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OFFICE OF
HEARING EXAMINER

BEFORE THE HEARING EXAMINER
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 NO.

MUP 12-014 (W)

RESPONSE TO APPELLANT'S MOTION
FOR SUMMARY JUDGMENT AND
REPLY IN FAVOR OF APPLICANT'S
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

As the Appellant has conceded in its Response to our Motion for Summary Judgment, there are no material facts or arguments in dispute in this matter. There is no dispute between the parties that the short plat, the single decision that is on appeal in this matter, is specifically exempted from both SEPA review and design review. The Hearing Examiner lacks the jurisdiction to hear the issue raised by the Appellant. The Applicant's Motion for Summary Judgment must be granted, and the appeal must be dismissed.

As for Appellant's Motion for Summary Judgment, the Appellant fails to establish any facts that would support its Motion. For this reason alone, the Motion must be denied. In addition, the Hearing Examiner lacks the jurisdiction to determine the question posed by the Appellant. Therefore, its Motion for Summary Judgment must be denied.

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MCCULLOUGH HILL LEARY, PS

701 Fifth Avenue, Suite 7220
Seattle, Washington 98104-7042
206.812.3388
206.812.3389 fax

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II. FACTS

The facts set forth in the Applicant's Motion for Summary Judgment dated May 22, 2012 are adopted and incorporated herein.

III. ISSUES

1. Should the Hearing Examiner grant Applicant's motion for summary judgment when no facts support Appellant's appeal, the Appellant has adopted the Applicant's arguments in its motion, and the Hearing Examiner lacks jurisdiction to hear this appeal?
2. Should the Hearing Examiner deny Appellant's Motion for Summary Judgment when and the Hearing Examiner lacks the jurisdiction to hear the question posed by the Appellant?

IV. EVIDENCE RELIED UPON

This motion relies on the pleadings and papers on file in this action and the Clawson Declaration filed with the Applicant's Motion for Summary Judgment.

V. AUTHORITY

A. No Genuine Issues of Material Fact Exist and Applicant is Entitled to Judgment as a Matter of Law.

Hearing Examiner Rule 3.02(a) states that an appeal may be dismissed without a hearing if the Examiner determines that it fails to state a claim for which the Examiner has jurisdiction to grant relief or is without merit. A party may request dismissal of all or part of an appeal by motion. HER 3.02(b).

The Examiner must grant summary judgment if the pleadings, depositions and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56; *Seattle Police Officers Guild v. City of Seattle*,

151 Wn.2d 450, 458, 13 P.3d 1065 (2000). A material fact exists when the outcome of the

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701 Fifth Avenue, Suite 7220
Seattle, Washington 98104-7042
206.812.3388
206.812.3389 fax

1 litigation depends on its resolution. *Seattle Police Officers Guild*, 151 Wn.2d at 458. The
2 Examiner must resolve all reasonable inferences against the moving party. *Id.* The Examiner
3 shall grant the motion if reasonable persons could reach but one conclusion. *Id.*; *Ellis v. City of*
4 *Seattle*, 142 WN.2d 450, 458, 13 P.3d 1065 (2000).

5
6 Here, no genuine issue of material fact exists. The Appellant in fact stated as such in its
7 Response/Motion, and agreed to the facts of the case.¹ *Appellant's Response/Motion*, p. 2. The
8 matter before the Examiner is a SEPA and design review appeal of a short subdivision. *Appeal*,
9 p. 1. Short subdivision land use decisions, except upon lands covered by water, are categorically
10 exempt from SEPA threshold determinations. SMC 25.05.800.F.1. Thus, the short plat
11 approved by the Director is exempt from SEPA review. Similarly, the Applicant's short plat is
12 exempt from Design Review. SMC 23.41.004.A (establishing Design Review thresholds for a
13 "new development proposal"). Governing law specifically exempts the short plat, which divides
14 into four unit lots those existing townhomes that were already permitted and constructed under
15 Permit #6257818, from SEPA or Design Review. The Director's review and approval of the
16 short plat was proper because the short plat is exempt from SEPA and Design Review. There are
17 no genuine issues of material fact under which the appeal could be granted. Consequently,
18 summary judgment must be granted.

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21 **B. The Examiner Lacks Jurisdiction to Grant Appellant's Requested Relief**

22 Appellant alleges that the Director allowed "piecemealing" in violation of City and State
23 law. *Appeal* at 2. As already stated, Appellant's claim is not appealable to the Hearing
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26 ¹ / The Appellant seems to misunderstand/misread Applicant's Motion for Summary Judgment. The facts
27 established by Applicant's Motion establish that
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206.812.3388
206.812.3389 fax

1 Examiner. The Examiner is authorized to consider appeals of five types of environmental
2 determinations: a determination of nonsignificance, a determination of final EIS adequacy,
3 determinations of significance based solely on historic and cultural preservation, a decision to
4 approve, condition or deny a project based on SEPA policies, and a decision that a project is
5 consistent with a Planned Action Ordinance and EIS. See SMC 23.76.004 Table A. The
6 Director's determination that a proposal is exempt from SEPA review is not on Table A, and is
7 not appealable to the Hearing Examiner. *Id.*

