BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of MAGNOLIA COMMUNITY COUNCIL AND OTHERS from a decision issued by the Director, Seattle Department of Construction and Inspections	Hearing Examiner File: MUP-21-016 (CU) Department Reference: 3028072-LU **APPLICANT'S CLOSING BRIEF**

I. INTRODUCTION

The project under review ("Project") consists of two single-family homes in a single-family zone. The homes meet single-family development standards. An Environmentally Critical Area ("ECA") Conditional Use Permit ("CUP") is needed solely due to the presence of critical areas. Seattle Municipal Code ("SMC" or "Code") 25.09.260 sets out the criteria and conditions that may be applied to an ECA CUP. The Project's compliance with these criteria is not at issue. SMC 23.42.042 does not authorize the City of Seattle ("City") to impose conditions unrelated to critical areas. Even if the City has this authority, the CUP must be affirmed because no additional conditions are necessary and any procedural error was harmless.

II. ARGUMENT

A. Non-ECA impacts are outside the scope of the City's review.

The City correctly determined that the non-ECA issues raised by Magnolia Community

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Council ("MCC") were beyond the scope of the CUP required for the Project. *See* City Ex. 1b at 2. Contrary to MCC's suggestion, the City did not ignore SMC 23.42.042.B; the City's Analysis and Decision ("Decision") demonstrates methodical application of the criteria for approval provided both by SMC 25.09.260 and SMC 23.42.042. City Ex. 1b at 2-6. The Decision recognizes, however, that although SMC 23.42.042 provides general authority for conditional uses, its conditioning authority is cabined by the specific terms of SMC 25.09.260.C.

MCC cannot establish that SMC 23.42.042.B gives the City blanket authority to impose non-ECA conditions on a project that requires a conditional approval solely due to the presence of critical areas. MCC's focus on the term "public interest" in SMC 23.42.042.B ignores the specific development standards provided by SMC 25.09.260.B as well as the detailed list of mitigating conditions set out in SMC 25.09.260.C. The Washington Supreme Court has squarely rejected the use of the term "public interest" in the manner MCC seeks. *Norco Constr. v. King County*, 97 Wn.2d 680, 688-689, 649 P.2d 103 (1982) (rejecting argument that "public interest" criteria of subdivision statute allowed county to disapprove application, stating the county's discretion was "limited by the land use regulations" applicable to the subdivision proposal). As the *Norco* Court stated, interpreting the term "public interest" "as conferring unlimited discretion . . . would make the other sections of the platting statute meaningless and place plat applicants in the untenable position of having no basis for determining how they could comply with the law." *Id*. at 688; *see also Friends of Cedar Park Neighborhood v. Seattle*, 156 Wn. App. 633, 649-653, 234 P.3d 214 (2010) (subdivision that complied with lot size requirements of code could not be denied based on public interest); *Anderson v. City of Issaquah*, 70 Wn. App. 64, 82-83, 851 P.2d 744, 755 (1993) (project could not be denied based on *ad hoc* standards). This is consistent with

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general principles of statutory interpretation. Zoning ordinances "should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language." *Dev. Servs. v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387, 392 (1999) (quotation omitted). In addition, "[a] specific statute will supersede a general one when both apply." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994); *see also Miller v. Pasco*, 50 Wn.2d 229, 233-34, 310 P.2d 863, 866 (1957) ("[W]here general powers are granted with specific powers enumerated, the general powers are modified, limited, and restricted to the extent of the specific enumeration."); *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853, 856 (2010) (when the legislature has both "codified a policy broadly" and "provided specific statutory guidance" that is "directly applicable" to the matter under review," the specific statute controls); *Jespersen v. Clark Cty.*, 199 Wn. App. 568, 580, 399 P.3d 1209, 1216 (2017).

