BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: EPIC, et al., From a Department of Construction and Inspections decision.	No. MUP-17-001 DCI Reference: 3020845 RESPONDENTS KING COUNTY AND APPLICANT'S JOINT MOTION TO DISMISS

I. INTRODUCTION AND RELIEF REQUESTED

This is an appeal of the Master Use Permit ("MUP") for King County's ("County's") Children and Family Justice Center ("CFJC") project ("Project"). The MUP includes two components: (1) modification or waiver of development standards for youth service centers under Seattle Municipal Code ("SMC" or "City Code") 23.51A.004; and (2) the imposition of conditions pursuant to the City of Seattle's ("City's") substantive State Environmental Policy Act ("SEPA") authority. The MUP does not authorize a change of use of the Project site. The appeal in this matter suffers from a number of fatal flaws, which require dismissal of the appeal in whole or in part. Specifically:

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- Decisions not subject to Hearing Examiner review. This appeal must be dismissed in its entirety because decisions made in the MUP are not subject to administrative appeal under SMC 23.76.006.C.
- Failure to demonstrate standing. In the alternative, this appeal must be dismissed in its entirety because appellant EPIC, and additional listed organizations and individuals ("Listed Organizations"), fail to demonstrate standing to challenge the decisions made in the MUP.
- Failure to preserve appeal. If this appeal is not dismissed in its entirety, then Listed Organizations who failed to appeal in accordance with the City Code and Examiner Rules must be dismissed from this appeal.
- Failure to comment. If this appeal is not dismissed in its entirety, then many of the Listed Organizations must be dismissed from the SEPA component of this appeal because they failed to comment on the Project.
- Failure to provide specific objections. If this appeal is not dismissed in its entirety, then the Hearing Examiner should dismiss those issues that EPIC has not stated with specificity and which it refused to clarify.
- Issues outside Hearing Examiner jurisdiction. If this appeal is not dismissed in its entirety, then the Hearing Examiner must dismiss several issues over which the Hearing Examiner lacks jurisdiction, including:
    - Constitutional claims;
    - Claims based on an inapplicable standard of review;
    - Claims regarding "piecemealing" of the original environmental review;

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- Claims relating to social justice policies and the Open Housing Ordinance (SMC Chapter 14.08);
- Claims relating to Type I decisions; and
- Additional SEPA claims that are untimely, not subject to administrative appeal and outside the scope of SEPA.

For these reasons, Respondents County and Peter Donnelly ("Applicant") (collectively, "Respondents") respectfully request that the Hearing Examiner dismiss this appeal in whole or in part.

II. STATEMENT OF FACTS

The Project includes one four-story structure containing courtrooms, office space, detention housing and school, and one four-story parking structure for 360 vehicles. Master Use Permit for Project No. 3020845 ("MUP"), pp. 1-2. A mitigated determination of nonsignificance ("MDNS") was issued for the Project by King County on December 5, 2013. On January 8, 2014, the County published a SEPA Notice of Action indicating its decision to proceed with the Project and identifying time limitations on any associated SEPA appeal, in accordance with RCW 43.21C.080. Declaration of Courtney A. Kaylor ("Kaylor Declaration"), Exs. A, B.

An application for the Project was submitted to the City Department of Construction and Inspections ("SDCI"). SDCI reviewed the Project for compliance with the substantive requirements of the City Code. The Project required the modification or waiver of development standards for youth service centers. SDCI reviewed and approved the requested modification or waiver. Specifically, structure width and side setback standards were modified for portions of the structure. MUP, pp. 3-6. SDCI utilized King County's MDNS. In addition, SDCI exercised

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its substantive authority under SEPA and imposed additional conditions on the Project. MUP, pp. 6-17.

The City issued the MUP on December 22, 2016. The MUP had two components: (1) the modification or waiver of development standards for youth service centers; and (2) the imposition of substantive SEPA conditions. MUP, pp. 3-17.

This appeal followed. EPIC submitted appeal documents that contain duplicative and vague appeal issues. *See* (Amended) Objections to Land Use Decision ("Appeal"). Prior to and during the prehearing conference in this matter, the Applicant requested clarification of several issues and the Hearing Examiner required clarification by February 2, 2017. On that date, EPIC submitted a response to the motion to clarify which, with few exceptions, is unresponsive and declines to clarify most issues. *See* Appellants' Response to Motion to Clarify.

Respondents now move to dismiss.

III. STATEMENT OF ISSUES

The issues raised in this motion are: (1) whether the Hearing Examiner should dismiss this action because the MUP is not subject to Examiner appeal; (2) in the alternative, whether the Hearing Examiner should dismiss this action because EPIC and Listed Organizations have not demonstrated standing; (3) if this appeal is not dismissed in its entirety, whether Listed Organizations who have not preserved an appeal as required by the City Code and Hearing Examiner Rules should be dismissed; (4) if this appeal is not dismissed in its entirety, whether numerous Listed Organizations should be dismissed from the SEPA component of this appeal because they failed to comment; (5) if this appeal is not dismissed in its entirety, whether the Hearing Examiner should dismiss those issues that EPIC has not stated with specificity and which EPIC refused to clarify in direct violation of the Examiner's Prehearing Order; (6) if this

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appeal is not dismissed in its entirety, whether the Hearing Examiner should dismiss issues over which the Examiner lacks jurisdiction, including: (a) constitutional claims, (b) claims based on an inapplicable standard of review, (c) claims regarding "piecemealing" of the original environmental review, (d) claims relating to social justice policies and the Open Housing Ordinance, (e) claims relating to Type I decisions, and (f) additional SEPA claims that are untimely, not subject to administrative appeal and outside the scope of SEPA.

IV. EVIDENCE RELIED UPON

This motion relies on the papers and pleadings in this matter and the Kaylor Declaration submitted concurrently with this motion. The papers and pleadings in this action include the Appeal, the Interests of Appellants in Decision ("Interests Statement"), the Prehearing Order, and the MUP, among other documents.

V. AUTHORITY

A. The Hearing Examiner may dismiss an appeal over which the Examiner lacks jurisdiction or that is without merit on its face, frivolous or brought merely to delay.

