

BEFORE THE CITY OF OLYMPIA HEARINGS EXAMINER

In re the Appeal of:	)	HEARING NO. 20-3136
WEST BAY YARDS DEVELOPMENT	)	
AGREEMENT,	)	ORDER DENYING APPELLANTS'
	)	MOTION FOR SUMMARY
OLYMPIA COALITION FOR	)	JUDGMENT AND GRANTING
ECOSYSTEMS PRESERVATION,	)	RESPONDENTS' MOTION FOR
	)	SUMMARY JUDGMENT
Appellant,	)	
	)	
vs.	)	
	)	
CITY OF OLYMPIA COMMUNITY	)	
PLANNING AND DEVELOPMENT	)	
DEPARTMENT; WEST BAY	)	
DEVELOPMENT GROUP, LLC; and	)	
HARDEL PLYWOOD CORPORATION,	)	
	)	
Respondents.	)	

THIS MATTER comes before the Hearing Examiner on Cross-Motions for Summary Judgment. Appellant, Olympia Coalition for Ecosystems Preservation ("Coalition"), moves for summary judgment and asks the Hearing Examiner to: (1) vacate the SEPA DNS and (2) require the City to prepare a EIS; or (3) in the alternative require the City to redo its SEPA Checklist and then issue a new Threshold Determination. Conversely, the Respondents, West Bay Development Group, LLC and Hardel Plywood Corporation ("West Bay"), move for summary judgment and ask the Hearing Examiner to uphold the City's SEPA Determination.

Coalition is represented by David Bricklin and Alex Sidles. The City of Olympia appears through its Senior Planner, Tim Smith, and is represented by Jeffery Myers, Special Counsel, and Michael Young, Deputy City Attorney. West Bay is represented by Heather Burgess and Tadeu Velloso.

The Hearing Examiner considered the following:

1. Notice of Appeal;
2. Appellant's Motion for Summary Judgment;

*Order Denying Appellant's
Motion for Summary
Judgment and Granting
Respondents' Motion for
Summary Judgment - 1*

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3. Declaration of L. Brandon Smith in Support of Applicant's Response and Cross-Motion for Summary Judgment;

4. Declaration of Heather L. Burgess in Support of Applicant's Response and Cross-Motion for Summary Judgment;

5. Applicant's Response and Cross-Motion for Summary Judgment;

6. City of Olympia's Response to Motion for Summary Judgment;

7. Appellant's Reply in Support of Summary Judgment.

All parties are in agreement that the matter is properly decided by summary judgment as there are no material issues of fact.

BACKGROUND

This appeal involves the City's SEPA review of a Development Agreement for the proposed redevelopment of the former Hardel Plywood facility along West Bay of Budd Inlet in the City of Olympia (the "Project Site"). The Project Site continues to be owned by Hardel but is under contract for purchase to West Bay. The Project Site has a well documented history of industrial contamination from its former use. Indeed, the ecology of much of West Bay has been compromised by industrial activities along its shorelines as well as various other activities related to urban development. These problems have led the City to undertake the "City of Olympia West Bay Environmental Restoration Assessment" ("West Bay Restoration Plan" or "Restoration Plan") dated February 26, 2016. It concludes that:

"The shorelines and intertidal areas within West Bay have been heavily altered and ample opportunity exists for restoration. Analysis shows that existing ecological and physical processes have been significantly impacted compared to historical conditions. The critical issues include disconnection of riparian forest and freshwater habitats from the Bay, conversion of shallow intertidal mud flats into navigable waters and uplands, loss of sediment and large wood inputs from bluffs and rivers/creeks, degradation of water quality by physical modification and untreated stormwater inputs, and degradation of intertidal areas by armoring, fill placement, and contamination."

