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HEARING EXAMINER

September 18, 2014

Via Email (Hearing.Examiner@seattle.gov)
and Facsimile ((206) 684-0536)

Sue Tanner
Hearing Examiner
City of Seattle
700 Fifth Avenue, Suite 4000
PO Box 94729
Seattle WA 98104

RE: Time Sensitive: Appellant's Initial Partial Response to Applicant's Motions in Limine, to Shorten Time, and for More Specific List of Exhibits
Hearing Examiner File No. MUP 14-006

Dear Hearing Examiner Tanner:

This is in partial initial response to the Motions in Limine, to Shorten Time, and for More Specific List of Exhibits received today from the Applicant. I write before the shortened response deadline to address one issue in particular, Applicant's Motion in Limine claiming, without specification, that Appellant is trying to "address issues associated with Type I Master Use Permit decisions". Motion at 2 lines 3-5. This is apparently an objection to the following notice that Appellant would not bring a separate prehearing dispositive motion:

> For the sake of efficiency and in light of the indications by the Examiner in the July 23, 2014 conference call that this matter will proceed to hearing regardless, Appellant continues to request a remand on procedural grounds, but will present its evidence and arguments for this at the hearing rather than in a separate motion [sic] prehearing motion. All rights are reserved in this regard.

The Applicant's in limine motion does not specify what specific issues and therefore what type of evidence it contends are out of bounds. It hints but does not directly say that it depends on generally characterizing remand arguments as strictly Type I because they relate to the acknowledged fact that the project was (mis)represented to the public and the Design Review Board as Land Use Code compliant. If granted, Applicant's demand would indiscriminately bar evidence on matters that are within the Examiner's jurisdiction. In contrast, if Applicant's limine

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request is not granted, specific, legitimate objections can still be appropriately handled at the hearing if and when they arise.

In any event, Appellant is entitled to present evidence that, for example, the Design Review Board's and consequently Director's decisions fell short, inter alia, with regard to substantive Height, Bulk, and Scale ("HBS") mitigation. The acknowledgement by DPD, in its (second) response to the Appellant's Request for Interpretation, that the project as presented to the Design Review Board violated the Land Use Code Floor Area Ration ("FAR") limit is relevant to this HBS contention and within the Examiner's jurisdiction.

Further, for example, the Examiner also has jurisdiction over whether the project, when subjected to Design Review (an integral part of the MUP process), was in compliance with SMC 23.41.014.F.2 ("Projects subject to design review must meet all codes and regulatory requirements applicable to the subject site"). *See* In the Matter of the Appeal of Claudia Ludwig, et al., Hearing Examiner File: MUP-13-009 (DD) at fn. 3 (SMC 23.76.022 relating to administrative appeals of Type I and Type II master use permits expressly authorizes the Examiner to consider procedural issues on appeal including those that relate to the procedures for Type II decisions).[1]

In addition, the question of whether the project was in compliance with the Land Use Code (including SMC 23.41.014.F.2) is also important in reviewing Design Review including its key public participation component. *See* In re Friends of Olympic Sculpture Park et al, Hearing Examiner File Nos. MUP -09-021, 09-022 (DR,W), January 14, 2010 at Conclusion 5, 6,7,8.

Applicant's motion (page 1, lines 17-20) pretends, apparently referring to the July 23, 2014 conference call, that the Examiner has already ruled that such matters are outside her jurisdiction. No such ruling was made. In fact, when the Appellant requested a written ruling the Examiner expressly indicated that the conference call discussion was just that and nothing had been decided. The September 19 motion date was then set as an outside date option for Appellant based on Appellant's suggestion that there might be some economy realized in a motion before the hearing.

However, subsequently, in reviewing the record, and particularly after deposing DPD's Mr. Mills and Mr. Papers last week, it became apparent that such a motion would not appreciably save any time because the testimony and evidence involved would have to be presented in any event.

To the extent that after reviewing this letter, the Examiner determines that a motion is required by September 19, please consider this letter as such a motion and please provide the Appellant with an opportunity to Reply.

[1] The Land Use Code MUP procedures also require that an application must be submitted by, inter alia, the property owner or contract purchaser. SMC 23.76.010 A.1. In an unusual twist, the documentary record here demonstrates noncompliance, apparently known to DPD, at the time of issuance of the Director's Decision.

Finally, per the Examiner's Order of earlier today, Appellant will respond separately on September 23, 2014, to the remainder of Applicant's motion.

Respectfully,

EGLICK KIKER WHITED PLLC

Peter J. Eglick

cc: G. Richard Hill
William D. Mills
Garry Papers
Client

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William Mills	City of Seattle Department of Planning & Development	(206) 233-7902	
Garry Papers	City of Seattle Department of Planning & Development	(206) 233-7902	

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FROM Peter J. Eglick

Client/Matter: *Neighbors Encouraging Responsible Development v. DPD, et al.*
City of Seattle Hearing Examiner Case No. MUP-14-006

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