"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 merely to secure delay." Hearing Examiner Rules of Practice and Procedure ("HER"), Rule 3.02. "Any party may request dismissal of all or part of an appeal by motion." *Id*.

B. The Hearing Examiner should dismiss this action because the MUP is not subject to Examiner appeal.

The Hearing Examiner should dismiss this action because the MUP is not subject to Examiner appeal. As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451,

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471, 61 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120; HER 2.03. The Seattle Land Use Code (SMC Chapter 23) provides that only some land use decisions classified as "Type II" decisions are subject to appeal to the Hearing Examiner. SMC 23.76.006.C.2.o; SMC 25.05.680.A.1 (for proposals requiring a MUP for which SDCI or a non-City agency is lead agency, SEPA appeal procedures are governed by Chapter SMC 23.76). Specifically, SMC 23.76.006.C provides, in pertinent part:

> C. The following are Type II decisions:
>
> 1. The following procedural environmental decisions for Master Use Permits and for building, demolition, grading, and other construction permits are subject to appeal to the Hearing Examiner and are not subject to further appeal to the City Council (supplemental procedures for environmental review are established in Chapter 25.05, Environmental Policies and Procedures):
>
> a. Determination of Non-significance (DNS), including mitigated DNS;
>
> b. Determination that a final environmental impact statement (EIS) is adequate; and
>
> c. Determination of Significance based solely on historic and cultural preservation.
>
> 2. The following decisions are subject to appeal to the Hearing Examiner (except shoreline decisions and related environmental determinations that are appealable to the Shorelines Hearings Board):
>
> a. Establishment or change of use for temporary uses . . .;
>
> b. Short subdivisions;
>
> c. Variances . . .;
>
> d. Special exceptions . . .;
>
> e. Design review decisions . . .;
>
> f. Administrative conditional uses . . .;
>
> g. The following shoreline decisions . . .

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1) Shoreline substantial development permits;

2) Shoreline variances; and

3) Shoreline conditional uses;

h. Major Phased Developments;

i. Determination of project consistency with a planned action ordinance, only if the project requires another Type II decision;

j. Establishment of light rail transit facilities . . .;

k. Downtown planned community developments;

l. Establishment of temporary uses for transitional encampments . . .;

m. Modification of mitigation amounts . . .; and

n. Modification of payment or performance amounts . . .; and

o. Except for projects determined to be consistent with a planned action ordinance, decisions to approve, condition, or deny based on SEPA policies if such decisions are integrated with the decisions listed in subsections 23.76.006.C.2.a. through 23.76.006.C.2.l . . .

SMC 23.76.006.C (emphasis added)

The MUP is not subject to appeal under SMC 23.76.006.C.1 because the MDNS was issued by the County, not the City, and the appeal period for that decision ran long ago. Kaylor Declaration, Exs. A, B; *see also* Section G.3, *infra*. The only SEPA action taken by the City was the imposition of substantive SEPA conditions. MUP, pp. 1, 16-17. That action is not included among the SEPA actions listed in SMC 23.76.006.C.1.

The MUP is also not subject to appeal under SMC 23.76.006.C.2 because the modification or waiver of development standards under 23.51A.004 is not one of the decisions identified in Section 23.76.006.C.2.a-n. In addition, the City's substantive SEPA decision

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contained in the MUP was not integrated with any of the decisions listed in 23.76.006.C.2.a-l. Accordingly, the SEPA decision is not subject to administrative appeal.

The Hearing Examiner must interpret and apply the City Code according to its plain meaning. *Post v. City of Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). Under the plain meaning of SMC 23.76.006.C, the decisions made in the MUP are not subject to administrative appeal. This provides a separate and independent ground on which the Hearing Examiner must dismiss this appeal in its entirety.

C. The Hearing Examiner must dismiss this matter because EPIC has not established standing.

In the alternative, the Hearing Examiner must dismiss this matter because EPIC and Listed Organizations have not established standing. This provides a separate and independent ground on which the Hearing Examiner must dismiss this action in its entirety.

1. EPIC has not established standing to challenge the modification or waiver of development standards for youth service centers.

The Hearing Examiner Rules require an appeal to state "how the appellant is significantly affected by or interested in the matter appealed." HER 3.01(d)(2). The rule reflects the threshold requirement that an appellant must have standing. "Standing is a constitutional doctrine designed to assure that the plaintiff has a direct stake in the controversy." *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992). The United States Supreme Court has stated the test as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, see id., at 756; *Warth v. Seldin*, 422 U.S. 490, 508, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore, supra*, at 155 (*quoting Los Angeles v. Lyons*, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)). Second, there must be a causal

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> connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id*., at 38, 43.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L.Ed.2d 351, 364, 6 Fla. L. Weekly Fed. S. 374 (1992).

In this case, the only decision within the MUP subject to the Hearing Examiner's jurisdiction (other than SEPA conditioning, which is discussed below) is the approved modification to structure width and side setback standards. MUP, pp. 3-6. In order to establish standing to challenge this decision, EPIC and the Listed Organizations must show that they are "significantly affected by or interested in" the modification to structure width and side setback standards.

In its appeal documents, EPIC states:

> The Appellants have varied interests in the project. Standing will be demonstrated in the hearing for several organizations, which should be sufficient for the Hearing Examiner's jurisdiction. Appellant organizations represent individuals who will be negatively impacted by the proposed project, including (1) people living nearby the project and suffering impacts from the construction and operation of the proposed facility: (sic) (2) people who will be negatively impacted by the operation of the proposed jail; (3) taxpayers who would be required to fund the proposed facility. Other organizations represent populations that are at risk of over-incarceration in the detention facility and populations that rely upon public services that are placed at risk by the proposed project's inordinate waste of public resources and tax dollars. Most individuals and organizations involved as Appellants have an interest in protecting the lives of the kids – most of whom are kids of color – that would be placed at risk through the construction and operation of the facility.

