

**BEFORE THE HEARING EXAMINER  
FOR CITY OF REDMOND**

In the Matter of the Appeal of	)	NO. SEPA-2015-01939
	)	
	)	
<b>Irina Berger</b>	)	
	)	<b>Berger SEPA Appeal</b>
	)	
	)	
of the January 29, 2016 Determination of	)	
Non-Significance for the	)	<b><u>RULING GRANTING APPLICANT'S</u></b>
Redmond City Center project at	)	<b><u>MOTION TO DISMISS</u></b>
16135 NE 85th Street	)	
_____	)	

Irina Berger filed an appeal of the determination of non-significance (DNS) issued January 29, 2016 (file no. SEPA-2015-01939) in the Redmond Technical Committee review of the Redmond City Center project (LAND-2013-01989, the project). The project would build a two tower, nine story mixed use development at 16135 NE 85th Street in downtown Redmond. Improvements would include approximately 240 dwelling units, 25,000 square feet of retail, and 83,000 square feet of office space with utilities and infrastructure at the site of the former downtown post office. The appeal of the DNS was timely filed on or before February 12, 2016.

The appeal identified the following four alleged errors in the DNS:

1. Building is very high for area and TQS zoning codes of city.
2. High building will block light to close building changing live conditions of building occupants and decrease property values.
3. High number of units will increase traffic in already high traffic area, increase pollution in area.
4. High building will change condition for vegetation around, decreasing amount of trees in area.

Because Redmond Zoning Code (RZC) 21.76.050.E.6 requires that appeals of the DNS and Notice of Decision for the project to be consolidated, the DNS appeal was held pending completion of the appeal period on the Notice of Decision of the Technical Committee's decision on the required land use approval. The Technical Committee's Notice of Decision approving the project (LAND-2013-01989) was issued February 18, 2016. Ms. Berger did not appeal the Notice of Decision.

The undersigned was notified of the appeal and requested the parties identify a date for pre-hearing conference to clarify issues before the April 20, 2016 hearing date. The Appellant indicated she was not available to attend a pre-hearing conference. In lieu of an in-person

meeting, an order was issued March 14, 2016 setting the hearing date and establishing a schedule for pre-hearing submission of witness and exhibit lists, dispositive motions, pre-hearing briefing, and the exhibits themselves.

On March 31, 2016, counsel for the Applicant submitted a motion to dismiss the DNS appeal in its entirety. The motion to dismiss argued the following:

1. Appellant failed to provide statement describing standing to appeal;
2. Appellant failed to comment during applicable comment period;
3. Appellant failed to provide a concise statement of each alleged error and failed to explain how the City's decision to issue a DNS fails to meet applicable decision criteria; and
4. The Hearing Examiner lacks jurisdiction to hear two of the four issue statements.

A second pre-hearing order was issued April 1, 2016 requesting responses from the Appellant and the City on the motion to dismiss, and allowing a reply from the Applicant. This order stipulated that the April 4, 2016 witness and exhibit list deadline remained in effect, in the event that the motion was denied or otherwise taken under advisement until after hearing on the merits. This second order established April 11, 2016 as the date the ruling on the motion to dismiss would be issued.

The Appellant declined to submit a witness and exhibit list on April 4, 2016, despite both orders. The Appellant, pro se, and the Technical Committee, via counsel, submitted timely responses to the motion, and the Applicant submitted a timely reply consistent with the April 1, 2016 order.

### **Jurisdiction**

The Hearing Examiner is authorized to hear and decide appeals of environmental threshold determinations by the Technical Committee pursuant to RZC 21.76.050.G.

Pursuant to Hearing Examiner Rule of Procedure V.2.A.g, the Hearing Examiner has the authority to consider and rule upon all procedural and other motions appropriate to the proceeding.

### **SEPA Appeal Provisions**

Pursuant to RZC 21.70.190, the City of Redmond adopted WAC 197-11-680, with the following clarifications:

- A. Any interested person may appeal a threshold determination, adequacy of a final EIS, and the conditions or denials of a requested action made by a nonelected City official based on SEPA. No other SEPA appeals shall be allowed.
- B. All appeals must be in writing and must be submitted on an appeal form approved by the SEPA Responsible Official. The appeal form must set forth:
  1. Facts demonstrating that the person is adversely affected by the decision;
  2. A concise statement identifying each alleged error of fact, law, or procedure which the appellant alleges justify overturning the decision;
  3. The specific relief requested; and
  4. Any other information reasonably necessary to make a decision on the appeal.

## **Discussion**

### **Standing**

The Applicant argued that the Appellant did not provide facts demonstrating standing, in that she had neither submitted comments on the project after the January 6, 2016 notice of application, nor had identified how she personally would be adversely affected by the impacts listed in the appeal.

In her response to the motion, the Appellant did not contest the assertion that she had not submitted comments, noting only that there was no comment period provided on the DNS.<sup>1</sup> There is no evidence that Appellant submitted comments in response to the notice of application.

It is true that the Appellant left blank the portion of the appeal form requiring a statement identifying the basis of standing. Without discussion, the Appellant gave an address of 16275 NE 85th Street, which location abuts the project's site. It is presumed the Appellant resides near to and/or has a view of the proposed project and on that basis asserts interest.

In Redmond SEPA appeals, RZC 21.70.190.A confers standing on any "interested person" to challenge the adequacy of an environmental threshold determination. "Interested person" is not defined in the RZC or the WAC's SEPA definitions provisions. The Hearing Examiner rules of procedure, adopted pursuant to RMC 4.28.060, define interested person as: "any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before the Hearing Examiner." Any challenge to standing based on an alleged failure of the Appellant to meet the "interested person" standard requires reference to authority outside the City and State codes governing appeals of DNSs, which would be case law.