1 The Restoration Plan subdivides West Bay into nine "reaches" each having one or more
2 possible alternatives for restoring ecological functions as well as providing recreational
3 opportunities and other improvements. The Project Sites shoreline is referred to as "Reach 5 –
4 Hardel Plywood". The Restoration Plan has a single proposed alternative for its restoration:

5 "One restoration alternative was developed for this reach that essentially
6 maintains the existing uplands and shoreline plan form, but creates fronting
7 intertidal beach and marsh areas primarily through placing beach substrates
8 offshore of the existing revetment. Riparian plantings could be installed above
9 the beach. Sea level rise adaptation could be included in this alternative. Given
10 the relatively deep water depths in this reach, substrate would be placed in the low
intertidal for establishment of an Olympia Oyster reef. Substrate placement may
require permission from WA DNR. Four conceptual stormwater improvement
opportunities that would be supportive of restoration were identified and
investigated in this reach, including treatment along West Bay Drive."

11 The West Bay Restoration Plan has not undergone SEPA review.

12 West Bay wishes to purchase the Project Site from Hardel and redevelop it into a mix of
13 residential and commercial uses known as "West Bay Yards" (the "Project"). The Project
14 envisions approximately 478 market-rate rental housing units in 5 mixed-use buildings along
15 with approximately 20,500 square feet of retail, restaurant and recreation uses. It would also
16 provide public access amenities including a waterfront trail as well as vegetation conservation
17 areas and shoreline restoration consistent with the recommendations found in the West Bay
18 Restoration Plan.

19 The first step in any possible redevelopment of the Project Site is the "West Bay Yards
20 Development Agreement" (the "Development Agreement"), proposed between the City and West
21 Bay. Under Olympia's Municipal Code, a development agreement is the required first step in
22 any development of this nature: "Any development agreement associated with a specific project
23 or development plan shall be heard by the City Council prior to consideration of any related
24 project application." OMC 18.53.040. The City interprets its ordinance as requiring the
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1 Development Agreement to be in place before development applications are submitted. Thus,
2 this Development Agreement must be in place before West Bay can submit any development
3 applications to the City.

4 Development agreements are authorized by State law. RCW 36.70B.170-.210. Among
5 other things, "a development agreement must set forth the development standards and other
6 provisions that shall apply to and govern and vest the development, use, and mitigation of the
7 development of the real property for the duration specified in the agreement. A development
8 agreement shall be consistent with applicable development regulations adopted by local
9 government planning under Chapter 36.70A RCW." The statute specifically recognizes the right
10 to include mitigation measures, project phasing and vesting periods. RCW 36.70B.170(3)(c)(g)
11 and (i). Again, Olympia not only recognizes the benefit of development agreements but requires
12 that one be in place prior to development application.

13 The proposed Development Agreement approves the conceptual site plan; allows for site
14 development in two phases and building development in three phases; vests the development to
15 existing land use regulations at the time of the Agreement; and also vests impact fees to each
16 construction phase. It allows the development to take place over fifteen years.

17 The Development Agreement expressly recognizes the West Bay Restoration Plan and
18 declares:

19 "The Project will include significant access amenities, including a waterfront trail,
20 *and will also complete shoreline restoration along the property boundary*
21 *consistent with the recommendations identified in the City of Olympia West Bay*
22 *Environmental Restoration Assessment Final Report* (Coat and Harbor
Engineering, 2016) for "Reach 5 – Hardel Plywood" and the City of Olympia
[Shoreline] Master Program."

23 The Development Agreement expressly requires that shoreline restoration will be
24 completed as part of each phase's site development, and the waterfront trail shall be completed as
25 part of Phase 1.

1 It is worth noting that the Project's proposed residential and commercial uses are
2 permitted uses under the Project Site's current zoning designation of "Urban Waterfront"
3 ("UW"). The proposed uses are also permitted uses under the Project Site's current Shoreline
4 Environmental Designation (SED) of "Urban Intensity" ("UI") under the City's Shoreline Master
5 Program (SMP). The proposed uses are also consistent with the City's current Comprehensive
6 Plan and its Land Use Map. Stated slightly differently, the Development Agreement does not
7 allow for any land use that is not currently allowed under the City's development regulations.

