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 RESPONSE TO MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Examiner's Order on Respondent's Joint Motion to Dismiss was correct. The Examiner lacks jurisdiction to consider EPIC's appeal under the plain language of the Seattle Municipal Code ("SMC" or "Code"). In its Memorandum of Law in Support of Motion for Reconsideration ("Memorandum"), EPIC[1] fails to address the standards for reconsideration by the Examiner. The Examiner must deny EPIC's motion for reconsideration based on this fatal defect alone.

[1] While EPIC asserts that additional listed organizations seek reconsideration, in fact the firm Smith & Lowney represents only EPIC and OneAmerica. *See* Interest of Appellants in Decision and Declaration of Richard Stolz, Executive Director of OneAmerica. Columbia Legal Services has appeared only on behalf of EPIC. *See* Notice of Appearance, dated February 13, 2007. No other party filed a motion.

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Instead of addressing the standards for reconsideration, EPIC's Memorandum simply revisits arguments the Examiner previously rejected. The Examiner correctly concluded that under the plain language of SMC 23.76.006.C, a decision regarding modification to development standards for a Youth Service Center is not subject to examiner appeal. EPIC's erroneous reliance on the post hoc declaration of one City Council member and a previously referenced staff report and fiscal note should not persuade the Examiner. Well-established legal authority clearly rejects the use of such documents to contradict clear code language.

Accordingly, the Applicant Patrick Donnelly ("Applicant") and King County ("County") request that the Hearing Examiner deny EPIC's motion for reconsideration.

II. AUTHORITY

A. EPIC ignores the standards for reconsideration set forth in HER 3.20.

The Examiner should deny EPIC's Motion to Reconsider. EPIC's 17-page legal memorandum fails to meet – or even address – the Examiner's standards for reconsideration.

Hearing Examiner Rules of Practice and Procedure ("HER") 3.20(a) unambiguously sets forth the circumstances in which the Examiner may grant a motion to reconsider. It reads:

> The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if one or more of the following is shown:
>
> (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
>
> (2) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
>
> (3) Error in the computation of the amount of damages or other monetary element of the decision;
>
> (4) Clear mistake as to a material fact.

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EPIC's motion makes no argument under any of these criteria. The Examiner must reject EPIC's motion for reconsideration on this basis alone.[2]

Even if EPIC had made an argument based on these standards, which it chose not to do, it would fail to satisfy any of these standards. First, there was no irregularity in the proceedings. The Applicant and the County, with the City of Seattle ("City") joining in part, moved for dismissal. EPIC responded, and the Applicant and County replied. The Hearing Examiner reviewed the motion and rendered a decision. There was no irregularity, so HER 3.20(a)(1) provides no basis for dismissal.

Second, EPIC cites no newly discovered material evidence that it could not, with reasonable diligence, have produced in connection with the motion. The only "evidence" EPIC presented with its motion for reconsideration related to legislative history and was readily available throughout this proceeding. Therefore, EPIC cannot satisfy HER 3.20(a)(2).

Third, this case does not involve damages. HER 3.20(a)(3) does not apply.

Fourth, EPIC has not even suggested that the Hearing Examiner made a clear mistake as to any material fact. EPIC's motion for reconsideration is based on arguments about interpretation of the Code. Statutory interpretation is a question of law. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). EPIC cannot satisfy HER 3.20(a)(4).

In sum, EPIC has not even addressed, and could not satisfy, the criteria for reconsideration described in HER 3.20(a). The Examiner must deny the motion on this basis alone.

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[2] EPIC may attempt to cure this deficiency on reply. However, EPIC cannot make new arguments for the first time on reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

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B. EPIC fails to establish that the Examiner has jurisdiction to consider the decisions made in the MUP under SMC 23.76.006.C.

1. The language of the Code is clear and unambiguous.

Since the Code is unambiguous, its plain language controls. The legislative history and other materials offered by EPIC are irrelevant and the Examiner may not consider them. *Burton,* 153 Wn.2d at 423 ("[O]nly where the legislative intent is not clear from the words of a statute may the court resort to extrinsic aids, such as legislative history." (Internal quotations omitted.)) Because EPIC's argument relies wholly on information that is legally irrelevant, and which the Examiner should not consider, the Examiner must deny EPIC's motion for reconsideration.

