BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of MAGNOLIA COMMUNITY COUNCIL AND OTHERS; and FRIENDS OF THE LAST 6,000 From a decision issued by the Director, Seattle Department of Construction and Inspections	Hearing Examiner File: MUP 21-016 (CU) and MUP 21-017 (ECA) Department Reference: 3028072-LU APPLICANT'S REPLY IN SUPPORT OF MOTION FOR DISMISSAL

I. INTRODUCTION AND RELIEF REQUESTED

In its Motion to Dismiss ("Motion"), Respondent Oceanstar, LLC ("Applicant") established that the appeals filed by Appellants Magnolia Community Council ("MCC") and Friends of the Last 6000 ("Friends") must be dismissed for lack of subject matter jurisdiction and failure to state a claim on which relief may be granted. Appellants filed responses ("MCC Response" and "Friends Response," respectively) that fail to overcome the arguments in the Motion. Both Appellants argue the merits of their claims in an attempt to distract the Examiner from the subject of this motion: the Examiner's jurisdiction and authority over these

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claims. The Examiner should not be fooled. For the reasons stated in the Motion and below, both appeals should be dismissed in their entirety.

II. ARGUMENT

A. Scope of Motion and Appeal.

Applicant filed a Motion to Dismiss pursuant to Hearing Examiner Rule of Practice and Procedure ("HER") 3.02(a), which states: "An appeal may 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 . . . ." By analogy to CR 12(b)(6), MCC asserts that Applicant has a "high burden" to prevail on its motion. However, in a 12(b)(6) motion, "[o]nce 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, 807 (2013). MCC and Friends have the burden to establish the Examiner's subject matter jurisdiction over their claims and fail to do so.

Applicant did not refer to any documents outside of the Appellants' respective notices of appeal, and it did not move for summary judgment. Nonetheless, both Appellants have attached documents to their responsive briefing relating not to the Examiner's jurisdiction, but rather to the merits of their claims. The Hearing Examiner should disregard these documents because they are outside of the scope of the Motion and irrelevant to the legal grounds on which Applicant moved for dismissal. *See, e.g., Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168, 176 (2008) ("Generally, in ruling on a CR 12(b)(6) motion to dismiss, the trial court may consider only the allegations contained in the complaint and may not go beyond the face of the pleadings.") (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13

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(1975) ("On a CR 12(b)(6) motion, no matter outside the pleadings may be considered, and the court in ruling on it must proceed without examining depositions and affidavits which could show precisely what, if anything, the plaintiffs could possibly present to entitle them to the relief they seek.")). However, even if the Examiner were to consider the documents, they would not save Appellants' claims from dismissal, for the reasons discussed below.

In addition, both the MCC Response and the Friends Response seek to raise new issues and to recharacterize claims in a manner that is not consistent with their notices of appeal. This is prohibited. HER 3.01(d)(3) requires appellants to state "specific objections" to a decision in the notice of appeal, and SMC 23.76.022.C.3.a likewise provides: "Specific objections to the Director's decision and the relief sought shall be stated in the written appeal." The Hearing Examiner has repeatedly affirmed that "any issue not raised in the Notice of Appeal, may not be raised later in the hearing process." *Moehring*, HE File No. MUP-18-001, Order on Motion to Dismiss at 3 (March 15, 2018); *see also, e.g.*, *Oxman*, HE File No. MUP-12-015, Findings and Decision at 5 (Aug. 16, 2012) ("At hearing and in his closing statement, the Appellant raised several issues that were not identified in his appeal: . . . The issues were not timely raised in the appeal, and cannot be considered."). HER 3.05 provides that "[f]or good cause shown, the Hearing Examiner may allow an appeal to be amended no later than 10 days after the date on which it was filed." Neither Appellant timely sought to amend their appeal and should not be permitted to do so through responsive briefing.

B. MCC Response

In its Notice of Appeal ("MCC Notice of Appeal"), MCC raised three claims, the third of which included four subclaims requesting specific mitigating conditions. All of these claims fail

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for the reasons stated in the Motion.

1. MCC Claim 3 – State Environmental Policy Act ("SEPA") Exemption

Claim 3.a in the MCC Notice of Appeal is entitled: "The Project is not exempt from SEPA." MCC Notice of Appeal, p. 3. It includes the statement: "[T]he Department's grant of a categorical exemption is clearly erroneous and should be reversed." *Id.*, p. 4. Accordingly, Applicant established in the Motion that the City of Seattle's ("City") determination that the Project is categorically exempt from SEPA review is not subject to administrative appeal. Motion, pp. 5-7.

