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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
Inspections.

Hearing Examiner File:
MUP-23-011

Department Reference
3038146-LU

APPLICANT’S REPLY IN SUPPORT OF
MOTION FOR PARTIAL DISMISSAL

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17 **I. INTRODUCTION**

18 In its Objection and Answer to Motion for Partial Dismissal (“Response”), Appellant
19 Aquarian Foundation, Inc. (“Appellant”) fails to counter the arguments in the Motion for Partial
20 Dismissal (“Motion”) filed by for Respondent Jodi Patterson O’Hare (“Applicant”). The
21 Response depends primarily on an incorrect understanding of the Hearing Examiner’s
22 jurisdiction in this appeal, which “must derive entirely from specific directives within the Code.”
23 *Appeal of Cesmat*, HE Nos. MUP-19-026 and S-19-001, Order on Motion to Dismiss and for
24 Summary Judgment (September 12, 2019) at 1 (citing *Chaussee v. Snohomish County Council*,
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28 APPLICANT’S REPLY IN SUPPORT OF
MOTION FOR PARTIAL DISMISSAL - 1

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38 Wn. App. 630, 636 (1984)). The Hearing Examiner should grant the Motion and dismiss or narrow Appellant's claims as described therein.

II. ARGUMENT

A. The Hearing Examiner should disregard issues not raised in the Motion or the Appeal.

First, at several places in the Response, Appellant suggests that it should not be limited to the claims raised in its Notice of Appeal ("Notice"). Appellant is incorrect. As provided by SMC 23.76.022.C.3.a and HER 5.01(d)(3), "issues raised during an appeal must have been identified in the Notice of Appeal." *Appeal of Hisatomi*, HE No. MUP-23-006, Amended Order on Remand at 6 (Sept. 21, 2023).

Second, Appellant submitted ten exhibits along with the Response. The Applicant does not object to the Examiner taking judicial notice of Exhibits 1, 2, 4, 5, 8, and 10, as these are public documents that do not require the Motion to be treated as a motion for summary judgment.¹ However, these exhibits either support the Applicant, for the reasons explained below, or are irrelevant. The Hearing Examiner should not consider the remaining exhibits and should not treat the Motion as a motion for summary judgment because the Motion raised only legal arguments for the dismissal of Appellant's claims and can be resolved on that basis, without consideration of Appellant's assertions about the merits of its claims. The Applicant does not concede the accuracy of any statement or representation in the Response or its attachments.

¹ "[W]here a plaintiff asserts allegations in a complaint on specific documents but does not physically attach those documents, the documents may be considered in ruling on a CR 12(b)(6) motion for judgment on the pleadings." *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487, 491 (2015).

1 Third, similarly, consistent with the nature of a motion to dismiss, the Applicant assumed
2 the truth of Appellant's factual allegations in the Motion. Contrary to statements in the Response
3 (at page 6 and elsewhere), the Applicant does not concede the correctness or merits of any of
4 Appellant's factual or legal claims in the Notice, whether or not those claims are properly within
5 the scope of this appeal.
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7 **B. Claims concerning property rights and other permitting processes must be**
8 **dismissed.**

9 As confirmed by the arguments in the Response, much of this appeal depends on two
10 concepts that are outside the scope of Hearing Examiner jurisdiction in this appeal under SMC
11 23.76.022.C.6: (1) the requirements of construction, grading, or other permits that may be
12 required for the Project, and (2) claims based in property law. These concepts appear throughout
13 the Response but are the particular focus of sections 5.A-F, J-L, and P-Q. Overall, Appellant
14 asserts that issuance of the MUP was improper because the Project will not be able to satisfy
15 requirements for issuance of grading or construction permits, as well as because this and other
16 aspects of the Project will encroach on Appellant's property rights. Neither assertion is within
17 the Examiner's jurisdiction, and claims based on both assertions must be dismissed.
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19 **1. Future permits are not part of the MUP.**

