CITY OF SPOKANE VALLEY HEARING EXAMINER

Re: Appeal of SEPA Determination for EGR-2018-0074/SEPA-2018-0019 ROBERT PHELPS, Appellant, v. CITY OF SPOKANE VALLEY, Respondent, v. WHIPPLE CONSULTING ENGINEERS, Applicant.	**File No.: APP-2019-0002** CITY OF SPOKANE VALLEY'S PRE-HEARING BRIEF

The City of Spokane Valley (the "City"), by and through its attorney of record, Erik J. Lamb, submits this Pre-Hearing Brief in support of the City's issuance of a Mitigated Determination of Non-Significance.

I. INTRODUCTION

Dennis and Melissa Crapo (the "Owners"), along with Whipple Consulting Engineers (the "Applicant"), submitted an Engineered Grading (EGR-2018-0074) and Flood Plain Development

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

(FPD-2018-0002) permit application to the City on October 4, 2018, to place approximately 29,000 cubic yards of fill in 3.4 acres of the 5.86 acre site on parcel number 45333.1807 (the "Project") to allow it to be removed from the Special Flood Hazard Area (SFHA) through a Conditional Letter of Map Revision based on Fill (CLOMR-F) through the Federal Emergency Management Agency (FEMA). The Project is generally located west of the Y intersection of East Sands Road and South Bowdish Road (hereinafter "Subject Property").

After substantial review, receipt of agency and public comments, and imposition of several conditions to address a number of impacts from the Project, the City's Building and Planning Division issued a Mitigated Determination of Non-Significance (the "MDNS" or "SEP-2018-0019") for the Subject Property on April 19, 2019. On May 3, 2019, Albert Merkel (the "Appellant's Representative") submitted a timely appeal to the issuance of the MDNS on behalf of Robert Phelps (collectively with Appellant's Representative, the "Appellant"). However, the grading and floodplain permits could not be issued until receipt of the CLOMR-F from FEMA, which would have occurred outside of the standard appeal hearing period. Accordingly, to avoid an "orphaned" SEPA appeal, and to comply with RCW 43.21C.075(3)(b) and WAC 197-11-680(3)(a)(v), the Parties agreed in June of 2019 to continue the hearing until the underlying permits were issued so that the SEPA appeal hearing could be combined into one open record hearing. *See* Decl. E. Lamb, ¶¶3-4. Importantly, Appellant was specifically notified of the need to have a single consolidated open record hearing. Dec. E. Lamb ¶3. On December 11, 2019, FEMA granted CLOMR-F approval for the Subject Property.

On March 4, 2020, EGR-2018-0074 and FPD-2018-0002 were issued. On March 12, 2020, Appellant was given actual, written notice that the permits had been issued and was notified of the appeal period. *See* Email from Jenny Nickerson to Appellant, dated March 12, 2020 (Attached

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10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

Exhibit 1 to Decl. J. Nickerson). To ensure that there was no issue with timely notice, Appellant was given until March 26, 2020 to appeal EGR-2018-0074 and FPD-2018-0002. *See* Email from Jenny Nickerson to Appellant, dated March 16, 2020 (Attached Exhibit 1 to Decl. J. Nickerson). While the City generously allowed Appellant ample opportunity to appeal the underlying permits, Appellant chose not to appeal either EGR-2018-0074 or FPD-2018-0002. *See* Email from Appellant to Jenny Nickerson, dated March 26, 2020 (Attached Exhibit 1 to Decl. J. Nickerson). Those decisions are now final and cannot be reversed or modified at this time. Accordingly, the only item before the Hearing Examiner is the freestanding SEPA appeal. On May 5, 2020, Notice of Appeal Hearing Date was emailed to all parties, setting a hearing date of June 10, 2020.

II. STANDARD OF REVIEW

A challenge to a governmental decision under SEPA is to be reviewed under the "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 276 (1976). *See also Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wn. App. 787, 795 (2013). Under the "clearly erroneous" standard, a court will overturn an agency decision only if "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Norway Hill*, 87 Wn.2d at 274 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). An agency's decision to issue a MDNS is "accorded substantial weight." *Moss v. City of Bellingham*, 109 Wn. App. 6, 13-14 (2001). *See also* RCW 43.21C.090.