The MCC Response agrees, stating at page 4 that "MCC is not challenging SDCI's SEPA exempt determination in this appeal" and is instead basing its claims on SMC 23.42.042. Although this statement is inconsistent with the wording of MCC's appeal, it nonetheless represents a concession that MCC Claim 3.a has been abandoned and should be dismissed. "A party abandons an issue by failing to pursue it on appeal[.]" *Holder v. Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

2. MCC Claim 3.b – View Covenants

Claim 3.b in the MCC Notice of Appeal is entitled: "The Decision fails to consider specific deed restrictions, conditions, and view covenants related to the Property." MCC Notice of Appeal, p. 5. The Hearing Examiner, however, does not have jurisdiction to require compliance with deed restrictions or provide covenants; those are matters for the Superior Court. *See* Motion, p. 7 (citing RCW 2.08.010). MCC has not disputed this jurisdictional matter in its response and has therefore conceded it. *Olympic Stewardship Found. v. Envtl. & Land Use Hrgs. Office*, 199 Wn. App. 668, 687, 399 P.3d 562 (2017) (court does not consider claim

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unsupported by argument).

Instead, MCC contends that it is "not seeking to enforce a private covenant." MCC Response, p. 6. It asserts that the claim is really that the City should have utilized its discretion under SMC 23.42.042 to impose a condition protecting the view from the Judkins Viewpoint and that "the covenants and restrictions . . . should have guided" that process. MCC Response, p. 6. This argument cannot save MCC's claim for multiple reasons.

First, it impermissibly seeks to amend the MCC Notice of Appeal, in which Claim 3.b is clearly stated as an assertion of error on the basis of the City's "fail[ure] to consider specific deed restrictions, conditions, and view covenants." That is the claim that MCC raised, and it is too late to amend the appeal. SMC 23.76.022.C.3.a; HER 3.01(d)(3); HER 3.05.

Second, MCC seeks to draw a distinction without a legally relevant difference. MCC is asserting that the Hearing Examiner should require the City to impose conditions on the Project that have the same effect as enforcement of the deed restrictions and view covenants would have, on the basis that the restrictions and covenants "demonstrate the public interest and need for protection" of the view. MCC Response, p. 6. But there is no difference between an order requiring compliance with covenants and an order requiring conditions that "consider" the covenants. If a party with the standing to enforce a covenant believes that Applicant is out of compliance, it can bring an action in Superior Court. MCC's apparent assertion that the Hearing Examiner may do the same simply by invoking the term "public interest" is unsupported by legal authority and inconsistent with the limited scope of an administrative appeal under SMC Chapter 23.76.

Third, MCC cites "representations and references" made by Applicant's design team

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concerning the covenants and the view issue more generally. In addition to being outside the scope of the Motion, these citations are irrelevant: the question is not whether the view exists or whether Applicant is aware of the covenants, but whether the Hearing Examiner has jurisdiction to enforce the covenants.

Fourth, even if MCC's claim were considered to be a general assertion that the City erred in not exercising its discretion under SMC 23.42.042 to impose conditions protecting the view from, the Judkins Viewpoint, the claim would fail for the reasons stated at pages 8-9 of the Motion. The Code protects public views only in the Shoreline District and, in the context of SEPA review, where designated by SMC 25.05.675.P. Although the list of designated public views in SMC 25.05.675.P, Attachment A includes multiple parks, including parks with the word "Viewpoint" in their name, it does *not* include the Judkins Viewpoint.[1] MCC argues that the Hearing Examiner may ignore these express limitations and impose view-related conditions anytime a project requiring a conditional use permit happens to be adjacent to a public location with a view, because that would be in the "public interest." MCC's reliance on such a broad term, however, belies the specific and far-reaching effect of the ruling it seeks, which is the creation of protected public views designated not by the City Council but by the Hearing Examiner. This is inconsistent with the Code and with the Examiner's adjudicative role. *HJS Development, Inc. v. Pierce Count*y, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003) (As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by statute and ordinance."). There is no basis for MCC's claim to a protected view.

[1] In addition, as a matter of common law, there is no right to a view in Washington. *Ashe v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) ("In Washington . . . a person has no property right in the view across their neighbor's land.")

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3. MCC Claim 3.c – Mitigating Conditions

For the reasons explained in the Motion, the mitigating conditions requested by MCC are not within the Examiner's authority to impose.

a. View Protection

The first mitigating conditions requested by MCC concern the view from the Judkins Viewpoint. MCC Notice of Appeal, p. 7. For the reasons already discussed, the Hearing Examiner does not have the authority to designate a public view for protection or to enforce a covenant and therefore lacks jurisdiction over this claim.