20 Appellant's claims regarding separate permitting processes must be dismissed because
21 they are not part of the Type II decision at issue. Fundamentally, Appellant appears to assume
22 that the MUP cannot be granted unless the City has already concluded that all future permits that
23 may be required for a project must also be granted, but this conception is unsupported by the
24 Code, which establishes separate and distinct permit and appeal processes for each determination
25 and confines the Examiner's jurisdiction to the Type II decision being appealed. Appellant states
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1 that the Applicant has applied for construction and other permits “under MUP 3038146-LU,”
2 Response at 7, but Appellant’s own Exhibit 1 demonstrates that the other permit applications are
3 separate applications with separate record numbers.

4 As indicated at page 9 of the Response, Appellant’s argument depends on a misreading of
5 SMC 23.76.031, “Type I and Type II Master Use Permits’ relationship to building permits,”
6 which reads:
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8 If a Master Use Permit is issued for a project, a building permit is issued for the project,
9 and the project is constructed pursuant to the building permit:

10 A. Conditions of or incorporated in the Master Use Permit shall remain in effect,
11 notwithstanding expiration of the Master Use Permit pursuant to Sections 23.76.029
12 and 23.76.030, until the project is demolished or until an earlier date on which:

- 13 1. The condition by its terms expires or is fully satisfied;
14 2. The condition is removed through a permitting decision; or
15 3. If the condition was imposed as to a specific use within the project, that use is
16 terminated; and

17 B. Terms of a building permit relating to requirements of Section 23.58C.050 shall
18 remain in effect for the time period specified according to subsection 23.58C.050.B,
19 notwithstanding:

- 20 1. Expiration of the Master Use Permit according to Sections 23.76.029 and
21 23.76.030; or
22 2. Any contrary provision of Title 22.

23 Appellant reads the opening text of this provision in isolation, apparently construing it as a
24 statement that if a MUP is issued, then a building permit will necessarily be issued as well.

25 Response at 9 (“If a Master Use Permit is issued for a project, a building permit is issued for the
26 project, and the project is constructed under the building permit.”). But that is a clear misreading
27 of the Code, which contains a colon where Appellant has placed a period. The plain text of SMC
28 23.76.031 indicates that *if* a MUP is issued, and *if* a building permit is also issued that results in

1 construction, *then* terms and conditions of both permits remain in effect. It does not state, as
2 Appellant suggests, that if a MUP is issued, *then* a building permit is issued.

3 Similarly, Appellant states in the same section: “The following procedural environmental
4 decisions for a Master Use Permit and for building, demolition, grading, and other construction
5 permits are subject to appeal to the Hearing Examiner[,] pursuant to [SMC 23.76.006.C.1].”²

6 Response at 9; *see also id.* at 4. Again, this misreads the cited provision, which here states:

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8 C. The following are Type II decisions:

9 1. The following procedural environmental decisions for Master Use Permits and for
10 building, demolition, grading, and other construction permits are subject to appeal to
11 the Hearing Examiner and are not subject to further appeal to the City Council
12 (supplemental procedures for environmental review are established in Chapter 25.05,
Environmental Policies and Procedures):

- 13 a. Determination of Non-significance (DNS), including mitigated DNS;
14 b. Determination that a final Environmental Impact Statement (EIS) is adequate;
15 and
16 c. Determination of Significance based solely on historic and cultural
17 preservation.

18 SMC 23.76.006.C.1. This does not support Appellant’s claim both because it refers only
19 decisions made under the State Environmental Policy Act (“SEPA”), which does not apply here,
20 and because it would not establish that Master Use Permits are the equivalent of the other listed
21 permits even if SEPA did apply.

22 Because this appeal does not include review of requirements for building, grading, or
23 other permits, Appellant’s citation of SMC 22.170.070.C.1.c and SMC 22.170.200 does not
24 authorize its claims. Those provisions are requirements for a grading permit, with which the
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27 ² Although the Response references SMC 23.76.036, the language it cites appears in SMC 23.76.006.C.1. SMC
28 23.76.036 concerns Council land use decisions and has nothing to do with this issue.

