BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

In re: Eastbay Flats and Townhomes (Westman Mill) Appeal of Determination of Non-Significance and Land Use Appeal	No. 17-2795 APPLICANT'S COMBINED REPLY IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND MOTION TO DISMISS RE TRIBAL TREATY RIGHTS

COMES NOW the Applicant, 3rd Gen Investment Group, LLC ("Applicant" or "3rd Gen"), by and through its attorneys Joseph A. Rehberger and Cascadia Law Group PLLC, and hereby submits this combined reply in support of its motions to dismiss and for summary judgment on Appellant Olympia Urban Waters League's ("Appellant" or "OUWL") appeal.

I. REPLY ARGUMENT AND AUTHORITY

A. Appellant's SEPA Claim is Barred Based on Its Failure to Comment on the DNS

3rd Gen moved the Examiner to dismiss OUWL's SEPA appeal based on OUWL's failure to comment on the City's threshold determination of nonsignificance (DNS). In response, OUWL does not contest that it failed to comment on the DNS during the required applicable SEPA comment period. *See* OUWL's Opposition on Standing at 10, lines 9-23. Instead, OUWL argues that it had previously commented on the "land use application" and "at numerous other junctures in the process," and further complains, without substantiation, "there is no indication in the record the [prior] comments were taken seriously." *Id.* While not addressing it in later argument, in its fact section, OUWL asserts that "[OUWL] also submitted a public comment to

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the City in September 2017 concerning the application." *Id.* at 2, lines 14-15 (attached as Attachment 2 to its Opposition on Standing). However, it is undisputed that this comment did not address the City's DNS, nor could it have, as it was submitted in response to the land use application and preceded the City's threshold determination and SEPA comment period by five months. Nor are prior comments sufficient. As has been noted, "failure to take advantage of an opportunity to comment in the SEPA process precludes administrative or judicial challenge on a basis that could have been, but was not, communicated through the available SEPA comment process."[1] The SEPA comment process is a required administrative step under the City's adopted environmental rules. OUWL provided no comments during the available SEPA comment process.[2]

Under both the SEPA rules and Olympia's Municipal Code, a party that does not comment on a threshold determination during the comment period waives its right to later appeal that determination. WAC 197-11-545 (Effect of no comment); OMC 14.04.020 (same).[3] The SEPA rules provide 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. . . ." WAC 197-11-545 (emphasis added). Pursuant to WAC 197-11-545 and OMC 14.04.020, OUWL's failure to comment on the DNS prohibits

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[1] SETTLE, RICHARD L., THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT, A LEGAL AND POLICY ANALYSIS at § 20.04[1] (emphasis added) (citing *Boehm v. City of Vancouver*, 111 Wn. App. 711 (2002)).

[2] In its fact section, OUWL notes that Mr. Branch "has personally written" comments to the City, but these "personal" comments were not submitted on behalf of OUWL, the only appellant here. OUWL Opposition on Standing at 2, lines 11-12. Mr. Branch's own declaration establishes that these other personal comments are distinguished from prior comments submitted by and on behalf of OUWL, *see* Declaration of Harry Branch ("Branch Decl.") at ¶ 13, declaring that "[i]n addition to the letter that [OUWL] wrote to the City in September 2017 for the application file, I personally have written several letters to the City regarding the proposal." *Id.* (describing the nature of his personal comments). These "personal" comments cannot and do not excuse OUWL's failure to comment on the DNS.

[3] Requiring commenting as a predicate to any appeal is supported by the process outlined in the SEPA Rules and OMC. Upon issuance of a threshold determination of DNS, providing that "[a]ny person, affected tribe, or agency may submit comments to the lead agency within fourteen days of the date of issuance of the DNS," WAC 197-11-340(2)(c), and in response, the responsible official "shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or supporting documents." WAC 197-11-340(2)(f); *see also* OMC 14.04.020 (incorporating same). As noted, lack of objection or comment is then conclusively construed as lack of objection. WAC 197-11-545; OMC 14.04.020. The purposes of SEPA are frustrated where objection to a SEPA determination is saved until an unfavorable decision is finalized. *See cf. Kitsap County v. State Dep't of Natural Res.*, 99 Wn.2d 386, 391 (1983).

