BEFORE THE HEARING EXAMINER FOR THE CITY OF KENMORE

RE: Patrick O'Brien SEPA and Shoreline Exemption Appeal PRJ23-0025/SEPA23-0027	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Overview

The appeals are dismissed for want of jurisdiction. The Kenmore Municipal Code is unequivocally clear that the examiner has no authority to consider appeals of shoreline exemption decisions or associated State Environmental Policy Act (SEPA) determinations.

The findings and conclusions sections of this decision, composed of the first seven pages, address the grounds for dismissal. The remaining portions of the decision, excluding the final "Decision" section, address some of the concerns expressed by the Appellants during the hearing process. Except as deemed relevant by a reviewing court, these additional comments are not intended to serve as part of the decision.

The complexities of local review are unavoidable. That is why people often hire attorneys to litigate local land use appeals when they can afford them. Nonetheless every effort should be made to make the process as accessible and understandable to citizens as possible while at the same time avoiding the appearance of favoring one party over another by helping them make their case. Despite its complexities local review still provides a more cost effective and expeditious resolution of land use issues than resort to the courts. An important part of maintaining that accessibility and cost-effectiveness is keeping hearing participants and the public in general informed on how and why the review process functions as it does. Much of the "extra" information in this decision has already been shared with the parties to the extent that fairness and time permitted. A lot of that information is

repeated here so that anyone having questions about the process of this appeal has easy access to the necessary information.

Testimony

Oral argument on the Applicant's Motion to Dismiss was taken in a virtual hearing held on July 18, 2024. A computer-generated transcript of the hearing has been prepared to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A. Since the transcript is computer generated, it is not 100% accurate, but does provide a useful indication of what testimony was presented during the hearing.

Evidence Relied Upon

The evidence relied upon by the Examiner for the findings and conclusions of this decision were as follows:

June 17, 2024 Appeal of MDNS SEPA23-0027 by Patrick O'Brien et. al.

Applicant's July 8, 2024 Motion to Dismiss

Applicant's July 16, 2024 Reply to Motion to Dismiss

Email from Patrick O'Brien dated July 15, 2024[1].

Email from Maura Query dated July 18, 2024.

Email from Patrick O'Brien dated July 19, 2024.

Email from Curtis Chambers dated July 22, 2024

Email from Patrick O'Brien dated July 23, 2024

Email from Patrick O'Brien dated July 24, 2024

Email from Patrick O'Brien dated July 27, 2024

Email from Rachel Mazur dated July 31, 2024

[1] Mr. O'Brien did not include all of Applicant's attorneys in this email as required by the prehearing order. The Examiner forwarded the email to all parties required by the prehearing order on July 18, 2024 and provided additional opportunity for comment.

Email from Curtis Chambers dated July 31, 2024

Findings of Fact

Procedural:

1. Appellant. As identified in Section A of the Appellant's Appeal, the Appellants are composed of Patrick O'Brien acting for Concerned Citizen Partners and Citizens after Pollutants Source. The Appellant has failed to show that Janet Hays is a member of Concerned Citizen Partners or Citizens after Pollutants Source.

As outlined in the Conclusions of Law below, a major issue regarding whether the Appellant has standing[2] to bring this appeal is whether Janet Hays was a member of Concerned Citizen Partners or Citizens after Pollutants Source when she submitted comments on the SEPA decision under appeal. The Appellant was first put on notice that its standing to file the appeal was at issue in the City's motion to dismiss dated July 8, 2024. That motion alleged two grounds for dismissal. One of those grounds was that the Appellant had failed to provide any timely comment on the SEPA determination made for the proposal. The Second Revised Prehearing Order set a response deadline of July 15, 2024 to the Applicant's motion. The Appellant sent an email on July 15, 2024. The email was not labelled as a response to the Applicant's motion to dismiss. The email involved correspondence between counsel for Ms. Hays and the City regarding the partial acceptance of the City of SEPA comments submitted by Ms. Hays.

At the July 18, 2024 dismissal hearing the examiner requested to have copies of SEPA comments provided by Janet Hays. The City sent out a link on the same day of hearing. The link included a July 3, 2023 email from Janet Hays in which she sated "*I am making a comment as a Citizen residing in Kenmore since 1998…*" In that comment Ms. Hayes did not identify herself as a member of or state she was speaking on behalf of Concerned Citizen Partners or Citizens after Pollutants Source.