1 Project's compliance will be determined as needed when the City decides whether to issue such a
2 permit. That decision is not part of the MUP and cannot be challenged (much less preemptively
3 challenged) in this appeal.

4 **2. Claims concerning property rights are outside Examiner jurisdiction.**

5 The Response also contains several assertions of Appellant's property rights, including
6 the assertion that the Project will constitute a "trespass," that construction-related parking will
7 effect the "subjugation of one property owner's rights over another property owner's rights," and
8 that the Project will affect walls, fences, and trees in a manner inconsistent with Appellant's
9 "vested property rights." Response at 10-13. As stated in the Motion, the Examiner has
10 repeatedly confirmed that such claims must be addressed by the superior courts, "which are
11 assigned 'original jurisdiction in all cases . . . which involve the title or possession of real
12 property.'" *Appeal of Magnolia Community Council*, HE File Nos. MUP-21-016 and MUP-21-
13 017, Order on Applicant's Motion to Dismiss (June 28, 2021) at 2 (quoting RCW 2.08.010).
14 "[T]he Examiner does not have jurisdiction over issues that are not a violation of the standing
15 Code." *Appeal of Sherrard*, HE No. MUP-21-002, Order on Motions to Dismiss and for
16 Summary Judgment at 6 (May 6, 2021).

17 Appellant asserts that "[t]he Code specifically preserves the Appellant's property rights
18 as an adjoining property owner to the Project," citing SMC 22.170.200. That provision, entitled
19 "Protection of Adjoining Property," provides that "[a]ll grading and other land disturbing activity
20 shall occur entirely within the site unless encroachment on adjoining property is allowed by the
21 Director" and establishes requirements for when such allowances may occur. As stated above,
22 SMC 22.170.200 is part of the grading code and is not relevant to the decision under appeal. Nor
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1 does it purport to alter the scope of Hearing Examiner jurisdiction to include common-law
2 property claims – much less to do so with respect to issues unrelated to grading, such as
3 Appellant’s property-rights claims regarding traffic, trees, fences, and walls.

4 **C. Claims alleging traffic and parking impacts must be dismissed.**

5 For the reasons stated in section D of the Motion, Appellant’s claims concerning traffic
6 and parking must be dismissed. In section 5.M at page 11 of the Response, Appellant disputes
7 this but fails to provide any valid legal basis for its claims. The only Code provision Appellant
8 cites is “SMC 15.04.10.” Response at 11. The Applicant construes this as a reference to SMC
9 15.04.010, which is part of the City’s street and sidewalk use ordinance and not within the scope
10 of this appeal. In addition, the text of SMC 15.04.010 states that a written permit must be
11 obtained to make use of a public street. To the extent Appellant argues that such a permit cannot
12 be granted because it would conflict with Appellant’s property rights, the claim again improperly
13 invokes separate permitting process and invokes property law issues beyond Examiner
14 jurisdiction.

15 **D. Setback claims must be dismissed.**

16 In the Notice and in section 5.G at pages 8-9 of the Response, Appellant asserts that
17 “setbacks are required under the Code,” citing SMC 22.170.200 and SMC 23.86.012. The
18 Response also cites SMC 23.47A.014, which provides setback requirements for commercial
19 zones. As stated in the Motion, Appellant’s claims of noncompliance with these provisions must
20 be dismissed.

21 First, as discussed above, SMC 22.170.200 is part of the grading code and is not a
22 development regulation subject to Examiner consideration in this appeal. Second, the Project’s
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consistency with SMC 23.86.012 and SMC 23.47A.014 require Type I decisions about Code compliance that “may be subject to administrative review only through a land use interpretation pursuant to SMC 23.88.020.” *Sherrard, supra* at 2 (citing SMC 23.76.006.B.1; SMC 23.76.022.A.1). In addition, having not included SMC 23.47A.014 in its appeal claims in the Notice, Appellant cannot now invoke that provision for the first time, providing an additional basis for dismissal of that issue. *Hisatomi, supra*, at 6.