Interest Statement, p. 1. None of the stated interests relate to the decision to modify or waive structure width and side setback standards. Yet this is the only decision (other than the exercise of substantive SEPA authority, discussed below) contained in the MUP. Specifically:

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- EPIC claims that people living near the Project will "suffer impacts" from Project construction and operation. No document before the Examiner states whether these people are members of any Listed Organization and, if so, of which organizations they are members. Furthermore, no document identifies the identity of any member of any Listed Organization. No document states whether individual members live near the Project, nor how any individual will be impacted. In particular, no document identifies how these impacts will result from the decision under review, namely, the decision to modify structure width and side setback standards. EPIC has not established standing for itself or any Listed Organization.
- EPIC alleges that Listed Organizations represent people who will be negatively impacted by the operation of the Project. EPIC fails to state whether these people are members of any Listed Organization and, if so, of which organization they are members. No document identifies the identity of these members. In addition, the MUP does not authorize a new use or approve or control operations. The only decision before the Examiner is the waiver of development standards for structure width and side setbacks.
- EPIC alleges that Listed Organizations represent taxpayers who would be required to fund the proposed facility. Yet the MUP decision, while addressing the voter-approved Project, does not relate to funding. Furthermore, to allow taxpayer standing in the land use context would effectively eliminate the requirement that appellants must suffer a "concrete and particularized" injury in fact resulting from the

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challenged decision.[1] The Hearing Examiner should reject this absurd result.

- EPIC alleges that Listed Organizations represent populations at risk of over-incarceration and populations that rely on public services placed at risk by the Project. EPIC fails to state whether these populations are members of the Listed Organizations and, if so, of which organizations they are members. No document identifies the identity of these members. This alleged injury is not "concrete and particularized." It identifies neither how any risk of over-incarceration results from the challenged decision to modify development standards, nor how any public service is placed at risk by the challenged decision, and it is entirely speculative.
- EPIC alleges that "most" of the Listed Organizations have an interest in "protecting the lives of the kids . . . that would be placed at risk through the construction and operation" of the Project. However, issues related to the continuation of existing uses of the site are outside the scope of the decision made in the MUP. The allegation fails to identify how the life of any child would be placed at risk by the construction of the Project, and is otherwise speculative.

In sum, EPIC fails to establish standing and its challenge to the modification or waiver of development standards for youth service centers must be dismissed.

2. EPIC has not established SEPA standing.

EPIC and Listed Organizations lack standing under SEPA because they have not demonstrated an injury in fact. Also, some of the stated interests are not within SEPA's zone of interests.

[1] EPIC's "taxpayer" theory also appears to be an attempt to reassert claims that were rejected in *End Prison Industrial Complex v. King County*, Pierce County Superior Court #16-2-07335-2, and that are currently pending before Court of Appeals, Division II.

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It is well established that an appellant must establish standing in order for a SEPA appeal to be heard:

> The courts have established a two-part test for SEPA standing: the interest sought to be protected must arguably be within the zone of interests to be protected or regulated by the statute; and the petition must allege an "injury in fact." *Trepanier v. City of Everett,* 64 Wn. App. 380, 824 P.2d 524 (1992), *rev. denied,* 119 Wn.2d 1012 (1992). The Court in *Trepanier* also stated that when a person [or corporation] alleges a "threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. If the injury is merely conjectural or hypothetical, there can be no standing." 64 Wn. App. at 383.

See Examiner's Order on Motions to Dismiss/Cross Motion for Summary Judgment, *In the Matter of the Appeal of Laurelhurst Community Club and Seattle Community Council Federation from a DNS by DPD*, Hearing Examiner File W-11-007, p. 2 (2011).

In order for EPIC to show injury in fact, it must present affirmative evidence through the submittal of affidavits or other means that it will be specifically and adversely affected by the City's SEPA decision. *Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997). A bald assertion of injury without supporting evidentiary facts is insufficient to support standing. *CORE v. Olympia,* 33 Wn. App. 677, 682-683, 657 P.2d 790 (1983).

In this case, the City's SEPA decision did not include issuance of the MDNS. That decision was made by the County in 2013 and is no longer subject to review. *See* Kaylor Declaration, Exs. A, B; Section G.3, *infra*. Instead, the only SEPA decision embodied in the MUP is the decision to impose additional conditions on the Project pursuant to the City's substantive SEPA authority. Specifically, the MUP adds SEPA conditions requiring: (1) King County to record an acknowledgement of Transportation Management Plan ("TMP") permit conditions; (2) submission of a Construction Parking Management Plan ("CPMP"); and (3) submission of a TMP meeting specified requirements. MUP, p. 17. In order to establish standing to challenge the City's substantive SEPA decision, an appellant must assert that the

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additional conditions caused them injury in fact. None of the alleged injuries stem from the additional SEPA conditions. *See* Interest Statement, p.1. EPIC alleges that it or nonspecific Listed Organizations "represent" people who will be adversely affected by the construction or operation of the Project, but nothing in EPIC's interest statement relates to the additional SEPA conditions the City imposed. Further, as previously discussed, EPIC's allegations of injury are neither concrete, nor particularized. Instead, EPIC's alleged injuries are general and speculative. Accordingly, EPIC has failed to demonstrate the injury necessary to establish standing for itself or any Listed Organization.

Additionally, EPIC has not asserted any interest within SEPA's zone of interests. The City Code expressly excludes social policy and economic interests from SEPA review. SMC 25.05.448.C ("[e]xamples of information that are not required to be discussed in an EIS are . . . methods of financing proposals, economic competition . . . social policy analysis"); SMC 25.05.444 (elements of the environment); SMC 25.05.660.A.2. ("mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal . . ."). Most of EPIC's alleged interests are social policy or economic (taxpayer) interests. *See* Interest Statement, p. 1. These interests are insufficient to establish SEPA standing. EPIC has failed to demonstrate that their interests are within the zone of interests protected by SEPA.

Because EPIC and the Listed Organizations have failed to establish SEPA standing, the Hearing Examiner must dismiss the SEPA claims in this appeal.

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D. The Hearing Examiner must dismiss Listed Organizations because they have not preserved an appeal under the plain language of the City Code and the Hearing Examiner Rules.

