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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

10 In Re: Appeal by

11
12 AQUARIAN FOUNDATION, INC.

13 from the September 18, 2023 City of Seattle
14 Analysis and Decision of the Director of the
15 Seattle Department of Construction and
16 Inspections.

Hearing Examiner File:
MUP-23-011

Department Reference
3038146-LU

APPLICANT’S MOTION FOR PARTIAL
DISMISSAL

17 **I. INTRODUCTION AND RELIEF REQUESTED**

18 This is an appeal of a Master Use Permit (“MUP”) granted for Respondent Jodi Patterson
19 O’Hare (“Applicant”) to develop two multifamily residential buildings with retail and parking
20 (“Project”) in the Capitol Hill neighborhood of Seattle (“City”). The September 18, 2023
21 Analysis and Decision (“Decision”) contains the City’s decision to approve the design of the
22 Project under the City’s Design Review process.
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24 Aquarian Foundation, Inc. (“Appellant”) filed a Notice of Appeal (“Notice”) that
25 contains numerous claims and assertions. Some of these claims challenge the Project’s
26 consistency with the Seattle Design Guidelines (“Guidelines”); Applicant contests these claims
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1 on their merits but does not dispute that they are within the Hearing Examiner’s jurisdiction.
2 The other claims in the appeal, however, are outside the Examiner’s jurisdiction and must be
3 dismissed.

4 **II. STATEMENT OF FACTS**

5 **A. The Project**

6 The Project consists of two 5-story buildings containing 336 apartment units with retail
7 and parking for 373 vehicles. Decision at 1. The Project will be constructed at 1410 E John St.,
8 on a site (“Project Site”) located on a block that is bounded by East Thomas Street to the north,
9 15th Avenue East to the east, East John Street to the south, and 14th Avenue East to the west. *Id.*
10 The Project Site’s eastern portion is currently developed with a Safeway grocery store built in
11 1998. Decision at 2. The western portion of the site contains a surface parking lot with
12 vehicular access from the north, south, and west. *Id.*

13 **1. Design Review**

14 The Project was reviewed through the City’s Design Review process. Decision at 3-34.
15 The East Design Review Board (“Board”) discussed the Project in two separate meetings: first,
16 in a February 9, 2022 Early Design Guidance meeting and then in a February 9, 2023
17 Recommendation meeting. Decision at 3, 9. After the second meeting, the Board recommended
18 approval of the Project, including four development standard departures, with seven conditions
19 of approval. Decision at 13-14, 32-33.

20 After the Board’s recommendation of approval , the Seattle Department of Construction
21 and Inspections (“SDCI”) worked with the Applicant to update the Project’s design in response
22 to the Board’s conditions. Decision at 32. The SDCI Director (“Director”) reviewed the updated
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1 plans and found that they satisfied the conditions. Decision at 32-33. The Director accepted the
2 Board's recommendation and approved the Project's design subject to two additional conditions
3 (one related to street art and one requiring consistency with the materials represented to the
4 Board). Decision at 34.

5 **B. Decision and Appeal**

6 Appellant, the Aquarian Foundation, owns property located at the northeast corner of the
7 block containing the Project Site. Appellant's property abuts East Thomas Street to the north,
8 15th Avenue East to the east, and the Project Site to the south and west. On September 9, 2023,
9 Appellant timely filed a notice ("Notice of Appeal") appealing the Decision. As authorized by
10 the City of Seattle Hearing Examiner Rules of Practice and Procedure ("HER") and by the
11 Examiner during the November 2, 2023 prehearing conference in this matter, Applicant now
12 seeks partial dismissal of this appeal.

13 **III. ARGUMENT**

14 The claims in this appeal consist of the following responses to questions 2 and 3 on the
15 Office of Hearing Examiner's dedicated appeal form:

- 16 • Ten numbered "Objections" in response to Question 2 ("What are your objections
17 to the issue being appealed?"). *See* Notice of Appeal at 4. This Motion refers to
18 these as Objections 1 through 10.
- 19 • Thirteen numbered "Errors and Omissions" in response to Question 2. *See* Notice
20 of Appeal at 4-7. This Motion refers to these as Errors 1 through 13.

