

**BEFORE THE HEARING EXAMINER
FOR CLALLAM COUNTY**

In the Matter of the Appeal of)	No. CUP2021-00005;
)	No. ECL2021-00019
)	
Citizens for Carlsborg;)	Olympic Systems Properties CUP
Sequim Valley Airport and Sandy Sallee;)	
Old Mill Café, LLC and Valdena Culp;)	
A-M Systems, LLC and)	
Arthur B. Green, III)	
)	
)	
Of a Mitigated Determination)	ORDER FOLLOWING
<u>of Nonsignificance</u>)	PRE-HEARING CONFERENCE

TO PARTIES OF RECORD:

BACKGROUND

On November 30, 2021, Clallam County (County) determined that a Conditional Use Permit (CUP) application submitted by Olympic Systems Properties (Applicant), to construct a Solid Waste Transfer Station and Community Recycling Center, was complete. The County then requested further review of the application from applicable County departments and, later, scheduled an open record public hearing on the CUP (No. CUP2021-00005; No. ECL2021-00019) for February 3, 2022, at 1:00 PM.

Following additional internal review, the County issued a Mitigated Determination of Nonsignificance (MDNS) for the proposal, under the State Environmental Policy Act (SEPA) on January 11, 2022. Of note the MDNS stated that comments on the MDNS “can be provided at the hearing scheduled February 3, 2022” and that, unless withdrawn, the “threshold determination shall be final at the end of the comment period.” The MDNS also provided, however, that the “final threshold determination may be appealed to the Hearing Examiner” at the conclusion of the comment period. *Mitigated Determination of Nonsignificance, dated January 5, 2022 (Exhibit 15).*¹

Washington Administrative Code (WAC) 197-11-680(3)(v) provides that any *administrative appeal* allowed of “procedural and substantive determinations under SEPA” must be consolidated “with a hearing or appeal on the underlying governmental action in a single

¹ Notice of the open record hearing on the CUP application was provided between January 12 and January 16, 2022. Notice materials stated that an MDNS had been issued for the proposal on January 11, 2022. *Exhibit 32.*

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

simultaneous hearing before one hearing officer or body.” Accordingly, the information provided in the MDNS was, on its face, incorrect. If an administrative appeal of a SEPA determination to the Hearing Examiner is allowed on a particular application, such appeal must be consolidated with the hearing on the underlying permit. Alternatively, if no administrative appeal is allowed under a jurisdiction’s municipal code (and, of note, SEPA does not require that such appeal be allowed), any SEPA appeal must be brought under the Land Use Petition Act (LUPA) before a court with appropriate jurisdiction (not the Hearing Examiner) after a final decision on the underlying permit has been issued.

On January 25, 2022, Attorney Tom Ehrlichman appealed the MDNS to the Hearing Examiner on behalf of: Citizens for Carlsborg; Sequim Valley Airport and Andy Sallee; Old Mill Café, LLC and Valdena Culp; and A-M Systems, LLC and Arthur B. Green (identified hereafter, for convenience, as “Appellant”). In its appeal statement, the Appellant noted that the County’s SEPA “Responsible Official had yet to issue a statement, with the MDNS or supplementary to the MDNS, providing the time and date for any appeal of the MDNS,” and acknowledged that the SEPA comment period would be left open until “the day of the scheduled conditional use permit hearing before the Hearing Examiner.” *Citizens for Carlsborg et al. Appeal Statement, dated January 25, 2022.*

On January 28, 2022, Attorney Tom Ehrlichman submitted a “Motion for Prehearing Order by Carlsborg Village Properties, Inc.” (an additional appellant, identified hereafter as “CVPI”). In the motion, CVPI stated its intent in seeking clarity on the SEPA appeal process identified in the County’s MDNS. Further, CVPI noted that state law governing “administrative SEPA appeals requires consolidation of the CUP open record hearing with the County’s administrative SEPA appeal hearings” such that the MDNS should be corrected. *CVPI Motion for Prehearing Order, dated January 28, 2022.* The motion requested that the County’s MDNS be voided and that the CUP hearing be postponed and/or rescheduled to ensure “a process that provides for only one consolidated open record hearing under state law.” *CVPI Motion for Prehearing Order, dated January 28, 2022.*