If this appeal is not dismissed in its entirety, then the Hearing Examiner should dismiss the Listed Organizations, because they did not file a complete and timely appeal as required by the City Code and the Hearing Examiner Rules.

The City Code provides that, "[i]n form and content, the appeal shall conform with the rules of the Hearing Examiner." SMC 23.76.022.C.3.b. The Hearing Examiner Rules are neither complex nor onerous. However, they do require that an appeal must contain the "[s]ignature, address, telephone and facsimile numbers, and electronic mail address of the appellant and the appellant's designated representative, if any." HER 3.01(d)(5) (emphasis added). When a party is an organization or other entity"… the party shall designate an individual or firm to be its representative and provide written notification to the Hearing Examiner and the other parties of contact information for the representative . . ." HER 3.07 (emphasis added).

The documents filed in this matter do not contain the signature, address, telephone and facsimile numbers, and electronic mail address of any Listed Organization. No Listed Organization signed EPIC's appeal or filed its own appeal, and no Listed Organization designated EPIC's counsel as its representative. Instead, EPIC filed an appeal and simply attached an unsigned list entitled "Organizations and Individuals Joining MUP Appeal."

EPIC's Interest Statement provides that "Smith & Lowney PLLC represents EPIC as its attorney," but states that "Smith & Lowney PLLC currently does not have an attorney client relationship with the remainder of the Appellants…" Smith & Lowney PLLC states that it will "…serve as the contact for them in this appeal." Because Smith & Lowney PLLC does not

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represent any Listed Organization, it cannot appeal on their behalf. Likewise, under HER 3.07 Smith & Lowney PLLC cannot designate itself as a party representative.

Under the Examiner's rules, an appellant is a "…person, organization, or other entity who files a complete and timely appeal of a decision or other applicable action." HER 2.02(e). The Listed Organizations did not file a complete and timely appeal of the MUP. They are not appellants. The Hearing Examiner should dismiss the Listed Organizations from this appeal.

E. The Hearing Examiner must dismiss any Listed Organization from the SEPA appeal that failed to comment.

If this appeal is not dismissed in its entirety, then the Hearing Examiner must dismiss any Listed Organization from the SEPA component of this appeal that failed to comment.

WAC 197-11-545(2) provides that "lack of comment by... members of the public on environmental documents, within the time period specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of WAC 197-11-510 are met." The SEPA Handbook, at Section 5, further notes that "providing timely comments is usually a prerequisite to the appeal of a proposal."

The rule requiring petitioners to provide SEPA comments as a prerequisite to challenging a SEPA decision is mandated not only by SEPA regulations, but by authoritative decisions of the Supreme Court of Washington. For example, in *Kitsap County v. State Dep't of Natural Res.*, 99 Wn.2d 386, 392, 662 P.2d 381 (1983), the Supreme Court held that Kitsap County could not challenge the adequacy of an environmental impact statement for a clam harvesting program when "the County did not bother to comment or provide information on the EIS draft." *Id.*; *see also Your Snoqualmie Valley v. Snoqualmie*, GMHB Case No. 11-3-0012 (May 8, 2012) (dismissing for lack of standing the petitioners who failed to comment on the City's SEPA checklist or its DNS); *Shoreline v. Snohomish County*, GMHB Case Nos. 09-3-0013c and 10-3-

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0011c (January 18, 2011) (dismissing SEPA issues because the citizen's group did not comment on the environmental documents).

Here, SDCI issued a notice of application for the Project on September 24, 2015, and a revised notice of application on October 19, 2015. Kaylor Declaration, Exs. B and C. The revised notice lists among the approvals necessary "SEPA Mitigated to approve, condition or deny pursuant to 25.05.660," notes that "'SEPA' refers to the State Environmental Policy Act," and provides a 14-day comment period. *Id.*, Ex. B, p. 1. The following Listed Organizations failed to comment: Village of Hope; European Dissent; AnakBayan; Black Book Club; Block the Bunker; The People's Institute NW; FIGHT (Formerly Incarcerated Group Healing Together); One America; ARTifacts; Arts Corps; Banyan PNW; Buddhist Peace Fellowship; Campion Residents for Community Alternatives to Incarceration; CARW (Coalition of Anti-Racist Whites); Community Passageways; Companion Athletics; East African Business Association; Hidmo; Idle No More; MEChA, Seattle University; Migrant Justice Group, Coalition of Anti-Racist Whites; PARISOL; Pipsqueak; The Public Advocate; Raging Grannies, RB Restorative Justice – Real Change; Recover the World; SeaSol (Seattle Solidarity Network); Seattle International Socialist Organization; Seattle Mennonite Church; Stand Up; Stop Veolia Seattle; Seattle Young Peoples Project; Transit Riders Union; United Better Thinking; University Unitarian Church, Racial Justice Team; UW School of Social Work's Anti-Racism and White Allyship Group (ARWAG); Valley & Mountain; WA-BLOC; Women of Color for Systemic Change; Women of Color Speak Out; Youth Speaks; Rev. Rick Derksen; Rev. Mark Zimmerly, Madrona Grace Presbyterian Church; Rev. Andrew Conley Holcom, Admiral Congregational Church in West Seattle; and Rev. Beth Chronister, University Unitarian Church.

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Since these Listed Organizations failed to comment, their SEPA appeals must be dismissed.

F. The Hearing Examiner should dismiss issues that are not stated with specificity.

If this appeal is not dismissed in its entirety, then the Hearing Examiner should dismiss issues that are not stated with specificity in the Appeal and which EPIC refused to clarify.

Hearing Examiner Rule 3.01(d)(5) 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.) Rule 3.04 allows the Hearing Examiner to "require that the appellant provide clarification, additional information, or other submittal that the Hearing Examiner deems necessary to demonstrate the basis for the Hearing Examiner's jurisdiction, or to make the appeal complete and understandable." This is what the Hearing Examiner ordered following the prehearing conference. Prehearing Order, p. 1.

