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BEFORE THE CITY COUNCIL
FOR THE CITY OF SEATTLE

In the Matter of the Application of) Clerk File No. 313457
)
BOB MCCULLOUGH) Response of the Office of Housing to the
) applicant's appeal of the Office of Housing's
for a Multi-Family Tax Exemption) denial of its application for a property tax
) exemption for a congregate residence called
) the Juno Studios project
)

This document is the Office of Housing's response to the document entitled "Applicant's Appeal of Office of Housing's Denial of MFTE Application," which was filed with the City Clerk on January 10, 2014.

1. General background

RCW Chapter 84.14 authorizes certain cities to grant a limited property tax exemption for certain new or rehabilitated multi-family housing containing four or more "dwelling units." RCW 84.14.020. The tax exemption is authorized for 12 years if at least 20% of the units are "affordable" to low or moderate income households, regardless of whether the remaining units are affordable. The City of Seattle enacted SMC Chapter 5.73 to implement the state statute. Neither that statute nor Seattle's ordinance define the term "dwelling unit."

1 In the absence of a definition, the Seattle Office of Housing (OH), which is responsible
2 for determining a development project's eligibility for the tax exemption, necessarily must
3 employ some definition of the term in order to determine whether a proposed project contains
4 "dwelling units" and is therefore eligible for the exemption. OH consults with the City's
5 Department of Planning and Development (DPD) to help inform OH's decision whether a
6 proposed project contains dwelling units. DPD applies the Land Use Code's definition of
7 dwelling unit in a variety of regulatory contexts. That code defines a dwelling unit as

8 a room or rooms located within a structure, designed, arranged,
9 occupied or intended to be occupied by not more than one
10 household as living accommodations independent from any other
11 household. The existence of a food preparation area within the
12 room or rooms shall be evidence of the existence of a dwelling
13 unit. SMC 23.84A.008.

14 Although this definition has been relatively easy for DPD to apply to traditional housing
15 projects such as apartment buildings, DPD has grappled with the application of the definition to
16 certain forms of residential housing. In particular, certain housing developers have in recent
17 years proposed unconventional forms of multi-family housing, including housing called "micro-
18 units." Typically the developer will configure the housing in a manner that creates "pods" of up
19 to 8 rooms, referred to here as "micro-units," each including a bedroom and private bathroom.
20 Typically the micro-units lack built-in ranges or other kitchen appliances that are characteristic
21 of conventional apartments, but each pod includes a common kitchen that is available for use by
22 the occupants of the micro-units within the pod. These micro-units are rented separately. The
23 developer characterizes each pod as one "dwelling unit" for purposes of permit applications
submitted to DPD.

1 Using this approach, certain developers have structured their projects in a manner that
2 allows them to avoid forms of public and regulatory review that are triggered by the number of
3 "dwelling units" in the building. This includes review of environmental impacts pursuant to the
4 State Environmental Policy Act (SEPA)¹ and design review pursuant to the City's design review
5 ordinance.² By configuring the project in this manner, a housing project that contains, for
6 example, 64 micro-units is claimed to have only 8 "dwelling units" (8 micro-units per pod x 8
7 "dwelling units" = 64 micro-units).

8 A form of multi-unit housing that is somewhat similar to micro-units is a congregate
9 residence. Traditional forms of congregate residences include college dormitories, sororities and
10 fraternities, half-way houses and some senior or special needs housing. A recent off-shoot of the
11 micro-unit concept is a form of congregate residence. The individual rooms within these
12 facilities are similar to those in the micro-unit model described above but the rooms are not
13 grouped within a pod and a shared full kitchen is not always provided. A comparison of these
14 forms of housing is described in OH Exhibit 1 (DPD graphic).

15 DPD recognized that applying the Land Use Code definition of dwelling unit to these
16 distinctive housing types, for certain purposes, required a tailored regulatory approach.
17 Accordingly, for example, DPD adopted Director's Rule 12-2012, which addresses the
18 application of SEPA. Juno Exhibit A. That rule recognizes that certain residential uses are ill-
19 suited to the standard methodology used to determine if proposed development projects are
20 exempt from SEPA review. The rule states,

21 For residential uses not readily described as a discrete number of
22 units, including nursing homes and congregate residences, the
exemption will be based on a comparison of sleeping units

23 ¹ RCW 43.21C.