8 The Development Agreement was submitted to the City along with the SEPA Checklist.
9 The Checklist makes clear that the "Proposal" subject to SEPA review is the proposed
10 Development Agreement, not the Project itself. In its review of the SEPA Checklist the City
11 concurs that the "Proposal" is the Development Agreement, not the Project. The City concludes
12 that the Development Agreement, on its own, does not have a probable significant environmental
13 impact and issued a SEPA DNS.

14 Coalition timely appealed the SEPA DNS and then moved for summary judgment. It
15 argues that the "Proposal" subject to SEPA review is the Project, not simply the Development
16 Agreement. Coalition notes that our courts have been insistent upon conducting environmental
17 review at the earliest opportunity and that the details of this Project are already well established –
18 indeed, essentially fixed – that SEPA review of the Development Agreement mandates
19 environmental review of the enter Project.

20 West Bay cross-motined for Summary Judgment. It argues, and the City concurs, that
21 the "Proposal" subject to early environmental review is the Development Agreement, not the
22 Project itself, and that there is nothing about this Development Agreement deserving heightened
23 review.

1 ANALYSIS

2 The resolution of this appeal and the cross-motions requires the answering of two
3 questions: (1) What is the "Proposal" currently subject to environmental review? and (2) Does
4 this "Proposal" have a probable significant, adverse environmental impact?

5 1. What is the "Proposal"?

6 Coalition notes that the principal features of the Project are well defined including the
7 conceptual site plan, phasing plan, restoration plan and construction sequence. Through the
8 Development Agreement, the City binds itself to all of the Project's detail and allows all
9 development to vest to current Development Regulations. As everything about the Project is
10 well known, Coalition does not see how – or why – substantive environmental review can be
11 deferred. To the contrary, Coalition argues that our courts have uniformly insisted upon
12 substantive environmental review at the earliest opportunity which, in this case, is now.

13 The City and West Bay acknowledge our courts' insistence upon early environmental
14 review but argue that this standard applies to the specific "Proposal" being reviewed. In this case
15 the Proposal is the Development Agreement, not the Project, and the mandate of early
16 environmental review applies only to the Development Agreement. The City/West Bay argue
17 that Coalition conflates two separate Proposals (the Development Agreement and the actual
18 Project) into a single Proposal, and that the conflation of the two is improper. The City and West
19 Bay add that the standard for review is the "clearly erroneous" standard, and that the Hearing
20 Examiner must affirm the City's decision "unless he is firmly convinced that a mistake has been
21 committed".

22 There is no question that our courts insist upon substantive environmental review at the
23 earliest opportunity. *King County v. Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024
24 (1993); *Alpine Lakes v. Natural Resources*, 102 Wn. App. 1, 979 P.2d 929 (1999); *Lands*
25 *Council v. Parks & Rec. Comm'n*, 176 Wn. App. 787, 309 P.3d 734 (2013).

1 "[t]he risk of postponing environmental review is a 'dangerous incrementalism
2 where the obligation to decide is postponed successively while project momentum
3 builds.' 'It 'may begin a process of government action which can 'snowball' and
4 acquire virtually unstoppable administrative inertia.' 'To avoid this,
'decisionmakers need to be apprised of the environmental consequences *before*
the project picks up momentum, not after'". *King County* at 664.

5 This judicial insistence is firmly premised on SEPA's administrative regulations
6 including WAC 197-11-055(2):

7 "The lead agency shall prepare its Threshold Determination and Environmental
8 Impact Statement (EIS), if required, at the earliest possible point in the planning
9 and decision making process, when the principal features of a proposal and its
environmental impacts can be reasonably identified."

10 Again, Coalition argues that the "Proposal" is the Project itself and that both court
11 decisions and administrative regulations mandate its early environmental review.

