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 REPLY ON MOTION TO DISMISS**

I. INTRODUCTION

In its motion to dismiss, the applicant Johnson & Carr, LLC ("Johnson & Carr") seeks dismissal of Issues 1, 2, 3, 5 (in part) and 6. In its response brief, the appellant Eastlake Community Council ("ECC") withdraws the part of Issue 5 appealing the Environmentally Critical Area ("ECA") exemption and all of Issue 6. Accordingly, it is uncontested that these issues should be dismissed.

ECC opposes the dismissal of Issues 1, 2 and 3, however. With regard to Issue 1, ECC claims that the risk of explosion, "potential releases . . . affecting public health" and impacts to

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public services relating to fire are elements of the environment that the City did not consider. ECC is incorrect as a matter of law. This issue must be dismissed.

With regard to Issue 2, ECC improperly briefs a new issue that is not raised in Issue 2 or elsewhere in the appeal statement: specifically, whether the Project is correctly categorized as a congregate residence. Further, this issue is outside the jurisdiction of the Hearing Examiner. This briefing should be stricken and Issue 2 dismissed.

With regard to Issue 3, ECC again improperly attempts to expand the scope of the issue presented, asserting that the appeal statement that "no measures are proposed that would make the building proposal compatible" with the Eastlake Neighborhood Plan does not relate to the adequacy of mitigation measures – as its plain language would indicate – but rather the adequacy of the City's consideration of impacts. ECC also argues that the Eastlake Neighborhood Plan identifies "unusual circumstances" and a different balance of goals than the land use code as a whole, allowing it to be used to impose mitigation under the City's State Environmental Policy Act ("SEPA") Overview Policy. The plain language of the Eastlake Neighborhood Plan belies this claim.

For these reasons, the Hearing Examiner should dismiss Issues 1, 2 and 3.

II. AUTHORITY

A. ECC has the burden of proof to demonstrate that the Project will have significant adverse impacts.

The City Code requires the Hearing Examiner to give substantial weight to the Decision. SMC 23.76.022C.7. In addition, SEPA requires that DPD's decision to issue a DNS for the Project must be granted substantial weight. RCW 43.21C.090; SMC 23.76.022.C.7; *King County v. Central Puget Sound Growth Mgm't Hrgs. Bd.,* 91 Wn. App. 1, 30, 951 P.2d 1151 (1998). Courts interpret the "substantial weight" requirement as mandating the clearly erroneous

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standard of review. *Murden Cove Preservation Ass'n. v. Kitsap County*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985); *Cougar Mountain Ass'n. v. King County* 111 Wn.2d 742, 747-749, 764 P.2d 264 (1988); *Indian Trail Property Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430, 431, 886 P.2d 209 (1994). Under the clearly erroneous standard, reviewing bodies do not substitute their judgment for that of the agency but may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain, supra,* 111 Wn.2d at 747; *Polygon Corp. v. Seattle,* 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County,* 141 Wn.2d 185, 4 P.3d 115 (2000).

The burden is on Appellant to overcome the deference that the Decision must be given. *Brown v. Tacoma,* 30 Wn. App. 762, 764, 637 P.2d 1005 (1981). An appellant fails to meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. *See e.g.,* Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et al.,* File Nos. S-96-002 and S-96-003 (July 15, 1996), p. 13.

Further, with regard to Appellant's assertions that the Project will result in significant adverse environmental impacts, Appellant bears the burden of producing affirmative evidence of such impacts. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-720 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001). In *Boehm*, the Court rejected a challenge to a mitigated determination of non-significance ("MDNS") for a gas station associated with a Fred Meyer store. The appellant argued that the project had significant adverse cumulative impacts. The Court rejected this claim, stating: "[w]hen the Boehms complain of a failure to adequately identify or mitigate adverse impacts, they have produced no evidence that such impacts exist."

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Thus, the Court found these impacts to be speculative, and rejected the appellant's claim. *Boehm*, 11 Wn. App. at 719-720.

Similarly, in *Moss*, the Court upheld the issuance of a MDNS for a 79-acre, 172-lot subdivision. The Court emphasized the specific burden of proof borne by the appellants, stating that "although appellants complain generally that the impacts were not adequately analyzed, they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS." 109 Wn. App. at 23-24.

Boehm and *Moss* require an appellant to present affirmative evidence demonstrating the existence of a probable, significant, adverse environmental impact. Mere complaints are insufficient to satisfy an appellant's burden of proof in a SEPA appeal as a matter of law. The Seattle Hearing Examiner also requires appellants to produce affirmative evidence of alleged adverse impacts. *See, e.g.,* Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeal of Maple Leaf Community Council Executive Board*, File No. MUP-08-014 (W, DR) (Sept. 2, 2008), p. 11 ("The evidence presented by the Appellant raised general questions and concerns about possible risks from the project; its witnesses . . . while both experts in their fields, had not performed site-specific studies or evaluations of the project's impacts. The Appellant has not met its burden to show that the issuance of a DNS was in error"); Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeal of Philip Theil et al.*, File No. MUP-06-012 (W, DR) (May 16, 2006), p. 6 ("The appellants' SEPA appeal alleged a failure to mitigate impacts from height, bulk, and scale. Under SMC 25.05.675.G.2.c, a project that is approved pursuant to the design review process is presumed to comply with SEPA height, bulk and scale policies. The presumption may be rebutted only by clear and convincing evidence that the impacts documented through

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environmental review have not been adequately mitigated"); Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeals of Tatiana Farid and Squire Park Community Council, et al.*, File Nos. MUP-06-029 (W, S) and MUP-06-031 (W, S) (Nov. 14, 2006), p. 8 ("The evidence presented did not show that the impacts of light, glare, or noise, shadows, or other environmental impacts, would be significant or otherwise require mitigation . . . The Director's SEPA decision was not clearly erroneous . . .").