² SMC 23.41.

1 (functionally equivalent to bedrooms) to dwelling units. Each
2 bedroom will be counted as one-half of one dwelling unit in these
3 cases.

4 In response to the emerging forms of multi-family housing such as micro-units, DPD
5 evaluated proposed projects in various regulatory contexts based upon the specific characteristics
6 and configurations of the project. In some cases DPD concluded that rooms in a project
7 qualified as dwelling units and in other cases did not. In response to the proliferation of micro-
8 unit projects in certain neighborhoods, and later, certain congregate residence projects, citizens
9 began to complain to the City that developers were exploiting "loopholes" in the City's
10 regulatory scheme and avoiding public and regulatory review as a result.

11 In recognition of the vexing regulatory issues presented by these emerging forms of
12 housing, and in response to the public controversy surrounding the regulation of micro-units,
13 DPD prepared legislation to clarify the regulation of these housing types. A description of the
14 proposed legislation is contained in the DPD Director's Report for that legislation. OH Exhibit
15 2. The City Council has yet to consider that legislation, however, because neighborhood interest
16 groups opposed to micro-unit projects appealed DPD's SEPA decision regarding the legislation
17 to the Seattle Hearing Examiner. On February 4, 2014, the Hearing Examiner affirmed DPD's
18 "Determination of Nonsignificance" that no environmental impact statement is required before
19 the City Council may consider the proposed micro-housing/congregate legislation.

20 Because OH has relied upon DPD's interpretation and application of the term "dwelling
21 unit" to help decide if a housing project qualifies for the property tax exemption, OH's decision
22 process is coordinated with DPD's permit process. And like DPD, OH recognized that the
23 micro-unit concept was presenting new issues in the application of the tax exemption program.
Specifically, OH recognized that certain developers were describing the number of dwelling

1 units differently for purposes of their application for a tax exemption than they were for their
2 applications to DPD for development permits. For example, a developer of a micro-housing
3 project might claim in the DPD application to have only 10 "dwelling units," thereby avoiding
4 SEPA review and design review in a zone where the trigger for those reviews is 20 dwelling
5 units, even though each of the ten "dwelling units" includes eight separate micro-units.

6 At the same time, however, the developer might claim, in its application to OH to obtain
7 the property tax exemption, to have 80 dwelling units. SMC 5.73 establishes a maximum
8 household income and rent level for the 20% of dwelling units set aside as affordable. Were the
9 developer to claim only 10 units, as done for purposes of the development permit application
10 submitted to DPD, the developer would have to aggregate the income of all the residents within
11 each "dwelling unit" and charge the group of residents no more than the maximum rent
12 established under SMC 5.73 for a dwelling unit of two or more bedrooms. By asserting different
13 dwelling unit counts for the same project to two separate City departments (DPD and OH), the
14 developer is able to "cherry pick" the effects of those different counts: he or she gains the
15 benefit of the tax exemption but avoids the regulatory burden (e.g., SEPA and design review)
16 that might otherwise apply.

17 To address such discrepancies between the developers' applications to OH and DPD and
18 to help prevent such maneuvers, OH proposed the adoption of a Director's Rule. OH
19 memorandum to Mayor's Office, December 17, 2012, OH Exhibit 3. After receiving direction
20 from Mayor McGinn, OH adopted Director's Rule 01-2013 on March 12, 2013. Juno Exhibit E.
21 The rule provides that the number of units approved by the DPD development permit must match
22 the number of units contained in the developer's application for the property tax exemption.
23 Although the OH Director's Rule frames the issue mechanically by seeking numerical

1 consistency between the number of units identified in the DPD and OH applications, the purpose
2 of the rule is to ensure that the number of “dwelling units” identified in the application for the tax
3 exemption coincides with the number of “dwelling units” authorized by the DPD development
4 permit, if any. If DPD determines that a proposed housing project does not contain “dwelling
5 units” as that term is defined in the Land Use Code, then it is OH’s position that the project does
6 not contain dwelling units for purposes of the property tax exemption.

