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7 BEFORE THE HEARING EXAMINER
8 CITY OF SEATTLE

9 In the Matter of the Appeal of:) Hearing Examiner File:
10 BRIEN CHOW)
11) **R-20-001**
12 Appellant,)
13 From a Certificate of Approval issued by the) RESPONDENT CITY'S REPLY IN
14 Director, Department of Neighborhoods,) SUPPORT OF ITS MOTION TO
15 Respondent.) DISMISS
_____)

16 **I. INTRODUCTION**

17 Appellant Brien Chow's Rebuttal to Respondent City's Motion to Dismiss (hereafter "Chow
18 Response") does not successfully dispute any of the three bases raised in the City's Motion to
19 Dismiss. The Examiner must dismiss if he finds that even on one of the three bases raised by the
20 City has been met.

21 As a preliminary matter, the Examiner does not have jurisdiction over final demolition
22 decisions that occur in the International Special Review District. Mr. Chow does not rebut the fact
23 that the Director's decision approved the demolition of the Four Seas Restaurant. That undisputed

1 fact requires the Examiner to conclude he lacks jurisdiction here. SMC 23.66.316 explicitly bars the
2 administrative appeal of all final demolition decisions made in the International Special Review
3 District. Mr. Chow's "clarification" at Response p. 2 that his intent is not to stop the demolition of
4 the Four Seas; however, his intent is irrelevant and it does not overcome the plain language of the
5 Code that final demolition decisions, including that for the Four Seas, cannot be administratively
6 appealed. For this reason, the appeal must be dismissed.

7 Second, even if the Examiner does not dismiss the appeal under SMC 23.66.316, which he
8 should, the Examiner must dismiss this appeal where Mr. Chow missed the 14 day appeal window
9 set forth in SMC 23.66.030.E.1 to bring an administrative appeal. Mr. Chow does not and cannot
10 rebut the fact that he filed his appeal outside of the 14 day window for appeal. Mr. Chow's reliance
11 on documents not before the Examiner and hypothetical scenarios cannot overcome the plain
12 language of the Code. The plain language of the Code requires appeals be filed within the fourteen
13 day window after the DON Director's decision was issued. That is because the ISRD Board makes
14 a recommendation to the DON Director, and the DON Director makes the final decision. SMC
15 23.66.316. Because Mr. Chow's appeal was not filed in the 14-day window after the DON
16 Director's Decision was made and issued, the Examiner lacks jurisdiction over this appeal. The
17 appeal must be dismissed.

18 Finally, Mr. Chow fails to point to any code provision that grants the Examiner jurisdiction
19 over his tangential claims, ranging from an alleged conflict by a Department of Neighborhood's
20 staffer, issues related to an ISRD election and claims that community outreach under SMC 23.41
21 did not occur, all of which are unrelated to the Director of Neighborhood's Decision on a Certificate
22 of Approval. The Examiner does not have jurisdiction over such claims. The Examiner needs to
23 find only one of these three bases valid to dismiss Chow's appeal in its entirety.

II. AUTHORITY

a. Final Demolition Decisions for projects in the ISRD District are not subject to Administrative Appeal.

Because the DON Director's decision grants demolition approval to demolish the Four Seas Restaurant, the Director's decision is not subject to administrative appeal. The Code regulates demolition approval in the ISRD; SMC 23.66.318.D explicitly states "there is no administrative appeal of the decision of the Director of Neighborhoods."¹

Mr. Chow does not rebut the fact that the DON Director's Decision indeed approves demolition of the Four Seas Restaurant. Mr. Chow provides no successful argument to defeat this fact. His reliance on his intent is wholly irrelevant and does not overcome the plain language in the Code. SMC 23.66.318.D provides that Demolition Decisions made by the Director are not subject to administrative appeal. Consequently, under SMC 23.66.318.D, the Examiner has no jurisdiction to hear this appeal.

Although not raised by Mr. Chow, rules of statutory construction require that code provisions be read harmoniously. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 239–40, 110 P.3d 1132 (2005). Where Code provisions are in conflict, courts have applied different rules, finding that more specific language trumps more general language. *Brown v. City of Seattle*, 117 Wn. App. 781, 72 P.3d 764 (Div. 1 2003), as corrected, (Aug. 14, 2003); *Hallauer v. Spectrum Properties, Inc.*, 143 Wn. 2d 126, 146, 18 P.3d 540 (2001) (concerning conflicting statutory provisions).

Here, although SMC 23.66.030.E provides generally for appeals of decision in special review districts, SMC 23.66.318.D is more specific. Under both rules of statutory construction

¹ SMC 23.66.318.D: "There is no administrative appeal of the decision of the Director of Neighborhoods. The Director of Neighborhoods' decision shall be final. Any judicial review must be commenced as provided by state law."

1 outlined above, the prohibition in SMC 23.66.318.D makes clear that a particular type of board
2 decisions, demolition decisions is the ISRD, are not subject to administrative appeal. The Code is
3 clear that the DON Director's Decision here is not subject to administrative appeal. Therefore, the
4 appeal must be dismissed. This provides the first separate and independent ground on which the
5 Hearing Examiner must dismiss this appeal in its entirety.

