

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of:

JACK NIKFARD

From a Department of Construction and
Inspections decision.

No. MUP 17-019

SDCI Reference: 3018686

APPLICANT’S REPLY ON MOTION TO
DISMISS

I. INTRODUCTION

Appellant Jack Nikfard’s (“Appellant”) response attempts to rewrite his appeal to present a colorable substantive claim. This attempt must fail. The appeal is outside the Hearing Examiner’s explicit scope of review contained in Seattle Municipal Code (“SMC” or “Code”) 23.76.022, and it is too late to make the appeal comport with the Hearing Examiner’s jurisdiction. See Hearing Examiner Rules of Practice and Procedure 3.05 (allowing an appeal to be amended no later than 10 days after the date on which it was filed).

Appellant also restates his claims regarding violations of design review procedure under SMC Chapter 23.41 as somehow relating to the compliance with the procedures for Type II decisions as required in SMC Chapter 23.76. There is no basis in the Code to support

1 Appellant’s attempt to connect the design review process in SMC 23.41 with the public notice
2 requirements in SMC Chapter 23.76.

3 Appellant’s arguments find no support in Code, state law or case law, and the Examiner
4 should reject them. The Examiner has no authority to excuse or overlook these jurisdictional
5 defects. *Chaussee v. Snohomish County Council*, 38. Wn. App. 630, 638, 689 P.2d 1084 (1984).
6 Applicant Tom Bartholomew, on behalf of Martin Selig Real Estate (“Applicant”), accordingly
7 asks the Examiner to dismiss Appellant’s appeal.
8

9 **II. ARGUMENT**

10 **A. Appellant fails to state a claim that relates to compliance with substantive criteria**

11 In its response, Appellant seeks to rewrite his appeal, and argues that he is now
12 challenging the Director’s decision on the tower width departure (“Departure”) because it is
13 inconsistent with adopted design guidelines.¹ Appellant did not make this claim in his appeal.
14 Appellant’s appeal simply took issue with “the magnitude of the departure” without
15 commentary. There is no claim alleging noncompliance with substantive design criteria in the
16 appeal. SMC 23.76.022.C. It is too late for Appellant to amend his appeal, HER 3.05, and he
17 cannot do so now through a response to a motion to dismiss.
18
19

20 Appellant’s only “substantive” complaint in the appeal states that the departure is
21 different than what SMC 23.49.058.E—the code provision limiting a tower width to 120 feet—
22 requires. This is obvious, but Appellant sought an interpretation to drive the point home.
23 Appellant’s challenge to the “magnitude” of the departure related to the Code limit on tower
24

25
26

¹ Appellant also alleges that the Director may reject the Design Review Board’s recommendation when it is
27 inconsistent with regulatory requirements applicable to the site under SMC 23.41.014.F. Appellant selectively
28 quotes this provision out of context. One, this provision relates to SEPA conditions or other regulatory
requirements. Two, this provision relates to regulatory requirements, not development regulations which can be
departed from under SMC 23.41.012.

1 width and to his interpretation request, which Appellant has agreed is now moot. But there is
2 nothing in Appellant’s appeal that even implicitly states a claim based on incompatibility of the
3 departure with the applicable design guidelines – Appellant’s newly-created “substantive”
4 appeal. Indeed, not a single design guideline is cited in the appeal, nor is the category of “design
5 guidelines” even mentioned. Appellant essentially argues that since a plain reading of the appeal
6 would require its dismissal, Appellant must have meant something else, even if he didn’t say it.
7

8 This is an exercise in fiction. Appellant points to no specific aspect of his appeal that
9 falls within the Hearing Examiner’s scope. Instead, Appellant rewrites his appeal to allege, for
10 the first time, noncompliance with Design Guidelines. Because Appellant fails to state a
11 substantive claim or a violation of substantive criteria, as required by SMC 23.76.022, this claim
12 is accordingly outside the jurisdiction of the Hearing Examiner.
13

14 **B. The Hearing Examiner lacks jurisdiction to consider procedural claims under SMC**
15 **Chapter 23.41**

16 The Hearing Examiner does not have jurisdiction to entertain procedural claims regarding
17 compliance with SMC 23.41. *See In The Matter Of The Appeal Of Alliance For Livable Denny*
18 *Triangle And Unite Here Local 8*, MUP-14-016/S-14-001, Conclusion 3 (July 14, 2015) (noting
19 that while notice procedures under SMC Chapter 23.76 are within the Hearing Examiner’s
20 jurisdiction, the Examiner lacks jurisdiction over the procedural requirements of Chapter 23.41
21 on design review). In its response, Appellant presents no argument that justifies the
22 unprecedented expansion of the Hearing Examiner’s jurisdiction to include consideration of
23 procedural claims under SMC Chapter 23.41. Indeed, Appellant tellingly ignores the Hearing
24 Examiner’s decisions that hold it does not have jurisdiction to review design review procedures
25 under SMC 23.41. Appellant’s procedural claims must accordingly be dismissed.
26
27
28

