

EXHIBIT A



117 E. Louisa St. #1
Seattle, WA 98102-3278

May 1, 2014

Director, Dept. of Planning and Development
701 Fifth Avenue, #2000
PO Box 34019
Seattle, WA 98124-4019

**REQUEST FOR CODE INTERPRETATION REGARDING THE 2820 EASTLAKE AVENUE
PROJECT PROPOSAL (MUP #3014488)**

To the Director:

Pursuant to SMC 23.88.020(C)(3) and the Notice of Decision of April 17, 2014, the Eastlake Community Council (ECC) requests that DPD render an interpretation on the following matters regarding the 2820 Eastlake Avenue proposal:

(1) The proposed 115 bedroom/bathroom units do not constitute a form of congregate residence and should be regulated as 115 apartments.

The Analysis and Decision on MUP Application 3014488 approves a proposal described as a seven level congregate residence with 113 units, each consisting of a bedroom and a bathroom, plus two separate apartments. Based upon ECC's own count, which it confirmed today with a DPD reviewer, ECC alerts the Director that this calculation is in error and that the proposal in fact includes eight separate apartments; and 115 bedroom/bathroom units. In any case, ECC maintains that each of the bedroom/bathroom units claimed to constitute a congregate residence use do not qualify as such and that each constitutes a separate dwelling unit, and should be regulated as apartments, not as being part of a congregate residence.

(a) The Land Use Code defines a "congregate residence" as rooming that does not constitute a single household:

[RCW 23.84A.032 (9)] "Congregate residence" means a use in which rooms or lodging, with or without meals, are provided for nine or more non-transient persons not constituting a single household, excluding single-family dwelling units for which special or reasonable accommodation has been granted. (Emphasis added).

(b) The term “household” is defined as a “housekeeping unit” made up of any number of related persons and no more than eight unrelated persons:

[23.84A.016] "Household" means a housekeeping unit consisting of any number of related persons; eight or fewer non-related, non-transient persons; eight or fewer related and non-related non-transient persons, unless a grant of special or reasonable accommodation allows an additional number of persons. (Emphasis added).

(c) The term “housekeeping unit” is defined by the residential housing code as a “housing unit” with shared living facilities:

[22.204.090 "H"] "Housekeeping unit" means a housing unit of one (1) or more rooms, used for living, sleeping and cooking and sharing a common bathroom. (Emphasis added).

(d) The term “housing unit” includes a dormitory or single room occupancy unit:

[SMC 22.204.090 “H] "Housing unit" means any dwelling unit, housekeeping unit, guest room, dormitory, or single room occupancy unit.

(e) The 2009 Seattle Building Code, which applies to this project, defines “Congregate living facilities” as follows: “A building or part thereof that contains sleeping units where residents share bathroom and/or kitchen facilities.” Its Section 101.7 also states that “Where differences occur between provisions of this code and referenced codes and standard, the provisions of this code apply....”

Application of the above definitions leads to the conclusion that based upon the design and layout of the building each of the 115 bedroom/bathroom units would constitute a separate household because each would consist of a housing unit that would be used for separate living, sleeping, and cooking and each would have a common bathroom. As designed, each of the units would contain living and sleeping areas and have its own bathroom. As the building is configured, each of those units also would be used for cooking, as evident from the following design features:

1. each of the housing units is designed to be individually rented (as opposed to a dormitory, fraternity or sorority, where rooming comes as an incidence of some other arrangement with the operating facility, e.g. membership in fraternal organization or occupancy through a room and board agreement and the residents are members of a single association);
2. the size of each of the two kitchens for the 115 bedroom/bathroom units is notably inadequate (both in size and in distance from most residents) to provide the food preparation, cooking, food service, and food storage needs of the residents;
3. the proposal does not include provisions for food service, but leaves residents on their own;
4. nothing would require occupants to also join a meal plan as a condition of occupancy;

5. the proposal does not prevent the use of units for cooking such as through the use of microwaves, hot-plates, rice cookers, electric kettles, coffee makers, and the like.

Although further proof is not needed, note that although Director's Rule 7-83 ["Determining the Existence of a Dwelling Unit for the Purpose of Code Enforcement"] states that the existence of a food preparation area within the room or rooms shall be evidence of the existence of a dwelling unit," that Rule also states that "Even if there is no food preparation area, a dwelling unit might exist," and in its section headed "Existence of one and/or several of the following elements shall be considered evidence of the existence or more than one dwelling unit," the Rule provides a list that includes lists the following elements that , we submit, further establish that the bedroom/bathroom units proposed for 2820 Eastlake Ave. are dwelling units:

- "(b) separate addresses";
- "(c) Lockable interior doors that can exclude a portion of the dwelling unit from access to the entire dwelling unit";
- "(d) Separate lockable entrance to rooms or areas which are separated from other rooms or areas by key locks or privacy locks. Privacy locks on bathrooms and bedrooms shall be allowed."
- "(f) Occupancy of the premises by more than one separate family, independent from any other family, and using any of the facilities listed herein";
- "(m) Additional complete bathroom facilities in a separable part of the structure."