EPIC makes internally inconsistent arguments regarding the Code's alleged ambiguity. On the one hand, EPIC claims that the Code is clear on its face and supports its position. On the other hand, EPIC suggests that the Code is ambiguous and that resort to legislative history is warranted. Memorandum, p. 3. Both arguments are flawed.

To the extent that EPIC is claiming that the Code is ambiguous, EPIC is incorrect. "A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Burton,* 153 Wn.2d at 423. "A statute is not ambiguous if it defines precisely the range of activity that falls within its purview . . . Courts are not obligated to discern an ambiguity by imagining a variety of alternative interpretations." *Ass'n. of Wash. Sprits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 351, 340 P.3d 849 (2015). Here, SMC 23.76.006.C clearly and unambiguously states that only those Type II decisions listed in that section are subject to appeal to the Examiner.

EPIC erroneously claims, as it did when unsuccessfully opposing the motion to dismiss, that more general language elsewhere in the Code conflicts with the specific provisions of SMC

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23.76.006.C. This issue of law has already been resolved by the Examiner. The fact that one section of an ordinance includes more specific language than another does not create an ambiguity. Instead, as the Hearing Examiner properly ruled, the more specific language of SMC 23.76.006.C controls over other, more general, sections. *Ass'n. of Wash. Spirits & Wine Distribs., supra*, 182 Wn.2d 356 ("A general statutory provision must yield to a more specific statutory provision.").

EPIC cannot change the plain language of the Code by resorting to legislative history. The Examiner already determined – as a matter of law – that the operative Code language was unambiguous and required dismissal of EPIC's appeal. EPIC's attempt to use legislative history to create jurisdiction where none exists would essentially rewrite the Code to include new, unexpressed, and additional terms. The Examiner cannot indulge EPIC's attempt to rewrite the Code.

2. EPIC's argument that all Type II decisions are appealable is incorrect under the plain language of the Code.

EPIC incorrectly argues that all Type II decisions are subject to Examiner appeal. EPIC presents a convoluted argument that misplaces reliance on: (1) the general language of SMC 23.76.004.B and the provisions of SMC 23.76.028 regarding permit issuance; (2) a tortured reading of SMC 23.76.006.C based on a fundamental misunderstanding regarding the source of the Examiner's jurisdiction; (3) general language in a non-binding "TIP" issued by the Seattle Department of Construction and Land Use ("SDCI"); (4) dicta in one unrelated court decision; and (5) its assertion that the City Council did not intend to give SDCI "unreviewable" discretion. EPIC's Memorandum, pp. 3-7.

The Examiner should reject EPIC's argument. While EPIC asserts that all Type II decisions are subject to Examiner appeal under SMC 23.76.004.B and SMC 23.76.028, SMC

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23.76.004.B only provides general description of Type II decisions.

Similarly, SMC 23.76.028 does not address examiner jurisdiction. Instead, it regulates the timing of MUP issuance, and is relevant to MUP appeals only in its statement that "A Type II Master Use Permit is approved for issuance on the day following expiration of the applicable City of Seattle administrative appeal period . . ." (Emphasis added.) Thus, SMC 23.76.028 expressly acknowledges that there may, or may not, be an applicable administrative appeal period for Type II decisions.

In contrast, to SMC 23.76.004.B and SMC 23.76.028, SMC 23.76.006.C directly and specifically addresses which Type II decisions are subject to examiner appeal. SMC 23.76.006.C.2 ("The following decisions are subject to appeal to the Hearing Examiner . . ."). Thus, the specific delegation language in SMC 23.76.006.C controls over the general discussion of Type II decisions contained in SMC 23.76.004.B.

Next, EPIC erroneously argues that all Type II MUPs are subject to appeal under SMC 23.76.006.C because that section does not include a "category" of unappealable Type II decisions. EPIC's "missing category" argument reflects a fundamental misunderstanding of the source of the Examiner's jurisdiction, and again ignores the plain language of the City Code.