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OUWL from now appealing the threshold determination. In failing to comment, OUWL failed to exhaust its administrative remedies and waived its right to appeal. OUWL'S SEPA appeal must be dismissed.

B. Appellant's SEPA Claim Should be Dismissed Based Lack of Standing

As set forth in 3rd Gen's motion to dismiss, even had OUWL timely commented, OUWL still has failed to provide evidence that it will suffer any "injury in fact" necessary to confer SEPA standing. To establish standing an appellant must (1) show that the alleged endangered interests fall within the zone of interests protected by SEPA and (2) allege an injury in fact, which requires evidence of specific and perceptible harm. *See Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 212 (2000). *Patterson v. Segale*, 171 Wn. App. 251, 259 (2012) (party challenging an administrative decision bears the burden of establishing his or her standing to contest the decision).

Furthermore, OUWL bears the burden of demonstrating its standing. *E.g.*, *Allan v. Univ. of Wash.*, 92 Wn. App. 31, 37 (1998). Standing must exist for each claim and for each argument made in support of a claim. *E.g., State v. Johnson*, 179 Wn.2d 534, 551-52 (2014) (defendant lacked standing to challenge the suspension of his driver's license on constitutional grounds). A party may have standing to assert one claim or argument but not others. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) and *Johnson*, 179 Wn.2d at 551-52. Standing "is not dispensed in gross." *Lewis*, 518 U.S. at 358 n.6. "If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law." *Id.* (emphasis in original).

1. OUWL has not demonstrated injury in fact as a result of the proposed development necessary to confer SEPA standing.

In order to establish "injury in fact," an appellant must present "sufficient evidentiary facts" to establish that it "will be 'specifically and perceptibly harmed' by the proposed action." *Trepanier v. Everett*, 64 Wn. App. 380, 382-83 (1992). Here, even in response to this motion,

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OUWL does not allege that 3rd Gen's proposed action itself causes any "injury in fact" to OUWL or its members. OUWL makes two arguments seeking to recast its arguments and satisfy the "injury in fact" standing prong. Both fail. First, OUWL attempts to cast its SEPA challenge as one claiming procedural error only (described as failure to complete the "procedurally-required EIS"). OUWL is arguing that its injury is the lack of an EIS. However, in so doing OUWL simply conflates the predicate injury in fact argument with its specious arguments on the merits that an EIS should have been required. Second, OUWL argues not that the Westman Mill project itself will cause it any perceptible harm, but rather that the project may make some future hypothetical and unplanned restoration project more difficult. *See* OUWL Opposition on Standing at 9, lines 14-15. Neither of these arguments confer standing.

Alleged Procedural Error. Addressing the first issue, OUWL's assertion that an EIS is "procedurally-required," and failure to prepare one constitutes harm to OUWL, ultimately ignores the actual SEPA standing requirement and fundamentally misapplies SEPA. OUWL argues it has standing because

> the League has alleged injuries arise from the City's erroneous decision to issue a Determination of Non-Significance, without completing an Environmental Impact Statement. . . . Allowing the City to proceed without so much as addressing the merits of the League's appeal would threaten an immediate and concrete injury to the League, in that apparent impacts would be disregarded, without first completing a procedurally-required EIS.

OUWL Opposition on Standing at 8, lines 7-9, 23-26. The crux of OUWL's argument is that an EIS should be required to evaluate the use of the property (and primarily other nearby property) for a future hypothetical and unplanned restoration project, arguing

> [w]ere an EIS completed, it is likely that the restoration of the historic estuary of Moxlie Creek to an open-air setting would be seriously evaluated as an alternative use of the land for the proposed development—and such a restoration project could then be commissioned.

Id. at 8, lines 17-19. OUWL's arguments are misguided. Here the City followed the appropriate SEPA procedures, and in doing so, determined that the project would not have a probable

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significant adverse environmental impact and issued a DNS.[4] There is no "procedurally-required EIS" in such circumstances, and not completing one does not create an "injury in fact" conferring standing. If OUWL's position was correct, it would completely eviscerate the actual standing requirement that a party must show an injury in fact associated with the proposed development. Rather, standing would automatically be granted to *any person* who merely believes an EIS should be required. This contravenes well-established SEPA jurisprudence.

