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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of
NEIGHBORS ENCOURAGING
REASONABLE DEVELOPMENT

from a Decision and Interpretation issued by the
Director, Department of Planning and
Development

Hearing Examiner File:
MUP-15-022(W)
S-15-003

(DPD File: 3014342
Interpretation No. 13-005)

MOTION TO DISMISS

I. INTRODUCTION

Applicant Paul LaBellarte/Columbia Builders (“Applicant”) respectfully moves that the Hearing Examiner dismiss the appeal of appellant Neighbors Encouraging Reasonable Development (the “Appellant”), as the Appellant failed to properly appeal the Determination of Nonsignificance and the Interpretation issued by the Department of Planning and Development (“DPD”) in this matter. As a result, the Hearing Examiner does not have jurisdiction to hear this appeal. It must be dismissed.

II. FACTS

A. The Project and DPD Review.

The project that is the subject of appeal in this matter is a multifamily development proposed at 3050 S.W. Avalon Way (the “Project”). *Clawson Declaration, Exhibit 1, p. 1.* The

1 Project is zoned Midrise (“MR”) and is located in the West Seattle Junction Hub Urban Village.
2 *Clawson Declaration, Exhibit 2.* The Project is not located in a Station Area Overlay District
3 (“SAOD”). *Id.* The Project is located in a Steep Slope Environmentally Critical Area (“ECA”)
4 because it includes a slope that exceeds 40 percent. *Clawson Declaration, Exhibit 3, p. 2.* The
5 Project consists of 14 dwelling units with five to eight bedrooms apiece, for a total of 104
6 bedrooms. Each bedroom has a private bathroom. Each of the 14 dwelling units includes a
7 kitchen shared by the bedrooms of that unit. *Clawson Declaration, Exhibit 1, pp. 1-2.*

9 The Land Use Code and the City’s SEPA regulations include unit count thresholds for
10 Design Review and SEPA review. Design Review is triggered in the MR zone when a project
11 exceeds 20 dwelling units. *SMC 23.41.004, Table A.* SEPA review is triggered in an MR zone in
12 a non-SAOD Urban Village when a project exceeds 20 dwelling units. *SMC 25.05.800, Table A.*

14 Limited SEPA review is triggered when a project is located in an ECA. *SMC*
15 *25.05.908.A.* However, the scope of environmental of review of such projects is limited to
16 documenting whether the proposal is consistent with ECA regulations, and evaluating potentially
17 significant impacts on the ECA not addressed in the ECA regulations or policies. *SMC*
18 *25.05.908.B.* In other words, SEPA review that is triggered only because a project is located in
19 an ECA does not permit DPD to review SEPA issues unrelated to the ECA (for example,
20 parking-related impacts cannot be considered in an ECA-only SEPA determination).

22 In the present case, the Project is less than 20 dwelling units. As a result, no Design
23 Review or “full” SEPA review are required for the Project. *SMC 23.41.004, Table A, SMC*
24 *25.05.800, Table A.* However, the Project is located in a Steep Slope ECA, triggering SEPA to
25 review potential impacts to the ECA.
26

1 Appellant filed an interpretation request related to the Project on July 3, 2013. The main
2 question raised in the interpretation request was whether the 104 individual bedrooms in the
3 Project should be considered individual dwelling units under the Land Use Code, thus triggering
4 Design Review and “full” SEPA review. *Clawson Declaration, Exhibit 4.* The interpretation
5 request was related to Project Nos. 3014342 and 6327295. *Clawson Declaration, Exhibit 1.*

7 DPD issued a Determination of Nonsignificance/MUP decision for the Project regarding
8 the ECA SEPA on August 6, 2015. *Clawson Declaration, Exhibit 3.* DPD also issued an
9 Interpretation in response to Appellants’ interpretation request on the same day. *Clawson*
10 *Declaration, Exhibit 1.* Appellant filed an appeal of the Interpretation Decision on August 20,
11 2015. *Clawson Declaration, Exhibit 5.* Issues 4.1.1 through 4.1.13 all pertain to the
12 Interpretation Decision. Issues 4.1.14 and 4.1.15¹ allege that the Project does not meet bicycle
13 and automobile parking standards, and that it does not meet trash storage area requirements. *Id.*,
14 *p. 4.* The appellant did not appeal any issues related to the SEPA determination.

