Using SEPA to Encourage Economic Development and Sustainable Communities

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This article reviews and analyzes State Environmental Policy Act ("SEPA") tools that cities can use to encourage economic development and sustainable communities. The SEPA tools include categorical exemptions, three forms of "upfront SEPA," and functional equivalence. Used together, these SEPA tools can limit (or eliminate) SEPA-based challenges for urban projects, providing cities with a competitive edge to attract sustainable urban development.

A Challenging Task: Encouraging Urban Development

Washington State's cities are responsible for encouraging economic development and sustainable communities under the State's Growth Management Act ("GMA," Chapter 36.70A RCW). Generally, the GMA attempts to direct growth away from areas that have high resource and environmental values and into urban areas where infrastructure exists. In other words, encouraging urban development is an essential part of the State's environmental policy. Within this framework, the GMA attempts to balance environmental, housing, and economic development goals. Although environmental review is a necessary requirement to maintain the State's ecological integrity and policies, environmental review can also be used to obstruct rather than promote sustainable development.

In 1971, nearly 20 years before GMA's enactment, the Legislature enacted SEPA (Chapter 43.21C RCW) to ensure adequate environmental review of proposed projects. Since 1971, federal, state and local governments have adopted numerous additional environmental and growth management laws and regulations. Although specific environmental review occurs through these additional laws and regulations, SEPA review is fundamental to achieving the State's environmental and growth management goals. At the same time, SEPA review, including related administrative and judicial review, can delay and increase costs of projects with significant overall environmental, economic development and sustainability benefits, obstructing rather than promoting the State's environmental, growth and economic development policies in some cases.[2] For example, recently SEPA was used to challenge the State's first "Living Building," a commercial building located in a dense urban neighborhood and designed to generate 100% of its energy and water needs on-site, in addition to reaching numerous other "green building" benchmarks. Project opponents argued that the project requires an environmental impact statement, largely because the project will block their views.[3] The legal challenge has cost the developer tens of thousands of dollars; and, if the opponents are successful, they will delay the project for a year or more and substantially increase project costs. The SEPA-based appeal of the Living Building is one example that demonstrates how SEPA review can work in some cases at cross-purposes with the State's environmental, growth and economic development policies.

This article reviews and analyzes the SEPA tools that are available for cities (and counties within unincorporated urban growth areas) to reduce regulatory delay and increase certainty for cities and urban developers. Specifically, this article reviews categorical exemptions, upfront SEPA review, and functional equivalence. Additionally, recent legislative enactments provide new financing mechanisms for the State's fiscally strained cities to fund the implementation of selected SEPA tools.

Categorical Exemptions

Table 1: SEPA CATEGORICAL EXEMPTIONS (WAC 197-11-800(1)(c))

Project	Exemption Level
Residential Development	20 units
Multi-family Development	20 units
Commercial Development	12,000 square feet

Categorical exemptions provide a cost-effective tool for expediting development of projects that will not have a significant adverse environmental impact by exempting such projects from SEPA's environmental review requirements.[4] Specifically, cities may use their legislative authority to exempt from SEPA review projects that would develop up to 20 residential units, 20 multi-family units, and 12,000 square feet of commercial development. The exemptions provide a substantial development incentive for projects at or below the categorical exemption levels. However, the exemptions are limited, and some developments that cities want to encourage are beyond the exemption levels. For example, the six-story Living Building in Seattle would not be eligible for the categorical exemption. Additionally, a mixed-use development near a Sound Transit rail stop would not be exempt from SEPA because the residential development likely exceeds 20 units and the retail space would likely exceed 12,000 square feet. Accordingly, projects that cities want to encourage (*i.e.*, the Living Building, transit-oriented-development, etc.) remain vulnerable to timely and costly SEPA review processes and appeals.

Upfront SEPA

For projects not eligible for a categorical exemption, SEPA provides cities with three forms of upfront SEPA to minimize or eliminate SEPA-based appeals at the project level. The three forms of upfront SEPA are: (1) infill exemptions; (2) planned actions; and (3) transit-infill review.[5] If adopted, each tool requires the city to prepare or reference a non-project environmental impact statement ("EIS") that analyzes the environmental impacts of future development at the planning stage for a specified sub-area. If a new EIS is necessary, the city is responsible for preparing and defending the non-project EIS. Once the non-project EIS is complete, all projects that are consistent with statutory criteria and the sub-area's development regulations may rely on the non-project SEPA review and mitigation measures.

The intent of upfront SEPA is to streamline urban development by reducing or eliminating duplicative environmental review and reducing or eliminating potential SEPA-based administrative appeals *at the project level*. As a practical matter, however, the form of upfront SEPA will have differential consequences for both the city that completes (and initially funds) the upfront EIS and the developer who relies on that EIS, as further described in Table 2.