OUWL's reliance on *Lands Council v. Wash. State Parks & Rec. Comm'n*, 176 Wn. App. 787 (2013) to support its claim of procedural error in the absence of requiring an EIS is not instructive. The *Lands Council* case addressed the reclassification of 279 acres of old-growth forest at the Mount Spokane Ski Park, which were known to support sensitive plant and wildlife habitat for threatened and endangered species, for an alpine ski area. 176 Wn. App. at 792-93. In that case, an EIS was acknowledged to be required, and the only issue was the timing of its preparation. Of note, the defending agency "d[id] not dispute that expansion of the ski area would cause injury in fact" to the appellants. *Id.* at 800. Thus, the central issue before the Examiner on this issue, whether OUWL has met its burden of establishing "injury in fact," was not in dispute in the *Lands Council* case.

Missing the point, OUWL does not provide facts showing that that it will be "specifically and perceptibly harmed" *by* the proposed development. OUWL's arguments are not focused on alleged actual environmental impacts of the project itself, but on OUWL's stated desire that the property (and other property not subject to this appeal) be put to some other and different use. OUWL's position that an EIS becomes a procedural requirement whenever an appellant raises an alternative use for the property (even a use that arguably could provide some hypothetical environmental benefit in lieu of development) misapplies SEPA and is contrary to law. Moreover, OUWL does not allege any actual specific and perceptible harm occasioned *by the*

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[4] *See* Declaration of Joseph A. Rehberger ("Rehberger Decl.") at Exhibit A (SEPA Checklist) and Exhibit B (SEPA DNS).

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project to OUWL, and its generalized request that the City should simply engage in more process is insufficient and does not itself confer standing.[5]

Hypothetical Future Restoration Project. Addressing the second issue, OUWL argues that it will suffer an injury in fact because development might make a future restoration project more difficult. To this end, OUWL argues:

> The League alleges that the proposed development may make an environmentally significant restoration of the East Bay estuary practically impossible. If the DNS is not set aside, the League will be injured in that the water quality in the watershed will likely continue to decline as it has done in recent years, leading to a diminishment in the use value of the urban watershed in Moxlie and Indian Creeks.

OUWL Opposition on Standing at 9, lines 13-17. This bare assertion does not constitute an injury in fact from the project and cannot confer standing. Even if, as OUWL speculates, completion of this project 250 feet away from an underground piped culvert may practically limit restoration options, Washington courts have held that making a hypothetical future restoration project more difficult does not constitute an adverse environmental impact under SEPA. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 59 (2002).[6] Hence it cannot be the basis of a claimed "injury in fact" under SEPA. Rather, for OUWL to have standing, it must present evidence showing how the proposed project would adversely impact existing environmental conditions and how those impacts would cause it specific and perceptible harm. *Id.* OUWL has made no such showing. OUWL has not alleged that the project itself will cause it any environmental harm, only that it could prevent its preferred use of the property to address preexisting water quality issues. Further, Washington courts have consistently held that purely conjectural or hypothetical injuries will not confer standing. *Leavitt v. Jefferson County*,

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[5] The "abstract interest in having others comply with the law is not enough to confer standing." *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 663 (2016) (citing *Chelan Cnty. v. Nykriem*, 146 Wn.2d 904, 935 (2002)); see also *West v. Port of Olympia*, 2014 Wash. App. LEXIS 1924, *12, 2014 WL 3859591 (2014) (unpublished) (same).

[6] Moreover, the Declaration of Harry Branch does not present actual facts showing that the project itself will cause any significant adverse environmental impacts. "Conclusory opinions lacking adequate factual support are insufficient to defeat a motion for summary judgment." *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 575 (2010); *see also Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169 (2012) ("Conclusory statements and speculation will not preclude a grant of summary judgment.").

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74 Wn. App. 688, 670 (1994); *see also Trepanier v. City of Everett*, 64 Wn. App. 380, 383 (1992) (concluding that a "conjectural or hypothetical" injury will not confer standing); *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 299 (1997) (finding that "community displeasure and hypothetical injury" are "insufficient to confer standing"); *West v. Port of Olympia*, 2014 Wash. App. LEXIS 1924, *12-13, 2014 WL 3859591 (2014) (unpublished) (holding allegation that new activity may disturb areas that plaintiffs claim are already polluted and other hypothetical claims could not confer standing). Having not made this predicate showing, OUWL lacks standing to appeal under SEPA here.

