BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

ENDING THE PRISON INDUSTRIAL COMPLEX (EPIC), ET AL From a decision by the Director, Department of Construction and Inspections, on a Master Use Permit	Hearing Examiner File No.: **MUP-17-001** DCI Project No. 3020845 **APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION**

I. INTRODUCTION

Appellants request that the Hearing Examiner reconsider her decision dated March 1, 2017 to dismiss their appeal. Resolution of the issue here requires the reconciliation of three different parts of the Seattle Municipal Code, SMC 23.51A.004, SMC 23.76.004 and SMC 23.76.006. When read together in light of relevant legislative history and applicable rules of statutory construction, these code sections demonstrate that the City's challenged Youth Jail decisions are appealable.

The City Council unequivocally granted the Appellants a right to appeal the waiver of setbacks and width requirements for the new Youth Jail when it designated the decisions as

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"Type II." SMC 23.51A.004.B. All other Type II Director decisions are appealable, as evidenced by Washington Supreme Court case law, legislative history, DCI's interpretation of relevant Code provisions and, most importantly, the plain language of relevant Seattle Municipal Code provisions. If the City Council had intended to create a non-appealable Type II Director decision for the first time when it passed SMC 23.51A.004.B, it would have done so explicitly. Yet, there exists no evidence that the Council intended to create such a narrow and specific departure from the rules applied to Type II decisions. Denying an appeal in this case runs counter to the City Council's explicit legislative intent and appropriate rules of statutory construction.

II. ARGUMENT

On October 13, 2014, the City Council passed an ordinance that set out how land use decisions regarding the proposed new Youth Jail would be made in the future. Newly amended SMC 23.51A.004.B now reads in relevant part:

> 6. 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. **For youth service centers, the development standards for institutions…relating to structure width and setbacks may be waived or modified by the Director as a *Type II decision*.**
>
> **.**

SMC 23.51A.004.B (emphasis added).

The City Council's explicit statement that the Director's decisions related to the Youth Jail are "Type II" decisions means that they are appealable for four reasons: (1) there is no such thing as a non-appealable Type II Director's decision; (2) the City did not explicitly state that the Youth Jail Type II decisions are not appealable; (3) all of the legislative history indicates that the City Council understood and intended that these decisions be appealable; and (4) other

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applicable rules of statutory construction also require a reading that provides for appeal of these decisions.

The relevant provisions of SMC 23.51.004, SMC 23.76.004, and SMC 23.76.006 must each be read separately and in concert to effectuate the Council's intent in passing each section. *Brin v. Stutzman*, 89 Wn. App. 809, 831, 951 P.2d 291 (1998). If the plain language of each provision is clear and the three do not conflict or create an ambiguity, no further review is necessary. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

However, in the event of a conflict or ambiguity "courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences." *City of Seattle v. State*, 136 Wn.2d 693, 697-98, 965 P.2d 619 (1998). Crucially, "[t]he purpose of an enactment should prevail over express but inept wording." *Id.* If the plain language of the three sections demonstrates a conflict or ambiguity, then rules of statutory construction must be used to determine the Council's intent and harmonize the three sections. *In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810 (1998). Legislative history is one of the most basic and reliable means to do so. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

Here, the language of these three Code provisions, the relevant legislative history and other rules of statutory construction all indicate clear Council intent to allow an appeal of the Director's Youth Jail waiver decisions.

A. <u>ALL TYPE II DECISIONS MADE BY THE DIRECTOR ARE APPEALABLE</u>.

The Code distinguishes between two types of Director decisions, Type I decisions that are not appealable and Type II decisions that are. SMC 23.76.004.B provides:

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> Type I and II decisions are made by the Director and are consolidated in Master Use Permits. **Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner. Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner**; provided that Type II decisions enumerated in subsections 23.76.006.C.2.c, d, f, and g, and SEPA decisions integrated with them as set forth in subsection 23.76.006.C.2.m, shall be made by the Council when associated with a Council land use decision and are not subject to administrative appeal.

