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 APPLICANT'S AND KING COUNTY'S RESPONSE TO MOTION TO DISMISS PATRICK DONNELLY AND TO STRIKE RELATED FILINGS

I. INTRODUCTION

EPIC[1] moves to dismiss the project Applicant, Patrick Donnelly ("Applicant"), from this appeal and to strike his filings. EPIC's motion has no merit. EPIC misunderstands the Applicant's role. EPIC also ignores the plain language of the Hearing Examiner Rules of Process and Procedure ("Hearing Examiner Rules") and the legal consequences of applicant status under State law. Regardless of his relationship to any other party, the Applicant has the right to participate in the Hearing Examiner proceedings and must be named in any future

[1] While EPIC asserts that EPIC and "over seventy other community based organizations" request dismissal, in fact the firm Smith & Lowney represents only EPIC. *See* Interest of Appellants in Decision (contained in the Hearing Examiner file). No other party has moved for dismissal.

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superior court litigation over the Master Use Permit ("MUP") at issue here. The Hearing Examiner must deny EPIC's motion.

II. STATEMENT OF FACTS

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 Project application documents uniformly identify King County as the owner and the Applicant as the applicant for the Project. *See e.g.*, Declaration of Knoll Lowney Supporting Motion to Strike ("Lowney Declaration"), Ex. 1 (Statement of Financial Responsibility), Ex. 2 (Plan Cover Sheet), Ex. 5 No Protest Agreement). In addition to the application materials, the MUP decision identifies the Applicant as the applicant. MUP, p. 1.[2]

EPIC asserts that the Applicant is King County's agent and has no interest separate from that of King County. Motion to Dismiss Patrick Donnelly and Strike Related Filings ("Motion"), pp. 2 ("Mr. Donnelly's interest in this matter is purely derivative of King County's interest"); *see also* pp. 6-7. EPIC misunderstands the Applicant's role. EPIC relies heavily on the "Statement of Financial Responsibility" to support its argument. Yet EPIC fails to acknowledge the purpose of the Statement of Financial Responsibility. As its title reveals, the purpose of this form is to designate the entity responsible for paying application and review fees. Such a designation is required by the Seattle Municipal Code ("City Code" or "SMC"). SMC 23.900A.030.C. The Applicant was also identified by the owner, King County, as the entity designated to receive determinations and notices from the Seattle Department of Construction and Inspections ("SDCI"), as required by SMC 23.76.010.A.1.

However, the Applicant has another role. Howard S. Wright is the design-build

[2] The MUP is contained in the Hearing Examiner file for this appeal.

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contractor and developer ("Design-Build Contractor/Developer") for the Project. The Design-Build Contractor/Developer is responsible for design and land use and construction permitting of the Project. The Design-Build Contractor/Developer has a financial interest in the approval of the land use and construction permits for the Project separate from that of King County. Declaration of Paul Snorsky in Support of Response to Motion to Dismiss ("Snorsky Declaration"), ¶2.

Integrus Architecture is under contract with the Design-Build Contractor/Developer as a member of the design/build team. The Applicant is a Senior Associate, Project Manager and Architect with Integrus Architecture. In addition to being authorized to submit land use permit applications to the City of Seattle by King County, the property owner, the Applicant was acting as an agent of the Design-Build Contractor/Developer in his actions in connection with Master Use Permit Application No. 3020845. *Id*., ¶3.

In sum, the Applicant is the person acting as the applicant for the MUP and the representative of the developer of the Project.[3]

III. AUTHORITY

Contrary to EPIC's argument, the Applicant is a proper party to this appeal.

First, the Applicant is a party under the plain language of the Hearing Examiner Rules. Director's Rule (DR 5-2003) (the "Rule"), which EPIC relies on, relates to the payment of fees and is inapposite. Declaration of Courtney A. Kaylor in Support of Response to Motion to Dismiss the Applicant ("Kaylor Declaration"), Ex. A.

Second, contrary to EPIC's claim, the Applicant is a proper party to an appeal of the

[3] The Design-Build Contractor/Developer would be entitled to intervene under Hearing Examiner Rule 3.09. However, a motion for intervention is not necessary since it is represented by the Applicant, who is a party under the Hearing Examiner Rules. *See* Hearing Examiner Rule 2.02(e) and p. 4 of this brief, *infra*.

