BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by WARWICK CORP. from the February 16, 2023 City of Seattle Analysis and Decision of the Director of the Seattle Department of Construction and Inspections.	Hearing Examiner File: MUP-23-003 (DD, DR) Department Reference 3026266-LU APPLICANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

In its Response Brief ("Response"), Warwick Corporation ("Appellant") fails to counter the arguments in the Motion to Dismiss ("Motion") filed by Respondent Jodi Patterson O'Hare o/b/o AMLI Development Company LLC ("Applicant"). Appellant fails to respond to several of the arguments in the Motion, effectively abandoning multiple claims. In addition, Appellant fails to establish a basis for the Examiner to exercise jurisdiction over the issues that the Response does discuss. This appeal should be dismissed in full.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

II. ARGUMENT

A. Appellant's abandoned claims should be dismissed.

In the Motion, the Applicant established that all five claims in the appeal must be dismissed:

- Claim 1 must be dismissed because the Examiner lacks jurisdiction over challenges to the Code and constitutional claims.
- Claims 2 and 3 (in full) and Claim 4 (in part) must be dismissed because the Examiner lacks jurisdiction over SEPA transportation claims.
- The remainder of Claim 4 must be dismissed because the Examiner lacks jurisdiction over appeals regarding light; the Appellant has not alleged significant adverse impacts related to wind or seismic impacts; and SEPA does not require analysis of wind impacts.
- Claim 5 must be dismissed because the Examiner lacks jurisdiction over appeals regarding aesthetic impacts and because the City does not have authority to condition a project on the basis of alleged impacts to historic resources concerning adjacent, non-designated properties.

In the Response, Appellant does not address the Motion's arguments for dismissal of Claim 1, Claim 4 (other than transportation issues), or aesthetic impacts. Appellant has thus conceded that these claims are improper. *See Gobin v. Allstate Ins. Co.*, 54 Wn. App. 269, 272, 773 P.2d 131, 133 (1989); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61, 64 (2005). For the reasons stated in the Motion, they should be dismissed.

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

B. Transportation claims are exempt from appeal.

For the reasons stated in the Motion and accompanying Declaration of John Shaw ("Shaw Declaration" or "Shaw Dec."), the Project meets the criteria in RCW 43.21C.501 and is therefore exempt from appeal on the basis of traffic and transportation issues. Appellant fails to establish otherwise. Appellant primarily argues that it depends on loading and delivery activity in the alley for its business operations and that it is concerned that Project traffic will interfere with this, but this does not establish inconsistency with the statutory criteria.

1. The Project is consistent with RCW 43.21.C.501(2)(a)(i)(B).

The Project is consistent with the Transportation Element of the City of Seattle Comprehensive Plan ("Comprehensive Plan" or "Plan"), as required by RCW 43.21C.501(2)(a)(i)(B), for the reasons stated at pages 10-11 of the Motion and ⁋⁋ 4-14 of the Shaw Declaration.

Appellant does not dispute that the Project is consistent with any goal or policy identified by Mr. Shaw other than policy T2.14, to "maintain, preserve, and enhance the City's alleys as a valuable network for public spaces and access, loading and unloading for freight, and utility operations." Appellant asserts that Mr. Shaw does not explain how the Project will serve this goal "for anyone other than the project proponent itself" and that the Project will create alley traffic that impacts Appellant's use of the alley. This does not establish that the Project is inconsistent with the Transportation Element for two reasons.

First, the argument in the Response is that the Project's potential to impact adjacent development has not been considered, either in the SEPA process or in the Shaw Declaration. But this is obviously untrue. As Mr. Shaw explained, based on the information developed during

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

the transportation analysis, the Project will include a loading dock of sufficient size to accommodate deliveries and moving activity, and the City has imposed seven conditions governing loading and alley operations. Shaw Dec. ¶ 6. "The Project will preserve and maintain activity within the alley by providing these spaces and complying with these conditions." *Id.* Appellant's suggestion that the Applicant and City have "not even considered" impacts on the alley, Response at 8, is plainly inaccurate.