Yet, in its Response to Motion to Clarification, EPIC defied the Hearing Examiner's Order, refusing to provide the clarification the Hearing Examiner mandated with regard to several issues. Specifically,

- EPIC declined to clarify what changes it believes occurred to the Project, stating it refers to "all changes . . . without limitation" and that this issue "does not need clarification," despite the fact that EPIC itself appears unable to articulate what, if any, changes have occurred. Response to Motion to Clarify, pp. 2, 5.
- EPIC declined to clarify two of the bases for its allegations that a "new SEPA analysis should have been required" and that SEPA mitigation was inadequate. Instead, EPIC incorporated its response about changes to the Project. EPIC also

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stated it is "not prepared to limit their appeal issues on MDNS conditions at this time[.]" *Id*., pp. 3-4.

- EPIC refused to clarify its claim that the City failed to require compliance with the conditions of the MDNS, stating again that it is "not prepared to limit their appeal issues on MDNS conditions at this time." *Id*. at p. 5.
- EPIC refused to clarify its claim that the Project plans were inaccurate and inconsistent. *Id*. at pp. 5-6.

In sum, with regard to each of these issues, through its Order requiring EPIC to make its appeal statement more definite and certain, the Examiner has already found that EPIC did not provided "specific objections" nor a "complete and understandable" Appeal. HER 3.01(d)(5), 3.04. The Hearing Examiner gave EPIC the opportunity to cure those insufficiencies. EPIC failed to do so, choosing instead to defy the Hearing Examiner's order. The Hearing Examiner should now dismiss the issues that EPIC refused to clarify.

G. The Hearing Examiner must dismiss issues over which the Hearing Examiner lacks jurisdiction.

If this appeal is not dismissed in its entirety, then the Hearing Examiner should dismiss issues over which the Examiner lacks jurisdiction, including: (1) constitutional claims, (2) claims based on an inapplicable standard of review, (3) claims regarding "piecemealing" of the original environmental review, (4) claims relating to social justice policies and the Open Housing Ordinance, (5), claims relating to Type I decisions, and (6) SEPA claims that are untimely, not subject to administrative appeal and outside the scope of SEPA

1. The Hearing Examiner must dismiss EPIC's constitutional claim.

The Hearing Examiner must dismiss EPIC's constitutional claim that "the notices that were provided . . . deprived the public and neighbors and Appellants of due process and other

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constitutional rights." Appeal, p. 1. The Hearing Examiner lacks jurisdiction over constitutional claims.

As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120; HER 2.03. As previously discussed, the City Code provides that certain specifically identified land use decisions classified as "Type II" decisions are subject to appeal to the Hearing Examiner. SMC 23.76.006.C. However, there is no provision for Hearing Examiner jurisdiction over constitutional claims. SMC 3.02.115; SMC 3.02.120; SMC Chapter 23.76. Accordingly, the Hearing Examiner lacks jurisdiction to consider EPIC's constitutional claim.

Accordingly, the Hearing Examiner must dismiss this claim.

2. The Hearing Examiner must dismiss EPIC's claim that the MUP was arbitrary and capricious and not supported by substantial evidence.

EPIC claims that the MUP was arbitrary and capricious and not supported by substantial evidence. Appeal, p. 1. This is not the standard of review in this case. Under SMC 23.76.022.C.7, "[t]he Director's decisions made on a Type II Master Use Permit shall be given substantial weight."[2] The Hearing Examiner has interpreted this to require application of the clearly erroneous standard. *See e.g., In the Matter of the Appeals of Marc Worthy and Future Queen Anne*, Hearing Examiner File No. MUP-16-006 and MUP-16-007, Findings and Decision of the Hearing Examiner for the City of Seattle, July 12, 2016. The Hearing Examiner lacks

[2] As previously discussed, Respondents believe the Hearing Examiner does not have jurisdiction to review the particular Type II decisions made in the MUP. However, if the Hearing Examiner determines she has jurisdiction, then the standard of review is provided by SMC 23.76.022.C.7.

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jurisdiction to apply the standard of review referenced by EPIC and, therefore, this issue should be dismissed.

3. The Hearing Examiner must dismiss EPIC's "piecemealing" claims.

The Hearing Examiner must dismiss EPIC's claims that environmental review was "piecemealed." EPIC claims that:

- "The City and County improperly piecemealed the project in violation of SEPA."
- "The City failed to acknowledge that the residential development is an integral part of the project and must be considered in the analysis of the MUP, SEPA compliance, necessary mitigation and cumulative impacts."

The term "piecemealing" generally refers to the division of a project's SEPA review into separate parts in order to avoid consideration of the impacts of the project as a whole. Here, the County conducted environmental review on the Project. That environmental review ultimately resulted in the County's issuance of the MDNS in 2013 and SEPA Notice of Action in 2014. The Hearing Examiner lacks jurisdiction to review EPIC's piecemealing argument because EPIC's challenge is presented three years after the MDNS and Notice of Action were issued. Kaylor Declaration, Exs. A, B.

a. EPIC's SEPA appeal is untimely.

EPIC's effort to challenge SEPA adequacy is prohibited by the SEPA Notice of Action time restrictions in RCW 43.21C.080. SEPA Notice of Action provisions impose a uniform 21-day time limitation for appealing the sufficiency of SEPA compliance. This time period runs from the publication of an agency's Notice of Action.

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As the SEPA lead agency for the Project[3] the County conducted environmental review for the Project. On December 6, 2013, the County issued the MDNS, identifying five pages of required mitigation measures to "ensure that the impacts of the proposal fall short of the threshold level of environmental significance." Kaylor Declaration, Ex. A, p. 2. On January 8, 2014, the County published a SEPA Notice of Action, indicating its decision to proceed with Project development and obtain related permit approvals. In keeping with RCW 43.21C.080, the Notice of Action made clear that

> Any action to set aside, enjoin, review, or otherwise challenge such action on the grounds of noncompliance with the provisions of chapter 43.21C RCW (State Environmental Policy Act), or to set aside, enjoin, review, or otherwise challenge any subsequent governmental action on the Children and Family Justice Center proposal described herein on the grounds of noncompliance with the provisions of RCW 43.21C.030(2)(a) through (h), shall be commenced in Superior Court for the State of Washington on or before February 5, 2014, except as otherwise provided in RCW 43.21C.080(2).