After close of the July 18, 2024 hearing the Examiner examined the July 3, 2023 email from Ms. Hayes and concluded that the comment from Ms. Hays qualified as a SEPA comment. However, there was no information in the record as to whether Ms. Hay's comment qualified as a comment from the Appellant, i.e. Concerned Citizen Partners or Citizens after Pollutants Source. Given this lack of information, the Appellant was given another opportunity to defend itself against the Applicant's failure to exhaust argument by email dated July 22, 2024 as follows:

> ***Basis for Needing More Information***
>
> *The record is incomplete on Janet Hay's relationship to the Appellant. From the information provided by the City on July 18, 2024, it's clear Ms. Hays submitted a timely SEPA comment on July 3, 2024. Mr. O'Brien filed his appeal on behalf of*

[2] "Standing" in simplified terms means that a party has the right to file an appeal.

Concerned Citizen Partners and Citizens After Pollutants Source. It's unknown whether Ms. Hay's was a member of either of these two organizations when she commented.

If Mr. O'Brien would like to present information on the connection of Ms. Hays to Concerned Citizen Partners or Citizens After Pollutants Source, he may do so by 5 pm, July 25, 2024. Useful information would be when the two organizations were formed, whether they're registered with the state as nonprofit organizations, the organizational structure of the two organizations, membership size and when Ms. Hays became a member of either one. The City and Applicant may provide a response by 5 pm August 1, 2024.

Mr. O'Brien submitted an email dated July 24, 2024 labelled as a response to the Examiner's January 22, 2024 request for information. The email provided no information on Ms. Hays' relationship to Concerned Citizen Partners or Citizens after Pollutants Source. The Appellant has presented no evidence that Ms. Hays was commenting on behalf of either of those organizations when she presented her July 3, 2024 SEPA comments or that she was a member of either organization at that time.

2. Decision Under Appeal. The decision under appeal is Mitigated Determination of Non-Significance for SEPA23-0027 (MDNS). The MDNS assessed the impacts of a proposed dredging project in Lake Washington being reviewed under application for a shoreline substantial development exemption. The Applicant for the shoreline exemption was Glacier Northwest Inc.

3. Motion to Dismiss. The Applicant submitted the subject motion for dismissal on July 8, 2024. The motion argues two grounds for dismissal: (1) the Kenmore Municipal Code (KMC) does not authorize the Examiner to hear appeals of shoreline exemptions and associated SEPA review; and (2) the Appellants failed to submit timely SEPA comment. The Applicant asserted that the failure to comments serves as a failure to exhaust administrative remedies that deprives them of standing to file the appeal.

4. Hearing. Oral Argument on the Applicant's motion to dismiss was held on July 18, 2024. At the hearing the Appellants identified that Janet Hayes may have made timely SEPA comments on the project under appeal. The Examiner left the record open through August 1, 2024 as outlined in Finding of Fact No. 1 to address Ms. Hays' association with the Appellants of this appeal.

Conclusions of Law

1. Authority. The Examiner has no jurisdiction to consider the appeal filed by Mr. O'Brien. This lack of jurisdiction is based upon two grounds, specifically (1) the KMC expressly provides that there is no appeal authority for shoreline exemptions and associated SEPA determinations, and (2) Mr.

O'Brien and the nonprofit organizations that he represents did not comment on the SEPA determination made for the proposal.

No Appellate Jurisdiction

The KMC is clear and straightforward about Examiner jurisdiction over appeals of shoreline exemptions and associated SEPA determinations. The Examiner has no such jurisdiction. KMC 19.25.020 classifies shoreline exemptions as Type 1 land use decisions. KMC 19.30.070A lists the permits types subject to Examiner appeal jurisdiction. Type 1 land use decisions are not one of them. KMC 19.35.160D provides that *"[t]here is no administrative appeal of a DNS, MDNS, or EIS adequacy associated with a Type 1 decision…*" This limitation on SEPA appeals is a necessary result of the WAC 197-11-680(3)(v) restriction that prohibits SEPA appeals that aren't joined with appeals of the underlying permit decision. Since Type 1 decisions aren't subject to Examiner appeal, it's not possible in Kenmore to file an appeal of an associated SEPA appeal while conforming to the joinder requirements of WAC 197-11-680(3)(v). The Appellants have identified no alternative reading of the KMC. There is no alternative reading available. The Appellants filed their appeal in the wrong forum.