12 But the City and West Bay respond that "Proposal" is defined by administrative
13 regulation. Per WAC 197-11-784:

14 "'Proposal means a proposed action. A proposal includes both actions and
15 regulatory decisions of agencies as well as any actions proposed by applicants. A
16 proposal exists at that stage in the development of an action when an agency is
presented with an application"

17 The only application the City has received is the Development Agreement. Actual
18 development applications have not yet been submitted, and cannot be submitted, until the
Development Agreement is approved.

19 I conclude that, pursuant to WAC 197-11-784, the City's decision to regard the
20 "Proposal" subject to SEPA review as the Development Agreement, not the Project, is not clearly
21 erroneous and should therefore be affirmed.

22 (2) Does this "Proposal" have a probable significant, adverse environmental impact?

23 The determination that the "Proposal" is the Development Agreement, not the Project
24 itself, is merely the starting point for SEPA review. The second question, then, is whether the
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1 Development Agreement has a probable significant adverse environmental impact. This requires
2 a more careful analysis of the Development Agreement in relation to *Alpine Lakes* and *Lands*
3 *Council*. Both make clear that, even if the "Proposal" is a non-project action, it may still have
4 environmental impacts. These impacts may be in the form of an alteration to a site's land use
5 designation (*Lands Council*) or an assurance that future environmental review will be lessened
6 (*Alpine Lakes*).

7 But what determines whether a development agreement or similar non-project action has
8 a substantive environmental impact? The answer appears to be found in *Lands Council*. At page
9 795, the court begins its analysis by framing the question before it: "Was [this non-project
10 action] merely the adoption of a classification that would allow consideration of possible
11 development proposals in the future . . . or was it a final action approving some level of
12 development?" The court's framing of the question provides a dividing line between those non-
13 project actions that do not have environmental impacts (merely the adoption of a classification
14 that would allow consideration of possible development proposals in the future) from those non-
15 project actions that do have environmental impacts (a final action approving some level of
16 development). As applied to this appeal, does the Development Agreement merely allow
17 consideration of possible future development, or does it actually approve some level of
18 development?

19 The answer to this question requires a closer review of the Development Agreement. The
20 Agreement begins by noting that the Project "will complete shoreline restoration along the
21 property boundary consistent with the recommendations identified in the City of Olympia West
22 Bay Environmental Restoration [Plan]", and attaches a copy of the Plan to the Agreement. The
23 Development Agreement then goes on to approve the conceptual site plan; a two-pronged
24 phasing of site development including shoreline restoration in each phase; a three-pronged

1 phasing of building construction; a vesting of development regulations and a vesting of impact
2 fees to building phases.

3 Coalition argues that the Development Agreement's provisions for vesting and phasing
4 are sufficient enough on their own to warrant fuller environmental review. I respectfully
5 disagree. These provisions of the Development Agreement are expressly authorized by law.
6 RCW 36.70B.170(3). As earlier noted, the Project is a mix of uses that are permitted uses in the
7 site's current zoning designation and its Shoreline Environmental Designation, and are also
8 consistent with the City's Comprehensive Plan and its Land Use Map. The Development
9 Agreement does not allow for anything currently not allowed under the City's Development
10 Regulations. Nonetheless, Coalition argues that more intensive environmental review should
11 occur at this stage to examine possible future changes to development regulations, zoning
12 designations, shoreline designations, and comprehensive plans that might occur over the course
13 of this fifteen-year Development Agreement. But Coalition has not cited to any legal authority
14 for this argument and it is difficult to envision how such review would occur.

15 The more substantive argument raised by Coalition is that the Development Agreement's
16 inclusion of shoreline restoration as envisioned in the West Bay Restoration Plan requires fuller
17 environmental review. Put slightly differently, does the Development Agreement contain an
18 assurance from the City to West Bay that, if it satisfies the shoreline restoration requirements
19 contained in the Restoration Plan, the City will not ask for any additional shoreline restoration?
20 If the Development Agreement serves as such an assurance it has significant environmental
21 consequences requiring closer review in accordance with *Alpine Lakes*.