Table 2: "UPFRONT SEPA"

	Planned Actions (RCW 43.21.031)	**Infill Exemption** (RCW 43.21C.229)	**Transit-Infill Review** (RCW 43.21C.420)
Date enacted	1995	2003	2009
Non-project EIS required?	Yes Or reference another relevant non-project EIS	Yes Or reference another relevant non-project EIS	Yes
City's EIS cost recovery authorized?	No	No	Yes
Projects that may rely on non-project EIS	All projects in the specified subarea except essential public facilities	Only projects that are "mixed use" or residential	All projects in the specified subarea
"Shelf-life" of the non-project EIS	Not specified	Not specified	• The non-project EIS must be issued by July 18, 2018 • The project must vest ten years after the EIS is issued
EIS notice provisions	As provided in WAC 197-11-510	As provided in WAC 197-11-510	Extensive notice provisions
Project appeals for projects that are consistent with sub-area plan	Subject to appeal under WAC 197-11-172(2)(b)	Subject to appeal under WAC 197-11-305	Not subject to administrative or judicial appeals if the project vests within ten years of the EIS's issuance

***Planned Actions*, RCW 43.21.031**

To date, cities have predominantly relied on "planned actions" (RCW 43.21C.031) to complete the upfront environmental review of a sub-area. Planned actions have been used successfully to encourage economic development and sustainable communities.[6] However, planned actions have several practical limitations. First, preparing and potentially defending a non-project EIS is expensive. Other statutory provisions prohibit cities from recovering funds associated with completing a non-project EIS for a planned action ordinance, creating a significant cost for Washington State's fiscally strained cities. Second, essential public facilities may not be included in a planned action and rely on the planned action's non-project EIS. Finally, projects relying on the non-project EIS *are vulnerable to SEPA-based challenges* at the project level: (1) if the project does not meet the requirements of the planned action ordinance *or* (2) where the earlier-completed EIS does not adequately address all probable significant adverse impacts of a particular proposed project (WAC 197-11-172(2)(b)).[7] In effect, SEPA's planned action provisions allow a project opponent, instead of challenging the non-project EIS years earlier when it was prepared, to "second guess" the non-project EIS at the project level. This undermines the purpose of SEPA's planned action provision to increase regulatory certainty and reduce delay for the development of urban projects.

***Infill Exemptions*, RCW 43.21C.229**

The Legislature amended SEPA twice in an attempt to address planned action shortcomings. The 2003 "infill exemption" (RCW 43.21C.229) authorizes a city to enact new categorical exemptions beyond the levels authorized in WAC 197-11-800 (discussed above) if the city's comprehensive plan was subjected to environmental analysis through a non-project EIS prior to adoption. The exemptions may extend to all residential and "mixed-use" developments that are consistent with a sub-area plan for which a non-project EIS was completed. When used, the infill exemption is an effective tool to reduce the scope of SEPA-based appeals for certain types of urban development (*e.g.*, the Living Building or transit-oriented development). In fact, it is unclear why more cities do not use the infill exemption. Perhaps elected officials are not aware of the tool, or perhaps they are concerned about potential adverse public response to enactment of additional categorical exemptions.

However, the infill exemption does have certain limitations. Like planned actions, the infill exemption does not authorize a city to recover the costs associated with the non-project EIS. The infill exemption is also limited to residential and mixed-use development, but the statute does not define "mixed-use." Apparently, the development must include some residential development to be eligible, and purely commercial and/or industrial and/or institutional development is excluded. Finally, projects relying upon the infill exemption remain vulnerable to SEPA appeals based on claims under WAC 197-11-305.[8]

***Transit-Infill Review*, RCW 43.21C.420**

Enacted in 2009, "transit-infill review" (RCW 43.21C.420) is intended to expedite transit-oriented-development by addressing the limitations of planned actions and the infill exemption. First, transit-infill review explicitly authorizes cities to charge developers a fee to recover all costs associated with the non-project EIS. Second, all development (*e.g.*, commercial, industrial, mixed-use, residential, and public facilities) may rely on the non-project EIS. Finally, transit-infill review *eliminates all SEPA-based appeals* for subsequent urban development projects if:

(1) The city completes a non-project EIS for a sub-area plan and development regulations designed to accommodate infill development;

(2) The infill development is consistent with the sub-area plan and development regulations; and

(3) The developer submits an application sufficient to vest the project within a period specified by the city, *not to exceed ten years* after the issuance of the final EIS.[9]

Unlike planned actions, project opponents may not "second guess" the non-project EIS at the project level in an attempt to establish a litigable SEPA issue. Accordingly, using transit-infill review, cities can encourage urban development (*e.g.*, the Living Building or transit-oriented-development) by eliminating project-based SEPA appeals, provided that the specific project satisfies the above criteria.

