BEFORE THE HEARING EXAMINER for the CITY of MONROE

ORDER GRANTING RECONSIDERATION IN PART

FILE NUMBER:	AP2012-01
APPELLANT:	Lowell Anderson *et al.* C/o Lowell Anderson 129 E Rivmont Drive Monroe, WA 98272
RESPONDENT:	Brad Feilberg City of Monroe SEPA Responsible Official 806 W Main Street Monroe, WA 98272
ACTION SPONSOR:	East Monroe Economic Development Group, LLC C/o Joshua Freed 12900 NE 180th Street, Suite 220 Bothell, WA 98011
TYPE OF CASE:	State Environmental Policy Act (SEPA) Appeal: The Final Phased Environmental Impact Statement issued for the East Monroe Comprehensive Plan Amendment and associated rezone is alleged to be inadequate

WHEREAS, the City of Monroe Hearing Examiner (Examiner) issued a Decision in the above-entitled matter on July 24, 2012; and

WHEREAS, on August 3, 2012, Brad Feilberg, City of Monroe SEPA Responsible Official (Responsible Official), and the East Monroe Economic Development Group, LLC (EMEDG) filed timely Requests for Reconsideration (the Requests). [1]

A. Responsible Official's Request:

1. Standard of Review. The Responsible Official objects to the suggestion in Footnote 8 that the "substantial weight" standard "does not apply to FEIS adequacy."

Examiner response: The Examiner would first note that contrary to the Responsible Official's assertion that "The Examiner reasoned that the EIS" was not entitled to "substantial weight," Footnote 8 is *dicta* which merely suggests that "An argument

[1] The Responsible Official corrected a minor typographical error in a case citation by way of an August 6, 2012, filing. The correction was not substantive. The Examiner has evaluated the corrected version of the Responsible Official's Request.

could be made ...". (Emphasis added in both quotes) Footnote 8 contains only a hypothesis, not a reasoned analysis.

Footnote 8's hypothesis was based upon the language in the WAC and MMC sections cited in the sentence to which the footnote is attached. The Responsible Official points out in his Request that state law expressly includes EIS challenges in the matters for which "substantial weight" is to be accorded:

> In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement", the decision of the governmental agency shall be accorded substantial weight.

[RCW 43.21C.090, underlining added] The Examiner agrees with the Responsible Official; Footnote 8's hypothesis is contrary to state law. Footnote 8 will be deleted from the Decision.

As noted in Footnote 8, even if the hypothesis were true, it "would make no difference to the outcome of this appeal." Therefore, no further changes to the Decision are necessary as a result of the elimination of Footnote 8.

2. Presumption of City Council Awareness. The Responsible Official asks the Examiner

> to supplement [Conclusion of Law 2] with applicable Growth Board cases and/or judicial precedent defining the difference between the legislative discretion granted to the [City] Council under GMA ... versus relevant SEPA requirements, which are silent on the economics for EIS review."

Examiner response: The requested discussion has no bearing on the adequacy of the subject FPEIS; the Responsible Official asks the Examiner to include a discussion of a wholly separate matter than the adequacy of the FPEIS. The Examiner declines to burden the Decision with such a discussion.

3. Appeal Venue. The "Notice of Right of Appeal" paragraph at the end of the Decision indicates that "Judicial review may be sought pursuant to" certain cited state law, state rule, and City code provisions. The Responsible Official argues that the correct venue for further appeal would "presumably" be the Growth Management Hearings Board (GMHB).

Examiner response: The "Notice of Right of Appeal" paragraph is a classic example of where trying to simplify complex code interrelationships may lead to incorrect information. The Responsible Official's Request correctly quotes RCW 43.21C.075(6)(c): "Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations." And, as the Request also states, the venue for review of the City Council's action on the underlying Comprehensive Plan amendment "would presumably be the [GMHB]." (Emphasis added)

The Responsible Official is uncomfortable definitively stating the venue for further appeal. The Examiner lacks jurisdiction to decide the venue for further appeal. Therefore, the Examiner should have, and now will, make the "Notice of Right of Appeal" paragraph far more generic.

B. EMEDG's Request: EMEDG asks the Examiner to

> reverse entirely or, in the alternative, modify his decision to find that the FPEIS is appropriate and legally sufficient provided that the City of Monroe condition future development on additional specific environmental review including, but not limited to, a development agreement pursuant to RCW 36.70B.170 (formerly referred to as concomitant or contract re-zones agreement) with specific landowners.

Examiner response: EMEDG basically asks the Examiner to change the project about which the FPEIS was written. The Examiner lacks authority to determine the scope or nature of the proposal for which an EIS is prepared. The Examiner, therefore, declines to accept EMEDG's invitation; and

WHEREAS, the Examiner concludes for the reasons set forth above that the Decision as issued on July 24, 2012, should be revised as described in Paragraphs A.1 and A.3, above.

NOW, THEREFORE, the Examiner **GRANTS IN PART** one of the requests for reconsideration and **REVISES** the Decision, a complete copy of which, as revised, is attached.

ORDER issued August 8, 2012.

\s\ John E. Galt (Signed original in official file)
John E. Galt
Hearing Examiner