The MCC Response attaches a memorandum from the Seattle Parks Department that purportedly establishes that Judkins Viewpoint is "an official park viewpoint." MCC Response, p. 8. The Hearing Examiner should disregard this document for the reasons stated above. Regardless, the document is irrelevant: the Parks Department does not have the authority to rewrite the Code any more than the Hearing Examiner does. The project is SEPA exempt and, in any event, the list of designated public views in SMC 25.05.675, Attachment A, includes a number of parks with "Viewpoint" in their name but does not include the Judkins Viewpoint. The Council's choice *not* to include an item must be given effect. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451-452, 210 P.3d 297 (2009) ("A court "is required to assume the Legislature meant exactly what it said and apply the statute as written."). MCC does not cite any authority that authorizes the Hearing Examiner to add to this list through its review of a conditional use permit decision.

b. Future Use

MCC's second request for mitigation, like its withdrawn SEPA claim, is based on the

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allegation that Applicant is lying to the City in its permit application and secretly planning to use the Project in a manner that is inconsistent with the residential use allowed by the Decision. *See* MCC Notice of Appeal, pp. 3-4, 7. As Applicant explained at pages 6-7 of the Motion, this is not an allegation that provides a basis for relief in an appeal under SMC 23.76. Nor are such allegations addressed by the imposition of preemptive conditions under SMC 23.42.042.

Instead, any use of a structure "in any manner that is not permitted by the terms of any permit or authorization issued pursuant to this Title 23" and any "misrepresent[ation of] any material fact in any application, plans, or other information submitted to obtain any land use authorization," *see* SMC 23.90.002.B, D, are Code violations that are dealt with under the processes established by SMC Chapter 23.90. This Chapter does not provide for a Code violation to be adjudicated through an administrative appeal of a Type II Decision – or for a private right of action by a third party.

The MCC Response asserts at page 5 that the City's short-term rental regulations provide a basis for the imposition of conditions under SMC 23.42.042, but this is not the case. SMC 23.42.060.A provides that "[s]hort-term rental uses are permitted in any structure established as a dwelling unit," with some exceptions not applicable here. Short-term rental of a dwelling unit requires the owner of the dwelling unit to obtain a license and comply with the regulations and limitations of SMC 23.42.060 and SMC Chapter 6.600. Subject to these regulations and limitations, short term rental is available to every owner of a dwelling unit in Seattle. While the Applicant has no intention of using the Project for short-term rental, MCC has provided no authority for its claim that this single-family property owner should be treated differently than every other one in Seattle. In sum, nothing in the short-term rental regulations supports MCC's

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suggestion that the Hearing Examiner has the preemptive (and entirely redundant) authority to deny or condition a short-term rental license for the Property as part of an administrative appeal of a Type II decision.

For much the same reasons, the Hearing Examiner should deny MCC's baseless request for the removal of stairway access to the north side of the Project Site. This request too depends on the improper premise that the Applicant will fail to comply with the terms of its permit and the requirements of the Code. MCC has identified no Code requirement prohibiting direct access to a public park by abutting landowners, and there is no basis on which to order removal of a stairway that is allowed by the development regulations. And even if the speculative harms that MCC asserts were to occur, there are other mechanisms in the Code through which to address them: in addition to the general Code enforcement process and short-term rental regulations, the City's Parks Department has the authority to regulate the use of its property and to prohibit the use of the Judkins Viewpoint parking lot for improper purposes. *See, e.g.,* SMC 18.12.040, 18.12.042. The relief that MCC seeks is not a proper subject for this administrative appeal.

c. Memorandum of Agreement

MCC's third request for mitigation concerns a 2011 Memorandum of Agreement ("MOA") between the City and a prior owner of the Property, stating: "Conditions should be added to insure the construction and use of the Property comply with the MOA and do not adversely impact . . . replacement of the Magnolia Bridge." MCC Notice of Appeal, p. 7. In the Motion, Applicant explained that – as with the private view covenants – the Hearing Examiner does not have jurisdiction to enforce a Memorandum of Agreement between third parties in a

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land use appeal. MCC refers to this as "attempt[ing] to hide behind a curtain of enforcement of a private covenant," but it fails to provide any argument or authority countering the argument in the Motion. MCC Response, p. 8. "[C]ourts may assume that where no authority is cited, counsel has found none after diligent search. . . . failure to cite authority constitutes a concession that the argument lacks merit[.]" *Lodis v. Corbis Holdings, Inc*., 172 Wn. App. 835, 862, 292 P.3d 779 (2012). MCC's request should be dismissed as beyond the Examiner's jurisdiction.