Also, note that the DPD Correction letter of December 5, 2013 states that "We have concluded that spaces configured in this way are designed are arranged as separate dwelling units, and the building, as proposed, is subject to review as a 115-unit apartment building." The following week, the developer removed the second sinks from the sleeping rooms, apparently causing DPD to reclassify the sleeping rooms as a congregate residence. We suggest that DPD's was more correct in its original determination that the entire building is an apartment building, and that it erred in using the absence or presence of a kitchen sink in determining whether or not it was an apartment building.

For the reasons above, the bedroom/bathroom units proposed for 2820 Eastlake Avenue project would be separate housing units and separate dwelling units, should be regarded entirely as apartments, and should be regulated as such.

(2) The proposed 115 bedroom/bathroom units will inherently include transient residents in levels not allowed under the Land Use Code.

(a) The Land Use Code [SMC 232.84A.032 "R"] states that a "Congregate residence" provides housing for "for nine or more non-transient persons not constituting a single household...." , excluding single-family dwelling units for which special or reasonable accommodation has been granted."

(b) While "transient" is apparently not defined in the Land Use Code, it is defined in the Building Code, which defines it as "occupancy of a dwelling unit for not more than 30 days."

(c) As the proposed 2820 Eastlake Avenue project currently designed, many of its residents are unlikely to be staying for 30 days or more, and thus must be classified as transient residents. This is

inherent in the design, which is like a hotel rather than a dormitory, fraternity, or sorority--each of which has common dining facilities near or usually in the building.

(d) under the Code, a residence affording transient occupancy is lodging, which is a commercial use not allowed in this residential zone

For the reasons above, the 115 bedroom/bathroom units proposed for 2820 Eastlake Avenue project will be occupied by many transient residents and cannot be permitted as a residential use.

(3) The proposal includes light wells and below-grade windows that are impermissible as locations for sleeping rooms.

According to the August 12, 2013 Correction notice, six units on Level 2 “will have windows below grade,” and on Level 3, “two units would receive light from the light well on the east side.” In the latest plan set, these deficiencies were not corrected, and they are not consistent with Code.

(4) The proposal appears not to be following the Land Use Code regarding floor area ratio and height.

It appears that DPD has departed from the Code by allowing the developer to split the site for the purpose of averaging height, such that two paths are used rather than the one path that we understand the Code to require. Also, although they are proposing to excavate the site, they are counting the height from the original grade, and are counting the floor area ratio (FAR) from the original grade. Significant portions of levels 1, 2, and most of 3 are clearly above the new grade, but are not being counted in the FAR. These methods do not appear consistent with the Land Use Code, and are causing the building to be larger than the Code allows.

(5) The proposal appears to unjustifiably waive density limits, despite the project’s not qualifying for Green+4 rating in affordability

The “Green+4” rating allows the developer to ignore the 1/800 density requirement of LR-3. DPD erred in granting this project development bonuses based on claims of “affordable housing.” [See, e.g., DPD Correction Notice #1, Item #2 of August 12, 2013, stating that Green+4 rating involves building “new affordable housing” as defined in subsection 23.45.526.d]. We suggest that a basic minimum for “affordable” housing is a functioning kitchen; without it, there is likely additional cost for dining out. And as outlined above, the two common “kitchens” are not functional because each must be shared among 115+ tenants.

(6) The project lacks any of the common features traditionally associated with congregate housing.

A close examination of Seattle’s legislative history of the origins of congregate housing shows that it was always intended for institutional uses such as for special needs (e.g. “group homes”) and school housing (dormitories, fraternities, and sororities). Such prior instances have emphasized joint dining, shared bathrooms, large common areas, and extensive staff supervision—features that are completely absent from this proposal. The very term “congregate” highlights the communal features that are

clearly intended for this use. This project is not congregate housing in any meaningful sense, and is not consistent with the intent of the Land Use Code.

Conclusion. We look forward to your analysis. ECC reserves the right to supplement this request with additional information as it becomes available through requests for public records and the appeal process.

Sincerely,

A handwritten signature in black ink that reads "Chris Lemman". The signature is written in a cursive, flowing style.

Christopher K. Lemman, President
Eastlake Community Council
info@eastlakeseattle.org
(206) 322-5463

EXHIBIT B

From: McKim, Andy
Sent: Friday, May 02, 2014 12:29 PM
To: info@eastlakeSeattle.org
Subject: Code Interpretation Request regarding project at 2820 Eastlake Avenue East

Hello, Mr. Leman.

We have received your request for a Land Use Code interpretation, submitted in conjunction with your appeal of Project No. 3014488. We are able to address some but not all of the questions you have raised in an interpretation.

Under Section 23.88.020.C.3.c, an interpretation may be requested in conjunction with an appeal of the related MUP decision, even if the deadlines that otherwise would apply to the interpretation request are not met, but an interpretation regarding whether a use has been correctly classified may not be requested at this stage. Three of the six issues you have identified in your request – items #1, #2 and #6 – bear on the categorization of the use of the proposed building. In Item #1, you argue that the project is not properly characterized as a congregate residence, and the individual rooms should be regulated as apartment units instead. In Item #2, you assert that the project will inherently include transient residents, and that this would be inconsistent with the definition of “congregate residence.” In Item #6, you assert that the project lacks any of the common features traditionally associated with congregate housing. The central premise of all of these items is that the proposed facility should be regulated as something other than a congregate residence. Because this is a use classification issue, we are not able to address it in an interpretation requested at this stage.