1 Once again, Appellant inappropriately attempts to revise the appeal to include a new
2 claim in his response. Appellant argues that SMC 23.76.011.C, which guides public notice
3 requirements for Master Use Permits, was violated. But this claim is newly manufactured:
4 nowhere in Appellant’s appeal did he raise concerns regarding the mailed public notice pursuant
5 to these requirements. This new claim accordingly fails. HER 3.01(d); 3.05.
6

7 Even if the Hearing Examiner were to consider a new claim, the allegation that the City
8 violated the notice provisions under SMC 23.76.011.C is a red herring. There is no basis in
9 Code to connect the procedural provisions of SMC 23.41 with the public notice requirements in
10 SMC 23.76.011. Under established law, the intent of the City Council is determined from the
11 plain language of unambiguous provisions of the City Code. *HomeStreet, Inc. v. Dep’t of*
12 *Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Here, the plain and unambiguous language
13 of SMC 23.76.022.C.6 provides that the only procedures under SMC 23.76 are subject to appeal.
14 If the City Council intended to confer jurisdiction to the Hearing Examiner for claims regarding
15 design review procedures under SMC 23.41, it would have done so. Appellant does not provide
16 a cogent argument that supports his reading of SMC 23.76.022.C.6.
17
18

19 Appellant also makes the outrageous claim that SMC 23.76.011 somehow requires each
20 and every departure request to be listed in the mailed public notice for the Early Design
21 Guidance (“EDG”) meeting. This is not true. The purpose of the meetings—to conduct design
22 review—is clearly spelled out in the public notice.² This clearly satisfies the requirement of the
23 Code, which is to give notice of the “purpose” of the meeting. Nothing in the Code suggests that
24 the public notice include a detailed list of every item to be discussed (including the departures to
25 be sought) at a Design Review Board (“Board”) EDG meeting or Recommendation meeting.
26
27
28

1 Appellant further alleges that the purpose of the EDG meeting is to consider every
2 departure request for the project, and that the public notice accordingly must list each request.
3 This argument has no support in the Code. The purpose of an EDG meeting, outlined in SMC
4 23.41.014.B.2 and cited by Appellant, does not list consideration of departure requests as one of
5 the Board's purposes. Appellant can only cite to an EDG packet checklist, which states a packet
6 should list all anticipated departures. Even this guidance, which is not law, does not preclude
7 introduction and consideration of a departure at a later time.
8

9 Indeed, the only other applicable mention of departure requests outside of SMC
10 23.41.012, Development Standard Departures, is in SMC 23.41.014.E.2, where it states that at a
11 Design Review Board Recommendation meeting, the Board shall recommend whether to
12 approve any departure requests. Appellant admits in its appeal that, in this case, the departure
13 request at issue was raised at the First Recommendation meeting and that written and oral
14 comments on the tower width departure were provided by Appellant at the Second
15 Recommendation meeting.³ Appeal, p. 1; *see also* Attachment B to Applicant's Motion to
16 Dismiss (Decision), pp. 16-17. Appellant provides no Code provision, no case law, and no facts
17 that support his argument that all departure requests must be explicitly listed in the public notice
18 for an EDG meeting or considered at an EDG meeting. The Code requires departures to be
19 considered by the Board at a Recommendation meeting; as admitted by Appellant in his appeal,
20 the departure was considered and approved in accordance with applicable law. Appellant's
21
22
23
24

25 ² The cases cited by Appellant do not apply here because neither case discusses a Hearing Examiner's jurisdiction,
26 which is expressly limited by Code. *See Chausee*, 38 Wn. App. 630 at 636. Moreover, both cited cases discussed
27 notice relating to a final decision, and not a recommendation to the Director, who makes a final decision.

28 ³ Appellant states in its response that the departure was not mentioned during the first design review
recommendation meeting. Response, p. 6. This is directly contradicted by Appellant's statement in the appeal that,
"[d]uring the third meeting (first Recommendations), the applicant made the first oral mention of the departure
request." Appeal, p. 1.

1 arguments accordingly fail.


2 Appellant reinvents his procedural claim in an effort to avoid dismissal. But it is too late
3 to raise new claims, and even so, SMC 23.76.011 does not require that the City's notice of an
4 EDG meeting must include all departure requests. Because the Hearing Examiner does not have
5 jurisdiction to entertain claims regarding design review procedure, Appellant's procedural claims
6 must be dismissed.
7

8 **III. CONCLUSION**

9 Appellant agrees its Interpretation claim is moot. The Applicant requests that the
10 Hearing Examiner enter an order dismissing the remainder of Appellant's Appeal.

11 DATED this 15th day of June, 2017.

12
13 MCCULLOUGH HILL LEARY, P.S.

14
15 By: 
16 John C. McCullough, WSBA #12740
17 Katie Kendall, WSBA #48164
18 Attorneys for Applicant
19
20
21
22
23
24
25
26
27
28