Second, even if the Examiner were to construe these assertions as an argument that the Project is inconsistent with the Transportation Element because it will allegedly create congestion in the alley (which the Examiner should not do because Appellant has not made that argument), the argument would fail. A comprehensive plan is "not a document designed for making specific land use decisions." *Lakeside Indus. v. Thurston Cty*., 119 Wn. App. 886, 894, 83 P.3d 433, 437 (2004). Even when individual projects are reviewed for consistency with a comprehensive plan, "a proposed land use decision must only generally conform, rather than strictly conform, to the comprehensive plan." *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007); *see Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 44, 873 P.2d 498, 507-08 (1994) ("[T]he extremely broad nature of the comprehensive plan [supports] the conclusion that [a project] is not so incompatible . . . as to be proscribed by the comprehensive plan."); *Barrie v. Kitsap Cty.*, 93 Wn.2d 843, 850, 613 P.2d 1148, 1153 (1980) ("In the instant case, even though the Ross shopping center does not completely conform with the plan, it is well within the statutory parameters outlined above. There has not been willful and unreasonable action but instead reasoned action following careful consideration of the issue."). The wording of the City's Plan confirms that it is not intended to be used as Appellant suggests: it states that its

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

goals should be read as "aspirations, not guarantees or mandates." Comprehensive Plan at 17.[1] The Plan's policies are statements of "general policy" that "help[] to guide the creation of or changes to specific rules or strategies." *Id*. They involve "a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy." *Id*.; *see Chinn v. City of Spokane*, 173 Wn. App. 89, 102, 293 P.3d 401, 407 (2013) (when a comprehensive plan "employs precatory language," such as "encourage" and "should," and does not "prohibit" development according to established standards, development is not "in conflict with the [plan's] aspirational goals" simply because it does not serve all of them).

Accordingly, even if Appellant's factual allegations regarding the alley were correct, which they are not, congestion in a single alley does not render a project inconsistent with the Transportation Element as a whole. Appellant's contention otherwise conflicts not only with the law governing comprehensive plans but also with the obvious purpose of RCW 43.21C.501, which is to exempt projects from appeal. The hearing that would be required on the magnitude of those alleged impacts would be the equivalent of a hearing required on the merits of SEPA transportation claims, which would defeat the purpose of the exemption. Instead, as previous decisions by the Examiner and the Court of Appeals have confirmed, consistency is determined by specific, identifiable standards. *Escala Owners Ass'n v. City of Seattle*, No. 82568-2-I (unpublished), 2022 WL 2915536 at *10, review denied, 200 Wn.2d 1019, 520 P.3d 966 (2022) (affirming conclusion that "the project is consistent with the City's comprehensive plan because it exemplifies the precise development contemplated by the City's transportation policy focusing

[1] The Comprehensive Plan is available at https://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/ComprehensivePlanCouncilAdopted2021.pdf

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

on density, multimodal transportation options, and pedestrian safety."); *see Fischer Studio Condominium Building Owners Association*, HE File No. MUP-21-004, Order on Motion to Dismiss (May 5, 2021) at 7-11; *Thomson*, HE File No. MUP-22-002, Order on Partial Dismissal Motion (May 2, 2022) at 2; *Escala Owners Association*, HE No. MUP-19-031, Findings and Decision at 10.

Appellant also asserts that the Shaw Declaration did not address polices LU 6.6 and 6.8 and Goal B-G11. Response at 7-8. These provisions are irrelevant. RCW 43.21C.501(2)(a)(i)(B) exempts projects from appeal that are "consistent with the transportation element of a comprehensive plan." Polices LU 6.6 and 6.8 and Goal B-G11 are not part of the Transportation Element of the City's Plan; instead, they appear in the Land Use Element and the Neighborhood Plans Element of the Comprehensive Plan, respectively. *See* Plan at 49, 283. Appellant rewrites the statute by suggesting that policies need only be "found in the transportation component of the Comprehensive Plan," but that is not what the statute says. Even if the provisions were relevant, they would not establish inconsistency with the Plan. The Project is consistent with Policy LU 6.6 because it provides alley access to parking. Policy LU 6.8 refers to policies allowing off-site parking, not requiring its use by individual projects. The Project is consistent with Goal B-G11 for the reasons stated in the Shaw Declaration: it will preserve the alley's availability for access by incorporating the loading and delivery measures described in the MDNS.