7 **2. The Juno Studios project**

8 **2.1 Juno’s development permit application to DPD**

9 On May 9, 2013, a development permit application was submitted to DPD for the Juno
10 Studios project, the project that is the subject of this appeal. OH Exhibit 4. The project
11 description on the applicant’s (Juno) cover sheet characterized the project as a “20 room
12 congregate residence,” but later on the same page states that “20 dwelling units” are proposed.
13 The actual floor plan sheets attached to the cover sheet show 40 residential rooms. An asterisk
14 on page 2 of the application indicates that the number 20 reflects the number of units Juno
15 identified for purposes of determining whether the proposed congregate facility is exempt from
16 SEPA review pursuant to DPD Director’s Rule 12-2012, described above. A project that
17 contains 20 or fewer dwelling units is exempt from SEPA review. SMC 25.05.800 (A) (2) (a).

18 DPD issued the development permit for the Juno project on August 23, 2013, approving
19 the proposed congregate residence “per plans.” Juno Exhibit C. On the face of the permit the
20 number of “residential units” in the project was identified as 20, because the zoning reviewer
21 understood that to represent the number of “dwelling units” for purposes of determining if the
22 project was exempt from SEPA review, per DR 12-2012. Declaration of Christopher Ndifon,
23 OH Exhibit 5. However, DPD reviewed and approved the project as a congregate residence

1 containing 40 bedrooms, as reflected in the applicant's detailed plans, and applied Land Use
2 Code development standards accordingly. Juno Exhibit F; OH Exhibit 6.

3 Subsequently, DPD revised the number shown in the "residential units" box on the permit
4 from 20 to 1, because DPD determined that the bedrooms did not constitute "dwelling units" for
5 any purpose other than application of the SEPA exemption determination. This revision was
6 described to Juno in an email from DPD's Cheryl Mosteller on November 25, 2013. Juno
7 Exhibit F. However, the correct number should have been zero, because DPD's view is that the
8 project is not comprised of any dwelling units as that term is defined in the Land Use Code.
9 DPD staff entered the number "1" rather than "0" because it initially understood that the
10 computer program would not accept "zero." Declaration of Cheryl Mosteller, OH Exhibit 7.
11 This was incorrect; the correct number should have been zero because the rooms in the project
12 do not meet the Land Use Code's definition of dwelling unit. OH Exhibit 6. Regardless of the
13 numbers shown in the "residential units" box, however, DPD approved the project that Juno
14 proposed, a congregate residence containing 40 bedrooms, and that project is now under
15 construction.

16 Although DPD approved the project as proposed, Juno then attempted to appeal DPD's
17 change in the number shown in the "residential units" box on the permit to the Director of DPD
18 under the appeal provisions of the Seattle Building Code. Juno Exhibit K. DPD rejected the
19 appeal because the determination of the number of residential units was a "Type 1" decision
20 under the Land Use Code. OH Exhibit 6. Appeals of Land Use Code decisions, if available,
21 must occur pursuant to the procedures of the Land Use Code, not the Seattle Building Code. The
22 Land Use Code does not authorize administrative appeals of Type 1 permit decisions. SMC
23 23.76.004 (B).

1 **2.2 Juno's application to OH for a property tax exemption**

2 Juno submitted an application for a property tax exemption to OH on August 23, 2013,
3 the same day the DPD development permit was issued. In that application Juno described its
4 project as a "40 unit apartment building." Juno Exhibit B. OH (Mike Kent) reviewed the
5 application and initially identified two potential problems with the application. Mr. Kent phoned
6 Juno and followed up with an email to Juno on September 3, 2013. Juno Exhibit D. First, OH
7 noted the apparent discrepancy between the number of dwelling units identified in the DPD
8 application (20) and the number of dwelling units identified in Juno's application to OH for the
9 tax exemption (40). Second, OH noted that the tax exemption program is reserved for
10 multifamily housing projects but that the DPD permit authorized construction of a congregate
11 residence, which OH understood at that time to entail a single dwelling unit under the Land Use
12 Code. As noted above, the tax exemption is available only if a project contains four or more
13 dwelling units. OH asked Juno to respond to the identified problems.

