

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

In the Matter of the Appeal of)	No. APL LAND-2021-00035
)	
)	
Jim Jordan)	
)	
Of the December 18, 2020)	RULING ON APPLICANT'S
State Environmental Policy Act)	MOTION TO DISMISS
Determination of Non-Significance)	
#SEPA-2019-01173 related to the proposed)	
Cascadia Montessori School Expansion at)	
<u>4239 - 162nd Avenue NE, Redmond</u>)	

Following the February 16, 2021 pre-hearing conference on the above captioned appeal, and consistent with the scheduling order of the same date, counsel for the Applicant submitted a motion to dismiss the appeal of the DNS. During the pre-hearing conference, counsel for the City had indicated that the City may join Applicant's motion; however, the City neither joined nor submitted any written response to the motion.

In deciding the motion to dismiss, the undersigned reviewed the following documents:

- SEPA-2019-01173 Determination of Non-Significance Certification of Public Notice, issued December 18, 2020, with attached SEPA environmental checklist and mailing list
- Appeal of DNS filed by Jim Jordan on January 19, 2021
- Applicant's Motion to Dismiss SEPA appeal, filed February 18, 2021
- Appellant's Response to Motion to Dismiss, filed February 24, 2021
- Applicant's Reply in support of Motion to Dismiss, filed March 1, 2021

Discussion:

According to the facts submitted in the documents reviewed, the subject property is an approximately 2.3-acre parcel at 4239 162nd Avenue NE, with three existing buildings, play areas, and parking clustered in the eastern end of the parcel. The subject property is traversed by one or more streams and contains one or more wetlands (the documents are inconsistent about number of each type), which are regulated sensitive areas pursuant to the City's critical areas ordinance. In the Motion, the Applicant contended - and the Appellant in his response agreed - that the proposed development envelope is well outside of these critical areas. It appears from the limited facts available at this time that all required regulatory buffers would be provided if the project is constructed as proposed.

The project currently contemplated is a requested conditional use permit (CUP) that would expand existing Building C by 610 square feet in a single-story addition, and change its building occupancy type from Residential to Education. The project would also increase the site's off-street parking capacity from 10 spaces to 18 spaces. These improvements are identified (in the Motion) as intended to allow the school to increase enrollment by 55 students, from the current maximum of 75 students to 130 students, to be served by a staff increase of four, from 17 to 21 employees. A contemplated future project disclosed in the SEPA review but not proposed in the instant CUP is redevelopment of an existing basketball court in one of three ways: (a) into new community space of about 3,080 square feet; (b) into new classroom space of about 1,540 square feet; or (c) into two new portables totaling about 1,540 square feet.

The Appeal alleges the following (paraphrased/abbreviated) errors in the DNS:

1. Procedural issues related to posting of notice, adequacy of available information on file with City;
2. Lack of baseline info about existing use in order to allow analysis of propose expansion;
3. Lack of info about number of classrooms and staff, from which to determine the needed number of off-street parking stalls;
4. There will be traffic congestion from busses and parent vehicles on 162nd during drop off/pick up;
5. Inadequate off street parking - 18 spaces not justified; and
6. Inadequate queuing analysis.

In its motion to dismiss, the Applicant contends that the underlying CUP is categorically exempt from SEPA review and need not have been subjected to any review under SEPA because the proposal would result in school development below the threshold established in Redmond Zoning Code (RZC) 21.70.090.A.4. Pursuant to that provision, school development of less than 30,000 square feet of building(s) and fewer than 90 parking stalls are categorically exempt from SEPA review.

Nevertheless, the City undertook SEPA review. The December 18, 2020 DNS issued by the City states that it is based on Washington Administrative Code (WAC) 197-11-340(2) and indicates that the City determined that no environmental impact statement is required pursuant to RCW 43.21C.030(2)(c). The DNS cites no other state regulation or local code provision establishing any intended limit or parameter delineating the extent of the City's review of the proposal for compliance with the State Environmental Policy Act (SEPA).

The Applicant's Motion to Dismiss cites WAC 197-11-305, Categorical exemptions, which reads:

- (1) If a proposal fits within any of the provisions in Part Nine of these rules, the proposal shall be categorically exempt from threshold determination requirements (WAC 197-11-720) except as follows:
 - (a) The proposal is not exempt under WAC 197-11-908, critical areas.
 - (b) The proposal is a segment of a proposal that includes:

- (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not; or
 - (ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction. If so, that agency shall be the lead agency, unless the agencies with jurisdiction agree that another agency should be the lead agency. Agencies may petition the department of ecology to resolve disputes (WAC 197-11-946). For such proposals, the agency or applicant may proceed with the exempt aspects of the proposals, prior to conducting environmental review, if the requirements of WAC 197-11-070 are met.
- (2) An agency is not required to document that a proposal is categorically exempt. Agencies may note on an application that a proposal is categorically exempt or place such a determination in agency files.

