

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeal of

**WARWICK CORP.**

from a decision by the Director,  
Seattle Department of Construction  
and Inspections

Hearing Examiner Files:  
**MUP 23-003**

Department Reference  
3026266-LU

**ORDER ON MOTION TO  
DISMISS**

1. **Background.** Seattle Department of Construction and Inspections (“Department”) approved a multifamily residential building with retail and parking in downtown Seattle. The Project is 44-stories tall, with seven-stories below grade. It is across an alley from the 1970’s era Warwick Seattle Hotel, which is 18-stories tall, with a five-story car park. Appellant Warwick Corp. appealed the Department’s decision to the Hearing Examiner. Applicant AMLI Development Company LLC moved to dismiss. Warwick responded<sup>1</sup> and AMLI replied. The Department did not separately brief the motion but submitted a declaration supporting dismissal.

2. **Dismissal.** A dismissal motion is granted if the Examiner lacks jurisdiction.<sup>2</sup> AMLI asserted the Examiner lacks jurisdiction over the five appeal issues: (1) Violation of Property Rights of Warwick Corp; (2) Traffic Congestion; (3) Use of Alley Way; (4) Light, Air, Access and Open Space; and (5) Historic Resources and Compatible Scale.

3. **Hearing Examiner’s Scope of Review.** The Seattle Municipal Code governs governs the Examiner’s scope of review.<sup>3</sup>

The Hearing Examiner shall entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76, compliance with substantive criteria, determinations of nonsignificance (DNSs), adequacy of an EIS upon which the decision was made, or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts, and any requests for an interpretation included in the appeal or consolidated appeal pursuant to Section 23.88.020.C.3.<sup>4</sup>

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<sup>1</sup> The response included declarations from General Manager Bathke; Mr. Jacobs, a traffic engineer; Ms. Woo, Director of Preservation Services with Historic Seattle; and, Mr. Kaplan, an architect.

<sup>2</sup> Hearing Examiner Rules of Practice and Procedure 3.17(j).

<sup>3</sup> Ch. 23.76 SMC; Ch. 3.02 SMC.

<sup>4</sup> SMC 23.76.022(C)(6).

Under this provision, Examiner review is limited to Department decision consistency with the SMC. Also, the Examiner cannot adjudicate statutorily exempt matters.

4. **Issue 1 - Property Rights.** Warwick states code height requirements only allow it a much smaller building than AMLI, asserting this conflicts with the “principles of Magna Carta, which is the underlying foundation of the Bill of Rights and the US Constitution,” and states “[t]he 14<sup>th</sup> Amendment ... specified that no person should be deprived of life, liberty or property without due process of law.” These are challenges to the SMC itself, not allegations that the Department’s decision is inconsistent with the SMC. Magna Carta principles and 14<sup>th</sup> Amendment concerns can be raised with the legislative body, but the Examiner lacks the authority to rescind code requirements.

5. **Issues 2 (Traffic Congestion), Issue 3 (Alley Use), and Issue 4 in Part (Fire Access).** These issues challenge the 2018 traffic study and request a new one. They are raised under the State Environmental Policy Act, Ch. 43.21C RCW,<sup>5</sup> which exempts transportation impacts from appeal when certain criteria are met.

(1) Project actions described in this section that pertain to residential, multifamily, or mixed-use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 are exempt from appeals under this chapter on the basis of the evaluation of or impacts to the following elements of the environment, provided that the appropriate requirements for a particular element of the environment, as set forth in subsections (2) and (3) of this section, are met.

(2) (a) Transportation. A project action pertaining to residential, multifamily, or mixed-use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 is exempt from appeals under this chapter on the basis of the evaluation of or impacts to transportation elements of the environment, so long as the project is:

(i)(A) Consistent with a locally adopted transportation plan; or (B) **Consistent with the transportation element of a comprehensive plan;** and

(ii)(A) A project for which traffic or parking impact fees are imposed pursuant to RCW 82.02.050 through 82.02.090; or (B) A project for which **traffic or parking impacts are mitigated by an ordinance**, or ordinances, of general application adopted by the city or town.

(b) The exemption under this subsection (2) does not apply if the department of transportation has found that the project will present significant adverse impacts to the state-owned transportation system.<sup>6</sup>

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<sup>5</sup> SMC 23.76.022(C)(6); Ch. 25.05 SMC.

<sup>6</sup> RCW 43.21C.501(1) and (2), emphasis added.

The first exemption criterion addresses whether the Project is consistent with the Comprehensive Plan's transportation element. The Department provided written testimony from a planner with 26 years of Seattle transportation experience and a Ph.D in City and Regional Planning. He detailed how the Project is consistent with the Plan.