It is recognized that the appeal statements to the decisions under review incorrectly identified that appeals should be filed with the hearing examiner. The appeal statement of the MNDS provides that the MDNS is subject to an appeal to the hearing examiner. Mr. O'Brien testified that the Appellants relied upon this appeal statement as guidance as to where to file their appeal. Unfortunately, City staff and the Examiner do not have the authority to waive or modify the appeal process adopted by the City Council. Administrative tribunals are creatures of the legislative body that creates them. *Lejeune v. Clallam City*., 64 Wn. App. 257, 270–71, 823 P.2d 1144 (1992); *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979); *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984). Their power is limited to that which the creating body grants. *Lejeune*, 64 Wn. App. At 270-71. The City Council has not given the hearing examiner the authority to assume jurisdiction over Type I decisions and associated SEPA determinations. This is particularly true for jurisdictional requirements. The courts won't recognize jurisdiction even if agreed upon by the parties, i.e. even if the City, Applicant and Appellant agreed to examiner jurisdiction, jurisdiction would still not be valid. *See Angelo Prop. Co. v. Hafiz*, 274 P.3d 1075 (Wash. Ct. App. 2012).

Appellant SEPA Comment Pre-Requisite to SEPA Appeal

The Appellants had the responsibility to submit timely SEPA comments as a condition of filing their SEPA appeal.

There is no Washington appellate court opinion that addresses the responsibly to timely comment on SEPA determinations as a prerequisite to filing a SEPA appeal. The closest that any legal authority comes to requiring public comment on administrative permits are rulings from state administrative tribunals that comment written SEPA comments must be provided to confer standing for SEPA appeals. The Pollution Control Hearings Board, the Shoreline Hearings Board and the Growth Management Hearings Board have all ruled that failure to comment during SEPA comments period deprived the appellants of standing to file their appeals. *Pacificorp v. City of Walla Walla*, 2014 WL 1390955 (Wash.Pol.Control Bd) at 8; *Brown v. Snohomish County*, SHB 06-035 (Order Granting Summary

Judgment, May 11, 2007); *Lowen Limited Family Partnership v. City of Seattle*, 2013 WL 5651357. (Wash.Central.Puget.Sd.Growth.Mgmt.Hrgs.Bd) at 4. A key consideration in all of these cases is that WAC 197-11-545(2) provides that *"[l]ack of comment by … members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis*."

The SEPA appellants have provided no legal authority contrary to the holdings of the Pollution Control Hearings Board, the Shoreline Hearings Board and the Growth Management Hearings Board. There is no rational basis to distinguish the legal conclusions of those administrative tribunals from those which should apply to hearing examiner review. As with the state review boards, WAC 197-11-545(2) as quoted above is found determinative on the obligation of the Appellants to submit timely SEPA review comments. Their failure to due so deprives them of the right to appeal.

Janet Hays Comments Doesn't Confer Standing to Appellants

SEPA comments submitted by Janet Hays do not qualify as timely SEPA comments made on behalf of the Appellants.

As outlined in Finding of Fact No. 1, during oral argument on the Applicant's motion to dismiss the Appellant asserted that Janet Hays submitted timely SEPA comments. The Examiner left the record open to give the Appellant the opportunity to identify whether Ms. Hays was a member of the nonprofit organizations that serve as Appellants in this proceeding. The Appellant failed to provide any information pertinent to Ms. Hays association with the two organizations identified as Appellants by Mr. O'Brien in his appeal.

The questions posed by the examiner to Appellants were designed to them identify whether Ms. Hays comments could confer standing to Appellants under the judicial doctrine of associational standing. For the Appellant organizations to establish standing through its members under the associational standing doctrine, the organizations must establish that (1) the members of the organization would otherwise would have standing to sue on their own; (2) the interests that the organizations seek to protect are germane to its purpose; and (3) neither the claim nor the relief requires the participation of the organization's individual members. *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 192 Wn. App. 621, 639 (2016).

