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 REPLY TO MCC'S CLOSING BRIEF**

Magnolia Community Council ("MCC") advances a legal argument that is contrary to the text and structure of the Seattle Municipal Code ("SMC" or "Code"). For the reasons stated in Oceanstar, LLC's ("Applicant") opening brief, SMC 25.09.260 does not authorize the City of Seattle ("City") or the Hearing Examiner ("Examiner") to impose conditions unrelated to the environmentally critical areas ("ECA") that are the sole reason the proposed single-family homes ("Project") were required to obtain a conditional use permit ("CUP").

A. MCC's Legal Interpretation is Incorrect

MCC's misunderstanding of the Code is exemplified by its assertion that it would be an "absurd result" if SMC 25.09.260 were to provide "SDCI having less discretion to protect the public interest in critical areas than SDCI does in non-critical areas." MCC Br. at 4. MCC misses the point. SMC 25.09.260 allows the City to protect critical areas, and protection of those

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areas is in the public interest. But, aside from their location in critical areas, the homes are permitted as of right by the zoning. *See* Applicant Br. at 4. If MCC's reading were correct, the view- and landmark-related conditions it seeks would be within the City's power to impose in the complete absence of related standards or criteria. It is far from absurd to construe the City's conditioning authority as related to – and cabined by – the factor enabling its exercise, which here is the Project's location on a parcel containing ECAs.

MCC also misreads the text of SMC 25.09.260. MCC quotes the first portion of SMC 25.09.260.A.1, which includes a reference to SMC 23.42.042, but that provision simply does not operate the way that MCC claims it does. Interpreting SMC 23.42.042 as an unlimited grant of conditioning authority for any "public interest" purpose, as MCC advocates, conflicts directly with Washington Supreme Court precedent. *Norco Constr. v. King County*, 97 Wn.2d 680, 688-689, 649 P.2d 103 (1982) (interpreting the term "public interest" "as conferring unlimited discretion . . . would make the other sections of the platting statute meaningless"). As in *Norco*, MCC's reading would render meaningless the detailed conditioning authority provided by SMC 25.09.260.B and C. This would also conflict with well-established principles of statutory interpretation more generally. *See* Applicant Br. at 2-4. Recognizing these clear textual limits, the City properly interpreted its authority in light of the nature of the application under review.

MCC cites *Cingular Wireless v. Thurston Cty*., 131 Wn. App. 756, 129 P.3d 300 (2006), for the proposition that a city can condition a project based on CUP criteria. But in *Cingular* the general CUP standards were "precise," not "vague," "free-floating" or "standardless." *Id*. at 779. Here, in contrast, MCC argues the City should have imposed conditions relating to views and historic resources when the CUP criteria mention neither of those things.

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In addition, nothing in MCC's brief points to authority for the Examiner to hear these claims. For the reasons stated at page 5 of Applicant's brief, SMC 23.76.022.C.6 does not provide jurisdiction over MCC's claims. The appeal should be denied on that basis alone.

B. No Additional Conditions are Needed and Any Error was Harmless.

As explained in Section C of Applicant's opening brief, even if SMC 25.09.260 did provide the City with authority to consider "public interest" conditions unrelated to ECAs, it would not entitle MCC to relief in this appeal. MCC's insistence that "failure to exercise discretion is an abuse of discretion" relies on a principle drawn from contexts that are not relevant here. *See* Applicant Br. at 5-6. Similarly, the sole case cited in MCC's brief – *Bowcutt v. Delta N. Star Corp.*, 95.Wn. App. 311, 320, 976 P.2d 643, 648 (1999) – involves a trial court's understanding of its authority to impose a preliminary injunction, which is similarly unrelated to this scenario. MCC has never provided authority establishing that a local government's exercise of administrative conditioning authority must (or even can) be reviewed under the same standard.

Moreover, even "[i]f the trial court abuses its discretion, the error will not be reversible unless the appellant demonstrates prejudice." *Colley v. PeaceHealth*, 177 Wn. App. 717, 723, 312 P.3d 989, 993 (2013); *accord, e.g.*, *Hall v. Feigenbaum*, 178 Wn. App. 811, 824, 319 P.3d 61, 67 (2014). For the reasons Applicant has explained, MCC has not done so: MCC had another opportunity to make its case; the City's reviewer testified based on MCC's presentation that he would not have imposed the requested conditions even under a different interpretation of SMC 25.09.260; and MCC's evidence simply did not demonstrate an impact to the public interest. Applicant Br. at 5-8.

The additional factual arguments in MCC's closing brief do not help its case. Contrary to

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MCC's suggestion that the Applicant's intent to maintain landscaping that preserves the view from Ursula Judkins park is "unwritten," *see* MCC Br. at 4, the City issued the CUP for the plans the Applicant submitted (and to which the Applicant will be held), which include renderings of tree heights that preserve views. Ex. 4 at A4.01. In addition, the height that varieties of this species can reach will not prevent the Applicant from seeking to plant a lower-growing cultivar as part of the final landscape plan, which may be approved so long as the same ecological function is maintained, and/or from trimming the trees as needed to maintain visibility (tree "topping" is not allowed, but normal pruning is allowable, *see* SMC 25.11.030). *See Testimony of Kwatee Stamm; Testimony of Christy Carr.* Finally, MCC's statements about the Admiral's House are unpersuasive. As Mr. Drivdahl testified, sheet A3.01 of Exhibit 4 is a plan drawing that fails to represent the vantage point or perspective applicable to actual views. And Ms. Woo's statements about impacts to "prominence" are contradicted by the evidence concerning the Project's design and screening (which MCC continues to ignore); the centrality of the area in *front* of the Admiral's House to its historic significance; and the legal nature of the SMC 25.12.350 landmarking criteria. The appeal should be denied.

DATED this 12th day of October, 2021.

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