

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**NEIGHBORS ENCOURAGING
REASONABLE DEVELOPMENT**

from a decision and interpretation
by the Director, Department of
Planning and Development

Hearing Examiner Files:
**MUP-15-022(DR,W)
S-15-003**

Department References:
3014342 and 3015697

**ORDER ON MOTIONS
TO DISMISS**

On September 24, 2015, the Director of the Department of Planning and Development ("Department") and the Applicant, Paul LaBellarte/Columbia Builders, each filed a motion to dismiss this appeal. The Appellant, Neighbors Encouraging Reasonable Development, filed its response to the motions on October 1, 2015. The Hearing Examiner has reviewed the file in this matter¹ as well as the motions and response and the supporting declarations.

The Department issued a SEPA Determination of Non-significance ("DNS") for a proposal for a seven-story apartment building containing 14 dwelling units and 104 bedrooms, to be constructed at 3050 SW Avalon Way. The property is zoned Midrise. Because the Department determined that the proposal did not exceed 20 dwelling units, it did not go through the design review process.² For the same reason, and because the proposal is not located within an urban village or urban center containing a Station Area Overlay District, it was not required to go through full review under SEPA.³ However, because it is located within a Steep Slope Environmentally Critical Area (ECA), the proposal was required to undergo limited review under SEPA, including documentation of whether the proposal is consistent with ECA regulations and an assessment of any significant impacts on the ECA not addressed in the ECA requirements.⁴

On July 3, 2015, the Appellant filed a request with the Department for an interpretation concerning whether the proposal contained 104 rather than 14 dwelling units.⁵ On August 6, 2015, the Department issued the DNS⁶ and also issued Interpretation No.13-005, which concluded that the proposal was properly regulated as a 14-unit apartment building.⁷ The DNS was included within a document entitled "Analysis and Decision of the Director," which identified the DNS as the only

¹ This case was originally assigned to a hearing examiner pro tem but was reassigned to the Hearing Examiner on October 6, 2015.

² See Table A for SMC 23.41.004.

³ See Table A for SMC 25.05.800.

⁴ See SMC 25.05.908.A and .B.

⁵ Exhibit 3 to Declaration of Charles H. Burkhalter, Jr. in opposition to motions to dismiss ("Burkhalter Declaration").

⁶ Burkhalter Declaration, Exhibit 2.

⁷ Exhibit 1 to Declaration of Jessica M. Clawson in support of the Applicant's motion to dismiss ("Clawson Declaration").

“approval” required for the proposal.⁸ The DNS explains that environmental review of the proposal is limited:

The project site is located in an environmentally critical area (landslide-prone area) and, therefore, the application is not exempt from SEPA review. However, SMC 25.05.908.B provides that the scope of environmental review of projects within environmentally critical areas shall be limited to: 1) Documenting whether the proposal is consistent with The City of Seattle Regulations for Environmentally Critical Areas, SMC Chapter 25.09; and 2) Evaluating potentially significant impacts on the environmentally critical area resources not adequately addressed in The City of Seattle Environmentally Critical Areas Policies or the requirements of SMC Chapter 25.09, Regulations for Environmentally Critical Areas, including any additional mitigation measures needed to protect the environmentally critical areas in order to achieve consistency with SEPA and other applicable environmental review laws.⁹

On August 20, 2015, the Appellant filed its appeal.¹⁰ Under the section entitled “Decision Being Appealed,” the appeal reads as follows:

NERD appeals the August 6, 2015 "Analysis and Decision of the Director" ("Decision") concerning Master Use Permit Application No. 3014342, the August 6, 2015 Code Interpretation (DPD Interpretation No. 13-005) concerning Project Nos. 3014342 and 6327295, and all related and subsidiary decisions, including the failure to conduct Design Review and the failure to conduct SEPA Review beyond critical area components.¹¹

The appeal lists 15 appeal issues. The first thirteen issues relate to alleged errors in the “Director’s Interpretation”. Issue 14 states that the Director erred “in determining that the project meets bicycle parking and trash storage area requirements.” Issue 15 states that the Director relied in error “on the availability of the Code-required level of transit as a basis for allowing the project to provide no parking.”¹²

The Applicant moves to dismiss appeal issues 14 and 15, and the Department moves to dismiss appeal issue 15, because issues 14 and 15 seek to appeal “Type I” decisions. “Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner.” SMC 23.76.0040.B. The determination that a proposal complies with the Code’s development standards is a “Type I” decision. SMC 23.76.006.B. Issues concerning whether a proposal meets bicycle parking, trash storage area, or certain transit level requirements address Type I decisions and can be appealed to the Hearing Examiner only through appeal of a Land Use Code interpretation. Table A for SMC 23.76.004. Code interpretations are governed by Chapter 23.88 SMC. Because this proposal was a project application requiring public notice under Chapter 23.76 SMC, Code interpretations in this instance were governed by SMC 23.88.020.C.3. Under that section, a person could request an interpretation prior to the end of the public comment period on the application, SMC

⁸ Burkhalter Declaration, Exhibit 2 at 1.

⁹ Burkhalter Declaration, Exhibit 2 at 2.

¹⁰ Clawson Declaration, Exhibit 5.

¹¹ Clawson Declaration, Exhibit 5 at 2.

