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 REPLY ON MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

I. INTRODUCTION

In its response brief, EPIC[1] fails to establish facts or demonstrate as a matter of law that the Hearing Examiner has jurisdiction over this appeal. Specifically, EPIC fails to show that: (1) the decisions made in the Master Use Permit ("MUP") are subject to administrative appeal under Seattle Municipal Code ("City Code" or "SMC") 23.76.006.C; (2) EPIC or other organizations or individuals listed in the appeal ("Listed Organizations") have standing; (3) any Listed Organization satisfied the mandatory requirements for initiating an appeal to the Hearing

[1] While EPIC asserts that EPIC and "over 60 social justice organizations and faith leaders" request that the Hearing Examiner deny dismissal, in fact the firm Smith & Lowney represents only EPIC and, as of the filing of its response brief, OneAmerica. *See* Appellants' Response to Motion to Dismiss ("EPIC's Response"), p. 1; Interest of Appellants in Decision (contained in the Hearing Examiner File) and Declaration of Richard Stolz, Executive Director of OneAmerica ("Stolz Declaration"). Since OneAmerica did not file a motion, it is not entitled to file a reply. No other party filed a reply brief.

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Examiner; (4) Listed Organizations may appeal the State Environmental Policy Act ("SEPA") component of the MUP despite their failure to comment; (5) EPIC's vague claims meet the requirements for "specific objections" in an appeal; (6) the Hearing Examiner has jurisdiction over: (a) claims of "piecemealing" of SEPA review; (b) claims relating to social justice and housing policies; (c) claims relating to Type I decisions; and (d) additional SEPA claims that are untimely, not subject to administrative appeal and outside the scope of SEPA. Notably, EPIC fails to respond to the motion to dismiss its constitutional claims and claims based on an inapplicable standard of review. EPIC has abandoned these claims. Accordingly, the Applicant Patrick Donnelly ("Applicant") and King County ("County") request that the Hearing Examiner dismiss this appeal, in whole or in part.

II. RESPONSE TO STATEMENT OF FACTS

While failing to meet its burden on matters addressed in the motion to dismiss, EPIC devotes significant space in its Statement of Facts and throughout its Response to the discussion of matters that are legally irrelevant. EPIC includes discussion and exhibits relating to press coverage, political statements, and social and economic policy matters. Appellants' Response to Motion to Dismiss ("Response"), pp. 1-2, 4-6, 7, 33-34, 36-37, 38; Declaration of Knoll Lowney Supporting Opposition to Motion to Dismiss ("Lowney Declaration"), Exs. A, B, C, E. The Applicant and King County move to strike these portions of the Response and exhibits under Hearing Examiner Rule 2.17(b) ("The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged.").

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III. AUTHORITY

A. EPIC fails to establish that the decisions made in the MUP are subject to administrative appeal under SMC 23.76.006.C.

EPIC erroneously claims that the decisions in the MUP: (1) to modify or waive development standards for a youth service center ("Modification"); and (2) to impose substantive conditions under SEPA are subject to appeal to the Hearing Examiner. Specifically, EPIC incorrectly asserts that these decisions are appealable because: (1) the notice of the MUP decision ("Notice of Decision") says the MUP can be appealed to the Hearing Examiner; (2) the Modification is a Type II decision and SMC 23.76.004(B) and SMC 23.76.004, Table A, say that Type II decisions are subject to appeal to the Hearing Examiner; and (3) the legislative history of Ordinance 118202 shows the intent to make the Modification decision appealable. Response, pp. 10-11. Such arguments are without legal merit.

First, the Notice of Decision contains a "boilerplate" discussion of appeal options for different types of decisions, including options that nobody claims apply here, such as appeal to the Shoreline Hearings Board. Lowney Declaration, Ex. D, pp. 1-2. Only one line of the Notice of Decision implies that the MUP is appealable to the Hearing Examiner – the statement that "Appeals of this decision must be received by the Hearing Examiner no later than 1/5/2017." *Id*., p. 2. Notwithstanding any implication in the Notice of Decision, EPIC is represented by experienced land use counsel, who has the responsibility to conduct his own legal research on appeal options and properly file any appeal with the correct appellate body.

Further, and most importantly, as a matter of law, the Seattle Department of Construction and Inspection's ("SDCI's") Notice of Decision cannot create jurisdiction on the part of the Hearing Examiner. Only the City Code can confer such jurisdiction. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003) (A hearing examiner "has only the

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authority granted it by statute and ordinance."); SMC 3.02.115; SMC 3.02.120; HER 2.03. Here, the City Code grants the Hearing Examiner jurisdiction over appeals of only selected Type II decisions, and the decisions in the MUP are not among them. SMC 23.76.006.C.

Second, EPIC's reliance on SMC 23.76.004(B) and SMC 23.76.004, Table A is misplaced. Both these sections are in Subchapter I of Chapter 23.76, entitled "General Provisions." Consistent with this heading, they are general in nature. SMC 23.76.004(B) briefly describes Type I, II and III decisions, stating generically that "Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner[.]" SMC 23.76.004, Table A contains a list of Type II decisions that does not include a Modification or imposition of substantive SEPA conditions but does include a line for "Other Type II decisions that are identified as such in the Land Use Code." The table heading states "Appealable to Hearing Examiner or Shorelines Hearing Board."

In the face of these general statements, SMC 23.76.006C specifically and expressly identifies those Type II decisions that are subject to appeal to the Hearing Examiner – and some that are not appealable. For example, some types of establishment or change of use for temporary uses are appealable, and some are excepted from the list of appealable decisions. SMC 23.76.006.C.2.a. Some design review decisions are subject to appeal, and some are excepted. SMC 23.76.006.C.2.e. Determination of consistency with a planned action ordinance is appealable, but only if the project requires another Type II decision. SMC 23.76.006.C.2.i. Decisions to approve, deny or condition based on SEPA policies are subject to appeal only if they do not relate to projects determined to be consistent with a planned action ordinance and only if they are integrated with certain other listed decisions. SMC 23.76.006.C.2.o. EPIC never even mentions this specific language excluding the SEPA action here from appeal.

