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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of
NEIGHBORS OF 3447-9 22nd AVE WEST
of a decision issued by the Director,
Seattle Department of Construction and
Inspections.

Hearing Examiner File:
MUP 16-016 (W)

APPLICANT'S MOTION TO
DISMISS LAND USE APPEAL

COMES NOW the applicant Sound Builders/Einar Novion (the "Applicant"), by and through its undersigned attorneys, Samuel M. Jacobs and Debra M. Akhbari of Helsell Fetterman LLP, and moves the Hearing Examiner as follows:

I. INTRODUCTION AND RELIEF REQUESTED

This matter arises out of a land use appeal concerning the proposed development of four residences located at 3447 22nd Avenue West, Seattle, WA (the "Property"). Under Seattle Municipal Code ("SMC") 25.05.800, the Property would normally be categorically exempt from review under the State Environmental Policy Act ("SEPA"); however, because the Property is located in an environmentally critical area ("ECA"), the SMC requires that the proposed development be reviewed under SEPA. Accordingly, the Applicant submitted a SEPA Checklist and also applied for a limited exemption/relief from the development

APPLICANT'S MOTION TO DISMISS
LAND USE APPEAL - 1

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standards for steep slopes under SMC 25.09.180.B.2.c.¹

The exemption was granted and after a review of the proposed development project, SDCI issued a determination of non-significance under SEPA.

David Moehring, one of the appellants and their authorized representative (“Appellants”), appealed SDCI’s determination of non-significance by raising several objections that are wholly outside the limited scope of SDCI’s SEPA review. As a result, the appeal is without merit on its face and the appeal fails to state a claim for which the Hearing Examiner may grant relief. Therefore, the Applicant respectfully requests that the appeal be dismissed with prejudice.

II. STATEMENT OF FACTS

On or about May 27, 2015, the Applicant applied for land use permit number 3020730 to demolish an existing structure and to develop four residential units at 3447 22nd Ave W, Parcel Number 2770601540. The Property is located on a slope running from west down to east with a slightly steeper slope along the Property’s western edge. The Property is mapped as a potential landslide ECA, requiring that the Applicant go through the limited SEPA review process under SMC Chapter 25.05 – Environmental Policies and Procedures.

On or about July 1, 2015, the Applicant submitted a SEPA Checklist and a geotechnical report for the Property prepared by Nelson Geotechnical Associates (“Report”). A copy of the Report is attached hereto as **Exhibit A**. Although the Applicant’s computer-generated topographical survey calculated the slope to be less than 40 percent, because SDCI determined that the Property appeared to contain an area of the slope at 40 percent, the

¹ The Property is located in a “potential land slide area.” Under SMC 25.09.020(3)(b)(5), “potential landslide areas” include areas that have “slopes with an incline of forty (40) percent or more within a vertical elevation change of at least ten feet (10’).” The Applicant does not believe nor concede that the Property contains a “steep slope.” However, because SDCI determined that a portion of the Property *appeared* to contain an area of the slope meeting the foregoing definition, the Applicant applied for the exemption under SMC 25.09.180.B.2.c.

1 Applicant requested relief from the development standards set forth in SMC Chapter 25.09
2 under the exemption found within SMC 25.09.180 B. ("Exemption").

3 On August 5, 2015, Dean Griswold from the Seattle Department of Planning and
4 Development found that the Property qualified for the Exemption based in part on the
5 following:

6 The property qualified for relief from the prohibition on development within
7 Steep Slopes and Steep Slope Buffers because the Steep Slope Critical Area
8 is less than 20 feet in height and more than 30 feet from other Steep Slope
Critical Areas, as described in SMC 25.09.180 B2c. Exemption.

9 In addition, Mr. Griswold also determined that the Exemption was applicable
10 because the Report prepared by Nelson Geotechnical Associates "demonstrated that no
11 adverse impacts would result from allowing construction within the steep slope area,
12 provided the conditions in the report were adhered to." A copy of the Exemption granted to
13 the Applicant is attached hereto as **Exhibit B**.

14 After a comment period and review of additional materials provided by the
15 Applicant related to the development, together with the Exemption, on July 18, 2016, SDCI
16 issued a "Determination of Non-Significance" for the proposed development (the
17 "Decision"). A copy of the Decision is attached hereto as **Exhibit C**.

18 Consistent with SMC 25.05.908, the Decision states that the scope of review of
19 projects within ECAs is limited to (1) documenting whether the proposal is consistent with
20 the City's ECA regulations in SMC 25.09; and (2) evaluating potentially significant impacts
21 on the critical area resources not adequately addressed in the ECA regulations. Decision at
22 2.