To establish associational standing as outlined above, the prerequisite to it all is establishing that the person acting on behalf of the organization is actually a member. That was the purpose of the inquiries outlined in Finding of Fact No. 1. If the Appellant had submitted some credible evidence establishing that Ms. Hays was a member of the Appellant organizations when she submitted her SEPA comments, the Examiner would have given them ample opportunity to demonstrate meeting the requirements for associational standing. The Appellants instead presented no information pertinent to the Examiner's inquiries. Without any evidence establishing that Ms. Hays was a member when she submitted her comments, there is no basis to find standing on the basis of associational standing. The Appellants have not identified any Appellant or member of an Appellant organization who made timely SEPA comments for the MDNS under appeal. Failure to submit timely SEPA comments therefore qualifies

as a second and alternative basis for dismissing the SEPA appeal as requested in the Applicant's motion to dismiss[3].

Appellant Objectives – Soil Testing and Exhibit Admission

This section and the ones that follow (other than the "Decision" section) are not to be construed as findings or conclusions of this decision.

The Appellants apparently feel their objectives in this appeal have not been properly addressed in this process. Ultimately, since the Examiner has no jurisdiction to hear there is nothing the examiner could have done to address the Appellants' objectives. However, to prevent any misunderstandings on the fairness of the review process an explanation of how the process works is provided below.

One primary objective of the Appellants was to have some documentation on the water quality impacts of the proposal entered into the record. At random times outside of the process specified in the prehearing order the Appellants sought to have this documentation admitted into the record. Some of those documents were not accepted by City staff as timely for SEPA comment. The Appellants apparently believe the Examiner was complicit in some kind of effort to suppress consideration of the documents.

Submission of the appeal documents was clearly addressed in the prehearing order. The prehearing order for this case was only three pages long, one page of which was limited to providing contact information for the hearing parties. The hearing schedule identified that on July 26, 2024 witness and exhibit lists were due along with the exhibits to be presented by the parties. Section B of the prehearing order identified how to put together a witness and exhibit list. All the Appellants had to do to get their documents admitted was prepare a witness and exhibit list and then submit that along with the documents they wished entered into the record. At the beginning of the appeal hearing scheduled for July 30, 2024 the Examiner would then have asked if any party had any objections over entry of the exhibits listed in the witness and exhibit list. If the Appellants' documents were relevant to the appeal issues they raised in their appeal, the documents very likely would have been admitted. There was no conspiracy to suppress the Appellants' documents. The Appellants just had to follow the simple admission process laid out in the prehearing order.

The Appellants apparently believed that having their documents recognized beyond the process specified in the prehearing order would somehow create some legal significance for those documents. Any documents submitted to City staff as part of the SEPA review process likely made those documents public records of the City subject to state retention and disclosure laws. Without jurisdiction to hear

[3] Failure to comment only serves to deprive standing for filing a SEPA appeal. As identified elsewhere in this Decision, under currently available legal authority failure to comment doesn't deprive standing to file an appeal of a shoreline exemption. The Appellants June 17, 2024 written appeal only expressly identifies the SEPA MDNS as subject to appeal (Section B) but then seeks reversal of the shoreline exemption as one of its remedies (Section E). The issue of whether the Appellants have properly filed an appeal against the shoreline exemption hasn't been raised in this proceeding. In any event, if the Appellants are able to file an untimely judicial appeal they will be able to make clear at that time that their appeal includes the shoreline exemption.

the appeal, recognition by the examiner of those documents would accomplish nothing more. Without jurisdiction, filing those documents with the examiner would have as much legal significance as filing them with the traffic court of the City of Los Angeles.

The other primary objective raised by the Appellants was soil testing of the project site. As far as can be discerned from the Appellants' requests, they wanted the Applicant or someone else to do the soil testing. As explained by email to the Appellants, that issue would be addressed if and when it was first determined that the examiner had jurisdiction to hear the appeal. In normal course, soils testing would be something that would be required if the Appellants prevailed on their SEPA appeal as a result of the appeal hearing and the testing was found necessary for a complete environmental review. Requiring soils testing prior to the appeal hearing is a novel request that hasn't been asked of this examiner or possibly any other. There is no court opinion or regulation that directly authorizes the examiner to make such a requirement. However, the examiner certainly would have been open to consideration of any legal authority presented by the Appellants to substantiate such a request. In the absence of any legal authority to compel the testing, the Appellants likely would have had to do the testing themselves a their own expense if they wanted to have it done prior to the hearing.