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MUP under "well established legal principles." Specifically, under the Land Use Petition Act ("LUPA"), the applicant named in a permit decision is a mandatory party to any judicial appeal. RCW 36.70C.040(2)(b). In addition, both the property owner and developer are necessary parties. *Veradale Valley Citizens Planning Comm. v. Board of County Commissioners*, 22 Wn. App. 229, 232-233, 588 P.2d 750 (1978) (owners and applicant/developers were indispensable parties); *National Homeowners Ass'n. v. City of Seattle*, 82 Wn. App. 640, 919 P.2d 615 (1996) (developer and contract purchaser was an indispensable party). Precluding the Applicant's participation at the administrative level simply does not square with the procedures for land use appeals in Washington.

Finally, EPIC's policy arguments are without merit. These arguments are based on a misunderstanding of the Applicant's role. EPIC fails to recognize the Applicant is an agent for the Design-Build Contractor/Developer. In addition, EPIC's predictions of duplication of argument and prejudice are speculative.

The Hearing Examiner should reject EPIC's arguments and deny the motion to dismiss.

A. The Applicant is an "applicant" and "party" under the Hearing Examiner Rules.

Contrary to EPIC's unsupported claim, the Applicant is an "applicant" and a "party" as those terms are defined in the Hearing Examiner Rules.

The Hearing Examiner Rules define "applicant" as:

> the person, organization, or other entity who files an application or otherwise formally requests a permit or other type of City action that is the subject of an appeal or other review by the Hearing Examiner.

Hearing Examiner Rule 2.02(e) (emphasis added).

The Hearing Examiner Rules define "party" as, in relevant part:

> the person, organization, or other entity that has filed an appeal or application or is granted a hearing automatically by law . . . the person, organization, or other entity who

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> filed the application, request, or petition for a permit or other type of City authorization or action that is the subject of the hearing or appeal . . .

Hearing Examiner Rule 2.02(t) (emphasis added).

Here, it is uncontested that the Applicant filed the application for the Project. Lowney Declaration, Ex. 1, 2. Under the plain language of the Hearing Examiner Rules, the Applicant is an "applicant" and a "party." *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451-452, 210 P.3d 297 (2009) ("where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.").

EPIC relies on SMC 23.76.010 for the proposition that the Applicant is not an applicant. However, this City Code section does not support EPIC. SMC 23.76.010 does not purport to address who may participate in a Hearing Examiner appeal. Accordingly, it is relevant only to the extent that it expressly allows an authorized agent to act as a project applicant. SMC 23.76.010 provides:

> Applications for Master Use Permits shall be made by the property owner, lessee, contract purchaser, a City agency, or other public agency proposing a project the location of which has been approved by the City Council by ordinance or resolution, or by an authorized agent thereof. A Master Use Permit applicant shall designate a single person or entity to receive determinations and notices from the Director.

(Emphasis added.) In this case, the Applicant is the agent designated to receive determinations and notices on behalf of the property owner, King County. Lowney Declaration, Ex. 1. He is the applicant for the Project.

EPIC also relies on selective quotations from the Rule for the proposition that an applicant must have a financial interest in the project. Motion, p. 4. However, EPIC's reliance on this Rule is misplaced. Like SMC 23.76.010, the Rule does not purport to address who may participate in a Hearing Examiner appeal. Instead, the Rule clearly states its purpose to interpret

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SMC 22.900A[4] and SMC 23.76.010 relating to who is liable for the payment of application fees. Kaylor Declaration, Ex. A, p. 1. The Rule states:

> The purpose of these code sections is to identify who can be held liable for payment of fees and to ensure that DCLU has sufficient information to collect fees that are due on those occasions when payment is in dispute. This rule clarifies the responsibilities of the parties and the use of the Statement of Financial Responsibility form.

Kaylor Declaration, Ex. A, p. 2.

The Rule defines "Applicant," stating: "For purposes of Section 22.901A.030,[5] the term 'applicant' means a person or entity that falls within either of the following categories. (1) A person or entity with a financial interest in the project. 'Applicant' shall not include any person who is acting solely as an employee, contractor, subcontractor or consultant . . ."

