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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of
EASTLAKE COMMUNITY COUNCIL
of the Determination of Nonsignificance issued
by the Director, Department of Planning and
Development

Hearing Examiner File:
MUP-14-002

(DPD File: 3014488)

**APPLICANT JOHNSON CARR LLC'S
MOTION TO DISMISS**

I. RELIEF REQUESTED

The applicant Johnson Carr LLC ("Applicant") proposes to construct a residential project ("Project") consisting of a congregate residence with 113 bedrooms and two multifamily dwelling units in the Eastlake neighborhood of the City of Seattle ("City"). The City Department of Planning and Development ("DPD") thoroughly reviewed the Project under the State Environmental Policy Act ("SEPA") and implementing City regulations and issued a Master Use Permit ("MUP") decision consisting of a Determination of Nonsignificance ("DNS") with conditions. Appellant Eastlake Community Council ("Eastlake") filed an appeal of the DNS. The appeal raises six issues. The Applicant now seeks dismissal of Issues 1, 2, 3, 5 (in part) and 6.

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II. FACTS

The Project is a multifamily housing type commonly known as “microhousing.” The Project consists of a 113-unit congregate residence and two multifamily dwelling units (apartments). The Project is located at 2820 Eastlake Avenue East (“Property”) in the Eastlake neighborhood of Seattle.

The Applicant submitted an application for a MUP for the Project, including a SEPA environmental checklist with supporting materials, to DPD. DPD conducted SEPA review of the Project, including notice, acceptance of public comment, and environmental review. The environmental studies of the Project included the environmental checklist, traffic study and geotechnical report. During its review under SEPA, DPD requested additional information, including a parking utilization study, which the Applicant provided. Ultimately, after a thorough review of the Project, DPD issued the MUP, consisting of a DNS with five conditions.

Appellant filed this appeal to the Hearing Examiner.

III. ISSUES

The issue raised in this motion is whether the Hearing Examiner should dismiss Issues 1, 2, 3, 5 (in part) and 6.

IV. EVIDENCE RELIED UPON

This motion relies on the pleadings and papers on file in this action and the Declaration of Courtney A. Kaylor (“Kaylor Declaration”) filed concurrently with this motion.

V. AUTHORITY

A. Claims may be dismissed for failure to state a claim upon which relief may be granted or when they are without merit on their face.

“An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is

1 without merit on its face, frivolous, or brought merely to secure delay.” Hearing Examiner Rules
2 of Practice and Procedure, Rule 3.02. “Any party may request dismissal of all or part of an
3 appeal by motion.” *Id.*