16 The Hearing Examiner held a prehearing conference in this matter on September 16,
17 2015. At the prehearing conference, the parties agreed that the Appellant did not appeal any
18 issues related to the ECA SEPA determination. This agreement was memorialized in the
19 Examiner’s Prehearing Order dated September 20, 2015. The Appellant did not file an objections
20 to this statement, although an opportunity was left open for Appellant to do so. *Prehearing*
21 *Order.*

27 ¹ The appeal identifies Issue 4.1.15 as “4.1.5,” given the numbering of the appeal, we are assuming this was a minor
28 typo and the appeal issue was intended to be 4.1.15.

1 **B. Types of Review.**

2 The Land Use Code divides land use decisions into five categories. *SMC 23.76.004.A.*
3 Type I and II decisions are made by the Director and are consolidated into Master Use Permits.
4 *SMC 23.76.004.B.* Type I decisions are decisions made by the Director that are not appealable to
5 the Hearing Examiner. Type II decisions are discretionary decisions made by the Director that
6 are subject to an administrative open record appeal hearing to the Hearing Examiner. Type I, II,
7 or III decisions may be subject to land use interpretation. *Id.*

8 Application of development standards (i.e., zoning review), such as whether a Project
9 complies with automobile and bicycle parking requirements, or whether a Project meets trash
10 storage area requirements, are Type I decisions. *SMC 23.76.006.B.1.* Type I decisions are not
11 directly appealable to the Hearing Examiner, but may be appealed to the Hearing Examiner
12 through a land use interpretation subject to *SMC 23.88.020.* *SMC 23.76.006, 23.76.022.A.1.* A
13 Determination of Nonsignificance is a Type II decision that is directly appealable to the Hearing
14 Examiner. *SMC 23.76.006.C.1.a., SMC 23.76.022.A.2.*

15 **C. Interpretations.**

16 A decision by the Director as to the meaning, application, or intent of any development
17 regulation in Title 23 or in Chapter 25.09, Regulations for ECAs, as it relates to a specific
18 property, is subject to an interpretation. *SMC 23.88.020.A.*

19 A request for an interpretation, and a subsequent appeal to the Hearing Examiner, if
20 available, are administrative remedies that must be exhausted before judicial review of a
21 decision subject to interpretation may be sought. An interpretation decision by the
22 Director may affirm, reverse, or modify all or any portion of a Type I or Type II land use
23 decision.

24 *Id.* In the case of the subject interpretation, it related to a project application requiring public
25 notice (ECA SEPA requires public notice). As a result, the interpretation was subject to the
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1 same appeal deadline as the ECA SEPA determination; the interpretation “may be appealed only
2 if that project decision is appealed.” SMC 23.88.080.F.3.

3 III. ISSUES

- 4 A. Should the Hearing Examiner dismiss the interpretation appeal because the Appellant
5 failed to appeal the underlying Type II decision as required by the Seattle Municipal
6 Code?
7
- 8 B. Should the Hearing Examiner dismiss Issues 4.1.14 and 4.1.15 required their own
9 interpretation request which Appellant failed to file?
10
- 11 C. Should the Hearing Examiner dismiss the appeal because the failure of the Appellants
12 to properly file an appeal is jurisdictional?

13 IV. EVIDENCE

14 This motion relies upon the Declaration of Jessica M. Clawson, and the pleadings and
15 documents that are a part of the Hearing Examiner file in this matter.