The Project is consistent with the Transportation Element of the Comprehensive Plan and satisfies RCW 43.21.C.501(2)(a)(i)(B).

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

2. The Project is consistent with RCW 43.21.C.501(2)(a)(ii)(B).

Both traffic and parking impacts for the Project are mitigated by numerous City ordinances of general application, as required by RCW 43.21C.501(2)(a)(ii)(B), for the reasons stated at pages 11-12 of the Motion and ⁋⁋ 15-17 of the Shaw Declaration. Similarly to its arguments regarding the Comprehensive Plan, Appellant argues in the Response that the Project does not satisfy this provision because it will allegedly create impacts to Appellant's use of the alley. Again, Appellant is incorrect.

Appellant argues that the Project's impacts have not been "appropriately mitigated by ordinances of general application." Response at 9. But that is not what RCW 43.21C.501(2)(a)(ii)(B) requires. The statute does not contain the word "appropriately"; it simply requires that impacts be "mitigated." And "mitigation," as defined under SEPA, does not require that all impacts be fully eliminated; instead, mitigation includes minimizing or reducing impacts. WAC 197-11-768. Indeed, as originally enacted, RCW 43.21C.501 stated that traffic or parking impacts must be "expressly mitigated," but the legislature subsequently amended the statute to remove the word "expressly." *See Escala Owners Ass'n*, 2022 WL 2915536 at *10. This provides a further indication that the mitigation requirement is not intended to be absolute. Even if "express" mitigation were required, however, the statutes identified by Mr. Shaw would satisfy the requirement – as, again, the Court of Appeals and the Examiner have already affirmed in other cases. *Escala Owners Ass'n*, 2022 WL 2915536 at *10; *see Fischer Studio Building*, *supra*, at 7-11; *Thomson*, *supra*, at 2; *Escala Owners Association*, HE No. MUP-19-031, Findings and Decision at 10. Appellant's belief that impacts to its own development are not "adequately" mitigated does not establish that the Project's impacts are not "mitigated" as

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

established by RCW 43.21C.501(2)(a)(ii)(B). Again, requiring a full hearing to determine the adequacy of mitigation vis-à-vis a specific, existing development would defeat the purpose of the appeal exemption.

Appellant also argues that "proposed mitigation measures stand at odds with the ordinances of general application pertinent to an alleyway" because Applicant proposes "no stopping or standing" signs and – according to Appellant – "pushing freight traffic out of the alleyway and onto Fourth Avenue and Lenora Street." Response at 9. According to Appellant, this conflicts with ordinances that "prohibit freight trucks from stopping in the right of way along Fourth Avenue and Lenora Street, and from parking for 30 minutes or more in an alleyway which does not have a 'no stopping or standing' sign posted." Response at 9-10. This argument does not help Appellant. First, it does not relate to the wording of RCW 43.21C.501(2)(a)(ii)(B), which does not concern the impact of mitigating measures, only ordinances. Second, it makes no sense. City ordinances allow commercial vehicles to park in an alley for up to 30 minutes, but not where a posted sign prohibits parking. *See* SMC 11.72.330; SMC 11.74.010. There is no conflict between those ordinances, and mitigation measures imposed on the Project will further their goal – to allow multiple users to access alleys – by ensuring that no parking takes place where blockages may occur. In addition, as explained by Mr. Shaw, the transportation analysis prepared for the Project did not conclude that trucks would utilize neighboring streets for loading but, rather, established that the loading bays included with the Project will accommodate its loading and delivery needs. Shaw Dec. ¶ 6.

The Project satisfies RCW 43.21C.501(2)(a)(ii)(B).

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
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Fax: 206.812.3389

3. Arguments regarding Code changes and cumulative impacts are unavailing.

In Section B of the Response, Appellant appears to argue that the Project was not subject to SEPA procedural provisions that required the analysis of cumulative impacts, and that because these provisions have been updated since the Project's application submittals, a new analysis is required. Response at 4-5. This argument too fails for several reasons.