As a quasi-judicial official, the Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc. v. Pierce County,* 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); SMC 3.02.115; SMC 3.02.120; HER 2.03. Thus, unless the Code expressly grants jurisdiction to the Examiner, review authority is lacking. EPIC's argument fails because it relies on the opposite conclusion – that jurisdiction exists unless it is expressly withheld. EPIC cites no authority for this proposition, nor is there any.

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EPIC's "missing category" argument also cannot be squared with the plain language of SMC 23.76.006.C. Had the City Council intended EPIC's suggested result it could have much more easily adopted a code section that stated "all Type II decisions are subject to appeal to the Hearing Examiner." Instead, the City Council adopted SMC 23.76.006.C, which identifies 14 specific Type II decisions over which the Examiner has jurisdiction. Under EPIC's interpretation, this list would be superfluous. However, under accepted principles of interpretation, statutes are read to give effect to all words and not render any language superfluous. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009).

EPIC's reliance on a non-binding "TIP" (TIP 201) issued by SDCI as support for the notion that all Type II decisions are appealable to the Examiner is also unpersuasive. SDCI is an executive agency without the ability to delegate authority. Furthermore, the 2011 TIP, which was issued before the relevant modification provisions were even adopted, contains language that specifically prevents EPIC's argument. The TIP clearly states: "LEGAL DISCLAIMER: This Tip should not be used as a substitute for codes and regulations. The applicant is responsible for compliance with all code and rule requirements, whether or not described in this Tip." Declaration of Courtney A. Kaylor in Support of Response to Motion for Reconsideration (Kaylor Declaration"), Ex. A, pp. 2, 3 (emphasis added). Thus, the TIP specifically disclaims that it is a substitute for the Code. Further, the portion of the TIP that EPIC relies on is only a general statement describing Type II decisions. The TIP does not address appeals of modifications to development standards for Youth Service Centers. SMC 23.76.006.C's specific language controls.

Even if the TIP supported EPIC's assertion regarding SDCI's interpretation, which it does not, no deference would be due to it because the interpretation conflicts with the plain

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language of the Code. *HomeStreet, supra,* 166 Wn.2d at 451-452 ("Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency." (Internal quotations omitted.))

EPIC's reliance on dicta in *Smoke v. City of Seattle,* 132 Wn.2d 214, 937 P.2d 186 (1997) likewise misses the mark. The issue before the *Smoke* Court was exhaustion of administrative remedies for Type I permits. In passing, the Court stated that "Type II and III decisions are discretionary and appealable to the Hearing Examiner . . ." *Id*. at 223. The appealability of Type II decisions was not an issue before the Court. *Smoke* cannot help EPIC here.

Finally, EPIC argues that the City Council did not intend to give SDCI "unreviewable" discretion in issuing modifications for Youth Service Centers. EPIC relies on the declaration of a single City Council member, Council Member O'Brien ("O'Brien Declaration"), to establish legislative intent. However, the intent of a legislative body must be derived from the plain language of the statute itself. *HomeStreet, supra,*166 Wn.2d 451-452. Here, under the plain language of the Code, the challenged modification is not subject to appeal.

The Examiner should conclude, based upon numerous well-established appellate authorities, that the declaration of one legislator cannot establish the intent of the legislative body:

- **"[T]he comments of a single legislator are generally considered inadequate to establish legislative intent."** *In re F.D. Processing*, 119 Wn.2d 452, 461, 832 P.2d 1303, 1308 (1992) (Creditor, a milk supplier, asserted liens based upon RCW 60.13.020 against a debtor milk processing company in bankruptcy. The court held that the statute did not include milk within definition of products covered despite a senator's "statement of purpose" included in an amendment to the statute indicating milk should be included within the definition of products covered by the statute.)

- **"[E]ven a legislator's comments from the floor of the Legislature are not necessarily indicative of legislative intent. . . .Patently, comments about the purpose of an**

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amendment which does not become part of the enacted legislation, particularly where that legislation is in sharp contrast to the enacted legislation, cannot serve as evidence of legislative intent.". *United States Dist. Court for the E. Dist. of Wash. v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 63, 821 P.2d 18, 26 (1991) (Employees filed for worker's compensation, contending they were discharged in violation of public policy established by RCW 51.48.025, which prohibits an employer from discharging employees who file for worker's compensation. Employees attempted to rely on statements made during the legislative process as indications of legislative intent but court disagreed finding only that the statements were inconclusive).