16 V. ARGUMENT

17 **1. The Hearing Examiner must dismiss this appeal because Appellant failed to** 18 **appeal the underlying decision in this matter.**

19 The Examiner must dismiss this Appeal because the Appellant failed to appeal the
20 underlying decision in this matter. Such an appeal is required for any appeal to be heard by the
21 Examiner.
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23 The Land Use Code very clearly states that appeals of interpretations related to an
24 underlying project decision may only be heard when the underlying decision is appealed:

25 An interpretation related to a Type II Master Use Permit shall be subject to the same
26 appeal deadline as the related project decision, and may be appealed only if that project
27 decision is appealed. The appeal of an interpretation shall be consolidated with the

1 appeal of the related project decision. Interpretations related to projects that are appealed
2 to the Hearing Examiner shall be appealable to the Hearing Examiner...

3 SMC 23.88.020.F.3.

4 Here, the interpretation was subject to the same appeal deadline as the related project
5 decision, the ECA SEPA determination. Per SMC 23.88.020.F.3, the interpretation is appealable
6 only if that decision was appealed. No issues related to the ECA SEPA determination are raised
7 in the appeal statement; clearly the ECA SEPA decision was not intended to be appealed.

8 Hearing Examiner Rule (“HER”) 3.01(d) requires an appeal to contain at least a “brief statement
9 of the appellant’s issues on appeal, noting appellant’s specific objections to the decision or action
10 being appealed.” The Appellant included such a statement related to the interpretation, but no
11 ECA SEPA issues were included in the appeal statement; it is clear that the ECA SEPA decision
12 was not intended to be appealed. Finally, the parties agreed at the Prehearing Conference that no
13 issues related to the ECA SEPA determination were raised in the appeal. This statement was
14 memorialized in the Examiner’s Prehearing Order dated September 18, 2015. The Appellants
15 had the ability to revise this statement of fact, and failed to do so; we presume they agree that no
16 appeal of the ECA SEPA determination was filed.

17 The Appellant failed to appeal the ECA SEPA decision. As a result, the interpretation
18 appeal fails, because the related project decision, the ECA SEPA determination, was not
19 appealed as required by the Seattle Municipal Code, and was not appealed in a manner required
20 by the Hearing Examiner’s Rules. The Examiner must dismiss the appeal in its entirety.

1 **2. The Hearing Examiner must dismiss Issues 4.1.14 and 4.1.15 because the**
2 **Appellant failed to file an interpretation request for these issues.**

3 As already discussed above, the Appellant appealed thirteen issues related specifically to
4 the interpretation. The remaining two issues ask the Hearing Examiner to reverse DPD's decision
5 because DPD allegedly erred in determining that the project meets bicycle parking and trash
6 storage requirements, and because DPD erred in a level of transit determination as it relates to
7 automobile parking. *Clawson Declaration, Exhibit 5*. These issues are not properly before the
8 Hearing Examiner.
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10 The Hearing Examiner "has only the authority granted it by statute or ordinance" *HJS*
11 *Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003), and can only
12 hear a matter when he or she is empowered to do so by statute or ordinance. Here, DPD's
13 determination that the proposal complied with bicycle parking, trash storage, and
14 transit/automobile parking development standards is a Type I decision (a determination whether
15 a project meets development standards). SMC 23.76.006.B.1. Type I decisions are subject to
16 administrative review through a land use interpretation if the decision is one that is subject to
17 interpretation. SMC 23.76.022. The interpretation regarding the Type I decision issued by DPD
18 is appealable to the Hearing Examiner. SMC 23.88.020, 23.76.026. Type I decisions are not
19 directly appealable to the Examiner. As a result, the Examiner lacks jurisdiction to hear appeals
20 of Type I decisions.
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23 In this case, the Appellant was required to either file an interpretation during the Project's
24 application review period on this issue, or file an interpretation request at the time of its instant
25 appeal. *SMC 23.88.020.C.3.c* ("an appeal of a Type II decision...may include a request that the
26 Director issue in writing his or her interpretation of specified code sections, combined with an
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1 appeal of such interpretation...”). Determination of consistency with development standards are
2 Type I decisions that require request for interpretation prior to the Examiner obtaining
3 jurisdiction to hear them on appeal. SMC 23.76.022.A.1; The Examiner has consistently held
4 this to be the case: *see Findings and Recommendation of the Hearing Examiner, in the matter of*
5 *Aegis Living for a Contract Rezone, March 13, 2013, Conclusion 20, Footnote 1* (“No formal
6 Director’s interpretation was requested on [the frequent transit issue]; the Director’s application
7 of this standard, if a Type I decision, would be final under SMC 23.76.004 absent issuance of an
8 appealable DPD interpretation.”); *Findings and Decision of the Hearing Examiner, in the Matter*
9 *of the Appeal of Seattle Committee to Save Schools, August 13, 2014, Conclusion 2* (“Issues 4
10 and 5 claimed DPD had not correctly interpreted Code requirements concerning on-street bus
11 loading and off-street parking, both of which are Type I decision which cannot be appealed to
12 the Hearing Examiner except by means of the interpretation process of SMC 23.88.020, which
13 was not followed here.”).