14 When Mr. Kent did not receive a response, Mr. Kent contacted Juno in early October,
15 2013, and was told that Juno was still working on the issues that Mr. Kent had identified. Mr.
16 Kent contacted Juno again in early November, 2013 and Juno's lawyer, Ms. Jessica Clawson,
17 called Mr. Kent on November 8, 2013 to discuss the issues identified in Mr. Kent's September
18 email. On November 25, 2015, Ms. Mosteller notified Juno and OH via email that DPD was
19 reprinting the development permit to show a corrected unit count (from 20 to 1), and then Mr.
20 Kent notified Ms. Clawson and Mr. McCullough via email the same day that the Juno project did
21 not qualify for the property tax exemption. Juno Exhibit G. On December 3, 2013, Ms. Clawson
22 responded via email to Mr. Kent asking that OH delay issuing a formal eligibility decision letter
23 denying Juno's application. OH Exhibit 8.

1 On December 10, 2013, OH sent a formal letter to Juno denying the application for the
2 property tax exemption.³ Juno Exhibit I. The letter explained that the application was denied for
3 two reasons. First, the application was denied per OH Director's Rule 01-2013 because of the
4 apparent discrepancy between the number of units identified in the DPD and OH applications.
5 Second, the application was denied because OH understood at that time that DPD considered a
6 congregate residence to comprise only one dwelling unit (regardless of the number of bedrooms)
7 but that four dwelling units are required to qualify for the tax exemption.

8 On December 16, 2013, OH received a revised application from Juno for the Juno
9 Studios project, now asserting that the project contained 20 dwelling units rather than the 40
10 dwelling units identified in Juno's original application. Juno Exhibit J. In all other respects, the
11 revised application is nearly identical to the first,⁴ including the fact that the project contains 40
12 rooms that are to be rented to 40 or more residents. OH has not yet formally acted upon the
13 revised application. However, because the configuration of the rooms is identical to that
14 described in Juno's original application, and because DPD has concluded that those rooms are
15 not dwelling units as defined in the Land Use Code, OH's position is that the project does not
16 qualify for the property tax exemption.

17 Juno appealed OH's denial of the property tax exemption to the City Council on January
18 10, 2014.

22 ³ SMC 5.73.060 (A) requires OH to approve or deny an application within 90 days.

23 ⁴ The revised application included a copy of the DPD Director's Report regarding DPD's proposed legislation for micro-housing and congregate residences, dated October 1, 2013. That report was not included in Juno's original application to OH.

1 **3. Argument**

2 **3.1 OH's decision to deny the property tax exemption should be affirmed**
3 **because substantial evidence exists in the record that the rooms in the Juno**
4 **project do not constitute dwelling units.**

5 SMC 5.73.060 (F) provides that the OH Director's decision is to be upheld unless the
6 applicant "can show that there is no substantial evidence in the record to support the Director's
7 decision." "Substantial evidence" is described as evidence that a reasonable mind might accept
8 as adequate to support a conclusion, and is more than a scintilla of evidence but less than a
9 preponderance of evidence. Woodsum v. Astrue, 711 F. Supp. 2d 1239, 1245 (W.D. Wash.,
10 2010).

11 The Council's decision entails a legal determination by the Council regarding the
12 meaning of "dwelling unit" for purposes of SMC 5.73, and the application of that meaning to
13 Juno's proposed project. If the Council finds that substantial evidence exists that the rooms in
14 Juno's project are not dwelling units, then the Council should affirm OH's denial of the permit.

15 On the other hand if the Council finds that substantial evidence does not exist supporting
16 OH's decision, then the Council should reverse OH's denial of the tax exemption. A potential
17 consequence of such a decision may be to effectively nullify OH Director's Rule 01-2013, thus
18 enabling developers to obtain the property tax exemption yet evade public and regulatory review
19 pursuant to the Land Use Code.

20 As stated previously, the City's Land Use Code defines a "dwelling unit" as

21 a room or rooms located within a structure, designed, arranged,
22 occupied or intended to be occupied by not more than one
23 household as living accommodations independent from any other
household. The existence of a food preparation area within the
room or rooms shall be evidence of the existence of a dwelling
unit. SMC 23.84A.008.

1 The floor plans submitted by Juno generally show that the rooms contain a small sink
2 adjacent to a toilet in a bathroom area, but no area described or equipped as a kitchen with a
3 cookstove, refrigerator, kitchen sink, dishwasher or similar features. OH Exhibit 4. However,
4 the basement floor plan shows an area described as the "Kitchen/Laundry" area, and showing
5 what appears to be a cookstove. That floor plan also shows rooms described as an "Exercise
6 Room" and a "Library/Study."