9 This issue is identical to the issue previously raised by Appellant in its appeal of Project
10 #6257818, which was dismissed by the Hearing Examiner. In that case, the building permit was
11 exempt from SEPA and Design Review. The Appellant alleged that the building permit
12 constituted "piecemealing" under SEPA. *Clawson Declaration.* The Hearing Examiner
13 dismissed the appeal because the building permit was exempt from SEPA, and the determination
14 that the building permit was exempt from SEPA review was not an appealable decision
15 according to SMC 23.76.004 Table A. *Id.* As with the Examiner's dismissal of Project
16 #6257818, the Hearing Examiner lacks jurisdiction to hear the question of SEPA
17 "piecemealing." Therefore, this appeal must be dismissed.

20 Appellant states that the "Hearing Examiner represents the only relief to allowing a
21 clearly non-exempt project to become exempt on a technicality." *Appeal, p. 6.* This is not so;
22 the Hearing Examiner does not represent the "only relief" to the Appellant, since the Hearing
23 Examiner lacks the jurisdiction to answer this question, and therefore cannot grant the relief
24 requested by the Appellant. As with the *Dioxin II* case, referenced below, the question raised by
25

26 the Appellant may be heard by the Superior Court, through an appeal filed under the Land Use
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1 Petition Act within 21 days of the final decision.² The Examiner, however, lacks the jurisdiction
2 to reach this question. The appeal must be dismissed.

3 Finally, Appellant raises several new issues in its Motion for Summary Judgment
4 regarding contradictions in the Seattle Municipal Code, and whether the categorical exemption
5 granted to short plats is overly broad. *Appeal*, p. 5. Not only are these new issues raised
6 following the appeal that cannot now be raised, but the Hearing Examiner lacks jurisdiction to
7 hear these as well; these issues are policy questions better addressed to the City Council. These
8 issues must not be considered and must be dismissed by the Examiner.
9

10 **C. The *Dioxin II* case supports dismissal of this appeal.**

11 The Appellant cites at length to the dissent opinion in *Dioxin/Organochlorine Center, et*
12 *al., v. Pollution Control Hearings Board*, 131 Wn.2d 345, 932 P.2d 158 (1997) ("*Dioxin II*"
13 case).³ In fact, the *Dioxin II* case supports dismissal of this appeal.⁴ In that case, Boise Cascade
14 and other pulp and paper mills appealed a superior court order remanding reissuance of their
15 NPDES wastewater discharge permits to the Pollution Control Hearings Board to determine
16 whether the issuance of individual NPDES permits constituted a "major action" under SEPA,
17 even though these permits were listed as categorically exempt from SEPA review. *Id.* at 347-
18 348. The Washington Supreme Court reversed the superior court's decision, finding:
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22 ² / The short plat decision on its own would be ripe for consideration by the Superior Court: RCW
23 36.70C.020(1) has carefully defined "land use decision" as a "final determination by a local jurisdiction's body or
24 officer with the highest level of authority to make the determination..." Here, the Examiner lacks the authority to
25 make a determination regarding whether the short plat should have been exempt from SEPA and design review.
26 Therefore, the short plat decision represents the final determination regarding exemption and is the decision
27 appealable to Superior Court regarding the issue raised by the Appellant. Since no fact-finding appeal hearing would
28 have been held before the Examiner, the Appellant would be free to supplement the evidentiary record. RCW
36.70C.120.

³ / A dissent opinion is not the holding of the case, and does not establish controlling law.

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1 Because of the great public importance for a reliable system of categorical exemptions,
2 and the need for the orderly and cost effective administration of SEPA, we granted direct
3 review and reverse, holding actions classified as categorically exempt are immune from
4 SEPA review.

5 *Id.* at 348. The Court further stated that actions categorized as exempt “may not be
6 reviewed on a case by case basis under SEPA.” *Id.* at 356. Thus, the *Dioxin II* case supports
7 dismissal of the appeal in this case: the short plat is categorically exempt from SEPA review, and
8 may not be reviewed on a case-by-case basis. This appeal must be dismissed.


9 **VI. RELIEF REQUESTED**

10 Prescott respectfully moves that the Hearing Examiner grant the Appellant’s motion for
11 summary judgment as there are no genuine issues of material fact regarding this matter, and
12 respectfully moves that the appeal be dismissed because the Examiner lacks jurisdiction to hear
13 the Appellant’s SEPA claims. It further respectfully requests that the Applicant’s motion for
14 summary judgment be denied.

15 DATED this 4th day of June, 2012

16 MCCULLOUGH HILL LEARY, P.S.

17
18
19 By:



20 Jessica M. Clawson, WSBA #36901
21 John V. McCullough, WSBA #12740
22 Attorneys for Applicant, Prescott Development, LLC

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26 ^{4/} We have attached a copy of the case to this response/reply for the Hearing Examiner.