In Item #3 you assert that the proposal includes light wells and below-grade windows that are impermissible for sleeping rooms. The standards governing window requirements for sleeping rooms are in the residential building code rather than the Land Use Code. We are not able to address this issue in a Land Use Code interpretation.

The two remaining issues, #4 and #5, raise questions that we would be able to address in a Land Use Code interpretation at this point, but your questions appear to reflect some possible misunderstandings.

Under Item #4 you note that the lot has been split for purposes of averaging height, that structure height has been measured from the pre-existing grade rather than the finished grade, and also that areas poking above the finished grade-level have been excluded from the FAR calculation. Under the current height measurement technique, structure height is measured from existing grade, even if the finished grade is lower. (Section 23.86.006.) A structure may be segmented, and the grade-level averaged separately for the separate segments. (Director’s Rule 4-2012.) For purposes of the FAR standard, a portion of a structure is considered underground only if it is below existing AND finished grade. Underground stories are exempted from FAR, but under some circumstances an exemption is also provided for portions of floors that extend no more than four feet above existing or finished grade, whichever is lower.

In Item #5, you assert that the density limits have been waived even though the project does not qualify for “Green+4 rating in affordability.” Density limits limit the number of dwelling units that may be provided, based on the lot area. Congregate residences are not arranged as a discrete number of dwelling units, so they simply aren’t subject to density limits. However, if they were, no density limit would apply in any case if the development meets the standards of Section 23.45.510.C. One of the

requirements in that section is a commitment to meet specified green building performance standards. However, a structure does not need to qualify as “affordable housing” in order to meet the green building performance standards.

I am able to proceed with an interpretation on Items #4 and #5 alone if you would like for me to do so, having been alerted to these possible misunderstandings. Please let me know whether you would like for me to do so, or whether you would prefer to withdraw your request.

Thanks!

Andy McKim
Land Use Planner – Supervisor

EXHIBIT C

From: Eastlake Community Council [<mailto:info@eastlakeseattle.org>]

Sent: Friday, May 23, 2014 7:31 AM

To: McKim, Andy

Cc: Jeff Eustis

Subject: Please cancel ECC's request for a Code Interpretation regarding 2820 Eastlake Avenue

Andy—

We have decided not to proceed with the Code Interpretation we had originally requested for the 2820 Eastlake Avenue project. As you will recall, you ruled that you could not provide most of the Code Interpretation we had asked for. We have decided not to proceed with any of the Code Interpretation Request, and so are withdrawing our request and would be grateful if you could refund our \$2500 payment. Thanks for your patience with our change of heart.

Chris Leman (206) 322-5463
President, Eastlake Community Council
117 E. Louisa St. #1
Seattle, WA 98102-3278

EXHIBIT D

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KING COUNTY SUPERIOR COURT

EASTLAKE COMMUNITY COUNCIL, a
Washington non-profit corporation

No. 14-2-14778-3 SEA

PETITIONER,

LAND USE PETITION
(Ch. 36.70C RCW)

v.

CITY OF SEATTLE, a Washington
Municipal Corporation; JOHNSON & CARR,
LLC; CRESCENDO HOLDINGS, LLC;
MICRO HOUSING, LLC; and JAY
JANETTE;

RESPONDENTS

Pursuant to the Land Use Petition Act, Chapter 36.70C RCW, and Article IV,
Section 6 of the Washington State Constitution, Eastlake Community Council brings this
action and alleges as follows:

1. NAME AND MAILING ADDRESS OF PETITIONER

Eastlake Community Council
c/o Chris Leman, President
2370 Yale Avenue East
Seattle, WA 98102-3310

//
/

1 **2. NAME AND MAILING ADDRESS OF PETITIONER'S ATTORNEYS**

2 Jeffrey M. Eustis
3 ARAMBURU & EUSTIS, LLP
4 720 Third Avenue, Suite 2000
5 Seattle, Washington 98104

6 **3. NAME AND MAILING ADDRESS OF LOCAL JURISDICTION WHOSE**
7 **LAND USE DECISION IS AT ISSUE**

8 City of Seattle
9 600 Fourth Avenue
10 Seattle, Washington 98104

11 **4. THE DECISION-MAKING OFFICERS AND DECISIONS APPEALED**

12 4.1 The decision-making officers reaching the decisions at issue are identified

13 below:

14 City of Seattle Department of Planning and Development ("DPD")
15 Diane Sugimura, Director,
16 by Bruce Rips, Senior Land Use Planner, and
17 by Andrew McKim, Land Use Planner Supervisor
18 700 Fifth Avenue, Suite 2000
19 P.O. Box 34019
20 Seattle, Washington 98124-4019

21 4.2 On April 17, 2014, DPD, through Bruce Rips issued an Analysis and
22 Decision approving a Determination of Non-Significance with conditions ("DNS") under
23 Master Use Permit Application 3014488 for the development of a housing proposal
24 located at 2820 and 2822 Eastlake Avenue East consisting principally of two dwelling
25 units, 113 bedroom/bathroom units, two separate kitchens and no parking (also referred
26 to as the "housing proposal.") A copy of the Analysis and Decision, together with its
27 accompanying Notice of Decisions, is set forth at Appendix A to this Petition.