It is agreed that examiners should have more authority to compel discovery such as soil testing. There is currently no statute that gives examiners direct authority to compel discovery such as depositions, interrogatories or even site visits. In lieu of depositions and interrogatories local land use litigants instead usually rely upon their opportunity for cross-examination at the appeal hearing. If significant new information arises from cross-examination the hearing can then be continued to give time for the litigants to address that information. In some cases the parties set up mutually agreeable ground rules for depositions and/or interrogatories. Record requests can be made for public documents. Although examiner authority has its limitations, there are strategies available for acquiring necessary information prior to or at a hearing. As noted in examiner emails, the Examiner was happy to consider options for the information sought by the Appellants if and when it was determined the examiner had jurisdiction to review the case.

Examiner Communications

The Appellant often submitted several emails per week attempting to engage in an on-going debate with the Examiner. To maintain the integrity of the review process, the Examiner could not respond to most of those emails. This had nothing to do with the merits of the Appellants' appeal. Rather, as explained in an examiner email the type of exchange pursued by the Appellant was not consistent with the requirements of the prehearing order or the functions and responsibilities attaching to the conduct of a quasi-judicial proceeding.

Pro se citizen appeals (excluding code enforcement) are relatively rare. Kenmore has had an unusually large number of them simply by having three or four of them filed in the last eight years. In the one or two dozen pro se appeals heard by the examiner, all of the citizen appellants[4] except the one in this

[4] The examiner doesn't have a complete recollection of how many citizen appeals used the prehearing order format of this appeal. Probably in the range of somewhere between 6 and 20. The examiner has conducted over 2,000 hearings.

appeal had no trouble following the requirements of the prehearing orders. The prehearing order of this appeal as in all others is a simple document just three pages long with one page composed of contact information and another the hearing schedule. The order identified who must be included in all email communications. The order set out a motion process defining the times that requests could be made and when opposing parties could contest them. The order also identified when and how exhibits could be entered into the record.

The Appellant chose to ignore the requirements of the prehearing order in its entirety. The Appellant regularly excluded necessary parties from his email communications despite multiple warnings from the examiner and City to stop that practice. He repeatedly requested admission of documents into the record at random times when the prehearing order laid out a simple witness/exhibit list process for easy admission. He regularly attempted to engage the examiner in an on-going debate on the merits of his appeal and related requests, rarely following the motion filing/response/reply process laid out in the prehearing order.

The Appellant's zealousness to his cause and belief in holding public officials accountable is all certainly commendable. However in quasi-judicial proceedings such as this one there is also an associated responsibility to the other parties. Hearing rules must be followed so all parties have a fair opportunity to present their case and defend themselves against opposing view points. Engaging the decision maker in an on-going debate as pursued by the Appellants puts the other parties at an unfair disadvantage. That practice forces the other parties to regularly monitor randomly timed emails to ensure that decisions aren't made that may affect their case. It runs the risk of generating examiner comments that illegally prejudge issues that shouldn't be resolved until the scheduled appeal hearing has been completed. The examiner is required to be open-minded about the merits of the case until the appeal hearing is closed. The integrity of the process is put at risk by the type of communications pursued by the Appellant. The examiner responded to the Appellant's emails to the extent necessary to prevent any reasonable confusion about the hearing process. Beyond that the emails of the Appellant that were unauthorized and/or irrelevant had to be ignored to maintain a fair review process.

Although the examiner was not in a position to regularly respond to the numerous emails submitted by the Appellants, he was always on the lookout for any basic misunderstandings exhibited by the Appellants that could deprive them of an opportunity to be heard. As previously noted, if the Examiner had jurisdiction he would have addressed the soil testing issue after the jurisdictional issue was resolved. With jurisdiction, admission of the Hays documents would likely have been accomplished with little difficulty if those documents were relevant. It was the hearing examiner that identified that the City's SEPA appeal statement was in error and that on that basis the Appellants may be able to file a late judicial appeal under the doctrine of equitable tolling. It was also the examiner who identified that the comments of Ms. Hays could confer standing upon the Appellants if she was a member of the Appellant organizations when she made her SEPA comments. It was the examiner who sua sponte left

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A small portion of those 2,000 hearings were land use appeals and a small portion of those appeals were filed by pro se citizens.

the record open to give the Appellants a second chance to establish that Ms. Hays conferred them standing.