Later that day, the Hearing Examiner issued a response to the request, entitled “Order on Appellants’ Request for Pre-Hearing Conference.” That order discussed the WAC provision (cited above) requiring a consolidated hearing process but, also, Clallam County Code (CCC) 27.01.210(2)(a), which dictates that any appeal related to the adequacy of a “SEPA threshold determination” which “is part of the decision on the underlying permit” shall be filed with the Superior Court.² The order further noted that:

In the interest of efficiency, unless the parties file an objection, the Hearing Examiner finds that the CUP application and SEPA MDNS appeal could be

² Though not referenced in the Hearing Examiner’s order, it should be noted that CCC 26.10.640 provides additional guidance on this issue and does not provide for an administrative appeal of a DNS for a Type III permit (like a CUP).

consolidated by holding the application hearing on February 3, 2022, to be followed by a SEPA MDNS appeal hearing on a date to be determined at a Pre-Hearing Conference.

Order on Appellants' Request for Pre-Hearing Conference, dated January 28, 2022.

The order then set the Pre-Hearing Conference for February 3, 2022, at 11:00 PM, two hours in advance of the scheduled CUP hearing. In addition, the order stated that “the parties should come prepared to address whether the Hearing Examiner has jurisdiction to hold a SEPA MDNS appeal hearing” under the municipal code. *Order on Appellants' Request for Pre-Hearing Conference, dated January 28, 2022.*

Later that same day (January 28, 2022), Attorney Ehrlichman submitted an email to the Hearing Examiner addressing the order. In particular, the email stressed CVPI’s objection to “holding the hearing on Feb. 3 on the CUP hearing to start proceedings and then continue the hearing to hold a later SEPA appeal hearing.” Further, the email noted the Appellant’s (Citizens for Carlsborg et. al) objection to holding the CUP hearing on February 3, 2022, since the Appellant’s “intend to make a single presentation for the two matters. . . in light of the intertwining and overlapping issues.” Further, the email stated that the Appellant had “not had adequate time to prepare our expert witness testimony.” The email provided additional reasons why holding the CUP hearing, as scheduled, would be “problematic.” *Email from Attorney Ehrlichman to the Hearing Examiner, dated January 28, 2022.*

On January 31, 2022, Attorney Ehrlichman submitted another email to the Hearing Examiner on behalf of his clients. In that communication, Mr. Ehrlichman conveyed his ability to participate in the scheduled pre-hearing conference. Further, he stated that “we no longer object to the Hearing Examiner’s proposal to open the CUP hearing” and then, if necessary “continue it to hear SEPA appeals.” *Email from Attorney Ehrlichman to the Hearing Examiner, dated January 31, 2022.*

On the same day (January 31, 2022), the Applicant submitted a motion requesting that the CUP hearing be continued in light of the filed SEPA appeal and the County’s recommendation (in its staff report) that the proposal be denied. In particular, the Applicant stressed that it had not had adequate time to prepare a response to the County’s recommendation and, further, that jurisdictional issues related to SEPA should be resolved in advance of the CUP hearing moving forward. In the motion, the Applicant noted that it would explicitly waive its right to have the application decided within the 120-day period dictated by the municipal code. *Applicant’s Motion to Continue Hearing, dated January 31, 2022.*

The next day, February 1, 2022, the Hearing Examiner issued a response to the Applicant’s motion, entitled “Order on Applicant’s Motion to Continue Hearing.” In the order, the Hearing Examiner noted his intent to “resolve issues regarding the CUP application hearing and SEPA MDNS appeal at the Pre-Hearing Conference” still scheduled in advance of the CUP hearing,

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

that all parties “have indicated they are available to participate,” and that “it would be premature to rule on any of these pending matters before allowing some discussion (on the procedural issues) from the parties. The order concluded:

Accordingly, the Pre-Hearing Conference shall commence, as planned. The open record application hearing on the CUP may move forward later that day, consistent with the public notice provided, but all parties should be aware that—even were this to occur—the record would be left open to allow for the Applicant and Appellant to provide additional information. Thus, the parties should be prepared to address the issues set out in the Hearing Examiner’s Order on Appellants’ Request for a Pre-Hearing Conference (*January 28, 2022*), and to respond orally to the Applicant’s Motion to Continue Hearing. Written responses are not required but may be submitted at the Pre-Hearing Conference.

Order on Applicant’s Motion to Continue Hearing, dated February 1, 2022.

