**BEFORE THE HEARING EXAMINER**
**CITY OF SEATTLE**

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| In the Matter of the Appeals of<br><br>**MAGNOLIA COMMUNITY COUNCIL AND OTHERS & FRIENDS OF THE LAST 6,000**<br><br>from decisions issued by the Director, Seattle Department of Construction and Inspections | Hearing Examiner Files:<br>MUP-21-016 (CU) & MUP-21-017 (ECA)<br><br>Department References: 3028072-LU<br><br>**RESPONSE OF FRIENDS OF THE LAST 6,000 ON MOTION TO DISMISS** |

## I. RELIEF REQUESTED

Appellant, Friends of The Last 6,000 ("Friends"), requests the Hearing Examiner to deny the motion to dismiss filed by Respondent, Oceanstar, LLC ("Applicant").

## II. STATEMENT OF FACTS

In June 2013, the Applicant purchased the property located at 2500 West Marina Pl. in Seattle. The property consists of a single parcel of approximately 3.89 acres, which include areas zoned as Single Family ("SF") 5000, SF 7200, and Industrial General ("IG"). The portion



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of the parcel zoned IG is largely occupied by the Admiral House Landmark – a stately home and grounds currently used for non-residential purposes. The SF areas of the parcel are in an environmentally critical area and "are predominately characterized by steep slopes."[1]

In or about June 2017, Eric Drivdahl, an architect for the Applicant, contacted the Seattle Department of Construction and Inspection ("SDCI") regarding the possible development of a portion of the SF area. It appears from documents submitted to SDCI that the Applicant initially planned to subdivide the parcel to create 4 new lots and construct a single-family dwelling on each lot.[2]

On July 8, 2017, SDCI Master Use Permit supervisor, Jerry Suder, responded to Mr. Drivdahl's earlier correspondence. Mr. Suder initially informed Mr. Drivdahl that the Applicant's parcel is "an extremely challenging site on which to pursue additional development."[3] Moving through the development options, Mr. Suder stated that while the Applicant could subdivide the site, "each new lot would need to have buildable area that is not steep slope or buffer." He went on to explain that "[t]he administrative condition use does not appear to be available for this site", and that an "ECA variance might be helpful to you, but only for one more house."

In August 2017, Mr. Suder met with Mr. Drivdahl and other individuals involved with the Applicant's proposed development. The notes of that meeting reflect comments largely

[1] See, Declaration of Margaret Boyle ("Boyle Decl."), at ¶ 3, Exhibit 1, page 2.
[2] Id., at ¶¶ 4-5, Exhibits 2, 3.
[3] Id., at ¶ 6, Exhibit 4. Mr. Suder also informed Mr. Drivdahl that no future development would ever be allowed on the steep slope or buffer. Id.



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consistent with Mr. Suder's initial observations of the difficulty and limitations of further development on the Applicant's site.[4]

Following this meeting, the Applicant dropped its plans to subdivide the parcel and build 4 single-family dwelling units. Instead, the Applicant submitted plans that left the parcel intact, and despite Mr. Suder's observation that it appeared the site would only allow one additional dwelling unit, the Applicant submitted new plans that provided for the construction of two single-family dwelling units.[5] The Applicant then sought an Environmentally Critical Area Administrative Conditional Use ("ECA ACU") permit under SMC 25.09.260 to allow its desired construction to occur.

In furtherance of its permit application, the Applicant submitted development plans, as well as reports detailing the location of the trees and vegetation on the parcel, and the mitigation efforts that it asserts will be undertaken in the event its planned development was permitted. The Applicant's plans and reports were met with various Correction Notices issued by a number of different SDCI reviewers, including reviewers from Zoning and Revegetation.

