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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

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11 In the Matter of the Appeal by

12 NAOMI E. RUDEN

13 of a Decision by the Director of the Seattle
14 Department of Construction and Inspections.
15

Hearing Examiner File:
MUP-20-026

Department Reference:
Project 3035728-LU

APPLICANT’S MOTION FOR
PARTIAL DISMISSAL

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17 **I. INTRODUCTION**

18 Naomi E. Ruden (“Appellant”) appealed the Master Use Permit decision (“MUP”)
19 granted for the Applicant Ian Maples’s (“Applicant”) application to construct an 8-story, 125-
20 unit apartment building with retail (“Project”) in the City of Seattle (“City”). Appellant raises
21 multiple claims, including objections relating to the Seattle Municipal Code (“SMC” or the
22 “Code”), Seattle Comprehensive Plan policies, the Revised Code of Washington (“RCW”),
23 Washington State Housing Finance Commission’s Low-Income Housing Tax Credit Program
24 agreements, the National Historic Preservation Act, the National Environmental Policy Act, the
25 Rehabilitation Act, and the Code of Federal Regulations. The Applicant requests that the
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28 APPLICANT’S MOTION FOR
PARTIAL DISMISSAL - 1

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1 Hearing Examiner dismiss issues that are not properly before the Examiner pursuant to the City
2 of Seattle Hearing Examiner Rules of Practice and Procedure (“HER”) 3.02(a).

3 II. FACTS

4 The Project is a proposed 8-story, mixed use building with 125 apartment units and
5 retail.¹ The Project’s address is 1323 East Union Street, and it will be located on a parcel (the
6 “Project Site”) at the northeast corner of a block bounded by 14th Avenue, East Spring Street,
7 13th Avenue, and East Union Street in the First Hill/Capitol Hill Urban Center of the City of
8 Seattle.

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10 On November 19, 2020, the Seattle Department of Construction and Inspections
11 (“SDCI”) issued the MUP decision for the Project. The MUP includes the Project’s SEPA
12 determination, and the Design Review decision.

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14 On November 30, 2020, Appellant filed an appeal of the MUP decision to the Hearing
15 Examiner on multiple grounds.

16 As authorized by the City of Seattle Hearing Examiner Rules of Practice and Procedure
17 (“HER”), the Applicant now asks the Examiner to dismiss the Appellant’s objections that are not
18 properly before the Examiner.
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20 III. EVIDENCE

21 This motion relies on the pleadings and papers on file in this action with the Hearing
22 Examiner.
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27 ¹ This statement of facts is drawn from the MUP decision.

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IV. ARGUMENT

A. The Examiner may dismiss an appeal over which the Examiner lacks jurisdiction or that is without merit on its face.

Pursuant to Hearing Examiner Rule (“HER”) 3.02(a), “[a]n appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay.” HER 3.02(b) allows any party to request dismissal of all or part of an appeal by motion. “Once challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence.” *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 806-07, 292 P.3d 147 (2013), *aff’d*, 181 Wn.2d 272, 333 P.3d 380 (2014).

B. The Examiner lacks jurisdiction over Appellant’s claims.

1. The Examiner lacks jurisdiction over Appellant’s claims relating to federal statutes and regulations.

In her first claim (claim 2.1), Appellant alleges that the Project fails to comply with the National Historic Preservation Act (“NHPA”), the National Environmental Protection Act (“NEPA”), and their corresponding regulations (36 C.F.R. § 800 and 40 C.F.R. §§ 1500-1508, respectively). More specifically, Appellant argues that “[b]efore any permits are issued . . . this project must undergo [NHPA] Section 106 and NEPA Reviews.” In her second claim (claim 2.2), Appellant also asserts that the Project’s lot boundary adjustments must comply with National Register of Historic Places regulations (36 CFR § 60.14). In her fifth claim (claim 2.5), Appellant states that the Applicant “must abide by HUD Basic Laws,” and that elimination of parking facilities by the Project constitutes discrimination under Section 504 of the

1 Rehabilitation Act. Finally, in a bullet below her seventh claim (claim 2.7), she alleges that
2 changes to amenity areas require approval by HUD.

3 The Hearing Examiner has no jurisdiction over federal matters, including federal statutes
4 and regulations. *See In the Matter of the Appeal of Four Seasons Hotel Seattle, et al., from a*
5 *decision issued by the Director, Department of Construction and Inspections Regarding a Major*
6 *Public Project Construction Variance*, Hearing Examiner File Nos. HC-18-001 through HC-18-
7 007, Orders on Motions (June 6, 2018), p. 3. The Examiner therefore lacks jurisdiction to hear
8 claims 2.1, 2.2, 2.5, and 2.7 bullet two, and the Examiner should dismiss them.