- Four numbered statements in response to Question 3 (“What relief do you want?”). *See* Notice of Appeal at 8. This Motion refers to these as Requests for Relief 1 through 5.¹

A. The Examiner may dismiss a claim over which the Examiner lacks jurisdiction or that is without merit on its face.

“Any party may request dismissal of all or part of an appeal by motion pursuant to HER 3.17.” HER 5.04(a). “A party may move to dismiss an appeal, in whole or in part, if . . . [t]he Examiner lacks jurisdiction, in whole or in part, over the appeal; [t]he appeal is frivolous or without merit on its face; or [o]ther grounds established by law exist.” HER 3.17(j). “Examiner jurisdiction is limited to matters identified in the Seattle Municipal Code or assigned to the Hearing Examiner by ordinance or other City Council action.” Hearing Examiner Rules of Practice and Procedure (“HER”) 3.01(b). “A party or the Examiner may raise issues concerning Examiner jurisdiction at any time.” HER 3.01(c).

B. The Hearing Examiner’s scope of review is confined to the Code.

“The City of Seattle Hearing Examiner has jurisdiction only over appeals the Seattle Municipal Code assigns to it.” *Appeal of Thomson*, HE No. MUP-22-002, Order on Partial Dismissal Motion at 1 (May 2, 2022). The Hearing Examiner’s scope of review in an appeal of a Master Use Permit (“MUP”) decision is governed by SMC 23.76.022.C.6:

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

¹ The requests on page 8 of the Notice of Appeal do not include a number 4. Applicant construes this as a typographical error and assumes the two sentences located between numbers 3 and 5, beginning with the phrase “Reject the current design,” was intended as Request for Relief 4.

1 interpretation included in the appeal or consolidated appeal pursuant to Section
2 23.88.020.C.3.

3 “Under this provision, Examiner review is limited to Department decision consistency
4 with the SMC.” *Appeal of Warwick Corp.*, HE No. MUP-23-003, Order on Motion to Dismiss at
5 2 (May 9, 2023); *see also id.* (“Also, the Examiner cannot adjudicate statutorily exempt
6 matters.”). “[T]he Examiner does not have jurisdiction over issues that are not a violation of the
7 standing Code.” *Appeal of Sherrard*, HE No. MUP-21-002, Order on Motions to Dismiss and
8 for Summary Judgment at 6 (May 6, 2021).

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10 **C. Claims concerning property rights must be dismissed.**

11 Appellant asserts that the Decision and Board recommendation were in error because the
12 Appellant “has not and will not grant easements or agreements” that the Project may require for
13 future approvals, such as shoring, excavation, and demolition permits. Appellant also asserts
14 that it has “clearly vested property rights” in walls and a fence located on the lot lines between its
15 Property and the Project Site, and that the Project will represent an “encroachment on the Church
16 air space.” These claims are contained in Objections 2, 3, 4, and 9; Errors 2, 3, and 4; and
17 Request for Relief 5.

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19 These claims must be dismissed because they raise issues outside of Code criteria. “[T]he
20 Examiner can only address Code consistency.” *Appeal of Magnolia Community Council*, HE
21 File Nos. MUP-21-016 and MUP-21-017, Order on Applicant’s Motion to Dismiss (June 28,
22 2021) at 2. Here, “[n]o Code provision is identified the project does not comply with.” *Id.* at 5.
23 Therefore, “[t]his issue should be dismissed.” *Id.* The property issues on which these claims are
24 based should not be addressed as assertions in an appeal of a Type II MUP decision, but rather
25 by the superior courts, “which are assigned ‘original jurisdiction in all cases . . . which involve
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1 the title or possession of real property.” *Id.* at 2 (quoting RCW 2.08.010); *see Appeal of*
2 *Hisatomi*, HE No. MUP-23-006, Amended Order on Remand at 5 (Sept. 21, 2023) (“The
3 Examiner’s jurisdiction does not extend to private easement disputes.”).

4 In addition, Appellant’s claims here prematurely challenge other, ongoing (or
5 hypothetical) permit processes that have not resulted in appealable decisions and, in any case,
6 would not be Type II Master Use Permit decisions within the scope of SMC 23.76.022.A.

7 Objections 2, 3, 4, and 9; Errors 2, 3, and 4; and Request for Relief 5 are outside the
8 scope of review in this appeal and must be dismissed.

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10 **D. Claims alleging traffic and parking impacts must be dismissed.**

11 Appellant asserts that construction and/or operation of the Project will disrupt
12 surrounding street parking and interfere with Appellant’s access to its driveway and garage.
13 These claims are contained in Objection 6, Error 12, and Requests for Relief 3 and 4.²

14 These claims must be dismissed because they do not cite and are not based on any
15 applicable Code provision. *See Magnolia Community Council, supra*, at 2. Although a
16 transportation impact analysis might review such issues when required under SEPA, the Project
17 is exempt from such a requirement. Decision at 1. Appellant has identified no other authority in
18 the Code requiring analysis or conditioning of the Project on the basis of alleged traffic or
19 parking impacts. These claims must be dismissed.