- "**It [is] well settled that the Legislature's intent in passing a particular bill cannot be shown by the affidavit of a legislator**." *Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 658, 818 P.2d 1076, 1078 (1991). (Police and firemen's unions filed unfair labor practice grievances with the Public Employment Relations Commission due to the city's changes in rules regarding hiring, firing, and discipline. City attempted to introduce a statement from a former legislator to show the legislative intent behind enacting the Public Employees' Collective Bargaining Act but the court stated it was inadmissible because intent cannot be show by the affidavit of a legislator.)

- "**Legislative intent in passing a statute cannot be shown by depositions and affidavits of individual state legislators**." *Woodson v. State*, 95 Wn.2d 257, 264, 623 P.2d 683, 685 (1980).

- "**What one legislator may have believed does not establish that the Legislature intended something contrary to its express declaration in the [statue**]". *Pannell v. Thompson*, 91 Wn.2d 591, 598, 589 P.2d 1235 (1979).

- "The depositions of the various state officers and the affidavits of the legislators were not read into the record, but were offered as exhibits. The city strenuously objected to their admission. The trial judge held them inadmissible, but permitted them to be made a part of the record on the remote chance that this court might think otherwise. They remain unread in the unbroken original package in which they were brought here; for**, it is perfectly clear, both upon reason and authority, that the legislative intent in passing the statute cannot be shown or proven in any such manner**." *Spokane v. State*, 198 Wn. 682, 687, 89 P.2d 826 (1939).

The O'Brien Declaration has no probative value. The Hearing Examiner should disregard it.[3]

Finally, EPIC is incorrect that a modification decision is "unreviewable" under the plain language of the Code. A final land use decision that is not subject to administrative appeal may be timely appealed to superior court under LUPA. RCW 36.70C.020, 36.70C.030, 36.70C.040.

[3] Indeed, as requested in Section IV of this Brief, the O'Brien Declaration should be stricken under HER 2.17.

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EPIC had the opportunity to appeal to superior court, but improperly filed its appeal with the wrong appellate body.

For these reasons, the Hearing Examiner should reject EPIC's arguments and deny the Motion for Reconsideration.

3. The Examiner must reject EPIC's attempt to rewrite SMC 23.76.006.C.

The Examiner should reject EPIC's claims that the Hearing Examiner should reconsider her decision: (1) to give effect to the plain language of SMC 23.76.004; (2) because the City Council "inadvertently" failed to adopt language making the modification of development standards subject to appeal.; (3) to avoid an absurd result; and (4) to avoid overturning settled principles of law. EPIC's Memorandum, pp. 7-8. These arguments have no merit.

First, the Examiner's decision does not ignore the specific language of SMC 23.76.004 identifying those Type II decisions that are subject to appeal in order to give effect to SMC 23.76.006.C. Instead, the Examiner properly recognized SMC 23.76.004 for what it is: only a brief, general description of Type II decisions. The Examiner correctly read SMC 23.76.004 together with SMC 23.76.006.C and determined that SMC 23.76.006.C controls because it specifically addresses appeals. *See Ass'n. of Wash. Spirits & Wine Distribs.,* 182 Wn.2d 356.

Second, the Examiner is "required to assume the Legislature meant exactly what it said and apply the statute as written." *HomeStreet, Inc.,* 166 Wn.2d at 452. As argued in section B.2, above, Council Member O'Brien's assertion that the City Council's failure to adopt language making modifications of development standards for Youth Service Centers subject to administrative appeal was "inadvertent" and a "drafting error" should not be considered and does not, as a matter of law, establish the intent of the Council. *Pannell, supra,* 91 Wn.2d at 598 ("What one legislator may have believed does not establish that the Legislature intended

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something contrary to its express declaration in the [statue]".) Further, an omission depriving the Examiner of jurisdiction cannot be considered a "minor, clerical" oversight as EPIC asserts. Rather, the decision about the appropriate appeal path is a significant policy decision. When the City Council wants to make a specific decision subject to appeal to the Examiner, it knows how to do this expressly. *See e.g.,* SMC 23.79.012 (appeal of development standard departure for public schools). The Council did not so in this case. The Examiner should reject EPIC's invitation to amend the Code.