23 On or about August 1, 2016, the Appellants filed a land use appeal of the Decision
24 (the "Appeal"). The Appellants object to the Decision on three grounds: (1) the proposed
25 density; (2) soil stability in the steep slope area; and (3) the proposed clear-cutting of trees

1 on the Property. Appeal at A, B and C.

2 The Appellants request that the Decision be reversed “based on inadequate
3 documentation” and seek the following additional relief: (1) construction of fewer buildings
4 on the Property and/or reconfiguration of the structures to address privacy issues; (2)
5 placement of windows on the new buildings to be coordinated with adjacent homes to
6 respect privacy; (3) creation of diagrams showing vehicle access and turning for townhouse-
7 sized vehicles; (4) “assurance that concerns of the soil stability raised with Nelson
8 Geotechnical Associates . . . are demonstrated to be addressed rather than requesting
9 variances”; (5) the creation of new slope diagrams and verification that the diagrams are
10 consistent with actual conditions; (6) revision of the location of the excavation to be
11 equidistance from the edge of the proposed buildings; and (7) details on temporary and
12 permanent soil retention and creation of drawings and calculations to support the details.

13 The hearing on the Appeal is currently scheduled for September 13, 2016. However,
14 the Appeal is appropriate for dismissal because the issues raised on appeal are outside the
15 jurisdiction of SDCI and the Hearing Examiner, the Appellants’ objections to the Decisions
16 are without merit, and the Hearing Examiner does not have jurisdiction to grant the relief
17 requested.

18 III. STATEMENT OF ISSUES

19 Whether this Appeal, which does not challenge SDCI’s determination of non-
20 significance, should be dismissed because it is without merit on its face and fails to state a
21 claim for which the Hearing Examiner has jurisdiction to grant relief? **Answer: Yes.**

22 IV. EVIDENCE RELIED UPON

23 This motion is based upon the Decision, the Appeal, and the exhibits attached hereto.

24 V. ARGUMENT AND AUTHORITY

25 Under SMC 25.05.908 A. - Environmentally critical areas – the relevant provision

reads as follows:

A. Pursuant to WAC 197-11-908 and 197-11-305(1)(a), proposals identified in subsection (C) and located within the following environmentally critical areas are not categorically exempt from review under this chapter.

1. Landslide-prone areas, including, but not limited to, known landslide areas, potential landslide areas, and steep slopes of forty (40) percent average slope or greater;

However, the scope of SEPA review for this category of property is extremely limited. Specifically, under SMC 25.05.908 B., review is limited to the following:

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.

Under SMC 25.05.908 B., SDCI's review and subsequent Decision was limited to the above criteria. This means that the Appellants are limited to these issues on appeal. The Appeal should be dismissed because the Appellants fail to raise any of these issues.

Hearing Examiner Rules of Practice and Procedure ("HER") 3.02(a) reads as follows:

An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought nearly to secure delay.

Under HER 3.02(a), there are several bases for dismissing the Appeal. However, the

1 simplest and the most compelling reasons for dismissal are that (1) the Appeal is without
2 merit on its face; and (2) the Appeal fails to state a claim for which the Hearing Examiner
3 has jurisdiction to grant relief.

4 **A. The Appeal, and the objections therein, are without merit on their face.**

5 The Appeal of SDCI's determination of non-significance under SEPA does not
6 allege that the Applicant's proposal is either (1) inconsistent with the ECA regulations under
7 SEPA; or (2) will have a potentially significant impact on critical areas that are not
8 addressed in ECA regulations.

9 1. Density.

10 The Appellants' first objection to the Decision is based on "density", alleging that
11 the SMC only allows for the development of three residences on the Property pursuant to
12 SMC 23.45.512. Appellants further allege that based on the density and close proximity of
13 the buildings "it is unlikely that the occupants in buildings 1 and 2 will be able to reasonably
14 maneuver their vehicles into their respective garages." Appeal at A. According to the
15 Appellants, as a result of the close proximity, it is likely that the "owners will not be able to
16 park their vehicles off the street." Appellants' objections relating to density are without
17 merit on their face.

18 Issues of density and parking do not concern the ECA and are beyond the limited
19 scope of SEPA review. Therefore, they may not be raised on appeal.

20 2. Stabilized Soil.

21 The Appellants next allege that the slope is inaccurately calculated and that slope is
22 "certainly over the 40% critical slope threshold." Appeal at C. However, that is not the basis
23 for the Decision by SDCI to permit development in the steep slope area.