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

ECC claims that Issue 1 should not be dismissed because the impacts alleged in this Issue are environmental impacts and the City Department of Planning and Development ("DPD") did not give "actual consideration" to them. Opposition by Eastlake Community Council to Applicant's Motion to Dismiss Issues ("ECC's Response"), pp. 2-4. ECC is incorrect as a matter of law.

First, the impacts alleged in Issue 1 are not potential environmental impacts of the Project. This Issue asserts that there are (1) "public health, fire, and explosion risk[s]" from providing sinks in bathrooms only and not providing "adequate ventilation" in the cooking areas of each unit; (2) fire risk in common kitchens and (3) public safety risks due to lack of fresh air and adequate egress routes. In its response brief, ECC asserts that these alleged impacts relate to elements of the environment under Seattle Municipal Code ("SMC" or "City Code") 25.05.444.B.1.b, B.1.c and B.4.a. ECC's Response, p. 3. These sections do not support ECC's claim.

SMC 25.05.444.B.1.b addresses "environmental health" and includes "risk of explosion." ECC bears the burden of proof to provide affirmative evidence that this multifamily housing project results in a significant adverse risk of explosion; it is insufficient as a matter of law for

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ECC to simply state that such a risk may exist. *See Boehm, supra,* 111 Wn. App. 711; *Moss, supra,* 109 Wn. App. 6. Yet in its response, ECC provides not only no evidence, but no rational link between the construction of a multifamily residential development and the "risk of explosion" – indeed, there is none. This claim is without merit on its face and should be dismissed. Hearing Examiner Rules of Practice and Procedure, Rule 3.02. SMC 25.05.444.1.c addresses "releases or potential releases to the environment affecting public health, such as toxic or hazardous materials." Neither the Project nor Issue 1 has anything to do with toxic or hazardous materials. ECC's reliance on this section is misplaced. SMC 25.05.444.B.4.a addresses public services and utilities, including fire service. But Issue 1 says nothing about public services. This section is inapposite. Notably, ECC does not provide any authority whatsoever for the proposition that "public health" or "public safety" impacts are elements of the environment under SEPA. ECC's claims relating to these impacts should be dismissed.

Second, ECC's claim that the City did not give "actual consideration" to these impacts ignores both ECC's burden of proof and the City's SEPA Overview Policy. Specifically, ECC bears the burden of proof to provide affirmative evidence that the Project will result in significant adverse impacts. The mere allegation that the City did not give "actual consideration" to this impact is insufficient as a matter of law. *See Boehm, supra,* 111 Wn. App. 711; *Moss, supra,* 109 Wn. App. 6. ECC's argument also fails to consider the SEPA Overview Policy, which states that, "[w]here City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation" subject to seven limitations. SMC 25.05.665.D (emphasis added). Here, the Seattle Building Code includes regulations that address the risk of fire and explosion, fresh air (ventilation) and egress in residential structures. Seattle Building Code ("SBC") Chapters 7,

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9, 10 and 12. ECC does not contest this fact. Further, none of the limitations of the Overview Policy are present here. ECC does not contest this fact either. Accordingly, DPD was required by the Overview Policy to presume that the SBC mitigates the impacts alleged by ECC. This was all the consideration required by the City's SEPA regulations.

In sum, ECC's arguments with regard to Issue 1 lack merit. This issue should be dismissed.

C. Issue 2 should be dismissed because it is without merit on its face.

Issue 2 asserts that there are "public safety and neighborhood impacts from the transient nature of many of the proposed building's residents." Appeal, p. 2. Johnson & Carr moved to dismiss this issue because these are not impacts to the physical environment. In its response brief, ECC improperly goes far beyond the original allegations of Issue 2 and raises an entirely new issue – whether the Project is a lodging use not allowed in the zone – that is not a SEPA issue and is outside the scope of the Hearing Examiner's jurisdiction. ECC's Response, pp. 4-6. ECC's briefing on this subject should be stricken, and Issue 2 should be dismissed.

A "[d]etermination that a proposal complies with development standards" is a Type I decision. SMC 23.76.006.B.1. A Type I decision is not appealable to the Hearing Examiner. Rather, the only method by which a Type I decision may be appealed is through a request for a Code Interpretation. SMC 23.76.022.A.1. A Code Interpretation relating to a project requiring public notice (such as the one at issue here) may be requested during the public comment period. SMC 23.88.020.C.3.a. In addition, an appeal of a Type II decision may include a request for a Code Interpretation, but an interpretation "regarding whether a use proposed under the related project application has been correctly classified may not be requested" at this time. SMC 23.88.020.C.3.c.