Third, the Examiner's decision did not create an absurd result. Many land use decisions are not subject to administrative appeal but instead may be appealed to superior court by means of a timely filed LUPA petition. These include, among others, all Type I decisions and all Type II decisions that are not identified in SMC 23.76.006.C. RCW 36.70C.020, 36.70C.030, 36.70C.040. There is nothing absurd, or even unusual, about the fact that modifications to development standards for Youth Service Centers fall within this broad category.

Fourth, the Examiner's decision does not overturn well settled principles of law. None of the authority discussed by EPIC (including SDCI's informal TIP and the decision in *Smoke, supra*, 132 Wn.2d 214) addressed the appropriate appeal path for decisions on the modification of development standards for Youth Service Centers. The only "well settled" law is the plain language of SMC 23.76.006.C, which the Examiner followed.

The Examiner must reject these arguments.

4. The City Council adopted SMC 23.76.006.C, under which the modification decision is not subject to Examiner appeal.

EPIC misses the point by asserting that if the City Council had intended that the modification decision would be non-appealable, it would have explicitly stated it was creating a category of non-appealable Type II decisions. Memorandum, pp. 8-9. This is exactly what the

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City Council did when it adopted SMC 23.76.006.C. As argued in section B.2, above, SMC 23.76.006.C specifically identifies those Type II decisions that are subject to appeal to the Examiner. All other Type II decisions are not subject to administrative appeal. Contrary to EPIC's apparent belief, the Examiner does not possess inherent jurisdiction that must be limited by the Code. Instead, as a quasi-judicial official, the Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc., supra,* 148 Wn.2d at 471; SMC 3.02.115; SMC 3.02.120; HER 2.03. Unless the Code expressly grants the Examiner authority to review a particular decision, the Examiner lacks jurisdiction. Accordingly, the Examiner cannot review any Type II decision that is not listed in SMC 23.76.006.C, including the modification decision at issue here.

5. EPIC's reliance on legislative history is misplaced.

The Examiner should not be persuaded by documents EPIC presents in support of its argument that the City Council intended that the modification decision be appealable. As EPIC admits, the Examiner's focus should be on whether legislative history materials are probative of legislative intent. Here they are not. EPIC relies on: (1) a declaration from Councilmember O'Brien; (2) a the fiscal note associated with the legislation that adopted SMC 23.51A.004.B; (3) the SDCI staff report on the legislation that adopted SMC 23.51A.004.B; and (4) an amendment to SMC 23.76.006.C proposed by SDCI, but rejected by the City Council that would make the modification subject to appeal to the Examiner. EPIC's argument fails, not the least because legislative history is irrelevant here. The plain and unambiguous language of SMC 23.76.006.C controls. Unambiguous language is not subject to construction. *HomeStreet, supra,* 166 Wn.2d at 452. The Examiner should not even consider the legislative history offered by EPIC.

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Even if the Examiner considers EPIC's materials, she must still reject EPIC's argument. As discussed in detail in section B.2, it is well settled that the declaration of an individual legislator cannot establish legislative intent. *In re F.D. Processing, supra*, 119 Wn.2d at 461; *United States Dist. Court for the E. Dist. of Wash., supra*, 118 Wn.2d at 63; *Yakima, supra*, 117 Wn.2d at 658; *Woodson, supra*, 95 Wn.2d at 264; *Pannell, supra*, 91 Wn.2d at 598; *Spokane, supra*, 198 Wn. at 687. Accordingly, Councilmember O'Brien's declaration does not establish the legislative intent of the City Council. The proffered fiscal note and staff report simply reassert points the Examiner properly rejected in the motion to dismiss. As the Examiner determined, they are not sufficiently reliable indicators of legislative intent.

In *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 104-105, 829 P.2d 91 (1992), cited by EPIC, the court based its interpretation of the statute primarily on its plain language. The *Lutheran Day Care* court used legislative history only to "buttress" the intent shown in the statutory language. *Id*. at 104. *Lutheran Day Care* does not support EPIC's position here, because EPIC is attempting to use legislative history to *contradict* the plain language of the Code. Further, the legislative history referenced in *Lutheran Day Care* was a memorandum from a House Committee to a Senate Committee and its members. In contrast, here, the legislative history materials are merely an SDCI staff report and fiscal note that do not purport to express any legislative opinion. *See* O'Brien Declaration, Exs. 1, 2. The Examiner should conclude that they are not sufficiently probative to support consideration.

