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 (ECA CUP) Department Reference: 3028072-LU MCC'S REPLY TO APPLICANT'S CLOSING BRIEF

A. No authority support's Oceanstar's Argument A.

Section A of Applicant's 's Closing Brief cites eight cases, only one of which involves a CUP, and none of which support the argument that Oceanstar makes.

Oceanstar argues, in effect, that the Hearing Examiner cannot apply the "public interest" criterion in SMC 23.42.042.B to Oceanstar's project because there are specific criteria that also apply to its project in SMC Chapter 25.09. This argument is not supported by any authority cited by Oceanstar, nor by any other authority, and the argument attempts to prove too much. If accepted, it would mean that the CUP criterion in 23.42.042.B for "adverse impacts on the public interest" cannot be applied to CUP projects anywhere in the City, not just within critical areas, because all development in Seattle is subject to prescriptive criteria in the Land Use Code. Projects that require CUPs are projects that the City Council believes may have adverse impacts to the public interest that prescriptive code criteria do not anticipate; and the Council grants additional discretion to SDCI to identify and mitigate such un-anticipated adverse impacts to the public interest by application of the CUP criteria in SMC 23.42.042.

No case holds that such a "public interest" criterium is invalid, i.e. unconstitutional. Instead there are cases where the application of a "public interest" criterium was overturned because the facts in that case did not justify the decision, but no case invalidates such a test,

which has been part of Washington law in the subdivision statute since at least 1969 (chapter 271 of the Laws of 1969, §11).

Thus in *Norco Constr. V. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982), the Court did not invalidate the "public interest" criterion in RCW 58,17.110(1), which the County Council cited as authority for refusing to act on a plat application until the Council changed the law that applied to the application. The Court instead invalidated the County Council's application of the criterium to the facts of that case, and the Court based its decision on due process principles:

> Consistent with the type of abuse noted in the above cases, the unreasonable lapse of time alone, without an express showing of coercion, can prove unconstitutionally detrimental to a developer harmed by this action.

Norco Constr. v. King County, 97 Wn.2d 680, 686, 649 P.2d 103, 107 (1982)

Oceanstar cites another subdivision case, *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633 (2010), but this case supports MCC, not Oceanstar, because Division I *upheld* the Hearing Examiner's determination that the short plat *served the public interest*:

> In sum, the hearing examiner did not erroneously interpret the law or erroneously apply the law to the facts in concluding that the proposed short subdivision served the "the public use and interests" under the SMC.

The only case cited by Oceanstar that involved a CUP was *Development Services v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 3876 (1999), in which the City's *denial* of a CUP was *affirmed* because the applicant failed to meet a specific criterium for a heliport. The majority decision does not address the "public interest" criterium in 23.42.042.B, and the only references to the public interest are in Justice Sander's dissent, where his analysis *supports* MCC's position that a permit decision that furthers a specific public interest is an appropriate exercise of the police power:

> In the past we have upheld regulations which are reasonably related to promoting a truly public interest as within the scope of the police power. . . . But where actions purportedly taken under the police power have not furthered an identifiable *public* interest they have been struck down.

Dev. Servs. v. City *of Seattle*, 138 Wn.2d 107, 126, 979 P.2d 387, 397 (1999) (internal citations omitted; emphasis in original).

The facts presented at the hearing by MCC demonstrate that Oceanstar's application will adversely impact two identifiable public interests as well as adjoining public property: it will destroy the identifiable public interest in public views from a public Viewpoint, and will materially damage the identifiable public interest in the visual integrity of a City Landmark.

Neither the case law nor the facts support Oceanstar's argument that the Hearing Examiner cannot apply the plain meaning of SMC 23.42.042 to such specific facts. Both SMC 23.42.042.A and SMC 25.09.260.A.1 require that SMC 23.42.042 be applied to CUPs within critical areas, and SDCI's refusal to do so, and Oceanstar's refusal to acknowledge either the plain meaning of the code or the impacts of its proposed development, compel denial of Oceanstar's application.

B. Oceanstar's Argument B is repudiated by both the code and the case law.

Oceanstar asserts that the delegation of jurisdiction in SMC 23.76.022.C.6, "Scope of Review," is instead a denial of jurisdiction to grant relief to MCC. This code section delegates to the Hearing Examiner the authority to address issues of "compliance with substantive criteria" as well as a "failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts . . ." The evidence demonstrates that SDCI's decision does not comply with the substantive criteria of SMC 23.42.042, and that SDCI refused to apply these criteria to address adverse environmental impacts to the Viewpoint or the Admiral's House.

Oceanstar asserts that because SDCI exempted its project from SEPA, the adverse environmental impacts over which the Hearing Examiner has jurisdiction should be limited to "the environmental impacts expressly delineated in SMC 25.09.260.B and C." The existence or not of adverse environmental impacts does not depend on whether SDCI exempts a proposal from SEPA, and the substantive criteria for approval of a CUP are independent of SEPA. Oceanstar's argument is repudiated by one of the cases that Oceanstar purports to rely upon: *Dev. Servs. V. City of Seattle, supra*, where the Seattle Hearing Examiner determined there were no significant environmental impacts, but the City Council nonetheless denied the CUP for failure to meet one of the substantive criteria for a CUP, and the Supreme Court affirmed.

Oceanstar's argument also is repudiated by the Thurston County case that MCC cited in its Closing Brief, *Cingular Wireless v. Thurston Cty.*, 131 Wn. App. 756, 129 P.3d 300, 315 (2006), where the Thurston County Hearing Examiner concluded there were no significant adverse environmental impacts from a proposed cell towner but nonetheless denied a special use permit for the tower because of adverse impacts to neighborhood character.

C. Oceanstar's Argument C improperly argues the facts and asks the Hearing Examiner to ignore them because Mr. Houston did.

Under the guise of asserting "harmless error," Oceanstar spends three pages re-arguing the facts instead of addressing the legal issue that the Hearing Examiner told the parties to address in their written closings. MCC is prejudiced because it has no opportunity, in a four-page Reply, to respond to Oceanstar's creative but unsupported characterization of the evidence.

Oceanstar asks the Hearing Examiner to defer to Mr. Drivdahl's decisions about the scope of the project and to Mr. Houston's conclusion that no mitigation is needed. SMC 23.76.022.C.7, however, states that Mr. Houston's decision "shall be given no deference," and Mr. Houston's conclusion that no mitigation is warranted is not "well-supported," as asserted by Oceanstar. Oceanstar is simply asking the Hearing Examiner to disregard substantial evidence about adverse impacts to the public interest and to adjoining public property.

DATED this 12th 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 12, 2021, I caused to be served the foregoing document, upon the following individuals, in the manner indicated below:

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DATED this 12th day of October, 2021, at Seattle, Washington.

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