6 **b. The Hearing Examiner lacks jurisdiction because the appeal was not timely**
7 **filed as required by SMC 23.66.030.**

8 In the alternative, the Examiner lacks jurisdiction over this appeal because it was not filed
9 within the fourteen day appeal window. If the Examiner finds that he has jurisdiction over the
10 DON Director's decision for 714 S. King Street, Mr. Chow failed to file his appeal within the 14
11 day appeal window set forth in the Code. SMC 23.66.030.E.1 provides that an appeal can be filed
12 within fourteen days after the Director's Decision has been issued. The Code does not say that an
13 appeal can be filed within fourteen days after the ISRD makes a decision. This is so because the
14 ISRD Board only makes a recommendation to the DON Director; it is the DON Director who
15 makes the actual Decision on applications for certificate of application. SMC 23.66.316.²

16 Mr. Chow plainly mischaracterizes the Code when he asserts that appeals must be filed
17 "within 14 days of a decision of the ISRD board". Chow Response at p. 1. SMC 23.66.030.E.1
18 states "Any interested person may appeal the decision of the Department of Neighborhoods
19 Director to the Hearing Examiner by filing a notice of appeal within 14 days of the Department of
20 Neighborhoods Director's decision."

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22 ² "... The Board shall make a written recommendation based upon the extent to which the proposal is consistent with
23 the goals and objectives of the International Special Review District and the use and development standards of this chapter. The Department of Neighborhoods Director shall make and issue a decision according to the procedures and timelines set forth in section 23.66.030 D of this Land Use Code."

1 Moreover, Mr. Chow’s argument that his appeal meets the “intent and purpose” of the
2 “instructions” posted on the board website is both incorrect and unavailing. Chow Response at 1
3 and 4 Looking beyond the plain language of the Code is not appropriate here, where SMC
4 23.66.030.E.1 is clear. The Examiner need not look at legislative intent of a code provision unless
5 the relevant code provision is ambiguous. “Where statutory language is plain and unambiguous,
6 courts will . . . glean the legislative intent from the words of the statute itself[.]” *HomeStreet, Inc.*
7 *v. Dep’t. of Revenue*, 166 Wn.2d 444, 451-452, 210 P.3d 297 (2009). Here, the Code is crystal
8 clear that the appeal window is 14 days after the Director of Neighborhoods issued a decision. It
9 is undisputed that Mr. Chow filed his appeal before the Director made a final decision, not within
10 the 14 day appeal window. Therefore, the Examiner lacks jurisdiction over this appeal.

11 Mr. Chow relies on a number of other facts, none of which overcomes his failure to timely
12 file his appeal as required by SMC 23.66.030.E.1. For example, claims that because the
13 Examiner’s Office “accepted” his appeal, or scheduled a pre-hearing conference, such actions
14 constitutes “de facto jurisdiction” by the Examiner. Chow Response at p. 1, 5. As a quasi-judicial
15 official, the Hearing Examiner “has only the authority granted it by statute and ordinance.”³ Unless
16 an appellant properly and timely files an administrative appeal, the Examiner lacks jurisdiction
17 over the appeal.

18 Likewise, Mr. Chow’s reliance on a selective reading of a city document not properly
19 before the Examiner that speak generally about the appeal process does not in any way supersede
20 the plain language of the Code.⁴ Finally, the principles in the City’s Race and Social Justice
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22 ³ *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120;
HER 2.03.

23 ⁴ Mr. Chow at p. 4 of his Response, last bullet, cites to a DON document that states that an appeal must be filed within
14 days of approval. The document stated in multiple places that the ISRD is an “advisory board”, that any changes
listed in the document “require review by the Board, which makes a recommendation to the Director of the Department

1 Initiative and Racial Equity Toolbox do not serve as a basis to “allow the appeal to proceed.” Chow
2 Response at pp. 3, 5. As noted previously, the Hearing Examiner “has only the authority granted
3 it by statute and ordinance.”⁵

4 There is no provision of the City Code that grants the Hearing Examiner the authority to
5 render decisions on “the City’s Race and Social Justice Initiative” or the “Racial Equity Toolbox”
6 in the context of the appeal of a Decision by the Director of the Department of Neighborhoods.
7 The Hearing Examiner must interpret and apply the City Code according to its plain meaning. *Post*
8 *v. City of Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). Under the plain meaning of SMC
9 23.66.030.E.1, any administrative appeal of a certificate of approval must be filed within fourteen
10 days after the DON Director’s Decision. Because Mr. Chow’s appeal missed the appeal window
11 set forth at SMC 23.66.030.E.1, the Examiner lacks jurisdiction to hear the appeal. This provides
12 a separate and independent ground on which the Hearing Examiner must dismiss this appeal in its
13 entirety.