10 **2. The Examiner lacks jurisdiction over Appellant's claims relating to the**
11 **Revised Code of Washington and Washington State Agency Program**
12 **Agreements.**

13 Appellant makes two claims alleging that the Project violates Washington state law and
14 agreements made pursuant to a program operated by a Washington state agency. First, Appellant
15 argues in claim 2.4 that "Removal of Existing Handicapped Accessible Parking from HUD
16 Properties in the MHA zones is discriminatory" and in violation of Chapter 70.92 RCW, which
17 is Washington state law requiring certain building provisions for aged and handicapped persons.
18 Second, Appellant contends in claim 2.6 that the Project does not comply with Regulatory
19 Agreement #20021217000384 and Covenant Agreement #2001100300526 created pursuant to
20 the Low Income Housing Tax Credit Program, which is administered by the Washington State
21 Housing Finance Commission.

23 As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by
24 statute and ordinance." *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d
25 1141 (2003); SMC 3.02.115; SMC 3.02.120; HER 2.03. There is no provision for Hearing
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1 Examiner jurisdiction over claims relating to ADA or agreements related to the Low Income Tax
2 Credit Program. To the extent that the City reviews compliance with ADA, that review occurs
3 during building permit review, and the resulting decision is not before the Examiner, nor is it
4 appealable to the Examiner. The claim should therefore be dismissed.

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6 Accordingly, the Hearing Examiner lacks jurisdiction to consider claims 2.4 and 2.6.
7 They must be dismissed.

8 **3. The Examiner lacks jurisdiction over Appellant's claims relating to the**
9 **Seattle Municipal Code and the Seattle Comprehensive Plan.**

10 *i. Seattle Municipal Code*

11 The Hearing Examiner must dismiss Appellant's claims regarding (1) Mandatory
12 Housing Affordability ("MHA"), (2) Seattle Fire Code noncompliance, and (3)
13 "addressing/location of entryway" "conflicts" (claims 2.4, 2.8, and 2.12, respectively).

14
15 First, Appellant alleges in claim 2.4 that "MHA fails to protect the disabled from
16 discriminatory actions, and fails to preserve existing designated very low-income housing (30%
17 AMI) intended for this population." To the extent that Appellant is appealing MHA zoning
18 enacted under Ordinance No. 125791, the Examiner already heard an appeal of the SEPA
19 determination for that Ordinance; the Ordinance was also appealable to the Growth Management
20 Hearings Board, but obviously any such appeal opportunity has long since passed. Claims
21 related to the MHA ordinance must be dismissed.
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23 Second, Appellant claims in issue 2.7 bullet three, and issue 2.8 of her appeal form that
24 the Project does not comply with the Seattle Fire Code. As discussed in the prior section, the
25 Hearing Examiner has only the authority granted by statute and ordinance. *HJS Development*,
26 *supra*, 148 Wn.2d at 471; SMC 3.02.115; SMC 3.02.120; HER 2.03. The Seattle Fire Code is
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1 located within the Seattle Building Code, and compliance with the Building Code is confirmed
2 through construction permits and other approvals unrelated to this MUP decision. Such building
3 permits have not yet been issued, and in any event such permits are not appealable to the Hearing
4 Examiner. As a result, the Examiner must dismiss claims related to the Seattle Fire Code.

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6 Similarly, there is no provision of the Seattle Municipal Code that provides the Hearing
7 Examiner with jurisdiction to hear appeal claims on “conflicts” regarding “addressing/location of
8 entryway” as alleged by Appellant in claim 2.12 of her appeal form. The decision to grant a
9 building an address is not a Type II decision appealable to the Hearing Examiner. *See* SMC
10 23.76.004, Table A.

11
12 Accordingly, claims 2.4, 2.7 bullet three, 2.8, and 2.12 should be dismissed as they are
13 not properly before the Hearing Examiner.

14 *ii. Seattle Comprehensive Plan*

15 In claim 2.4, Appellant also claims that the Project fails to meet the policies set forth in
16 the Seattle Comprehensive Plan. Those policies, located in the “Future Land Use Map and
17 Locations of Zones” section of the Plan, are as follows:

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19 “LU 2.7 Review future legislative rezones to determine if they pose a risk of
20 increasing the displacement of residents, especially marginalized populations, and
the businesses and institutions that serve them.

21 LU 2.8 Evaluate new land use regulations to determine if there are potential
22 adverse outcomes that may affect marginalized populations or other groups or
23 individuals unfairly, and seek to avoid or mitigate such potential outcomes.”

24 A local jurisdiction planning under the Growth Management Act (“GMA”), RCW Ch. 36.70A,
25 must prepare a comprehensive plan that “sets out [its] generalized coordinated land use policy
26 statement.” *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 608, 174 P.3d 25, 31 (2007) (internal
27

quotations omitted); RCW 36.70A.070. The GMA requires that jurisdictions promulgate “development regulations,” which are local laws such as zoning ordinances that implement and are consistent with a jurisdiction’s comprehensive plan. RCW 36.70A.040(3)(d). Development regulations turn the general policy statements in the plan into specific legal requirements. *Woods*, 162 Wn.2d at 613. Jurisdictions review and make decisions on project permit applications under the applicable development regulations, not the comprehensive plan. Fundamental land use planning choices made in adopted development regulations serve as the foundation for project review. RCW 36.70B.030.