To the extent that the MCC Response at page 9 seeks to recharacterize this claim as a request for conditions concerning the Project's alleged impacts to the Magnolia Bridge replacement unrelated to the MOA, the Examiner should not permit this belated attempt to amend the MCC Notice of Appeal, which is phrased entirely in reference to the MOA.

d. Landmarks Preservation Board

MCC's fourth request for mitigation states, in full: "The Decision does not meaningfully address the impact of the Project on the Admiral's House. The Decision should be modified to require advance approval of the Landmarks Preservation Board ("Board") pursuant to SMC Chapter 25.12." MCC Notice of Appeal, p. 7. As noted in the Motion, this request is improper for several reasons: the Project does not make changes to the landmarked portion of the Property; the Project is exempt from SEPA (and the "adjacency review" that could otherwise take place under the City's substantive authority); and the Code does not authorize the Hearing Examiner to order action by the Board. Motion, pp. 9-10.

In response, MCC ignores the jurisdictional issues and proceeds to argue its case on the merits. While MCC's arguments lack merit, the Applicant is not addressing them here because they are made only to distract from the threshold question before the Examiner, which is whether

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the Examiner has jurisdiction to order Board review. The Examiner should similarly disregard this argument, since it is irrelevant to that question. MCC's failure to even address the jurisdictional argument indicates its concession that the Examiner lacks jurisdiction to order the relief it seeks. *Lodis, supra*, 172 Wn. App. 862 (failure to cite authority constitutes a concession that the argument lacks merit.).

For this reason in addition to those stated in the Motion, the Hearing Examiner should deny MCC's request to order review by the Board.

C. Friends' Claims

The Friends Notice of Appeal included: (1) a claim generally objecting to the SEPA exemption as well as several claims alleging insufficient SEPA analysis of particular environmental impacts (pp. 2-5); (2) a claim objecting to the City's "interpretation of this building site status" (pp. 5-6); (3) a separate claim of improper SEPA analysis of historic and cultural preservation (p. 6); (4) a claim "object[ing] to the tenor and specifics of the Arborist's Report" (p. 6); and (5) a claim that the Project is inconsistent with City climate change policy (p. 7). Applicant established in the Motion that none of these claims can survive, and the Friends Response fails to overcome these arguments.

1. Abandoned Claims

Most notably, the Friends Response fails to respond to – and therefore concedes – Applicant's arguments for the dismissal of all of Friends' SEPA claims (including historic preservation) as well as its climate change policy claim. These claims must therefore be dismissed for the reasons stated in the Motion. *Olympic Stewardship Found., supra,* 199 Wn.

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App. 687 (court does not consider claim unsupported by argument); *Lodis, supra*, 172 Wn. App. 862 (failure to cite authority constitutes a concession that the argument lacks merit).

2. Legal Building Site.

Friends' second claim challenged the City's determination under SMC 25.09.260.B.1.c that the Project site was in existence as a legal building site prior to October 31, 1992. *See* Friends Notice of Appeal, p. 3.[2] As explained in the Applicant's Motion at pp. 13-14, the determination of legal building site status is a Type I decision over which the Examiner lacks subject matter jurisdiction, unless a Code Interpretation was requested and appealed, which did not occur here.

In its Response, Friends completely ignores the jurisdictional issue presented by the Motion. Its failure to brief the jurisdictional issues is fatal to its claim. *Olympic Stewardship Found., supra,* 199 Wn. App. 687 (court does not consider claim unsupported by argument); *Lodis*, *supra*, 172 Wn. App. 862 (failure to cite authority constitutes a concession that the argument lacks merit).

Instead of discussing the issue presented by the Motion, the Friends Response argues that its legal building site claim should survive on the basis of two, entirely new assertions: first, that Friends' legal building site claim is really challenging the City's authority to approve a Project that includes two dwelling units on this site; and second, that there is an "issue of fact" regarding whether the dwelling-units comprising the Project meet the definition of "single-family dwelling." Friends Response, pp. 5-9. The Examiner lacks jurisdiction over the legal building

[2] Friends also criticized the approach taken by City staff reviewing the Project application. For the reasons stated at pages 14-15 of the Motion, these criticisms do not constitute a valid claim. Friends has not responded to these arguments and has therefore conceded them.