First, Appellant misreads the vesting provisions of the Code. Appellant argues that non-Design Review components of an application" vest as of the date of decision, but that is not what the Code says. Instead, "a complete application for a Master Use Permit that includes a design review component . . . shall be considered under the Land Use Code and other land use control ordinances in effect on" the date of initial submittal or a subsequent date chosen by the applicant. SMC 23.76.026.C.2.

Second, the vesting issue is irrelevant because Appellant fails to demonstrate that relevant SEPA provisions have changed. The Declaration of Martin Kaplan states at paragraph 5 that between 2018 and 2023, "there have been substantial alterations to the Seattle zoning code and Seattle Design Review standards, including the requirement (as of 2019) that projects consider the cumulative impacts of a particular proposed action." Mr. Kaplan, however, neither cites any specific Code provision that has been amended nor asserts that SEPA procedures have been amended. And the only SEPA provision cited in the Response, SMC 25.05.670, has not been amended since its enactment in 1988. It does not matter, for purposes of the Motion, whether the Project is considered under the 2018 Code or the 2023 Code.

Third, even leaving these issues aside, Appellant's "cumulative effects" argument is unavailing. Appellant asserts that traffic and transportation impacts have not been adequately

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

analyzed in light of the Project's alleged cumulative impacts to these elements of the environment, but this assertion does not establish a basis for the Examiner to review these claims, which are exempt from appeal under RCW 43.21C.501.

Appellant's transportation claims must be dismissed.

C. Historic resources claims must be dismissed.

Finally, Appellant asks the Examiner to "refer" the Seattle Cinerama to the Landmarks Preservation Board ("Board") for potential designation as a City landmark. Again, Appellant misrepresents the language of the Code.

Appellant does not dispute that, as stated in the Motion, the City may only use its substantive SEPA authority regarding historic resources in accordance with SMC 25.05.675. *See* Motion at 16 (citing SMC 25.05.680.I). However, Appellant asserts that "where a project may affect structures or sites" that meet the criteria for designation, the potentially affected structure may be referred to the Board. Response at 11. This again seeks to rewrite the Code, which states that referral may occur "[f]or projects involving structures or sites which are not yet designated as historical landmarks but which appear to meet the criteria for designation . . . ." SMC 25.05.675.H.2.c (emphasis added). In other words, the only structure that may be referred for designation as part of the SEPA process is a structure on the site under review – not a site across the street. This meaning is underscored by the subsequent reference in SMC 25.05.675.H.2.c to what happens "[if] the project is rejected for nomination" (emphasis added). By contrast, the only reference in SMC 25.05.675.H to structures adjacent to the project site under review (as the Cinerama is in this case) is subsection 2.d, which refers to proposals "adjacent to or across the street from a designated site or structure" (emphasis added).

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

In sum, subsection 2.c provides for referral and nomination of a structure or site that will itself be modified by the proposed project under SEPA review. Subsection 2.d establishes procedures for when the proposed project under SEPA review is adjacent to a designated site or structure. No language in SMC 25.05.675.H, however, provides for the process that Appellant suggests – referral of an undesignated, adjacent structure as part of a SEPA appeal – and thus the outcome that Appellant seeks is unavailable. "The Hearing Examiner's jurisdiction must derive entirely from specific directives within the Code." *Cesmat*, HE File Nos. MUP-19-026 and S-19-001, Order on Motion to Dismiss and for Summary Judgment (September 12, 2019) at 1 (citing *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 (1984)). It does not include the authority to provide relief that is not included in the Code's directives, as Appellant requests here. Because the only argument the Motion raises in support of Appellant's historic resources claim seeks impermissibly to rewrite the Code, Appellant fails to establish a basis for the Examiner to hear Claim 5. The claim too must be dismissed.

III. CONCLUSION

The Applicant respectfully requests that the Hearing Examiner dismiss this appeal in full.

DATED this 4th day of May 2023.

s/Courtney A. Kaylor, WSBA #27519
s/David Carpman, WSBA #54753
Attorneys for Applicant
McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
Tel: 206-812-3388
Fax: 206-812-3398
Email: courtney@mhseattle.com
Email: dcarpman@mhseattle.com