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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE
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11 In the Matter of Appeal of:

12 ESCALA OWNERS ASSOCIATION

13 Of a Master Use Permit Decision issued by the
14 Director, Seattle Department of Construction &
15 Inspections

Hearing Examiner File: MUP-17-035

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RESPONDENTS CITY OF SEATTLE AND
JODI PATTERSON-O'HARE'S JOINT
MOTION FOR PARTIAL DISMISSAL

17 **I. INTRODUCTION AND RELIEF REQUESTED**

18 This is an appeal of the Master Use Permit ("MUP") for a 48-story building in the City of
19 Seattle's ("City's") Belltown neighborhood ("Project"). The MUP includes three components:

20 (1) design review approval under the Seattle Municipal Code ("SMC" or "Code") Chapter 23.41;

21 (2) the City's procedural compliance with the State Environmental Policy Act ("SEPA"),

22 including the adoption of the Downtown Height and Density Changes Final Environmental

23 Impact Statement ("FEIS") for the Project and determination of EIS adequacy; and (3)

24 imposition of conditions pursuant to the City's substantive SEPA authority. The Escala Owners

25 Association ("Appellant") allege that the Project violates certain Code provisions. Notice of

26 Appeal, Claim 2.1.b.
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1 The Appellant's Code interpretation claim 2.1.b ("Garage Layout/Slope Claim") is fatally
2 flawed and must be dismissed because the Hearing Examiner lacks jurisdiction to hear a
3 challenge to a Code interpretation. The Appellant failed to file an interpretation of the Project
4 before the public comment period on the Project ended. The Appellant also failed to file a
5 request that the Director issue an interpretation on the Code provisions and corresponding appeal
6 as part of its Notice of Appeal pursuant to SMC 23.88.020. Thus, the Appellant failed to invoke
7 the Hearing Examiner's jurisdiction. Respondents City and Jodi Patterson-O'Hare ("Applicant")
8 (collectively, "Respondents") respectfully request that the Hearing Examiner dismiss the Garage
9 Layout/Slope Claim.
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11 II. STATEMENT OF FACTS

12 The Project includes one 48-story structure containing 432 apartment units, 155 hotel
13 rooms, retail and restaurant space and below-grade parking for 239 vehicles. Master Use Permit
14 for Project No. 3019699 ("MUP"), pg. 1-2. The City issued a SEPA determination of
15 significance and notice of adoption of the FEIS and availability of an Addendum to the FEIS for
16 the Project on December 15, 2016 ("First Addendum"). In response to public comments,
17 including numerous comments from the Appellant, the City issued a second SEPA determination
18 of significance and notice of adoption of the FEIS and availability of an Addendum to the FEIS
19 on July 3, 2017 ("Second Addendum").
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21 An application for the Project was submitted to the City Department of Construction and
22 Inspections ("SDCI"). SDCI reviewed the Project for compliance with the substantive
23 requirements of the Code. The Code classifies a "[d]etermination that a proposal complies with
24 development standards" as a Type I decision to be made by SDCI. SMC 23.76.006.B. The
25 Project proposed that the below-grade parking be served by valet. Additionally, the Project
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1 requested that the aisle slopes on some parking levels exceed the Code maximum of 15 percent.
2 SDCI reviewed and approved the Project's garage layout and the aisle slope modification.
3 Declaration of Ian S. Morrison ("Morrison Decl."), Ex. A, pg. 2.

4 The Appellant did not file a Code interpretation regarding the Project's proposed garage
5 layout and slope modification prior to the end of the comment period on the Project. Declaration
6 of Shelley Bolser ("Bolser Decl."), ¶¶ 2-3.

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8 On October 26, 2017, the City issued the MUP. The MUP includes three components: (1)
9 design review approval under the Seattle Municipal Code ("SMC" or "Code") Chapter 23.41; (2)
10 the City's procedural compliance with the State Environmental Policy Act ("SEPA"), including
11 the adoption of the FEIS for the Project and determination of EIS adequacy; and (3) imposition
12 of conditions pursuant to the City's substantive SEPA authority. MUP, pgs. 2-34.

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14 On November 9, 2017, the Appellant appealed the MUP. Among its claims, the
15 Appellant raised the Garage Layout/Slope Claim, which alleges:

16 In some respects, the proposal violates code provisions, which in turn, causes
17 significant adverse environmental impacts. For example, the garage layout
18 violates 23.54.030.H. That provision requires compliance with specific stall
19 dimensions and aisle widths if and when the valet operations ceases. As designed,
20 the garage could never meet that code requirement since columns and elevator
core locations make them impossible to meet. In addition, aisle slopes on some
parking levels are greater than the code maximum of 15%.

21 The Respondents now move to dismiss the Appellant's Garage Layout/Slope Claim.

22 III. STATEMENT OF ISSUES

23 The issue raised in this motion is whether the Hearing Examiner should dismiss the
24 Appellant's Garage Layout/Slope Claim because it raises a Type I issue of Code interpretation
25 and the Appellant failed to properly file an interpretation as required by SMC 23.88.020.C.3.
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1 **IV. EVIDENCE RELIED UPON**

2 This motion relies on the papers and pleadings in this matter, the Morrison Declaration
3 and the Bolser Declaration submitted concurrently with this motion.

