BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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

I. INTRODUCTION

SDCI's Decision and the testimony of the planner who wrote it, Michael Houston, both demonstrate that that Department did not exercise the discretion delegated to it by SMC 23.42.042.B "to impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity."

Oceanstar's property is imbued with the public interest because it is the setting for a designated City landmark, the Admiral's House; and the Ursula Judkins Viewpoint is not just a public park imbued with public interest in the "vicinity," it adjoins the applicant's property.

Mr. Houston conducted a public meeting on September 23, 2019 to receive public comments about adverse impacts on the public interest and the public park, but he disregarded these comments because, as he stated at the top of page 2 of his Decision, he deemed them "beyond the scope of this review and analysis." He did not, however, tell the public at the public hearing that he intended to ignore their comments about adverse impacts to the public park and the public interest.

At the appeal hearing Mr. Houston similarly disregarded the evidence presented by the Magnolia Community Council ("MCC") about adverse impacts to the public interest and to public

property, testifying that he heard nothing that would lead him to change his Decision. If Mr. Houston is correct, the appeal hearing was as much a waste of time as the public meeting, because both were about adverse impacts that are "beyond the scope" of SDCI's review and analysis.

Mr. Houston's understanding of the law is wrong. His refusal to apply the law as written by the City Council is legally indefensible and constitutes an abuse of discretion, for the reasons summarized below.

II. ARGUMENT AND AUTHORITY

A. Mr. Houston's interpretation of the code ignores its plain meaning and violates fundamental rules of construction.

Division I recently summarized the "plain meaning" rule of construction in *Washington State Department of Transportation v. City of Seattle,* 192 Wn. App 824, 368 P.3d 251 (2016):

> Our objective is to ascertain and give effect to legislative intent. When the meaning of statutory language is clear on its face, the court must give effect to that plain meaning as an expression of legislative intent. If the plain language is subject to only one interpretation, our inquiry is at an end.

Id. at 837 (citations omitted, emphasis added).

SMC 25.09.260.A.1 states: "In Single-Family zones the Director is authorized to approve an environmentally critical areas administrative conditional use pursuant to Section 23.42.042 and this Section 25.09.260 . . ." Similarly, SMC 23.42.042.A states: "Administrative conditional uses . . . as provided in the respective zones of Subtitle III, Part 2, of this Land Use Code, and applicable provisions of SMC Chapter 25.09, Regulations for Environmentally Critical Areas, may be authorized . . ."

In other words, the plain language of SMC 23.42.042.A states that it applies to conditional use permits ("CUPS") issued under Chapter 25.09, and the plain language of 25.09.260.A.1 states that CUPS issued in environmentally critical areas are to be approved "pursuant to Section 23.42.042." There is no ambiguity about either code provision: the

standards in 23.42.042 apply to CUPS issued under 25.09.260.A.1 because *both* the Land Use Code and the Regulations for Environmentally Critical Areas say they do.

Similarly, there is no ambiguity about the discretion that SMC 23.42.042.B delegates to Mr. Houston that he refuses to exercise:

> 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.

Mr. Houston chose not to "impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity" because he decided that such adverse impacts were "beyond the scope of his review." This assertion, and the Decision that results from it, are patently unlawful in light of the plain language of SMC 25.09.260.A.1 and 23.42.042.A and B.

Mr. Houston's decision to disregard the plain language of these three subsections of the code violates multiple canons of construction in addition to the plain meaning rule:

> We must construe the statute "'so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 134 Wn. App. 329, 332, 139 P.3d 411 (2006) (quoting *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005)). We must also avoid an interpretation that results in unlikely or strained consequences. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 635, 278 P.3d 173 (2012). We consider a provision "within the context of the regulatory and statutory scheme as a whole." *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993), cited in *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002).

Dep't of Transp. v. City of Seattle, *supra* at 838.

Mr. Houston's interpretation of SMC 23.42.042.B renders "meaningless or superfluous" the City Council's delegation of authority to "impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity." In addition, Mr. Houston's interpretation of SMC 23.42.042.B results in "unlikely or strained consequences" or, as other

cases put it, in “unlikely, strained, or absurd results.” *Burns v. City of Seattle*, 161 Wn 2d 129, 150, 164 P.3d 475 (2007) (citations omitted).

The fundamental absurdity of Mr. Houston’s interpretation is that it results in SDCI having *less* discretion to protect the public interest in critical areas than SDCI does in non-critical areas. Both the State Legislature and the Seattle City Council disagree.

The Growth Management Act at RCW 36.70A.040(3) (and elsewhere) requires the City to designate and protect critical areas because of the public interest in such areas. And the very purpose of the City’s critical area regulations, as stated by the City Council at 25.09.010, is to enlarge the City’s authority to protect the public interest:

> This Chapter 25.09 is intended 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.

The purpose of Chapter 25.09 is to afford SDCI *more* authority to protect the public interest in critical areas than the Land Use Code affords when non-critical areas are developed. Mr. Houston’s interpretation to the contrary leads to the absurd result that the Ursula Judkins Viewpoint (the "Viewpoint") and the Admiral’s House are receiving less protection from SDCI than they would receive under RCW 23.42.042 if Oceanstar’s property were not a critical area.