4 **B. Issue 1 should be dismissed because it is without merit on its face.**

5 Issue 1 asserts that there are (1) “public health, fire, and explosion risk[s]” from
6 providing sinks in bathrooms only and not providing “adequate ventilation” in the cooking areas
7 of each unit; (2) fire risk in common kitchens and (3) public safety risks due to lack of fresh air
8 and adequate egress routes. Appeal, p. 2. These claims have no merit on their face and must be
9 dismissed as a matter of law for two reasons.
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11 First, alleged “public health” and “public safety” risks to future occupants of the Project
12 are outside the scope of SEPA. SEPA requires analysis of the *environmental* impacts caused by
13 a proposal. RCW 43.21C.110(1)(f); WAC 197-11-448; WAC 197-11-444; Seattle Municipal
14 Code (“SMC” or “City Code”) 25.05.444; SMC 25.05.740. The elements of the environment
15 that may be considered under SEPA are listed in the SEPA rules and City Code. This list does
16 not include “public health” (except in relation to releases of toxic or hazardous substances) or
17 “public safety” impacts. WAC 197-11-448; SMC 25.05.444. To the contrary, “environment”
18 refers to “physical environmental quality.” WAC 197-11-740; SMC 25.05.740. “Social policy
19 analysis” including “fiscal and welfare policies” is not within the scope of environmental review
20 under SEPA. WAC 197-11-448(3); SMC 25.05.448.
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22 Second, the City’s construction codes address any impacts associated with fire and
23 explosion risk associated with cooking, “lack of fresh air” and adequate egress routes. Under
24 state SEPA rules providing for Growth Management Act (“GMA”) and SEPA integration, a local
25 government may determine that its development regulations and other local, state and federal
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1 laws or rules provide adequate analysis and mitigation for some or all environmental impacts of
2 a project. WAC 197-11-158. This rule is reflected in the City's "Overview Policy" which
3 provides that, "Where City regulations have been adopted to address an environmental impact, it
4 shall be presumed that such regulations are adequate to achieve sufficient mitigation" subject to
5 seven limitations. SMC 25.05.665.D.
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7 Here, the City has adopted regulations that address the risk of fire and explosion, fresh air
8 (ventilation) and egress in residential structures. This is the 2012 Seattle Building Code
9 ("SBC"). SBC Chapter 7 (Fire and Smoke Protection Features) and Chapter 9 (Fire Protection
10 Systems) address the risk of fire and explosion in residential (and other) structures. SMC
11 Chapter 12 addresses the interior environment, including ventilation. Chapter 10 addresses
12 egress. Under the City's Overview Policy, it is presumed that these regulations are adequate to
13 achieve sufficient mitigation, subject to the limitations stated in the Overview Policy.
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15 None of the limitations apply here. The first is that no regulation has been adopted to
16 mitigate the impact in question. Here, the SBC mitigates all of the impacts in question. The
17 second is that the applicable City Code has been judicially invalidated. This is not the case here.
18 The third is that the project site presents unusual circumstances which would result in
19 environmental impacts which substantially exceed those anticipated by the applicable City Code
20 or zoning. The impacts alleged here do not relate to the Project site. The fourth is that the
21 development proposal presents unusual features, such as unforeseen design, new technology, or a
22 use not identified in the applicable City Code, that results in environmental impacts which
23 substantially exceed those anticipated by the applicable City Code or zoning. Here, the SBC
24 defines "congregate living facilities" as a "building or part thereof that contains sleeping units
25 where residents share bathroom and/or kitchen facilities." SBC Section 202. Thus, a congregate
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1 residence such as the one at issue here is specifically contemplated by the SBC. The fifth is that
2 the project is located near the edge of a zone and results in substantial problems of transition in
3 scale or use. However, the alleged impacts relate to conditions internal to the Project, not to
4 zone transitions. The sixth is that the project is vested to a regulation that no longer reflects the
5 City's policy with regard to the relevant environmental impact. Here, the relevant regulation is
6 the same version of the SBC that was in effect when the Project application was submitted. The
7 seventh and final limitation is that the project creates undue impacts based on cumulative effects.
8 But, the impacts alleged here are not cumulative but instead relate to this specific Project on its
9 own.
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11 In sum: (1) alleged impacts to the "public health" and "public safety" of future residents
12 of the Project are outside the scope of SEPA; and (2) alleged impacts relating to fire, explosion,
13 fresh air and egress are addressed by existing regulations under the City's Overview Policy.
14 Accordingly, Issue 1 must be dismissed.
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16 **C. Issue 2 should be dismissed because it is without merit on its face.**

17 Issue 2 asserts that there are "public safety and neighborhood impacts from the transient
18 nature of many of the proposed building's residents." Appeal, p. 2. This claim has no merit on
19 its face and must be dismissed. As previously discussed, SEPA requires analysis of only the
20 physical environmental impacts caused by a proposal. RCW 43.21C.110(1)(f); WAC 197-11-
21 448; WAC 197-11-444; SMC 25.05.444; SMC 25.05.740. Public safety impacts are not impacts
22 to the physical environment. WAC 197-11-448; SMC 25.05.444. It is unclear what
23 "neighborhood" impacts Appellant believes may result from residents staying only a short time,¹
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27 ¹ The dictionary definition of transient is "staying somewhere only a short time." *Merriam-Webster.com*. Merriam-
28 Webster, n.d. Web. 27 May 2014. This motion does not address whether or not many future residents of the Project
will stay only a short time, as this determination not necessary to the resolution of this issue.

1 but Appellant has not alleged any physical environmental impacts in the neighborhood. For
2 these reasons, Issue 2 must be dismissed.

3 **D. Issue 3 should be dismissed because it is without merit on its face.**

4 Issue 3 asserts that the Project is not compatible with existing and proposed land uses and
5 plans, including the Eastlake Neighborhood Plan. Appeal, p. 2. This claim has no merit on its
6 face and must be dismissed.
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8 The City's SEPA Policies, at SMC 25.05.665-25.05.675, strictly limit how land use plans
9 may be used in the SEPA process. The Overview Policy states, "adopted City policies may serve
10 as the basis for exercising substantive SEPA authority with respect to a project only to the extent
11 that they are explicitly referenced herein." SMC 25.05.665.B (emphasis added). Yet, the
12 Appellant fails to identify any SEPA Policy which explicitly references a land use plan provision
13 with which Appellant believes the Project is incompatible.
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15 The Overview Policy also specifically limits how neighborhood plans may be used in the
16 SEPA process. The Overview Policy states that neighborhood plans in existence as of July 1988
17 (including the Eastlake Neighborhood Plan) may be used as a basis for the exercise of
18 substantive SEPA authority only to the extent that: (1) "the plan identifies unusual
19 circumstances such as substantially different site size or shape, topography, or inadequate
20 infrastructure which would result in adverse environmental impacts which substantially exceed
21 those anticipated by the code or zoning" or (2) "the plan establishes a different balance of
22 environmental and other goals than is characteristic of the land use code as a whole." SMC
23 25.05.665.C.¹
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27 ¹ In addition, the authority and conditions based on an existing plan cannot exceed the limitations in the cumulative
28 effects policy (SMC 25.05.670) and specific environmental policies (SMC 25.05.675). Also, any SEPA conditions
based on a neighborhood plan must be consistent with rezones adopted after the plan. *Id.*

