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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In re:  
  
APPROVAL OF APPLICATION NO. 3021625  
FOR PROJECT LOCATED AT 1706 ALKI AVE  
S.W.

No. MUP-16-024  
  
RESPONDENTS' JOINT MOTION FOR  
PARTIAL DISMISSAL

**I. INTRODUCTION**

Appellant Scott Francis (“Appellant”) has raised several issues that are outside the subject matter jurisdiction of the Hearing Examiner. Applicant 1708-1708 Alki Ave SW (“Alki Ave”) and Respondent City of Seattle (“City”) respectfully request that the Hearing Examiner grant this motion to dismiss those issues in the appeal that the Hearing Examiner lacks jurisdiction to consider.

**II. FACTS**

Alki Ave proposes to construct two, three-story townhouse structures (for a total of seven units) and ten parking spaces at 1706-1708 Alki Avenue SW in West Seattle (“Project”). See Appeal of Scott Francis (“Appeal”), Exh. A. The Project site is located in a liquefaction and a

1 landslide-prone environmentally critical area, and the eastern portion of the project is located  
2 within a steep slope buffer. Declaration of Katie Kendall (“Kendall Decl.”), Exh. A. The Project  
3 is not located in a fish and wildlife habitat conservation area or a riparian corridor. Kendall  
4 Decl., Exh. B. A portion of the Project site is also located within 200 feet of the ordinary high-  
5 water mark of the Puget Sound, and is located in the Urban Residential (“UR”) Shoreline  
6 Environment. Kendall Decl., Exh. C.

8 The Project was subject to the Streamlined Design Review (“SDR”) process under SMC  
9 23.41.018. During the SDR process, Applicant requested adjustments of certain yard setback  
10 requirements found at SMC 23.45.518. Per SMC 23.41.018.D.4.a, an applicant can seek an  
11 adjustment to reduce yard setback requirements by maximum of 50 percent. Staff of the  
12 Department of Planning and Development, now known as the Seattle Department of  
13 Construction and Inspections (“SDCI”), recommended that the setback adjustments be provided.

15 Even with the setback adjustments, the rear proposed structure will be located within the  
16 steep slope buffer located to the east of the Property and outside of the shoreline environment.  
17 The applicant sought a variance under SMC 25.09.180.E to permit development within this steep  
18 slope buffer. It is anticipated that the project would disturb approximately 68% of the steep  
19 slope buffer located on the project site. Appeal, Exh. A. The remaining buffer area will either be  
20 left undisturbed or revegetated after removal of non-native vegetation and invasive plants and  
21 noxious weeds. *Id.*

23 SDCI conducted a thorough review of the Project under its Shoreline Master Program,  
24 the State Environmental Policy Act (“SEPA”), and the Environmental Critical Areas Ordinance  
25 (SMC Chapter 25.09).  
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1 On November 17, 2016, the City issued a Master Use Permit decision (“MUP”)  
2 consisting of a shoreline substantial development permit (“SSDP”), a SEPA determination of  
3 nonsignificance with conditions (“DNS”) for the Project, and an Environmentally Critical Areas  
4 (“ECA”) Variance to allow development in a steep slope area buffer under SMC 25.09.180.E. *Id.*

5  
6 Appellant filed this appeal challenging the MUP decision. Review of the appeal reveals  
7 that the appeal raises issues the Hearing Examiner lacks jurisdiction to consider. This motion  
8 seeks to dismiss all issues that exceed the Examiner’s jurisdiction.

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10 **III. ISSUE**

11 Should the Hearing Examiner dismiss Appellant’s claims related to the streamlined  
12 design review process, claims regarding compliance with the City’s ECA regulations that do not  
13 relate to the ECA Variance granted under SMC 25.09.180.E, and claims regarding the City’s  
14 compliance with SEPA, when the Hearing Examiner lacks jurisdiction to hear these issues under  
15 the SMC?

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17 **IV. EVIDENCE RELIED UPON**

18 This motion relies on the pleadings and papers on file in this action and the Declaration  
19 of Katie Kendall filed concurrently with this motion.

