

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

JACK NIKFARD

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

Hearing Examiner File:
MUP-17-019 (DR)

Department Reference:
3018686

**ORDER ON MOTION
TO DISMISS**

The Department of Construction and Inspections (“Department”) issued a SEPA Determination of Nonsignificance (“DNS”) and design review approval for a proposal to construct a 36-story mixed use building at 2031 Third Avenue in downtown Seattle. The Appellant, Jack Nikfard, appealed the Department’s design review decision. J. Richard Aramburu was granted limited intervenor status in the appeal. The Applicant, Tom Bartholomew for Martin Selig Real Estate, filed a motion to dismiss the appeal, and the motion was fully briefed. The Hearing Examiner has reviewed the file in this matter including the briefs on the motion.

The Applicant seeks dismissal of the Appellant’s first appeal issue, which reads as follows:

Of specific concern is the “Tower Width” departure that was granted through the Design Review process based on two main points:

1. The magnitude of the departure. A 178’ wide tower is proposed, exceeding by 48 percent, the 120’ allowed by code. Below is an excerpt from SMC 23.49.058E:

The appeal letter then quotes from SMC 23.49.058.E.2.a, a development standard regulating maximum tower width.

The Applicant argues that the Examiner lacks jurisdiction over the Appellant’s stated concern about the tower width departure because it raises a claim addressed to the Department’s application of the Land Use Code, which is a Type I decision that cannot be appealed to the Examiner. The Appellant responds that the claim challenges the Department’s “substantive decision to approve the departure ... as part of the design review process,”¹ and that a design review decision is a Type II decision that may be appealed to the Examiner under SMC 23.76.006.C.6, which grants the Examiner authority to review Type II decisions for “compliance with substantive criteria.” The Appellant then suggests several “substantive criteria” that govern a design review decision, including: 1) SMC 23.41.012.A, which provides that departures “may be allowed if an applicant demonstrates that departures from Land Use Code requirements would result in a development that better meets the intent of adopted design guidelines; 2) SMC 23.41.0014.F.1, which allows

¹ Response of Jack Nikfard to Motion to Dismiss at 1.

the Director to “condition a proposed project to achieve compliance with design guidelines” and the “purpose and intent” of Chapter 23.41 SMC; and 3) SMC 23.41.014.F.2, which requires that the Director accept a Design Review Board decision of four or more Board members unless, *inter alia*, the decision conflicts with “regulatory requirements applicable to the site.” The Appellant notes that the tower width limits in SMC 23.49.058.E.2 are one such regulatory requirement.²

SMC 23.76.022.C.3.b states that “[i]n form and content, [an] appeal shall conform with the rules of the Hearing Examiner. Hearing Examiner Rule (“HER”) 3.01(d) states that an appeal must include the appellant’s specific objections to the decision or action being appealed.” The appeal’s first claim in this case merely states that the “magnitude of the departure” for the proposal’s tower width is of concern. It does not state a specific objection concerning the tower width’s compliance with particular design guidelines, or claim that the departure failed to result in a development that better meets the intent of specific design guidelines than would a development that met the tower width development standards. Further, the claim does not allege that the Board’s decision, as adopted by the Director under SMC 23.41.014.F.2, would “[reflect] inconsistent application of the design review guidelines;” “[exceed] the authority of the Design Review Board;” “[conflict] with SEPA conditions or other regulatory requirements applicable to the site;” or “[conflict] with the requirements of state or federal law.”³ Thus, the claim fails to state a design review claim for which the Examiner has jurisdiction to grant relief, and pursuant to HER 3.02, it must be dismissed.

The Applicant also seeks dismissal of the Appellant’s second appeal issue, which asserts that there was a lack of information concerning the tower width departure made available to the public through the design review process. The appeal states that: 1) none of the design proposals made available to the public for download mentioned a tower width departure; 2) during the first recommendation meeting, the applicant mentioned a 20% tower width departure request, but the request was not included in the design proposal available for download prior to the meeting; and 3) members of the public expressed concerns in writing and at the second recommendation meeting, but Department staff determined that they were not timely.⁴

The Applicant contends that the Examiner lacks jurisdiction to consider claims concerning compliance with design review procedures set forth in Chapter 23.41 SMC. In an appeal of a design review decision, which is a Type II decision, the Examiner’s jurisdiction over procedural requirements is limited by SMC 23.76.022 to “issues that relate to compliance with the procedures for Type II decisions *as required in this chapter 23.76*.”⁵ Nothing in the Code gives the Examiner jurisdiction over the procedural requirements of Chapter 23.41 SMC or procedures developed by the Department for the administration of that chapter. The Appellant argues that the deficiencies listed in the second appeal issues do, in fact, relate to compliance with the procedures for Type II decisions in Chapter 23.76 SMC, specifically the requirement in SMC 23.76.011 that the “time, date, location and purpose of the meeting shall be included with the mailed notice” of the early design guidance meeting. However, the second appeal issue does not address the mailed notice

² Response of Jack Nikfard to Motion to Dismiss at 5-6.

³ SMC 23.41.014.F.2. To the extent that the claim is said to have alleged that the departure decision is inconsistent with the regulatory requirements for tower width, the argument is puzzling. A departure from a development standard will inherently result in a proposal that does not comply with the strict requirements of that development standard.

⁴ Appeal at 1.

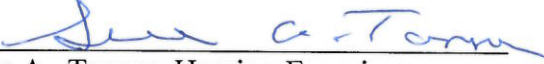
⁵ SMC 23.76.022.C.6 (emphasis added).

that was sent for the early design guidance meeting. Instead, it challenges the completeness of project information made available to the public through other means during the design review process. Although there may have been deficiencies in that information, under SMC 23.76.022, the Examiner lacks jurisdiction to consider them.

Finally, the Applicant moves for dismissal of the Appellant's request for a Code Interpretation, arguing that the Appellant failed to comply with the requirements of Chapter 23.88 SMC and that the request is moot. The Appellant agrees that the request is moot.

The Appellant's request for a Code Interpretation is moot and is therefore **DISMISSED**. The Examiner has no jurisdiction over the other two issues raised in the appeal, and the appeal is therefore **DISMISSED**. The appeal hearing scheduled for June 28, 2017 is **CANCELLED**.

Entered this 23rd day of June, 2017.


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CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matter of **Jack Nikfard**. Hearing Examiner File: **MUP-17-019 (DR)** in the manner indicated.

Party	Method of Service
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Dated: June 23, 2017



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