The Correction Notices issued by SDCI's Zoning Reviewers included one informing the Applicant that the parcel's SF zone only allowed single-family dwelling units (i.e., detached dwelling units), and as a result, Applicant's proposed structures were not allowed because they were "attached."[6] The Applicant responded: "Parking garage has been adjusted to be completely below existing grade. Per agreement with SDCI email 2/11/2020, this will allow the

[4] Id., at ¶ 7, Exhibit 5. As will be discussed, *infra*, Friends will use the term "single-family dwelling unit" despite the proposed structures not meeting the definition of such dwelling set out in SMC 23.84A.032.
[5] Id., Exhibit 1, "Summary of Proposal."



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houses to be considered as separate single family residences for zoning purposes."[7] The alleged "email agreement" is not included in the public records available in the SDCI project portal.[8]

The Applicant also received Correction Notices from SDCI's Revegetation reviewers. In a Correction Notice issued on July 28, 2020, the Applicant was told its plans were insufficient to establish compliance with the "avoidance of tree removal" requirement in SMC 25.09.260.B.2.b.[9] To correct the deficiency, the Reviewer required the Applicant to provide those "site design and construction alternatives" it considered to avoid the removal of trees. There is no record evidencing the Applicant providing the Reviewer with any design or construction alternatives it considered to avoid the removal of trees. Ultimately, the Director of SDCI granted the ECA ACU without requiring the Applicant to provide this information.

## III. EVIDENCE RELIED UPON

Friends rely upon the SDCI records and the Declaration of Margaret Boyle.

## IV. ISSUES

Has the Applicant shown that Friends' appeal should be dismissed as a matter of law?

## V. ARGUMENT

### A. The Applicant has not shown it is entitled to dismissal of Friends' appeal.

As set out in SMC 25.09.010, the purpose and intent of Chapter 25.09 to it is

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[6] Id., at ¶ 9, Exhibit 7. This exhibit contains both that portion of the Applicant's plans related to the garage, and the Zoning Reviewer's Correction Notice.

[7] Id., at ¶ 10, Exhibit 8. This exhibit contains both the Applicant's written response to the Zoning Reviewer's Correction Notice, and that portion of the Applicant's adjusted plans related to the garage.

[8] Id.

[9] Id., at ¶ 11, Exhibit 9.



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"provide for and promote the health, safety and welfare of the general public…[and] to promote safe, stable, and compatible development that avoids and mitigates adverse environmental impacts and potential harm on the parcel and to adjacent property, the surrounding neighborhood, and the related drainage basin." Friends' appeal exposes defects in the Director's decision granting the Applicant's ECA ACU permit.

**Legal building site status:**

SMC 25.09.260.D provides that "[t]he Director shall issue written findings of fact and conclusions to support the Director's [ECA ACU] decision…appeal of this administrative conditional use shall be as prescribed for Type II land use decisions in Chapter 23.76." Friends is challenging the Director's written finding that the Applicant's undivided parcel is a legal building site for its proposed two, single-family structures. As such, Friends' challenge is properly before the Hearing Examiner.

As established above, the Applicant's proposed development is located on an undivided parcel that already contains one residence, albeit located in an IG zone and currently purposed for commercial uses. Yet, even assuming the ability of the Applicant to place a single-family dwelling in the SF zone – as SDCI supervisor Suder suggested was possible – the current language of SMC 25.09 does not appear to allow that the placement of more than one dwelling unit. In other words, even allowing for the SF zoned portion of the property to be viewed as a separate building "lot," SMC 25.09 does not allow that lot to contain more than one single-family dwelling unit.



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Seattle's density regulation, SMC 23.44.017, provides that "[i]n SF 5000, SF 7200, and SF 9600 zones, only one single-family dwelling unit is allowed per lot, except that up to two accessory dwelling units may also be approved pursuant to Section 23.44.041, and except as approved as part of an administrative condition use permit under Section 25.09.260, a clustered housing planned development under Section 23.44.024, or a planned residential development under Section 23.44.034."

