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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

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

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

**I. INTRODUCTION**

In his response brief, Appellant Scott Francis (“Appellant”) fails to demonstrate as a matter of law that the Hearing Examiner has jurisdiction over two issues in this appeal.<sup>1</sup> Specifically, Appellant is unable to find any legal support for his arguments that (1) setback adjustments granted under the Streamlined Design Review (“SDR”) process are Type II Decisions reviewable by the Hearing Examiner; and (2) determinations of overall compliance with the City’s Environmental Critical Areas (“ECA”) Ordinance (Chapter SMC 25.09) is reviewable by the Hearing Examiner. Accordingly, Applicant 1708-1708 Alki Ave SW (“Alki

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<sup>1</sup> Appellant concurs that the Hearing Examiner lacks jurisdiction to consider State Environmental Policy Act (“SEPA”) issues in this appeal, and all claims related to SEPA must accordingly be dismissed. See Response to Motion to Dismiss, V.C.

1 Ave”) and Respondent City of Seattle (“City”) respectfully request that the Hearing Examiner  
2 dismiss those issues for lack of jurisdiction.

3 **II. ARGUMENT**

4 **A. Streamlined Design Review decisions are Type I issues not reviewable by the**  
5 **Hearing Examiner.**

6 In its response, Appellant misconstrues an inapplicable section of a City of Seattle TIP to  
7 support its proposition that the Hearing Examiner has authority to review the City’s approval of  
8 development standard adjustments under its SDR process. Appellant’s arguments fail for several  
9 reasons.

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11 The TIP that Appellants rely on discusses Administrative Design Review departures.  
12 Contrary to Appellant’s assertions, the City did not grant an Administrative Design Review  
13 departure. This allegation is not supported by any facts in the record or the Land Use Code.  
14 Instead, the City granted an adjustment to setback requirements as part of the SDR process.  
15 Appeal of Scott Francis (“Appeal”), Exh. A. (granting an adjustment to reduce setback  
16 requirements up to a maximum of 50 percent); SMC 23.41.018.D.4.a (permitting SDCl to adjust  
17 the setback and separation requirements by a maximum of 50 percent). Appellant also ignores  
18 the clear language of SMC 23.41.018.C.2, which unequivocally states that “[a]djustments to  
19 certain development standards pursuant to subsection 23.41.018.D may be approved as a Type I  
20 decision.” *See also* SMC 23.76.006B.13. Appellant provides no authority that compels a  
21 contrary conclusion. In addition, even if a TIP could be used as substitute for the Land Use  
22 Code, which it cannot (*see* TIP 238B), the TIP concurs with the Land Use Code and states that  
23 SDR adjustments are Type I decisions not appealable to the Hearing Examiner.  
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1 Appellant also attempts to piggyback its claims regarding compliance with SMC  
2 23.41.018 and Design Review Guidelines on the Hearing Examiner’s review of the ECA  
3 variance, claiming that the SDR adjustments are “inseparable” from the City’s ECA Variance  
4 decision. Appellants provide no legal or factual support for this assertion.  
5

6 The Hearing Examiner has jurisdiction to review the ECA Variance, and in that review,  
7 will review the criteria for granting a variance. SMC 25.09.180.E and SMC 25.09.280.B. One  
8 element of consideration is the reduction of front and rear setbacks. SMC 25.09.280.B.5. This  
9 consideration of setbacks does not, however, revive claims regarding compliance with Design  
10 Review Guidelines and SMC 23.41.018 raised by Appellants or allow the Hearing Examiner to  
11 review the SDR adjustments to side setbacks. Because Appellant failed to seek an interpretation  
12 regarding the SDR adjustments, the Hearing Examiner must assume, in her review of the  
13 variance criteria, that the City’s Type I decisions regarding the adjustment complies with SMC  
14 23.41.018 and the Design Review Guidelines.  
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16 Appellant’s SDR claims must accordingly be dismissed.  
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18 **B. The Hearing Examiner should dismiss all ECA claims raised in the appeal that are  
19 not related to the ECA Variance for lack of jurisdiction.**

20 In its response, Appellant raises a new claim that he was deprived of the opportunity to  
21 seek an interpretation to establish the project site as a wildlife habitat conservation area because  
22 the purported presence of herons was not noted in the SEPA checklist. Appellant is incorrect.  
23 Not only can Appellant not raise a new claim in its response to a motion to dismiss (*see* HE Rule  
24 3.01(d)), but Appellant also had every opportunity to file an interpretation request, and simply  
25 failed to do so. Indeed, the City Code permits Appellant to file a request for an interpretation  
26 under SMC 23.88.020.C.3.c. at the same time as his appeal of the Type II decision. *See* SMC  
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1 23.88.020.C.3.c. (“an appeal of a Type II decision to the Hearing Examiner . . . may include a  
2 request that the Director issue in writing an interpretation of specified code sections, combined  
3 with an appeal of such interpretation . . .”). Appellant did not seek an interpretation regarding  
4 the critical areas on the Project site, and cannot now challenge the Director’s findings regarding  
5 the ECA areas on site. *See* Appeal, Exh. A, p. 2 (determining the types of critical areas at the  
6 Project site).  
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8 Appellant further argues that SDCI’s determination regarding the Project’s compliance  
9 with Chapter 25.09 must be appealable to the Hearing Examiner because SDCI did not make a  
10 decision related to the meaning, application, or intent of Chapter 25.09. Appellant is incorrect.  
11 To the extent any determination under the ECA is not considered a “decision,” the determination  
12 is not appealable to the Hearing Examiner by default. The Hearing Examiner “has only the  
13 authority granted it by statute and ordinance.” *HJS Development, Inc. v. Pierce County*, 148  
14 Wn.2d 451, 471, 61 P.3d 1141 (2003); HER 2.03. The City Code clearly states that decisions  
15 made under the ECA are not appealable to the Hearing Examiner unless explicitly noted in the  
16 ECA. SMC 25.09.017.F (“Other administrative appeal provisions set out in Title 23 do not  
17 apply to decisions under this Chapter 25.09, except as specifically provided.”). With the  
18 exception to the appeal of the ECA Variance, Appellant points to no provision of Chapter 25.09  
19 that specifically provides for appeal to the Hearing Examiner. Accordingly, the Hearing  
20 Examiner does not have jurisdiction to consider those ECA claims that are not related to the  
21 ECA Variance granted under SMC 25.09.180.E, and these claims must be dismissed.  
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## 25 II. CONCLUSION

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

3 DATED this 21<sup>st</sup> day of February, 2017.

4 MCCULLOUGH HILL LEARY, P.S.

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6  
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