By way of specific example, SDCI approved a conditional use permit that requires the planting of 24 Amelanchier Alnifolia trees next to the Viewpoint even though the City’s own witness, Ms. Carr, agrees these trees will grow to 20 to 30 feet, thereby obstructing the view from a Viewpoint that exists solely because of its view. *See* MCC Exhibit 23.[1]

[1] Oceanstar called Mr. Stamm, the author of the revegetation and mitigation plan approved by SDCI, to testify for the first time about Oceanstar's unwritten "design intent" to substitute lower growth Amelanchier Alnifolia cultivar shrubs for the trees to avoid obstructing the UJV view. However, according to the testimony of Ms. Carr, SDCI's environmental analyst, such a change would require future SDCI approval and she generally does not approve cultivars because they are not true native trees.

Similarly, Mr. Houston approved an application that allows for the mass and scale of Oceanstar's proposed buildings to overwhelm views of the Admiral's House, as demonstrated by the testimony of Eugenia Woo, Director of Preservation Services for Historic Seattle, and by various exhibits including the plans themselves, e.g., City Exhibit 4, p. A3.01, which show the buildings' mass being approximately three times that of the Admiral's House, looming over it on the slope. [2]

The public, as a matter of law, has an interest in a designated City Landmark, and SMC 23.42.042.B gives SDCI the authority to mitigate such adverse impacts to the public interest, but Mr. Houston declined to consider such impacts because he interprets Chapter 25.09 to constrain rather than expand SDCI's authority to protect the public interest. This is manifestly absurd.

The City first enacted Chapter 25.09 to protect critical areas in 1992, as required by the new GMA, and from then until now, 25.09.260 has required compliance with SMC 23.42.042 whenever an applicant applies for a CUP in a critical area: the 1992 version of 25.09.260 allowed an administrative conditional use permit as "authorized under SMC Section 23.42.042". Ordinance 116253, § 1, 7/17/92. In 1992 the City simultaneously amended 23.42.042 to apply to Chap. 25.09 and .260. Ordinance 116262, § 6, 7/17/92.

For almost 30 years the City Council has required SDCI to evaluate the public interest under SMC 23.42.042 before approving a CUP in a critical area, just as SDCI does before approving a CUP outside a critical area. Mr. Houston's decision to afford the public less protection because Oceanstar proposes to develop a critical area is absurd as well as unlawful.

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[2] Ms. Woo testified that the Admiral's House received its landmark designation in part based on its prominence and spatial location on the steep slope below the Viewpoint. She further testified that the two buildings' massive scale and location would have an adverse impact on the Admiral's House landmark status and the public interest in preserving those landmarks. On cross examination, Oceanstar's lawyer tried to minimize this adverse impact by having Ms. Woo acknowledge that there were two other factors supporting the Admiral's House's designation. Ms. Woo testified on redirect that the Admiral's House's prominence was the main and most important factor in its designation and losing it would still be an adverse impact.

B. SDCI's decision to exempt Oceanstar's proposal from SEPA review is irrelevant to SDCI's authority under 23.42. 042.

Oceanstar previously argued that SDCI cannot protect views from the Ursula Judkins Viewpoint because SDCI exempted the proposal from SEPA review. This argument is as absurd as Mr. Houston's position that he has less authority, rather than more, to mitigate adverse impacts to the public interest from development within a critical area.

SEPA *supplements* SDCI's authority, it does not displace it, as SEPA itself states. SMC 25.05.030.A; WAC 197-11-030(1). Many cases demonstrate this statutory fact, including *Cingular Wireless v. Thurston Cty.*, 131 Wn. App. 756, 129 P.3d 300, 315 (2006). The Thurston County Hearing Examiner denied a special use permit to erect a cell tower based on findings that the tower would have adverse effects on neighborhood character. The denial was affirmed on appeal even though the Hearing Examiner also upheld a Mitigated Determination of Nonsignificance for the proposed tower. In other words, there were no significant adverse impacts under SEPA, and therefore the proposal could not be denied under SEPA per WAC 197-11-660(1)(f), but the denial was upheld under the County's police power, independent of SEPA, to require compliance with the County's criteria for a special use permit.

SDCI's discretionary authority under SMC 23.42.042 and 25.09.260 is similarly independent of its SEPA authority under Chapter 25.05 SMC, and Mr. Houston has acknowledged that he did not exercise that discretionary authority. A failure to exercise discretion is an abuse of discretion. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643, 648 (1999) ("Failure to exercise discretion is an abuse of discretion.") (internal citation omitted).

III. CONCLUSION

Ursula Judkins was a passionate, tireless advocate for the public good, successfully preserving during her lifetime many community assets for all time, such as Discovery Park and the West Point lighthouse and shoreline. In 2005, a grateful community named the newly acquired viewpoint, originally a part of Seattle's Olmsted Brothers' park legacy, in her honor.

SDCI's decision, based on an impermissible and unlawful interpretation of clear legislation intended to protect the public interest and adjacent property, threatens Ms. Judkins' legacy, the public Viewpoint, and the Admiral's House, a City Landmark.

The evidence at the hearing demonstrates significant “adverse impacts on the public interest and other properties in the zone or vicinity” that SDCI refused to acknowledge or even consider mitigating. Oceanstar’s proposal should be denied pursuant to SMC 23.42.042.C because the weight of the evidence demonstrates it “is materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located.” In the alternative, the Hearing Examiner should remand the application to SDCI with direction to exercise the discretion that SMC 23.42.042.B requires SDCI to exercise before making a decision.

DATED this 5th day of October, 2021.

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DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on October 5, 2021, I caused to be served the foregoing document, upon the following individuals, in the manner indicated below:

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DATED this 5th day of October, 2021, at Seattle, Washington.

s/Nikea Smedley
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