24 Although development is generally prohibited in steep slope areas under SMC
25 25.09.180 B.1., development is permitted if "the applicant demonstrates that the provisions

1 of subsections 25.09.180 B.2 or 25.09.180 E apply.” Subsection 25.09.180 B.2 applies to
2 the Property and therefore development is allowed.

3 The Applicant applied for and was granted an exemption under SMC 25.09.180
4 B.2.c. because the steep slope area at issue is demonstrated to be “less than 20 feet in height
5 and more than 30 feet from other Steep Slope Critical Areas.” Decision at 2 (quoting the
6 Exemption). The Exemption was granted because the geotechnical report “demonstrated
7 that no adverse impacts would result from allowing construction within the steep slope area,
8 provided the conditions in the report” are adhered to. Decision at 2 (quoting the
9 Exemption).

10 The Appellants do not challenge the Exemption or that the Property is not subject to
11 the Exemption under SMC 25.09.180 B.2.c.

12 3. Trees.

13 The Appellants make three objections related to “trees.” First, Appellants allege that
14 “[t]here are 7 existing trees listed on the arborist report, yet drawings show 5 trees.” Appeal
15 at E. Second, Appellants stated that “[a]t least 2 trees (CH6) are within the critical slope
16 area that should not be removed.” Appeal at E. Finally, Appellants state that the “City of
17 Seattle Office for Sustainability of Environment 2007 Tree Canopy map shows this site with
18 significant trees within the local area.” Appeal at E. All three objections relating to “trees”
19 simply allege factual statements.

20 Appellants fail to relate the trees to the ECA or slope stability and further fail to
21 allege that the cutting of the trees will cause a stability issue. Additionally, Appellants do
22 not seek any relief relating to the trees at issue let alone the two trees in the “critical slope
23 area.” As a result, Appellants’ objections relating to “trees” are without merit and must be
24 dismissed.

25 Consequently, because the objections raised by the Appellants are outside the limited

1 scope of SEPA review and because Appellants fail to demonstrate how the proposal is
2 inconsistent with the ECA regulations under SMC 25.09 or that any of these issues will have
3 a potential significant impact on the ECA not addressed under the SMC, the Appeal, and the
4 objections raised therein, is without merit on its face.

5 **B. The Hearing Examiner does not have jurisdiction to grant the relief requested**
6 **by the Appellants.**

7 Even if the objections raised by the Appellants had merit and fell within the limited
8 scope of SEPA review, the Appeal is still subject to dismissal because the Hearing Examiner
9 does not have jurisdiction to grant the relief Appellants request.²

10 1. “Reverse the decision based on inadequate documentation.”

11 Appellants request that the decision (assumed to be SDCI’s Decision of a
12 determination of non-significance) be reversed because of inadequate documentation.
13 Appellants fail to articulate how the documentation is inadequate and how SDCI’s Decision
14 was in error. Instead, the Appellants simply request that documents be drafted *differently*,
15 stating that it “appears the engineer may have misrepresented a proper section and slope
16 direction in order to calculate a 38.6% slope within an area that is certainly over the 40%
17 critical slope threshold.” Appeal at C. Again, SDCI’s decision that development is
18 permitted in the steep slope area is not based on the slope – it is based on the Exemption.

19 Although a Hearing Examiner has the authority to reverse a SEPA determination of
20 non-significance, such a request must be based on facts and evidence; a blanket statement
21 requesting reversal of SDCI’s Decision without supporting facts or authority is insufficient
22 and the Hearing Examiner may not grant the relief Appellants request. It would also be
23 absurd to argue that the Hearing Examiner should issue a determination of significance and
24 order the Applicant to prepare an EIS for a four unit property.

25 _____
² Each request is quoted directly from the Appeal. No edits or changes have been made.

1 2. “G. The original application showed 3 structures on the site. We request the
2 City enforce SMC 23.45.512 yielding no more than 3 dwellings or vindicate
3 allowing this builder an exception as the submitted revision 4 configuration that
4 exceeds healthy L1 residential development.”

5 This request is outside the scope of SEPA review, was not addressed by SDCI in its
6 Decision, and therefore the Hearing Examiner does not have jurisdiction to grant this relief.

7 3. “H. There are proposed window locations on the 4 homes with bedroom
8 floors looking directly across into other bedroom floors 10-12 feet away. Large
9 master bedroom windows (above tree heights) look west directly into the master
10 bedrooms of the adjacent properties on 23rd. The location and height of these
11 windows must be coordinated with adjacent homes to respect privacy.”

