellant's argument would prohibit vesting by preconditioning any development agreement upon completion of project level SEPA review, an absurd result that is contrary to the very purpose that development agreements are intended to serve.

Further, if Appellant is correct, the developer must engage in project review and must complete project specific environmental review without knowing that the development standards are certain and without knowing what mitigation requirements will be applied. In so doing, Appellant puts the cart before the horse and would deny the applicant for a development agreement the certainty that is designed to incentivize investment in a project, including investment in environmental review that may be substantial and expensive. This conflicts with the Development Agreement statute that allows entry of the Development Agreement at the outset of the permit process. RCW 36.70B.170.

D. SEPARATE CONSIDERATION OF THE DEVELOPMENT AGREEMENT AND PROJECT REVIEW IS NOT IMPROPER PIECEMEALING OF ENVIRONMENTAL REVIEW.

SEPA does not demand such absurd results, nor does it demand that environmental review of the application for a development agreement be conducted with environmental review of the underlying project. Because these two distinct proposals have independent utility, they can be analyzed independently without violating principles forbidding improper segmentation. The legal analysis of segmentation is to be conducted using the connected action principles embodied in SEPA and NEPA. Under these principles, segments of a related course of action may be assessed separately if each segment has "independent utility." Segmentation is only improper when a segmented project has no independent justification or life of its own. *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir 1985) (road

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and timber sales had to be considered in single EIS because "the timber sales [could not] proceed without the road, and the road would not be built 'but for' the contemplated limber sales" and, thus. the two actions were 'inextricably intertwined.'") (*citing Daly v Volpe,* 514 F.2d 1106 (9th Cir. 1975)); *One Thousand Friends of Iowa v Mineta,* 364 F.3d 890, 894 (8th Cir. 2004) ("A segmentation is improper when the segmented project has no independent justification, no life of its own, or is simply illogical when viewed in isolation.").

Improper segmentation or piecemealing of a project occurs when a proposal is split into smaller components in an effort to avoid full SEPA review. 'Piecemealing' only occurs where the local authority 'allow{s} one portion of the { single} project to proceed while the other portion of the project awaits approval.' *Batchelder v. City of Seattle,* 77 Wn.App. 154, 160, 890 P.2d 25, *review denied,* 127 Wn.2d 1022 (1995). Improper piecemeal review, or segmentation of a project, occurs where a development is 'so interrelated and interdependent that no part of the project can proceed until all provisions of { the SMA and SEPA} have been fully complied with.' *Merkel v. Port of Brownsville,* 8 Wn.App. 844, 847, 509 P.2d 390 (1973). *Merkel* is illustrative of what improper segmentation and piecemeal development is. There, the Port of Brownsville proposed to proceed with cutting trees and implementing development of areas lying outside the 200 foot shoreline areas while efforts to obtain a shoreline permit were still pending. The court found the project was a single project which was subject to shoreline jurisdiction and could not piecemeal the development into shoreline and non-shoreline segments. That is not what is happening here. The entirety of the proposed project will still be subject to SEPA review. That review is distinct from review of the Development Agreement itself, which does not permit any modification of the environment.

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Improper segmentation will not occur here, as the proposed Development Agreement fully acknowledges that SEPA review of the project as a whole will be conducted along with project review and issuance of land use decisions. There is no evidence of improper segmentation that would avoid the required review. The approval of the development is logically and functionally independent of the decision whether to enter into a development agreement. One is not dependent on the other - the Development Agreement might be approved by the City Council, but the permits for the project itself might later be denied by the City's officials. Likewise, the developer could elect to proceed with the project without entering into a development agreement with the City. As such, SEPA allows consideration of the Development Agreement separately from the project review which will follow, complete with its own environmental review and SEPA determinations, as the City's Code provides.

The cases cited by Appellant are distinguishable. In *Alpine Lakes Protection Society v. Wash. St. Dep't of Natural Resources,* 102 Wn.App. 1, 16–17, 979 P.2d 929 (1999), approval of a watershed analysis required EIS because once approved, Class IV forest practices that would otherwise require threshold SEPA review would become categorically exempt. Thus, the subsequent logging would evade SEPA review. Later courts have distinguished *Alpine Lakes* as "unhelpful" on this precise basis. *Chuckanut Conservancy v. Washington State Dep't of Nat. Res.*, 156 Wn. App. 274, 293 n. 51, 232 P.3d 1154 (2010). Here, by contrast, the Development Agreement does not commit to inevitable approval of the underlying project and does not evade SEPA review which it expressly acknowledges will occur as part of project review.

Similarly, in *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 309 P.3d 734 (2013), the redesignation of 279 acres adjacent to a ski resort for "recreational use" was a final action that had impacts by itself. The court held that the Parks Commission's management

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classification decision to approve redesignation of property to allow recreational use was effectively the Commission's final decision to approve expansion of the ski area that its own staff conceded would have a probable significant, adverse environmental impact and thus required an EIS. 176 Wn.App. at 802-803. It was essentially the same thing as approving a rezone of property to a classification allowing a ski resort as a permitted use without analyzing any of the impacts of allowing that use. Here, the approval of a Development Agreement does not approve the underlying development project as the reclassification decision in *Lands Council* did.

Appellant fails to distinguish between and conflates approval of a Development Agreement with approval of the project itself. In doing so, Appellant insinuates that the City is somehow evading its environmental review responsibilities by first setting the parameters by which project review will be conducted. The City's review of the redevelopment proposal will, as the Development Agreement recognizes, necessarily include full environmental review of the project. This will require submittal of a new project specific checklist and consideration of project impacts and potential mitigation. The City expects that this will occur at the outset of project review and will be aided by submittal of a full application to define more precisely what the project will entail.

IV. CONCLUSION

Appellants point only to impacts from the underlying project, which will be considered as part of the forthcoming project level SEPA review to accompany project review for the project. This is a separate review from the current proposal, which is to enter into a Development Agreement that establishes the parameters and phasing for submittal of project applications and implementation of the redevelopment project, if such applications are approved. This is consistent with both state law providing for development agreements to incentivize investment into projects like West Bay Yards, which will require substantial cost and time in the permitting process. Because the Development

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Agreement does not itself have any environmental impact, the City did not err in issuing the DNS and the Examiner should uphold the City's determination.

Dated this 27th day of January 2021.

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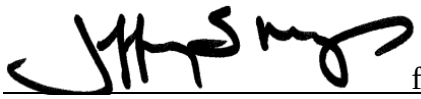
CITY OF OLYMPIA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CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the attached document to be served to the below listed party via electronic mail per service agreement:

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DATED this 27th day of January 2021, at Olympia, WA.

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