Attachment 8

BEFORE THE CITY OF OLYMPIA HEARING EXAMINER

In Re Appeal of West Bay Yards Development Agreement, OLYMPIA COALITION FOR ECOSYSTEMS PRESERVATION Appellant, v. CITY OF OLYMPIA COMMUNITY PLANNING AND DEVELOPMENT DEPARTMENT Respondent.	NO. 20-3136 APPELLANT'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION

The City and developer have failed to grapple with the substance of the Coalition's argument, namely, whether the Hardel Property proposal is sufficiently well defined to enable environmental review now. If the project is sufficiently well defined to allow some meaningful review now, SEPA commands that the review start now. It matters not at all that more review can or will be done later. The issue is when must the review start. If, as here, the project's principal elements are known and allow for environmental review, the agency violates the law by postponing all review until later.

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The City and developer have no response to that issue—which presumably explains their failure to address it. But ignoring the issue does not make it go away. As shown in our motion and in this reply, the project's core elements are well known and allow for environmental review now. That initial environmental review must be completed before the City Council takes its first action to move this project through the regulatory process.

Rather than contest the proposition that environmental review must start once a project is sufficiently well defined to allow for some environmental review, the City and developer argue that the City will conduct environmental review during subsequent permitting phases. But that is irrelevant. Whether *additional* review occurs later does not address the issue of whether the project is sufficiently well defined at this time to allow some environmental review now. SEPA requires environmental review both now at the Development Agreement phase *and* at the subsequent permitting phases. It is not the case that the requirement for subsequent review insulates the project from undergoing review now. The City and developer's argument to the contrary is legally erroneous.

The City and developer also argue that the proposed development agreement does not involve any legally binding commitments by the City so that it cannot trigger environmental review. That claim suffers two fatal defects. One, the proposed development does include binding commitments by the City. (It is not called an "agreement" for nothing.) But for the agreement, the City would be free to adopt new regulations that might change the uses allowed on the site, increase mitigation requirements, or create other regulatory requirements. The development agreement, if approved, precludes all of that. Before the City ties its hands, it should complete its initial environmental review. Indeed, per SEPA, it must complete that review before making any commitments.

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The second fatal error in the argument is that commitments are not needed to trigger SEPA. Even if the Development Agreement did not include any commitments, SEPA review would still be necessary now. If only agency actions that involved legally binding commitments triggered SEPA, then SEPA would never apply to an agency's adoption of any planning document. Yet the statute, rules and case law are clear that planning level actions are subject to SEPA. The *King County Boundary Review Board* case cited in our opening brief is just one example. There, the Supreme Court held that the mere act of annexing land to a city could trigger SEPA—where it was clear that the annexation was the first step in a long series of agency decisions that would ultimately result in a large residential development. That the annexation did not include any enforceable commitments to issue permits for the project did not stop the Supreme Court from ordering environmental review at that early stage.

In our motion, we also demonstrated that the project's impacts are significant, thus, the required environmental review must be in the form of an EIS. Motion at 17. Notably, neither respondent disputes our evidence of the project's significant impacts. Because those facts are not in dispute, the Examiner should remand for environmental review at this stage in the form of an EIS.

II. ARGUMENT

A. SEPA Requires Review at Both the Development Agreement Stage and Subsequent Permit Stages.

As discussed in our motion (at 11–12), SEPA requires review of a project "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2). Even in a non-project action, the decision-maker must analyze whether significant, adverse impacts are probable following the government action. *Alpine Lakes Prot. Society v. Dep't of Natural Resources*,

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102 Wn. App. 1, 16 (1999); *King Cty. v. King Cty. Boundary Review Board*, 122 Wn.2d 648, 663 (1993). The impacts that must be analyzed are the impacts of the maximum development of the property allowed by the government action. *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 2 Wn. App. 2d 737, 752 (2018).

Analysis must occur "when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055. We described in our motion the many principal features of the Hardel Property proposal that can reasonably be identified now, including 478 housing units; five mixed-use buildings; 20,500 feet of commercial retail, restaurant, and recreation space; a shoreline trail; shoreline fill and restoration; frontage improvements; utilities; and various other elements. *See* Mot. at 1, 6–7 (citing Dev. Agrmt., Sec. 1; and Sec. 11.1 and 11.2; and Sec. 7). In its response, the developer concedes that these are, indeed, features of the proposal. *See* Dev. Resp. at 5.[1] Thus, it is the impacts of these principal features that must be considered now, at the Development Agreement phase.

The City and developer never actually grapple with (or even acknowledge) the requirement to analyze impacts "at the earliest possible point." They do not argue that the Hardel Property proposal is too ill defined to enable reasonable analysis at this stage. They do not argue that the analysis performed at this stage was reasonably sufficient. They do not defend the dozens of non-responses on the SEPA Checklist. Instead, the entirety of their defense is that there will be subsequent phases of environmental review.