The Plan provides, “[e]nsure that transportation decisions ... support the City’s overall growth strategy and are coordinated with this Plan’s land use goals.”<sup>7</sup> The Project is within the City’s primary urban center, the Downtown Urban Center. The Department declarant concluded that “[p]rovision of transportation facilities and services to accommodate growth in this area, including the Project, is consistent with the Plan.”<sup>8</sup> Similar to another case, the Project’s use mix and design “is consistent with the City’s comprehensive plan because it exemplifies the precise development contemplated by the City’s transportation policy focusing on density, multimodal transportation options, and pedestrian safety.”<sup>9</sup>

Warwick contends it depends on loading and delivery activities in the alley and it alleges Project traffic will interfere with these operations, asserting this conflicts with Policy T2.14 to “[m]aintain, preserve and enhance the City’s alleys as a valuable network for public spaces and access, loading and unloading for freight, and utility operations.”<sup>10</sup> The Project includes a sufficiently sized loading dock to accommodate deliveries and moving activity, and the Department imposed seven conditions governing loading and alley operations.<sup>11</sup> The Department’s transportation planner determined that “[t]he Project will preserve and maintain activity within the alley by providing these [loading] spaces and complying with these conditions.”<sup>12</sup> The Project is consistent with the Plan, including policies on alley circulation. Only general consistency is necessary to meet this criterion as the Plan provides general policy direction. The Plan is not designed for making specific land use decisions.<sup>13</sup> This is the job of development regulations.

The second criterion is whether the regulatory structure addresses Project impacts. The Department identified City transportation regulations and provided detail on them through written testimony.<sup>14</sup> Referenced regulations address transportation impacts, including driving speeds, pedestrian safety, alley operations including loading and access, permitting, parking, and level-of-service standards.<sup>15</sup> Warwick objects to the Project meeting this criterion based on regulatory adequacy to address Project impacts. The exemption language does not require elimination of all impacts, as evidenced by the legislature’s removal of language requiring

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<sup>7</sup> Declaration of John Shaw, p. 3, citing Exhibit C (Plan), p. 74, Goal TG1.

<sup>8</sup> Declaration of John Shaw, p. 3, ¶ 5.

<sup>9</sup> *Escala Owners Ass’n v. City of Seattle*, No. 82568-2-1 (unpublished), 2022 WL 2915536 at \*10, review denied, 200 Wn.2d 1019 (2022).

<sup>10</sup> Declaration of John Shaw, Ex. C (Plan), p. 78, Policy T2.14.

<sup>11</sup> Declaration of John Shaw, ¶ 6.

<sup>12</sup> Declaration of John Shaw, ¶ 6.

<sup>13</sup> See e.g., *Lakeside Indus. v. Thurston Cty.*, 119 Wn.App. 886, 894 (2004); *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 613 (2007).

<sup>14</sup> Declaration of John Shaw, pp. 7-20.

<sup>15</sup> *Id.*, identifying the regulatory structure.

impacts to be “expressly mitigated.”<sup>16</sup> However, the SMC regulatory structure is extensive, and alley operations are “expressly” mitigated to ensure multiple users may utilize the alleys and parking/loading does not block alley traffic.<sup>17</sup> Regulations are in place to address the Project’s parking and traffic impacts.

As for the third criterion, the State Department of Transportation confirmed the Project does not present significant adverse impacts to the state-owned transportation system (“WSDOT has no concerns with this project.”).<sup>18</sup>

As the three criteria are met, the Project is exempt from an environmental review appeal on transportation issues. A full hearing to assess exemption applicability is not required. If the criteria are met, the exemption applies. If the Examiner had to hear the appeal to determine exemption applicability, this would defeat appeal exemption’s purpose.

Warwick raises a vesting argument, but this does not change the analysis. The Department is required to review a complete master use permit application with a design review component under the land use controls in effect on the submittal date, or a subsequent date should the applicant so choose.<sup>19</sup> This occurred with the Project. And, there are no code amendments changing the exemption, which is statutory.

**6. Issue 4 - Light, Air Access and Open Space.** As with transportation issues, SEPA contains a light and glare exemption.

Light and glare. A project action pertaining to residential, multifamily, or mixed-use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 is exempt from appeals under this chapter on the basis of the evaluation of or impacts to the light and glare element of the environment, so long as the project is subject to design review pursuant to adopted design review requirements at the local government level.<sup>20</sup>

The Project was subject to design review, so the exemption applies.<sup>21</sup> Warwick did not respond to arguments on this exemption (other than the transportation aspect addressed above), abandoning the issue.