The Decision is consistent with these principles. The City's authority to require conditions is not unlimited, as MCC's interpretation of "public interest" would imply. *Norco, supra*, 97 Wn.2d at 688-689. Instead, the conditions authorized by SMC 25.09.260.C (which include the mitigation sequence set out in SMC 25.09.065) indicate the measures the City Council intended to be authorized for an administrative conditional use of this type – *i.e.*, those that address ECA impacts. In addition to cabining the scope of the City's SMC 23.42.042 authority to impose conditions in the public interest, this list of specific terms sets the scope of the City's SMC 25.09.260.C.1 authority to impose "conditions to protect other properties." *Green v. Pierce Cty.*, 197 Wn.2d 841, 854, 487 P.3d 499, 505 (2021) (general term at the end of a list must be interpreted with reference to specific words preceding it). The Decision correctly

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applied this authority. *See* Ex. 1b at 6 (grading and drainage requirements "protect adjacent properties so that they are not adversely affected by this project").

MCC's argument also misapprehends what is under appeal, which not the "use" of the Project. "Administrative conditional use" is defined as "a use *or other feature of development* that may be permitted . . . pursuant to specified criteria." SMC 23.84A.040 (emphasis added). Here, the use of the Project – single-family residences – was not the reason that a CUP was required. The homes would be allowed as of right in the single-family zone in which they are located, but for the presence of critical areas. Instead, the Project was required to obtain CUP approval for a "feature of development," *see* SMC 23.84A.040 – namely, the fact that the permitted use will be located on a site containing ECAs. The City logically confined its review to the question of whether the Project conforms with the criteria of SMC 25.09.260.B and C so as to permit the conditional *feature* of the homes (their location in ECA areas).

In this context, the measures that MCC seeks to have the Examiner impose – namely, altering the landscaping, reducing the Project's size, and moving the Project to a different location on the Property, all to mitigate alleged impacts that have nothing to do with ECAs – are particularly inappropriate. Because SMC 25.09.260.B and C (as well as SMC 25.09.065) speak directly to landscaping for the purposes of maintaining slope stability and reducing non-native vegetation, it would be inconsistent with the statutory scheme to alter the plans approved by the City's expert reviewer for an unrelated reason. Likewise, MCC's request to reduce the Project's height and move it to a different location on the Property is inconsistent with the provision of development standards in SMC 25.09.260.B.3.b. These both specifically address the configuration of homes (setting standards for yard size and building separation) and expressly

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note that standards applicable to single-family residences (including the height limit) otherwise apply. SMC 25.09.260.B.3.b. MCC's argument that the Examiner should rewrite the Code to go beyond these requirements is unavailing.

B. The Examiner lacks jurisdiction to grant the relief MCC seeks.

The Examiner lacks jurisdiction to impose the mitigating conditions that MCC seeks. In an appeal of a Type II decision, the Examiner is authorized to "entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76, compliance with substantive criteria, . . . or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts." SMC 23.76.022.C.6. Here, there is no claim of inconsistency with the procedures of SMC 23.76. In addition, it is undisputed that the Project complies with the applicable substantive criteria – namely, those in SMC 25.09.260 and the single-family development standards. Finally, the conditions MCC seeks are not conditions that would address "disclosed adverse environmental impacts." Instead – particularly in the absence of SEPA substantive authority, which does not apply here – that phrase should be read as a direct reference to the environmental impacts expressly delineated in SMC 25.09.260.B and C. *See Green,* 197 Wn.2d at 854; *Dev. Servs.*, 138 Wn.2d at 117. Accordingly, MCC's claims are outside the scope of what the Examiner may consider under SMC 23.77.022.C.6 and the Examiner should reject them on this basis.

C. Any procedural error was harmless because no additional conditions are needed.

In the alternative, even if the City and the Examiner had jurisdiction to consider MCC's claims, MCC cannot prevail. At hearing, MCC argued that the City abused its discretion by "failing to exercise discretion." The principle that MCC invokes is drawn primarily from cases in which judges or prosecutors erroneously believe they lack discretion over the harshness of a

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criminal sentence or other punitive measure, implicating considerations not applicable here. *E.g. State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106, 1110 (2017); *Brunson v. Pierce Cty.*, 149 Wn. App. 855, 861, 205 P.3d 963, 966 (2009). In the development context, courts have held that a city's refusal to act on a permit application constitutes an abuse of discretion. *E.g. Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 315, 596 P.2d 285, 290 (1979). That scenario is not what occurred here. There is no authority supporting MCC's contention that a legal error by a city reviewer regarding the scope of its ability to condition a project constitutes an abuse of discretion requiring reversal.

