**BEFORE THE HEARING EXAMINER**
**FOR THE CITY OF SEATTLE**

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

## I. REPLY

The City of Seattle has confirmed that the Seattle Department of Construction and Inspections ("SDCI") and the City Council always intended to make the Director's decision on the MUP appealable to the Hearing Examiner. *See* MUP; also, *Lowney Decl. in Opposition to Motion to Dismiss*, **Exhibit D** (SDCI Notice of Decision) (authorizing appeal of MUP decision to Hearing Examiner). This alone is new information sufficient for reconsideration under Hearing Examiner Rule (HER) 3.20. The statutory history and the documents attached to the motion for reconsideration and this reply confirm that everyone involved – including King County – knew that the MUP was subject to administrative appeal.



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The County's efforts to argue that Appellants made a mistake and filed in the wrong venue is cynical and disingenuous. Appellants had a right to rely upon the unambiguous language of the City's notice of decision. As the City admits, the Ordinance was intended to make the decision appealable, notwithstanding the oversight of adopting a conforming amendment to SMC 23.76.006. This is especially clear when looking at the legislative history. The early drafts of the legislation made the decision a Type I decision – which would have made the decision non-appealable – but the ordinance was changed before passage to categorize the MUP decision as a Type II decision, thereby guaranteeing a right of appeal. *See Lowney Reply Decl.,* ***Exs. A and B.***

The County always understood this. Indeed, throughout this process, the County explicitly and repeatedly stated – in writing – that the City's MUP decision would be appealable to the Seattle Hearing Examiner and that time for this appeal was built into the project schedule. *See Lowney Reply Decl.,* ***Exs. C and D.***

The Hearing Examiner should reconsider her decision and allow the administrative appeal to move forward. This is the fairest and most appropriate result and also preserves public resources and serves judicial efficiency.

**A. The Hearing Examiner has the power to reconsider the dismissal.**

The Hearing Examiner has the authority to reconsider her decision, and there are ample justifications to do so here. Appellants showed that the dismissal was erroneous and prevented a fair hearing, which falls within the exceedingly broad "irregularity in proceedings" standard of HER 3.20(a)(1), identifying when a Hearing Examiner may grant a motion for reconsideration. Appellants also rely upon new evidence under HER 3.20(a)(2). Under the County's argument,



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the Hearing Examiner could *never* reconsider an erroneous jurisdictional dismissal. That would be inconsistent with the hearing examiner rules and her inherent authority to do justice. *See State v. Hawkins*, 72 Wn.2d 565, 434 P.2d 584 (1967) (a court has the inherent authority to grant a new trial, and thus can do so even on grounds not listed in CR 59).

**B. The City's admission that a mistake was made requires reconsideration.**

The City's response to the Motion for Reconsideration is an admission of a party opponent and admissible as substantive evidence that a legislative error was made and that SDCI and the City Council intended the MUP to be appealable to the Examiner. *State v. Garland*, 169 Wn. App. 869, 886, 282 P.3d 1137 (2012); *SDCI's Response on EPIC's Motion for Reconsideration*. This alone is basis for reconsideration under HER 3.20(a)(1) and (2).

**C. There is no question that the code is ambiguous and requires construction.**

The Hearing Examiner's decision on the motion to dismiss has already found the code is ambiguous, which is beyond reasonable dispute. Indeed, ambiguity is created merely by the disharmony between the land use framework which makes all Type II decisions subject to Hearing Examiner appeal (SMC 23.76.004) and the City's Council's ordinance which the County claims creates a Type II decision **not** subject to administrative appeal. The County cannot credibly claim that the code is clear and unambiguous in light of contemporaneous documents showing that the County always interpreted the code as subjecting the MUP to administrative appeal. *See Lowney Reply Decl., **Exs. C and D***. The ambiguity must be resolved through statutory construction to preserve the right to appeal.

**D. Statutory History shows that SDCI and the City Council intended the decision to be subject to administrative appeal.**

It is because this project is so controversial that SDCI and the City Council went out of



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their way to create an opportunity for appeal. As such, they clearly did not use this ordinance as a mechanism to create – for the first time – a "non-appealable Type II decision" as the County argues.

**1. The draft ordinance was changed to reclassify the waiver from a Type I decision to a Type II decision.**

Newly discovered evidence leaves no question that SDCI and the City Council always intended for the Director's decision to be appealable. The original draft of the legislation, which was publicized as part of the SEPA review, categorized the waiver as a Type I decision, which would have made it non-appealable. *Lowney Reply Decl.*, ***Ex. A****;* SMC 23.76.004.B ("Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner.") This was true in all of the early drafts. *See Lowney Reply Decl.*, ***Ex. B.***

When the ordinance was finalized, this categorization was changed to a Type II decision to create a right of administrative appeal. *See* SMC 23.76.004.B. ("Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner.")