Kaylor Declaration, Ex. B.

SEPA's imposition of this definitive notice of action time-bar was established as part of a land use regulatory reform effort to "'smoke out' and resolve procedural SEPA challenges early." Settle, Washington State Environmental Policy Act: A Legal and Policy Analysis, §20.05[3] ("When notice of action is given, project opponents must legally challenge the DNS or EIS in relation to that action and cannot wait to challenge the DNS or EIS in relation to a subsequent action."). This approach is consistent with the policy of this State to address land use challenges in an expedited and efficient manner so that legal uncertainties can be promptly resolved and land development is not unnecessarily slowed or defeated by litigation-based

[3] SEPA rules establish which jurisdiction is responsible for undertaking SEPA duties when more than one public agency is involved in approving aspects of a proposal. Among these, WAC 197-11-926 provides that "[w]hen an agency initiates a proposal, it is the lead agency for that proposal." King County initiated the Project and accordingly served as the SEPA lead agency.

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delays. *Summit-Waller v. Pierce County*, 77 Wn. App. 384, 394 (1995). Any challenge to the SEPA review undertaken for the Project was accordingly required to have been brought under RCW 43.21C.080 within twenty-one days following issuance of the County's January 2014 Notice of Action.

> [A]ny action to set aside, enjoin, review or otherwise challenge any such governmental action or subsequent governmental action for which the notice is given ... shall be commenced within twenty-one days from the date of the last newspaper publication of the notice … or be barred.

RCW 43.21C.080(2)(a) (emphasis added). This limitation plainly bars EPIC's belated SEPA challenge based on "piecemealing" of environmental review. *See Wells v. Whatcom County Water District*, 105 Wn. App. 143 (2001) (Notice of Action issued for sewage line planning decision bars SEPA-based challenge to subsequent implementing permits).[4]

b. EPIC's piecemealing argument and other procedural SEPA claims are precluded by res judicata.

The Hearing Examiner must dismiss this claim because the question of timeliness under RCW 43.21C.080 was previously litigated.

The doctrine of res judicata, or claim preclusion, prevents the same parties from relitigating a claim that was raised or could have been raised in an earlier action. *Roberson v. Perez*, 156 Wn.2d 33, 41 n. 7, 123 P.3d 844 (2005). The doctrine is intended to prevent piecemeal litigation and to ensure the finality of judgments. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 117 (2005). Res judicata applies if a subsequent action is identical to an earlier action in (1) identity of persons and parties,[5] (2) the subject

[4] To the extent that EPIC's piecemealing claim is aimed at the issuance of land use permits in stages, this claim fails. This argument has nothing to do with piecemealing of SEPA review, which was already conducted by the County. Further, there is no requirement in the City Code that a project cannot be permitted or developed in stages.

[5] Nonparties to the prior action may have a concurrence of identity with parties to the prior action if in privity with a party. *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 224, 164 P.3d 500

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matter, (3) the cause of action, and (4) the quality of the persons for or against whom the claim is made. *Id.* Res judicata applies to quasi-judicial decisions. *Clallam County v. W. Wash. Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 121 P.3d 764 (2005).

Squarely before the court in King County Superior Court cause number 16-2-07355-2 SEA was the question of whether procedural SEPA challenges were time barred under RCW 43.21C.080. There, EPIC appealed a lot boundary adjustment ("LBA") decision for the Project. There, as here, EPIC argued that "new" information created a substantial change in the project sufficient to defeat the procedural SEPA time bar under RCW 43.21C.080(2)(b). In dismissing EPIC's appeal, the superior court specifically rejected EPIC's substantial change argument and found that EPIC's procedural SEPA challenge was untimely. Kaylor Declaration, Ex. E. EPIC did not appeal the Superior Court's prior decision and it cannot now revisit the application of RCW 43.21C.080.

Res judicata applies here because in both cases EPIC appealed a City permit related to the Project and asserted the same challenges to the County's SEPA process. There are no additional parties properly before the Hearing Examiner in this action because, despite Smith and Lowney, PLLC's flawed attempt to add the Listed Organizations to this MUP appeal, it was not entitled to do so. Even if the Examiner were to conclude that an additional appellant exists, privity is clear. The record is devoid of evidence that any of the Listed Organizations ever intended to appeal at all, and certainly they do not now show any interest diverging from EPIC's.

(2007). A party has privity with a nonparty if it adequately represented the nonparty's interests in the prior proceeding. *Id.* Washington courts have allowed nonparty preclusion in cases involving issues of public concern, such as election challenges, in which serial litigants are precluded from suing the same entity (usually the government) to challenge the same conduct. *In re Coday, supra,* 156 Wn.2d at 501.

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Finally, the subject matter (the Project) and cause of action is the same. EPIC seeks to invalidate the same SEPA process based on the identical analysis.[6]

Accordingly, the Hearing Examiner must dismiss these claims.

4. The Hearing Examiner must dismiss EPIC's claim based on "social justice policies" and the Open Housing Ordinance.

The Hearing Examiner must dismiss EPIC's claim regarding "social justice policies" and the Open Housing Ordinance. EPIC claims that the MUP is inconsistent with the City's social justice policies and Open Housing Ordinance and that the City failed to follow their procedures. Appeal, p. 1. The Hearing Examiner lacks jurisdiction over these issues.