2. Future hypothetical restoration projects are not within the zone of interests protected by SEPA.

Separate from the above, OUWL has further failed to establish its claimed interests fall within the zone of interests protected by SEPA. As set forth above, Washington courts have held that making a hypothetical future restoration project more difficult does not constitute an adverse environmental impact under SEPA, *Thornton Creek Legal Defense Fund*, 113 Wn. App. at 59, and hence fall outside the zone of interests protected by SEPA. Furthermore, inherently speculative impacts are not within the zone of interests covered by SEPA. *See Conserv. Nw. v. Okanogan County*, 194 Wn. App. 1034, 2016 Wash. App. LEXIS 1410, *49 (2016) (unpublished); *see also* discussion at Applicant's Motion to Dismiss at 6 n.5.

C. Appellant Lacks Standing to Assert or Rely on Tribal Treaty Rights

3rd Gen also moved to dismiss OUWL's appeal on standing grounds to the extent it alleges violations of tribal treaty rights. In response, OUWL argues that it is not asserting a cause of action under any tribal treaty but is merely challenging the legality of the City's land use approval and DNS as permitted under City ordinances and under the SEPA rules. OUWL Opposition on Standing at 11, lines 4-7. It points to OMC 18.75.040(F), which allows the Hearing Examiner to grant relief if he determines that the staff's decision was "an erroneous interpretation of law," a "clearly erroneous application of the law to the facts," or "outside the authority or jurisdiction of the decision-maker." OUWL Opposition on Standing at 11, lines 12-

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24. OUWL also points to WAC 197-11-330(3)(e)(iii), which requires an official making a threshold determination under SEPA to consider that the proposal may to a significant degree conflict with local, state, or federal laws for the protection of the environment. OUWL Opposition on Standing at 11, lines 25-27, and 12, lines 1-2.

But standing cannot be predicated on a general, abstract interest in having the City comply with the law. *See Thompson*, 193 Wn. App. at 663; *West*, 2014 Wash. App. LEXIS 1924, at *12. As discussed above, OUWL must show that its rights have been adversely affected by the City's land use and SEPA decisions. A "party has standing to challenge an issue only insofar as [the issue] adversely impacts *its own rights*." *Cty. Court v. Allen*, 442 U.S. 140, 154–55 (1979) (emphasis added).

The law that OUWL alleges has been erroneously interpreted or applied, or that conflicts with the project, is the Treaty of Medicine Creek.[7] OUWL has no rights under the Treaty. It therefore cannot be adversely affected by land use or SEPA decisions that allegedly violate that Treaty.

Because it has no rights under the Treaty, OUWL does not fall within the Treaty's zone of interest. The "zone of interest" limitation focuses on whether the government intended to protect the party's interests when enacting the law in question—here, the Treaty. *See Chelan Cty.*, 146 Wn.2d at 938; *see also St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739-40 (1995). Only those persons meant to be protected by the legal provision at issue are within the zone of interest. As the U.S. Supreme Court has explained:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings, and not those of the reporters, that company would not be "adversely affected" within the meaning of the statute.

[7] OUWL assumes the Ninth Circuit's decision in *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *cert. granted*, __ U.S. __, 138 S. Ct. 735 (2018), which declared that the State of Washington violated tribal treaty fishing rights by installing culverts in streams suitable for salmon habitat, will apply to the City of Olympia and to Moxlie Creek. That assumption has not been adjudicated.

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Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990). Accordingly, the reporting company would not be within the statute's zone of interest and would not have standing to challenge an agency's failure to comply with the statute. *Id.*

If OUWL had standing here for the reason it offers—because "state and city laws confer upon [it] the right to challenge the City's action for failure to conform with relevant state and federal laws"—then everyone would have standing on that basis. OUWL Opposition on Standing at 12, lines 14-16. Similarly, everyone would have standing under the APA to seek judicial review of an agency order on grounds that the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). But that is certainly not the law.