¹² Clawson Declaration, Exhibit 5 at 4.

23.88.020.C.3.a, or could include a request for, and appeal of, the interpretation within the appeal of a Type II decision, such as the SEPA DNS at issue here. SMC 23.88.020.C.3.

The Appellant contends that the following language in its July 3, 2015 interpretation request constituted a request for an interpretation of the applicability of Code requirements concerning bicycle parking, trash storage areas, and transit-levels as they relate to an exemption from certain vehicle parking requirements:

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 permit development that would otherwise harm natural and built environment.¹³

The Appellant notes that transportation and parking are included in the list of elements of the built environment within the WAC, and that it expected the Department to address these concerns in Interpretation No. 13-005. The Appellant asserts that if the Department did not understand what the Appellant was seeking, it should have asked for clarification. However, the entire interpretation request related to the correct number of dwelling units included in the proposal and the Department's alleged practice of allowing developers to minimize the number of dwelling units to "bring projects below the threshold for mandated SEPA and Design Review for applicable zones."¹⁴ A reasonable person would not read the paragraph quoted above as requesting an interpretation of the applicability of the Code's specific requirements concerning bicycle parking, trash storage areas, and transit-levels as they relate to an exemption from certain vehicle parking requirements. Further, there is no evidence that the Appellant took any action immediately after the interpretation was issued to inform the Director that the Appellant considered the interpretation incomplete. Appeal issues 14 and 15 are not before the Examiner as part of an appeal of a Land Use Code Interpretation. Consequently, the Examiner has no jurisdiction over them, and they are **DISMISSED**.

The Applicant asserts that the appeal should be dismissed because the Appellant failed to appeal the underlying decision, the DNS. Raising a similar issue, the Department asserts that "the appeal fails to state any basis, within the scope of the ECA SEPA review, for reversing the ... DNS".¹⁵ To appeal a Type II decision, such as the DNS, the "appeal shall ... clearly identify each component of the Type II Master Use Permit being appealed." SMC 23.76.022.C.3.a. Rule 3.01(d) of the Hearing Examiner Rules of Practice and Procedure requires that an appeal include a "brief statement of the appellant's issues on appeal, *noting appellant's specific objections to the decision or action being appealed.*" Emphasis added. The Appellant contends that it did appeal the DNS and cites the language in section 1 of its appeal, quoted above. That language does state that the "Analysis and Decision of the Director" is being appealed, as is the Code interpretation. The "Analysis and Decision" includes only the DNS, so the language may be sufficient to meet the requirements of SMC 23.76.022.C.3.a. However, it does not meet the requirements of Rule 3.01 for a statement of "specific objections to the decision or action being appealed." One would normally look to the appeal issues, or "Appeal Grounds" in this case, for that specificity. But that section of the appeal does not include any issue

¹³ Burkhalter Declaration, Exhibit 3 at 2.

¹⁴ *Id.*

¹⁵ DPD's Motion to Dismiss at 2.

related to the DNS. Further, this concern was apparently a subject of discussion at the prehearing conference held in this case on September 16, 2015. The Prehearing Order recites the following:

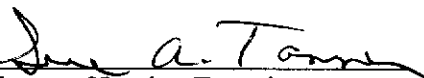
3. The following statement is intended as clarification of the issue regarding the SEPA component of the MUP decision appeal. Appellant shall file any correction to this statement no later than September 22.

Appellant does not claim that the determination of non-significance as to probable adverse impacts of the project on the environmentally critical area involved is erroneous but claims that the determination should not have been limited to those impacts because the interpretation on which the count of dwelling units was based is in error.

Nothing in the record indicates that the Appellant filed a correction to the clarification of the appeal concerning the DNS. The appeal does not include any issues related to the DNS, the only Type II decision that could have been appealed. Consequently, the DNS was not appealed.

SMC 23.88.020.F.3 states that "[a]n 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.*" The Appellant argues that it did appeal the project decision, the DNS, at the same time it appealed the Code Interpretation, and that a "negative ruling." by the Examiner on the DNS appeal does not automatically require dismissal of the associated appeal of the interpretation. But the appeal itself merely states that the "Analysis and Decision of the Director" is appealed. As noted, nothing else in the appeal relates in any way to the DNS, and, as recited in the Prehearing Order, the Appellant agreed that they did not claim that the DNS was erroneous as to probable adverse impacts on the ECA. Because the DNS was not appealed, the appeal of the interpretation is not properly before the Examiner under SMC 23.88.020, and the Examiner therefore lacks jurisdiction to consider it. The motions to dismiss are **GRANTED**. The appeal is **DISMISSED**, and the appeal hearing scheduled for November 5, 2015 is **CANCELLED**.

Entered this 14th day of October, 2015.


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**BEFORE THE HEARING EXAMINER
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 **Order of Dismissal** to each person listed below, or on the attached mailing list, in the matter of **Neighbors Encouraging Reasonable Development**, Hearing Examiner Files: **MUP-15-022 (W), S-15-003**, in the manner indicated.

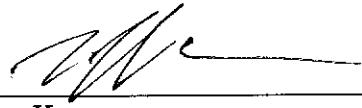
Party	Method of Service
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Dated: October 14, 2015



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