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Modifications are not listed as appealable decisions. SMC 23.76.006.C.2. It is well settled that, when interpreting a statute or ordinance, the specific controls over the general. *In re Marriage of T*, 68 Wn. App. 329, 334, 842 P.2d 1010 (1993) ("It is a basic rule of statutory construction that a specific provision controls over one that is general in nature.") Here, SMC 23.76.006.C.2 is the specific section, while the sections that EPIC relies on are general in nature. SMC 23.76.006.C.2 controls. Further, if all Type II decisions were appealable, as EPIC argues, then the language of SMC 23.76.006.C.2 identifying some Type II decisions as appealable and others as not subject to appeal would be rendered superfluous. Another well recognized canon of statutory interpretation is that statutes must be read to avoid rendering any provision superfluous. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009).

Third, the legislative history of Ordinance 118202 does not (and cannot) confer jurisdiction on the Hearing Examiner. The staff report that EPIC relies on makes passing reference to the appeal of Type II decisions to the Hearing Examiner. Lowney Declaration, Ex. E, pp. 2, 4. This is but one item in the entire legislative history and cannot establish the intent of the City Council as a whole. Ultimately, Ordinance 118202 did not modify SMC 23.76.006.C.2, nor did it adopt any other City Code provisions expressly rendering the decisions at issue here subject to appeal. Under established law, the intent of the City Council is determined from the plain language of unambiguous provisions of the City Code. *Homestreet, supra*, 166 Wn.2d at 451. Here, the plain and unambiguous language of SMC 23.76.006.C.2 provides that the Modification and SEPA action in this case are not subject to appeal. The Hearing Examiner's inquiry must end here.

In sum, the MUP in this case is not subject to appeal to the Hearing Examiner. The Hearing Examiner lacks jurisdiction and must dismiss this appeal in its entirety.

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B. EPIC and Listed Organizations fail to demonstrate standing.

EPIC erroneously claims that it has standing and that "the Examiner does not need to examine the standing of other Appellants," *i.e.*, the Listed Organizations. Specifically, EPIC claims: (1) EPIC and the Listed Organizations appropriately plead interests and injury; (2) EPIC's standing confers standing on all purported appellants; (3) EPIC will suffer injury in fact; (4) EPIC has standing because it meets the zone of interests test; (5) EPIC and the Listed Organizations have "taxpayer standing"; and (6) the Hearing Examiner need not consider EPIC's declaration regarding standing. Response, pp. 12-21. EPIC is incorrect.

1. EPIC failed to properly plead standing.

EPIC asserts that the allegations regarding standing in its appeal are "more than sufficient" to deny the motion to dismiss. Response, pp. 12-14. EPIC is incorrect.

EPIC asserts that the City Code does not require injury, only "interest," to have standing to file a Hearing Examiner appeal, citing SMC 25.05.755. SMC 25.05.755 is the definition of "interested person" under the City's SEPA rules. This section does not establish the standard for standing to appeal to the Hearing Examiner.

EPIC also claims that the "brief statement" in the appeal alleging harm to the Listed Organizations' members is sufficient to establish standing. To the contrary, this vague and conclusory statement is woefully inadequate, as it fails to provide evidence of an "immediate, concrete, and specific" injury to any of the Listed Organizations as required by law. *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992). EPIC's citation to *SAVE v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) does not support its argument. *SAVE* requires that "an organization must show that it or one of its members will be specifically and perceptibly

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harmed by the action." *Id*. The "brief statement" in EPIC's appeal document does not even come close to meeting this standard.

EPIC claims the harm alleged in its appeal documents fall within SEPA's zone of interests. However, despite EPIC's bare assertion to the contrary, none of the harm alleged in the appeal relates to the narrow SEPA decision at issue here, which is to provide additional conditioning of the Project, beyond what was already determined by the County to be sufficient to mitigate any impacts to a less than significant level in the MDNS, which was not timely challenged and is now not subject to appeal. Declaration of Courtney A. Kaylor in Support of Motion to Dismiss ("Kaylor Declaration"), Exs. A, B; RCW 43.21C.080(2).

The Hearing Examiner must reject EPIC's claim that the conclusory allegations of harm in its appeal document are sufficient to establish standing.

2. EPIC cannot confer standing on other entities.

EPIC claims its standing confers standing on the Listed Organizations. Response, p. 14. This is nonsense. EPIC relies on three cases, none of which support its position.

In *Doe v. Bolton*, 410 U.S. 179, 189, 93 S. Ct. 739 (1972), the Court considered a statute limiting the availability of abortions. The Court held that the plaintiff individual seeking an abortion had standing. *Id*. at 187. In addition, plaintiff physicians also had standing because "the physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory" requirements. *Id*. at 188. The Court held that potential plaintiff nurses, clergy, social workers and corporations are "another step removed" but that the Court need not rule on their standing because "nothing is gained or lost by the presence or absence" of these potential plaintiffs. *Id*. at 189. The Court did not rule, as EPIC represents, that one plaintiff conferred standing on all.

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In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 126 S. Ct. 1297, an association of law schools and law faculties alleged that a law that tied federal funding for institutes of higher education to giving access to military recruiters infringed on their First Amendment rights. In a footnote, the Court stated that there were multiple plaintiffs. Because one of them had standing, Article III's case-or-controversy requirement was satisfied. *Id*. at fn. 2. In other words, the Court could consider the merits even if some parties lacked standing. This case does not hold, as EPIC represents, that the standing of one plaintiff conferred standing on the others.

In *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993), the Court considered the constitutionality of the Forest Resources Conservation and Shortage Relief Act. There were three plaintiffs. The Court stated that if one of them had standing, it could reach the merits "without considering whether the other two also have standing." *Id*. at 942. The Court did not hold that the standing of one plaintiff conferred standing on the others.

In sum, EPIC's claim that the standing of one confers standing on others has no merit.

3. EPIC has not shown injury in fact.

EPIC claims it and Listed Organizations will suffer injury in fact. Response, pp. 14-19. EPIC is incorrect.

The burden is on an appellant to demonstrate injury in fact. To establish injury in fact, an appellant must show that he will be "specifically and perceptibly harmed" by the proposed action. *Trepanier, supra*, 64 Wn. App. at 382. When a person alleges a future injury, he must show an "immediate, concrete, and specific injury" to himself. *Id*. at 383. The appellant "must present facts that show he will be adversely affected . . . His affidavits [must] collectively

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demonstrate sufficient evidentiary facts to indicate that he will suffer an injury in fact." *Trepanier, supra* at 383, citing *Concerned Olympia Residents v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983) (internal quotations omitted); *see also Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997) (appellant must present affirmative evidence through the submittal of affidavits or other means that it will be specifically and adversely affected by the decision).