EPIC quotes the latter part of this definition but misleadingly omits the key limiting phrase "for purposes of Section 22.901A.030." Motion, p. 4. SMC Chapter 22.901A was decodified and replaced with SMC 22.900A in 1998. Kaylor Declaration, Ex. B. Today, SMC 22.900A.030 addresses payment of permit fees by the financially responsible party. Neither this section nor any other portion of SMC Title 22, Chapter IX relates to who may appeal a Title 23 Director's decision. Under its plain terms, the Rule has no bearing on who may participate as a party in a Hearing Examiner appeal. Instead, the purpose and effect of this Rule relates only to who is financially responsible for permit fees.

EPIC block-quotes a statement that it claims comes from the Rule purportedly excluding architects, agents and design professionals from the definition of "applicant." Motion, p. 4. Yet, this statement does not appear in the Rule. Kaylor Declaration, Ex. A. Even if it did, this

[4] SMC Chapter 22.901A was repealed and replaced with SMC Chapter 22.900A in 1998. Kaylor Declaration, Ex. B. The

[5] The current provisions governing payment of fees are at SMC 22.900A.030.

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statement would be irrelevant here, because it would relate only to the definition of "applicant" under former City Code Section 22.901A.030. In this context, the limitation makes sense: only an owner can commit itself to paying fees. However, the Hearing Examiner Rules' definition of "applicant" is not so limited. Hearing Examiner Rule 2.02(e). The Hearing Examiner must reject EPIC's attempt to stretch the Rule to encompass matters expressly excluded from its purview.

In sum, under the plain language of the Hearing Examiner Rules and City Code, the Applicant is the applicant for the Project and is entitled to participate in this appeal.

B. The Applicant is a proper party to an appeal of the MUP under well-established legal principles.

EPIC claims that the Applicant is an improper party under "well established legal principles." Motion, p. 5. However, EPIC fails to discuss the legal requirements for land use appeals in Washington. Instead, the authority EPIC relies on is inapplicable here. The Hearing Examiner must reject EPIC's argument.

EPIC's discussion of legal principles is notable primarily for what it omits – the law governing land use appeals in Washington. LUPA governs appeals of land use decisions such as the City's decision on the Project. Under LUPA:

> A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:
>
> * * *
>
> (b) Each of the following persons if the person is not the petitioner:
>
> (i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and
>
> (ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue . . .

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RCW 36.70C.040(2) (emphasis added). Here, the Applicant is identified by name in the MUP decision. While the Applicant's address is not provided in the MUP decision, the Project address is provided, and a prudent plaintiff would name the Applicant as a party.

Further, the Applicant must be named in any appeal as the representative of the Design-Build Contractor/Developer. The law is well settled that both owners and developers of projects are indispensable parties to a land use appeal. *Veradale Valley, supra,* 22 Wn. App. at 232-233; *National Homeowners, supra,* 82 Wn. App. 640. Under this authority, the Applicant is an indispensable party to an appeal of the MUP.

EPIC ignores this authority, which is specific to land use applications and appeals in Washington. Yet, the more general authority relied on by EPIC is inapposite. EPIC cites Civil Rule 17. Motion, p. 5. The Civil Rules are not binding in the Hearing Examiner setting; rather, the Hearing Examiner "may" look to them for "guidance." Hearing Examiner Rule 1.03(c). In contrast to this general rule applicable in the court setting, here the Hearing Examiner Rules clearly state that an applicant is a person who submits a land use application and an applicant is a proper party to a Hearing Examiner appeal. Hearing Examiner Rule 2.02(e) and (t).

While ignoring clear Washington state land use authorities, EPIC relies on caselaw discussing unrelated substance areas, *Peyton Bldg., LLC v. Niko's Gourmet, Inc*., 180 Wn. App. 674, 323 P.3d 629 (2014) (a landlord-tenant case); *Northwest Independent Forest Mfrs. v. Department of Labor and Indus.,* 78 Wn. App. 707, 899 P.2d 6 (1995) (a workers' compensation case); *Kim v. Moffett*, 156 Wn. App. 689, 234 P.3d 279, 282-84 (2010) (a breach of contract case); and *Denman v. Richardson*, 284 P. 592 (W.D. Wash 1921) (an old federal district court case involving a claim of appropriation of funds by a trustee). Motion, pp. 5-6. None of these are land use cases and they are not applicable here.