1 Here, Appellant fails to reference any provision of the Eastlake Neighborhood Plan that
2 either (1) identifies unusual circumstances resulting in substantially adverse environmental
3 impacts which substantially exceed those anticipated by the land use code or zoning; or (2)
4 establishes a different balance than in the land use code as a whole. In short, Appellant has not
5 met the threshold requirement mandated by the City's SEPA Policies before the Eastlake
6 Neighborhood Plan may be considered.
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8 Accordingly, the Hearing Examiner should dismiss Issue 3.

9 **E. Issue 5 should be dismissed, in part, because the Hearing Examiner lacks**
10 **jurisdiction over appeals of Environmentally Critical Area ("ECA") exemptions.**

11 Issue 5 asserts, in part, that DPD erred in granting the Project an ECA exemption.
12 Appeal, p. 4. This portion of Issue 5 must be dismissed for lack of jurisdiction. ECA
13 exemptions are governed by SMC Chapter 25.09 (Regulations for Environmentally Critical
14 Areas). Section 25.09.017 provides that, other than those relating to code interpretations,
15 "administrative appeal provisions set out in Title 23 do not apply to decisions under this chapter,
16 except as specifically provided." Title 23 addresses Hearing Examiner appeals. However, there
17 is no Hearing Examiner appeal specifically provided in Chapter 25.09 for ECA exemptions.
18 SMC 25.09.045. Accordingly, the Hearing Examiner lacks jurisdiction to review the issuance of
19 the ECA exemption. This portion of Issue 5 must be dismissed.
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21 **F. Issue 6 should be dismissed because it is without merit on its face.**

22 Issue 6 asserts that the public notices and MUP decision inaccurately state the number
23 and types of units in the Project. Appeal, p. 4. This claim has no merit on its face and must be
24 dismissed as a matter of law for two reasons.
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1 First, on its face, this Issue does not raise a SEPA claim. There is no allegation of any
2 specific significant adverse environmental impact in this Issue. Since no SEPA claim is raised,
3 the Hearing Examiner lacks jurisdiction, and this Issue must be dismissed.

4 Second, the SEPA notice and MUP decision were sufficient to inform the public of the
5 nature of the Project. To the extent a SEPA issue is implied in Issue 6, it is a claim relating to
6 the accuracy of the project description in the SEPA notice. SEPA notices for projects requiring
7 MUPs must be given pursuant to SMC Title 23. SMC 25.05.510. SMC 23.76.012.C requires
8 that a notice of application must include a “description of the proposed project action.” The
9 notice of the MUP decision must “state the nature of the applicant’s proposal.” SMC
10 23.76.020.D. Procedural errors occurring during the SEPA process may be dismissed as
11 harmless if they are not consequential. *Klickitat County Citizens Against Imported Waste v.*
12 *Klickitat County*, 122 Wn.2d 619, 637-638, 860 P.2d 390 (1993).

13 Here, the revised notice, issued on December 26, 2013, states: “Land Use Application to
14 allow a congregate residence with 113 bedrooms and two separate dwelling units in an
15 environmentally critical area. No parking proposed.” Kaylor Declaration, Ex. A (12/26/13
16 Notice), p. 1. The notice of MUP issuance has the same Project description. *Id.*, Ex. B (4/17/14
17 Notice), p. 1. These notices were sufficient to apprise interested persons of the nature of the
18 Project. Indeed, many comments were received on the notice of application, including
19 comments by Appellant, and Appellant filed this appeal following issuance of the MUP
20 decision.¹

21 For these reasons, Issue 6 must be dismissed.

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28 ¹ Appellant lacks standing to assert lack of adequate notice on behalf of other persons or entities.

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VI. CONCLUSION

For these reasons, the Applicant requests the Hearing Examiner to enter an order dismissing Issues 1, 2, 3, 5 (in part) and 6.

Dated this 30th day of May, 2014.

MCCULLOUGH HILL LEARY, P.S.

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