14 **c. The Hearing Examiner does not have jurisdiction over claims unrelated to**
15 **a certificate of approval.**

16 Even if the Examiner does not dismiss Mr. Chow’s appeal under the first two basis for
17 dismissal, the Examiner has no jurisdiction over the claims raised by Mr. Chow. SMC 23.66.030
18 clearly spells out when an appeal of a certificate of approval can be heard by the Examiner. Mr.
19 Chow raises three unrelated claims in his appeal; all of which the Examiner lacks the jurisdiction
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22 of Neighborhoods.”; It also states “The Process: Board Review: ... It then makes a recommendation to the Director
23 of the Department of Neighborhoods as to whether a certificate of approval should be issued, issued with conditions
or denied. “ Mr. Chow’s selective citation to statements in the document do not carry his burden to establish legislative
intent that the Examiner accept appeals of recommendations made by the advisory ISRD Board.

⁵ *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120;
HER 2.03.

1 over: Community outreach; alleged bias by DON Staffer Rebecca Frestedt; and the applicant
2 benefits from an “election challenge” to members running for the ISRD Board.

3 As to community outreach, Mr. Chow “clarifies” that while community outreach did occur
4 here “there were minimal efforts from Interim CDA’ i.e. inadequate outreach efforts.” Response
5 at p. 2.⁶ Yet, he cites to no code provision that requires the public input that he desires. That is
6 because there are no Code provisions that grant the Examiner jurisdiction over community
7 outreach under the Race and Social Initiative. He also does not address the Code provision of
8 SMC 23.41.002.B.1 which provides that development in any of the special review districts,
9 including the ISRD, is exempt from design review public outreach requirements.

10 He goes on to state “while not specifically required, community outreach is a key
11 component of these types of decisions.” Response at p. 6 (emphasis added). Even Mr. Chow
12 admits that community outreach is not required here. His claim related to community outreach
13 must be dismissed.

14 As to an alleged conflict of interest, the Hearing Examiner has only the authority granted by
15 statute and ordinance.⁷ There is no provision of the City Code that grants the Hearing Examiner
16 the authority to render decisions over whether a DON employee had a conflict of interest and
17 wielded “undue influence” over Board members in the context of the appeal of a decision by the
18 Director of Neighborhoods. Mr. Chow’s citation to the Examiner’s Public Guide to Appeals and
19 Hearings, does not support his claim that the Examiner has jurisdiction over “bias” in the context
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22 ⁶ Mr. Chow alleges without any factual support that he represents elderly residents with limited to no English and adjacent
23 businesses who were not informed of nor notified about nor asked for input on the design of the project. Response at 2.
Such a claim was not contained in his Notice of Appeal. The City objects to allowing Mr. Chow to amend his Notice of
Appeal after the deadline to file and appeal and after the pre-hearing conference that allows clarification of issues.

⁷ *HJS Development, supra*, 148 Wn.2d at 471; SMC 3.02.115; SMC 3.02.120; HER 2.03.

1 of the appeal of a decision by the Director of Neighborhoods.⁸ Response, p. 3. Finally, Mr. Chow
2 does not point to any code provision which allows the Examiner to have jurisdiction to review
3 claims that the applicant benefitted from an “election challenge” to members running for the ISRD
4 Board.

5 III. CONCLUSION

6 The Director of Neighborhoods issued a final decision on the application to demolish and
7 redevelop 714 S. King Street on December 24, 2019. Under SMC 23.66.318, the decision is final,
8 and administrative review of such decision is barred. In addition, Mr. Chow’s appeal is procedurally
9 flawed, and cannot be brought before the Hearing Examiner. Each claim in Mr. Chow’s appeal is
10 precluded by code. Therefore, the Hearing Examiner does not have jurisdiction to hear this appeal,
11 and the appeal should be dismissed.

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18 ⁸ The reply does not address Mr. Chow’s attempt to significantly expand his appeal by seeking to add new claims
19 through his Response including claims of “violations of codes and malfeasance related to obtaining Certificate of
20 Approval.” Response at p. 3, claims that “the process of arriving at the certificate of approval was not in accord with
21 established operating procedures of the ISRD.” Response at p 4, claims that “a quorum was present... despite
22 community pleas... to postpones the meeting.” And that the DON ISRD Board Coordinator determined the application
23 was completed and “urged them to act on it” Response at p. 5, claims that the DON ISRD Board Coordinator
“instructed three ISRD board members present to disregard comments on community outreach and engagement” p. 6,
and that she “misled the ISRD board members and community members in attendance by declaring Robert’s Rules of
Order allows a chair to second a motion.” Response at pp. 6-7. Mr. Chow’s attempt to expand this claims through his
Response is not permitted. His notice of Appeal did not allege any of these claims from “violations of codes”,
“malfeasance”, claims related to a quorum or procedures related to motions under Roberts Rules of Order. Hearing
Examiner Rule 3.01(d)(5) requires that an appeal include “[a] brief statement of the appellant’s issues on appeal,
noting appellant’s specific objections to the decision or action being appealed.” (Emphasis added.) None of these
issues were raised in Appellant’s Notice of Appeal. It is too late for Mr. Chow to raise them now.

1 DATED this 23rd day of March 2020.

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I also certify that on this date, a copy of the same document was sent via email to the following party:

the foregoing being the last known address of the above-named party.

s/Alicia Reise
ALICIA REISE, Legal Assistant