

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2016-0012 / SEP2016-0091
Application for)
Whatcom Business Alliance) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Summary of Appeal: The Whatcom Business Alliance has appealed a Determination of Non-Significance issued by the Responsible Official for Whatcom County Planning and Development Service on November 22, 2016, under file SEP2016-00091. The DNS was issued on a proposed Whatcom County Planning Commission Draft Cherry Point Urban Growth Area Comprehensive Plan – Land Use Amendments.

Summary of Decision: The Appellants have failed to establish the likelihood of substantial adverse environmental impacts from the project. The fiscal and economic impacts alleged are not “environmental” impacts that must be addressed under SEPA. The Appeal is denied and the issuance of a DNS on the project is upheld.

FINDINGS OF FACT

I.

Background Information

Appellant: Whatcom Business Alliance
Legal Property Owners: Whatcom County
WC File # Being Appealed: SEP 2016-00091

Property Location/Address: The proposed Comprehensive Plan Amendments relate to the Cherry Point Major/Port Industrial Urban Growth Area (UGA). The Cherry Point UGA is approximately 7,035 acres, located south of Birch Bay, east of Georgia Strait, north of the Lummi Nation Reservation, and west of Ferndale.

Zoning: Heavy Impact Industrial
Light Impact Industrial
Cherry Point Industrial District

Comprehensive Plan: Major/Port Industrial Urban Growth Area (UGA)

Authorizing Ordinances: WCC 20.92 Hearing Examiner
WCC 20.84.240 Appeals

Applicable Whatcom County Code: WCC 16.08 State Environmental Policy Act

Exhibits:

- 1 SEPA Appeal Form, APL2016-0012 / SEP2016-0091 with attachments
 - 1-1 Letter dated December 16, 2016, from Tony Larson, President, Whatcom Business Alliance, to Whatcom County Hearing Examiner and Director, Whatcom County Planning and Development Services
 - 1-2 Appeal Supplemental Statement
 - 1-3 Customer Receipt, December 16, 2016
- 2 SEPA Determination of Non-significance, issued November 22, 2016, with attachments
 - 2-1 SEPA Distribution List
 - 2-2 Legal Notice, dated November 22, 2016
 - 2-3 Vicinity Map
- 3 SEPA Environmental Checklist with attachments
 - 3-1 Cherry Point Proposal [Council Resolution], September 14, 2016
 - 3-2 Planning Commission Draft: Cherry Point Amendments, November 10, 2016
 - 3-3 Alternative No. 1 [Council Member Alternative], September 14, 2016
 - 3-4 Alternative No. 2 [No Action Alternative], September 14, 2016
- 4 Whatcom County Planning Commission: Amendments to the Cherry Point UGA Section of the Whatcom County Comprehensive Plan, January 12, 2017
- 5 Memorandum dated January 13, 2017, from Permit Center Specialist to Hearing Examiner re: SEPA Appeal – Cherry Point Amendments, APL2016-0012
- 6 PDS Staff Report, dated February 10, 2017

- 7 Whatcom Business Alliance Opening Memorandum of Points and Authorities, prepared by Erin Anderson; Certificate of Service, dated February 24, 2017; cover letter via overnight courier, dated February 27, 2017
- 8 Email string from Erin Anderson to Royce Buckingham, Feb 9, 2017 re: revised case schedule proposal
- 9 Email string from Erin Anderson to Royce Buckingham, Feb 22, 2017 re: WBA SEPA Appeal
- 10 County's Memorandum, prepared by Royce Buckingham, dated March 2, 2017, with attached Certificate of Service and Whatcom County Hearing Examiner Decision, South Fork Heritage Association, APL2010-0015/SEPA2010-0031, dated October 8, 2010, with attached Staff Report, prepared by Whatcom County Planning & Development Services, SEPA Official, dated September 17, 2010
- 11 Whatcom Business Alliance Response To Whatcom County Memorandum, prepared by Erin Anderson, dated March 10, 2017
- 12 Hearing Examiner Memo to Erin Anderson, and Royce Buckingham, dated March 21, 2017, re: WBA Decision Appeal Language

Parties of Record

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II.

The Whatcom County Council is considering amendments to the Whatcom County Comprehensive Plan Policies for the Cherry Point Urban Growth Area.

In regard to the proposed changes, Whatcom County Planning and Development Services issued a SEPA Determination of Non-Significance (DNS) which became final on December 9, 2016. The Whatcom Business Alliance filed a timely Appeal of the DNS. This Appeal is the subject of this Decision.