28 4.3 On May 1, 2014, the Eastlake Community Council ("Eastlake") filed an
29 appeal with the Seattle Hearing Examiner of the DNS contained within the Analysis and

1 Decision. Pursuant to the Notice of Decisions, the DNS was the only part of the
2 Analysis and Decision appealable to the Hearing Examiner.

3 4.4 On May 1, 2014, Eastlake also filed with DPD a request for interpretation
4 of issues as to whether the housing proposal approved through the Analysis and
5 Decision conformed to the requirements of the City land use and building codes. A copy
6 of that request is set forth at Appendix B to this Petition.

7 4.5 On May 2, 2014, DPD, through Andrew McKim, determined that issues
8 concerning whether the housing proposal conformed to the requirements of the City
9 land use and building codes (in particular, issues 1, 2 and 6 of Eastlake's interpretation
10 request) could not be addressed through the code interpretation process. A copy of
11 Mr. McKim's determination is set forth at Appendix C to this Petition.

12 4.6 As of the date of this Petition, the information DPD has made available
13 through its website and in its responses to Eastlake's public records requests
14 represents that Master Use Permit 3014488 for a change of use from single family and
15 apartments to congregate housing has not been issued. However, to toll any limitation
16 period that may have been triggered by DPD's refusal to consider issues 1, 2 and 6 of
17 Eastlake's code interpretation request, Eastlake seeks review of those issues through
18 the instant Petition with the intent of joining to this action the appeal of any subsequent
19 final decisions on Master Use Permit Application 3014488.

20 //

21 /

1 **5. IDENTIFICATION OF PERSONS TO BE MADE PARTIES UNDER RCW**
2 **36.70C.040(2)(b) THROUGH (d)**

3 5.1 The local jurisdiction is:

4 City of Seattle
5 600 Fourth Avenue
6 Seattle, Washington 98104

7 5.2 The Analysis and Decision of DPD identifies the applicant as Jay Janette
8 for Micro Housing LLC. On information and belief, Jay Janette is an architect for the
9 parties developing the housing proposal. Application documents identify Mr. Janette's
10 address as follows:

11 Jay Janette,
12 Janette Architecture
13 5309 22nd Avenue NW, Suite B
14 Seattle, WA 98107

15 5.3 Micro Housing LLC is a Washington Limited Liability Company and the
16 entity which the Analysis and Decision states to be represented by Jay Janette. The
17 address for Micro Housing LLC is:

18 Micro Housing, LLC
19 13930 92nd Street SE, Ste. A.
20 Snohomish, WA 98290

21 5.4 On information and belief, the entity developing the proposal is not Micro
22 Housing, LLC, but Johnson & Carr, LLC, a Washington Limited Liability Company
23 formed by Kelten Johnson and Tyler Carr, who are also members of Micro Housing
24 LLC. The registered agent and address for Johnson & Carr, LLC are:

25 Tyler Carr,
26 Johnson & Carr, LLC
27 506 2ND Ave., Ste 1020
28 Seattle, WA 98104-2328

1 On information and belief, Johnson & Carr, LLC may also do business under Johnson
2 Carr, LLC, and JohnsonCarr, LLC, which are not registered with the Corporations
3 Division of the Washington Secretary of State as separate business entities.

4 5.5 The taxpayer and titleholder of record for the properties at 2820 and 2822
5 Eastlake Avenue East is Crescendo Holdings, LLC, whose address is:

6 Crescendo Holdings, LLC
7 13930 92nd Street SE, Ste. A
8 Snohomish, WA 98290

9 5.6 In the proceedings before DPD, the legal representatives for Johnson &
10 Carr, LLC (including JohnsonCarr, LLC) are:

11 Jessica Clawson, and
12 Courtney Kaylor
13 McCullough Hill Leary, PS
14 701 5th Avenue, Ste. 6600
15 Seattle, WA 98104

16 5.7 Pursuant to RCW 36.70C.050, Petitioner will join any additional parties
17 identified to Petitioner as necessary for the just adjudication of this Petition.

18 6. FACTS DEMONSTRATING STANDING

19 6.1 Eastlake Community Council, a Washington non-profit corporation, is a
20 membership organization composed of people who live, work, or own property in the
21 Eastlake neighborhood, whose boundaries include the subject property. The housing
22 proposal would directly and adversely affect the lives, livelihoods, and properties of
23 Eastlake's members such as by exacerbating traffic and parking congestion, by creating
population pressures upon local transit, area parks, and other public facilities, and by
producing a scale of development incompatible with the vicinity. Petitioner is aggrieved,

1 adversely affected and prejudiced or likely to be prejudiced by DPD decisions
2 challenged in this Petition.

