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BEFORE THE HEARING EXAMINER  
OF THE CITY OF SEATTLE

In the Matter of the Appeal of:

DAVID D. MILLER  
of a Grant - Short Subdivision issued by  
the Director, Department of Planning  
and Development

Hearing Examiner File:  
MUP 12-014(W)

MOTION FOR SUMMARY  
JUDGMENT AND RESPONSE IN  
OPPOSITION TO APPLICANT’S  
MOTION FOR SUMMARY  
JUDGMENT AND DISMISSAL

**I. INTRODUCTION**

I am surprised, but gratified, at Applicant’s filing for Summary Judgment in addition to their expected filing for Dismissal. The application for Summary Judgment demonstrates Applicant’s acceptance of these central facts in this case: To avoid SEPA review, Applicant split what was always intended to be a 9-unit project into functionally-related and physically-related 5-unit and 4-unit projects. Also unchallenged is the analysis the Department of Planning and Development (“DPD”) mistakenly uses the document-focused

1 SMC 25.05.060.C.2 instead of the threshold-focused SMC 25.05.305.A.2.b as the basis for  
2 their decision not to intervene in this project.

3 With both parties agreeing to the central facts of the case, we are now free to turn to  
4 code and case law to determine the resulting best course of action.<sup>1</sup>

5 In the 2007 case *Dioxin Ctr. v Pollution Control Board* (131 Wn.2d 345, 932 P.2d 158)  
6 (hereafter “*Dioxin II*”), the Washington State Supreme Court set out a two-part test for  
7 when a project may bypass SEPA exemptions. The first test is whether the exemption  
8 applies. The second is whether the exemption is overbroad. It should be noted the *Dioxin II*  
9 ruling overturned many years of a different standard, one that measured the environmental  
10 harm of an action and allowed the jurist to break a SEPA exemption if he/she determined  
11 an actual or possible significant adverse environmental harm existed.  
12

13 The SEPA exemption in SMC 25.05.800.F.1 applies in this situation. Therefore, the  
14 discussion turns to whether the exemption is overbroad.  
15

## 16 **II. RELIEF AND ACTION REQUESTED**

17 Applicant’s motion for Summary Judgment should be rejected. Applicant’s motion for  
18 Dismissal should be rejected.  
19  
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21 \_\_\_\_\_  
22 <sup>1</sup> If the Applicant backs away from their request for Summary Judgment in this  
23 case by claiming this project was not always intended to be a 9-unit project into  
24 functionally-related and physically-related 5-unit and 4-unit projects, or the analysis that  
25 SMC 25.05.305.A.2.b contains the proper threshold-related test, then this matter is not  
26 subject to Summary Judgment and we must proceed to the hearing. Appellant has only  
27 received partial responses to a related Public Disclosure Request, but already additional  
28 documents appeared show this was effectively considered one project from beginning to  
end. Applicant certainly holds additional subpoenaable documents showing this to be the  
case. If the fact this is a 9-unit project is questioned, Appellant must be given leave to  
explore this at the hearing, entering documents and witness testimony into the record.

1 Appellant enters a motion for Summary Judgment, asking the Hearing Examiner to  
2 remand the project to DPD for SEPA and design review as the 9-unit project it is.

3  
4 **III. CONDITIONS REQUIRED FOR SUMMARY JUDGMENT**

5 As Applicant notes in their filing, a motion for Summary Judgment can only be made  
6 when the facts in the case are clearly not in dispute. Section V of their brief, beginning on  
7 page 3, sets out the supporting rules and law in sufficient detail, so repetition in this  
8 Motion is not warranted. Appellant grants Applicant's arguments in Section V.  
9

10 In terms of the two-part test outlined in *Dioxin II*, Appellant also grants Applicant's  
11 argument the short plat falls within the categorical SEPA exemption in SMC 25.05.800.F.1.