For example, in *Allan v. University of Washington*, 92 Wn. App. 31 (1998), *aff'd*, 140 Wn.2d 323 (2000), the wife of a professor sued the university, arguing that changes it made to the faculty code violated the rulemaking requirements of the Administrative Procedure Act (APA). She claimed she should have been given notice of the proposed revisions and an opportunity to comment on them before adoption. *Id.* at 34-35. The faculty code applied to faculty members and to persons claiming discrimination, harassment, or other wrongdoing by a faculty member. *Id.* at 34. The plaintiff argued that she was within the zone of interest protected by the APA because she was married to a faculty member and because her children attended the university. On appeal, however, the court found that she lacked a "concrete interest of the type the legislation was intended to protect." *Id.* at 37. Her interest was "merely one that she holds in common with all other citizens: the opportunity to comment upon proposed rules and to have the agency consider those comments." *Id.* at 38. Because she was not within the APA's zone of interest, she lacked standing to challenge the revisions to the faculty code.

Just as the professor's wife fell outside the APA's zone of interest, OUWL falls outside the Treaty's zone of interest. The parties who negotiated the Treaty—the United States and the Tribes—did not intend to protect OUWL's interests in improving water quality and enhancing biological diversity. The Stevens Treaties protect Tribes' right to take up to fifty percent of all harvestable fish. *See Washington*, 853 F.3d at 953-58. As the 9th Circuit has observed, the

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United States' principal purpose in negotiating the treaties was to open up the Northwest for white settlement, while the Tribes' principal purpose was to "secure a means of supporting themselves once the Treaties took effect." *Id.* at 851. OUWL has cited no authority for the proposition that the parties to the Treaty of Medicine Creek intended to protect the rights of non-tribal members who opposed a DNS or land use decision, even if their opposition was based on concerns that Tribes may share. OUWL is not within the zone of interests the Treaty seeks to protect. *See High Tide Seafoods v. State of Washington*, 106 Wn.2d 695, 702 (1986) (non-tribal members could not "prove their injury falls within the zone of the fishing rights of treaty Indians").

D. 3rd Gen is Entitled to Summary Judgment (SEPA)

Even if the Examiner was to reach the merits of OUWL's SEPA appeal, such appeal cannot survive summary judgment and should be dismissed. Despite OUWL's extensive briefing and discussion of the character and benefit of natural estuary environments (which don't exist near or adjacent to the proposal), OUWL's response fails to create an issue of material fact as to the City's SEPA determination. OUWL's SEPA claim as set out in its Notice of Appeal and Appeal Brief is premised on just three issues: (1) that generally, more environmental review was procedurally necessary and an EIS should be required to evaluate alternative uses for the property not being proposed by the Applicant, *see* Notice of Appeal at 2 and Appeal Brief at 22-23, (2) that the project would "make it difficult or impossible to restore Moxlie Creek from its culvert to an open air estuary," *see* Notice of Appeal at 2, and (3) that the City improperly "piecemealed the environmental analysis," by not considering future unplanned development on adjacent parcels, *see* Appeal Brief at 24-25.[8] Based on the record before the Examiner, these claims all fail as a matter of law.

[8] To the extent OUWL's Notice of Appeal purports to raise tribal treaty rights as an element of its SEPA claim, that claim is separately addressed in Section C herein. Of note, OUWL does not establish or submit facts showing that development of the project itself will violate any tribal treaty rights. The culvert already exists and has for decades.

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1. The City adequately evaluated the environmental impacts and its decision is entitled to substantial weight on review.

The SEPA checklist for the proposal comprehensively and more than adequately disclosed environmental impacts associated with the project. Of note, under SEPA, the mention of one or many environmental impact(s) in a checklist, or even adverse environmental impacts, does not necessarily mean that the impacts are significant. WAC 197-11-315(5). The SEPA Rules provide that "[i]f the responsible official determines there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a determination of nonsignificance (DNS)." WAC 197-11-340. An agency's decision to issue an DNS must be accorded substantial weight. RCW 43.21C.090.