3 6.2 The interests of Eastlake and its members are among those that DPD was
4 required to consider in rendering its decisions. Among other purposes, the Seattle Land
5 Use Code serves to: maintain a compatible scale of development throughout the City,
6 including the Eastlake neighborhood; minimize traffic congestion; enhance the
7 streetscape and pedestrian environment; allow for efficient use of land without major
8 disruption; and direct development to areas with adequate services and amenities and
9 away from areas lacking adequate services and amenities. SMC 23.02.020.A. DPD's
10 approval of the housing proposal would defeat those purposes because: the approved
11 housing proposal would be out of scale with the surrounding development; it would
12 exacerbate traffic and parking congestion; its lack of parking and loading areas would
13 detract from the streetscape and pedestrian environment; it would produce major
14 disruption; it would tax existing services and facilities; and it fails to conform to the
15 requirements of the city's land use and building codes.

16 6.3 A judgment in favor of Eastlake would eliminate the prejudice caused or
17 likely to be caused by the decisions of DPD as it would result in a ruling that the housing
18 proposal is impermissible within the applicable LR3 zone and as a result the proposal's
19 many adverse impacts would be averted.

20 6.4 Eastlake has exhausted its administrative remedies to the extent required
21 by law by attempting to obtain an administrative determination on the issues raised in
22 this Petition.
23

1 **7. STATEMENT OF FACTS**

2 7.1 On or about June 13, 2013, the applicant, under the name Johnson Carr,
3 LLC, submitted to DPD a proposed site plan and other application information to
4 establish the use at the 2820 and 2822 Eastlake Avenue East site for seven floors of
5 congregate housing. The application represented the existing use of the site as
6 consisting of a single family structure and an apartment building.

7 7.2 The LR3/RC zoning applicable to the site of the housing proposal allows
8 multi-family housing at a base density of one dwelling unit for each 800 square feet of
9 lot area, subject to: increased density for low income disabled and elderly housing
10 under SMC 23.45.512.A and .512.B; for increased density achievable through greater
11 Floor Area Ratios under SMC 23.45.510.C; and for carriage houses, nursing homes,
12 congregate housing, assisted living facilities, and certain accessory dwelling units. SMC
13 23.45.512.C. The LR3 base density requirements would allow up to 14 dwelling units on
14 the project site which consists of 11,000 square feet. The housing proposal seeks an
15 exemption from the LR3 density limits as congregate housing. The Seattle Land Use
16 Code at SMC 23.84A.032 defines "congregate residence" as "a use in which rooms or
17 lodging, with or without meals, are provided for nine or more non-transient persons not
18 constituting a single household ..." The Seattle Building Code at Section 310 defines
19 "congregate living facilities" as "[a] building or part thereof that contains sleeping units
20 where residents share bathroom and/or kitchen facilities." The housing proposal would
21 not provide shared bathroom facilities for the 113 bedroom units and it would not
22 provide kitchen facilities capable of being shared by residents of 113 bedroom units.

1 7.3 The application and approval documentation have provided different
2 housing unit counts for the proposal. The Environmental Checklist originally submitted
3 in support of the application described the use as consisting of 115 congregate units
4 and boarding house. In a revised application submitted in December 2013, the applicant
5 described the proposal as including 113 bedrooms and two separate dwelling units.
6 Plan revisions submitted on March 4, 2014 showed approximately 107 separate
7 bedroom units and eight separate dwelling units. Plan revisions submitted on May 5,
8 2014 (after DPD's approval of its Analysis and Decision), identified 113 bedroom units
9 and two separate dwelling units.

10 7.4 On April 17, 2014, DPD issued its Analysis and Decision approving a DNS
11 for a housing proposal described as consisting of 113 bedrooms and two dwelling units.
12 But as described within the plan set dated March 4, 2014, the last revision prior to
13 issuance of the Analysis and Decision, the housing proposal would consist of eight
14 dwelling units (with kitchens), and approximately 107 housing units, each consisting of a
15 bedroom and a bathroom but without kitchen or other food preparation facilities.
16 Apparently intended for use by the separate bedroom units, the housing proposal would
17 provide two kitchens, one located in a first level laundry room with dimensions of
18 approximately ten by fifteen feet, and a second on the fifth floor within a "great room" of
19 approximately 16 feet square. Neither separately nor together would the two kitchens
20 provide facilities capable of meeting the food storage, preparation, service and dining
21 needs of the residents of the bedroom units. The DPD has produced the March 4, 2014
22 revised plans only in electronic format, which are available at DPD's website at
23

1 <http://web6.seattle.gov/dpd/edms/> under Plan SetV4, a copy of which is incorporated by
2 this reference into this pleading as if fully set forth.

3 7.5 On May 1, 2014, Eastlake appealed to the Seattle Hearing Examiner the
4 DNS within the Analysis and Decision and requested of DPD a code interpretation as to
5 whether the housing proposal was permissible within the LR3/RC zone as a form of
6 congregate housing, in particular, requests 1, 2 and 6 of Eastlake's code interpretation
7 request set forth at Appendix B.