This statutory history leaves no question that the intent was to create the right of an appeal. There is no other reason to change the legislation to explicitly reclassify the decision from a Type I ("not appealable to the Hearing Examiner") to a Type II ("subject to an administrative open record appeal hearing to the Hearing Examiner.") SMC 23.76.004.B.

**2. SDCI highlighted this change to the City Council.**

SDCI staff and its director understood the importance of the classification and went out of their way to communicate to the City Council that the waiver decision would be subject to administrative appeal. Mike Podowski, the Code Development Manager for SDCI, specifically



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edited the Director's Report so that the City Council would be given this critical information. His edits read:

> The proposed Code amendment would allow King County to apply for a Type II (DPD decision requires public notice and comment and is appealable to the Hearing Examiner) waiver or modification of these setback and maximum width standards . . . .

*Lowney Decl., **Ex. E*** (revision marks in original, showing Podowski edits to Director's Report). The fiscal note presented the City Council was also edited to add this information. *Compare **Ex. E** to Lowney Decl. in Opposition to Motion to Dismiss* (final fiscal note stating that decision was appealable) and *Lowney Reply Decl., **Ex. F*** (early draft of fiscal note silent on opportunity to appeal).

Notably, these documents did not state that the waiver would be a Type II decision that was appealable. Rather, they used a parenthetical to confirm that by designating the decision as a Type II decision, the legislation would make it appealable.

**3. SDCI issued a decision and notice of decision stating the MUP was subject to administrative appeal.**

Finally, the City issued the formal decision and notice of decision stating that the decision was appealable to the Hearing Examiner and informing the public that this was the avenue for appeal. *See* MUP; also, *Lowney Decl. in Opposition to Motion to Dismiss*, **Exhibit D** (SDCI Notice of Decision) (authorizing appeal of MUP decision to Hearing Examiner). This was not an informal or voluntary statement. State law required this notice of decision to include accurate appeal information. RCW 36.70B.130.



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**E. The Hearing Examiner must defer to SDCI's interpretation of the code.**

The Hearing Examiner must give deference to SDCI's contemporaneous interpretations because SDCI's decision that the MUP is appealable is entitled to substantial weight in this proceeding. SMC 23.76.022(7). Even if the Seattle Municipal Code was silent, the Hearing Examiner – like a court – must give deference to the City on this interpretation. "[I]n 'any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.'" *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008) (*citing Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956)); *see also Pinecrest Homeowners Ass'n*, 151 Wn.2d 379, 290, 88 P.3d 939 (Supreme Court's review of city ordinances must accord deference to city council's expertise); *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001) (courts generally accord deference to an agency's interpretation of an ambiguous ordinance); *Hayes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976) ("In the course of judicial review, due deference must be given to the specialized knowledge and expertise of the administrative agency."); *Friends of Law v. King County*, 63 Wn. App. 650, 656, 821 P.2d 539 (1991) ("long-standing interpretation by the agency charged with enforcing former KCC 19.28.010 is reasonable and merits great deference."); *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992), *review denied*, 120 Wn. 2d 1020 (1993) (considerable judicial deference is given to the construction of an ordinance by the agency charged with its enforcement).

The Land Use Petition Act (LUPA) also expressly incorporates this deferential standard. *See* RCW 36.70C.130(1)(b) (party seeking relief must show that land use decision is erroneous



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interpretation of the law "after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise").

The Hearing Examiner should defer to the City and SDCI's contemporaneous interpretation, which is shown in five formal documents. All of these contemporaneous documents – the SDCI Director's Report, Fiscal Impact Study, MUP Decision, Notice of Decision, and its Memorandum in Support of Motion for Reconsideration – are consistent. They all state that the decision was appealable to the Hearing Examiner. These five formal documents distinguish this case from *Louisiana Pacific Corp. v. Asarco*, 131 Wn.2d 587, 934 P.2d 685 (1997), holding that one statement from an "unidentified House Staff Counsel" could not establish legislative intent.

**F. The County's strained interpretation is contrary to the plain language of the code.**

The County's argument that the City Council created a non-appealable Type II decision is absurd. It has not been able to identify a single other Type II decision that is not subject to appeal. This is because there is no such thing, since by definition "Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner." SMC 23.76.004.B. The County's argument – that the City Council's failure to adopt a conforming amendment in SMC 23.76.006 created a non-appealable Type II decision –turns the code on its head. It ignores the entire land use framework, which distinguishes Type I and Type II decisions solely upon the basis of right of administrative appeal. It also is contrary to numerous provisions of the code which are based upon this distinction. *See* SMC 23.76.028.B (Type II decisions issued after appeal period ends or appeal resolved). All of the City Council's recent actions suggest that it is sticking with the



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distinction between Type I and Type II decisions, but that these classifications only need to happen once, in the substantive provisions of the code, without need to constantly update compiling lists.[1]

There is no reason that the City would have created an entirely new category of decisions: a Type II decision not subject to administrative appeal. If it had wanted to do that, it would have just left the decision as a Type I decision as shown in the early drafts of the legislation. Moreover, if it wanted to create this new category of decision, it would have amended SMC 23.76.004.B to create an exception to the general rule that Type II decisions are appealable. The County's reading creates an absurd result that must be rejected.