E. Design claims should be limited to those supported by the Guidelines and included in the Notice of Appeal.

As stated in the Motion, the Applicant does not seek dismissal of Appellant’s design review claims in full; while vigorously disputing these (and all) claims, Applicant recognizes that the appeal raises issues related to the Project’s consistency with design guidelines that are within Hearing Examiner jurisdiction. However, the claims must be limited as stated in the Motion and cannot be supplemented by new allegations in the Response.

First, there is no basis for Appellant’s claims that the Project is inconsistent with design guidelines because it will interfere with the privacy of Appellant’s church building. Appellant cites Guideline PL-3-B-1, which states, “Provide security and privacy for residential buildings through the use of a buffer or semi-private space between the development and the street or neighboring buildings,” and argues that this “does not distinguish between buildings.” Response at 14. Again, this ignores the operative portion of this provision, which refers to providing “privacy *for residential buildings*.” Appellant does not dispute that its property contains a church rather than a residential building, and this guideline therefore does not apply. The same is true of Guideline CS2-D-5. *See* Motion at 9.

1 Second, the Response contains no answer to the argument in the Motion that the
2 guidelines do not support Appellant's claims regarding "air space" and "air flow." *See* Motion at
3 10. These claims must be dismissed.

4 Third, the Response cites numerous guidelines that were not cited in the Notice of Appeal
5 and cannot now be added to Appellant's claims. Appellant was required to provide its "*specific*
6 *objections* to the decision" in its appeal. HER 5.01(d)(3); *Hisatomi, supra* at 6. Appellant
7 clearly understood this requirement, because it asserted several specific objections regarding the
8 project's compliance with specific guidelines. *See* Notice at 5-6. Having failed to assert
9 noncompliance with guidelines other than those listed at page 10 of the Motion (guidelines CS1-
10 4-e, CS2-D-5, CS3-A, and PL3-B), however, Appellant cannot now expand the scope of its
11 appeal by alleging inconsistency with a raft of other guidelines for the first time.³ This would
12 prejudice the Applicant by allowing amendment of the appeal to add new issues after the appeal
13 deadline, after Applicant confirmed witness availability for the hearing based on the claims in
14 the appeal, and after the deadline for filing the Motion.

15 Fourth, in addition to citing new guidelines, sections 5.O and 5.P of the Response
16 impermissibly seek to expand the scope of Appellant's claims relating to trees. The Applicant
17 did not seek to dismiss all tree-related claims from this appeal, recognizing trees on the property
18 may be relevant to claims under the guidelines cited in the Notice (particularly guideline CS1-4-
19 e, "Tree Canopy"). In the Response, however, Appellant seeks to expand its claims by arguing
20 that removal of trees from the Project Site is inconsistent with provisions of SMC Chapter 25.11,
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27 ³ This includes guideline CS1-B-2, cited at page 16 of the Response for its reference to "shading on adjacent sites,"
which is not cited in the Notice.

Chapter 15.43, and a Director's Rule. Response at 12-13. These claims should be rejected because they impermissibly seek to expand the scope of the appeal beyond what was included in the Notice and because they relate to Code criteria that are not development regulations or criteria for granting the MUP under appeal.

F. Conceded issues.

Applicant asserted in the Motion that the Hearing Examiner should dismiss Error 13, which challenges the height limit applicable to the Project under SMC 23.58C.040. *See* Motion at 7. The Response does not dispute this argument and thereby concedes it.

III. CONCLUSION

For the reasons stated above and in the Motion, 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 1st day of December 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:

| | |
|---|---|
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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 1st day of December, 2023, at Seattle, Washington.

/s/ Sarah Willis

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