8 7.6 On May 2, 2014, DPD declined to issue an interpretation on questions
9 relating to whether the housing proposal was permissible within the applicable zoning,
10 in particular DPD's response to Items 1, 2 and 6 within Appendix C.

11 7.7 On May 5, 2014, subsequent to DPD's Analysis and Decision and
12 subsequent to both Eastlake's appeal of the DNS to the Hearing Examiner and its
13 request for interpretation, the applicant again revised its permit plans for the housing
14 proposal. The May 5, 2014 revised plans represent the housing proposal as consisting
15 of 113 congregate housing units and two dwelling units, for a total of 115 units. The
16 applicant and DPD have produced the May 5, 2014 revised plans only in electronic
17 format which are available at DPD's website at <http://web6.seattle.gov/dpd/edms/> under
18 Plan SetV5, a copy of which is incorporated by this reference into this pleading as if fully
19 set forth. DPD has not amended, revised or re-issued its Analysis and Decision in
20 response to the revised plan set of May 5, 2014.

21 8. STATEMENT OF ERRORS

22 8.1 To the extent that DPD's Analysis and Decision and its refusal to consider
23 whether the housing proposal meets requirements for congregate housing constitute

1 final decisions approving a change of use at the 2820 and 2822 Eastlake Avenue East
2 addresses from a single family structure and an apartment building to a proposal
3 consisting of 113 bedroom units (each with bathrooms but without kitchens or cooking
4 facilities) and two separate dwelling units, these decisions are in error because:

5 8.1.1 The collection of 113 bedroom/bathroom units does not qualify as a
6 congregate residence as evidenced by the sizing of kitchens incapable of serve the
7 needs of residents of 113 bedroom units; the lack of common dining facilities; the lack of
8 common food storage and food preparation facilities; and the lack of other facilities to
9 support congregate residents. The housing proposal is permissible under neither the
10 Seattle Land Use Code nor the Seattle Building Code.

11 8.1.2 The collection of 113 bedroom/bathroom units does not qualify as a
12 congregate residence because each bedroom/bathroom unit is designed to function
13 independently and would constitute a separate household unit.

14 8.1.3 Approval of the housing proposal with two dwelling units and 113 housing
15 units exceeds the allowable density within the applicable LR3/RC zone.

16 8.1.4 By law, DPD may only grant approval of land use proposals that conform
17 to the requirements of the Land Use Code and other applicable laws. SMC 23.76.028.B.

18 8.1.5 DPD's approval of congregate housing use for the sites at 2820 and 2822
19 Eastlake Avenue East is in error because it is contrary to the provisions of the Seattle
20 land use and building codes.

21 9. REQUEST FOR RELIEF

22 Wherefore, Petitioner requests that the Court grant the following relief:
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EXHIBIT E

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EASTLAKE COMMUNITY COUNCIL, a
Washington non-profit corporation,

Petitioner,

vs.

CITY OF SEATTLE, a Washington Municipal
Corporation; JOHNSON & CARR, LLC;
CRESCENDO HOLDINGS, LLC; MICRO
HOUSING, LLC; and JAY JANNETTE;

Respondents.

No. 14-2-14778-3 SEA

RESPONDENTS CITY OF SEATTLE'S
AND JOHNSON & CARR, LLC'S MOTION
TO DISMISS

I. INTRODUCTION

This case involves a congregate housing and apartment project ("Project") proposed by Johnson & Carr, LLC ("Johnson Carr") in the City of Seattle's ("City" or "Seattle") Eastlake neighborhood. The Eastlake Community Council ("ECC") opposes the Project.

The Seattle Municipal Code ("City Code" or "SMC") allows any person to seek an interpretation of how the City Code applies to a project ("Interpretation") during the public comment period for the project. An Interpretation may also be requested in conjunction with an

MOTION TO DISMISS

1 appeal of the project decision to the City’s Hearing Examiner, but an Interpretation of “whether a
2 use proposed under the related project application has been correctly classified” cannot be
3 requested at this time. SMC 23.88.020.C.3.c.

4 Here, there were three noticed public comment opportunities on the Project: the first
5 followed the initial notice of application and extended from June 21 to July 24, 2013; the second
6 during a public meeting on the Project held on October 29, 2013; and the third followed a notice
7 of revisions to the application and extended from December 26, 2013 to January 8, 2014.

8
9 ECC did not request an Interpretation during any of these comment periods. Instead,
10 ECC waited until May 1, 2014, after the decision on the Project was issued, to request an
11 Interpretation. ECC requested, among other things, an Interpretation on whether the use of the
12 Project had been correctly classified as a congregate residence. ECC also failed to couple its
13 Interpretation request with an appeal to the Hearing Examiner as required by the City Code.
14

15 Since the City Code specifically prohibits an Interpretation request from being made on
16 this issue after the close of the public comment period, the City properly declined to issue an
17 Interpretation on this topic.