HEARING EXAMINER SYSTEM BIAS

Mr. O'Brien has requested information about past examiner decisions. He has suggested that all examiner decisions rule in favor of the City because the examiner is paid by the city. Mr. O'Brien is free to make a records request to the City for the examiner's past decisions. There are only a handful of appeal issues that have been issued over the past eight years. Mr. O'Brien is free to make a records request with the City if he'd like to see them. Most if not all of those decisions likely have been resolved in favor of the City, with the fine in a code enforcement tree cutting case substantially reduced.

If a hearing examiner regularly rules against a City, the examiner or City staff aren't doing their job correctly or there are serious problems with the City's code. That is because City staff and the examiner have the same job when it concerns permit review. Specifically, the examiner and staff are tasked with applying the City's development regulation in the manner required by those regulations. That is not the objective of appellants, whether they be applicants or project opponents. For appellants, the code often serves as an obstacle to their objectives, whether that be protecting the community or making a greater profit. Hearing examiners have no authority to waive development standards on the sole basis that a development may be bad for a community. If the project meets permit criteria, it must be approved. If the examiner denies a project contrary to code, the courts will invalidate the decision, assess a large damages award against the City and require the project to move forward. City staff have the same obligation to follow code as the examiner. Given these circumstances, it should not be a surprise that hearing examiner decisions are often aligned with staff decisions.

Of course, not all code provisions are crystal clear and there can sometimes be legitimate differences of opinion as to how they should be applied. If it were possible to make codes undisputably clear for all situations there would be no need to pay lawyers to argue about what they mean. However, in those limited circumstances of code ambiguity, the examiner is required to provide deference to staff interpretations if the staff demonstrate that their interpretation is consistent with past code enforcement practices. *Ellensburg Cement Prods., Inc. v. Kittitas Cnty. & Homer L. (Louie) Gibson*, 317 P.3d 1037 (Wash. 2014)[5]. In essence, in the small number of appeal cases involving legitimate code ambiguity

[5] Mr. O'Brien has argued that deference is no longer due under the recently issued *Loper Bright Enters. V. Raimondo, Sec'y of Commerce*, US Supreme Court, No. 22-451. Loper is a US Supreme Court case applying the federal Administrative Procedures Act to federal agencies. The deference required by Washington courts is based upon RCW 36.70C.130(1)(b), which governs land use decisions of cities and counties and requires deference to local interpretation when "deference is due." It's possible that Washington courts may someday take the more conservative stance of the *Loper* opinion and change its current interpretation of RCW 36.70C.130(1)(b), but as the law stands now deference is due local interpretation when that interpretation is consistent with past practice.

where staff has applied the code in a consistent manner, the examiner is required to side with staff for interpretations that could go either way.

Beyond the deference required by the courts, staff's interpretation is also often the most compelling because it usually has the most experience in applying its code. Staff have often worked with the Planning Commission and City Council in adopting the code, have applied it in countless situations and usually have no reason to advocate anything but compliance with code. This experience and institutional knowledge gives staff the resources to make compelling arguments in the City's favor.

As to the fact that the City pays for examiner decisions, as a practical matter that likely has no influence and doesn't with the examiner of this case. Many experienced and reputable examiners are retained by dozens of cities. In the unlikely event that a city or county would actually terminate a contract because the examiner followed the law, that termination won't make much of a difference to the examiner's overall income. A greater concern to an examiner would be having his or her decision overturned on appeal. Examiners very rarely get overturned. It would undermine the contractual prospects of any examiner to have too many reversals. If income were to have any bearing on an examiner decision, the overriding concern would be to follow the law so that the examiner can boast at interviews that he or she rarely if ever gets reversed.

The irony of the Appellants' concern over impartiality is that hearing examiner systems on the west side of the mountains has become fairly universal because of hearing examiner impartiality. Presumably, the Appellants have asserted bias because they believe hearing examiners slant code interpretations as necessary to please their city/county clients. That type of bias can also work against a developer, where a local decision maker slants or ignores code standards to cater to political pressure against a project. Unfortunately, our state statutes and judicial opinions are biased in the sense that liability for making an incorrect decision for the most part only arises if the incorrect decision damages a developer. RCWD 64.40.020, for example, imposes liability for making decisions that are "arbitrary and capricious." This liability, however, only applies to permit applicants. Neighbors adversely affected by a bad land use decision rarely have any recourse to monetary damages for an incorrect decision. The only two published Washington appellate court decisions addressing land use damages claims were both multimillion dollar judgements rendered against municipalities for violating their code and bowing to local opposition against development projects. *See Westmark Development Corporation v. Burien*, 166 P.2d 813 (2007) (10.7 Million Dollar Judgment); *Maytown Sand and Gravel LLC v. Thurston County*, 198 Wn. App. 560 (2017) (12 Million Dollar Judgment).