SMC 23.76.004.B (emphasis added). This section is absolutely clear. Type I decisions are not appealable, while Type II decisions made by the Director can be appealed.

This distinction between appealable Type II Director decisions and non-appealable Type I decisions is consistent throughout the code. For example, SMC 23.76.028 sets the issuance dates for different types of Master Use Permits based upon their appealability. Type I decisions are generally approved for issuance upon the Director's decision. SMC 23.76.028.B. In contrast, the City may not issue a Type II Master Use Permit until the applicable administrative appeal period has run or, if appealed, until after the Hearing Examiner issues her final appeal decision. SMC 23.76.028.C.1.[1]

SMC 23.76.006.C does not include a category of unappealable Type II Director decisions. Certain Type II decisions listed there are reserved for the City Council as part of its Type IV land use decision-making process.[2] 23.76.006.C also authorizes appeals of certain **Type I** Director's decisions that would otherwise not be appealable and clarifies that some **Type I**

[1] SMC 23.76.028.C excludes only two non-relevant sorts of Type II decisions from the general rule that a MUP may not issue until the appeal period has run or the Hearing Examiner has issued her ruling. *See* SMC 23.76.028.C.2 & 3 (providing only limited exceptions for shoreline decisions and Type II decisions integrated in a Council decision).

[2] *See* SMC 23.76.006.C.2.c, d, f, g, & n. *See also*, SMC 23.76.004.B stating that these identified decisions are reserved for the City Council. Pursuant to SMC 23.76.036, the City Council makes these Type II decisions as part of its "quasi-judicial Type IV Council land use decisions" process. SMC 23.76.036.A. The Director made the decision at issue here and so the appealability of the identified City Council decisions is not relevant to the present analysis.

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Director's decisions are not appealable, even if connected to Type II decisions.[3] Rather than barring appeals from any Type II Director decisions, SMC 23.76.006.C actually authorizes appeals from some otherwise non-appealable Type I decisions.

Importantly, the Seattle Department of Construction and Inspections (DCI) interprets the Code to allow appeals from **all** Type II Director decisions. This interpretation should be given substantial deference. *See Waste Mgmt. of Seattle, Inc. v. Utils & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994) (agency's interpretation of statute afforded great weight when determining its meaning). The City's primary public information about the subject is consistent that Type II decisions are appealable. Client Assistance Memo 201 provides:

> **Procedures are distinguished according to** who makes the decision, the type and amount of public notice required, and **whether appeal opportunities are provided**. Type I and II MUP decisions are made by the Seattle DCI Director…**Type II decisions are discretionary decisions made by Seattle DCI *which are subject to administrative appeals...*** Shoreline decisions may be appealed to the Shoreline Hearings Board, and **other Type II decisions may be appealed to the City's Hearing Examiner**.

City of Seattle Assistance Memo 201, "*Master Use Permit Overview* (June 2, 2011), available at: http://www.seattle.gov/DPD/Publications/CAM/cam201.pdf (emphasis added). DCI's website also clarifies that Type II MUP **"**require public notice of your application. We make the MUP decision which can be appealed to the City's Hearing Examiner." Seattle Dep't of Constr. & Inspections, available at: http://www.seattle.gov/dpd/permits/permittypes/mupoverview/

[3] SMC 23.76.006.C.2.i states that a "[d]etermination of project consistency with a planned action ordinance" is only appealable, "if the project requires another Type II decision". A "determination of project consistency with a planned action ordinance" is generally a Type I, unappealable decision. SMC 23.76.006.B.15. SMC 23.76.006.C.2.i authorizes an appeal of this Type I decision, if the project to which it relates involves a separate Type II decision that by definition is appealable. SMC 23.76.006.C.2 prohibits an appeal of "temporary relocation of police and fire stations for 24 months or less" even if connected to an otherwise appealable Type II decision because that type of land use decision is explicitly set out as a Type I, non-appealable decision. *See* SMC 23.76.006.B.2 Similarly, SMC.23.76.006.C.2.e clarifies that design review decisions are generally Type II decisions unless they are actually "streamlined design review standards" which are also explicitly identified as Type I decisions in SMC 23.76.006.B.13.