18 Compounding its prior errors, ECC then withdrew its Interpretation request.

19
20 Now, ECC asks this Court to force the City to respond to its tardy, improperly filed, and
21 withdrawn request for an Interpretation. But ECC failed to exhaust its administrative remedies
22 when it did not comply with the City Code requirements for filing an Interpretation.
23 Accordingly, ECC lacks standing under the Land Use Petition Act (“LUPA”) and this Court
24 lacks jurisdiction to hear the petition. The Court must dismiss this action.
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MOTION TO DISMISS

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II. RELIEF REQUESTED

Johnson Carr and the City request that the Court dismiss this petition for lack of jurisdiction.

III. STATEMENT OF FACTS

Johnson Carr applied to the City in July 2013 for approval of the Project that consisted of a 115-room congregate residence. The City issued a notice of application for the Project on July 11, 2013. Kaylor Declaration, Ex. 1. ECC submitted comments on the Project on August 7, 2013. *Id.*, Ex. 2. The City held a public meeting on the Project on October 29, 2013. *Id.*, Ex. 3.

Subsequently, Johnson Carr revised the Project to a 113-room congregate residence and two apartments. On December 26, 2013, the City issued a revised notice of application for the Project. Kaylor Declaration, Ex. 4. The revised notice of application was sent to ECC. *Id.*

The Project requires a threshold determination under the State Environmental Policy Act (“SEPA”). A threshold determination is a decision that the proposal has no significant adverse environmental impacts and no further environmental review is required, or that the proposal requires an Environmental Impact Statement (“EIS”). On April 17, 2014, the City issued a Determination of Nonsignificance (“DNS”) with conditions determining that the Project requires no further environmental review. Kaylor Declaration, Ex. 5. The DNS was subject to appeal to the City’s Hearing Examiner by May 1, 2014.

On May 1, 2014, ECC filed an appeal of the DNS to the City’s Hearing Examiner. Kaylor Declaration, Ex. 6. This appeal is pending.

ECC could have filed a request for an Interpretation relating to the Project during any of the noticed public comment periods. Yet, despite the fact that it knew of the Project application since at least August 2013 when it submitted written comments on the Project, ECC delayed in

1 filing an Interpretation until after the DNS was issued on May 1, 2014. Kaylor Declaration, Ex.
2 7.

3 In its untimely Interpretation request, ECC sought determinations from the City that the
4 Project: (1) is not a congregate residence; (2) will include “transient residents” not allowed by
5 the City Code; (3) includes rooms with below grade windows not permissible for use as sleeping
6 rooms; (4) does not comply with City Code requirements relating to floor area ratio and height;
7 (5) does not comply with density limits; and (6) does not have the common features of
8 congregate housing. *Id.*

9
10 ECC submitted its request for an Interpretation to the City’s Department of Planning and
11 Development (“DPD”) but did not include any claims relating to the Interpretation request in its
12 appeal to the Hearing Examiner. Kaylor Declaration, Ex. 6.

13
14 The City properly determined that Interpretation items 1, 2, and 6 are not subject to an
15 Interpretation at this late date because they relate to whether the Project’s use has been correctly
16 classified; a subject that cannot be addressed by an Interpretation after a decision is issued on the
17 Project. Kaylor Declaration, Ex. 8.

18
19 ECC then withdrew its request for an Interpretation. *Id.*, Ex. 9.

20 In addition, ECC appealed the City’s decision to this Court under the Land Use Petition
21 Act (“LUPA”) (RCW 36.70C).

22 **IV. STATEMENT OF ISSUES**

23 Under City Code, a party seeking an Interpretation must seek the Interpretation during
24 prescribed comment periods. ECC, however, failed to request an Interpretation during any
25 prescribed period. Should the LUPA petition be dismissed for lack of jurisdiction because ECC
26

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28 MOTION TO DISMISS

1 failed to exhaust its administrative remedies by filing a timely Interpretation and therefore lacks
2 standing to bring this case under LUPA?

3 **V. EVIDENCE RELIED UPON**

4 This motion relies on the pleadings and papers on file in this action, and the Declaration
5 of Courtney A. Kaylor (“Kaylor Declaration”) filed with this motion.
6

7 **VI. AUTHORITY**

8 **A. A party must exhaust its administrative remedies to have standing.**

9 Standing to bring a LUPA petition is limited to the project applicant, property owner, and
10 other persons “aggrieved or adversely affected” by the land use decision. RCW 36.70C.060. To
11 be “aggrieved or adversely affected,” a petitioner must have exhausted its administrative
12 remedies. RCW 36.70C.060(2)(d).
13

14 “Exhausting administrative remedies is *always* a condition precedent to challenging a
15 ‘land use decision’ that is subject to review under LUPA.” *West v. Stahley*, 155 Wn. App. 691,
16 697, 229 P.3d 943 (2010). “[L]ike the 21-day statute of limitation, exhausting administrative
17 remedies is a fundamental tenet under LUPA; failure to do either is an absolute bar to bringing a
18 LUPA petition to superior court.” *Id.* at 699.
19

20 In *West*, the petitioner filed an administrative appeal but filed it after the 14-day deadline
21 under the municipal code had expired. The Court ruled that the petitioner failed to exhaust its
22 administrative remedies and dismissed its petition. *Id.* at 697-700. Similarly, in *Nickum v.*
23 *Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009), the petitioner filed an untimely
24 administrative appeal to the hearing examiner. The Court dismissed the petition holding the
25 petitioner lacked standing. *Id.* at 380.
26