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<sup>16</sup> *Escala Owners Ass’n v. City of Seattle*, No. 82568-2-1 (unpublished), 2022 WL 2915536 at \*10, review denied, 200 Wn.2d 1019 (2022), compare with RCW 43.21C.501 amendments adopted 2022 c 246 § 4, eff. June 9, 2022; see also WAC 197-11-768 (mitigation includes minimizing or reducing impacts).

<sup>17</sup> See e.g., SMC 11.72.330; SMC 11.74.010; Declaration of John Shaw, pp. 3-6, with listed regulations following.

<sup>18</sup> Declaration of John Shaw, ¶ 3 and Exhibit B.

<sup>19</sup> SMC 23.76.026(C)(2).

<sup>20</sup> RCW 43.21C.501(3)(b).

<sup>21</sup> *Fischer Studio Bldg. Condo. Owners Ass’n v. City of Seattle*, 524 P.3d 708, 713 (Wash. Ct. App. 2023).

The appeal also raised wind impacts. This is not an element of the environment SEPA requires assessment of. Environmental review is limited to elements in SMC 25.05.444, as RCW 43.21C.110(1)(f) requires.<sup>22</sup>

7. **Issue 5 - Historic Resources.** This issue states that by Project location adjacent to the Warwick Hotel and near the Cinerama movie theater, the Project “would completely over shadow this area and deprive it of its historic significance.” Also, “[t]he different height and size of the buildings are such that it would pose a threat to compatible scale within an area...” In responding to the dismissal motion, Warwick requested Examiner referral of the Cinerama movie theater to the Landmarks Preservation Board for consideration as a Historic Landmark.

The Project underwent design review, so the aesthetic impacts are exempt from appeal.<sup>23</sup> Regarding cultural impacts, the appeal requested Project conditioning or denial. The SMC limits SEPA substantive authority to when a project is on a site designated as a historic landmark, appears to meet the criteria, or is adjacent or across the street from a designated structure, or on a site with potential archaeological significance.<sup>24</sup> These criteria do not apply. The Department reviewed adjacent designated landmarks, which do not include the Warwick Hotel or Cinerama, and determined no changes were required and that the structure on the site was not eligible for designation.<sup>25</sup>

As for the request to refer the Cinerama Movie Theater to the Landmarks Preservation Board for designation, even assuming the code reference encompasses sites other than the Project’s, the SMC provides that authority not to the Hearing Examiner but to the Department. “[T]he decisionmaker or any interested person may refer the site or structure to the Landmarks Preservation Board for consideration.”<sup>26</sup> This section does not refer to the Examiner. The Examiner is a decisionmaker, but not for the Department, which is the entity the SMC is referring to.<sup>27</sup> Also, as the Examiner is not a constituent advocating before the Department, in this context, the Examiner cannot be an “interested person.”<sup>28</sup>

This is consistent with the role of the Hearing Examiner, which is not to advocate for one side or the other, but to adjudicate discrete cases as the code directs. A judicial body may not take policy stands outside jurisdictional confines.

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<sup>22</sup> SMC 25.05.740. *See also* SMC 25.05.752; *Appeal of Seattle Mobility Coalition*, HE File #W-18-013, Amended Findings and Decision (October 24, 2019), p. 7 (“SEPA environmental review is limited to analysis of potential impacts to the natural and built environment. Elements of the environment to be considered under SEPA review are listed in SMC 25.05.444.”).

<sup>23</sup> RCW 43.21C.501(3)(a).

<sup>24</sup> SMC 25.05.675(H)(2).

<sup>25</sup> Decision, p. 28.

<sup>26</sup> SMC 25.05.675(H)(2)(c)

<sup>27</sup> SMC 25.05.730 (Decisionmaker is “the agency official or officials who make the agency’s decision on a proposal.”).

<sup>28</sup> An interested person is “any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before an agency, and shall include any party in a contested case.” SMC 25.05.755. This does not include the Hearing Examiner. If the Examiner were to take such a role in a case, the Examiner could not hear it. HER 3.10.

**ORDER**

The motion to dismiss is **GRANTED**. The appeal is dismissed and the hearing set for July 12 and 13, 2023, is stricken.

Entered May 9, 2023.

A handwritten signature in black ink, appearing to be 'SD', written over a horizontal line.

Susan Drummond, Deputy Hearing Examiner

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the **ORDER ON MOTION TO DISMISS** to those below in **WARWICK CORP., MUP-23-003**, in the manner indicated.

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Dated: May 9, 2023.

/s/ Angela Oberhansly  
Angela Oberhansly, Legal Assistant