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HEARING EXAMINER

**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 Files:

**MUP-15-022(W)  
S-15-003**

(DPD Files 3014342 and 3015697  
Interpretation No. 13-005)

**DPD'S MOTION TO DISMISS**

The Department of Planning and Development respectfully moves that the Hearing Examiner dismiss the appeal of the Department's Determination of Nonsignificance ("DNS") by appellant Neighbors Encouraging Reasonable Development ("Appellant"), pursuant to Hearing Examiner Rules 2.16 and 3.02, on the grounds that the appeal fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief. The Department of Planning and Development further moves that the Hearing Examiner dismiss the appeal of the related Land Use Code interpretation, as a stand-alone appeal of the interpretation is not available absent an appeal of the related Master Use Permit decision.

**A. The question whether the proposed development should have required full SEPA review rather than limited ECA review is not within the Hearing Examiner's jurisdiction to consider.**

For residential developments, Seattle Municipal Code (SMC) Section 25.05.800 provides categorical exemptions from SEPA review based on the number of dwelling units. Proposals that otherwise qualify for a categorical exemption under SMC 25.05.800, but are located on land designated as an environmentally critical area ("ECA"), may trigger limited SEPA review according to SMC 25.05.908. In these cases, SMC 25.05.908.B provides that the scope of the review is limiting to documenting whether the proposal is consistent with ECA standards and evaluating potentially significant impacts on the ECA that aren't adequately addressed by the ECA regulations in SMC Chapter 25.09 and other environmental review laws. As stated in the decision for Project 3014342, the scope of the SEPA review in this case was of this limited nature, reflecting a determination that apart from its location in a steep-slope ECA, the project qualified for a categorical exemption under SMC 25.05.800.

Nothing in the code makes a determination that a project qualifies for a categorical exemption from SEPA review under SMC 25.95.800 appealable to the Hearing Examiner. Unlike most decisions that are subject to administrative appeal, no notice is required when an agency decides that a proposal is categorically exempt from SEPA review. An agency does not even need to document that a proposal has been found to be categorically exempt. (SMC 25.05.305.B.) The standards of Section 25.05.800 also are not eligible for consideration in a Land Use Code interpretation, according to SMC 23.88.020.

**B. The appeal fails to state any basis, within the scope of the ECA SEPA review, for reversing the Department's DNS**

Consistent with its conclusion that the proposal qualified for a general categorical exemption from SEPA review, the City's environmental review was properly limited to consideration of the impacts of the development on the steep-slope and landslide-prone ECA. The question legitimately before the Hearing Examiner is not whether broader SEPA review should have been required, but whether the Department appropriately exercised its authority, within the limits of ECA SEPA review, to approve, condition or deny the project. The scope of the Hearing Examiner's review for a Type II approval is described in SMC 23.76.022.C.6. The considerations listed in that section do not include a determination whether a different sort of review should have been required.

The appeal specifically challenges the Department's failure to conduct SEPA review beyond critical area components, but raises no objection to the environmental review that was provided for ECA issues. As agreed at the Prehearing Conference and as reflected in the Prehearing Order, the Appellant claims no error with respect to the environmental review that was provided for probable adverse impacts on the ECA. But review of impacts on the ECA was the sole issue before the Department in its SEPA decision. If there is no assertion that the Department's decision failed to adequately address impacts on the ECA, then no basis for the appeal of that decision has been stated, and the appeal must be dismissed.

The appeal mentions adverse parking, traffic and height/bulk/scale impacts under Part III, Appellant's Interests, however those matters are beyond the limited scope of the ECA SEPA review required for this project, as they are unrelated to the environmentally critical area on the site. Although impacts in these areas would be considered if full SEPA review were triggered, they are not properly before the Hearing Examiner as a part of a review of an ECA SEPA decision.