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16 In addition, the inclusion of the issues in the appeal cannot be construed as an
17 interpretation request on their own. “The Hearing Examiner shall not accept any request for an
18 interpretation included in the appeal unless it complies with the requirements of subsection
19 23.88.020.C.3.c” which requires that an appellant state with specificity how the Director’s
20 application of the code section is in error, and how the requester believes the sections should be
21 construed; the request must also include a separate appeal of the requested interpretation. *SMC*
22 *23.76.022.C.3, SMC 23.88.020.C.3.c.*

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25 As a result of failing to seek interpretation on Issues 4.1.14 and 4.1.15, the Appellant
26 cannot now therefore appeal these issues. The Examiner must dismiss these issues if the entire
27 appeal is not dismissed.

1 **3. The requirement that the ECA SEPA decision be appealed is jurisdictional, and**
2 **the Examiner must dismiss the appeal.**

3 The Hearing Examiner retains only the jurisdiction delegated to it by the Seattle
4 Municipal Code. *Graham Thrift Group v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228
5 (1994). The Hearing Examiner only has jurisdiction over a case when an appeal is properly filed.
6 A Type I decision listed in 23.76.006.B is only subject to Examiner review through a land use
7 interpretation. SMC 23.76.022.A.1. In order to be properly appealed, an appeal must “clearly
8 identify each component of the Type II Master Use Permit being appealed” and it must “conform
9 with the rules of the Hearing Examiner.” In addition:
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11 An interpretation relating to a Type II Master Use Permit shall be subject to the same
12 appeal deadline as the related project decision, and may be appealed only if that project
13 decision is appealed.

14 SMC 23.88.020.F.3. When an Appellant fails to properly file an appeal, the Examiner lacks
15 jurisdiction to hear such an appeal.

16 As stated, the underlying ECA SEPA decision was not appealed in this case, as is clearly
17 required by SMC 23.88.020.F.3. Here, there is no dispute that the ECA SEPA was not appealed
18 in this matter; no claims related to the ECA SEPA were stated in the “Appeal Grounds” section
19 of the appeal. The appeal does not meet the fairly liberal requirements of notice pleading in the
20 state of Washington. In order for a complaint/appeal to be valid under CR8a, the
21 complaint/appeal must include a statement that gives the respondent notice of the “nature of the
22 plaintiff’s claims and the legal grounds upon which the claims rest.” *Molloy v. City of Bellevue*,
23 71 Wn. App. 392, 295, 859, P.2d 613 (1993), *review denied*, 123 Wn.2d 1024 (1994). ”A
24 pleading is insufficient when it does not give the opposing party fair notice of what the claim is
25 and the ground upon which it rests.” *Dewey v. City of Tacoma School Dist., No. 10*, 95 Wn. App.
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1 18, 23, 974 P.2d 847 (1999). Here, the Appellant stated only once in its appeal that “MUP
2 3014342” was being appealed, but there is no mention of any issues related to MUP 3014342
3 that are alleged as errors or claims. The lack of issues raised regarding the Type II decision
4 essentially creates no appeal, and at the most creates an illusory appeal. The appeal does not
5 meet the Hearing Examiner’s Rules regarding the requirements for an appeal statement, which at
6 the very least require a minimum statement of issues raised related to the Type II decision. The
7 parties agreed at the prehearing conference that the Appellant did not appeal any issue related to
8 the ECA SEPA decision itself; a decision cannot be appealed if no specific issues are raised
9 related to the decision. SMC 23.76.022.A.1, HER 3.01(d).² Therefore, there is no dispute that
10 the ECA SEPA was not appealed; this appeal must be dismissed.³
11