[1] The developer attempts to cast doubt on the notion that dumping fill along the shoreline is a component of the Development Agreement. *See* Dev. Resp. at 6 ("the Agreement does not legally obligate the City to 'accept a significant shoreline fill'"). This statement is misleading. Shoreline fill is part of the Development Agreement. As we explain in our motion, the Development Agreement requires the City and developer to implement the City's Restoration Plan, which, in turn, "creates fronting intertidal beach and marsh areas primarily through placing beach substrates offshore of the existing revetment." Mot. at 4, n. 1 (citing Restoration Plan).

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As we demonstrated in our motion, the question of whether there will be subsequent phases of environmental review is completely irrelevant to the question of whether the review *at this phase* was adequate. Because the City and developer do not claim the City conducted any meaningful environmental review yet, the Hearing Examiner should conclude that the City's SEPA compliance at this phase was inadequate.

B. The City and Developer's Reference to OMC 18.53.040 Is Irrelevant.

Both the City and developer rely heavily on OMC 18.53.040 to argue that the only environmental review required of the Hardel Property proposal is at the permit phase. *See* City Resp. at 3, 6–7; Dev. Resp. at 3, 9–11. However, OMC 18.53.040 is irrelevant to the question of whether environmental review was required prior to considering the proposed Development Agreement because that code provision addresses the timing of adoption of a development agreement, not the timing of SEPA review.

In its entirety, OMC 18.53.040 provides:

> 18.53.040 Timing of Public Hearings
>
> 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.

This provision relates only to the timing of the City Council's decision on development agreements, which must occur before any permit application is considered by staff. The provision says nothing about the timing or scope of SEPA review.

All OMC 18.53.040 means is that the City's review of the Hardel Property proposal must proceed in phases: first, review of the development agreement, and second, review of any project permits. These are two separate land use decisions and, as such, each decision must be accompanied by its own SEPA review. Each land use decision is still subject to the requirements of SEPA,

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including that analysis be performed "at the earliest possible point … when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2). Also, that analysis must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335. Neither of these requirements has been met here. The City and developer do not even attempt to argue that they have.

Nothing in OMC 18.53.040, or any other provision of law, allows the City to defer environmental analysis to the permit phase. On the contrary, SEPA expressly provides that:

> The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

WAC 197-11-055(2)(a)(i). The City and applicant ignore this regulation, too. But ignoring the dispositive regulations does not nullify them. The Examiner can and should apply them, despite the respondents' efforts to ignore them.

C. The City and Developer Admit the City Did Not Conduct Adequate Environmental Review at This Phase and Wrongly Seek to Defer Analysis.

Both the City and developer admit the City did not conduct a full environmental analysis of the Hardel Property proposal at this phase:

- "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." City Resp. at 5.

- "The SEPA Checklist describes the Applicant's Development Agreement proposal as a non-project action (a characterization which the Appellant appears to accept) 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." Dev. Resp. at 10.

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These admissions end the dispute. The dozens of non-answers in the SEPA Checklist are the result of a deliberate, but unlawful, plan. The City's plan is to defer full analysis of the environmental impacts of the Hardel Property until the project phase, after the Development Agreement is already signed. This plan is not compliant with SEPA. WAC 197-11-055 requires full analysis now.

D. The City and Developer's Attempts to Distinguish Our Authorities Ignore Some of the Relevant Cases We Cited and Fail to Meaningfully Distinguish the Others.

In our motion, we relied on *Alpine Lakes Prot. Society v. Dep't of Natural Resources*, 102 Wn. App. 1, 16 (1999); *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787 (2013); and *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 2 Wn. App. 2d 737, 752 (2018); as well as federal NEPA caselaw. *See* Mot. at 12–13. Neither party addresses *Heritage Baptist* or federal caselaw. But *Heritage Baptist* and the federal cases provide compelling authority in support of our motion. As with the respondents' decision to ignore the relevant SEPA rules, ignoring these cases merely demonstrates the shallowness of the respondents' arguments.

The City and developer attempt to distinguish *Alpine Lakes* on the basis that it involved the approval of a watershed analysis. *See* City Resp. at 13–14; Dev. Resp. at 11–12. The City and developer point out that the watershed analysis in *Alpine Lakes* would have allowed subsequent, specific forest practices previously subject to SEPA review to become categorically exempt to SEPA review. While this observation is accurate, it is does not distinguish the holding in *Alpine Lakes* for purposes of our case. The relevant holding in *Alpine Lakes* is that nonproject actions are subject to SEPA review when they pave the way for subsequent actions which will have environmental

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impacts—regardless of whether there will be subsequent environmental review. That holding is as true for our case as it was in *Alpine Lakes*.