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21 **V. ARGUMENT**

22 **A. Claims may be dismissed for failure to state a claim upon which relief may be  
23 granted or when they are without merit on their face.**

24 “An appeal may be dismissed without a hearing if the Hearing Examiner determines that  
25 it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is  
26 without merit on its face, frivolous, or brought merely to secure delay.” Hearing Examiner Rules  
27 of Practice and Procedure, Rule 3.02. “Any party may request dismissal of all or part of an  
28 appeal by motion.” *Id.*

1 **B. The Hearing Examiner lacks jurisdiction to consider appeals of Type I issues.**

2 In the City of Seattle, a Master Use Permit must be obtained for all development projects  
3 that require “Type I,” “Type II,” and/or “Type III” decisions. Type I decisions are administrative  
4 decisions made by SDCI which are not appealable to the Hearing Examiner. SMC  
5 23.76.022.A.1. Instead, Type I decisions must be challenged administratively, if at all, through a  
6 land use interpretation request under SMC 23.88.020, provided the interpretation request is  
7 timely filed. *Id.* Type II decisions are discretionary decisions made by SDCI that are subject to  
8 appeal to the Hearing Examiner. SMC 23.76.004.B; SMC 23.76.022A.2.

9 Accordingly, if a MUP decision contains Type I and Type II decisions, only the Type II  
10 components of the decision may be appealed to the Hearing Examiner. If an appellant wants to  
11 challenge a component of a MUP decision that is classified as a Type I decision, it must file a  
12 request for interpretation along with its appeal of any Type II decision to the Hearing Examiner.  
13 SMC 23.88.020.C.3.c.

14 Here, the MUP for the Project included Type I and Type II decisions. The Appellant  
15 filed this appeal to the Hearing Examiner, but did not file any interpretation requests under SMC  
16 23.88.020. As a quasi-judicial official, the Hearing Examiner “has only the authority granted it  
17 by statute and ordinance.” *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61  
18 P.3d 1141 (2003); HER 2.03. SMC 23.76.022.C.6 limits the Hearing Examiner’s scope of  
19 review on appeal to “compliance with the procedures for Type II decisions as required in this  
20 chapter 23.76.” SMC 23.76.006. Because the Hearing Examiner only has jurisdiction over Type  
21 II issues, only the following Type II issue in the MUP decision can be considered by the  
22 Examiner: consistency with requirements for an Environmentally Critical Areas variance under  
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1 SMC 25.09.180.E.<sup>1</sup> See SMC 23.76.006.B.13 and 19; SMC 25.09.180.E.4 (“The process and  
2 procedures for a variance under this subsection E shall be as prescribed for Type II land use  
3 decisions in Chapter 23.76.”).

4 As outlined below, the Examiner has no jurisdiction to consider the other arguments  
5 raised by Appellant.  
6

7 **1. The Hearing Examiner should dismiss Streamlined Design Review claims**  
8 **raised in the appeal for lack of jurisdiction.**

9 Appellant claims that the City improperly granted adjustments to the front and side  
10 setbacks as part of the City’s SDR process. This allegation is not properly before the Examiner.  
11 The question of whether the Project complies with SDR guidance in the SMC is a Type I  
12 decision that the Examiner lacks jurisdiction to consider. See SMC 23.76.006B.13 (“streamlined  
13 design review decisions pursuant to Section 23.41.018 if no development standard departures are  
14 requested pursuant to Section 23.41.012” is a Type I decision).  
15

16 Appellant’s SDR process claims do not involve Type II decisions. Rather, they allege  
17 inconsistency with the SDR design guidance report, adopted design guidelines, and existing  
18 adjacent uses. See Appeal, p. 3. The scope of the Examiner’s jurisdiction does not extend to  
19 consideration of these issues.  
20

21 The SMC explicitly states that “[a]djustments to certain development standards pursuant  
22 to subsection 23.41.018.D may be approved as a Type I decision.” SMC 23.41.018.C.2. SMC  
23 23.41.018.D.4.a permits SDCI to adjust the setback and separation requirements by a maximum  
24 of 50 percent. Here, the Applicant, sought, and SDCI allowed, up to a 50 percent reduction of  
25 front, side and rear yard setback requirements, in full compliance with SMC 23.41.018.D.4.a.  
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27 <sup>1</sup> As discussed *infra*, to the extent Appellant’s allegations raise SEPA claims, an appeal of the City’s SEPA  
28 determination is not properly before the Hearing Examiner.

1 This decision is accordingly a Type I decision made by SDCI that must have been challenged  
2 through an interpretation request along with the appeal of the Type II MUP. SMC  
3 23.88.020.C.3.c. An interpretation request was never filed.