**C. An appeal of the interpretation is not available without an appeal of the related Type II project decision.**

Section 23.88.020.F.3 specifically provides, when an interpretation relates to a Type II Master Use Permit, that the interpretation may be appealed to the Hearing Examiner only if the related Master Use Permit decision also is appealed. In this case there was no effective appeal of the Master Use Permit decision, as no basis has been stated for reversing that approval, and the Appellant claims no error in DPD's ECA SEPA analysis. If the appeal of the Master Use Permit

decision is dismissed, what is left is a stand-alone appeal of the interpretation, which is not allowed under the code.<sup>1</sup>

If the Hearing Examiner dismisses the appeal of the Master Use Permit decision but not the interpretation, the fact that the interpretation appeal is still pending would not provide a basis, under the code, for withholding permits for the project. As a result, a permit could be issued, and work under that permit could be underway, before the Hearing Examiner rules on the interpretation. Under SMC Section 23.76.028.C.1, a Type II Master Use Permit is approved for issuance on the day following expiration of the appeal period, or, if the decision is appealed, on the fourth day following the final administrative appeal decision to grant or conditionally grant the permit. If the Hearing Examiner dismisses the appeal of the Master Use Permit decision, the Master Use Permit will qualify as ready for issuance four days later, and the Department will have no basis for withholding the building permit at that point. The pendency of an interpretation appeal does not affect these provisions or, on its own, provide a basis for withholding permits.

**D. Issues raised in Paragraph 4.1.15 of the Notice of Appeal are beyond the scope of the interpretation request and beyond the scope of the ECA SEPA review, and thus are not properly included in the appeal.**

In addition to the general bases provided above for dismissing the appeal, the final grounds provided in the appeal, Paragraph 4.1.15, specifically should be dismissed. Paragraph 4.1.15 asserts that the Director erroneously relied on the availability of frequent transit service, as regulated under the code, as a basis for requiring no parking for the project. This issue relates to the application of a development standard, but it was not raised in the request for interpretation and is also unrelated to the ECA SEPA analysis, and therefore is beyond the jurisdiction of the Hearing Examiner to consider. (A copy of the request for interpretation is attached.) The Appellant could have requested an additional interpretation on this issue in conjunction with an appeal of the Master Use Permit decision, applying SMC 23.88.020.C.3.c, but they did not. If the appeals of the DNS and the interpretation are not fully dismissed, we request that this issue be dismissed.

**E. Conclusion**

Based on the foregoing reasons, the Department respectfully requests that the Hearing Examiner dismiss the appeals both of the DNS and also of the related interpretation. In the alternative, if the Hearing Examiner does not dismiss these appeals, the Department requests that the Hearing Examiner treat this as a motion in limine or a motion for partial dismissal: The Department requests that the final grounds cited in the appeal, Paragraph 4.1.15 relating to frequent transit service, be dismissed, as that topic does not relate either to the ECA SEPA review or the

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<sup>1</sup> The Hearing Examiner has previously dismissed an interpretation appeal on the grounds that the related Type II Master Use Permit decision was not appealed. See *In the Matter of the Appeal of Alterra Condominium Homeowner Association*, Hearing Examiner File No. S-10-001. The Order from that case is attached. Although it did not affect the outcome, an issue that arose in that case was the fact that that notice of the interpretation failed to specify that any appeal must be in conjunction with an appeal of the related Master Use Permit decision. The need for an appeal of the related project decision was made explicit in the notice of the current interpretation, which is also attached.

questions raised in the request for interpretation. The Department also requests that discovery relating to frequent transit service calculations not be allowed. In addition, as it has already been resolved that the appeal raises no objections relating to the Department's ECA SEPA decision, the Department requests that discovery relating to that decision be excluded. In particular, the Department requests that Seth Amrhein and Jerry Suder, identified on the Appellant's witness list, not be called, as their involvement has been limited to the ECA SEPA review, the conclusions of which are not disputed.

Dated this 24<sup>th</sup> day of September, 2015.