The Parties have agreed to submit this matter to the Hearing Examiner based on the exhibits listed in Finding No. 1, above, and waived a hearing to submit additional evidence and/or oral argument. The Hearing Examiner understands the Parties have agreed that there are no factual disputes and that the issue raised is a legal issue regarding the necessity, considering “potential economic development and fiscal impacts,” as part of the SEPA Determination. [Appellants Opening Brief, Exhibit 7, page 2]

It is the position of the Planning Department that fiscal and economic impacts, even though they must be considered, are not environmental impacts, subject to review under SEPA. It is the position of the Appellants that fiscal and economic impacts from these changes constitute adverse impacts to the “built environment,” housing, jobs, public services, and population, that must be considered under SEPA.

The Appellant’s Brief alleges these impacts by stating in various places, as follows:

“These proposed changes to the Comprehensive Plan and related County Policies would profoundly affect both the built and natural aspects of the environment, with a commensurate impact on the human population, land use and local economy.” [Exhibit 7, page 12]

“If adopted, either of the two proposals that change the Comprehensive Plan would significantly curtail the existing uses of the land.” [Exhibit 7, page 14]

“The proposed changes to the newly-adopted Comprehensive Plan would cause severe economic effects - the loss of thousands of jobs, the elimination

of hundreds of millions of dollars in tax revenues, and a permanent reduction of the taxable base for future levy purposes -” [Exhibit 7, page 16]

There is no evidence in the record to support these broad assertions of extensive economic damage from the potential changes reviewed. There is no explanation of how or why these impacts would result from the the changes proposed. Even if adverse economic impacts were required to be addressed under SEPA, the Appellants have not made a showing, supported by factual evidence, that these impacts would be probable or significant. Under even the most limiting of the proposed changes, there is no logical reason to believe there will be significant adverse economic impacts to existing uses, jobs, or the current tax base. Existing uses will remain legal and allowed to expand. There is no obvious reason to expect a change in the current tax base. No providers of public services have indicated any concerns about adverse impacts from the proposed changes.

The proposed changes could adversely affect future economic activity by eliminating some possible alternatives for new economic growth in the UGA that could result from construction of new piers. If additional changes to the Cherry Point UGA Comprehensive Plan and supporting regulations are ultimately proposed and adopted, which ban export of unrefined fossil fuels, one additional potential source of economic growth would be constrained. However this is not part of the current proposals and not ripe for review at this time.

The economic impacts established by this record are all related to some potential loss of future opportunities for a few kinds of potential economic growth in the UGA. Whether or not these potential adverse impacts to future economic growth are probable, or will be significant, based on the record before the Hearing Examiner, are speculative.

III.

The nature of the proposed changes is set out in detail in both the Staff Report, Exhibit 6, and in the Whatcom County Planning Commission Findings of Fact and Reasons

for Action, Exhibit 4. These descriptions are consistent and are adopted as a Finding herein by this reference.

In summary, the proposed changes, depending on which proposals, if any, are adopted, could increase the need for existing industries to conform with the adopted Cherry Point Environmental Aquatic Reserve Management Plan; favor clean energy and low carbon emission industries for future development in the Cherry Point UGA; increase protection for nearshore wetlands; prohibit or further limit new hardening of the shoreline in the UGA; lead to new regulations regarding water recycling; prohibit additional piers in the UGA to the extent legally possible; somehow make 33 U.S.C.A. (Magnuson Amendment) applicable to County employees; and to undertake a study to determine how the County can legally work to limit unrefined fossil fuel exports from the Cherry Point UGA.

IV.

The Appellants assert probable significant adverse environmental impacts to the “built environment,” including housing, population, public service and shorelines. However there is, again, no description of what these impacts would be, or how, or why they would arise. Not knowing this information makes it impossible to assess whether or not they are significant, adverse, or probable.

V.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

WCC 16.08.170 allows Appeals of a Final Determination of Non-significance. This Section also states that the SEPA Determination made by the Responsible Official “... shall carry substantial weight in any appeal proceeding.”

The Hearing Examiner is given the right to reverse a Threshold Determination "... when, although there is evidence to support it, the Hearing Examiner, on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

The Appellants have the burden of establishing with clear, cogent, and convincing evidence, that there is a likelihood of significant adverse environmental impacts from the project.

A significant adverse environmental impact is defined as an impact which would have more than a moderate adverse impact on environmental quality.

II.

Whatcom County argues that the alleged adverse impacts are economic and fiscal impacts and not environmental impacts which are required to be reviewed under SEPA. To support this argument, the County cites WAC 197-11-448, which reads as follows:

WAC 197-11-448

Relationship of EIS to other considerations.