12 The central condition for Summary Judgment, all facts are agreed upon by the parties,  
13 should be satisfied.  
14

15 **IV. ANALYSIS**

16 With the preceding in place, what follows is analysis supporting the Relief and Actions  
17 requested by Appellant.  
18

19 **A. Dioxin II**

20 *Dioxin II* represented a departure from prior case law as noted above. It set a new standard  
21 for the determination of SEPA exemptions. This can be gleaned from an overall reading of  
22 the case, but it is neatly summarized in the dissent written by Justice Johnson on behalf of  
23 Justices Smith, Guy, and Talmadge.  
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1 "According to the majority, the only issues for which judicial  
2 review is available are (1) whether the categorical exemption is  
3 overbroad, and (2) whether a particular action properly falls within  
4 the categorical exemption."

5  
6 Another interesting aspect of *Dioxin II* is the fact the issue was already resolved  
7 before the Court took up the case.  
8

9  
10 "Although this case is now moot, the issues have been well briefed  
11 and we reach the merits because the reliability of the system of  
12 categorical exemptions under SEPA is a matter of continuing and  
13 substantial public interest requiring our determination."  
14

15  
16 The Court spends a fair amount of time discussing the "Mootness" of the case,  
17 outlining why they are allowed – even required – to answer the important questions posed  
18 by the case. There are important similarities with this current issue.

19 Appellant notes the Design Review ship has largely already sailed on this project as  
20 some or all of the 9 units have already been built. However, just as the court discussed in  
21 *Dioxin II*, there is substantial public interest involved here in terms of the issue of  
22 micropermitting to avoid SEPA review.  
23

1           **B. SMC contradictions**

2           The Seattle Municipal Code (“SMC”) contradicts itself in this particular instance.  
3           On one hand, 23.24.040.A.1 requires “conformance to the applicable Land Use Code  
4           provisions, as modified by this chapter.” The standard of “conformance” was clearly not  
5           met here as the facts in the case show. SEPA and design review of a 9-unit project are  
6           required under SMC. They were not performed. This is not in dispute by the parties.  
7

8           On the other hand, SMC 25.05.800.F.1 hides this project from SEPA review  
9           because it apparently ties the Hearing Examiner’s hand in forcing Department of Planning  
10          and Development (“DPD”) to perform the review required by SMC 23.24.040.A.1 before  
11          the short plat may be granted.  
12

13           **C. Adequate review is critical to the exemption**

14           The short plat exemption was designed by Council to avoid appeal on projects that  
15           have already gone through *adequate* review. As noted in the appeal, DPD did not perform  
16           adequate review of this project as SEPA review was not followed. Applicant, by virtue of  
17           asking for Summary Judgment, does not dispute the fact this was a 9-unit project that, were  
18           it not for micropermitting, would have triggered SEPA review.  
19  
20

21           **D. As applied here, this exemption is overly broad**

22           The SMC clearly intends for this 9-unit project to be under SEPA review. SMC  
23           23.24.040.A.1 clearly requires conformance to the SEPA code prior to issuance of any  
24           short plat. The exemption listed in SMC 25.05.800.F.1, provides a barrier to SEPA review  
25           in this situation.  
26  
27

1           Importantly, this represents the last chance the public interest of SEPA review can  
2 be redeemed. When the permits for the first five units were issued, no SEPA or design  
3 review threshold was crossed. When the permits for the following four units were issued,  
4 the Maple Leaf Community Council Executive Board (“MLCC”) filed a timely appeal  
5 with the Hearing Examiner. The Hearing Examiner returned MLCC’s appeal check  
6 **without hearing, motions, or decision.** The letter received by MLCC from the Hearing  
7 Examiner never mentions the word “dismissed” (May 22, 2012 Clawson Declarations,  
8 Exhibit D).

