

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

Hearing Examiner File:
**MUP-21-016 (CU) and
MUP-21-017 (ECA)**

**MAGNOLIA COMMUNITY COUNCIL
AND OTHERS; and, FRIENDS OF THE
LAST 6,000,**

Department Reference:
3028072-LU

from a decision issued by the Director,
Seattle Department of Construction
and Inspections.

**ORDER ON APPLICANT’S
MOTION TO DISMISS**

1. Motion. The Applicant, Oceanstar, LLC, requested dismissal of two appeals filed by Magnolia Community Council and Others, and Friends of the Last 6,000. The Department of Construction and Inspections did not take a position. The parties, referred to as Applicant, MCC, Friends, and Department submitted:

- Applicant’s Motion to Dismiss;
- MCC Response to Applicant’s Motion to Dismiss with Exhibits 1-2;
- Response of Friends of the Last 6,000 on Motion to Dismiss;
- Declaration of Margaret Boyle, with Exhibits 1-11; and,
- Applicant’s Reply in Support of Motion for Dismissal.

Appeals must identify specific objections, and untimely issues are not considered.¹ The Hearing Examiner Rules allow for dismissal if an appeal “fails to state an issue for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face....”² The motion to dismiss is akin to a CR 12(b)(6) motion.³

2. Background. The Department issued an Environmental Critical Areas Administrative Conditional Use under SMC 25.09.260. The decision allows two, three-story residences with parking for 13 vehicles on a 3.89-acre site with 87,109 square feet of steep slopes. The site is developed with the Admiral’s House, a designated landmark.

¹ SMC 23.76.022(C)(3)(a) (“specific objections ... shall be stated in the written appeal”); HER 3.01(d)(3) (appeal must include “specific objections”); *Moehring*, HE #MUP-18-001, Order on Motion to Dismiss (March 15, 2018), p. 3.

² HER 3.02(a); HER 2.16 (allowing for dismissal and other dispositive motions).

³ HER 1.03(C) (Superior Court Civil Rules may provide guidance).

3. State Environmental Policy Act, Ch. 43.21C RCW (SEPA) Exemption (MCC Issue 3a and Friends' Issues A & C). The Examiner's SEPA jurisdiction is limited to appeals of threshold determinations, environmental impact statements, and certain decisions on conditions.⁴ Consistent with state rule, categorical exemption determinations are not included. "Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS."⁵ Friends raises concerns over environmental disclosures, but SEPA does not apply to an exempt project, and a Checklist is not required for exempt proposals.⁶ As the Code does not provide an administrative appeal for challenging a SEPA exemption determination, the Examiner cannot entertain the SEPA issues MCC and Friends raised.

4. Private Property Restrictions (MCC Issue 3b). The appeal asks whether the Department adequately mitigated view impacts under SMC 23.42.042(B):

SMC 23.42.042(B) provides that in authorizing a conditional use, the Director may impose conditions to mitigate adverse impacts on the public interest, which here would include the UJV [Ursula Judkins Viewpoint] public view. Those conditions should consider the specific restrictions, conditions, and view covenants that developed over the history of the Property, which the Decision does not do. ... At the very least, the Decision must be modified to impose conditions that preserve the strong public interest in the dramatic public view from UJV.⁷

The Examiner does lack jurisdiction over private deed and covenant compliance. Title restriction disputes go to the superior courts, which are assigned "original jurisdiction in all cases ... which involve the title or possession of real property."⁸ A covenant may provide relevant context, but the Examiner can only address Code consistency. Covenant consistency cannot be addressed; SMC 23.42.042(B) consistency can be.

5. Conditions (MCC Issue 3c). The Director may impose conditions to mitigate impacts on adverse impacts on other properties when approving a conditional use.⁹ The City's SEPA policies do limit Department mitigation authority in the SEPA context, but not necessarily outside the SEPA context.

⁴ SMC 23.76.022(C)(6) (Jurisdiction is limited to "determinations of nonsignificance (DNSs), adequacy of an EIS upon which the decision was made, or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts..."); SMC 25.05.680(A)(1) (appeal procedures in Ch. 23.76 SMC).

⁵ WAC 197-11-680(3)(a)(iii).

⁶ SMC 25.05.305(A)(1); SMC 25.05.720.

⁷ MCC Appeal, pp. 5 and 7.

⁸ RCW 2.08.010.

⁹ SMC 23.42.042(B) ("In authorizing a conditional use, the Director or City Council may impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity.").

Nothing in these SEPA policies shall diminish the independent effect and authority of other environmentally related policies adopted by the City. Such City policies shall be considered together with these SEPA policies to guide discretionary land use decisions such as conditional uses and legislative actions such as rezones, adoption of area plans and siting of City facilities. Such adopted City policies may serve as the basis for exercising substantive SEPA authority with respect to a project only to the extent that they are explicitly referenced herein.¹⁰

As the appeal raises CUP mitigation issues under Ch. 25.09 SMC, and not only SEPA, MCC Issue 3(C)'s five mitigation questions may be addressed as clarified below.

a. Tree Height Restriction. The City protects shoreline views and designated public views.¹¹ Judkins Viewpoint is not a designated public view and is not within the shoreline. However, the appeal requests SMC 23.42.042 mitigation for view impacts, so it should not be dismissed. The Examiner is not now deciding the role of the City's SEPA regulation (SMC 25.05.675(P)) in determining view impact mitigation for a SEPA-exempt CUP.