If a City Council ignores the advice of counsel and makes a decision that is contrary to its code to appease its constituency, that can be construed as an intentional violation of the law that isn't covered by the City's insurance policy. That leaves the councilmembers potentially individually liable as well as the City government. As mentioned previously, the decision denying the application will then get reversed on judicial appeal and be approved anyway. City Councils understand that it's too late to engage in policy making once a development application is vested. At that point the code must be followed regardless of what the community may otherwise want. Hearing examiners serve the necessary role of applying the code as designed regardless of extraneous pressure for or against a project. The speculative loss of one contract amongst many has little pressure to bear on an examiner's

decision making process given the more direct interest in ensuring that the decision withstands a judicial appeal.

This appeal serves as a good example of how and why staff often prevails in appeals. The code for this appeal couldn't be any more clear on the fact that the Examiner has no authority to adjudicate the appeal. It's as close to a legal "slam dunk" as any legal issue could be in a decision making forum. The Appellants understandably couldn't even come up with a reason why the Examiner would have jurisdiction, because there is no legitimate reason available. The dismissal of this case ultimately favors staff and is yet another appeal resolved in their favor, but only because the examiner followed the law as he is required to do. An objective assessment of all of the Examiner's Kenmore decisions would lead to the same conclusion.

It is further instructive to compare the rulings in this matter with another ruling this same week for Bainbridge Island for a case in which the Appellants' own lawyers[6] are involved. *See Order Denying Motion to Dismiss*, Bainbridge Island, Guddat Building Permit. In that case the City Attorney and the Applicant joined in a motion to dismiss one of the consolidated appeals because it was allegedly filed one day late. Resolution of the issue depended upon whether the date of issuance of a shoreline exemption was the date it was emailed to the applicant or posted the next day on the City's website. The ruling found in favor of the Appellant and the City request to dismiss was denied. No deference was due the City's code interpretation because the issue hadn't come up before and the Appellant's argument was found more compelling.

In the same Bainbridge Island ruling, the examiner also addressed an Applicant argument that the appeal should be dismissed for reasons similar to those asserted in this case, that the Appellant had failed to comment on the shoreline exemption decision under appeal. Unlike in this case, that argument didn't justify dismissal because the examiner found no legal duty to comment on shoreline exemptions as a pre-requisite to filing an appeal. In this case a SEPA regulation requires comment for SEPA appeals and there are several state administrative tribunals that have ruled that failing to comment precludes a SEPA appeals. No such regulation or tribunal decisions require comment for shoreline exemptions. The examiner followed the law and the Appellants in Bainbridge Island have been permitted to continue with their appeal against the position of that City.

The Appellants' law firm notched another victory against a City a year ago. In that case Appellants' counsel persuaded the examiner to overturn a City staff decision approving the construction of a single-family home in a landslide hazard area. Appellants' counsel represented the adjoining landowners in

[6] The Appellants were not represented by counsel in this proceeding but did refer to prior exchanges with the City that did involve their counsel, specifically Claudia Newman of Bricklin & Newman LLP.

that appeal. Appellants' counsel can boast of many similar victories from the participation of that firm in several of the 2,000+ hearings conducted by the hearing examiner of this appeal.

Overall, cities often prevail in disputed appeals for the reasons outlined above. Ultimately, however, the final win/loss record for cities in hearing examiner review is reflective of what the law requires, not any other extraneous consideration.

Decision

Applicant's July 8, 2024 Motion to Dismiss is granted. The Examiner has no jurisdiction to hold a hearing or issue a decision on the June 17, 2024 appeal filed Patrick O'Brien et. al. of the SEPA23-0027 MDNS. The Appellants filed their appeal in the wrong forum and it cannot be considered by the City of Kenmore Hearing Examiner.

DATED this 15th day of August 2024.

City of Kenmore Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by Chapter 36.70C RCW. Appeal deadlines are short, and procedures strictly construed. Anyone wishing to file a judicial appeal of this decision should consult with an attorney to ensure that all procedural requirements are satisfied.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.