SMC 25.09.260, however, is not read to allow the Director the ability to fully disregard Seattle's general density regulation. When the language of SMC 23.44.017 is read in conjunction with SMC 25.09.260A.1 – the section that sets out the Director's ACU authority – there is no language that allows the Director to find that a single lot is a legal building site for multiple single-family dwelling units.

Instead, SMC 25.09.260.A.1 provides the Director limited discretion to approve an administrative conditional use permit in a single-family zone "for one or both of the following purposes:

> a. In calculating the maximum number of lots and units allowed on the entire parcel under subsection 25.09.240.G, the Director may count environmentally critical areas and/or buffers, except the open water area of a wetland or riparian corridor, that would otherwise be excluded, if an applicant is unable to demonstrate compliance with the requirements of subsection 25.09.240.B for the entire parcel proposed to be subdivided.
>
> b. For the entire parcel proposed to be subdivided, the Director may approve development of single family residences that meet the development standards of subsection 25.09.260.B.3 and the platting conditions in subsections 25.09.260.B.1 and 25.09.260.C.2.b. Except as specifically superseded by the development standards of subsection 25.09.260.B.3 and the platting conditions of subsection 25.09.260.C.2.b, all applicable regulations of Title 23 shall also apply to the entire parcel. The entire parcel is designated as the site."



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As such, the Director does have the discretion to relax other enumerated development standards, e.g., by allowing consideration of environmentally critical areas, when determining how much development to allow under a conditional use permit. Yet, neither of these provisions gives the Director the discretion to find that a single lot is a legal building site for multiple single-family dwelling units, and issue a conditional use permit for such development.

Thus, absent creation of additional lots, and consistent with the initial observations of SDCI supervisor Suder, *at most*, the Applicant is limited to adding only one additional single-family dwelling unit to its parcel. The Director's decision to allow two single-family dwelling units, under the guise that the parcel would support even more development, is not consistent with SMC 25.09.260.A.1 and should be rejected.

**There is an issue of fact regarding the Director's determination that the Applicant's proposed development are "single-family dwelling units."**

Even assuming that the Director had discretion to allow multiple single-family dwellings on one lot, the record does not allow a finding that the Director properly found the Applicant's proposed development was for single-family dwelling. Therefore, the Applicant's motion should be denied on this basis.

SMC 25.09.260.B.3.b. limits the Director's discretion to issue ECA ACU permits pursuant to SMC 25.09.260 to development of "single-family dwelling units." In this case, the Director found this condition met, stating in his decision that "SDCI staff has reviewed the proposal, including the number of residential *structures*…and Staff finds the proposal meets this



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code section and therefore can be developed as shown in the plan set."[10] Yet, SMC 23.84A.032 defines "single-family dwelling unit" as a detached principal structure having a permanent foundation, containing one dwelling unit." The Applicant's proposed development does not meet this definition.

It is not disputed that the Applicant's proposed "single-family dwellings" sit atop a common parking lot. Indeed, the Applicant described its proposed development as "two custom residences connected by an underground parking garage."[11] This configuration resulted in the Zoning Reviewer informing the Applicant, via a January 15, 2020 Correction Notice, "[i]t appears that the two dwelling units are attached and are therefore defined as an apartment, per SMC 23.84A.032."[12] That code provision defines an "apartment" as "a multifamily residential use that is not a cottage housing development, rowhouse development, or townhouse development."

In response to the Correction Notice, the Applicant informed the Reviewer "[p]arking garage has been adjusted to be completely below existing grade. Per agreement with SDCI email 2/11/2020, this will allow the houses to be considered as separate single family residences for zoning purposes."[13] The email "agreement" is not a public record, and Friends is unable to determine how the Director found, that by adjusting the garage, the Applicant's proposed structures became any less attached than they had been, or thereafter fit within the SMC definition of "single-family dwelling."

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[10] Id., Exhibit 1, pages 4-5. Emphasis added to draw attention to the Director's use of "structure" instead of "home" as has been used in other parts of the decision.
[11] Id., at ¶ 8, Exhibit 6
[12] Id., at ¶ 9, Exhibit 7.