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(emphasis added). The MUP and the Notice Of Decision in this case also evidence DCI's understanding that Type II Director decisions, including the Youth Jail Type II decisions, are appealable. *See* MUP; also, Lowney Dec., Exhibit D (SDCI Notice of Decision) (authorizing appeal of MUP decision to Hearing Examiner).

The Washington State Supreme Court also recognizes the important, clear distinction between Type I and Type II decisions. "The [Seattle Municipal Code] classifies [Master Use Permits] into three types of decisions. While **Type II and Type III** decisions are discretionary and appealable to a hearing examiner, Type I decisions are nonappealable decisions made by the Director which require the exercise of little or no discretion." *Smoke v. City of Seattle*, 132 Wn.2d 214, 223, 937 P.2d 186 (1997).

As the Washington Supreme Court has recognized, this distinction between Type I decisions and Type II decisions is important. The Code and the Council provide the Director with some limited, unreviewable discretion when making certain types of constrained, temporary or straightforward decisions. *See e.g.* SMC 23.76.006.B.2 (Director's decisions regarding certain temporary or interim uses are Type I decisions); SMC 23.76.006.B.7 ("[d]iscretionary exceptions for certain business signs" are Type I); SMC 23.76.006.B.11 ("[m]inor amendment to Major Phased Development" is Type I); *see also, Smoke,* 132 Wn.2d at 223 (Type I decisions are those "which require the exercise of little or no discretion"). However, the Code is equally clear that more complicated, difficult or potentially controversial Director decisions must be challengeable and reviewable by the Hearing Examiner. *See e.g.* SMC 23.76.006.C.b (decisions regarding "short subdivisions" are appealable Type II); SMC 23.76.006.C.2.c & d (variances and special

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exceptions that are not reserved for Council are Type II); SMC 23.76.006.C.2.h (Major Phased Development decisions are appealable Type II).

Given this administrative framework and the fact that the Council understood the Youth Jail to be a controversial project that had attracted significant public attention, it cannot be seriously asserted that the Council intended to grant the Director exclusive and unreviewable authority to render decisions regarding the Jail. *See* Declaration of Michael O'Brien at ¶ 10 (stating that Council intended to provide an avenue to appeal to a Hearing Examiner).

B. ANY CONFLICT BETWEEN THE THREE PROVISIONS MUST BE RESOLVED TO AVOID AN ABSURD RESULT AND GIVE MEANING TO ALL EXPRESS STATUTORY LANGUAGE.

The language of the three statutory sections conflict in one minor regard: SMC 23.76.006.C does not contain a reference to the catchall provision set out in Table A to 23.76.004 and does not explicitly reference 23.51A.004.B. To read 23.76.006.C to prohibit an appeal here ignores the plain language of 23.76.004.B that all Type II decisions are appealable except for a few land use decisions reserved for the City Council. Furthermore, this minor discrepancy should not be read to reach the absurd conclusion that in passing 23.51A.004, the City Council silently created, for the first time, an entirely new type of land use decision: A Director's discretionary Type II decision that is not appealable and only applies to decisions regarding the Youth Jail.

Instead it is apparent that when the City Council passed the Youth Jail ordinance it inadvertently failed to add a reference to 23.51A.004.B into 23.76.006.C. *See* O'Brien Decl. at ¶ 13 ("[t]he failure to add explicit language to SMC 23.76.006.C…was an inadvertent legislative drafting error. The absence of such language in SMC 23.76.006.C does not reflect the actual legislative intent in passing [SMC 23.51A.004.B]"). Such a minor, clerical oversight is not a

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sufficient basis to refuse to recognize otherwise abundantly clear legislative intent to allow appeals from the Director's Type II Youth Jail decisions. *State v. Taylor*, 97 Wn.2d 724, 729, 649 P.2d 633 (1982) (court should read erroneously omitted language into statute when failing to include the omission renders existing statutory language "absurd" or "meaningless.")