On February 2, 2022, Attorney P. Stephen DiJulio filed a notice of appearance on behalf of an additional party, the City of Port Angeles (hereinafter “Port Angeles”). Attorney DiJulio provided a memorandum with the notice of appearance detailing Port Angeles’s concerns about the proposal. *Notice of Appearance on Behalf of the City of Port Angeles, dated February 2, 2022.*

The next day, the Pre-Hearing Conference commenced, as directed by the Hearing Examiner’s various decisions/orders.

DISCUSSION

On February 3, 2022, representatives of the initial SEPA Appellant (Citizens for Carlsborg, et al.) and a subsequent appellant (CVPI)—both represented by Attorney Ehrlichman; the City of Port Angeles, represented Attorney DiJulio; the County, represented by Senior Planner Donella Clark; and the Applicant, represented by Attorney Alexander Wu, participated in the Pre-Hearing Conference at 11:00 AM. Procedural matters associated with the SEPA appeal(s) and the CUP application were discussed and the Hearing Examiner made several rulings. In summary:

- The Hearing Examiner ruled that he lacked authority under the municipal code to adjudicate any SEPA appeals of the DNS associated with the proposal and that such appeals would, instead, need to be brought in conjunction with any Land Use Petition Act (LUPA) appeals on the underlying CUP decision (made by the Hearing Examiner) before the superior court. The Hearing Examiner noted that he would produce a memorandum/decision further elaborating his reasoning for this ruling, to be included in the record associated with the CUP application. The Hearing Examiner believes this order provides enough information (above) about his ruling such that no further memorandum need be created.

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

- The Hearing Examiner ruled that the County must reissue its SEPA determination with clarifying language concerning relevant comment and appeal procedures.
- In light of the need to have the SEPA determination reissued (and in response to an earlier request by the Applicant), the Hearing Examiner ruled that the CUP hearing would be postponed. Ultimately, the Hearing Examiner determined that such hearing would commence on July 21, 2022, at 10:00 AM and, if necessary, would conclude on August 4, 2022. The applicable parties all stated they would have the ability to participate in the CUP hearing scheduled for that date.
- The Hearing Examiner ruled that all proposed exhibits previously numbered and identified by County staff, in relation to its review of the CUP proposal, would retain such numbering and that the Clerk to the Hearing Examiner would add additional exhibits to the record, as is customary. Of note, County staff had identified 34 potential exhibits at the time the Pre-Hearing Conference commenced. Essentially, the Hearing Examiner denied a request by Attorney Ehrlichman to “start fresh” and redo preparation of the already-submitted exhibits. The Hearing Examiner stressed that the record on this matter remains open and the parties, as well as members of the public, may submit additional materials and/or comments on the proposal until the open record hearing on this matter commences.
- Finally, the Hearing Examiner acknowledged that he has been appointed by the City of Port Angeles to serve as its Hearing Examiner but stated his belief that such appointment would not create a conflict of interest, despite the City of Port Angeles’s opposition to the proposal (and subsequent joinder in the SEPA appeal). In particular, the Hearing Examiner noted that he is not an employee of the City of Port Angeles and, further, serves as the appointed Hearing Examiner in 50 or so jurisdictions throughout the state. The Applicant stated that it would not object to the Hearing Examiner’s involvement in the present matter.

Oral Rulings of the Hearing Examiner, February 3, 2022.

ATTORNEY LETTERS AND RESPONSE

On or around February 7, 2022, the Hearing Examiner began work on preparation of an order, approximately two business days after conclusion of the Pre-Hearing Conference, capturing the oral rulings he delivered the week before. Such order was nearly complete toward the end of the work week when, shortly before said order was to be issued, County staff forwarded a letter from Attorney DiJulio (who participated in the Pre-Hearing Conference on behalf of Port Angeles), dated February 8, 2022. Reading said letter spurred the Hearing Examiner to perform a detailed review of the whirlwind of correspondence/communication that occurred in the day or two leading up to the Pre-Hearing Conference and, also, to again review his own written notes. Ultimately, the Hearing Examiner concluded that, despite his best efforts to provide clear direction at the Pre-Hearing Conference, there appears to have been some confusion concerning the CUP hearing originally scheduled for 1:00 PM on February 3, 2022.

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

In particular, Attorney DiJulio’s letter expressed concern that public testimony was not received on February 3, 2022, at the CUP hearing originally scheduled for 1:00 PM. Instead, County staff appeared at the scheduled hearing time (as opposed to the Hearing Examiner) and—according to Mr. DiJulio—informed the 60+ attendees that the hearing was being rescheduled because “the ‘parties’ agreed to a continuance.” *Attorney DiJulio Letter, dated February 8, 2022.*

Attorney DiJulio’s letter stressed:

The City is disappointed that those who appeared at the scheduled hearing were not heard. Several in the audience attempted to comment or ask questions, but they were told if they had questions to contact County planning staff. As a result, the record of those seeking to provide comment on the CUP application were put off and their comments may be lost.