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site claim as well as these new claims relating to the number of permissible units and the definition of a single-family dwelling for at least three reasons.[3]

a. Claims not Stated in Appeal

First, both arguments improperly seek to amend the appeal. "[A]ny issue not raised in the Notice of Appeal, may not be raised later in the hearing process." *Moehring*, HE File No. MUP-18-001, Order on Motion to Dismiss at 3 (March 15, 2018). Friends' claim did not challenge the number of units or whether the proposed homes qualify as single-family residences, but specifically challenged only the legal building site determination. Friends Notice of Appeal, p. 5 ("We object to the interpretation of this building site status."). The appeal also "question[ed] the interpretation that the Applicant could actually build *even more* residences on this site," *see id.*, p 5 (emphasis supplied), but it did not challenge the City's Type I determination that two single-family homes could be constructed or that the Project consisted of single-family homes. Friends' failure to provide any argument in support of the claims it actually raised is, alone, a sufficient basis for dismissal.

b. Claims Subject to Code Interpretation

Second, even if the Friends Notice of Appeal had included the claims set out in the Friends Response, they would be improper. The City's determination that the Project is a legal building site was a Type I decision. *See* SMC 23.76.004, Table A; SMC 23.76.006.B.1. Friends' new claims challenging the City's determination regarding the number of units that are allowed under the Code and that the homes qualify as single-family dwellings similarly relate to

[3] Friends' claims also fail on their merits. Applicant reserves its right to respond on the merits if the Examiner retains jurisdiction.

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Type I decisions over which the Examiner lacks subject matter jurisdiction. *Id*. As such, these issues are only subject to administrative review through the land use interpretation process established by SMC 23.88.020.C.3. SMC 23.76.022.A.1. Having not requested an interpretation in accordance with these procedures, Friends cannot now raise a challenge to the City's Type I determinations – even if it had included them in its appeal. This, too, is a sufficient basis for dismissal of this claim.

c. The Term "Legal Building Site"

Third, Friends' new arguments reflect a fundamental misunderstanding of the term "legal building site." The determination that a property is a legal building site has nothing to do with how many units are allowed on the property or whether proposed units qualify as single-family dwellings. Rather, "[a] legal building site is a lot that qualifies for separate development. To qualify, the lot must have been legally separated from neighboring properties and not be needed to meet code standards for a development on a neighboring lot." Seattle SDCI Tip#255.[4] Friends' arguments regarding the number of units and whether the proposed structures qualify as single-family dwellings are completely irrelevant to the determination that the Project site is a legal building site. Instead, this determination relates only to when the Project site was legally separated from neighboring properties and whether it is needed to meet Code standards for neighboring development. The Examiner must reject Friends' argument on this basis.

3. Urban Forest

Friends' final argument again seeks impermissibly to amend its Notice of Appeal. Friends' "Urban Forest" claim asserted that the Decision "[i]gnores the fact that the [Project Site]

[4] This Tip is available at http://www.seattle.gov/DPD/Publications/CAM/Tip255.pdf.

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is part of a continuous Urban Forest [and] sets a precedent for incursion into the city's remaining ECA's." Friends Notice of Appeal, p. 3. Friends also argued that "the tenor and specifics of the Arborist's Report" failed to recognize that certain tree varieties should be "especially valued." *Id.*, pp. 6-7. As described at pages 15-16 of the Motion, this claim failed to allege a violation of a Code provision or any other basis for relief.

The Friends Response effectively concedes this point by arguing that the Notice of Appeal did not mean what it said but, rather, intended to assert a claim under SMC 25.09.260.B.2.b ("An application under this Section 25.09.260 shall provide information sufficient to demonstrate that the proposal meets the following criteria . . . minimizes tree removal . . . ."). Specifically, Friends argues that after receiving a correction letter from the City, the Applicant failed to provide "sufficient documents establishing that it considered design or construction alternatives for its driveway." Friends Response, p. 10. The Hearing Examiner should not consider this argument because it goes far beyond the claim raised in the appeal. Not only does the Friends Notice of Appeal not mention SMC 25.09.260.B.2.b (or any other Code provision) or the correction letter, it does not concern the issue of driveway configuration or "construction alternatives." The claim does not assert that the Applicant has provided insufficient information about its proposed design, but rather that the Applicant's arborist assigned insufficient value to the tree species discussed. Friends cannot use its response brief to amend this claim, which must be dismissed for the reasons that are stated in the Motion and that Friends has failed to dispute.

III. CONCLUSION

The Applicant respectfully requests that the Hearing Examiner (1) grant the Motion; (2)

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dismiss the MCC appeal in full; and (3) dismiss the Friends appeal in full.

DATED this 24th day of June 2021.

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