12 VI. CONCLUSION

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14 Unfortunately, the dismissal of the appeal would appear on first glance to leave the
15 Appellant in a procedural pickle—it filed an interpretation request to determine whether SEPA
16 and Design Review should have been triggered due to the Appellant’s allegation that the Project
17 contains 104 dwelling units instead of 14 dwelling units. It then attempted to file an appeal of
18 the underlying decision and the interpretation to the Examiner but it appealed no issues related to
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23 ² To the extent this motion is construed as a Motion for Summary Judgment, this motion clearly meets the criterion
24 of Civil Rule 56(c) that a motion for summary judgment is properly granted when “there is no genuine issue as to
25 any material fact and the moving party is entitled to a judgment as a matter of law.” All parties agree that no issues
26 related to the ECA SEPA determination were raised by the Appellant. The Appellant did not oppose the Examiner’s
27 statement as to this fact, despite given the opportunity to do so. Thus, as a matter of law the Examiner must grant
28 this motion.

³ The Seattle Hearing Examiner routinely dismisses appeals, or appeal issues, when no claim has been properly
stated in an appeal statement. *See In the Matter of the Appeal of Roger Carlstrom, from a decision of the Director of
DPD, Dispositive Order filed February 21, 2006* (When an appellant files an appeal of a SEPA determination where
no part of the appeal of the Director’s SEPA determination states a claim under SEPA, the appeal is dismissed).

1 the underlying Type II decision, which results in a failure to appeal that decision. As a result, the
2 interpretation cannot be appealed to the Examiner and the appeal must be dismissed.

3 However unfortunate, it does not change the fact that the Hearing Examiner lacks
4 jurisdiction to hear the appeal and the appeal must be dismissed. The undisputed facts show that
5 the failed to appeal the ECA SEPA determination, and indeed no ECA SEPA issues were
6 properly included in the appeal; the Appellant agreed to this fact at the Prehearing Conference.
7 The code clearly states what is necessary for the Examiner to retain jurisdiction in an
8 interpretation appeal; the underlying decision must be properly appealed. Simply stating that the
9 “Decision” is appealed in the filing does not meet the state of Washington’s liberal pleading
10 rules; there is no statement within the rest of the appeal that the actual underlying decision is
11 being appealed.
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14 The rules and code apply uniformly to both experienced and inexperienced appellants.¹
15 The Appellant failed to appeal the Type II decision as required by SMC 23.88.020.F.3 and
16 23.76.022.C.3 and as required by the Hearing Examiner Rules. As a result, the Hearing
17 Examiner lacks jurisdiction to hear this appeal and it must be dismissed.

18 Dated this 24th day of September, 2015.

19
20 MCCULLOUGH HILL LEARY, P.S.

21
22
23 By: 

24 Jessica M. Clawson, WSBA #36901
25 Attorneys for Applicant

26
27 ¹ The instant appeal is not the Appellant’s first appeal before this Hearing Examiner; the last appeal filed by the
28 Appellants included several interpretations and properly appealed the underlying decision. *Clawson Declaration, Exhibit 6.*