EPIC cites three additional cases, none of which supports its position. In *Cosmopolitan Eng'g. Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298-299, 149 P.3d 666 (2006), the Court rejected the use of legislative history materials to establish intent because the statute was unambiguous. The Court observed that, even if it considered legislative history, that history

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was consistent with the statute's plain language. *Id.* at 304. Here, in contrast, EPIC seeks to establish legislative intent contrary to the plain language of the Code. In *Cosmopolitan Eng'g. Group*, the legislative history consisted of legislators' remarks on the floor and in committee throughout the legislative process. *Id*. Here, EPIC offers the two staff-created documents. *Cosmopolitan* is distinguishable.

Next, in *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992), the Court stated that "in searching for the intent of the Legislature, we must look first to the language of the statute." (Internal quotations omitted.) In *Reding*, the statute plainly stated its intent to codify a prior court decision. The legislative history was consistent. *Reding* does not support EPIC's attempts to establish legislative intent directly contrary to the language of the Code.

Finally, in *State v Reeves*, 194 Wn. App. 154, 336 P.3d 105 (2014), the Court found the language of the statute at issue to be ambiguous but construed it consistently with a broader statutory scheme, including related statutes. *Id*. at 160-162. The Court discussed the legislative history of the ambiguous statute, but found that it was "minimal" and that it did not specifically address the statutory section at issue. *Id*. at 161-162. *Reeves* does not support EPIC.

EPIC's argument that its two staff-created documents are more reliable than materials rejected in *Louisiana-Pacific Corp. v. Asarco* 131 Wn.2d 587, 934 P.2d 685 (1997) and *Hama Hama Co. v. Shorelines Hearings Bd*., 85 Wn.2d 441, 536 P.2d 157 (1975) is incorrect. The *Louisiana-Pacific Corp*. court found that legislative history consisting solely of staff statements was "minimal" and not a reasonable basis for determining intent. 131 Wn.2d at 599. Here, EPIC relies on only two documents produced by staff. The Examiner should follow the *Louisiana-Pacific Corp*. court and conclude that it is not reasonable to rely on a small number of staff documents to demonstrate the intent of the legislative body.

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Similarly, in *Hama Hama,* the Court found successive drafts of a statute to be an unreliable indicator of legislative intent. Instead, the Court relied on established rules of construction. 85 Wn.2d at 446-451. Like the *Hama Hama* court, the Examiner should determine the intent of the legislative body through principles of statutory construction, foremost among them that the plain language of the statute controls.

Finally, SDCI's recent failed amendment to SMC 23.76.006.C actually supports the Applicant and County, not EPIC. In 2016, SDCI issued a staff report discussing potential amendments to SMC 23.76.006.C as part of an omnibus bill, ultimately known as Council Bill ("CB") 118893. The failed 23.76.006 amendments would (1) "clarify that decisions to condition or deny based on SEPA policies are appealable if integrated with procedural SEPA decisions listed in subsection 23.76.006.C.1 as well as the decisions listed in subsections 23.76.006.C.2a through C.2.l"; and (2) add a new subsection 23.76.006.C.2.o stating 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 appeal process, are appealable even if not specifically listed in subsection 23.76.006.C."

CB 118893 was introduced in committee on January 19, 2017. As introduced, no new subsection 23.76.006.C.2.o was proposed. Instead, the proposed changes were placed in SMC 23.76.006.C.n. The proposed legislation read:

> n. 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.1 or 23.76.006.C.2.a through 23.76.006.C.2.l, and further including any other land use decision that is subject to public notice and administrative appeal . . .

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Kaylor Declaration, Ex. B. However, the changes were stricken from CB 118893 in committee, and the original language retained in the version of the bill transmitted to the full Council. Kaylor Declaration, Ex. C.