b. High Vantage Points at UJV from Grading. This issue may raise impracticability issues, as this is a public park. Seattle Parks and Recreation is not a party to this proceeding and imposing conditions on non-parties is likely infeasible. The parties do not address this concern, and as the question raised is on SMC 23.42.042 mitigation adequacy, the issue will remain before the Examiner for now.

c. Removal of North Side Exterior Stair Access. The Examiner will consider this SMC 23.42.042 mitigation issue.

d. Memorandum of Agreement (City, SDOT, and Prior Owner). The Examiner lacks authority to review the decision for MOU consistency. But a CUP may include mitigation to address "adverse impacts on ... other properties in the zone or vicinity."¹² Though not directive, the MOU may be used to provide factual background and context. This issue is similar, if not the same as Issue 3b.

e. Admiral's House Impacts/Landmarks Preservation Board Approval. The project does not include "any changes to the Admiral's House or the landmark portion of the property."¹³ Without such a change, Landmark Preservation Board jurisdiction is not triggered.¹⁴ The Board may review projects adjacent to designated sites or structures through its SEPA authority.¹⁵ However, the Department determined the project is exempt, and the Examiner lacks jurisdiction over an appeal of that determination so cannot address

¹⁰ SMC 25.05.665(B).

¹¹ SMC 23.60A.170; SMC 25.05.675(P).

¹² SMC 23.42.042(B).

¹³ Decision, p. 2.

¹⁴ SMC 25.12.670.

¹⁵ SMC 25.05.675(H)(2)(d).

the designation question. However, this issue also raises a question on whether mitigation should be imposed through SMC 23.42.042. This provides the Department authority separate from and in addition to SEPA. "The Director ... may impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity."¹⁶ The issue, as clarified, should remain.

6. Building Site Status (Friends Issue B). The Department determined that under SMC 25.09.260(B)(1)(c), the project existed as a legal building site before October 31, 1992, which impacts applicable review criteria. The appeal states, "we object to the interpretation of this building site status,"¹⁷ but the rationales for the objection do not raise cognizable issues.

- The appeal objects to the "interpretation of the rule allowing building on this environmentally sensitive site because it was a legal building site prior to October 31, 1992," as this would nullify many protective City regulations.¹⁸ This is an objection to the legislation, not an error in the application of the code to the site. The Examiner lacks jurisdiction over code appeals.
- The appeal objects to analysis suggesting the Applicant could build more than two residences. The Examiner can only address the decision approving two residences, not configurations which the Department did not approve.
- The Department relied on the Applicant's technical materials. The appeal objects but this is authorized. The Applicant is required to make these submissions.¹⁹
- The Department outlined permitting options for the Applicant. This is permissible. This is one reason for pre-application meetings.

The Applicant also argues dismissal is required due to a failure to appeal what was a Type 1 decision,²⁰ as the Code has a separate appeals process for Type I decisions. As the appeal does not identify a cognizable legal issue objecting to the building site question, this issue need not be decided.

7. Arborist Report (Friends Issue D). Objecting to a technical report's "tenor and specifics," without identifying a Code violation or citation to other legal authority, does not provide the Examiner a basis for addressing the technical analysis. However, the appeal does raise concerns about report classification of certain trees as invasive versus native, states groves are a protected category and should be retained, and with modest

¹⁶ SMC 23.42.042(B), *see also* subsection (C).

¹⁷ Appeal, p. 5.

¹⁸ Decision, pp. 2-3; Friends Notice of Appeal, p. 3.

¹⁹ SMC 25.09.260(B) (ECA conditional use application "shall provide information sufficient to demonstrate" compliance with criteria).

²⁰ SMC 23.76.004, Table A, but see first line excepting certain decision from Type 1 designation ("Application of development standards for decisions not otherwise designated Type II, III, IV, or V:"); SMC 23.76.006(B)(1).

measures, the health of certain trees could be restored. The Examiner may address these three questions.²¹

8. Climate Change Policy (Friends Issue E). Tree removal requirements for single-family home projects are at Ch. 25.11 SMC and SMC 23.44.020, and use and development for single-family zones are at Ch. 23.44 SMC. No Code provision is identified the project does not comply with. This issue should be dismissed.

ORDER

The Applicant's Motion to Dismiss is granted in part. As clarified, these issues are before the Examiner:

- MCC Issues 3b and 3c; and,
- Friends' Issues D.

The remaining issues (MCC Issue 3a and Friends Issues A, B, C, and E) are **DISMISSED**.

Entered June 28, 2021.

/s/Susan Drummond
Susan Drummond, Deputy Hearing Examiner

²¹ In responding to the dismissal motion, Friends identifies SMC 25.09.260(B)(2)(b) as the code section this issue is based on. While preferable to have been identified in the appeal, the three issues were nevertheless sufficiently articulated.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matters of **MAGNOLIA COMMUNITY COUNCIL AND OTHERS & FRIENDS OF THE LAST 6,000**, Hearing Examiner Files: **MUP-21-016 (CU) & MUP-21-017 (ECA)** in the manner indicated.

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Dated: June 28, 2021

/s/ Galen Edlund-Cho
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