**G. The County does not dispute legislative error.**

The County does not dispute that there was a legislative error or that in such situation the goal of the tribunal is to interpret the code to correct such error. *See* Memorandum in Support of Motion for Reconsideration.

**H. The County has also always understood that the MUP was appealable to the Hearing Examiner and publicly shared this understanding.**

The County's brief disingenuously suggests that Appellants merely appealed to the wrong body and should not have followed the appeal instructions in the City's notice of decision. In fact, the County also believed that the MUP was appealable to the Hearing Examiner and publicized this fact. For example, while the MUP was pending, the County held two briefings and issued staff reports stating:

[1] As discussed in *Appellants' Memorandum in Support of their Motion for Reconsideration*, the Council's latest action was to amend SMC 23.76.004 to state that the designation of Type II decisions subject to Hearing Examiner appeal should be found in the code, not just in SMC 23.76.006. SDCI has proposed to include the same type of edit to SMC 23.76.006. Rather than rejecting this, the City Council tabled it during its February 24, 2017 land use committee meeting because it had been combined into a paragraph also addressing a more complex SEPA issue.



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> The current CFJC project schedule anticipates the Master Use Permit being issued within the next few weeks. ***This decision may be appealed to the Seattle Hearing Examiner*** . . . ***Time for this appeal process is also built into the project schedule*** . . . .

*Lowney Reply Decl., **Ex. C*** (emphasis added). Then, six months later, the County issued the following public briefing:

> **Permitting Status and Timeline**
> When the Committee of the Whole was previously briefed in January 2016, the CFJC project schedule anticipated the Master Use Permit being issued within the next few weeks. Subsequently, the City of Seattle has issued two rounds of correction notices . . . ***Once the corrections have been resolved and the Seattle permitting director issues a Master Use Permit decision, this decision may be appealed to the Seattle Hearing Examiner within 14 days*** . . . ***Time for this appeal project is built into the updated project schedule.***

*Lowney Reply Decl**., Ex. D*** (emphasis added).

Thus, all of the parties' contemporaneous documents evidence a legal analysis that the MUP was appealable. The County's new arguments are merely a *post hoc* litigation strategy.

## I. Great injustice would occur if reconsideration is not granted.

Nobody can fault Appellants for relying upon the explicit appeal instructions in the notice of decision, especially given the City's contemporaneous documents showing legislative intent and the County's repeated statements that the MUP was appealable to the Examiner.

Yet, if the motion for reconsideration is not granted, Appellants will likely be forever deprived of an opportunity for appeal. The County argues that Appellants should have ignored the City's appeal instruction and immediately appealed to Superior Court. County Response, at 17. If reconsideration is denied, the County will undoubtedly argue that any effort to appeal the MUP to Superior Court is untimely, since the Superior Courts have rigorously enforced LUPA's twenty-one day statute of limitations.



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No court has considered what happens when a party follows false appeal instructions in a notice of decision issued pursuant to RCW 36.70B.130 (notice must state procedures for administrative appeal). What is clear is that such litigation will not speed up the project or create judicial efficiency. The City informed the public how to appeal, consistent with the City's and County's interpretation of the code, and the City cannot fairly reverse course by dismissing the appeal now. The Hearing Examiner should grant reconsideration to allow the MUP administrative appeal, including the related SEPA appeal, to move forward.

**J. The O'Brien Declaration is admissible.**

This is not the situation where the testimony of a single legislator is being submitted to establish legislative intent. Councilmember O'Brien served as chair of the Land Use Committee when the ordinance was enacted and is providing factual information about what the City Council considered and the roots of its error in failing to adopt a conforming amendment in SMC 23.76.006. The declaration is admissible, even if it cannot be used to determine legislative intent. *See Crespin v. Kizer*, 226 Cal. App. 3d 498 *12, 276 Cal. Rptr. 571 (Cal. App. 1st Dist. 1990) ("declaration by the assemblyman who was chair of the Subcommittee on Health and Welfare of the Committee on Ways and Means at the time Sen. Bill No. 175 was passed was admissible for the purpose of establishing the objective fact that the committee discussed a proposed amendment but did not include it in the final version of the bill sent to the Assembly floor, even though none of the assemblyman's statements regarding his interpretation or understanding of the final version of the bill was admissible to prove legislative intent.").



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RESPECTFULLY SUBMITTED this 23rd day of March, 2017.

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