Here, Appellant includes no detail as to how the Project fails to meet these policies, and instead predicates her claim upon direct quotes from the Comprehensive Plan’s land use policies. Even if Appellant did include an explanation of the alleged deficiencies, the Project permit decisions do not require compliance with the Comprehensive Plan. Further, Appellant fails to offer facts that would give the Hearing Examiner the jurisdiction to address this claim. Consequently, claim 2.4 should be dismissed due to lack of jurisdiction.

C. Appellant failed to file an interpretation of Type I decision; therefore Type I decisions are not properly before the Examiner.

The Code requires that any Type I decision be challenged via an interpretation. SMC 23.76.022.A.1. A determination that a project complies with development standards is a Type I decision. SMC 23.76.006.B.1. Many of Appellant’s claims involve Type I decisions, and no interpretation request has been filed related to these decisions. As a result, these claims must be rejected.

Appellant’s issue 2.7 related to compliance with the nonconformity provisions of the Code are a matter of compliance with development standards. No interpretation was filed related

1 to this claim, and therefore this claim is not properly before the Examiner. SMC 23.76.022.A.1.
2 As such, this claim must be dismissed.

3 Similarly, Appellant's issue 2.9 related to compliance with building width and depth
4 standards (SMC 23.45.528.B.1) is a matter of compliance with development standards. No
5 interpretation was filed related to this claim, and it is not properly before the Examiner. SMC
6 23.76.022.A.1. This claim must be dismissed.

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8 Appellant's issue 2.11 related to compliance with solid waste standards (SMC 23.54.040)
9 is also a matter of compliance with development standards. No interpretation was filed related to
10 this claim and it is not properly before the Examiner. SMC 23.76.022.A.1.

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12 Finally, Appellant's issue 2.13 related to compliance with the tree preservation code
13 (SMC 25.12.080) is a matter of compliance with development standards. No interpretation was
14 filed related to this claim and it is not properly before the Examiner. SMC 23.76.022.A.1.

15 All of these issues must be dismissed. They are not ripe for consideration by the
16 Examiner and the Examiner must dismiss them.

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18 **D. The Hearing Examiner should dismiss claims that are not stated with specificity.**

19 Hearing Examiner Rule ("HER") 3.01(d)(5) requires that an appeal include "[a] brief
20 statement of the appellant's issues on appeal, noting appellant's *specific objections* to the
21 decision or action being appealed." (Emphasis added.) Appellant asserts two claims regarding
22 Design Review which lack the specificity necessary to meet the HER 3.01(d)(5) standard.

23
24 In claim 2.7, Appellant alleges "[a]s for the Design Review, Conditioned, the conditions
25 to [sic] not go far enough to resolve many outstanding issues." Appellant's claim then lists
26 allegations of noncompliance, including lot boundary adjustments, nonconforming lot

1 boundaries, “HUD review,” Seattle Fire Code, public views, social distancing precautions due to
2 COVID-19, and height nonconformity – many of which were identified in the preceding section
3 of this motion as falling outside the jurisdiction of the Hearing Examiner. Additionally,
4 Appellant’s allegation fails to articulate the supposed deficiencies in Design Review with
5 sufficient detail necessary to understand the nature of the claim. Therefore, the lack of
6 specificity in claim 2.7 renders it ambiguous, and it should be dismissed as a result.
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8 In claim 2.15, Appellant requests that alternatives be sought out “in the design review-
9 such as keeping the line of sight open between the Helen V and E. Union St. Not only for safety
10 issues, but to save the views to the Helen V National Register Historic Property. Consider main
11 entranceway to 1323 E Union St to be located on E Union Street. Consider having separate
12 courtyards to maintain privacy of residents.” Like 2.7, this claim also fails to articulate
13 Appellant’s specific objections to the Design Review with sufficient detail to understand the
14 nature of her claim. Instead, Appellant suggests alternatives that are not relevant and factually
15 incorrect: as mentioned previously, the Hearing Examiner does not have jurisdiction to review
16 claims regarding entryway locations, and the Helen V is not listed on the National Register of
17 Historic Places and is not a designated City Landmark. The Hearing Examiner should therefore
18 dismiss claim 2.15 under HER 3.01(d)(5) due to the lack of specificity.
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21 V. CONCLUSION

22 For these reasons, Applicant requests that the Hearing Examiner dismiss Appellant’s
23 appeal in part. We request the Examiner clarify in its ruling what issues are still present in the
24 appeal, so that all parties may properly prepare for the hearing. If all claims requested to be
25 dismissed by this motion are dismissed, we believe only the following issues remain:
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- Issue 2.7, Bullet 4: SEPA—public views
- Issue 2.14: SEPA—construction impacts

DATED this 18th day of December, 2020.

s/Jessica Clawson, WSBA #36901
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