As discussed in the prior section, the Hearing Examiner has only the authority granted by statute and ordinance. *HJS Development, supra,* 148 Wn.2d at 471; SMC 3.02.115; SMC 3.02.120; HER 2.03. There is no provision of the City Code that grants the Hearing Examiner the authority to render decisions on "social justice policies" or the Open Housing Ordinance in the context of the appeal of a land use decision. With regard to SEPA particularly, social policies are not elements of the environment that must be addressed under SEPA and therefore the City lacks authority to impose SEPA conditions relating to these policies. SMC 25.05.448.C ("social policy analysis" not required by SEPA); SMC 25.05.444 (elements of the environment);

[6] Alternatively, the Examiner can conclude that collateral estoppel bars these claims. Collateral estoppel applies when an issue decided in an earlier case is identical to an issue presented in a later case, the earlier case ended in a judgment on the merits, the party against whom collateral estoppel would apply was a party to, or in privity with a party to the earlier case, and application of collateral estoppel does not result in injustice to the party against whom it is applied. *Christiansen v. Grant County Hospital Dist. No.1*, 152 Wash. 2d 299, 307, 96 P.3d 957 (2004). Here, the issues decided previously are identical to ones presented in this case. The prior case resulted in a judgment on the merits regarding the challenged issue. EPIC and the Listed Organizations are in privity under the legal principles discussed previously. Finally, the application of collateral estoppel does not result in injustice to EPIC or the Listed Organizations. These issues have been litigated and decided and no injustice results from the preclusion of repetitive litigation.

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SMC 25.05.660.A.2. ("mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal . . .").

Also, under SEPA, the City may only impose mitigation measures that are based on policies formally designated by the City as a basis for the exercise of its substantive SEPA authority. SMC 25.05.660.A.1. The City has not designated social justice policies or the Open Housing Ordinance as a basis to exercise its substantive SEPA authority. SMC 25.05.675 (policies designated as the basis for substantive SEPA authority).

In addition, actions based on the Open Housing Ordinance must be brought in superior court, not before the City's Hearing Examiner. SMC 14.08.095. Accordingly, the Hearing Examiner lacks jurisdiction to consider EPIC's claims about social justice policies and the Open Housing Ordinance.

Accordingly, the Hearing Examiner must dismiss this claim.

5. The Hearing Examiner must dismiss EPIC's claims regarding Type I decisions.

The Hearing Examiner must dismiss EPIC's claims regarding Type I decisions. Several of EPIC's claims address Type I decisions, including the following:

- "The project fails to comply with substantive criteria, including (1) failure to provide required setback; (2) failure to comply with maximum building width; (3) placing unpermitted development in an L3 zone; (4) failure to comply with height requirements; (5) failure to comply with landscaping, screening, and green factor requirements; (6) failure to comply with parking and loading berth requirements; and (7) failure to comply with FAR requirements. Appeal, p. 2.

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- "The Director erred in analyzing compliance with substantive criteria . . . including structural height, parking, traffic, modification of development standards, mitigation, toxics and hazardous materials, and green factor."[7] Appeal, p. 2.
- "The plans and documents submitted by King County were inaccurate and inconsistent and do not contain sufficient details to support the MUP approval . . ." Appeal, p. 2.

The Hearing Examiner lacks jurisdiction to review these Type I decisions.

Under the City Code, Type I decisions include the "[d]etermination that a proposal complies with development standards" and "[e]stablishment or change of use for uses permitted outright." SMC 23.76.006.B. All of the claims identified above challenge decisions that fall within these categories. Specifically, these claims challenge determinations regarding compliance with development standards (including setback, building width, height, landscaping, screening, green factor, parking, loading and FAR) and that the use proposed is permitted outright. These Type I decisions are only subject to appeal to the Hearing Examiner through a land use interpretation. SMC 23.76.022.A.1. Here, EPIC failed to seek an interpretation as to any issue. Because the Hearing Examiner lacks jurisdiction to hear EPIC's claims regarding these Type I decisions the Hearing Examiner must dismiss these claims.

6. The Hearing Examiner must also dismiss SEPA claims that are untimely, not subject to administrative appeal or outside the scope of SEPA.

The Hearing Examiner must dismiss additional SEPA claims that are untimely, not subject to administrative appeal, or outside the scope of SEPA. EPIC raises a number of SEPA claims that fall within these categories, including:

[7] The SEPA portion of this claim is discussed in Section G.6 below.

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- "A new SEPA analysis should have been required due to the changes that have occurred since the original mitigated determination of nonsignificance was issued, including: (1) changed public policy and information about the impacts of jailing youth, negative impacts of large juvenile detention facilities, and over-incarceration of youth of color; (2) new information about the need for a new youth jail . . . (6) failure of the project to conform to the mitigation required in the MDNS and (7) failure to comply with substantive criteria of the land use code." Appeal, p. 1.
- "The mitigation imposed under SEPA was inadequate to mitigate the environmental impacts of the project, including (1) crime and impacts of incarceration on children and particularly youth of color . . . (4) violations of law and public policy; (5) failure to conform to the mitigation required by the MDNS; and (6) failure to comply with the land use code. . . ." Appeal, p. 1.
- "The City failed to require compliance with the conditions of the MDNS, which constituted substantive criteria for the project." Appeal, p. 1.
- "The plans and documents submitted by King County were inaccurate and inconsistent and do not contain sufficient details to support the . . . SEPA analysis." Appeal, p. 2.

Since these claims are untimely, subject to administrative appeal or fall outside the scope of SEPA, the Hearing Examiner must dismiss them.

a. The Hearing Examiner must dismiss untimely SEPA claims regarding the adequacy of mitigation.

The claim that the mitigation imposed under SEPA is inadequate to mitigate the environmental impacts of the project is untimely. The County's issuance of the MDNS in 2013 represented a decision that the Project, as mitigated, would not result in significant adverse

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environmental impacts. The County issued a Notice of Action for the MDNS in 2014. The statute of limitations for challenging the MDNS has long since passed. Kaylor Declaration, Exs. A, B; Section G.3, *supra*. EPIC may not now, years later, claim that additional mitigation is required to mitigate significant impacts.

b. The Hearing Examiner must dismiss claims regarding impacts that are outside the scope of SEPA.

Several alleged impacts are outside the scope of SEPA. Specifically, "changed public policy and information about the impacts of jailing youth, negative impacts of large juvenile detention facilities, and over-incarceration of youth of color," "new information about the need for a new youth jail," "crime and impacts of incarceration on children and particularly children of color," and "violations of . . . public policy" relate to social policy considerations that are outside the scope of SEPA. SMC 25.05.448.C ("[e]xamples of information that are not required to be discussed in an EIS are . . . social policy analysis"); SMC 25.05.444 (elements of the environment); SMC 25.05.660.A.2. ("mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal . . .").

c. The Hearing Examiner must dismiss claims regarding Type I decisions and compliance with state and federal law.