In response to 3rd Gen's and the Port's motions for summary judgment, OUWL does not raise or submit any evidence that would show probable significant adverse environmental impacts will result from the project. In attempting to conceive of potential environmental impacts, OUWL asserts that the claimed impacts "encompass more than the effects of foreclosing future environmental restoration projects," yet it does not actually elucidate any such impacts separate from the preexisting conditions of Budd Bay, the historic pre-development conditions of the downtown area, and the surrounding watershed. OUWL describes the project area and its surrounding vicinity as "the last large block of undeveloped historic tideland," encompassing the "natural historic shoreline of East Budd Bay," and noting that the "proposal would affect contemplated estuarine habitat restoration projects." OUWL Dispositive Motion Opposition Brief at 10. OUWL would simply like to see this property left undeveloped. *See generally id.* While OUWL's response briefing asserts that "the checklist and DNS do not acknowledge the chronic water quality and habitat problems in the basin or evaluate whether any part of the site may be necessary for a previously identified habitat restoration project," *id.* at 11, these assertions do not provide facts supporting any allegations of impacts from the project, only preexisting conditions and OUWL's desire that the property be utilized to possibly address them. These are not probable significant adverse environmental impacts from the proposal. Accordingly, OUWL has not demonstrated any error.

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OUWL's Notice of Appeal and Appeal Brief raised a single issue as to this claim, alleging that the City's DNS is "clearly erroneous" based on an allegation that it "fail[ed] to take into account the existence of a critical area adjoining the site of the proposed development." OUWL's Appeal Brief at 26, lines 10-12. As 3rd Gen pointed out in its Motion to Dismiss at 8, lines 8-17, the location of the piped segment of Moxlie Creek was fully disclosed and considered. OUWL does not dispute this disclosure in the checklist. In response, OUWL attempts to raise other newly claimed "environmental impacts" such as grading and fill work, impervious surface, and general construction issues, none of which were commented on during the SEPA comment process or identified in its Notice of Appeal and are not properly before the Examiner on appeal,[9] and similarly do not constitute significant adverse environmental impacts. Moreover, to the extent OUWL is claiming procedural error under SEPA, all of these impacts were thoroughly identified in the Applicant's SEPA checklist[10] and considered by the City in its environmental review and prior to issuance of the DNS. OUWL also raises for the first time in its response briefing alleged wetlands at the site.[11] Again, contrary to OUWL's claim of procedural error,[12] this issue was expressly disclosed and considered in the SEPA checklist. Both Ecology and the City expressly commented and concluded that such alleged wetland-type features were the result of stormwater management and that neither regulate stormwater features as wetlands. *See* Rehberger Decl. at Exhibit A (SEPA Checklist at 6) (further noting that the "storm water ponds have been removed"). Finally, OUWL generally states that "[t]hese impacts and *perhaps others*" will persist because of the nature of the development proposal. OUWL Dispositive Motion Opposition Brief at 7, lines 23-24 (emphasis added). Merely asserting "perhaps others" does not create an issue that can survive summary judgment, as lead agencies are prohibited from

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[9] *See* OUWL Dispositive Motion Opposition Brief at 7; *compare* Notice of Appeal at 2.

[10] *See* Rehberger Decl. at Exhibit A (SEPA Checklist, specifically including § B.1(e) (describing excavation, fill, and grading work), at § B.1(g) (describing impervious surface), § B.1(h) (describing BMPs and measures to control impacts); *see also id.* (SEPA Checklist at § B.1(c) (describing nature of property as "originally a tidal flat that was raised with hydraulic fill" and citing environmental report).

[11] OUWL did not comment on this issue as part of the required SEPA comment process and did not raise this issue in its Notice of Appeal, and it is not properly an issue on appeal here.

[12] *See, e.g.,* OUWL Dispositive Motion Opposition Brief at 15 (asserting wetland issues not considered). These claims ignore the record.

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consideration of speculative impacts. WAC 197-11-060(4)(a) ("attention to impacts that are likely, not merely speculative").

As to each of the claimed procedural errors, these claims cannot survive summary judgment. These issues were adequately disclosed by the Applicant and considered by the City. OUWL has not alleged facts or law showing that the City's DNS was clearly erroneous.

2. The City did not improperly piecemeal the environmental review.

The City was not required to consider the cumulative impacts of future unplanned development activity in the vicinity and did not improperly piecemeal the environmental review. While OUWL speculates that the "Westman Mill proposal establishes a precedent for the future development" of other properties, OUWL's response does not address the required legal standard, which provides that "[a] cumulative impact analysis" under SEPA need occur only when the project under review will actually facilitate future action, and where the project being considered is "dependent on subsequent proposed development." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-720 (2002). OUWL does not provide any authority contradicting this clear requirement. Aside from mere speculation about possible future development, nor does OUWL present any facts showing that the current proposal is in any way *dependent* on a subsequent proposed development. OUWL's argument fails as a matter of law.