III. ARGUMENT

Appellant's appeal suffers from numerous fatal flaws and should be dismissed. As a threshold matter, Appellant failed to appeal the underlying grading and floodplain permits. Those permits are now final and cannot be further modified. As such there is no remedy through a separate stand-alone SEPA challenge and this appeal should be dismissed.

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10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

Further, under SEPA, only a threshold determination may be challenged, not the preparation and/or sufficiency of a checklist. Appellant's challenge in all three of its claims to the adequacy of the checklist is improper and thus the appeal should be dismissed. Finally, Appellant's substantive arguments fail because they do not identify a second proposal that should have been considered and do not identify how the City failed to address any significant adverse environmental impacts.

A. Appellant's failure to appeal the underlying permits has rendered the permits final and thus there is no remedy through a stand-alone SEPA appeal.

Appellant has no remedy through a stand-alone SEPA appeal to modify or challenge the final grading and floodplain permits which were not appealed. Thus, its appeal should be dismissed.

An appeal of a MDNS under SEPA must be combined with an appeal of the underlying governmental action into one consolidated, open record hearing. RCW 43.21C.075(3)(b); WAC 197-11-680(3)(a)(v). "[A] SEPA decision cannot be appealed without appealing the underlying land use decision." *Lakeside Indus. v. Thurston Cty.*, 119 Wn. App. 886, 901 (2004). The purpose of the linkage requirement is to "deny the existence of 'orphan' SEPA claims." *State v. Grays Harbor Cty.*, 122 Wn.2d 244, 251 (1993). This is because SEPA does not operate as a separate cause of action, but rather is tied to a specific underlying government action – i.e., the issuance of the grading and floodplain permits. RCW 43.21C.075; *see Quality Rock Prod. v. Thurston Cty.*, 139 Wn. App. 125, 140-41 (2007) (party who wants to appeal under SEPA must appeal both SEPA and the underlying governmental action). Further, the linkage requirement makes sense, because once the appeal period lapses without an appeal, a governmental permit becomes final and cannot be modified, challenged, or otherwise rescinded, even if it is illegal. *See Chelan Cty. v. Nykreim*,

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

146 Wn.2d 904 (2002) (land use decision not appealed within statutory period became final, even when the permit was issued illegally).

Here, the underlying governmental actions are the issuance of the grading and floodplain permits. Appellant has had ample opportunity to appeal those permits, but chose not to appeal those permits. First, Appellant was aware in June of 2019 of the need to conduct one consolidated, open record hearing. *See* Decl. E. Lamb ¶3. Next, Appellant was provided more than the standard fourteen days to appeal the permits after the permits were issued in March, 2020. *See* Decl. J. Nickerson ¶9 and Attached Exhibit 1 (providing actual notice of the issuance of the grading and floodplain permits); Decl. J. Nickerson ¶10 and Attached Exhibit 1 (email providing additional appeal time to ensure Appellant had a full 14 days to appeal the grading and floodplain permits). Yet despite all of the time, explanation, and notice, Appellant felt there was nothing in the permits to appeal and ultimately chose to not appeal them. Attached Exhibit 1 to Decl. J. Nickerson (when responding to appeal extension "I just heard from [Appellant's Representative], and he indicated he has nothing else to add at this time.").

The City provides a clear process for appealing permits, and Appellant is well aware of that process as shown by filing the SEPA appeal. SVMC 17.90.040. Floodplain and grading permits are Type I permits. SVMC 17.80.030. The issuance of a Type I permit is an administrative determination. SVMC 17.80.020(A). Importantly, a Type I permit is to be considered final the day after the appeal period expires, unless an appeal is filed. SVMC 17.90.020. *See South Hollywood Hills Citizens Ass'n v. King Cty.,* 101 Wn.2d 68, 73 (1984) ("The doctrine of exhaustion of administrative remedies is well established in Washington.").

Unfortunately for Appellant, despite the SEPA appeal, the permits, which are the underlying governmental action, were not challenged and have now become final, valid permits.

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10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

See Nykreim, 146 Wn.2d at 940. Thus, Appellant's challenge to the City's issuance of an MDNS must be dismissed since "a SEPA decision cannot be appealed without appealing the underlying land use decision." *Lakeside Indus.*, 119 Wn. App. at 901.