9  
10           The Hearing Examiner represents the only relief to allowing a clearly non-exempt  
11 project to become exempt on a technicality. SEPA and design review are backed up against  
12 the wall by virtue of the exemption in SMC 25.05.800.F.1

13           *In this specific situation*, therefore, the SEPA exemption in SMC 25.05.800.F.1 is  
14 clearly overly broad.<sup>2</sup> It foils the Hearing’s Examiner’s ability to remand the case to DPD  
15 for the SEPA review and design review required by statute. Some future review by DPD  
16 may result in a Determination of Non-Significance and the enforcement of no conditions  
17 on the project, but those decisions cannot be presupposed as it puts the threshold cart  
18 before the horse. Appellant would argue that allowing considerations of whether a DNS is  
19 *likely* or not, whether conditions are *likely* or not, or whether design review *likely*  
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24 \_\_\_\_\_  
25           <sup>2</sup> No attempt is made to claim SMC 25.05.800.F.1 is overly broad in every situation.  
26 No attempt is made to allege this exemption should be bypassed due to the existence of a  
27 significant adverse environmental impact, as that threshold determination is another matter.  
28 The claim here is germane to this specific situation only – a clearly non-exempt project has  
been exempted from SEPA and design review.

1 could/would result in any changes to the project violate the two-part rule in *Dioxin II* and  
2 should not be part of the decision process here.<sup>3</sup>

3 In *Dioxin II*, the Washington State Supreme Court provides the pathway to relief.  
4 The Hearing Examiner can declare the exemption provided is overly broad and remand this  
5 9-unit project back to DPD for SEPA and design review.  
6

7  
8 **E. Separation of SEPA review and granting the short plat**

9 It is noted above how in *Dioxin II* the Court gave itself leave to consider a decision  
10 after it became largely moot. Appellant is uncertain if this provides the Hearing Examiner  
11 permission to undertake the following decision pathway, or even if this Motion is the  
12 proper place to broach the subject, but Appellant desires to propose it anyway:  
13

14 Appellant would be amenable to the Hearing Examiner allowing the short plat to  
15 pass provided the case is remanded to DPD for a SEPA review directed by the Hearing  
16 Examiner. The components of the SEPA review would be centered upon testing and  
17 possible remediation of toxic dust on the project property and the adjacent areas of the  
18 MMSC Day School, a reasonable distance into the adjacent park, and the properties across  
19 the street along the dead-end NE 86<sup>th</sup> Street. Additionally, that the SEPA review examine  
20 certain traffic and pedestrian-safety conditions.  
21

22 It is not Appellant's intent to cause the Applicant economic hardship by holding up the  
23 short plat. The intent is to answer the question of the missing SEPA and design reviews.  
24

25 \_\_\_\_\_  
26 <sup>3</sup> If given leave by the *Dioxin II* decision to do so, Appellant would argue any lack  
27 of findings or conditions under SEPA would be unlikely given the extensive evidence  
28 otherwise provided by prior project proposals on the site.

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**V. CONCLUSION**

The facts in this case are not in dispute. A non-exempt project has been rendered exempt from SEPA and design review. Further, DPD failed to use the threshold-focused SMC 25.05.305.A.2.b and thereby failed to properly intervene to enforce SEPA and design review on this project.

SMC 23.24.040.A.1 requires “conformance to the applicable Land Use Code provisions...” prior to granting a short plat, one of which provisions is SEPA and design review for this project. SMC 25.05.800.F.1 prevents this on this project by exempting short-plats from review by the Hearing Examiner, who represents the only chance for SEPA and design review to occur on this project. This leaves us with conflicting portions of the code.

Following *Dioxin II*, the pathway to resolve this is to declare the exemption SMC 25.05.800.F.1 to be overly broad, deny the Applicant’s motion for Summary Judgment, deny the Applicant’s motion for Dismissal, and grant Appellant’s motion for Summary Judgment remanding the project for design review and Hearing Examiner directed SEPA review.

DATED this 29<sup>th</sup> day of May, 2012.

Respectfully submitted,

By: \_\_\_\_\_  
David D. Miller