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27 ² The assertions in Error 12 and Request for Relief 3 that the Decision “subjugate[s] the rights of one property owner
in favor of another” are addressed in the following section concerning challenges to the Code.

1 **E. Claims challenging the Code must be dismissed.**

2 Several claims expressly or implicitly challenge legislatively enacted Code provisions. In
3 particular, Error 13 challenges the height limit applicable to the Project under the City’s
4 Mandatory Housing Affordability program, which grants a height bonus (not a “height variance”
5 as stated in the Notice of Appeal) for residential projects that contribute to the City’s affordable
6 housing fund. *See* SMC 23.58C.040. Appellant’s opinion that “[t]he spirit and function of
7 rezoning . . . is defeated” by this legislative program is not an assertion that the Project is
8 inconsistent with the Code but rather “a challenge to the Code itself.” *See Fischer Studio*
9 *Condominium Building Owners Association*, HE File No. MUP-21-004, Order on Motion to
10 Dismiss (May 5, 2021) at 5. “Such challenges of the Code are not within the jurisdiction of the
11 Hearing Examiner.” *Id.*; *accord, e.g., Appeal of Seattle Committee to Save Schools*, HE No.
12 MUP-22-004, Order on Motion for Partial Dismissal at 2 (July 1, 2022) (“This is a legislative
13 policy choice the Examiner cannot review.”).

14 In addition, the portions of Error 12 and Request for Relief 3 stating that “the project is
15 not entitled to remove or disrupt the limited street parking” and that approval of the Project “only
16 benefits one of the property owners” again effectively challenge the sufficiency of the Code’s
17 standards, this time those governing traffic or parking, rather than the Project’s consistency with
18 the Code. Here too, because these claims challenge the Code rather than invoking it, they must
19 be dismissed.

20 **F. Additional claims require dismissal.**

21 Several additional claims require dismissal.
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1 Objection 1 states: “The Land Use that directly and negatively affects adjoining
2 properties.” This claim should be dismissed as redundant. Appellant cites no Code provision
3 and identifies no other authority for general consideration of effects on adjoining properties.
4 Any claim for relief must be based on a specific Code provision. *See Seattle Committee to Save*
5 *Schools, supra* at 3 (“This expresses Appellants’ disagreement with the project, rather than
6 identifying a departure issue.”). To the extent this claim objects to the “land use” allowed by the
7 Code, it is an impermissible challenge to the Code.

9 Objection 8 asserts a lack of “sufficient setbacks,” citing SMC 23.86.012 and SMC
10 22.170.200. Neither provision can support this claim in a Type II MUP appeal such as this
11 proceeding. First, SMC 23.86.012 provides methods for measuring setback averaging and
12 upper-level setbacks. Challenges to projects for allegedly failing to comply with individual
13 development standards, including Appellant’s assertion here, are challenges to a Type I decision.
14 *Sherrard, supra* at 2 (citing SMC 23.76.006.B.1). “Type I decisions may be subject to
15 administrative review only through a land use interpretation pursuant to SMC 23.88.020.” *Id.*
16 (citing SMC 23.76.022.A.1). Here, “[n]o interpretation was sought” *Id.* “Therefore, the
17 Hearing Examiner lacks jurisdiction over Appellant’s claim” *Id.* Second, SMC 22.170.200,
18 as part of the City’s grading code, governs land disturbing activity through grading permit
19 requirements and the code enforcement process. The section, entitled “Protection of Adjoining
20 Property,” contains provisions governing maximum grading slope, prohibiting encroachment,
21 and requiring setbacks. Although the Project will address these considerations as needed in
22 future permitting, they are not part of the MUP here and are thus outside the scope of this Type II
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1 MUP appeal. And again, to the extent this claim challenges the setback requirements established
2 by the Code as insufficient, it is an impermissible challenge to the Code.

