

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

SCOTT FRANCIS

From a land use decision by the Director,
Department of Construction and Inspections

Hearing Examiner File:
MUP-16-024 (ECAV)

Department Reference:
3021625

ORDER

The Respondents, Applicant 1706-1708 Alki Avenue and the Director, jointly moved on January 30, 2017 for dismissal of certain claims in the above-referenced appeal. The Appellant filed a response on February 13, 2017. The Respondents filed a joint reply on February 21, 2017. Having considered the filings in this matter, the undersigned Hearing Examiner Pro Tem grants the Respondents' motion for the reasons stated below.

1. Hearing Examiner Rule 3.02(a) provides that an appeal may be dismissed without a hearing if 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. The Respondents' motion seeks dismissal of the claims that: the front and side setback adjustments were not properly granted pursuant to streamlined design review under SMC 23.41.018; that the decision failed to analyze and mitigate the project's impacts on heron habitat and drainage, and construction-related impacts; and that the SEPA decision was in error.
2. SEPA claim. As to the SEPA-related claim, the Appellant's response noted that his appeal referenced SEPA issues, but that his MUP appeal does not ask the Examiner to consider SEPA issues. As noted by Respondents, the Examiner lacks authority to consider an appeal of the SEPA decision because the Shoreline Hearings Board has exclusive jurisdiction over that decision.
3. Streamlined design review. The appeal claims that the ECA variance decision is in error because the front and side setback adjustments, referenced in the variance decision, were not properly granted under SMC 23.41.018.D. However, this claim challenges the Director's SDR decision rather than the ECA variance decision. The Director's SDR decision is a Type I decision, which cannot be appealed to the Hearing Examiner; SMC 23.76.004.B; and no Director's interpretation was requested considering the Type I decision under SMC 23.88.020. The design review guidance cited in Appellant's response does not apply here, where no design departure was granted as part of administrative design review. Therefore, the Hearing Examiner lacks jurisdiction over this claim.
4. Habitat, drainage and construction impacts. The motion also seeks dismissal of the claims concerning the project's impacts on heron habitat and drainage, and its construction-related impacts, specifically, the impacts of pile-driving activities. The Respondents argue that these claims are outside of the Hearing Examiner's jurisdiction, since under SMC 25.09.017.F, the provisions of SMC 23.88.020 "*are the exclusive administrative remedy for any determination by*

the Director under Chapter 25.09, except as otherwise specifically provided." The Appellant argues that his claims may generally be reviewed under SMC 25.09.180.E.3, which authorizes the Director to impose conditions on the *"location, character and other features of the proposed development"* to carry out the purpose of Chapter 25.09 SMC and to mitigate the reduction or loss of the yard, setback or steep slope area or buffer.

5. But none of the cited provisions authorize the Examiner to review the project's compliance with ECA standards; to do so would render meaningless the language of SMC 25.09.017.F. The Code does not provide for an administrative appeal of the Director's determination as to the project's compliance with the ECA regarding habitat, drainage impacts and construction impacts. Absent specific Code provisions allowing the Examiner to review these determinations, the Hearing Examiner is limited to reviewing the ECA variance decision in light of the applicable criteria contained in SMC 25.09.180.E and 25.09.280.B.

6. With regard to the claimed impacts on habitat, the appeal does not actually allege that the site is within an ECA fish and wildlife conservation area so as to be subject to SMC 25.09. However, the Appellant's response states that he was deprived of an opportunity to seek a Director's interpretation concerning habitat areas because the Applicant failed to notify the City of the presence of herons. The Appellant could have filed an interpretation request at the time of filing the ECA variance decision appeal, so it is not clear that lack of information prevented him from seeking an interpretation. But in any event, the Examiner lacks authority to order the interpretation period to be re-opened for the reasons cited in this case, or to allow the Appellant to appeal a Type I decision as part of this appeal.

7. Because the Hearing Examiner lacks jurisdiction over the claims cited above, the Respondents' motion for partial dismissal is **GRANTED**.

Entered this 22nd day of February 2017.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order** to each person listed below, or on the attached mailing list, in the matter of **Scott Francis**. Hearing Examiner File: **MUP-16-024 (ECAV)** in the manner indicated.

Party	Method of Service
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Dated: February 22, 2017

TK

Tiffany Ku
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