

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

EPIC, ET AL.

from a decision by the Director,
Department of Construction and
Inspections

Hearing Examiner File:

**MUP-17-001
(W, MOD. STDS.)**

Department Reference:

3020845

**ORDER ON RESPONDENTS'
JOINT MOTION TO DISMISS**

Background

King County owns the existing Youth Services Center facility located at 1211 East Alder Street in Seattle. The County desires to demolish the existing facility and replace it with the Children and Family Justice Center. The first phase of the project would include the demolition work, site preparation, grading and excavation, and construction of two structures: a four-story structure for courtrooms, office space, detention housing and a school (“detention and justice structure”); and a four-story parking structure for 360 vehicles.¹ As lead agency under the State Environmental Policy Act, Chapter 43.21C RCW (“SEPA”), King County issued a mitigated determination of nonsignificance (“MDNS”) for the project on December 5, 2013. On January 4, 2014, King County issued a Notice of Action under SEPA, stating the County’s decision to proceed with the project and the deadline for filing a SEPA appeal.

Patrick Donnelly, on behalf of King County, filed an application for a Master Use Permit (“MUP”) for the project with the City’s Department of Construction and Inspections (“Department”). The application requested a modification or waiver of certain development standards pursuant to SMC 23.51A.004 (“Public facilities in multifamily zones”). The Department reviewed the application and issued a decision approving it.² The decision allowed modifications to structure width for both structures, and to side setbacks for parts of the detention and justice structure. The decision also imposed additional conditions on the project pursuant to the Department’s substantive SEPA authority.³ A standard notice to the applicant at the end of the decision describes the decision as an “appealable land use decision,”⁴ and the published Notice of Decision states that both the Department’s modification decision and decision imposing SEPA conditions may be appealed to the Hearing Examiner.⁵

¹ A future project phase would involve additions to both new structures but is not a part of the application.

² Declaration of Knoll Lowney Supporting Opposition to Motion to Dismiss (“Lowney Declaration”), Exhibit F.

³ King County’s MDNS included mitigation measures related to erosion, air quality, hazardous materials, contaminated soils and groundwater, greenhouse gases, surface water runoff, trees and vegetation, noise, and transportation. Declaration of Courtney Kaylor in Support of Motion to Dismiss, Exhibit A.

⁴ Lowney Declaration, Exhibit F at 17.

⁵ Lowney Declaration, Exhibit D at 2.

The Appellants timely appealed the decision. Following a telephonic prehearing conference, the Examiner issued a prehearing order that, *inter alia*, required the Appellants to clarify several of its appeal issues in response to the Applicant's motion to clarify. The Appellants filed their response to the motion to clarify on February 3, 2017. On the same date, King County and the Applicant filed a joint motion to dismiss all or parts of the appeal. The Department joined in the motion, other than those portions that seek dismissal on the bases of EPIC's and other listed organizations' standing and EPIC's failure to seek a Land Use Code interpretation. The motion was fully briefed, and the Examiner has considered the file in this appeal, including all briefing on the motion.

Analysis

The Respondents ask that the Examiner dismiss the entire appeal for lack of jurisdiction, arguing that neither the Department's decision to modify or waive development standards under SMC 23.51A.004.C, nor the Department's exercise of substantive SEPA authority under Chapter 25.05 SMC, is a Type II decision that may be appealed to the Hearing Examiner. The Respondents rely primarily on SMC 23.76.006, part of the Land Use Code.

Municipal codes are interpreted in the same manner as state statutes.⁶ The decision-maker's primary objective is to determine and carry out the intent of the legislative body, in this case, the City Council. If the Code's meaning is plain on its face, the Examiner must give effect to that plain meaning.⁷ In determining whether a plain meaning can be found, courts examine the language of a statute in the context of the statutory scheme as a whole.⁸ "Full effect must be given to the legislature's language, with no part rendered meaningless or superfluous."⁹ A statute or code "is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable."¹⁰ If a statute is ambiguous, or there are conflicting provisions that cannot be harmonized, the Examiner applies recognized principles of statutory construction to determine legislative intent.¹¹ One rule of statutory construction states that where two statutes or code sections conflict, the more specific statute prevails over the general statute.¹²

The Land Use Code, Chapter 23.76 SMC, first addresses Type II decisions and related appeals in Subchapter I, "General Provisions," which includes an overview of the "Land use decision framework" in SMC 23.76.004. That section explains that land use decisions are classified into five categories, or Types, and 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," with the exception of three specific types of permits if they are sought as part of a Council land use decision. Table A for 23.76.004 lists decisions included under each decision type and states that Type II decisions are "Appealable to Hearing Examiner or Shorelines Hearings Board".

⁶ *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

⁷ *Agrilink Foods, Inc. v. Department of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

⁸ *Id.*, citing *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002).

⁹ *Sleasman v. City of Lacey supra* at 646.

¹⁰ *Cerrillo v. Esparza*, 156 Wn.2d 194, 201, 142 P.3d 155 (2006).

¹¹ *See G.T. v. BlueShield*, 181 Wn.2d 691, 335 P.3d, 416 (2014).