Moreover, even if there had been an error in the City's understanding of its conditioning authority, it would not entitle MCC to relief because any error would have been harmless. City reviewer Michael Houston testified that even if he had, hypothetically, been authorized to impose mitigation for non-ECA issues, nothing in MCC's hearing presentation would have necessitated additional mitigation beyond what was already required. Houston Testimony, Recording Day 3, Part 1 at 33:00; *see Neighbors Encouraging Reasonable Development*, HE File No. MUP-14-006, Findings and Decision at 14 (Dec. 1, 2014) (appellants given opportunity to respond to change in basis for Director's decision were not prejudiced). In addition, even if the City was mistaken about its authority, remand is unnecessary because of the Code-provided administrative appeal process that MCC has invoked. Unlike in the types of cases described in the previous paragraph – where a court does not have the authority to prosecute a defendant or issue a permit – MCC had a full opportunity to make its case that the conditions it seeks are necessary. The evidence shows they are not and requiring a remand solely on the basis of legal error would be unjustified and redundant. *See Altman, et al.*, HE File No. MUP-20-009,

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Findings and Recommendation at 7 (Aug. 21, 2020) (appellants given the opportunity to present evidence on appeal in opposition to project applicant's analysis were not prejudiced by procedure and were not entitled to remand).

Mr. Houston's conclusion was well supported by the parties' hearing presentations, which demonstrated not only the lack of factual basis for MCC's claims but their legal flaws as well. In particular, MCC appears to believe that the Applicant must be required to "give up" more than it has already offered – arguing, for example, that the significant view improvements resulting from the Project's clearing of trees, *see* Ex. 68 at 2-3, are irrelevant if the clearing is necessary for construction. MCC Closing, Recording Day 3, Part 2, 8:00. The standards for mitigation are provided by the Code, not by MCC's opinions about the Applicant's worthiness or whether the Project represents too much of a "private gain."

Here, Mr. Houston properly concluded that MCC failed to demonstrate a need for mitigation beyond the substantial amount already incorporated in the Project – including the Project's undisputed avoidance of the landmark boundary, its lower-than-allowed height and roof configuration, its use of green roofs, the above-minimum setback that is substantially further than required from the park boundary, and the landscaping that balances screening with view preservation. *Drivdahl Testimony*; Ex. 68 at 3-4; Ex. 4 at 11, 16. MCC failed to demonstrate that the Code requires anything more. MCC repeatedly invoked the view and landscape covenant recorded by a prior owner, but not only is that document beyond the Examiner's authority to enforce, it does not protect adjacent properties. Ex. 56 at 2. MCC provided no support for its contention that a partial view blockage for a park visitor standing directly adjacent to the fence between the properties (at the lowest elevation in the park) would constitute an

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impact to the "public interest" when the range and availability of views would be improved from the park as a whole. Indeed, even leaving aside the untenable request for the Examiner to require the Applicant to re-grade the Ursula Judkins Park itself, MCC's presentation made clear that its actual request is for the Applicant to address and improve the *existing* condition of view-blocking vegetation, not an impact that would result from the Project. *See* Ex. 48 at 2, 3-4.

Similarly, MCC's claim that the Project would affect the "landmark status" of the Admiral's House was legally unsupported because – as MCC's witness conceded – a designated landmark must meet only one of six criteria, and MCC did not allege that the Project would affect two of the criteria under which the Project was designated. *Woo Testimony*; *see* SMC 25.12.350. MCC's landmark claims also depended on an exhibit showing the highly unrepresentative view from a cruise ship and ignored the fact that vegetation behind the Admiral's House will remain and new trees will be added with construction of the Project and provide visual screening. *Compare* Ex. 52 with Ex. 71; *Drivdahl Testimony*.

MCC has failed to show a need for additional mitigation or for reversal of the Decision.

III. CONCLUSION

For these reasons, the Applicant Oceanstar LLC requests that MCC's appeal be denied.

DATED this 5th day of October, 2021.

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