No Listed Organization other than OneAmerica submitted any affidavit at all. These Listed Organizations failed to establish standing as a matter of law and they must be dismissed from this case. *Trepanier*, 64 Wn. App. at 383, citing *Concerned Olympia Residents, supra*, 33 Wn. App. at 683; *Anderson*, 86 Wn. App. At 299.

OneAmerica's Executive Director submitted a declaration stating "it is likely unnecessary for each group to show standing" and suggesting that it would provide "further information on our organizations' interest in this matter" on request by the Hearing Examiner. Declaration of Richard Stolz, Executive Director of OneAmerica ("Stolz Declaration"), p. 2. This is insufficient to confer standing. *Trepanier*, 64 Wn. App. at 383, citing *Concerned Olympia Residents*, 33 Wn. App. at 683; *Anderson*, 86 Wn. App. At 299. OneAmerica is represented by Smith & Lowney PLLC as well as other attorneys, according to its declaration, and is responsible for understanding its legal obligations. OneAmerica must be dismissed from this case.

EPIC submitted a declaration from one member. While this declaration asserts that EPIC will suffer harm, it falls short of providing sufficient evidentiary facts to demonstrate an immediate, concrete and specific injury resulting from the decision made by the City in the MUP. Specifically:

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- The declaration asserts that EPIC's members will suffer harm from construction of the Project and from the Project itself after construction. Declaration of Senait Brown ("Brown Declaration"), ¶5. However, the two decisions at issue in this appeal are: (1) the Modification of building width and setback standards and (2) the imposition of additional substantive SEPA conditions beyond those imposed by the County. Lowney Declaration, Ex. F, p. 1. The Brown Declaration does not allege injury resulting from those actions. Further, for an organization to have standing based on alleged injury to its members, the organization must show that "the interests it seeks to protect are germane to the organization's purpose." *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd*., 166 Wn. App. 117, 138, 272 P.3d 876 (2012). Here, EPIC has not established that construction impacts or the post-construction aesthetic impacts it alleges are germane to its purpose. To the contrary, the Brown Declaration states that EPIC is "an anti-racist, multicultural and intergenerational organizing collective with the goal of ending the prison industrial complex (surveillance, policing, and incarceration) and building stronger communities." Brown Declaration, ¶1. The alleged impacts do not relate to this purpose.
- The declaration includes conclusory, one-sentence allegations that EPIC's members will suffer various construction impacts (related to traffic, parking, noise, dust). Brown Declaration, ¶6. These allegations are not sufficiently specific to show immediate, concrete and specific harm to EPIC. Also, none of these alleged injuries result from the Modification or imposition of additional SEPA conditions. Further, these alleged injuries are not germane to EPIC's purpose. *KS Tacoma Holdings*, 166 Wn. App. at 138.

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- The declaration claims construction impacts "can" harm businesses in the area. Brown Declaration, ¶6. This is speculative, and economic harm is not within SEPA's zone of interest. WAC 197-11-448; *Harris v. Pierce County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996); *West 514, Inc. v. Cty. of Spokane*, 53 Wn. App. 838, 847, 770 P.2d 1065 (1989).
- The declaration alleges a "reasonable fear of risk" from contamination. Brown Declaration, ¶6. A "fear of risk" is not an immediate, concrete injury. Further, this alleged injury is not germane to EPIC's purpose. *KS Tacoma Holdings,* 166 Wn. App. at 138.
- The declaration alleges that the Modification would lead to a development that is "out of scale" with the neighborhood, "impose an institutional character" on the neighborhood, and impact people who walk and drive on the street adjacent, or use nearby open space. Brown Declaration, ¶7. These allegations are not sufficiently specific to show immediate, concrete and specific harm to EPIC. Rather, these allegations are similar to the allegations of aesthetic impact found inadequate to provide standing in *KS Tacoma Holdings,* 166 Wn. App. 117. In that case, the plaintiff was "highly critical of the proposed building design." *Id*. at 135. This alleged injury was insufficient to establish standing because the plaintiff did not allege any "direct and specific harm flowing from an 'unattractive' building design." *Id*. Further, the plaintiff failed to show this injury was redressable because, even if plaintiff won its appeal, a future building design was "not guaranteed to please" plaintiff. *Id*. Here, EPIC has not alleged direct and specific harm resulting from the design allowed by the Modification, nor has EPIC shown that, if the Modification

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were reversed, the ultimate Project design would be "guaranteed to please" its members. Further, this alleged injury is not germane to EPIC's purpose. *Id*. at 138.

- The declaration alleges that the Project will have aesthetic impacts. Brown Declaration, ¶8. However, this allegation is not sufficiently specific to show immediate, concrete and specific harm to EPIC. *KS Tacoma Holdings,* 166 Wn. App. at 135. In addition, this alleged injury is not germane to EPIC's purpose. *Id*. at 138.
- The declaration alleges the Project will harm property values. Brown Declaration, ¶8. This is not within SEPA's zone of interests. *Harris,* 84 Wn. App. at 231.
- The declaration alleges that members who work within the existing facility and families involved with the juvenile detention system will be placed at risk of exposure to toxic substances in part due to "the City's refusal to enforce the toxic cleanup standards set in the Mitigated Determination of Non-Significance." Brown Declaration, ¶9. This allegation is contrary to the express language of the MUP, which adopts the conditions relating to hazardous substance cleanup in the MDNS. Lowney Declaration, Ex. F, pp. 7-8, 11-14. These allegations are unfounded speculation. Further, while working in the existing facility relates to EPIC's purpose, matters relating to hazardous substances are not germane to this purpose. *Id*. at 138.
- The declaration also asserts that, if the MUP were to be reversed, then additional land would become available for residential use. Brown Declaration, ¶10. This is pure speculation and does not establish immediate, concrete and specific harm to EPIC. In addition, this alleged injury is not germane to EPIC's purpose. *Id*. at 138.
- The declaration asserts taxpayer standing. Brown Declaration, ¶11. This is addressed in Section III.B.5, *infra*.