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As a result, this should result in either (1) the Applicant's motion being denied because it has not shown an absence of fact regarding how its structures were determined to comply with SMC 25.09.260.B.3.b., or (2) consideration of the motion being continued to allow Friends to conduct discovery on this issue.[14]

**The Director erroneously found Applicant's development complies with the tree preservation requirements of SMC 25.09.260.B.2.b.**

Friends' appeal, while somewhat inartful, sufficiently asserts that the Director erroneously found the Applicant's materials provided him with sufficient information to find compliance with the provisions of 25.09.260B.2.b. That is, Friends has clearly asserted that the Applicant had not provided information sufficient to allow the Director to determine that the Applicant's proposed driveway location "minimizes tree removal" as required by 25.09.260B.2.b. A review of the Applicant's submissions supports Friends' argument.

SMC 25.09.260B.2.b required the Applicant to provide information sufficient to demonstrate that its proposed development "minimizes tree removal." The Director found the Applicant's materials showed that "[t]he location of the driveway extension…minimizes tree removal[.]"[15] This finding is inconsistent with the information provided by the Applicant, and the Director's Revegetation Reviewer's evaluation of that information.

On July 28, 2020, SDCI Revegetation Reviewer, Christy Carr, issued a Correction Notice to the Applicant stating:

> Section 6.1 of the mitigation plan states, "The proposed structures and driveway access have been located to avoid impacts to existing trees and tree groves to the

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[13] Id., at ¶ 10, Exhibit 8.
[14] HER 1.03Civil Rule 56(f).
[15] Id., Exhibit 1, at page 4.



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> greatest extent feasible." While the preferred alternative results in the fewest number of trees to be removed, it is not clear that this alternative could not be achieved with additional avoidance of tree removal. **There is insufficient detail to determine compliance with SMC 25.09.065 and 25.09.260.B.2.b**. **related to avoidance of tree removal.** Please expand Table 2 in the mitigation report to provide general health characteristics of each tree (as provided in the table in the plan set) and a rationale for why it is not being retained. Please include any site design or construction alternatives considered in order to retain the trees.[16]
>
> On September 24, 2020, the Applicant responded by informing Ms. Carr that:
>
> "The arborist report has been updated to show justification for each tree removal and has been resubmitted with this correction letter. The environmental report and tree plan sheets from the landscape architect (L4.0 & L4.1) have been updated to more clearly show this information."[17]

Yet, the provided information does not fully address Ms. Carr's noted deficiency regarding the Applicant's compliance with SMC 25.09.260.B.2.b.[18] The referenced tree plan sheets only reflect the location and identification of trees, and arborist report does not include any description, much less a site design or construction plan, evidencing consideration by the Applicant of ***any*** alternative driveway location in an effort to minimize tree removal. Instead, the updated report provides an unsubstantiated claim that "given the topography and the soils, the driveway can only go one place."[19]

As a result, the Applicant did not provide Ms. Carr, and therefore the Director, with sufficient documents establishing that it considered design or construction alternatives for its driveway that would "minimize tree removal" as required under SMC 25.09.260.B.2.b., and the

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[16] Id., at ¶ 11, Exhibit 9.
[17] Id., at ¶ 12, Exhibit 10.
[18] See, Id., at ¶ 13, Exhibit 11. To save trees, only the pertinent pages of the updated arborist report have been included.
[19] Id., at page 11.



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Director erroneously found that requirement complied with when granting the Applicant's ECA ACU.

## VI. CONCLUSION

Based upon the foregoing, the Applicant's motion to dismiss should be either denied, or continued so that Friends may conduct discovery regarding the Director's issuance of the ECA ACU permit.

DATED this 17th day of June, 2021.

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**DECLARATION OF SERVICE**

I certify under penalty of perjury, under the laws of the State of Washington, that on June 17, 2021, I caused this document to be emailed to the following:

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