The *Alpine Lakes* court relied in multiple instances on *King Cty. v. King Cty. Boundary Review Board*, 122 Wn.2d 648 (1993), in particular for the *Boundary Review* court's holding that "The absence of specific development plans should not be conclusive of whether an adverse environmental impact is likely." *Id*. at 663. In *Boundary Review*, the court reversed a DNS for a government action that was even further removed from ultimate development than the Development Agreement here. In *Boundary Review*, the proposal was a decision to approve a municipal boundary change, that would later be followed by a zoning change, that would ultimately be followed by actual project permits for development. *Id*. at 665. The court held that the SEPA review for the boundary change must analyze the impacts of the ultimate development, notwithstanding the multiple, additional governmental actions (nonproject and project) that would precede development. As the *Boundary Review* court said in reversing the DNS, "There is also no doubt the development discussed in the environmental checklists will have a significant adverse impact on the environment … Appellants do not contest that development would have such effects and, on the record in this case, the potential adverse effect of this development may be presumed." *Id*. Thus, the Court did not just vacate the DNS and order a second threshold determination. Given the known significant impacts associated with the project which were not contested by the respondents, the Court vacated the DNS and ordered preparation of an EIS.

Here, the Hardel Property proposal is much more fleshed-out than the development contemplated in *Boundary Review* and its impacts are every bit as significant and, as in *Boundary Review,* undisputed. Here, the Development Agreement spells out precise square footage, number of residential units, location of buildings, and the extent of shoreline fill. The adverse impacts of such

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specific development are much more knowable. If the inchoate development in *Boundary Review* required preparation of an EIS, then the much more fleshed-out proposal here requires full SEPA consideration, as well—not deferral to the permitting phase.

As we described in our motion for summary judgment (Mot. at 17), the Hardel Property proposal is a massive undertaking whose general contours are already well understood. The proposal involves the filling of the shoreline, rerouting of traffic, and construction of numerous, large buildings. The developer acknowledges that this is, indeed, the scale of the proposal that is under discussion. *See* Dev. Resp. at 6 ("The Applicant's estimated total cost to develop the Project is in excess of $200 million"). The City and developer do not dispute the significance of the project's impacts—they simply claim they will evaluate the impacts later. This is not consistent with SEPA, for the reasons articulated in *Boundary Review*.

The City and developer point out that the underlying decision in *Lands Council* was a redesignation of state parks land that would allow a specific proposal to be implemented—a ski resort. The City distinguishes *Lands Council* on the grounds that *Lands Council* was "essentially the same thing as approving a rezone." City Resp. at 12. The developer distinguishes *Lands Council* on the grounds that the decision "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." Dev. Resp. at 14.

These efforts to distinguish *Lands Council* actually demonstrate the relevance of *Lands Council* to this case. The Hardel Property Development Agreement would lock in the current regulatory standards and mitigation requirements. *See* Dev. Resp. at 9 (citing RCW 36.70B.170). In addition, the Development Agreement would lock in the developer and City to implementation of a specific Restoration Plan. *See* Dev. Resp. at 5 (citing "the recommendations identified in the West

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Bay Assessment for 'Reach 5 – Hardel Plywood.'"). Thus, adopting the Development Agreement is no different than adopting the land use designation in *Lands Council*—in both cases, the governmental decision locks in particular regulations that will apply to a specific property, in order to carry out a specific, well-fleshed-out development proposal. Therefore, just as in *Lands Council*, the City should have evaluated the environmental impacts of the ultimate development that the developer is proposing and not deferred analysis to the permitting phase.

Finally, as noted, *Heritage Baptist* holds that the impacts that must be analyzed at the nonproject level are the impacts of maximum level of development allowed by the nonproject proposal. The City and developer make no answer to our point that *Heritage Baptist* requires the full impacts of the Hardel Property development proposal to be analyzed now, at this stage.

III. CONCLUSION

The City and developer's responses demonstrate a deliberate failure to comply with SEPA. The failure was premised on the erroneous belief that subsequent project-level can substitute for review of the project's impacts now, when the first steps are taken to advance this proposal through the regulatory process. The Supreme Court has forcefully rejected this type of delay in the SEPA process:

> Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. *See* Rodgers, *The Washington Environmental Policy Act,* 60 Wash.L.Rev. 33, 54 (1984) (the risk of postponing environmental review is "a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds"). Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

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King Cty. v. Washington State Boundary Review Bd. for King Cty., supra, 122 Wn.2d at 664 (emphasis in original; footnote omitted).

The "dangerous incrementalism" posed by the staff's approach should be rejected by the Examiner. The City Council members "need to be apprised of the environmental consequences *before* the project picks up momentum, not after" (and *before* the City Council's *only* involvement with this project, not after). The Hearing Examiner should issue an order:

1) Vacating the DNS for failure to comply with SEPA;

2) Requiring the City to prepare an EIS.

Respectfully submitted this 5th day of February, 2021.

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