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EPIC has not established immediate, concrete and specific harm resulting from the MUP decision and cannot therefore make the requisite showing of any injury in fact necessary to confer standing.

4. Most of EPIC's alleged injuries are not within the zone of interests protected by SEPA.

EPIC claims it meets the zone of interests test. Response, pp. 19-20. The Applicant and County acknowledge that some of the injuries alleged in EPIC's Response – specifically, those relating to *physical* impacts to the environment – fall within SEPA's zone of interests. However, most of EPIC's alleged injuries – including those relating to social policies and economics – do not fall within the zone of interests addressed by SEPA. WAC 197-11-448. Further, in order to establish standing, EPIC and the Listed Organizations must show injury in fact. Since EPIC and the Listed Organizations have failed to do this, they lack standing regardless of whether some of their alleged injuries are within SEPA's zone of interests. *Trepanier,* 64 Wn. App. at 383.

5. EPIC does not have standing merely by their status as taxpayers.

EPIC claims it has "taxpayer standing." Response, pp. 20-21. EPIC is incorrect.

Taxpayer standing does not exist in Seattle Hearing Examiner land use appeals. Rather, in these cases, the appellant must show injury in fact and (for SEPA claims) that the interests it seeks to protect are within SEPA's zone of interests. HER 3.01(d)(2); 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).

None of the cases relied on by EPIC grant taxpayer standing in a hearing examiner proceeding or, more broadly, a challenge to a local government's land use permitting decision. *Friends of N. Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 120, 336 P.3d 632

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(2014) (granting taxpayer standing to challenge county's amendment of its acceptance of dedicated park land); *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2 267, 281, 937 P.2d 1082 (1997) (denying taxpayer standing to challenge street vacation decision); *State ex. Re. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (granting taxpayer standing to challenge prisoner work release program); *Wash. Pub. Tr. Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn. App. 178, 182, 69 P.3d 351 (2003) (denying taxpayer standing to challenge process for approval of mall redevelopment); *Robinson v. City of Seattle*, 102 Wn. App. 795, 804-805, 10 P.3d 452 (2000) (taxpayer standing granted in challenge to drug testing program).

Further, even with taxpayer standing, a plaintiff challenging a discretionary governmental act must show a special injury or unique right that is being violated, in a manner special and different from the rights of other taxpayers. *Friends of N. Spokane*, 184 Wn. App. at 120; *Greater Harbor, supra*, 132 Wn.2d at 281. EPIC has failed to do this here.

EPIC and the Listed Organizations do not have taxpayer standing.

6. EPIC must provide evidence to establish standing.

EPIC claims the Hearing Examiner need not consider EPIC's declaration regarding standing. Response, p. 21. This is incorrect. To demonstrate standing, the appellant "must present facts that show he will be adversely affected . . . His affidavits [must] collectively demonstrate sufficient evidentiary facts to indicate that he will suffer an injury in fact." *Trepanier*, 64 Wn. App. at 383, citing *Concerned Olympia Residents, supra*, 33 Wn. App. at 683 (internal quotations omitted); *see also Anderson*, 86 Wn. App. at 299 (appellant must present affirmative evidence through the submittal of affidavits or other means that it will be specifically

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and adversely affected by the decision). The Hearing Examiner must reject EPIC's argument on this point.

C. EPIC fails to show that all Listed Organizations satisfied the mandatory requirements for appeals to the Hearing Examiner.

EPIC asserts that the name of a single "representative" was all that was required for the Listed Organizations to appeal.[2] Specifically, EPIC claims the Listed Organizations were not required to provide their contact information and signatures because: (1) of the length of time provided to appeal; (2) the requirement is not jurisdictional; and (3) the Applicant and County will not be prejudiced. Response, pp. 21-23. EPIC is incorrect.

First, EPIC's claim that this requirement was difficult to meet due to mandatory appeal timelines rings hollow. When this appeal was filed, Smith & Lowney asserted that the Listed Organizations were active appellants. If, in fact, any Listed Organization was prepared to appeal the long-pending MUP decision, obtaining a signature and representative designation from that organization should have been a simple formality, especially in this age of cell phones and email communication. The Hearing Examiner's requirement to provide contact information and signature is a very basic one and not burdensome by any stretch of the imagination. If the Listed Organizations were able to obtain internal authorization to appeal during the appeal period, as EPIC claims,[3] surely they could have provided contact information and a signature. Even now, more than a month after the appeal was filed, only EPIC (through its attorney) and OneAmerica (through a declaration) have provided the required information. The fact that the MUP was issued during a holiday period does not excuse the Listed Organizations' negligence now.

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[2] EPIC also asserts that the Listed Organizations were relying on the signature of their "joint counsel." Response, p. 21. This is an inaccurate statement. At the time of filing, the firm Smith & Lowney represented only EPIC and, even now, represents only EPIC and OneAmerica. *See* Interest of Appellants in Decision; Stolz Declaration.

[3] The Stolz Declaration relates only to OneAmerica and there is no evidence in the record that any other Listed Organization took any action with regard to authorizing an appeal.

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Second, the requirements for the content of an appeal are not optional, as EPIC appears to believe. SMC 23.76.022.C.3 requires that "[i]n form and content, the appeal shall conform with the rules of the Hearing Examiner." The Hearing Examiner Rules of Practice and Procedure ("Hearing Examiner Rules") provide: "All appeals must comply with these Rules and with the requirements established in the law under which the appeal is filed." Rule 3.01(a) (emphasis added). "An appeal must be in writing and contain the following . . . [s]ignature, address, telephone and facsimile numbers, and electronic mail address of the appellant and the appellant's designated representative, if any." Rule 3.01(d)(5). "Shall" and "must" are mandatory. *Singleton v. Frost*, 108 Wn.2d 723, 727-728, 742 P.2d 1224 (1987). None of the contrary authority cited by EPIC (Response, pp. 22-23) addresses the City Code or the Hearing Examiner Rules applicable here.