4 **V. AUTHORITY**

5 **A. The Hearing Examiner may dismiss an appeal over which the Examiner lacks**
6 **jurisdiction or that is without merit on its face, frivolous or brought merely to delay**

7 “An appeal may be dismissed without a hearing if the Hearing Examiner determines that
8 it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is
9 without merit on its face, frivolous, or brought merely to secure delay.” Hearing Examiner Rules
10 of Practice and Procedure (“Rules”) 3.02. “Any party may request dismissal of all or part of an
11 appeal by motion.” *Id.*

12 **B. The Hearing Examiner should dismiss the Appellant’s Garage Layout/Slope Claim**
13 **because it is a Type I Decision and the Appellant failed to file a Code interpretation**

14 The Hearing Examiner should dismiss the Garage Layout/Slope Claim because the
15 Appellant failed to properly seek a Code interpretation on this issue; therefore, the Hearing
16 Examiner lacks jurisdiction to hear the claim. As a quasi-judicial official, the Hearing Examiner
17 “has only the authority granted it by statute and ordinance.” *HJS Development, Inc. v. Pierce*
18 *County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); SMC 3.02.120; Rule 2.03. Type I decisions
19 include the “[d]etermination that a proposal complies with development standards.” SMC
20 23.76.006.B. The Garage Layout/Slope Claim raises a Type I claim. Notice of Appeal, pg. 4
21 (“...the proposal violates code provisions...the garage layout violates [SMC] 23.54.030.H...in
22 addition, aisle slopes on some parking levels are greater than the code maximum of 15%.”). The
23 Code provisions cited by the Appellant are development standards applicable to the Project. *See*
24 SMC 23.54.030.H.
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1 The Code provides that Type I decisions “may be subject to administrative review
2 through a land use interpretation pursuant to SMC 23.88.020.” SMC 23.76.004, Table A,
3 Footnote 2; SMC 23.76.022.A.1. The Code establishes specific methods and requirements¹ for
4 filing interpretations that relate to a project application – such as the Project under appeal here.

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6 First, any person may request an interpretation prior to the end of the public comment
7 period for the project application. SMC 23.88.020.C.3.a. It is uncontroverted that the Appellant
8 failed to file *any* interpretation regarding the Project prior to the end of the comment period.
9 Bolser Decl., ¶ 3. Appellant’s failure to seek an interpretation on these issues prior to the end of
10 the comment period forecloses their Garage Layout/Slope Claim here.

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12 Alternatively, an appeal of a Type II decision (such as the MUP) “may include a request
13 that the Director issue in writing an interpretation of specified code sections, *combined with an*
14 *appeal of such interpretation.*” SMC 23.88.020.C.3.c (emphasis added). Under this provision
15 that authorizes the combination of an interpretation request with the MUP appeal, the request:

16 ...shall state *with specificity*²:

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18 (1) How the Director’s construction of application of the specified
code sections is in error; and
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20 (2) How the requester believes those sections should be construed or
applied.

21 SMC 23.88.020.C.3.c (emphasis added).

22 The Notice of Appeal is deficient in several respects. First, it fails to include a request
23 that the Director issue an interpretation as expressly required by SMC 23.88.020.C.3.c. It is
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26 ¹ The Code requires any interpretation appeal “shall be accompanied by payment of filing fee as established in SMC
Chapter 3.02.” SMC 23.88.020.G.2. The current fee for an interpretation is \$3,150. Morrison Decl., Ex. C, pg. 4.

27 ² The Code and the Rules both reiterate the requirement for specificity. See SMC 23.88.020.G.1 (appeals “shall state
28 specifically why the applicant believes the interpretation to be incorrect.”) and Rule 3.01(d)(3) (requiring a “brief
statement of the appellant’s issues on appeal, noting appellant’s specific objections to the decision...”).

1 axomatic that the Appellant cannot challenge SDCI's application of the Code if it fails to
2 request an interpretation from the Director. This omission alone is fatal to Appellant's claim.
3 Second, the Notice of Appeal includes only vague, conclusory statements regarding alleged Code
4 noncompliance. Contrary to the Code requirement, the Notice of Appeal fails to state with any
5 level of specificity *how* SDCI's application of the Code provisions for the garage layout and
6 aisle modifications are in error according to the Appellant's reading of the Code. Third, the
7 Appellant also failed to state with any level of specificity how the Code should be applied.
8 Lastly, the Appellant failed to submit the Code-required interpretation filing fees with the Notice
9 of Appeal. The Appellant paid an \$85.00 filing fee to the Office of the Hearing Examiner.
10 Morrison Decl., Ex. B. The Code requires payment of an additional \$3,150 fee for Code
11 interpretations. *Id.*, Ex. C. In sum, the Appellant failed to properly seek an interpretation of the
12 Project, pay the required fees or to state a claim as regarding the Garage Layout/Slope Claim.
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14 Type I decisions are only subject to appeal to the Hearing Examiner through compliance
15 with SMC 23.88.020 provisions for filing an interpretation. *See* SMC 23.76.022.A.1; *see also In*
16 *the Matter of the Appeal of Jack Nikfard*, HE File No. MUP-17-019 (DR) (Order on Motion to
17 Dismiss), June 23, 2017, pg. 3. The Appellant failed to do so in this matter. Accordingly, the
18 Hearing Examiner lacks jurisdiction to hear the Garage Layout/Slope Claim. *Id.* Therefore, the
19 Hearing Examiner must dismiss the Appellant's Garage Layout/Slope Claim.
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21 VI. CONCLUSION

22 For these reasons, the Respondents respectfully request that the Hearing Examiner
23 dismiss the Appellant's Garage Layout/Slope Claim.
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1 DATED this 5th day of January, 2018.

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