4 The Hearing Examiner accordingly does not have jurisdiction to consider Appellant's  
5 SDR claims and these claims must be dismissed. *HJS Development*, 148 Wn.2d at 471; HER  
6 2.03.  
7

8 **2. The Hearing Examiner should dismiss all ECA claims raised in the appeal**  
9 **that are not related to the ECA Variance for lack of jurisdiction.**

10 Appellant raises a number of issues related to consistency with the City's ECA  
11 regulations. Specifically, Appellant alleges that the City's Decision failed to condition the  
12 Project as it relates to habitat for protected species,<sup>2</sup> drainage, and potential construction impacts.  
13 None of these allegations relates to the City's approval of the ECA Steep Slope Variance and the  
14 variance criteria the City is required to consider under SMC 25.09.180.E and SMC 25.09.280.B,  
15 and they are accordingly outside of the jurisdiction of the Hearing Examiner to consider.<sup>3</sup>  
16

17 All determinations of the applicability of, and consistency with, ECA requirements are  
18 Type I decisions and are not appealable to the Hearing Examiner. SMC 25.09.017.F. Section  
19 25.09.017 provides that, other than those relating to code interpretations, "administrative appeal  
20 provisions set out in Title 23 do not apply to decisions under this chapter, except as specifically  
21 provided." Title 23 addresses Hearing Examiner appeals. However, there is no Hearing  
22 Examiner appeal specifically provided for in Chapter 25.09 for ECA compliance. *See generally*  
23 *SMC 25.09*. Appellant has not sought a land use interpretation and cannot do so now.  
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27 <sup>2</sup> The Project is not located in a fish and wildlife habitat conservation area, and Appellant has not alleged otherwise.  
28 Kendall Decl., Exh. B. Even if the Project were located in this type of critical area, however, compliance with the  
ECA regulations is a Type I decision not appealable to the Hearing Examiner. SMC 25.09.017.F.

1 The Hearing Examiner does not have jurisdiction to consider those ECA claims that are  
2 not related to the ECA Variance granted under SMC 25.09.180.E, and these claims must  
3 accordingly be dismissed. *HJS Development*, 148 Wn.2d at 471; HER 2.03.

4 **C. The Hearing Examiner lacks jurisdiction to consider claims regarding SEPA**  
5 **because the Shorelines Hearings Board has sole jurisdiction over issues relating to**  
6 **the Shoreline Management Act and associated environmental determinations.**

7 Appellant challenges the City's SEPA determination to issue a Determination of  
8 Nonsignificance. Pursuant to RCW 43.21C.075(7), the Shorelines Hearings Board has sole  
9 jurisdiction over issues relating to the Shoreline Management Act and associated environmental  
10 determinations. *See* SMC 23.76.022.B (“An appeal of related environmental actions, including a  
11 Determination of Nonsignificance (DNS), determination that an EIS is adequate, and the  
12 decision to grant, condition or deny the shoreline proposal based on the City's SEPA Policies  
13 pursuant to Section 25.05.660, shall be consolidated in the appeal to the Shorelines Hearings  
14 Board”).

15  
16 Because the Shorelines Hearings Board has exclusive jurisdiction to hear an appeal of  
17 actions related to the issuance of an SSDP, such as the DNS issued by the City, the Hearing  
18 Examiner lacks jurisdiction to hear Appellant's SEPA claims in Section III.C, as well as any  
19 other claims relating to SEPA in this appeal. *McQuarrie v. City of Seattle*, SHB No. 08-033  
20 (Order on Summary Judgment, April 27, 2009) (holding that the Shorelines Hearings Board has  
21 jurisdiction over appeals of SEPA decisions).

22  
23 Accordingly, Appellant's SEPA claims are not properly before the Hearing Examiner and  
24 should be dismissed.

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27 <sup>3</sup> As discussed *infra*, to the extent Appellant's allegations raise SEPA claims, an appeal of the City's SEPA  
28 determination is not properly before the Hearing Examiner.


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VI. CONCLUSION


For these reasons, the Applicant and the City request that the Hearing Examiner enter an order dismissing all claims regarding compliance with the streamlined design review process, all claims regarding compliance with the City's ECA regulations that do not relate to the ECA Variance granted under SMC 25.09.180.E, and all claims related to SEPA compliance.

DATED this 30<sup>th</sup> day of January, 2017.

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