As detailed above, 23.76.004.B explicitly states that Type II Director decisions are appealable. The City Council has never created any other non-appealable Type II Director decision. DCI, the agency empowered to enforce Seattle's land use code, universally agrees that Director's Type II decisions are appealable, a view endorsed by the Washington State Supreme Court. Under these circumstances, had the City Council intended to create a wholly new category of non-appealable Type II Director decisions it would have done so unequivocally and clearly. *See State v. Greenwood*, 120 Wn.2d 585, 593, 845 P.2d 971 (1993) ("[t]he intent to overturn settled principles of law will … not be presumed" absent express legislative direction); *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 26, 380 P.2d 730 (1963) ("the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction[.]").

C. IF THE COUNCIL INTENDED THAT THESE DECISIONS BE UNAPPEALABLE IT WOULD HAVE SAID SO.

If the City Council intended decisions regarding the youth jail described at SMC 23.51A.004.B to be non-appealable, it would have either identified them as **Type I** decisions or explicitly stated that it was creating a category of non-appealable Type II Director's decisions. It did neither.

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As detailed above, the Code has never recognized any other non-appealable Type II Director decision. The ordinance and legislative history contains no indication that the City Council intended to do so. Given the explicit language of 23.76.004.B that all Type II decisions are appealable, the language of 23.51A.004 that the Youth Jail waivers are Type II decisions, and the fact that the Code has never recognized a non-appealable Type II decision, the Council would have been explicit that it intended to create a new category of non-appealable Type II decisions relating to the Youth Jail. *Ashenbrenner* , 62 Wn.2d at 26. Therefore, the silence - and inadvertent clerical error in SMC 23.76.006.C – should neither bar nor punish the Appellants. Instead, the most appropriate reading is that in the absence of language stating that modifications or waiver of development standards are special non-appealable Type II decisions, the Youth Jail waiver decisions are appealable.

D. <u>THE LEGISLATIVE HISTORY IS AUTHORITATIVE AND RELIABLE AND SHOWS THAT THE COUNCIL INTENDED TO ALLOW APPEALS.</u>

The legislative history of 23.51A.004 unequivocally demonstrates that the Council intended that the Director's Master Use Permit decision was appealable. For example, the Fiscal Note states that the legislation would

> "[a]llow the DPD Director as a Type II Land Use Decision (includes notice to neighbors, ***opportunity for comment and appeal of the DPD decision to the Hearing Examiner***) to modify or waive maximum structure width and setback standards for YSCs based on programming, service and structural needs and compliance with proposed Urban Design Objectives.

Lowney Dec., Ex. E. p.22 (Fiscal Note (July 1, 2014)) (emphasis added). Additionally, the DPD Director's Report on the proposed Youth Service Center Amendments states that "[t]he proposal would allow applicants to apply for a Type II (***a DPD decision*** that requires public notice, comment, and ***is appealable to the Hearing Examiner***) waiver or modification of these setbacks

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and maximum width standards." *Id.* at 23-25 (DPD Youth Service Centers Report (July 1, 2014)) (emphasis added).

This relevant legislative history that clearly articulates the Council's legislative intent should guide the interpretation of the code sections at issue here. *See* O'Brien Decl. at ¶¶ 7, 10 & 16. When reviewing various types of legislative history, the "focus is not on where the materials are found, but on whether they are sufficiently probative of the Legislature's intent." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 104-05, 829 P.2d 91 (1992). Accordingly, Washington courts have relied on a number of sources of legislative history to determine legislative intent. *See* e.g. *Cosmopolitan Eng'g Group Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304, 149 P.3d 666 (2006) (using legislative history of House floor debate and recordings of committee hearings to determine legislative intent); *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992) ("[i]n the past [the Supreme Court] has looked to legislative bill reports and analyses to discern the Legislature's intent"); *State v. Reeves*, 184 Wn. App. 154, 162, 336 P.3d 105 (2014) (using legislative history consisting of Senate and House Bill reports to determine legislative intent).