Pursuant to WAC 197-11-800(1)(b)(iv), the construction of [a ... school ..] building with 4,000 square feet of gross floor area, and with associated parking facilities designed for twenty automobiles is exempt from SEPA review. The Applicant notes that the City of Redmond elected to raise the categorical exemption threshold for school construction as permitted by the SEPA regulations. WAC 197-11-800(1)(c). The state SEPA school categorical exemption threshold is lower, but the proposal still does not exceed it.

There is an additional caveat to categorical exemptions established WAC 197-11-800(1)(a)(i), which reads:

WAC 197-11-800 Categorical exemptions. ...

- (1) Minor new construction - Flexible thresholds.
 - (a) The exemptions in this subsection apply to all licenses required to undertake the construction in question. ...The exemptions in this subsection apply except when the project:
 - (i) Is undertaken wholly or partly on lands covered by water;

The Applicant argues that SEPA review was pursued by the City due to the presences of critical areas on the subject, and that pursuant to WAC 197-11-900 Critical areas, such SEPA review is of a limited scope. WAC 197-11-908 reads:

- (1) Each county/city may select certain categorical exemptions that do not apply in one or more critical areas designated in a critical areas ordinance adopted under GMA (RCW 36.70A.060). The selection of exemptions that will not apply may be made from the following subsections of WAC 197-11-800: (1), (2)(a) through (h), (3), (5), (6)(a), (13)(c), (23)(a) through (g), and (24)(c), (e), (g), (h). The scope of environmental review of actions within these areas shall be limited to:
 - (a) Documenting whether the proposal is consistent with the requirements of the critical areas ordinance; and
 - (b) Evaluating potentially significant impacts on the critical area resources not adequately addressed by GMA planning documents and development regulations, if any, including any additional mitigation measures needed to protect the critical areas in order to achieve consistency with SEPA and other applicable environmental review laws. All other categorical exemptions apply whether or not the proposal will be located within a critical area. Exemptions selected by an agency under this section shall be listed in the agency's SEPA procedures (WAC 197-11-906).

The Applicant's Motion to Dismiss contends that the proposed development, even including contemplated future redevelopment of the basketball court, is still categorically exempt by state and City regulations unless the project is "undertaken wholly or partly on land covered by water." WAC 197-11-800(1)(a)(i). The Motion characterizes the City's decision to proceed with SEPA review as having been "in an abundance of caution" due to the stream/ wetland areas on the subject property and asserts that SEPA review could only have proceeded under WAC 197-11-908(1)(a)(1). The Motion contends that because no part of the development would occur within the ordinary high water mark of any waterbody, the project is categorically exempt from environmental Review and there was no need for a threshold determination in the first place, much less the additional review sought by the Appellant.

Again, the DNS is silent as to the topic of categorical exemption and as to the City's reasoning for proceeding with SEPA review despite the project's apparent falling within the school categorical exemption. Instead, the City simply reviewed the project application materials and the completed environmental checklist and issued a DNS. Following the pre-hearing conference and receipt of the Applicant's Motion, the City declined to join in the Applicant's motion and filed no motion or briefing of its own explaining the reason the project was subjected to SEPA review rather than having been found to be categorically exempt.

Conclusion:

Even assuming the Applicant's "abundance of caution/WAC 197-11-908(1)(a)" theory is the correct basis under which the project was not treated as categorically exempt, what we now have is a DNS, subject to appeal. The Applicant did not appeal the City's DNS and in its motion has not shown a basis for setting aside the DNS once issued in favor of a retroactive determination of categorical exemption.

If there is further argument on this point from the Applicant or the City, it may be forwarded in hearing briefing; however, on the basis of argument submitted so far, dismissal of the appeal is not appropriate. A DNS was issued by the City and timely appealed by the Appellant.

ORDER:

The motion to dismiss the appeal of the DNS is **denied**.

The SEPA appeal hearing on the merits of the errors alleged in the timely filed appeal shall proceed as scheduled in the February 16, 2021 scheduling order except as follows.

Because this ruling on the motion to dismiss has been issued one business day later than announced, **the parties shall have through 3:00 pm on March 11, 2021 to exchange witness and exhibits lists as detailed in the scheduling order.**

Ordered March 8, 2021.

By:



Sharon A. Rice
Redmond Hearing Examiner