Finally, EPIC is wrong that the failure to provide this information does not prejudice the Applicant and County. Rather, this issue impinges on basic principle of procedural fairness. As illustrated by the motion currently pending before the Hearing Examiner, the County and the Applicant are left to speculate regarding theoretical facts that might support the standing of persons or organizational members who have not identified themselves or their interest in this appeal. Should any respondents wish to negotiate a resolution, who would the County and the Applicant contact? Certainly not Mr. Lowney, as he admits that his firm does not represent any Listed Organization (except, now, OneAmerica), and it cannot be presumed that his client, EPIC, has the same interest as any one of the Listed Organizations. To whom should discovery be directed? What questions should be asked?

If this appeal results in a decision that the Applicant or County decide to appeal under the Land Use Petition Act ("LUPA"), the jurisdictional requirements of that statute require

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petitioners to name and serve "each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker." RCW 36.70C.040(2)(d). Service must be made by mail at "the address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section," namely, administrative appellants. RCW 36.70C.040(5)(c). Here there is no contact name or address for any of the Listed Organizations. Similarly, must it be presumed that each Listed Organization has an independent right to file its own LUPA appeal, if unsatisfied with the Hearing Examiner's decision?

EPIC's reliance on *Conom v. Snohomish County*, 155 Wn.2d 154, 118 P.3d 344 (2005), is misplaced. In *Conom* the Supreme Court concluded that the appellant's failure to timely note an initial hearing in a LUPA appeal was not a jurisdiction error. *Id*. at 163. Here, in contrast, the error is not merely technical. It involves a fundamental, jurisdictional prerequisite to maintaining a Hearing Examiner appeal.

The Hearing Examiner Rule to provide signatures and contact information exists for a good reason – it dovetails with basic due process requirements. The Applicant and the County cannot adequately defend against what are for all practical purposes unknown entities and individuals. EPIC's claim that its failure to follow the rules will not prejudice other parties is neither accurate nor legally significant in the context of its jurisdictional defect.

The Listed Organizations are not appellants and should be dismissed from this appeal.

D. EPIC fails to establish that Listed Organizations may appeal the SEPA component of the MUP despite their failure to comment.

EPIC claims that Listed Organizations who did not comment may nevertheless appeal the SEPA component of the MUP. EPIC cites a single unrelated Hearing Examiner decision as authority that an appeal is allowed. EPIC also claims the Listed Organizations can appeal

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because an individual who is purportedly a member of one of the Listed Organizations commented. Response, pp. 23-24. EPIC is incorrect.

EPIC simply ignores the extensive authority provided in the motion to dismiss that requires a party to submit SEPA comments in order to later file a SEPA appeal. WAC 197-11-545(2) ("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."); SEPA Handbook, Section 5 ("providing timely comments is usually a prerequisite to the appeal of a proposal"); *Kitsap County v. State Dep't of Natural Res.*, 99 Wn.2d 386, 392, 662 P.2d 381 (1983) (county's appeal of environmental impact statement dismissed for failure to comment); *see also* SMC 25.05.545 (effect of no comment).

Instead, EPIC erroneously relies on *In the Matter of the Appeal of Smart Growth Seattle*, Hearing Examiner File W-14-001, Order on Motion to Dismiss (September 2, 2014). In *Smart Growth*, the appellant had sent two letters (one to a City Council member and one to SDCI) regarding the project at issue. The comments did not technically qualify as SEPA comments because one was not timely and the other did not discuss SEPA or identify the organization. However, the appellant participated in the administrative process by submitting at least some comments. Here, in contrast, none of the challenged Listed Organizations submitted any comments at all. Also, here, these same Listed Organizations failed to designate a representative, provide contact information, a signature on the appeal or any information about their alleged standing. Thus, their participation appears at best to be in name only. They should be dismissed.

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EPIC also suggests that the Listed Organizations may appeal because some of their members commented. The only example EPIC provides is that of a Rose Ernst who commented and is a member of European Dissent. Response, p. 24. EPIC did not provide a copy of the comment letter, but a review of the SDCI file shows that Ms. Ernst identified her affiliation with European Dissent. While this does not provide "standing" to European Dissent (*see* Section III.C above), as EPIC claims, the Applicant and the County withdraw their request to dismiss European Dissent on the grounds of failure to comment. Since EPIC has not identified any other example of a specific individual commenting on behalf of a Listed Organization, however, the Examiner should grant the Applicant and the County's Motion to Dismiss regarding each Listed Organization identified in relation to this issue.

In sum, the Hearing Examiner must reject EPIC's arguments and dismiss the Listed Organizations who failed to provide timely SEPA comments, failed to provide contact information or a signature on the appeal and failed to provide any information to establish standing.

E. EPIC fails to demonstrate that their vague claims meet the requirements for "specific objections" in an appeal.

EPIC asserts it was not required to provide clarification because: (1) it was not ordered by the Hearing Examiner; and (2) EPIC is confused about what plans were approved. Response, pp. 24-26. EPIC is incorrect.

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

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to make the appeal complete and understandable." Contrary to EPIC's assertion, the Appellant, County and City requested clarification at the prehearing conference in this matter. The Hearing Examiner also independently noted the need for clarification. This is what the Hearing Examiner ordered verbally during the prehearing conference and by Order following the prehearing conference. Prehearing Order, p. 1.

EPIC asserts the need for discovery to identify any changes to the Project plans that might have occurred during MUP review. While EPIC claims confusion about this, all plans submitted to SDCI are public record. EPIC has had access to them since their submission to SDCI by means of a Public Records Act request. It is disingenuous for EPIC to claim that there is a need for discovery on this issue now. It appears EPIC intends to engage in a classic "fishing expedition," in which it uses discovery to develop specific claims it did not contemplate when it filed the appeal, and to use discovery as an excuse to delay the Project. The Hearing Examiner Rules preclude such an approach, requiring instead "specific objections" at the time an appeal is filed. Hearing Examiner Rule 3.01(d)(5).

The authority relied on by EPIC relates to the superior court civil litigation process. Response, p. 26, fn. 18. The civil litigation process is different in nature from the land use appeals process, since it does not implicate the strong public policy in Washington for "expedited appeal procedures" to "provide consistent, predictable, and timely" review in land use cases. *See e.g.*, RCW 36.70C.010. Thus, the authority EPIC cites is inapplicable here.