Cities considering using transit-infill review should be aware of the statute's eligibility criteria, extensive mailed notice, and upfront public participation provisions. These provisions vary depending on population and region of the State. Additionally, transit-infill review contains a sunset provision. That provision establishes a July 18, 2018 cut-off date for EISs that may be used for transit-infill review. After July 18, 2018, projects may continue to rely on the non-project EIS for limitations on further SEPA only if the EIS was issued by the city before July 18, 2018. In effect, cities have approximately a seven year window to complete a non-project EIS for transit-infill review purposes.

Functional Equivalence

A "functional equivalence" provision enacted in 1995 (RCW 43.21C.240) arms GMA planning jurisdictions (for the purposes of this article, "cities") with a cost-effective tool to limit the time, expense, and scope of SEPA review. Functional equivalence allows cities to determine that existing local, state, and federal laws or rules provide adequate analysis and mitigation of some or all of the specific adverse environmental impacts of a proposed project. This allows the city to streamline the review process without the preparation of a costly EIS.[10]

However, cities that rely on functional equivalence do not immunize development projects from potential SEPA-based judicial and administrative appeals. The regulations enacting functional equivalence allow project opponents to identify environmental "impacts resulting from changed conditions, impacts indicated by new information, [or] impacts not reasonably foreseeable in the GMA planning process" (WAC 197-11-158(3)). If such impacts are identified, the project may require an EIS, and that EIS is then subject to an adequacy appeal. This process may stall the project for years and greatly increase project costs, perhaps to a point of infeasibility. In short, SEPA's functional equivalence provision may not provide the same level of certainty and expedition as upfront SEPA.

From a practical perspective, however, functional equivalence can play a supporting role to narrow the scope of potential SEPA-appeals. For example, a jurisdiction that has enacted a planned action ordinance may also use functional equivalence when issuing a threshold determination for a proposed project. The city's threshold determination would state that the requirements for environmental analysis, protection, and mitigation have been adequately addressed in the city's development regulations, comprehensive plan, and in other applicable federal, state and local laws or rules, *including the mitigation identified in the planned action ordinance*. Therefore, if a project opponent successfully challenges the planned action on the basis of a

no longer adequate non-project EIS, the city may rely upon functional equivalence to demonstrate SEPA compliance nevertheless.

Moving Forward: Urban Development and SEPA

Project opponents repeatedly use SEPA as their primary legal means to challenge urban development. The use of the State's most fundamental environmental law to block urban development is particularly ironic because the State has made strong policy decisions to encourage urban development as a means to protect farms and forests (by directing growth away from those lands) and to reduce the State's greenhouse gas emissions (by making transit and transit-oriented-development available in urban areas).

Categorical exemptions, the three forms of upfront SEPA, and functional equivalence used separately or in combination provide effective tools to foster sustainable urban development. By utilizing these tools, cities can provide urban developers with significant reductions in regulatory uncertainty and potential delay caused by time consuming and costly SEPA-based appeals. In short, these complementary SEPA tools may enable cities to promote and expedite economic development and sustainable communities.

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2 *See* WAC 197-11-330(5) (in making a SEPA threshold determination, the lead agency may not balance beneficial aspects of a proposal with adverse environmental impacts).

3 *See* WAC 197-11-330(5) (here, the beneficial environmental aspects of the Living Building may not be used to offset the building's potential adverse environmental impacts, including any viewshed impacts). *See also* WAC 197-11-444(2)(b)(iv); *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978).

4 Defined in WAC 197-11-720, "categorical exemption" "means a type of action, specified in these rules, which does not significantly affect the environment (RCW 43.21C.110 (1)(a)); categorical exemptions are found in Part Nine of these rules. Neither a threshold determination nor any environmental document, including an environmental checklist or environmental impact statement, is required for any categorically exempt action (RCW 43.21C.031). These rules provide for those circumstances in which a specific action that would fit within a categorical exemption shall not be considered categorically exempt (WAC 197-11-305)."

5 These terms are used for descriptive purposes in this article, and the descriptive term may not appear in the relevant SEPA statute authorizing the tool.

6 Planned action success stories abound. For example, the City of Everett used a planned action to complete environmental review for the Paine Field sub-area as an incentive for Boeing to keep its operations in Washington State. Today, Paine Field is home to the Boeing manufacturing plants for the 747, 767, 777, and 787 aircraft. In addition to economic development, cities have successfully used planned actions to encourage urban revitalization projects, with examples including Mill Creek Town Center and Federal Way City Center.

7 *See*, *Davidson Serles & Associates v. City of Kirkland*, 159 Wn. App. 148, 244 P.3d 1003 (2011).

8 For example, a SEPA-based challenge under WAC 197-11-305(1)(b)(ii) may assert that a project relying upon the infill exemption is one project in a series of exempt actions that are physically or functionally related to each other, and that together the projects may have a probable significant impact upon the environment.

9 The ten-year vesting requirement creates a potential timing issue for sub-area plans with a build-out scenario exceeding ten years.

10 *See, e.g.*, *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001), *review denied*, 146 Wn.2d 1017, 51 P.3d 86 (2002).