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Andrew S. McKim  
Land Use Planner – Supervisor  
Seattle Department of Planning and Development

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeal of

**ALTERRA CONDOMINIUM  
HOMEOWNER ASSOCIATION**

Hearing Examiner file:  
**S-10-001**

From an Interpretation by the Director,  
Department of Planning and Development

Director's Interpretation 09-004

**ORDER**

The Director and the Applicant moved for dismissal of this appeal. The Appellant filed a response on August 9, 2010. The Applicant filed a reply on August 10, 2010.

On June 24, 2010, the Director issued Notice of Interpretation 09-004 and Notice of Decision for Master Use Permit 3009833, both of which relate to a mixed-use development project located at 901 Dexter Avenue North. The Appellant filed a timely appeal of Director's Interpretation but did not appeal the Master Use Permit decision for the project by the July 8, 2010 deadline. SMC 23.88.020.F.3 provides that an interpretation relating to a Type II Master Use Permit "*shall be subject to the same appeal deadline as the related project decision, and may be appealed only if that project decision is appealed.*"

Interpretation 09-004 relates to a Type II Master Use Permit. The Director and the Applicant argue that the Examiner therefore lacks jurisdiction to hear the appeal because the project decision was not appealed. The Code language is clear, and does not allow an appeal of this interpretation to the Examiner if the project decision is not also appealed.

The Appellant argues that its appeal statement includes a challenge to the project, but the appeal letter specifically identifies the interpretation as the subject of the appeal, and includes a copy of the interpretation. The Appellant also cites the failure of DPD and the Notice of the Interpretation to mention that an appeal of the project decision was required to be filed in order to appeal the interpretation. The Appellant points out that it was required to pay \$9,000.00 for this interpretation, that it was in communication with DPD staff about the timing of the interpretation, and that it did not wish to engage in unnecessary appeals of the project. But regardless of these factors, the Examiner lacks equitable authority to disregard SMC 23.88.020.F.3 or to require DPD to re-publish the decision and interpretation to re-start the appeal period.

The motions of the Director and the Applicant are granted, and the appeal is hereby dismissed.

Entered this 11<sup>th</sup> day of August, 2010.

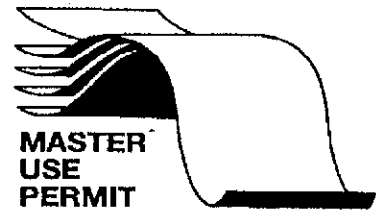


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# Seattle Department of Planning and Development

D. M. Sugimura, Director

August 6, 2015



## Notice of Interpretation

**Project:** 3015697 **Zone:** ARTERIAL WITHIN 100 FT., URBAN VILLAGE OVERLAY, SCENIC VIEW WITHIN 500 FT., SALMON WATERSHED, SPECIAL GRADING REQUIREMENT, MIDRISE

**Notice Date:** 08/06/2015

**Planner:** Andrew McKim - (206) 684-8737

**Address:** 3050 SW Avalon Way  
**Project No.** 3015697

This interpretation was requested by Neighbors Encouraging Reasonable Development, a group of neighbors living in the vicinity of the development proposed under DPD Project Nos. 3014342 and 6327295. The development was proposed as a 14-unit apartment building, and has been approved on that basis. The question raised for interpretation was whether the 104 bedrooms in the proposed building should be regulated as separate dwelling units. Each of the bedrooms has a private bathroom. Early versions of the plans showed counters with sinks in each bedroom, outside the bathroom, but those features were eliminated before the plans were approved. The interpretation concludes that the individual bedrooms are not designed and arranged as separate dwelling units, and that the proposed building is appropriately regulated as a 14-unit apartment building based on the plans as modified.

