

BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of	)	
	)	
MAGNOLIA COMMUNITY COUNCIL	)	Hearing Examiner File:
AND OTHERS	)	MUP-21-016 (ECA CUP)
	)	
from a decision issued by the Director,	)	Department Reference:
Seattle Department of Construction	)	3028072-LU
and Inspections.	)	
	)	MCC'S REPLY IN SUPPORT OF
	)	MOTION FOR RECONSIDERATION/
	)	CLARIFICATION

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**I. REPLY ARGUMENT AND AUTHORITY**

The Hearing Examiner's Decision reverses the Director's Decision in part and determines that SDCI has the authority to include MUP conditions: 1) to ensure that the Project landscaping and fencing do not exacerbate the view impacts by exceeding 4-6' in height; and 2) "to require necessary maintenance to ensure that does not occur." Decision, pp. 8, 9. Yet, Oceanstar refuses to acknowledge that the Hearing Examiner's reversal necessitates a new Director's Decision in which SDCI exercises such authority, and SDCI refuses to commit to issuing a new Director's Decision. Without a new Director's Decision there is no way to stop Oceanstar's project from "exacerbate[ing] the view impacts." Oceanstar's response confirms that it does not want to be stopped from exacerbating such impacts, stating that protection of the Viewpoint view in the future is somehow "independent of the Project before SDCI." Oceanstar Response, p. 3. A ruling that allows no new Director's Decision to issue even though the prior Decision has been reversed in part, fails to resolve MCC's appeal and constitutes an irregularity in the proceedings unfair to MCC. The Examiner should reconsider her Decision to require a new Director's Decision on remand.<sup>1</sup>

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<sup>1</sup> SDCI has not filed a response to MCC's motion. Under HER 2.16(b), the Examiner may consider this lack of response as evidence of SDCI's consent to MCC's motion.

As the Hearing Examiner's Decision and all of the relevant testimony at the hearing recognize, the proposed plants, which are an integral part of the Project before SDCI, are living organisms that grow higher and wider over time. Accordingly, the view protection SDCI should have provided is meaningless unless there are requirements to maintain the Project restrictions as this growth occurs. From its response, however, Oceanstar takes the position on remand that no future restrictions are before SDCI. As indicated in its email, SDCI may concur with Oceanstar as it has done throughout this process and not issue a new Director's Decision, even though the prior decision has been reversed for its failure to address the view impacts of future vegetation and fencing. Without the issuance of a new Director's Decision that imposes appropriate, enforceable mitigation, MCC and the public are deprived of the benefit of their successful appeal and views from the Viewpoint will be degraded and lost over time. Given Oceanstar's and SDCI's positions, the Decision needs to be reconsidered and clarified to require a new MUP decision.

The evidence at the appeal hearing also demonstrates the need for reconsideration and clarification. Mr. Houston testified that he was aware of SMC 25.09.260(A)(1)'s inclusion of SMC 23.42.042 as authority for an ECA CUP. Nonetheless, as he also testified, SDCI did not consider the adverse impacts on the public and the Viewpoint. The Hearing Examiner's Decision now requires consideration of such impacts, and in order for the remand to be meaningful and for such reconsideration to lead to enforceable view protection, a new Director's Decision must be made that performs the analysis the original Director's Decision should have performed, and that imposes the conditions the original Director's Decision should have imposed. And even if SDCI performs this analysis and imposes appropriate conditions, they will be unenforceable over time without a new Director's Decision.

There *may* be situations where a remand after an appeal does not require a new MUP decision: in particular, when the remand directs SDCI to change its decision in a specific way,

so that all parties know from the Hearing Examiner's Decision what conditions are being imposed on the MUP. But that is not the situation here. SDCI failed to exercise the discretion the code required it to exercise, and no one except perhaps SDCI itself knows what conditions it will impose once it exercises the required discretion. If a new Director's Decision is not required, then MCC is effectively denied its code-created right to appeal that future exercise of discretion.

Oceanstar's past conduct provides additional evidence of the need for a new, enforceable and appealable Director's Decision. Oceanstar bought the Project property with the full knowledge and acquiescence in the View Covenant (Exhibit 56) and its presence in the official land records. The covenant also appeared in the Project plans under "Easements of Record" (Exhibit 4, p. 3). Despite the clear restrictions of the covenant however, the record in this appeal is devoid of any evidence of Oceanstar's compliance with that covenant and full of evidence, from the testimony of Gene Mullins, Eric Drivdahl, and others, of no intention whatsoever of Oceanstar to comply with the covenant. See, e.g., Gene Mullins' testimony, Day 1, Tape 2, 57:10-57:28.

Mr. Mullins also testified to Oceanstar's improper and illegal installation of razor wire on the top of fencing on the Viewpoint property in 2017. *Id.* at 57:55-59:03. The installation of the razor wire violates SMC 15.48.020 and 18.30.020. As Mr. Mullins further testified, despite notice and requests from Seattle Parks and Recreation in 2017, Oceanstar refused and continues to refuse to remove the razor wire. *Id.* at 59:03-1:00:25.

These examples vividly demonstrate the need for reconsideration or clarification of the Decision to specifically require a new Director's Decision.

## **II. CONCLUSION**

The Hearing Examiner reversed the Director's Decision for its failure to exercise the discretion the code requires SDCI to exercise. Once that discretion is exercised, a new

Director's Decision is required, both to make its conditions enforceable in the future and to give the public the appeal rights that the code requires when discretion is exercised. MCC requests the Hearing Examiner reconsider and revise her prior Decision to expressly require SDCI to issue a new Director's Decision at the conclusion of the remand.

DATED this 12th day of November, 2021.

/s/Edward R. Coulson

Edward R. Coulson  
1522 Thorndyke Avenue W.  
Seattle, WA 98199  
Telephone: (206) 953-2579  
Email: coule@schweetlaw.com  
**Authorized Representative for Magnolia  
Community Council and Other  
Appellants**

/s/Patrick J. Schneider

Patrick J. Schneider, WSBA #11957  
FOSTER GARVEY PC  
1111 Third Avenue, Suite 3000  
Seattle, WA 98101-3292  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700  
Email: pat.schneider@foster.com  
**Attorneys for Magnolia Community Council**

## 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 November 12, 2021, I caused to be served the foregoing document, upon the following individuals, in the manner indicated below:

**Via Email to:**

Tom Brown  
Gelotte Hommas Drivdahl  
425-828-3081  
[tomb@ghdarch.com](mailto:tomb@ghdarch.com)

***Applicant***

**Via Email to:**

John C. McCullough  
Courtney Kaylor  
David P. Carpman  
McCullough Hill Leary, PS  
206-812-3388  
[jack@mhseattle.com](mailto:jack@mhseattle.com)  
[courtney@mhseattle.com](mailto:courtney@mhseattle.com)  
[dcarpman@mhseattle.com](mailto:dcarpman@mhseattle.com)  
[mwarncock@mhseattle.com](mailto:mwarncock@mhseattle.com)

***Attorneys for Oceanstar LLC, Applicant***

**Via Email to:**

Michael Houston  
Erika Ikstrums  
Seattle Department of Construction and  
Inspection  
206-727-3885

[michaelt.houston@seattle.gov](mailto:michaelt.houston@seattle.gov)  
[erika.ikstrums@seattle.gov](mailto:erika.ikstrums@seattle.gov)

***Seattle Department of Construction and  
Inspection***

DATED this 12<sup>th</sup> day of November, 2021, at Seattle, Washington.

*s/Nikea Smedley*

Nikea Smedley, Legal Practice Assistant