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28 MOTION TO DISMISS

1 **B. ECC failed to timely request an Interpretation.**

2 The City Code contains specific timing and filing requirements that must be followed
3 when seeking an Interpretation. The requirements for interpretations relating to projects that
4 require public notice, like the Project, require the Interpretation be filed before the end of the
5 public comment period:
6

7 If an interpretation relates to a project application requiring public notice pursuant
8 to the provisions of Chapter 23.76, the following rules govern the deadline by
9 which the request for interpretation must be received by the Department in order
10 for the interpretation to be applied to the pending permit application:

11 a. *Any person may request an interpretation prior to the end of the public
comment period, including any extension, for the project application.*

12 b. The project applicant may request an interpretation after the end of the public
comment period and prior to publication of a land use decision or
13 recommendation, if he or she agrees in writing that the time limits required by
SMC Section 23.76.005 shall be calculated from the day the interpretation is
14 requested.

15 c. *Notwithstanding the above deadlines, an appeal of a Type II decision or a
request for further consideration of a Type III recommendation may include a
16 request that the Director issue in writing his or her interpretation of specified
code sections, combined with an appeal of such interpretation, provided that an
17 interpretation regarding whether a use proposed under the related project
application has been correctly classified may not be requested pursuant to this
18 subsection (c). . . .*

19
20 SMC 23.88.020.C.3 (emphasis added). An appeal of a Type II decision goes to the City's
21 Hearing Examiner. SMC 23.76.022.

22 Here, ECC failed to timely submit a request under subsection (a); failed to properly
23 include its request for an Interpretation in its Hearing Examiner appeal under section (c); and
24 withdrew its request for an Interpretation altogether. Each of these is an independent basis for
25 determining that ECC failed to exhaust its administrative remedies.
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28 MOTION TO DISMISS

1 **1. ECC failed to timely request an Interpretation during the public comment**
2 **period.**

3 If ECC wanted an Interpretation on whether the Project was properly classified as a
4 congregate residence, it could have filed a request during one of the three public comment
5 periods provided on the Project. SMC 23.88.020.C.3.a. Yet, ECC failed to do so. Instead, ECC
6 waited until the Project had been under review for 10 months and a decision issued on the
7 Project before requesting an Interpretation. Kaylor Declaration, Exs. 1, 7. By then the deadline
8 for requesting an Interpretation had long since passed. SMC 23.88.020.C.3.a, c.
9

10 In short: ECC missed an administrative deadline and failed to exhaust its administrative
11 remedies; failure to exhaust administrative remedies is an absolute bar to bringing a LUPA
12 petition, *West, supra*, 155 Wn. App. 699; and the Court should dismiss this petition on this basis
13 alone.
14

15 **2. ECC failed to include a request for an Interpretation in its appeal to the**
16 **Hearing Examiner.**

17 Not only did ECC fail to request an Interpretation during the public comment period, it
18 failed to properly request an Interpretation. The only way that a party may seek an Interpretation
19 after the public comment period ends is to include the Interpretation request and an anticipatory
20 appeal of the interpretation in its Hearing Examiner appeal of the Project decision. SMC
21 23.88.020.C.3.c (“an appeal of a Type II decision . . . may include a request that the Director
22 issue in writing his or her interpretation of specified code sections, combined with an appeal of
23 such interpretation”). Yet, ECC failed to request an Interpretation, or appeal the anticipated
24 Interpretation, in its Hearing Examiner appeal. Kaylor Declaration, Ex. 6. ECC did not follow
25 the proper administrative procedures for seeking an Interpretation and failed to exhaust its
26 administrative remedies. The Court should dismiss this petition on this basis as well.
27

28 MOTION TO DISMISS

1 **3. ECC withdrew its request for an Interpretation.**

2 Finally, not only did ECC timely file or properly seek an Interpretation, ECC withdrew
3 its tardy and improperly filed request. After the City informed ECC that it was too late to seek
4 an Interpretation relating to the use classification of the Project, ECC wrote to the City and
5 withdrew its request:
6

7 *We have decided not to proceed with the Code Interpretation we had originally*
8 *requested for the 2820 Eastlake Avenue project. As you will recall, you ruled that*
9 *you could not provide most of the Code Interpretation we had asked for. We have*
10 *decided not to proceed with any of the Code Interpretation Request, and so are*
 withdrawing our request and would be grateful if you could refund our \$2500
 payment. Thanks for your patience with our change of heart.

11 Kaylor Declaration, Ex. 9 (emphasis added). Following this withdrawal, there was no
12 Interpretation request pending. Since it affirmatively withdrew its request, ECC failed to exhaust
13 its administrative remedies. The Court should dismiss this petition for this additional reason.
14

15 **VII. CONCLUSION**

16 ECC failed to exhaust its administrative remedies and lacks standing. Accordingly, this
17 Court lacks jurisdiction and should dismiss ECC's petition.

18 Dated this 17th day of June, 2014.

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MOTION TO DISMISS

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