¹² *State v. Baker*, 194 Wn. App. 678, 683, 378 P.3d 243 (2016).

Decisions waiving or modifying development standards are not included in the decisions listed in Table A. The Appellants note, however, that the last entry in Table A under "Type II" is "Other Type II decisions that are identified as such in the Land Use Code". They point out that SMC 23.51A.004.C expressly addresses the King County Youth Service Center¹³ and provides that "development standards ... relating to structure width and setbacks may be waived or modified by the Director *as a Type II decision*."¹⁴ However, Footnote 1 to Table A explains that the table is intended only as a general description of Type II decisions, and that it is SMC 23.76.006 that "establish[es] the types of land use decisions in each category."¹⁵

SMC 23.76.006 is part of the Land Use Code's Subchapter II, entitled "Master Use Permits" ("MUPS"). This section states that Type I, II and III decisions are components of MUPS and then lists decisions under their correct "Type". SMC 23.76.006.B is the list of Type I decisions and ends with the catchall phrase, "Other Type I decisions."¹⁶ SMC 23.76.006.C states that "[t]he following are Type II decisions." SMC 23.76.006.C.1 and C.2, then provide a detailed list of Type II decisions that are appealable to the Hearing Examiner and also note any specific exceptions to decisions otherwise listed as Type II¹⁷. There is no catchall provision for Type II decisions corresponding to the one for Type I decisions in SMC 23.76.006.B. A decision modifying or waiving development standards pursuant to SMC 23.51A.004 is not included in SMC 23.76.006.C's list of Type II decisions that may be appealed to the Examiner.

SMC 23.76.022, another part of Land Use Code Subchapter II on MUPS, directly addresses "Administrative reviews and appeals for Type I and Type II Master Use Permits". Subsection A of SMC 23.76.022 covers "Appealable decisions". Subsection A.2 reads as follows: "All Type II decisions *listed in subsection 23.76.006.C* are subject to an administrative open record appeal as described in this Section 23.76.022."¹⁸ SMC 23.76.022.C then sets forth the procedures for open record appeals before the Hearing Examiner.¹⁹

When SMC 23.76.004, SMC 23.76.006, and SMC 23.76.022 and read together and harmonized, their plain meaning is apparent. SMC 23.76.004 is intended to provide a general summary of the land use decision framework, much of which is taken up again in SMC 23.76.006 in greater detail. SMC 23.76.004.B makes the general statement that Type I decisions are made by the Director and may not be appealed to the Examiner, whereas Type II decisions are discretionary decisions made

¹³ "Youth service centers existing as of January 1, 2013, in public facilities operated by King County in an LR3 zone within an Urban Center and replacement, additions or expansions to such King County public facilities,"

¹⁴ Emphasis added.

¹⁵ Footnote 1 reads as follows: "Sections 23.76.006 and 23.76.036 establish the types of land use decisions in each category. This Table A for 23.76.004 is intended to provide only a general description of land use decision types." (SMC 23.76.006 addresses Council land use decisions.)

¹⁶ SMC 23.76.006.B.19.

¹⁷ For example, the establishment or change of use for a temporary use of more than four weeks, not otherwise permitted in the zone, or not meeting development standards, is a Type II decision appealable to the Hearing Examiner except the temporary relocation of a police or fire station for two years or less, which is not. SMC 23.76.006.C.2.a. And a determination of project consistency with a planned action ordinance is not a Type II decision appealable to the Examiner unless the project also requires another Type II decision. SMC 23.76.006.C.2.i.

¹⁸ Emphasis added.

¹⁹ Emphasis added.

by the Director and are subject to an appeal to the Examiner. Read in isolation, this section appears to state that all Type II decisions may be appealed to the Examiner. If that were true, the Director's decision to modify development standards for the subject project could be appealed to the Hearing Examiner because, as a Type II decision identified as such in SMC 23.51A.004, it would fit within the list of Type II decisions in Table A for 23.76.004. But Footnote 1 to Table A confirms that it is SMC 23.76.006, not SMC 23.76.004, that "establish[es] the types of land use decisions in each category." And SMC 23.76.006 controls not just which decisions are Type II, but of those, which may be administratively appealed. This construction is reinforced by SMC 23.76.022, which is the source of the Examiner's jurisdiction over appeals of Type II decisions and confirms that "[a]ll Type II decisions listed in subsection 23.76.006.C" may be appealed to the Hearing Examiner.

Finally, even if SMC 23.76.006 were found to conflict with SMC 23.76.004, making it necessary to resort to the rules of statutory construction, the result is the same. SMC 23.76.006 is the more specific of the two Code sections and thus, under the rules of statutory construction, would prevail over the more general language in SMC 23.76.004. Further, to interpret SMC 23.76.004 as controlling, thereby allowing all Type II decisions to be appealed to the Hearing Examiner, would render the carefully crafted detail on Type II appeals in SMC 23.76.006 superfluous, again contrary to an established rule of statutory construction.

