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OFFICE OF
HEARING EXAMINER

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

DAVID D. MILLER

of a Grant – Short Subdivision issued by the
Director, Department of Planning and
Development

HEARING EXAMINER FILE NO.

MUP 12-014 (W)

MOTION FOR SUMMARY JUDGMENT
AND DISMISSAL

I. INTRODUCTION

The Director of the Department of Planning and Development (“Director”) approved the Prescott Development, LLC (“Prescott”) short subdivision application (“Application”) to subdivide one development site into four unit lots (“short plat”). The Appellant, David D. Miller, appealed the Director’s approval of the short plat, stating that the Director should have conducted State Environmental Policy Act (“SEPA”) review and Design Review procedures.

The Seattle Municipal Code (“SMC”) exempts short plat approvals from SEPA. SMC 23.05.800.F.1. A short plat is not subject to SEPA review, and design review for projects within the Lowrise 2 zone is not mandated. SMC 23.41.004.B.3. Therefore, there are no disputes regarding genuine issues of material fact, and the Examiner lacks jurisdiction over the appeal. Hearing Examiner Rules (“HER”) 2.03; HER 3.02. Applicant’s motion for summary judgment and dismissal should be granted.

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II. FACTS

On September 16, 2011, the Director approved a building permit application to establish the use and construct four townhomes at 1401 NE 86th Street (the same site as the Project site). (Project #6257818). *Clawson Declaration, Exhibit A*. Appellant in current appeal, David D. Miller, filed an appeal of Project #6257818 on September 29, 2011. *Clawson Declaration, Exhibits B and C*. In the appeal of Project #6257818, Appellant raised the same alleged SEPA “piecemealing” and Design Review claims regarding the townhomes as are contained in the present appeal. Responding by letter, the Examiner dismissed the appeal for lack of jurisdiction. *Clawson Declaration, Exhibit D*. The Examiner stated:

You allege that this process constitutes “piecemealing” the project to avoid required review under the State Environmental Policy Act (SEPA). SMC 23.76.004 authorizes the Hearing Examiner to consider appeals of four types of environmental determinations, but the decision you seek to appeal is not among them...Because the Hearing Examiner lacks jurisdiction to consider your appeal, we are returning the \$50.00 appeal fee you submitted.

Id.

On March 3, 2012, Prescott applied for a short subdivision to divide one lot into four unit lots. *Master Use Permit (“MUP”) #3012505*. The short plat simply subdivides the already-existing townhomes constructed under Project #6257818, the permit that was the subject of Mr. Miller’s dismissed appeal. Short plats are exempt from SEPA review. SMC 23.05.800.F.1. Short plats are also exempt from Design Review. SMC 23.41.004.B. Since short plats are both SEPA and design review exempt, the Director did not conduct SEPA or Design Review of the Applicant’s short plat. The short plat was approved on April 5, 2012. *MUP #3012505*.

1 The Appellant, David D. Miller, filed an appeal of the short plat. The appeal raises issues
2 identical to those issues raised in the dismissed appeal of Project #6257818.

3 **III. ISSUES**

- 4 1. Whether the Hearing Examiner must grant Applicant's motion for summary judgment
5 when no facts support Appellant's appeal and where the Seattle Municipal Code
6 specifically exempt the Applicant's short plat from both SEPA and Design Review?
- 7 2. Whether the Hearing Examiner must grant Applicant's motion for dismissal where
8 the Examiner lacks jurisdiction to grant the Appellant's requested relief?

9 **IV. EVIDENCE RELIED UPON**

10 This motion relies on the pleadings and papers on file in this action and the Clawson
11 Declaration.

12 **V. AUTHORITY**

13 **A. No Genuine Issues of Material Fact Exist and Applicant is Entitled to Judgment**
14 **as a Matter of Law.**

15 Hearing Examiner Rule 3.02(a) states that an appeal may be dismissed without a hearing
16 if the Examiner determines that it fails to state a claim for which the Examiner has jurisdiction to
17 grant relief or is without merit. A party may request dismissal of all or part of an appeal by
18 motion. HER 3.02(b).