The failure to appeal the underlying permits renders this appeal moot. Even if the Hearing Examiner should find in favor of Appellant on the challenge to the MDNS, the permits are still a final determination and development may proceed. *See e.g., Durland v. San Juan Cty.*, 182 Wn.2d 55, 64-66 (2014) (no land use decision that may be subject to LUPA appeal was made when there is a process for administrative appeal but challengers failed to appeal a building permit); *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169 (2000) (failure to timely appeal a rezone bars a collateral challenge when opposing a project action, even if the rezone may have constituted impermissible urban growth outside of the boundaries); *Grays Harbor*, 122 Wn.2d at 249 (under SEPA, "if an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted *before* judicial review is sought"); *West v. Stahley*, 155 Wn. App. 691 (2010) (failure to timely appeal permit precluded LUPA challenge, even with a MDNS appeal case pending).

Appellant failed to timely appeal the permits and therefore failed to exhaust all administrative remedies – rendering the permits final.

B. Appellant's appeal should be dismissed because Appellant fails to raise a valid challenge to the MDNS in any of the claims.

Appellant's appeal must be dismissed since Appellant fails to raise a valid challenge to the MDNS. Critically, all three of Appellant's claims relate to the adequacy of the preparation of the SEPA Checklist rather than the issuance of the MDNS. Under SEPA, such a challenge in an administrative appeal is improper and should be dismissed.

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10210 E. Sprague Avenue
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(509) 720-5105 Phone
(509) 720-5095 Fax

Under WAC 197-11-680(3)(a)(iii), administrative appeals are limited to "review of a final threshold determination." The MDNS, and not the preparation of the environmental checklist, is the final threshold determination at issue. *See Boehm v. City of Vancouver*, 111 Wn. App. 711, 718 (2002) ("MDNS is an alternative threshold determination"). Appellant is challenging the sufficiency of the environmental checklist, not the issuance of the MDNS. Appellant claims that the "*Environmental Checklist* submitted by [Applicant] does not address the environmental impacts of the area where the Applicant intends to remove the 'fill' from." APP-2019-0002(3)(1) (emphasis added); *see also* APP-2019-0002(3)(2) (alleging that the "*Environmental Checklist*" demonstrates that Project is related to a greater planned proposal) (emphasis added); APP-2019-0002(3)(3) (alleging that the "*Environmental Checklist*" is insufficient) (emphasis added). The record, while full of claims challenging the SEPA Checklist, is devoid of any claims or challenges to the MDNS itself. By alleging that the checklist did not address the environmental impacts of the area where the fill is to be removed, but making no claims that an improper checklist has rendered the MDNS invalid, Appellant has failed to raise a valid challenging to a threshold determination.

The preparation of an environmental checklist is not "clearly erroneous," so long as relevant environmental factors are considered when making a threshold determination. *Indian Trail Property Owner's Ass'n v. City of Spokane,* 76 Wn. App. 430, 443 (1994); WAC 197-11-350. The City was presented with a SEPA Checklist that contained information reasonably sufficient to evaluate any potential environmental impact. Decl. M. Palanuik ¶4 and Attached Exhibit 1. Before issuing the MDNS, the City conducted a SEPA Checklist review which described the project's potential environmental impacts and listed out potential mitigation measures. Decl. M. Palanuik ¶6 and Attached Exhibit 2. The City also sent out the SEPA

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

Checklist to outside agencies, as well as to the public[1], for comments and reviewed those comments when issuing the MDNS. Decl. M. Palanuik ¶6. Based upon a review of the SEPA Checklist, and a consideration of the environmental factors in WAC 197-11-444, the City issued a MDNS for the Subject Property. Decl. M. Palanuik ¶7 and Attached Exhibit 2.

C. Appellant's appeal should be dismissed as there is no second proposal to be considered and the City considered all relevant factors in issuing the MDNS.

1. Claim 1 fails as the fill is not a part of a larger proposal and therefore the environmental impact from fill onto the Subject Property was adequately considered.

Appellant's first claim suggests that somehow the site where the fill will originate from was improperly excluded from the environmental review in the instant case. There is no factual or legal support and this claim should be dismissed.