### HOW TO APPEAL THE INTERPRETATION

This interpretation may be appealed to the Seattle Hearing Examiner only in conjunction with an appeal of the related Master Use Permit decision (Project No. 3014342). Appeal of the interpretation may be submitted through 5:00 p.m. August 20, 2015 and must be accompanied by an \$85.00 filing fee in a check payable to the City of Seattle. The appeal must state specifically why the appellant believes the interpretation to be incorrect. The appeal must be sent to:

City of Seattle  
Hearing Examiner  
700 5th Avenue, Suite 4000  
P.O. Box 94729  
Seattle, WA 98124-4729

Interp 13-005  
3015697

RFI 3014342

Hand Delivered to:

DPD Code Interpretation and Implementation Group  
700 Fifth Avenue, Suite 2000  
PO Box 34019  
Seattle, WA 98124-4019

Dept. of Planning & Development  
Public Resource Center

Re: Request for Interpretation

III 03 2013

Project #3014342  
3050 SW Avalon Way

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Dear Andrew S. McKim and the Code Interpretation Group:

On behalf of the residents who reside in the 32<sup>nd</sup> Ave SW Neighborhood (Neighbors Encouraging Reasonable Development), Paul Haury is submitting this Request for Interpretation for project 3014342/6327295, 3050 SW Avalon Way, that is currently being viewed as 14 Unit apodment structure instead of a 102 Unit Apartment in a MR zone that abuts a Single Family 5000 zone. Given existing codes and definitions, and the recent interpretation 13-002 for Project 3014912, we believe that based on the characteristics of the project as revealed by the Project Application, the SEPA Checklist and the submitted plans, that this project should be found to be a 102 Unit Apartment and be recommenced as such through full public Early Design Guidance and full SEPA Review. In short:

- The submitted application for Master Use Permit calls the structure a 14 unit Apartment Building with 102 bedrooms
- MUP application states the project as 7 levels with two levels having mezzanines
- The name for this project is as given by the developer who submitted the SEPA Checklist is appropriately named, "Avalon Apartments"
- The SEPA Checklist states the project as 14 dwelling units to occupy as a boarding house
- The SEPA Checklist states this project is intended to approximately house 102 individuals
- The SEPA Checklist states the maximum height of the structure is 70 feet
- The plans show the maximum height is
- The plans reveal that each individual will rent a small secure living areas within a secure building containing 7 levels with 2 levels having mezzanines
- The plans reveal here are 14 common kitchens
- The plans reveal that each individual bedroom will also contain 1) a food prep area with cabinets, 2) a refrigerator and 3) a sink, and 4) a bathroom that also has a separate sink; further that each room is identified by level and unit number

We too have followed the controversy surrounding the development of apodments like the entity of Harvard District Neighbors LLC, and are aware of the prevailing notion that the number of dwelling units is to be determined by the number of shared kitchen facilities located in the apodment

structure. We are aware of the practice of DPD allowing apartment developers to count only the number of full, shared kitchens as a way of minimizing the number of 'dwelling units' to thereby bring projects below the threshold for mandated SEPA and Design Review for applicable zones. In this case with project 3014342, it places the level below 20 which would have forced Design Review and SEPA Review.

Dept. of Planning & Development  
Public Resource Center

11/03/2013  
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This practice of understating the actual number of dwelling units has allowed developers to evade oversight and review that would balance proposed development with existing neighborhoods via Design Review and SEPA Review with specific regard to (WAC 197-11-444) (2) Built Environments. Design Review and SEPA Review are intended to promote compatible development and in turn prevent development that would otherwise harm natural and built environments.

We believe that the current approach by the DPD ignores DPD's existing published interpretation of the definition of a dwelling unit. We believe this approach leads to development that is excessive in the area of Height, Bulk and Scale in respect to their proposed environments. We believe that this approach leads to development that is incompatible from a design and fit perspective. We request that DPD confirm the existing SMCs and interpretations and apply the definition to the above mentioned application for the project at address 3050 SW Avalon Way and find it to be a structure with 102 dwelling units and not 14 units with 102 bedrooms.

The Seattle Municipal Code does not define a "kitchen." Rather, reference is made to the definition of a "food preparation area." Food preparation areas are included in the definition of a dwelling as one of a number of factors to be viewed in establishing the existence of a dwelling unit.

SMC 23.84A.008 defines a dwelling unit as follows:

"Dwelling unit" means a room or rooms located within a structure, designed, arranged, occupied or intended to be occupied by not more than one household as living accommodations independent from any other household. The existence of a food preparation area within the room or rooms shall be evidence of the existence of a dwelling unit.