19 The Examiner must grant summary judgment if the pleadings, depositions and any
20 affidavits show that there is no genuine issue as to any material fact and that the moving party is
21 entitled to judgment as a matter of law. CR 56; *Seattle Police Officers Guild v. City of Seattle*,
22 151 Wn.2d 450, 458, 13 P.3d 1065 (2000). A material fact exists when the outcome of the
23 litigation depends on its resolution. *Seattle Police Officers Guild*, 151 Wn.2d at 458. The
24 Examiner must resolve all reasonable inferences against the moving party. *Id.* The Examiner
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1 shall grant the motion if reasonable persons could reach but one conclusion. *Id.*; *Ellis v. City of*
2 *Seattle*, 142 WN.2d 450, 458, 13 P.3d 1065 (2000).

3 Here, no genuine issue of material fact exists. Short subdivision land use decisions,
4 except upon lands covered by water, are categorically exempt from SEPA threshold
5 determinations. SMC 25.05.800.F.1. Thus, the short plat approved by the Director is exempt
6 from SEPA review. Similarly, the Applicant's short plat is exempt from Design Review. SMC
7 23.41.004.A (establishing Design Review thresholds for a "new development proposal").
8 Governing law specifically exempts the short plat, which divides into four unit lots those existing
9 townhomes that were already permitted and constructed under Permit #6257818, from SEPA or
10 Design Review. The Director's review and approval of the short plat was proper because the
11 short plat is exempt from SEPA and Design Review. There are no genuine issues of material
12 fact under which the appeal could be granted. Consequently, summary judgment must be
13 granted.
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16 **B. The Examiner Lacks Jurisdiction to Grant Appellant's Requested Relief**

17 Appellant alleges that the Director allowed "piecemealing" in violation of City and State
18 law. *Appeal* at 2. Appellant's claim is not appealable to the Hearing Examiner. The Examiner
19 is authorized to consider appeals of five types of environmental determinations: a determination
20 of nonsignificance, a determination of final EIS adequacy, determinations of significance based
21 solely on historic and cultural preservation, a decision to approve, condition or deny a project
22 based on SEPA policies, and a decision that a project is consistent with a Planned Action
23 Ordinance and EIS. See SMC 23.76.004 Table A. The Director's determination that a proposal
24 is exempt from SEPA review is not on Table A, and is not appealable. *Id.*
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1 This issue is identical to the issue previously raised by Appellant in its appeal of Project
2 #6257818, which was dismissed by the Hearing Examiner. In that case, the building permit was
3 exempt from SEPA and Design Review. The Appellant alleged that the building permit
4 constituted "piecemealing" under SEPA. *Clawson Declaration*. The Hearing Examiner
5 dismissed the appeal because the building permit was exempt from SEPA, and the determination
6 that the building permit was exempt from SEPA review was not an appealable decision
7 according to SMC 23.76.004 Table A. *Id.* As with the Examiner's dismissal of Project
8 #6257818, the Hearing Examiner lacks jurisdiction to hear the instant appeal. Therefore, this
9 appeal must be dismissed.
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12 **VI. RELIEF REQUESTED**

13 Prescott respectfully moves that the Hearing Examiner grant the Appellant's motion for
14 summary judgment as there are no genuine issues of material fact regarding this matter, and
15 respectfully moves that the appeal be dismissed because the Examiner lacks jurisdiction to hear
16 the Appellant's SEPA claims.
17

18 DATED this 9th day of May, 2012

19 MCCULLOUGH HILL LEARY, P.S.

20
21 By: 

22 Jessica M. Clawson, WSBA #36901

23 John C. McCullough, WSBA #12740

24 Attorneys for Applicant, Prescott Development, LLC
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