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EPIC's citations to extra-jurisdictional authorities are off-topic and should not persuade the Hearing Examiner. For instance, in *Maynor v. Onslow Cty*., 488 S.E.2d 289 (N.C. 1997), a North Carolina court assumed without deciding that the manager of an adult bookstore was a proper party in an action challenging an ordinance regulating the location of adult businesses. *Maynor* does not support EPIC's argument. Similarly, *Wetherell v. Douglas Cty*., 54 Or. LUBA 782, 2007 Ore. Land Use Bd. App Lexis 76 (May 23, 2007) involved the application of Oregon statutes to a party who the Land Use Board of Appeals ("LUBA") found did not qualify as an applicant. Here, in contrast, the Applicant meets the Hearing Examiner Rules' definition of applicant. Further, the Oregon law has no persuasive weight in light of the unambiguous Hearing Examiner Rule applicable here.

EPIC further alleges that the Applicant lacks standing. Motion, p. 7. However, EPIC apparently forgets that it is the *Appellant*, not the Respondents, who must demonstrate standing in this case. Hearing Examiner Rules, Rule 3.01(d)(2).

In sum, EPIC's argument regarding "well established legal principles" ignores those principles. Land use precedent in Washington contradicts EPIC's position. The Hearing Examiner must reject EPIC's claim.

C. EPIC's policy arguments misunderstand the Applicant's role and are without merit.

EPIC claims: (1) the Applicant will merely "duplicate" King County's arguments; (2) allowing an architect to litigate alongside "his employer" is "dangerous" and (3) allowing the Applicant to participate undermines transparency. Motion, pp. 8-10. These claims lack merit.

EPIC's first argument is based on the flawed premise that the Applicant is solely the County's agent. Contrary to EPIC's belief, the Applicant is affiliated with a separate entity, the Design-Build Contractor/Developer for the Project. While both the County and Design-Build

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Contractor/Developer are defending the Project, this private entity has interests and goals that are not identical to those of the public entity property owner. Case law in Washington establishes that a developer, in addition to a property owner, is an indispensable party in a land use proceeding. *Veradale Valley, supra*, 22 Wn. App. at232-233; *National Homeowners, supra*, 82 Wn. App. 640.

In addition, EPIC's unfounded speculation that the County and Applicant's witnesses will be "undoubtedly duplicative" assumes too much. Contrary to EPIC's bald assertion, the County and Applicant have no interest in boring the Hearing Examiner with duplicative evidence, and will present their case in an appropriate manner. Indeed, in a prior filing, EPIC asserted that the Applicant "fully understands" any changes to the Project or new information. Appellants' Response to Motion to Clarify, p. 2; *Id.*, ("Mr. Donnelly is fully informed"); *Id*. at p. 6 ("Mr. Donnelly is fully knowledgeable about the plans and documents"). Having extolled the Applicant's individual knowledge and understanding, it is now disingenuous for Appellants to claim he has "nothing additional" to add. *See* Motion, p. 8.

EPIC's second argument is also based on EPIC's fundamental misunderstanding of the Applicant's role. The Applicant is part of the design-build team and acting on behalf of a party that is separate and distinct from the County, the Design-Build Contractor/Developer. EPIC's assertion that the Appellant's participation will "drive up the costs and burden" of this appeal simply cannot be squared with the manner in which this case has proceeded to date. The Appellant made a motion to clarify, which the City and County verbally joined at the prehearing conference. The Appellant and County filed a joint motion to dismiss and the City joined in most of the arguments presented. There has been no increased cost or burden. Indeed, if any party is driving up costs, it is Appellants, by filing a vague appeal, much of which it then refused

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to clarify, and presenting numerous claims that are clearly outside the jurisdiction of the Hearing Examiner. *See* Respondents King County and Applicant's Joint Motion to Dismiss.

EPIC's third argument is similarly based on EPIC's misunderstanding of the Applicant's role. The Applicant is an independent party, with separate interests, which it has the legal right to defend from EPIC's meritless appeal.

IV. RESPONSE TO MOTION TO STRIKE

For the reasons previously discussed, EPIC's motion to dismiss is without merit. The Hearing Examiner should deny the motion. For the same reasons, the Hearing Examiner should deny EPIC's motion to strike.

V. CONCLUSION

For these reasons, the Hearing Examiner must deny EPIC's the motion to dismiss the Applicant from this appeal and EPIC's motion to strike.

DATED this 13th day of February, 2017.

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