Further, the only area of confusion identified by EPIC in its Response relates to the location of Project-related interior uses. EPIC's uncertainty regarding interior uses is unrelated to the MUP decision, and does not provide a justification for EPIC's attempt to preserve an appeal of "all changes . . .without limitation," broad claims about SEPA review, compliance with

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any of the conditions of the MDNS and its claims of inaccuracies or inconsistencies in the Project plans. *See* Appellants' Response to Motion to Clarify, pp. 2-6.

The Hearing Examiner should dismiss those claims that EPIC did not clarify.

F. EPIC fails to show that the Hearing Examiner has jurisdiction over specific claims subject to this motion to dismiss.

EPIC asserts that the Hearing Examiner should defer ruling on the motion to dismiss until after discovery has been conducted and arguments on the merits complete. Response, pp. 26-27. EPIC misses the point. The Applicant and the County (joined by the City) seek dismissal of these issues because the Hearing Examiner lacks jurisdiction over them. Facts that may be produced in discovery and argument on the merits of these claims are irrelevant to the subject of the motion, which is the scope of the Hearing Examiner's jurisdiction.

Instead, EPIC has failed to demonstrate that the Hearing Examiner has jurisdiction over (1) claims of "piecemealing" of SEPA review; (2) claims relating to social justice and housing policies; (3) claims relating to Type I decisions; and (4) additional SEPA claims that are untimely, not subject to administrative appeal and outside the scope of SEPA. Also, EPIC fails to respond to the motion to dismiss its constitutional claims and claims based on an inapplicable standard of review. EPIC states it relies on "its prior arguments on these points." Response, p. 26, fn. 19. There are no prior written arguments on these topics. EPIC has abandoned these claims. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (party abandoned issue when it only incorporated prior briefing by reference; "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."

The Hearing Examiner must dismiss these claims.

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1. EPIC fails to establish that the Hearing Examiner has jurisdiction over claims of "piecemealing" of SEPA review.

EPIC claims that the Hearing Examiner has jurisdiction over claims of "piecemealing" SEPA review because: (1) the Notice of Action does not apply to administrative appeals; (2) the Notice of Action has no impact on post-2013 compliance; and (3) piecemealing issues are not subject to res judicata. Response, pp. 27-32. EPIC is incorrect.

First, EPIC's argument that the Notice of Action statute does not apply to administrative actions misses the point. Response, pp. 27-28. Under RCW 43.21C.080(2)(a), neither a trial court nor a hearing examiner may order additional SEPA review, because "…the issue is time barred..." *Wells v. Whatcom County Water Dist.*, 105 Wn. App. 143, 152, 19 P.3d 453 (2001).

Here, the County conducted SEPA review, issued a mitigated determination of nonsignificance ("MDNS") in 2013, and issued a Notice of Action in 2014. Pursuant to RCW 43.21C.080, the Notice of Action imposed a time limit for any appeals of the County's SEPA action – including appeals based on claims of "piecemealing." EPIC's piecemealing claims attempt to retroactively challenge the County's 2013 environmental review. EPIC expressly references the County's environmental review, alleging "The City and County improperly piecemealed the project in violation of SEPA." (Amended) Objection to Land Use Decision, p. 1 (emphasis added). This challenge is not – and cannot be – directed at the City's MUP because it was not a threshold determination, and the County performed the environmental review. The only SEPA-related action the City took was to impose additional SEPA conditions. Lowney Declaration, Ex. F, p. 1. EPIC's piecemealing challenge is untimely.

Second, EPIC argues that RCW 43.21C.080 does not preclude piecemealing claims related to post-2013 events. Specifically, EPIC claims that additional SEPA review is required due to changes in the Project or new information. Response, pp. 28-31. Such argument

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conflates piecemealing with WAC 197-11-600's substantial change provisions. WAC 197-11-600 does not relate to the concept of piecemealing.

Regardless, EPIC's argument regarding further SEPA review does not address a decision contained in the MUP. The only SEPA issue decided within the MUP was to impose additional substantive SEPA conditions beyond those specified in the MDNS. Lowney Declaration, Ex. F, p. 1. The Hearing Examiner lacks jurisdiction to revisit the no-longer reviewable MDNS. The decision to utilize existing environmental documents is not subject to Examiner appeal. SMC 23.76.006.C. The Hearing Examiner lacks jurisdiction for this reason as well.

Third, EPIC's attempt to avoid res judicata fails. EPIC claims that the prior case involved a lot boundary adjustment ("LBA") only. Response, p. 31. This is not so. In that case, as here, EPIC argued that "new" information created a substantial change in the Project sufficient to defeat the RCW 43.21C.080 time bar. In dismissing EPIC's appeal, the superior court specifically rejected EPIC's substantial change argument and found that EPIC's SEPA challenge was untimely. Kaylor Declaration, Ex. E. EPIC asserts it intends to raise the exact same issue here. Response, pp. 28-31. Thus, the identity of subject matter requirement for res judicata is satisfied. *See Clallam County v. W. Wash. Growth Mgmt. Hearings Bd.,* 130 Wn. App. 127, 121 P.3d 764 (2005) (elements of res judicata).

Next, EPIC claims that the LBA was "relatively insignificant" so it had "no motivation or reason to appeal." Response, p. 32. Yet EPIC did appeal to Superior Court, raising the same factual allegations regarding the same SEPA process. That appeal resulted in the decision that now precludes EPIC from raising the same claim again now. Kaylor Declaration, Ex. E. There is no injustice in applying res judicata here.

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EPIC also asserts that the Listed Organizations may raise this issue because they did not control the LBA litigation. Response, p. 32. This is not a requirement for res judicata. Res judicata requires "identity" of parties. *Clallam County, supra,* 130 Wn. App. 127. 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 (2007). A party has privity with a nonparty if it adequately represented the nonparty's interests in the prior proceeding. *Id.* Here, EPIC asserts no interests of the Listed Organizations that are different from EPIC's. Indeed, EPIC's Response acknowledges that "…Appellants are presenting a unified appeal." Response, p. 32. It is disingenuous for EPIC to attempt to assert that any Listed Organization was not adequately represented by EPIC in its prior appeal. Additionally, Washington courts allow 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. The identity of parties element is satisfied.

The Examiner should reject EPIC's attempts to avoid res judicata and relitigate its SEPA claims here.