12 Potential privacy concerns are not related to ECA, are outside the scope of SEPA
13 review, and were not addressed by SDCI. Therefore, the Hearing Examiner does not have
14 jurisdiction to grant the relief requested.

15 4. “J. Drawings show two windows in elevation but not on the floor plan (top
16 floor opening into a master closet).”

17 Drawings related to window placement are not related to ECA, are outside the scope
18 of SEPA review, and were not addressed by SDCI. Therefore, the Hearing Examiner does
19 not have jurisdiction to grant the relief requested.

20 5. “K. Provide vehicle access and turning diagrams for townhouse-sized
21 vehicle into the proposed garages. One diagram must be for each of the 4 garages
22 with marked dimensions while demonstrating the approach both entering and
23 backing away from the garage to the street.”

24 The location of garages and the ingress and egress path of a vehicle coming to and
25 from the Property is outside the scope of SEPA review, was not considered by SDCI in its
Decision, and is not properly before the Hearing Examiner.

6. “L. Given the above, buildings 3 and 4 should be reconfigured into 1 home
or as a row-house with abutting walls rather than a 10'-gap. This would reduce
privacy issues, differentiate entrances, and save existing 30'-tall trees near the north
and south property lines.”

1 Again, privacy issues are not within the scope of a SEPA review, were not
2 considered by SDCI, and the Hearing Examiner does not have jurisdiction to grant this
3 relief.

4 7. “M. We need assurance that concerns of the soil stability raised with Nelson
5 Geotechnical Associates (posted May 26, 2016) are demonstrated to be addressed
6 rather than requesting variances. Drawing slope diagrams must be corrected and
7 verified with actual conditions.”

8 The Appellants want the Hearing Examiner to direct the Applicant and the City to
9 provide assurances of soil stability and compliance with permit requirements. The
10 Exemption and the Report address these issues and were part of SDCI’s evaluation in
11 issuing its determination of non-significance. The Appellants do not challenge the validity
12 of the Exemption; they only challenge that the slope is greater than 40 percent.

13 Specifically, the Appellants want assurances that the SMC and permitting will be
14 followed and that the Applicant will comply with the development requirements imposed on
15 the Property. Because Appellants fail to state a valid challenge to SDCI’s Decision, the
16 Hearing Examiner does not have jurisdiction to grant the relief requested.

17 8. “N. Temporary excavations within critical slope areas endanger adjacent
18 properties already within City-designated mud-slide hazard areas. Revise the
19 location of the red line excavation to be equidistant from the edge of proposed
20 buildings (excluding proposed central drive area).”

21 Appellants have no valid basis to request a revision of the “red line excavation”.
22 While untrue and unsupported, this is simply a factual allegation and not a request for relief.
23 Therefore, the Hearing Examiner does not have jurisdiction to grant the relief, if any,
24 requested.

25 9. “P. Maintain or provide detail on temporary and permanent soil retention.
Submit drawings/calculations how”

Appellants fail to argue how the information submitted to SDCI is inadequate. SDCI

1 addressed soils in its Decision, finding that after review of the materials submitted by the
2 Applicant, the “existing Grading and Stormwater Codes will sufficiently mitigate adverse
3 impacts to the ECAs.” Decision at 4. SDCI further found that no additional conditioning
4 was warranted pursuant to SEPA policies.

5 To the extent the Appellants seek information, drawings, and/or documents that are
6 not required under ECA regulation at this stage in the permit process, or that are not
7 necessary under SEPA, then the Hearing Examiner does not have jurisdiction to grant the
8 requested relief.

9 For the reasons set forth above, this Appeal must be dismissed for failing to state a
10 claim for which the Hearing Examiner has jurisdiction to grant the requested relief.

11 VI. CONCLUSION

12 In its determination of non-significance, SDCI would not have had authority, much
13 less jurisdiction, to grant the relief that the Appellant requests. Therefore, the Hearing
14 Examiner does not have the authority to award the relief requested.

15 Furthermore, HER 3.02(a) allow the Hearing Examiner to dismiss an appeal prior to
16 the hearing if the appeal fails to state a claim for which the Hearing Examiner has
17 jurisdiction to grant relief, is without merit on its face, is frivolous or is brought merely to
18 secure delay. The Appeal fails to raise a valid objection to the narrow scope of SEPA
19 review and is without merit on its face. Accordingly, it is respectfully requested that the
20 Hearing Examiner dismiss the Appeal with prejudice.

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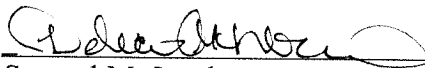
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1 Respectfully submitted this 19th day of August, 2016.

2 HELSELL FETTERMAN LLP

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