SEPA requires that environmental review be conducted for a "proposal." A "proposal" means "a proposed action." It exists "at that stage in the development of an action when an agency is presented with an application, or has a goal…and the environmental effects can be meaningfully evaluated." WAC 197-11-784; *see also* WAC 197-11-055(2)(a). Parts of proposals must be considered together if they are "closely related". WAC 197-11-060(3)(b). Proposals are closely related if they "[c]annot or will not proceed unless the other proposals…are implemented simultaneously with them; or [a]re interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation." *Id.*

[1] The City received three public comments for the Project, one from Appellant and two from other individuals. The two comments not from Appellant raise issues that are not before the Hearing Examiner on review. The issues raised by Appellant are substantially similar to the issues raised by Appellant in this appeal and, for the reasons set forth in this brief, were not addressed or deemed appropriate for review in the issuance of the MDNS. *See* Del. M. Palaniuk ¶7.

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10210 E. Sprague Avenue
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(509) 720-5105 Phone
(509) 720-5095 Fax

Appellant has submitted no evidence that the Project and the fill source are so related as to be considered dependent upon each other. Appellant's sole "factual" support is reliance on the SEPA handbook. Yet the Handbook does not provide a "factual" basis supporting that the source of the fill must be combined with this Project. Rather, the Handbook simply provides direction in how to comply with SEPA when parts of a proposal are so closely related as to be one proposal. It does not explain what other project exists or how the source of the fill is somehow so related as to be part of this Project.

Instead, the City has only been presented with one application related to the Subject Property – to fill and grade the 3.4 acres removed from the SFHA. Decl. M. Palanuik ¶6. Applicant identified that the 'fill' would be coming from other construction sites generating structural material. *See* SEPA Checklist Part A(11). Yet this statement does not identify a part of a separate proposal that is "closely related" to this Project, or one that cannot be completed without this Project, or that this Project is somehow part of a larger single proposal. Rather, this statement identifies that fill exists from completion of other projects and the Applicant has determined that the current Project provides an opportunity to beneficially use that extra fill.

Other than the example stated in the SEPA Handbook, Appellant has failed to identify any statutory requirement that Applicant must address the environmental impacts at not just the Subject Property, but at the site from where the fill is being removed. This failure is especially true when Appellant has failed to identify that there are actions related to the Project at any location other than the Subject Property. If any requirement is placed upon the fill, it would be that the fill contain no hazardous material. Decl. M. Palanuik ¶8. Applicant has identified that an on-site geotechnical engineer will be getting the fill from a pre-approved source. *See* SEPA Checklist Part B(1)(e). Therefore, contrary to Appellant's contentions, the fill actually has been addressed in the

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

environmental checklist and the use of an on-site geotechnical engineer will mitigate any potential significant adverse environmental impact.

The current MDNS is distinguishable from the SEPA Handbook as the "fill-out site" is not a part of a larger proposal and there is no factual or legal basis to support this claim. As all relevant environmental factors were considered in its issuance, the MDNS should be upheld.

2. Claims 2 and 3 fail as the only proposal is to add fill and to remove a portion of the Subject Property from the floodplain map.

Claims 2 and 3 appear to argue the same issue that there is somehow a second "development" proposal that was not identified or considered under the MDNS. However, there is no factual or legal basis to support these claims and they should be dismissed.

SEPA requires that the City prepare a threshold determination and review a project "when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2). A proposal only exists when the City has been presented with an application or "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated." WAC 197-11-055(2)(a). *See also* WAC 197-11-784 (defining "proposal").

Specifically, Appellant is challenging a project review action. *See* WAC 197-11-704; SVMC 21.20.160 (adopting WAC 197-11-700 through 197-11-792). Project review is to "be used to make individual project decisions, not land use planning decisions." RCW 36.70A.470. It is to be site and project specific. *Lanzce G. Douglass, Inc. v. City of Spokane Valley,* 154 Wn. App. 408, 426 (2010). The only project presented to the City by Applicant is that of filling approximately 3.4 acres at the Subject Property, and therefore review should be specific to the Subject Property and identified projects related to the Subject Property.