3 Error 1 asserts that “there are very real and imminent hazards to the adjacent properties
4 from the planned demolition and excavation of the subject Safeway building” For the same
5 reasons that apply to Appellant’s claim invoking SMC 22.170.200, as described in the previous
6 paragraph, Appellant’s claims of construction-related hazards do not raise land use or design
7 review issues and cannot be addressed in this proceeding.
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9 **G. Design claims should be confined to applicable standards, and claims not based on**
10 **the Code or guidelines should be dismissed.**

11 Applicant’s remaining claims concern design issues and are contained in Objections 5, 7,
12 and 10; Errors 5 through 11; and Requests for Relief 1 and 2. Applicant disputes these claims on
13 their merits but does not dispute that the claims raise issues generally related to the Project’s
14 consistency with the Guidelines.
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16 Because these claims each contain assertions related to identified design guidelines,
17 Applicant does not seek dismissal of any claim in full. However, Applicant requests that these
18 claims be dismissed in part – specifically, that Appellant’s assertions of “invasion of privacy”
19 and “lack of sunlight and air flow” be excluded from the appeal for lack of any basis in the Code.
20 Although design guidelines such as CS2-D-5 refer to privacy for *residential units*, see Decision
21 at 16, Appellant’s property contains a church, not residential units. Similarly, guideline CS1-B
22 provides considerations relevant to sunlight access *by* the proposed building undergoing design
23 review (here, the Project), not adjacent properties. There is no guideline concerning shadows on
24 adjacent properties. Instead the City addresses such considerations through its SEPA policies,
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1 which, as mentioned above, do not apply to the Project. *See* SMC 25.05.675.Q.1.d.³ Similarly,
2 no guideline supports Appellant’s claim regarding “air space” and “air flow.” These assertions
3 cannot be the basis for relief because “[n]o code conflict is identified for Examiner review.”

4 *Appeal of Zhang*, HE No. MUP-21-010, Order Granting Motion to Dismiss at 2 (June 9, 2021).

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6 In addition, Applicant requests that the Examiner limit Appellant’s claims and hearing
7 presentation regarding to design issues to the assertions in the Notice of Appeal that are
8 identifiably based on applicable guidelines. As provided by SMC 23.76.022.C.3.a and HER
9 5.01(d)(3), “issues raised during an appeal must have been identified in the Notice of Appeal.”

10 *Hisatomi, supra*, at 6. The guidelines cited and/or quoted in the Notice of Appeal are:

11 CS1-4-e “Tree Canopy” (Objection 10, Error 9)

12 CS2-D-5 “Respect for Adjacent Sites” (Error 11)

13 CS3-A “Emphasizing Positive Neighborhood Attributes” (Objections 5 and 7, Error 8)

14 PL3-B “Residential Edges” (Error 7)

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16 While other claims include assertions that appear to relate to the requirements of these
17 guidelines, Appellant should not be permitted to invoke additional guidelines or design
18 considerations unrelated to applicable guidelines at hearing.

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20 Applicant reserves its right to raise additional aspects of Appellant’s claims and/or
21 hearing presentation as unsupported by the guidelines or otherwise beyond Examiner
22 jurisdiction.

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26 ³ Even if the Project were not SEPA-exempt, this provision would confirm that the Code does not provide a basis for
27 Appellant’s claims regarding sunlight. Instead, the City has made the legislative policy judgment that “Title 23
attempts to protect private property from undue shadow impacts through height, bulk and setback controls, but it is
impractical to protect private properties from shadows through project-specific review.” SMC 25.05.675.Q.1.d.

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IV. CONCLUSION

For the reasons stated above, Applicant respectfully requests that the Hearing Examiner (1) dismiss Objections 1, 2, 3, 4, 6, 8, and 9; Errors 1, 2, 3, 4, 12, 13; and Request for Relief 3, 4, and 5 in full; (2) dismiss those portions of Objections 5, 7, and 10; Errors 5 through 11; and Requests for Relief 1 and 2 that assert error based on privacy, sunlight, and air flow; and (3) limit the remaining portions of Objections 5, 7, and 10; Errors 5 through 11; and Requests for Relief 1 and 2 to the issue of consistency with the design guidelines identified in the Notice of Appeal.

DATED this 9th day of November 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am employed at the law firm of McCullough Hill PLLC, over the age of eighteen and not a party to the within cause. On the date written below, a true and correct copy of the foregoing document was filed with the City of Seattle Hearing Examiner and copies served via email to:

Reverend Jann Werner 315 15th Avenue East Seattle, WA 98112 info@aquarianfoundation.com	David Sachs SDCI 700 5th Ave #2000 Seattle, WA 98104 david.sachs@seattle.gov
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Authorized Representative for Appellant

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on the 9th day of November, 2023, at Seattle, Washington.

/s/ Sarah Willis

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