The City believes that the record before the Hearing Examiner should reflect this unusual process and the apparent status that no hearing was commenced on February 3rd. The City does understand that all submissions, including those received before, at or after the 1 p.m. proceeding will be made part of the record.

Attorney DiJulio Letter, dated February 8, 2022.

The Hearing Examiner’s notes and his own recollection leave him with the firm belief that, in light of the long postponement/continuance requested by the Applicant (and granted by the Hearing Examiner), and the potential for a *significant* quantity of additional information/material to be submitted to the record, he determined it would be premature to “commence” the open record hearing on the CUP application to receive public testimony—and continue said hearing to a later date following receipt of any such testimony—and, instead, that the hearing should simply be postponed.

To be clear, though, the Hearing Examiner did not rule (nor intend to give the impression) that the CUP hearing be postponed in light of any “agreement” between the parties to the SEPA appeal(s). As detailed above, the Applicant requested that the CUP hearing be postponed on January 31, 2022, approximately three days before the original hearing was scheduled to commence. The Hearing Examiner issued an order the next day (on February 1, 2022) noting that, as a Pre-Hearing Conference was already scheduled related to procedural matters concerning the (potential) SEPA appeal(s) and the CUP application, any such ruling on the continuance request would be addressed at the Pre-Hearing Conference. That order further noted that the CUP application hearing “*may* move forward later that day, consistent with the public notice provided” but that, even were that to happen, “the record would be left open to allow for the Applicant and Appellant to provide additional information.” *Order on Applicant’s Motion to Continue Hearing, dated February 1, 2022 (emphasis added).*

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

As Attorney DiJulio did not file a notice of appearance until February 2, 2022, it is possible he did not receive the order in question in advance of the Pre-Hearing Conference. That said, state law only allows one open record hearing on an application such as this. It is not unreasonable to assume that members of the public wishing to testify on the limited record currently available would have additional thoughts and/or testimony once additional materials are provided to augment the record. This, though, would essentially create an iterative hearing process whereby the Hearing Examiner received testimony (potentially from the same parties and/or members of the public) on more than one occasion in contravention of the “one hearing” requirement of state law. Accordingly, the Hearing Examiner believes the County acted appropriately in informing members of the public who “signed on” to the originally scheduled hearing at 1:00 PM that the hearing had been postponed and that no testimony would be received. Still, Attorney DiJulio’s concerns on behalf of the City of Port Angeles are noted, and the County should include his letter in the exhibits associated with the CUP application.

Shortly after the Hearing Examiner had revisited (and nearly completed) the post-hearing order he had been crafting after review of Attorney DiJulio’s letter, Attorney Ehrlichman also submitted a letter, dated February 10, 2022, on behalf of one of the several clients (A-M Systems, LLC) he has represented throughout this process. This letter reiterated Attorney DiJulio’s concerns and requested, “at a minimum,” that the Hearing Examiner’s post-hearing order specifically address approximately three pages worth of concerns. *Attorney Ehrlichman Letter, dated February 10, 2022.*

As a preliminary matter, the County should include Attorney Ehrlichman’s letter in the exhibits associated with the CUP application. The Hearing Examiner’s recollection of what transpired at the Pre-Hearing Conference is somewhat different than Attorney Ehrlichman’s and inclusion of the letter will, at a minimum, preserve his concerns.

That said, Attorney Ehrlichman’s letter contends and/or requests:

- Acknowledgment that the Hearing Examiner issued an order prior to the Pre-Hearing Conference stating an “intention” to open the scheduled CUP hearing on February 3, 2022, “in order to take public testimony, and that the hearing could be continued to allow the applicant to make their presentation.”
- All parties concurred, at the outset of the conference, that “the MDNS required some corrections.” In light of this, the County “proposed to reissue the MDNS that same afternoon and then schedule a continued public hearing at the earliest possible date as allowed by notice requirements.”
- In response, the Applicant then requested “a five-month delay” of the CUP application hearing, a request that was not joined by any other party, which the Hearing Examiner granted.
- The Hearing Examiner did not open the CUP hearing later that day, contrary to the “notice of hearing.”