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10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

To date, the only proposal the City has received from Applicant for the Subject Property is the grading and floodplain permits, which are covered under the relevant SEPA Checklist and MDNS as SEP-2018-0019. Decl. M. Palanuik ¶¶3, 9. The application materials note that Applicant is solely looking to remove 3.4 acres of a 5.86-acre site from the SFHA through a CLOMR-F in order to place approximately 29,000 cubic yards of fill in the 3.4 acres. *See* MDNS. The application materials do not identify any future development or construction project for the Subject Property. *See* SEPA Checklist Part A(7) (when asked about future activity related and/or connected with the proposal, Applicant stated "none at this time"); Part (B)(1)(g) (no percentage of the site will be covered with "impervious surfaces," such as asphalt or buildings); Part B(9)(a) (no housing units to be provided by the project); Part B(10)(a) (question asking for tallest height of any proposed structure does not apply). *See Boehm*, 111 Wn. App. at 720 (cumulative impacts that are "speculative" and have no evidence of facilitating future impact do not need to be considered). *Cf. King Cty. v. Wash. State Boundary Rev. Brd.,* 122 Wn.2d 648 (1993) (intent to develop after annexation indicated in environmental checklist); *Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wn. App. 787 (2013) (directors review of final plan "analogous to construction-level review of grading plans and similar matters for an *already approved development*") (emphasis added).

WAC 197-11-060(4)(a) requires the consideration of "impacts that are likely, not merely speculative." With no additional application presented to the City, Appellant cannot identify any specific project that must be considered in conjunction with SEP-2018-0019 without resorting to speculation. Thus, under WAC 197-11-055(2), it would be impossible to evaluate a non-existent project application in conjunction with SEP-2018-0019. Appellant suggests that since the

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

developer is filling the Subject Property, there must necessarily be an additional project. Here, there is only one submitted proposal.

Appellant relies upon the City's determination in the SEPA Checklist Review that filling the site will prepare it for future development for factual support. Appellant contends the City's determination is in "clear" contradiction with Applicant's contention that no development or housing will result from the project. However, Appellant misreads and misunderstands the City's statement in the Checklist Review. Since the Subject Property is completely within a floodplain, the Applicant determined it was necessary to remove a portion of the site from the floodplain. Once this action is completed, that portion of the property could then be developed as allowed by the City's zoning and development regulations,[2] and subject to the appropriate review for whatever project is proposed at that time. Appellant also conveniently ignores other statements in the Checklist Review that specifically identify this limitation on any future development. MDNS, Checklist Review B(8) ("Any future land uses will be required to comply with the R-2 development standards with regard to density, lot size, setbacks, and structure height…Any future residential development that will generate more than ten peak hour vehicular trips will require further environmental review."). Thus, the statement in the Checklist Review simply acknowledges that after this step, additional development may occur, subject to review and approval under the statutory and local project review processes. It is a determination by the City that development would be possible on the Subject Property, not a statement by Applicant that development *will* happen.

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[2] The property is zoned R-2, which allows a number of types of development, including but not limited to churches, day cares, schools, community residential facilities (6 residents or less), bed and breakfasts, cemeteries, golf courses, parks, community facilities, and single-family residential. *See* Permitted Use Matrix in SVMC 19.60.050.

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax

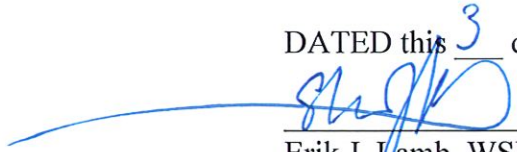
The fact that some speculative development may occur in the future does not establish that the City has failed to address any environmental impacts in the MDNS. *See Boehm*, 111 Wn. App. at 720 ("cumulative impacts argument must fail unless [Appellant] can demonstrate that the project is dependent on subsequent proposed development.") Appellant, much like in *Boehm*, has failed to present any evidence that there will be adverse environmental impacts upon the Subject Property that were not considered during the City's review of environmental documents prior to MDNS issuance. The City has been provided no proposal by Applicant for future development that would require evaluation on the same environmental document as SEP-2018-0019. Any future project that is not categorically exempt would require additional SEPA review at the time it is submitted to the City.

There is no requirement under SEPA, or any other local or state regulation, that requires Applicant to select, identify, and apply for potential future development plans during the permitting process.

IV. CONCLUSION

For the reasons set forth above, the City respectfully requests that the Hearing Examiner uphold the City's issuance of a MDNS for the project upon the Subject Property.

DATED this 3 day of June 2020.



Erik J. Lamb, WSBA #40557
Attorney for City of Spokane Valley

City of Spokane Valley
10210 E. Sprague Avenue
Spokane Valley, WA 99206
(509) 720-5105 Phone
(509) 720-5095 Fax