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Here, the determination that the Project is a congregate residence and housing, not an impermissible lodging use, was a Type I decision. This decision is not subject to appeal to the Hearing Examiner. Rather, the only way this decision can be appealed is through a timely filed request for Code Interpretation and subsequent appeal of the Code Interpretation to the Hearing Examiner. There is no Code Interpretation appeal pending before the Hearing Examiner relating to the Project. Accordingly, the Hearing Examiner lacks jurisdiction over ECC's claims.

ECC is aware of this limitation on the Hearing Examiner's jurisdiction. ECC failed to file a Code Interpretation request during the comment period. However, ECC attempted to file an untimely Code Interpretation request on the last day of the appeal period for the Master Use Permit for the Project. Declaration of Courtney A. Kaylor in Support of Reply on Motion to Dismiss ("Kaylor Declaration"), Ex. A. However, ECC failed to include this request in its appeal to the Hearing Examiner, and even if it had, could not have requested a Code Interpretation on the proper use classification of the Project at that late date. SMC 23.88.020.C.3.c. Accordingly, DPD properly refused to issue a Code Interpretation relating to the Project's use classification. Kaylor Declaration, Ex. B. ECC then withdrew its Code Interpretation request. *Id.*, Ex. C. Despite the fact that it withdrew the request, ECC then appealed DPD's decision not to issue a Code Interpretation on the Project's use classification to Superior Court. *Id.*, Ex. D. The City's and Johnson & Carr's Motion to Dismiss that appeal is pending. *Id.*, Ex. E.

In sum, the Hearing Examiner lacks jurisdiction over ECC's claim that the Project is an impermissible lodging use, an issue that could only have been raised through a timely Code Interpretation request. ECC's actions show it is aware of this fact. ECC's attempt to now raise

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this issue in these Hearing Examiner proceedings is disingenuous. ECC's briefing on this topic should be stricken and Issue 2 dismissed.

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

In its response brief, ECC asserts that the City failed to give "actual consideration" to the Eastlake Neighborhood Plan and that the Eastlake Neighborhood Plan may be used as a basis for the exercise of substantive SEPA authority under the City's SEPA Overview Policy. ECC's Response, pp. 6-9. ECC is incorrect on both counts.

First, ECC bears the burden of proof to provide affirmative evidence that the Project will result in significant adverse impacts. The mere allegation that the City did not give "actual consideration" to this impact is insufficient as a matter of law. *See Boehm, supra,* 111 Wn. App. 711; *Moss, supra,* 109 Wn. App. 6.

Second, ECC's arguments regarding the City's SEPA overview policy fail. As an initial matter, ECC ignores the provision of the Overview Policy that states, "adopted City policies may serve as the basis for exercising substantive SEPA authority with respect to a project only to the extent that they are explicitly referenced herein." SMC 25.05.665.B (emphasis added). ECC fails to identify any SEPA Policy which explicitly references a land use plan provision with which Appellant believes the Project is incompatible. ECC's failure to address this portion of the Overview Policy alone provides sufficient basis on which to dismiss Issue 3.

ECC's arguments regarding other provisions of the Overview Policy are also unavailing. The Overview Policy states that neighborhood plans in existence as of July 1988 (including the Eastlake Neighborhood Plan) may be used as a basis for the exercise of substantive SEPA authority only to the extent that: (1) "the plan identifies unusual circumstances such as substantially different site size or shape, topography, or inadequate infrastructure which would

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result in adverse environmental impacts which substantially exceed those anticipated by the code or zoning" or (2) "the plan establishes a different balance of environmental and other goals than is characteristic of the land use code as a whole." SMC 25.05.665.C. ECC asserts the first criterion is met because the goals and policies for the Eastlake neighborhood recognize that "each neighborhood is unique." ECC's Response, p. 7. Yet, if this alone were sufficient to establish "unusual circumstances" then this exception would swallow the rule. Since all neighborhoods are "unique," every neighborhood plan could be used as the basis of the exercise of substantive SEPA authority, rendering the Overview Policy provisions meaningless.

ECC also asserts that the Eastlake Community Plan establishes a "different balance of environmental and other goals" than the land use code as a whole because it has policies "to increase owner-occupancy, to rehabilitate existing house (sic), to oppose speculative developments, to create retail storefronts and to create low-income housing that is disperse and low profile." ECC Response, p. 8. ECC misses the point. None of the policies it references relate to environmental goals or the balance between environmental and other goals. ECC's claim fails on this ground.

For these reasons, the Hearing Examiner should reject ECC's unfounded arguments and dismiss Issue 3.

III. CONCLUSION

ECC has withdrawn the part of Issue 5 appealing the ECA exemption and all of Issue 6. In addition, ECC's arguments relating to Issues 1, 2 and 3 lack merit. Accordingly, the Hearing Examiner should dismiss Issues 1, 2, 3, 5 (in part) and 6.

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Dated this 20th day of June, 2014.

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