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

- The Hearing Examiner ruled that “any documents listed in the “Hearing Examiner’s Exhibit List,” as it “existed on February 3, 2022, including additions by staff of documents received as of that date but not yet listed, would be retained as part of the record” for the future CUP hearing “and would not need to be resubmitted.”
- Hundreds of comment letters, documents, and other information was submitted opposing the project in anticipation of the CUP application hearing (and potential SEPA appeals) scheduled for February 3, 2022. While identified by the County’s Clerk as “Exhibit 33,” several submittals do not appear to have been included in the record.
- The Hearing Examiner should clearly identify “what is and isn’t a part of the record” as of close of business on February 3, 2022.
- The Hearing Examiner should require production of an updated exhibit list.

Attorney Ehrlichman Letter, dated February 10, 2022.

Many of Attorney Ehrlichman’s concerns and contentions have already been addressed earlier in this order. That said, the Hearing Examiner notes:

- The parties involved in the SEPA appeal(s) submitted a significant quantity of motions and requests—often informally through email communication—in the 72 hours or so in advance of the CUP application hearing originally scheduled for February 3, 2022. This inevitably created some confusion despite the Hearing Examiner’s best efforts to adhere to an orderly process.
- While the Hearing Examiner indicated in advance of the Pre-Hearing Conference in at least one order that it would be possible to commence the CUP application hearing and then continue it, if necessary, to a later date, he is confident none of his orders guaranteed this outcome. All such orders conveyed the Hearing Examiner’s belief that information gathered at the Pre-Hearing Conference would dictate the most sensible path forward in relation to how and when to commence any potential SEPA appeal(s) and the CUP application hearing.
- The Hearing Examiner acknowledges that the five-month delay requested by the Applicant to commence the CUP application hearing was not “joined” by any other party. That said, the Hearing Examiner assumed (perhaps wrongly in light of the submitted attorney letters) that those opposing the project would welcome such a delay as it would, at best, allow for additional information to be submitted in opposition to the proposal and, at worst, significantly delay development of the proposal were it to be approved. Further, the Hearing Examiner notes that Attorney Ehrlichman himself requested postponement of the CUP application hearing in advance of the Pre-Hearing Conference on behalf of at least one of the clients/groups he represents.
- While Attorney Ehrlichman’s concerns about the record are entirely valid, the Hearing Examiner relies on County staff to compile the potential record in advance of any open record hearing. As noted above, County staff had explicitly identified 34 potential exhibits prior to the Pre-Hearing Conference. According to Attorney Ehrlichman, a significant amount of information was not included in these potential exhibits.

*Order Following Pre-Hearing Conference
Clallam County Hearing Examiner
Olympic Systems Properties CUP
No. CUP21-00005; No. ECL2021-00019*

Thankfully, given the long continuance granted, there is ample time for the County to correct any perceived omissions in the record that Attorney Ehrlichman has identified.

- The record on the CUP application will remain open until the hearing commences on July 21, 2022. The Hearing Examiner expects that all information, documents, reports, etc.—including all procedural communications—submitted by the parties to the now dismissed SEPA appeals (which, technically, were dismissed by oral ruling of the Hearing Examiner on February 3, 2022) will be included in the record, along with all additional information, documents, reports, etc. submitted by the Applicant, interested parties, reviewing agencies, the County, members of the public, and any other entities between February 3, 2022, and July 21, 2022. County staff shall make every effort to update its website periodically with new submissions such that Attorney Ehrlichman (and others) have the opportunity to verify that inadvertent omissions do not occur and are quickly rectified.

ORDER

As detailed above (and ruled on at the Pre-Hearing Conference), the various SEPA appeals associated with this proposal are dismissed, without prejudice, in light of the Hearing Examiner's lack of jurisdiction to address such matters because the municipal code does not allow for administrative appeal of a DNS/MDNS in these circumstances. That said, the SEPA determination issued on this proposal contained significant errors such that it is appropriate for the County to re-notice the SEPA determination, re-open the applicable comment period, and provide accurate and clarifying information in such materials about the County's SEPA appeal process. In addition, the County shall re-notice the open record hearing associated with the CUP application in a timely manner and as dictated by the municipal code. Finally, the County shall update the document list (potential "exhibit list") associated with the CUP application hearing now scheduled to commence on July 21, 2022, as detailed above.

SO ORDERED this 3rd day of March 2022.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center