2. EPIC fails to show that the Hearing Examiner may consider social justice and housing policies.

EPIC erroneously asserts the Hearing Examiner has jurisdiction over social justice and housing policy matters: (1) in the context of its appeal of the Modification; (2) under SEPA's general purpose statement and City Code provisions requiring the SEPA analysis of impacts to housing and public safety; (3) because of Comprehensive Plan housing policies; and (4) under

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SMC 25.05.440(E)(5), which it asserts requires consideration of racial discrimination under SEPA. Response, pp. 32-39. None of these arguments has merit.

First, EPIC has provided no authority whatsoever for its contention that social justice and housing policies are relevant to the decision on the Modification. *See* Response, p. 32, fn. 23. SMC 23.51A.004.B.6 provides that a modification of development standards may be granted "if needed to accommodate unique programming, public service delivery, or structural needs of the facility" and if three urban design standards are met. This section allows SDCI and the Hearing Examiner to determine whether the modification to development standards is necessary. This section does not allow SDCI or the Hearing Examiner to second guess whether the proposed Project itself is necessary or to revisit County policy decisions about its juvenile justice facilities. The Hearing Examiner must decline EPIC's invitation to do so.[4]

Second, there is no merit to EPIC's claim that the Hearing Examiner has jurisdiction to consider social justice and housing issues under either SEPA's general purpose statement or City Code provisions requiring the SEPA analysis of impacts to housing and public safety. General purpose statements contained in RCW 43.21C.010(1), (3) and RCW 43.21C.020 and cited by EPIC do not control over the specific SEPA Rules that provide that SEPA considers only environmental impacts and that a "social policy analysis" is not required. WAC 197-11-448; *see also* SMC 25.05.448.C ("social policy analysis" not required by SEPA).

Additional provisions EPIC cites are off point and do not support Examiner jurisdiction here. For instance, EPIC cites SMC 25.05.675.I.2.b, a subset of the City's SEPA housing policy which states that each person has a right to a healthful environment and that "affordable

[4] EPIC's policy discussion at Response, pp. 33-34, 36-37 and 38, relates to matters outside the scope of the Hearing Examiner's jurisdiction. The Hearing Examiner should strike this discussion under Hearing Examiner Rule 2.17(b) ("The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged.").

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housing" is a component of a healthful environment. EPIC also cites 25.05.444.B.2.b, which states that housing is an element of the environment. However, these policies relate to environmental impacts on existing physical housing, not housing policy. EPIC's reliance on SMC 25.05.330.C.5.d and its counterpart WAC 197-11-330(C)(5)(d) are similarly misplaced. SMC 25.05.330.C.5.d requires the City to take into account effects on public health or safety when it makes a threshold determination. However, the City made no threshold determination here. Furthermore, SMC 25.05.330.C.5.d relates to actual, physical health and safety, not social policy. None of these authorities support EPIC's claim that the Hearing Examiner has jurisdiction to consider social or housing policies.

EPIC misplaces reliance on *West 514, Inc., supra*, 53 Wn. App. 838. In *West 514*, the Court held that economic impacts do not need to be considered under SEPA unless they result in physical blight. The Court emphasized that SEPA addresses only the "*physical* environment." *Id.* at 847 (emphasis in original). This holding is at odds with EPIC's position that the Hearing Examiner has jurisdiction over social policy.

Perhaps even more fundamentally, EPIC's argument that "the youth jail will negatively affect public health and safety and will create unsafe and dangerous housing for youth" ignores the very narrow scope of the SEPA decision before the Hearing Examiner. *See* Response, p. 36. Here, the only SEPA decision in the MUP is the imposition of substantive SEPA conditions under the City's SEPA authority. EPIC's policy claims do not relate to the decision at issue here.

Third, EPIC erroneously relies on SMC 25.05.675.J.2.b in support of its theory that the City was required to evaluate conflicts with Seattle Comprehensive Plan policies – specifically, Land Use Goal 3, Land Use Goal 14, and Land Use Goal 32 – and to mitigate them. Response,

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pp. 37-38. SMC 25.05.675.J.2.b provides that the City may impose conditions to achieve consistency with the policies in Section B of the Land Use Element of the Comprehensive Plan regarding Land Use Categories. When SMC 25.05.675.J.2.b was adopted, the Land Use Element had a Section B entitled Land Use Categories. Section B was divided into subsections on Single Family Areas, Multifamily Residential Areas, Mixed-Use Commercial Areas, Industrial Areas and Downtown Areas.[5] However, the current Comprehensive Plan no longer has a Section B. The goals and policies that correspond to the former Section B start on page 51 of the current Comprehensive Plan and encompass Land Use Goal 7 through Land Use Goal 11. *See* Comprehensive Plan, pp. 51-52 (Single Family Residential Areas), pp. 53-54 (Multifamily Residential Areas), pp. 54-57 (Commercial/Mixed Use Areas), pp. 58-61 (Industrial Areas) and p. 61 (Downtown Areas).[6] The Land Use Goals that EPIC relies on are not included in this section. Accordingly, contrary to EPIC's claim, the City has no authority to impose mitigation based on these goals under SMC 25.05.675.J.2.b.

Fourth, EPIC asserts that the Hearing Examiner has jurisdiction over social justice policies under SMC 25.05.440(E)(5),[7] which it asserts requires consideration of racial discrimination under SEPA. Response, pp. 38-39. EPIC is wrong. This section is inapplicable here. SMC 25.05.440 identifies the required content of an environmental impact statement ("EIS"). Here, the City was not the lead agency and did not prepare an EIS. Instead, the City's action was limited to imposing substantive conditions under SEPA. Lowney Declaration, Ex. F, p. 1. The Hearing Examiner must reject this argument out of hand.

[5] http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd016650.pdf
[6] http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/p2580242.pdf
[7] This is a typographical error in EPIC's Response. The section quoted is SMC 25.05.440.E.6.

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For these reasons, the Hearing Examiner must reject EPIC's arguments and dismiss its claims based on social justice and housing policies.

3. EPIC fails to demonstrate that the Hearing Examiner has jurisdiction over claims relating to Type I decisions.

EPIC's assertions that the Hearing Examiner has jurisdiction over the Project's compliance with "substantive criteria" are erroneous. EPIC asserts that (1) the Hearing Examiner has jurisdiction over these claims under SMC 23.76.022(C)(6) and SMC 23.76.020; (2) EPIC's challenges to the Project's compliance with "substantive criteria" overlap with other claims so there would be no benefit to dismissing them; and (3) EPIC's claim regarding inadequate plans is subject to appeal under SMC 23.76.022(C)(6). Response, pp. 39-42. EPIC is incorrect.