The Appellants argue that the City Council intended that a decision waiving or modifying development standards for a Youth Services Center project be appealable to the Hearing Examiner. They point to a staff report addressing the ordinance that amended the Land Use Code to define the new land use of "Youth Service Center" and allow waiver or modification of structure setbacks and building width for that use. The staff report includes a statement that the "proposal would allow applicants to apply for a Type II (a DPD decision that requires public notice and comment and is appealable to the Hearing Examiner) waiver or modification of these setback and maximum width standards."²⁰ The same language appears in the Fiscal Note for the ordinance.²¹ Nonetheless, the ordinance itself includes no language on appeals. Elements of legislative history, such as a staff report or comment, are not generally considered reliable in determining legislative intent.²² More importantly, legislative history cannot confer jurisdiction on the Hearing Examiner that is not found in the Code.²³

The Appellants also cite the appeal language included in the Department's decision and public notice of the decision. That notice was clearly in error, but an error of law by the Department cannot confer jurisdiction on the Hearing Examiner. The Examiner's jurisdiction is limited to that granted by ordinance or Code.²⁴

²⁰ Lowney Declaration, Exhibit E.

²¹ *Id.*

²² See, e.g., *Louisiana-Pacific Corp. v. Asarco Inc.*, 131 Wn.2d 587, 599, 934 P.2d 685 (1997); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 451, 536 P.2d 157, (1975).

²³ *HJS Development, Inc. v. Pierce Cy.* 148 Wn.2d 451, 471, 61 P.3d 1141(2003) citing *Lejeune v. Clallam Cy.*, 64 Wn.App. 257, 270-272, 823 P.2d 1144 (1992); *State v. Pierce*, 11 Wn.App. 577, 581, 523 P.2d 1201 (1974).

²⁴ *Id.*

To summarize, under SMC 23.76.022 and SMC 23.76.006, the Department's decision modifying certain development standards for the Children and Family Justice Center project is not subject to appeal to the Hearing Examiner and therefore, the appeal of that decision must be dismissed.

The Appellants also appealed the Department's decision imposing additional mitigating conditions on the project pursuant to the Department's authority under SEPA. The Respondents seek dismissal of that appeal on jurisdictional grounds, as well. Appeals of SEPA decisions are addressed in SMC 25.05.680, the applicable part of which reads as follows:

A. Master Use Permits and Council Land Use Decisions

1. For proposals requiring a Master Use Permit under Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions, for which the Seattle Department of Construction and Inspections or a non-City agency is the lead agency, SEPA appeal procedures shall be as provided in Chapter 23.76.²⁵

The project at issue here required a MUP under Chapter 23.76 SMC for the request to waive or modify development standards, and a non-City agency, King County, is the lead agency pursuant to the applicable SEPA Rules.²⁶ Therefore, under SMC 25.05.680.A.1, the Land Use Code, Chapter 23.76 SMC governs whether, and how the City's decision imposing SEPA conditions on the project may be appealed.

As discussed above, SMC 23.76.006.C identifies decisions that qualify as Type II and thus, may be appealed to the Hearing Examiner. SMC 23.76.006.C.2.o states that appeals of a decision to condition a project pursuant to the City's SEPA policies is a Type II decision only if it is integrated with at least one of the Type II decisions listed in SMC 23.76.006.C.2.a through SMC 23.76.006.C.2.1.²⁷ The City's decision imposing SEPA conditions was integrated with its decision approving modifications to structure width and building setbacks for the project. That modification decision is not one of the Type II decisions listed in SMC 23.76.006.C.2.a through C.2.1. Consequently, the City's decision imposing SEPA conditions on the Family and Justice Center project may not be appealed to the Hearing Examiner, and the appeal of that decision also must be dismissed.

²⁵ Emphasis added.

²⁶ See WAC 197-11-926.


²⁷ SMC 23.76.006.C.2.o reads as follows: The following decisions are subject to appeal to the Hearing Examiner (except shoreline decisions and related environmental determinations that are appealable to the Shorelines Hearings Board):

- o. Except for projects determined to be consistent with a planned action ordinance, decisions to approve, condition, or deny based on SEPA policies if such decisions are integrated with the decisions listed in subsections 23.76.006.C.2.a. through 23.76.006.C.2.1; provided that, for decisions listed in subsections 23.76.006.C.2.c, 23.76.006.C.2.d, 23.76.006.C.2.f, and 23.76.006.C.2.g that are made by the Council, integrated decisions to approve, condition, or deny based on SEPA policies are made by the Council pursuant to Section 23.76.036."

Decision

Under the Land Use Code, neither the Department's decision to modify or waive development standards for the Family and Justice Center Project under SMC 23.51A.004.C, nor the Department's imposition of SEPA conditions on the Project under Chapter 25.05 SMC, is a Type II decision that may be appealed to the Hearing Examiner. Therefore, it is not necessary to address the Respondents' alternative grounds for dismissal or partial dismissal. If a reviewing body, like the Examiner, lacks jurisdiction over a matter, it has authority only to enter an order of dismissal.²⁸ The appeal of the Department's decision approving the Project is **DISMISSED**, and the hearing scheduled for June 2, 2017 is **CANCELLED**.

Entered this 1st day of March, 2017.


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Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing the record. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

²⁸ See *Young v. Clark*, 140 Wn.2d 130, 65 P.3rd 1192 (2003); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).