The Order rejected the use of the staff report and fiscal note offered by Appellants as evidence of the Council's intent that the MUP decision would be appealable, on the grounds that these sources of legislative history "are generally not considered reliable in determining legislative intent." Order at 4. Two cases, *Louisiana-Pacific Corp. v. Asarco*, 131 Wn.2d 587, 599, 934 P.2d 685 (1997), and *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 451, 536 P.2d 157 (1975) are cited to support this proposition. However, these cases are readily distinguishable from the much more persuasive and authoritative legislative history found here.

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In *Louisiana Pacific Corp.*, the defendant used part of a statement made at a committee hearing by an unidentified House employee to support its interpretation of a statute. 131 Wn.2d at 598. Given the unknown nature of the statement, the Court held that the "limited legislative history available does not lend itself to a reliable conclusion of legislative intent[.]" *Id.* at 599. The Court further noted, "[t]he quoted statement, however informed its speaker may be, does not measure up to any reasonable definition of legislative history as a basis for determining 'legislative intent.'" *Id.*

Likewise, in *Hama Hama*, the respondent simply relied upon prior drafts of a statute to support its interpretation of the legislature's intent. 85 Wn.2d at 449-50. The Court noted that this rule of construction has been recognized as not particularly helpful for determining legislative intent. *Id.* at 449 ("[n]umerous legal scholars have…cautioned against over-emphasis and overreliance upon the fact or happenstance of successive drafts as an *absolute* determinant rule, or tool for interpreting a statute.").[4]

Neither problem identified in these two cases exists here. Unlike the unidentifiable statement offered by the Defendants in *Louisiana Pacific* as evidence to prove legislative intent, Appellants provided statements and other evidence from *verifiable* and dependable sources to show the Council's intent that all Type II Director decisions are appealable. See O'Brien Decl. at ¶¶ 7-11 & 16. The Director's report, upon which the City Council relied when passing SMC

[4] The Court in *Hama Hama* relied upon another rule of statutory construction that was far more probative of legislative intent than the prior drafts rule. The statute at issue in that case had previously been interpreted by the administrative agency charged with its administration and enforcement. *Hama Hama*, 85 Wn.2d. at 448. The *Hama Hama* Court found that the agency's interpretation is given "*great weight in determining legislative intent.*" *Id.* (emphasis added). As discussed above, DCI interprets the Seattle Municipal Code to allow appeals from all Type II Director decisions, including those related to the Youth Jail.

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23.51A.004, was produced by the agency responsible for ruling on the MUP, DCI (then DPD).[5] By contrast to this clear, unequivocal legislative history, there is nothing in the legislative history that suggests that the City Council intended to create a Type II decision that is not appealable.

Other recent legislative efforts by DCI also demonstrate that the Director's Type II Youth Jail decisions are appealable. DCI has proposed an ordinance to the Council that will provide a ***"clarification"*** to SMC 23.76.006.C "that any other Type II decision identified in the Land Use Code, or other decisions that are identified as subject to a public notice and administrative appeal process, are appealable even if not specifically listed in subsection 23.76.006.C."[6] Importantly, for these purposes, DCI points out that these amendments are "small scale, with a limited scope of impact. Such amendments include correcting typographical errors and incorrect section references, as well as clarifying or correcting existing code language."[7] "The proposed amendments generally include clean-up amendments that correct inadvertent clerical errors, incorrect cross-references and clarification of existing Code language."[8] These amendments are "intended to clarify current provisions or to correct minor oversights and clerical or typographical errors."[9]

The Director's statements demonstrate that these changes do not alter any substantive rights to appeal, since that decision is made by the Council in designating a decision as a Type I

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[5] The Report was prepared by an identifiable source from the City of Seattle (DPD employee Kristian Kofoed). The accompanying fiscal note similarly references Mr. Kofoed as the contact person for the note, as well as another identifiable source, Melissa Lawrie, who is an analyst with the City Budget Office (CBO).The Council relied upon this staff analysis when voting on the Ordinance. O'Brien Decl. at ¶ 9.