22 As noted early on, the West Bay Restoration Plan has not undergone SEPA review nor is
23 it adopted by reference in the City's most recent SMP or Comprehensive Plan (both of which
24 have undergone SEPA review). To date the environmental impacts of the Restoration Plan have
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1 not been analyzed. The fact that the Restoration Plan is a noble and well intended effort to
2 restore the ecology of West Bay does not exempt it from SEPA review. "Even proposals
3 intended to protect or improve the environment may require an EIS. SEPA regulations do not
4 allow Threshold Determinations to be made by balancing the potential "good/bad" effects of a
5 proposal." *Alpine Lakes* at 15. Therefore, if the Development Agreement can be construed as
6 assuring West Bay of no greater shoreline restoration than is found in the Plan, this assurance
7 triggers heightened environmental review.

8 I conclude that the Development Agreement does not contain any such assurance. Both
9 the City and West Bay acknowledge that the Restoration Plan merely serves as a guide, and that
10 the Development Agreement makes no assurance that the City will not demand greater shoreline
11 restoration as part of any development. Therefore, and unlike *Alpine Lakes*, the Development
12 Agreement does not serve to limit future substantive environmental review of the Project's
13 shoreline restoration.

14 In summary, had the Development Agreement not incorporated the West Bay Restoration
15 Plan it would have been far easier to deny Coalition's Motion for Summary Judgment. In that
16 case it would simply have been a matter of concluding that the "Proposal" was the Development
17 Agreement, and that the Development Agreement merely provided for phasing and vesting as
18 expressly allowed by law. The incorporation of the West Bay Restoration Plan into the
19 Development Agreement significantly alters the analysis and requires a determination as to
20 whether it effectively establishes a maximum requirement for shoreline restoration without the
21 benefit of substantive SEPA review, not unlike that found in *Alpine Lakes*. I conclude that the
22 Development Agreement does not establish a maximum requirement for shorelines restoration
23 and that *Alpine Lakes* is therefore not applicable.

24 I therefore make the following:
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2. Any Conclusions of Law contained in the previous Background or Analysis

3. There are no material issues of fact and the matter may be resolved by summary judgment.

5. On appeal, the City's Threshold Determination is accorded substantial weight. The Hearing Examiner may not substitute his 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.

7. Development agreements are authorized by law and are expressly authorized to include mitigation measures, project phasing and vesting. RCW 36.70B.170.

9. The City's Development Regulations allow for development agreements and require that they be approved by the City Council prior to consideration of any related project application. RCW 18.53.040.

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10. To the extent that the Development Agreement between the City and West Bay approves the conceptual site plan, allows for phasing of site development and construction, and assures vesting to Development Regulations, it is merely the adoption of an agreement that allows for consideration of possible development proposals in the future, and does not actually approve some level of development.

11. If the incorporation of the West Bay Restoration Plan into the Development Agreement served as an assured maximum requirement of shorelines restoration for the Project, such assurance would require fuller environmental review. *Alpine Lakes*.

12. The incorporation of the Restoration Plan into the Development Agreement is not intended to provide such assurance nor do either the City or West Bay interpret it in such a manner. To the contrary, the Development Agreement does not preclude the City from demanding increased shoreline restoration beyond what is proposed in the Restoration Plan. The Restoration Plan is incorporated into the Development Agreement to serve as a guide, not as any assured level of restoration.

13. Even with the incorporation of the Restoration Plan into the Development Agreement, it remains the adoption of an agreement that allows consideration of possible development proposals in the future, and is not the final action of the City approving some level of development.

ORDER

Now, therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Appellant's Motion for Summary Judgment is **denied**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Respondents' Cross-Motion for Summary Judgment is **granted**.

1 DATED this 17 day of February, 2021.



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4 Mark C. Scheibmeir
City of Olympia Hearing Examiner