3. There is no basis for requiring an EIS for this project.

Quite simply, there is no basis in law or fact for requiring an EIS be prepared for this project. An EIS is only required when the responsible official determines that a proposal may have a probable significant adverse environmental impact and hence issues a determination of significance (DS). WAC 197-11-360. An EIS is not required merely because a third party would like the permitting agency to consider other possible uses for a property, or for the parcel to be reserved and dedicated for a hypothetical future restoration project. Having failed to identify any "probable significant adverse environmental impact" that would be *caused* by the project under SEPA, there is no basis for requiring an EIS.

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E. 3rd Gen is Entitled to Summary Judgment (CAO)

Because the City of Olympia's Critical Areas Ordinance does not require buffers for underground piped culverts, 3rd Gen moved for summary judgment on this issue. *See* Applicant's Motion to Dismiss at 10-12. OUWL provided no response authority or argument to the contrary (other than incorporating its original Appeal Brief and claiming one statement in the Declaration of Harry Branch creates a material issue of fact). OUWL has not presented any issue of material fact precluding summary judgment.

In seeking to create an issue of fact, OUWL's response relies on one statement in a declaration from one of its members, alleging that:

> the Creeks may be restored to open air by running them through a more natural course other than the middle of Chestnut Street, and it is likely that the present development lies within a short distance (under 250 feet) of preferable locations for the daylighted creek to run, and/or the natural location of Indian and Moxlie Creeks and the estuary mouth at high tide.

OUWL's Dispositive Motion Opposition Brief at 21 (citing Branch Decl. at ¶ 19). This lone (unsubstantiated) statement from one of OUWL's members claiming that it is "likely" that a "preferable location[ ]" for a hypothetical daylighted Moxlie Creek "may" involve relocating it from its current actual culverted location *to a different location nearer* to 3rd Gen's project does not create an issue of fact. The City is not required to consider future potential buffering requirements associated with a completely conjectural and hypothetical relocation of a culvert or stream (as opposed to its current condition). OUWL cites no authority for this novel proposition. OUWL's appeal on this issue should be dismissed on summary judgment.

II. RESPONSE TO APPELLANT'S "CROSS MOTION" FOR SUMMARY JUDGMENT

Finally, the Examiner should deny OUWL's "cross motion" for summary judgment. In its opposition, OUWL requests the Examiner "enter summary judgment in favor of [OUWL] on the SEPA claim" alleging that "there are no genuine issues of material fact and the City's Determination of Non-Significance (DNS) is defective as a matter of law." OUWL's Dispositive Motion Opposition Brief at 1, lines 20-23. OUWL's "cross motion" is not timely or properly

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submitted. The Examiner's Pre-Hearing order set a "deadline for any dispositive motion" of April 4, 2018. Pre-Hearing Order at ¶ 6 (Mar. 29, 2018). OUWL did not bring any dispositive motions on April 4. Further, it is the City's land use decision and SEPA determination that is at issue and OUWL is not entitled to "cross move" against the City and its decisions seeking summary judgment where the City was not the original moving party here.

Based on and incorporating by reference the arguments in the combined briefing by both the Applicant and the Port of Olympia, and the documents and record before the Examiner, the City's DNS cannot be held to be defective "as a matter of law" and OUWL's "cross-motion" for summary judgment should be denied.

III. JOINDER

3rd Gen further joins in and incorporates by reference Respondent Port of Olympia's Reply to Appellant's Omnibus Opposition, filed April 18, 2018.

IV. CONCLUSION

Appellant's mere claimed interest in seeing this property held in an undeveloped state and then reserved for some possible future restoration effort does not support an appeal, let alone any reversal or other relief. Because OUWL failed to comment during the applicable SEPA process and has failed to meet its burden to demonstrate standing, its SEPA appeal should be dismissed. Further, OUWL has not met its burden in response to 3rd Gen's motion for summary judgment, and this appeal should be dismissed without necessitating further briefing and resources be expended at and in preparation of a hearing. Accordingly, based on the combined motions of the Applicant and the Port, 3rd Gen respectfully requests the Examiner dismiss this appeal, in its entirety.

DATED this 18th day of April, 2018.

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