[6] Bill Mills SDCI 2016 Omnibus Director's Report July 28, 2016 #D7 DIRECTOR'S REPORT AND RECOMMENDATION Omnibus Ordinance (emphasis added). http://www.seattle.gov/dpd/BuildingConnections/2016OmnibusDirectors%20Report.pdf, page 1, 12 (emphasis added).

[7] *Id.*

[8] http://www.seattle.gov/dpd/BuildingConnections/2016OmnibusSEPANotice.pdf

[9] http://www.seattle.gov/dpd/BuildingConnections/2016OmnibusSEPAChecklist.pdf, p. 2, 3 (emphasis added).

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or Type II. Thus, the Director did not describe the amendment to .006 as changing the appealability of any decision. Instead, he said it was a mere ***"clarification"*** of existing language and "corrections of clerical or typographical errors." (emphasis added). The Director and DCI understand that all Type II decisions are appealable, notwithstanding some inadvertent omission in 23.76.006.C.

E. IN ADDITION TO LEGISLATIVE HISTORY, OTHER RULES OF STATUTORY CONSTRUCTION ALSO SHOW THAT THE MUP IS A TYPE II APPEALABLE DECISION.

The legislative history offered by Appellants provides strong support for finding that the City Council intended the Director's MUP decision to be appealable. Application of other rules of statutory construction, including those related to specificity, timing, and error also supports this interpretation of the Code.

A specific statute will supersede a general statute when both apply. *Waste Mgmt. v. Utils. & Transp. Comm'n,* 123 Wn.2d 621, 630, 829 P.2d 1034 (1994). Similarly, the latest enacted provision prevails when there is a conflict with an older statutory section. *State v. J.P.*, 149 Wn.2d. 444, 454, 69 P.3d 318 (2003). In addition, if an apparent legislative error creates an absurdity or renders statutory language meaningless, corrective language should be read into a statutory scheme to effectuate the legislative intent. *Taylor*, 97 Wn.2d at 729; *also, In re Det. of Martin*, 163 Wn.2d 501, 513, 182 P.3d 951 (2008) (language must be added if it is "imperatively require" to make statutory language rational). Each of these rules is relevant to whether the MUP decision is appealable.

i. SMC 23.51A.004.B is a more specific statute than SMC 23.76.006.C and thus controls.

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The Hearing Examiner should find that the MUP decision is an appealable Type II decision because the Youth Jail ordinance is more specific than SMC 23.76.006.C. SMC 23.51A.004.B, which addresses the specific project at issue here, is even more specific (and more recent) than SMC 23.76.006.C. There, the City Council clearly expressed its intent to make the waiver decision regarding the Youth Jail appealable by specifically designating it as a "Type II decision." The Council would have designated it as a Type I decision if it wished to deny the opportunity for an administrative appeal.

There is no question that the designation of the waiver or modification as a Type II decision in SMC 23.51A.004.B evidences an intent to make that decision appealable. That is the accepted meaning of a Type II decision. Because it is the most recent expression of legislative intent and because it is specific as to the youth jail waiver decisions, SMC 23.51A.004 is the relevant statute for purposes of determining the question of appealability rather than the earlier and more generally applicable 23.76.006.C..

ii. SMC 23.76.004 was more recently amended and so controls.