First, the Code sections EPIC cites do not apply to Type I decisions. SMC 23.76.022.C.6 addresses the scope of Hearing Examiner review. It states: "The Hearing Examiner shall entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76, compliance with substantive criteria" and other matters. (Emphasis added.) While EPIC misleadingly omits the reference to Type II decisions, it is clear that the Hearing Examiner may consider procedural and substantive claims relating to Type II decisions. SMC 23.76.020 states that the Director grants a Type II decision based on compliance with substantive requirements, among other things. It does not address the appealability of Type I decisions. Instead, under the clear provisions of the City Code, Type I decisions are not subject to appeal to the Hearing Examiner absent a request for Code Interpretation, which was not made in this case. SMC 23.76.022.A.1. Neither SMC 23.76.022.C.6 nor SMC 23.76.020 allow EPIC to challenge a Type I decision within the context of a Type II Examiner appeal.

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Second, EPIC's asserted belief that its claims are intertwined does not expand the jurisdiction of the Hearing Examiner. If EPIC wanted to challenge compliance with development standards, it was required to make a request for Code Interpretation, which it did not. SMC 23.76.022.A.1. EPIC is precluded from arguing that the Project does not comply with development standards in this appeal. *Id.*

Third, EPIC asserts its challenges to the adequacy of plans based on SMC 23.76.022.C.6. Yet SMC 23.76.022.C.6 applies only to appeals of Type II decisions. An administrative determination that plans are adequate for review is not a Type II decision.

For these reasons, the Hearing Examiner must dismiss EPIC's challenges to Type I decisions.

4. EPIC fails to demonstrate that the Hearing Examiner has jurisdiction over additional SEPA claims that are untimely, not subject to administrative appeal and outside the scope of SEPA.

EPIC claims that the Hearing Examiner has jurisdiction over: (1) its claim that mitigation is inadequate; (2) claims regarding social policy impacts; and (3) noncompliance with substantive criteria of the land use code and the mitigation imposed by the County's MDNS. Response, pp. 42-44. EPIC is incorrect.

First, EPIC misunderstands the scope of review here. The City's exercise of its substantive SEPA authority is limited. Under 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 . . ." Under SEPA, the City may only impose mitigation measures that are based on its formally designated policies as a basis for the exercise of its substantive SEPA authority. SMC 25.05.660.A.1. However, EPIC's claims exceed this limited scope. EPIC's claim is that there are impacts that were not identified previously and that should be mitigated.

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Response, p. 43 (EPIC seeks to "put on a case about the specific, significant environmental impacts from this development project"). As argued in Section III.F.1, above, this claim is an improper collateral attack on the County's MDNS, which was issued long ago, and which cannot be challenged now. Kaylor Declaration, Exs. A, B; RCW 43.21C.080(2). It is not supported by the City's substantive SEPA authority.

Second, EPIC's claims about social policies are addressed in Section III.F.2, *supra*. EPIC's assertion that it is entitled to "put on a case about the specific, significant environmental impacts from this development project" (Response, p. 43) simply illustrates the overreaching nature of its claims. The Project's environmental impacts were analyzed and an MDNS issued by the County in 2013. Kaylor Declaration, Exs. A, B. The time to challenge the sufficiency of the Project's SEPA review has long since passed. RCW 43.21C.080(2).

Third, EPIC's statement that the City did not require compliance with the County's MDNS conditions is simply wrong, as discussed in detail in the Motion to Dismiss. EPIC's own citation to the King County Code provision stating that the mitigation measures specified in an MDNS "shall be deemed conditions of any decision" further undermines its claims. Response, p. 44. There is no basis for a new SEPA analysis. Further, the Hearing Examiner lacks jurisdiction over EPIC's claim that a new SEPA analysis is required. Kaylor Declaration, Exs. A, B; RCW 43.21C.080(2); SMC 23.76.006.C.

EPIC provides no meaningful response to the motion to dismiss its claims regarding MDNS conditions. These conditions are either directly referenced in the MUP, relate to approvals that do not occur until later in the land use permitting process, or relate to compliance with state or federal law. EPIC cites only to WAC 197-11-330(3)(e)(iii) and SMC 25.05.330.C.5.c to support its claim that the Hearing Examiner may consider compliance with

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state or federal law. Response, p. 43. These sections relate to the SEPA threshold determination process. Here, the City did not make a threshold determination. These sections do not apply.

The Hearing Examiner must reject EPIC's arguments and dismiss the SEPA claims over which the Hearing Examiner lacks jurisdiction.

IV. SUMMARY JUDGMENT MOTION

EPIC asserts that this motion should be decided under Hearing Examiner Rule 3.02 (as a motion to dismiss). Response, p. 44. On this point, the Applicant and County agree with EPIC. The Hearing Examiner lacks jurisdiction over many of EPIC's claims and should dismiss them on that basis.

The Applicant and County included an alternative motion for summary judgment because a declaration was provided to support the motion. If the motion is considered one for summary judgment, then the Applicant and County have met their burden to show that there are no genuine issues of material fact and they are entitled to judgment as a matter of law. CR 56. A party moving for summary judgment may meet its burden to show there are no genuine issues of material fact by pointing out to the Hearing Examiner that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187 (1989), *rev'd in part on other grounds*, 130 Wn.2d 160, 179, 922 P.2d 59 (1996). Once the moving party has made this prima facie showing, the burden shifts to the non-moving party to show a genuine issue of material fact exists. *Briggs v. Nova Servs*., 166 Wn.2d 794, 811, 213 P.3d 910 (2009). Here, the Applicant and County have met their burden. In response, EPIC failed to provide evidence demonstrating a genuine issue of material fact or to show that the Applicant and County are not entitled to judgment as a matter of law.

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Accordingly, the Hearing Examiner should grant dismissal or, in the alternative, summary judgment to the Applicant and County.

V. CONCLUSION

For these reasons, the Applicant and the County request that the Hearing Examiner dismiss this appeal, in whole or in part.

DATED this 17th day of February, 2017.

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