Other alleged impacts relate to compliance with City Code provisions or state or federal law over which the Hearing Examiner lacks jurisdiction. As previously discussed, the Hearing Examiner has only the authority granted by statute and ordinance. *HJS Development, supra*, 148 Wn.2d at 471; SMC 3.02.115; SMC 3.02.120; HER 2.03. The Hearing Examiner lacks jurisdiction to review Type I decisions such as compliance with development standards because EPIC failed to seek a code interpretation with regard these standards. SMC 23.76.022.A.1. Further, nothing in the City Code gives the Hearing Examiner jurisdiction to determine

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compliance with state or federal law. EPIC's claims based on "failure to comply with the substantive criteria of the land use code," and "failure to conform to the mitigation required by the MDNS" fall within these categories.[8] In making these claims, EPIC attempts to challenge matters outside the jurisdiction of the Hearing Examiner by framing them as SEPA claims. The Hearing Examiner should decline the invitation to exceed her authority.

With regard to the claim that the Project does not conform to the mitigation required by the MDNS, the mitigation identified in the MDNS is specifically identified in the MUP or consists of compliance with City, state or federal codes and regulations over which the Hearing Examiner lacks jurisdiction. Specifically:

- For erosion impacts, the MDNS requires a Comprehensive Drainage Control Plan and Geotechnical Design Study. The procedure to be followed is to obtain a MUP, building permit and grading permit. MDNS, p. 2. Drainage control is addressed during construction permitting under SMC Chapter 22.807. Geotechnical investigation occurs during construction permitting as well under SMC 22.170.070.C.2.d.
- For emissions from construction vehicles, contractors would use well maintained construction equipment and avoid idling for a long time. The procedure to be followed is to obtain a MUP, building permit and grading permit. MDNS, p. 2. The MUP incorporates this mitigation measure as part of the proposal. MUP, p. 8.

[8] EPIC also asserts "violations of law" generally. Appeal, p. 1. In its Response to Motion Clarify, EPIC states that "Appellants' claim about noncompliance with substantive criteria of the land use code refers to the same criteria specifically enumerated in other issues in the notice of appeal." Response to Motion to Clarify, p. 4. Respondents therefore move to dismiss this issue because it challenges Type I decisions regarding compliance with development standards for the reasons discussed in this Section.

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- For air quality impacts, debris and exposed areas would be sprinkled, quarry spall areas would be provided onsite, and truck loads and routes monitored. The procedure to be followed is to obtain a MUP, building permit and grading permit. MDNS, p. 2. The MUP incorporates this mitigation measure as part of the proposal. MUP, p. 8.
- For demolition impacts, any hazardous substances would be removed in accordance with state and federal guidelines. The procedure to be followed is notification of the Puget Sound Clean Air Association ("PSCAA"). MDNS, p. 3. The MUP incorporates this mitigation measure as part of the proposal and references and PSCAA and EPA regulations. MUP, p. 11.
- For groundwater or soil contamination, contaminated soil would be removed where practical and buildings would be designed to incorporate protective measures. The procedure to be followed is compliance with Washington State Department of Ecology ("DOE") and City requirements. MDNS, p. 3. The MUP incorporates this mitigation measure as part of the proposal and references DOE's regulations in this area. MUP, p. 14.
- For construction dewatering of contaminated groundwater, water would be stored and treated onsite and discharged in accordance with approved permits. The procedure to be followed is compliance with DOE and City requirements. MDNS, p. 3. The MUP incorporates this mitigation measure as part of the proposal and references DOE's regulations. MUP, p. 14.
- For construction impacts, truck movements would be scheduled and coordinated. The procedure to be followed is executing a truck routing plan with the City. MDNS, p. 3. The MUP incorporates this measure as part of the proposal. MUP, p. 9.

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- For greenhouse gas emissions, the project would incorporate a number of measures to reduce energy consumption and be built to achieve LEED Gold certification. The procedure to be followed is compliance with City and state energy code requirements and obtaining LEED Gold certification. MDNS, p. 3. These are measures that occur at the construction permit stage (or after), not at the MUP stage.
- For surface water runoff, the project would comply with the City's drainage control ordinance, obtain approval of a drainage control plan as part of the building permit process, comply with the City's stormwater code, and comply with the County's NPDES permit. The procedure to be followed is obtaining a MUP and building permit and complying with the NPDES permit. MDNS, pp. 3-4. These measures involve compliance with City Code and an independent state-issued permit.
- For tree removal, removal would comply with the City's tree ordinance. The procedure to be followed is to obtain a MUP and building permit. MDNS, p. 4.
- For noise, the project would comply with the City's noise ordinance. The procedure to be followed is to obtain a MUP and building permit. MDNS, p. 4.
- For traffic, the project would provide frontage improvements meeting City standards, a Construction Management Plan ("CMP") including specified information, parking management measures during construction, and a Transportation Management Plan ("TMP") may be required. The procedure to be followed is to obtain a MUP and building permit. MDNS, pp. 6. Frontage improvements are required by SMC 23.15.015. The MUP incorporates the CMP and construction parking measures as part of the proposal. MUP, pp. 9-10. Review of a CMP is done by Seattle Department of Transportation ("SDOT") during the building permit process. *See*

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MUP, p. 10. The MUP specifically requires a TMP. MUP, p. 17.

All of these MDNS conditions are identified in the MUP or involve compliance with City Code provisions, a Type I decision, and/or state and federal laws. The Hearing Examiner lacks jurisdiction to consider these issues. EPIC may not circumvent the limitations on the Hearing Examiner's jurisdiction by recasting its claims about City Code compliance or compliance with state and federal law as SEPA claims.

Accordingly, the Hearing Examiner must dismiss these claims.

VI. CONCLUSION

For these reasons, Respondents jointly request that the Hearing Examiner dismiss this action in whole or in part.

DATED this 3rd day of February, 2017.

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