The history of CB 118893 illustrates two critical points. First, as of January 2017 SDCI believed that under SMC 23.76.006.C's current language not all Type II decisions are appealable to the Examiner. Second, when SDCI proposed to amend SMC 23.76.006.C, the amendment was rejected in committee. This directly contradicts EPIC's arguments regarding Council intent as expressed in the plain language of SMC 23.76.006.C.

In sum, EPIC's legislative history argument lacks merit. The Hearing Examiner must deny EPIC's motion.

6. Principles of statutory construction support dismissal.

EPIC's arguments that: (1) SMC 23.51A.004.B controls because it is more specific than SMC 23.76.006.C; (2) SMC 23.76.004 controls because it was more recently amended; and (3) the failure to make the modification subject to appeal was a "legislative error" that creates an absurd result lack merit. *See* EPIC's Memorandum, pp. 13-16. The Examiner should conclude that the plain language of the Code requires dismissal.

EPIC's argument that SMC 23.51A.004.B is more specific than SMC 23.76.006.C fails on its face. As discussed in section B.2, above, SMC 23.51.004.B does not discuss administrative appeals or delegate review authority. In contrast, SMC 23.76.006.C identifies with particularity those Type II decisions that are subject to Examiner review. Regarding appeal of modification to development standards for a Youth Service Center, SMC 23.51A.004.B is silent and SMC 23.76.006.C is specific.

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EPIC's discussion of 2013 amendments to SMC 23.76.004 is simply irrelevant. The 2013 amendments do not pertain to appeals. The 2013 amendment simply adds "Other Type II decisions that are identified as such in the Land Use Code" to the list of Type II decisions. Kaylor Declaration, Ex. D. Since no amendments relating to appeals were made in 2013, and the Council rejected amendments to SMC 23.76.006.C in 2017, the 2013 amendments do not help EPIC.

Finally, EPIC's absurdity argument also falls flat, especially in the context of a motion to reconsider. As previously discussed, many land use decisions are not subject to administrative appeal, and are instead directly appealable to superior court under LUPA. RCW 36.70C.020, 36.70C.030, 36.70C.040. There is nothing absurd about the fact that a simple modification to development standards for a Youth Service Center would fall within this broad category.

For these reasons, the Examiner must reject EPIC's statutory construction arguments.

7. The SEPA decision here is not subject to appeal to the Examiner

EPIC argues that, since it believes the modification decision is appealable to the Examiner, then the challenged SEPA decision is also subject to appeal. This claim is nonsense. Modification decisions are not subject to Examiner appeal, for all of the reasons discussed in this response and in the Applicant and County's motion to dismiss. However, even if the modification were subject to administrative appeal, the associated SEPA decision would still not be subject to appeal to the Examiner under the plain language of the Code. SMC 23.76.006.C.2.n, which expressly limits administrative appeals of decisions to approve, condition or deny under SEPA. Only those substantive SEPA decisions associated with the reviewable decisions identified in 23.76.006.C.2.a. through 23.76.006.C.2.l are appealable to the Examiner.

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Decisions to modify development standards for Youth Service Centers are not included in C.2.a through l. The SEPA decision here is not subject to administrative appeal.

III. CONCLUSION

For these reasons, the Applicant and the County respectfully request that the Examiner deny EPIC's motion for reconsideration.

IV. MOTION TO STRIKE

The Applicant and County move to strike the O'Brien Declaration and all portions of EPIC's motion that rely on it. Under HER 2.17, the Examiner "may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged." The Examiner should strike the Declaration based on Rule of Evidence 402, 602 and 701 because O'Brian is not competent to testify regarding the intent of the City Council as a whole. *See* HER 103(c) (the Examiner may look to the Superior Court Civil Rules for guidance). The law is well established that the testimony of a single legislator cannot be used to establish legislative intent. *In re F.D. Processing, supra,* 119 Wn.2d at 461; *United States Dist. Court for the E. Dist. of Wash., supra,* 118 Wn.2d at 63; *Yakima, supra,* 117 Wn.2d at 658; *Woodson, supra,* 95 Wn.2d at 264; *Pannell, supra,* 91 Wn.2d at 598; *Spokane, supra,* 198 Wn. at 687. Accordingly, the O'Brien Declaration is irrelevant and immaterial. The Examiner should strike the O'Brien Declaration and all parts of EPIC's motion that rely on this Declaration.

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