- (1) SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. However, the environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decision makers. Rather, an environmental impact statement analyzes *environmental* impacts and must be used by agency decision makers, along with other relevant considerations or documents, in making final decisions on a proposal. The EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts. SEPA does not require that an EIS be an agency's only decision making document. [Emphasis added.]**
- (2) The term "socioeconomic" is not used in the statute or in these rules because the term does not have a uniform meaning and has caused a great deal of uncertainty. Areas of urban environmental concern which must be considered are specified in RCW 43.21C.110 (1)(f), the environmental checklist (WAC 197-

11-960) and WAC 197-11-440 and 197-11-444.

- (3) **Examples of information that are not required to be discussed in an EIS are: Methods of financing proposals, economic competition, profits and personal income and wages, and social policy analysis (such as fiscal and welfare policies and nonconstruction aspects of education and communications). EISs may include whether housing is low, middle, or high income. [Emphasis added.]**
- (4) Agencies have the option to combine EISs with other documents or to include additional analyses in EISs, that will assist in making decisions (WAC 197-11-440(8) and 197-11-640). Agencies may use the scoping process to help identify issues of concern to citizens.

The Appellants argue that the proposed Comprehensive Plan changes would affect certain items of the “built environment,” listed as environmental issues in WAC 197-11-444, such as population, housing, shoreline use, public services, and the movement/circulation of goods. However, as indicated in the findings, there is no description of what these impacts would be or how or why they would arise, with the exception of a general allegation of severe economic and fiscal impacts not supported by any evidence.

The “built environment” is defined in RCW 43.21C110(f), as follows:

The list of elements of the environment shall consist of the "natural" and "built" environment. The elements of the built environment shall consist of public services and utilities (such as water, sewer, schools, fire and police protection), transportation, environmental health (such as explosive materials and toxic waste), and land and shoreline use (including housing, and a description of the relationships with land use and shoreline plans and designations, including population).

[Emphasis added.]

There is nothing in this definition that suggests consideration of fiscal and economic impacts, including impacts on future job creation or tax revenues, is within the definition of “built environment,” and therefore to be addressed under the Washington State Environmental Protection Act. The Appellants have not identified any other significant adverse impacts to the defined or listed elements of the “built environment,” and have not established any probable significant adverse impacts, whether environmental or economic.

While it is clear that fiscal, economic, and general public welfare issues are to be addressed in the Planning Process under the Growth Management Act and under the County's adopted Planning Policies, it is clearly not required to be addressed by the SEPA Evaluation Process. These issues are not "environmental" issues. SEPA was designed to make sure decision makers have sufficient information about environmental impacts to balance the consideration of economic and fiscal issues when making decisions.

III.

The Appellants have failed to establish the likelihood of a significant adverse environmental impact resulting from the proposed action. The Hearing Examiner is convinced that the DNS issued by the Responsible Official is appropriate and was issued after an adequate review of the proposal and of its potential impacts. Merely naming possible areas of environmental impact is not adequate to meet the Appellants' burden of establishing, with clear and convincing evidence, that a significant adverse environmental impact is likely.

IV.

WAC 197-11-680 allows Administrative Appeals on SEPA procedures only "... to review a Final Threshold Determination and Final EIS." Concerns stated about the adequacy of the submitted SEPA Checklist raise procedural issues beyond the correctness of this DNS. Flaws in an Environmental Checklist, in and of themselves, are not a sufficient basis for overturning the Threshold Determination of the Responsible Official under SEPA. The Appellants need to establish a likely significant adverse environmental impact, and not just a poorly or inaccurately completed Environmental Checklist.

V.

The decision by the Responsible Official to issue a SEPA Threshold Determination of Non-Significance should be upheld.

VI.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

The Appellants have failed to establish the likelihood of substantial adverse environmental impacts from the proposed changes to the Cherry Point UGA Comprehensive Plan. The Appeal is denied and the issuance of a DNS on the project is upheld.


**NOTICE OF APPEAL PROCEDURES FROM THIS FINAL DECISION OF
THE WHATCOM COUNTY HEARING EXAMINER UNDER SEPA**

This action of the Hearing Examiner is final. The following review procedure is available from this Decision and may be taken by the Applicant, any Party of Record, or any County Department.

This Appeal of the SEPA DNS issued by Whatcom County on proposed changes to the Cherry Point UGA Comprehensive Plan is the only Appeal allowed at the local level pursuant to WAC 197-11-680 (3)(a)(iv).

Any further Appeal of this decision must be made to the Growth Management Hearings Board after final County Council action on the Proposal.

DATED this 21st day of March 2017.



Michael Bobbink, Hearing Examiner