(Emphasis added.)

The existence of a "food preparation area" is thus evidence of the existence of a dwelling unit but does not, by itself, determine the number of units in a structure.

SMC 23.84A.012 defines a food preparation area as follows:

"Food preparation area" means a room or portion of a room designed, arranged, intended or used for cooking or otherwise making food ready for consumption.

(Emphasis added.)

The code does not contain a definition for a housekeeping unit.

With respect to the above application, the following facts demonstrate the existence of multiple dwelling units as opposed to bedrooms:



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- Each "dwelling unit" (referred to as a bedroom by the applicant) within the overall structure is intended to be occupied by one person who is unrelated to the others;
- Each "dwelling unit" (referred to as a bedroom by the applicant) is intended as a living accommodation independent of the other households. Each room is separately lockable and identifiable;
- While a larger kitchen is available for all, each individual "dwelling unit" has a (probable microwave oven,) a refrigerator, a sink and cabinets (separate from and in addition to the bathroom sink). Thus, each "dwelling unit" contains "a portion of a room ... intended for cooking or otherwise making food ready for consumption." There is no question that each unit contains its own food preparation area with refrigerator, sink and cabinets.
- The shared kitchens establish the existence of *at least* fourteen dwelling units. The existence of shared kitchens cannot obviate the existence of the food preparation areas within each of the individual units and alone are not dispositive as to the number of dwelling units in the structure.

This analysis finds support in a Official Code Interpretation 1983-7, a copy of which is included herein. This interpretation, which remains in full force and effect, defines a dwelling unit for code enforcement purposes. While some of the definitions have since be modified in insignificant ways, the interpretation remains in place.

Interpretation 1983-7 provides:

"Existence of one and/or several of the following elements shall be considered, evidence of the existence of more than one dwelling unit;

j. Additional food preparation areas, including some combination of the following features: stove, refrigerator, kitchen cabinets, microwave oven, hotplate, sink, dishwasher.

Under the above language, the existence of any one of the factors listed shall be considered as evidence of the existence of a dwelling unit. Three separate indicia confirm the existence of a food preparation area in each room. Other indicia of separate dwelling units listed in the Interpretation include:

- c) Lockable interior doors that can exclude a portion of the dwelling unit from access to the entire building.
- d) Separate lockable entrance to rooms or areas which are so separated from other rooms or areas by key locks . . .
- e) Number of door signaling devices.
- f) Occupancy for the premises by more than one separate family, independent from any other family, and using any of the facilities listed herein.
- g) Existence of rental agreements or leases for a portion of the ... dwelling other than permitted "lodger" agreements.

(Emphasis added.)

The above code language and DPD's own controlling Interpretation establish the manner in which the number of dwelling units in an apodment structure is to be determined. This interpretation should be

applied to the above application and this 102 "dwelling unit" structure should be subject to Design Review and SEPA Review.

Sincerely and submitted on July 3<sup>rd</sup>, 2013,

Paul Haury



On behalf of Neighbors Encouraging Reasonable Development  
www.SeattleNERD.org  
206-714-6113  
4115 32nd Ave SW  
Seattle WA

Dept. of Planning & Development  
Public Resource Center

JUL 03 2013

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CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached Motion to Dismiss, together with its attachments, via email, to each person listed below, in the matter of the appeal of **Neighbors Encouraging Reasonable Development**, Hearing Examiner Files **MUP-15-022(W)** and **S-15-003**.

Paul LaBellarte/Columbia Builders  
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Laura Counley  
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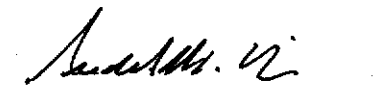
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Office of the Hearing Examiner  
City of Seattle  
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Dated this 24<sup>th</sup> day of September, 2015.



Andrew S. McKim  
Land Use Planner – Supervisor  
Seattle Department of Planning and Development