As argued by the Applicant, it is well established by the courts of Washington that in order to have standing pursuant to SEPA, an appellant must 1) assert impairment to an interest within the "zone of interests" regulated by SEPA and must 2) allege facts capable of showing "injury in fact." In order to establish injury in fact, an appellant must allege facts that, if true, would show he or she would be "specifically and perceptibly harmed" by the proposed action in a manner different from the public in general.<sup>2</sup> The requirement of RZC 21.70.190.B.1 to submit on the appeal form "facts demonstrating that the person is adversely affected by the decision" mirrors this requirement to show injury in fact, which has been acknowledged by Washington courts to be fundamental to SEPA standing.

In answer to this question on the form, the Appellant stated:

Propose building is very high for Redmond city. It will block light for surrounding building including Fraser Court Building. This building plan to have significant units number, which will affect traffic in area. TQS zoning for area not allowed buildings

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<sup>1</sup> Despite stating it was issued under WAC 197-11-340(2), the DNS stated there was no comment period provided after its issuance (despite the rules established requiring comments at 197-11-340(2)(b) through (f)).

<sup>2</sup> *Trepanier v. City of Everett*, 64 Wn. App. 380, 382 (1992); *Concerned Olympia Residents for the Environment v. City of Olympia*, 33 Wn. App. 667, 684 (1983).

higher than 6 stores. Unusually high building for area will damage consistency of town building setting, and affect city and area appeal and beauty and decrease value of area properties. (*sic*)

This statement alleges adverse effects in terms of reduced solar exposure for surrounding buildings, increased traffic, development inconsistent in appearance with existing neighborhood, and impacts to property values. Of these, consistency of appearance with existing development and impacts property values are not interests regulated by SEPA and cannot be challenged in the context of an appeal of the DNS.

Traffic impacts and solar exposure reduction, asserted in both the appeal and the Appellant's response to the motion to dismiss, may be issues within the zone of interests regulated by SEPA; however, the Appellant alleges these impacts generally as to all surrounding development. There are no facts alleged capable of showing that the Appellant is personally harmed by the project in a manner that is unique when compared to the impacts that would be experienced by all surrounding residents or by the public at large. The Appellant arguably failed to demonstrate SEPA standing.

#### *Issues Outside the Proper Scope of a SEPA Appeal*

The Appellant challenges the consistency of the nine-story project with the development standards of the underlying zoning district. However, she did not file an appeal of the Notice of Decision issued February 18, 2016. Zoning consistency is not an issue within the scope of interests regulated by SEPA and if the appeal were to go forward, this issue would be excluded.

In the motion to dismiss, counsel for the Applicant argued that impacts to vegetation, as asserted in the appeal, in fact relate to a tree exception request that was submitted by the Applicant and approved administratively by the City. In Redmond, compliance with the City's tree preservation ordinance is reviewed through the land use permitting process rather than under SEPA. The Applicant argued that these vegetation impacts are therefore not properly before the Hearing Examiner in an appeal of the DNS. However, impacts to vegetation are properly reviewed during the environmental threshold determination process; there is a section addressing vegetation on the environmental checklist. The project's impacts to vegetation could be considered in a SEPA appeal; however, the Appellant failed to assert any personal adverse effects from impacts to vegetation and has not established standing with regard to vegetation impacts.

#### *Failure to Allege Errors of Fact, Law, or Procedure in the Technical Committee's SEPA Review*

Finally, the motion to dismiss contended that the Appellant did not identify any errors in the Technical Committee's review of the environmental checklist or its DNS issuance. To the extent that an appellant should be given the benefit of the doubt as to properly stating claims in an appeal and given the paucity of information provided in the appeal itself, the Examiner intentionally scheduled the ruling on the motion to dismiss after the witness and exhibit lists were due to be submitted on April 4, 2016, in order to provide an additional opportunity for the Appellant to identify how the issues stated in the appeal could be argued as SEPA challenges at hearing. The Appellant declined to submit witness and exhibit lists. The materials submitted to date do not identify specific alleged errors in the City's compliance with SEPA regulations

procedurally or substantively. Such errors must be found in order to conclude the DNS was issued in error.

**Ruling**

1. The Applicant's motion to dismiss is granted. The Appellant did not appeal the February 18, 2016 Notice of Decision; she cannot now challenge the project approval outside the scope of the DNS appeal. Issues asserted related to consistency with zoning, impacts to neighborhood character, and property values are not within the "zone of interests" regulated by SEPA; no relief can be granted on these issues in the context of a DNS appeal. To the extent that adverse impacts alleged are capable of being found to be within the "zone of interests" regulated by SEPA (traffic impacts, solar exposure reduction, vegetation impacts), the Appellant did not allege specific and perceptible harm that she would experience as a result of approval as distinguished from project impacts to all surrounding residents and to the public at large. Information in the appeal form and in the Appellant's response to the motion to dismiss together do not show alleged injury in fact, and therefore do not comply with the requirement of RZC 21.70.190.B.1. The Appellant has not shown she has standing.
2. The appeal is dismissed. The hearing scheduled for April 20, 2016 is canceled, as are all further submittal requirements of the March 14, 2016 pre-hearing order setting hearing and pre-hearing schedule.

**Decided** April 11, 2016.

By:



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Sharon A. Rice  
Redmond Hearing Examiner

Note: Decisions of the hearing examiner in Type II appeals of Technical Committee decisions are appealable to the City Council pursuant to RZC 21.76.060.E.4 and RZC 21.76.060.M.