Furthermore, the recent amendment to Table A in 23.76.004 should also govern any interpretation of the conflict between the language of Table A to .004 and 23.76.006.C. Both of these lists compiled the Council's substantive designations. Thus, they were duplicative of the substantive code sections in which the Council designated each land use decision as a Type I, II, or III decision. They were also duplicative of each other. In 2013, the Council indicated its intent to not rely upon such duplicative lists to determine what decisions fall into which categories. It amended the table in SMC 23.76.004 to obviate the need to update this list of Type II decisions by adding a concluding category of "Other Type II decisions that are identified as such in the

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Land Use Code." SMC 23.76.004 Table A. In amending Table A, the Council instructed that when determining which land use decisions fall into which type, one should look to "the Land Use Code" as a whole, not simply SMC 23.76.006.C.

The addition of this final item to the table in 23.76.004 is critically important. This was the Council's most recent action on the importance of the duplicative lists in SMC 23.76.004 and .006.

The Hearing Examiner notes that a footnote in 23.76.004 refers only to SMC 23.76.006. Order on Motion to Dismiss, p. 3. However, that footnote predated the 2013 amendment to Table A. The amendment to Table A also effects how this footnote must be interpreted. After the 2013 amendment, SMC 23.76.004 required reference to 23.76.006 and the land use code as a whole when determining appealability. Thus the Examiner should defer to the Council's more recently articulated intent found in the amendment to .004, rather than a strained reading of .006 which negates more recent express and specific language in .004 and 23.51A.004.B. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990) ("[g]enerally, provisions of a specific more recent statute prevail in a conflict with a more general predecessor.").

iii. A legislative error cannot require an absurd result.

In amending 23.51A.004 the City Council intended that the Director's decisions be appealable. *See* Fiscal Note and DPD Director's Report; O'Brien Decl. at ¶¶ 7, 10 & 16. The only reasonable explanation for the absence of a cross reference in 23.76.006.C to 23.51A.004 is an inadvertent clerical omission during the 2013 legislative process. *See* O'Brien Decl. at ¶¶ 13-16. Such a minor statutory flaw cannot derail clear legislative intent, particularly when failing to

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include the omission renders existing statutory language "absurd" or "meaningless." *Taylor*, 97 Wn.2d at 729.

Generally, courts are reticent to add language to a statute even when a legislative error may be apparent. However, courts will read language into a statute when "it is imperative to make the statue rational". *Id.* Courts will "supply omitted language" in order to avoid a reading that is "absurd" or renders the existing legislative language "meaningless". *Id.; also In re Det. of Martin*, 163 Wn.2d at 513.

Here any interpretation that relies on the absence of a cross reference in 23.76.006.C to deny a right of appeal is absurd and renders the City Council's statement in 23.51A.004 that youth jail waiver decisions are "Type II decisions" a meaningless, nullity. Accordingly, to the extent that the absence of language in SMC 23.76.006.C can be read to prohibit such an appeal, appropriate language must be read into that section to avoid such an absurd result.

F. <u>BECAUSE THE UNDERLYING WAIVER DECISIONS ARE APPEALABLE, THE SEPA DECISIONS ARE ALSO APPEALABLE.</u>

SMC 23.76.006.C.2.n. states that "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.l" are appealable. As discussed above, the Director's Type II decisions to grant width and setback waivers for the Youth Jail are appealable to the Hearing Examiner. Therefore pursuant to SMC 23.76.006.C.2.n., the SEPA issues are also appealable. The Hearing Examiner has authority to address the Director's SEPA related decisions because they are integrated with clearly appealable Type II decisions.

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III. CONCLUSION

The Director's decision to approve the MUP for the new Youth Jail is an appealable Type II decision within the jurisdiction of the Hearing Examiner. Therefore, the Appellants respectfully request that the Hearing Examiner grant this motion for reconsideration, rescind the order of dismissal and decide this matter on the merits.

RESPECTFULLY SUBMITTED this 13th day of March, 2017.

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