7 Like rooms in other types of congregate residences, the rooms depicted in the floor plans
8 do not resemble conventional apartments. In particular, the rooms lack the kitchen facilities that
9 are typically found in apartments. Rather, the rooms are similar to rooms that may be found in
10 other types of congregate residences, such as dormitory rooms. Although one may find
11 microwave ovens or mini-refrigerators in a dorm room, dorm rooms are not functionally
12 equivalent to conventional apartments. Moreover, the rooms were not represented as separate
13 dwelling units in the project application that was submitted to DPD. Indeed, Juno admits in this
14 appeal that it proposed "a congregate residence consisting of 40 sleeping rooms."⁵ (Emphasis
15 added.) These facts are substantial evidence that the rooms in the Juno congregate residence are
16 not "dwelling units." Therefore, the Council should affirm OH's decision denying the property
17 tax exemption for the Juno project.

18 3.2 Response to Juno's argument

19 In this appeal, Juno makes two inconsistent arguments. First, Juno argues that the
20 Council should reverse OH's denial of the tax exemption, and grant the exemption.⁶ Juno argues
21 that OH Director's Rule 1-2013 is unlawful and may not be applied to an application for a tax
22 exemption. Juno argues that the decision whether to grant the exemption must be based solely

23 ⁵ Juno's appeal, p. 1.

⁶ Juno's appeal, pages 6-7.

1 upon the provisions of SMC 5.73. Even if one assumes that Juno's argument regarding the
2 alleged illegality of Director's Rule 1-2013 is correct (and OH believes that Juno's argument is
3 not correct), that still leaves the City Council with the task of determining whether substantial
4 evidence exists that the rooms in the Juno project do not constitute "dwelling units" for purposes
5 of Chapter 5.73. For the reasons described above, OH contends that substantial evidence exists
6 that the rooms should not be considered to be dwelling units.

7 Second, Juno argues, inconsistently,⁷ that it is premature for the Council to decide this tax
8 appeal. Juno argues that the appeal is premature because OH allegedly determined that Juno's
9 application for a tax exemption was incomplete. However, OH did not find that Juno's
10 application was incomplete, and Juno has not identified any document from OH stating that the
11 application was incomplete.

12 Juno appears to refer to Mr. Kent's email to Juno on September 3, 2013 as notice that the
13 application was incomplete. However, as Juno admits, Mr. Kent was "asking him (Mr.
14 McCullough) questions about the number of units..."⁸ and "seeking additional information to
15 complete its review...."⁹ Rather than deny Juno's application outright on the basis of OH's DR
16 01-2013, which Mr. Kent might have done, Mr. Kent was affording Juno an opportunity to
17 explain the apparent discrepancy between the unit counts contained in Juno's application for the
18 tax exemption and the development permit issued to Juno by DPD. Mr. Kent's questions were a
19 request for "additional information during the review process if more information is needed to
20 evaluate the application according to the criteria in the chapter," as authorized by SMC 5.73.050.
21 The email was not a notice to Juno that its application was incomplete.

22 ⁷ It is inconsistent for Juno to argue that it is premature for the Council to hear this appeal because it lacks necessary
information, but then argue that the Council should hear the appeal and grant the tax exemption.

23 ⁸ Juno's appeal, p. 2.

⁹ Juno's appeal, p. 5.

1 Further, SMC 5.73.050 states that any application that has not been deemed incomplete
2 after a period of 28 days is considered complete. OH did not deem Juno's application to be
3 incomplete within 28 days, or at any time, and therefore Juno's application was complete.
4 Juno's argument that this appeal is premature because OH allegedly found Juno's application to
5 be incomplete is without merit.

6 Juno also argues that this appeal is premature because Juno's attempted appeal of the
7 DPD permit "revision" was pending when Juno filed this appeal on January 10, 2014.¹⁰ DPD
8 denied Juno's attempted appeal of the DPD permit revision on January 16, 2014, and the DPD
9 letter states that the 40 rooms approved for this congregate residence do not constitute "dwelling
10 units" as defined in the Land Use Code. OH Exhibit 6. Remanding this appeal to OH would
11 accomplish nothing because DPD has rejected Juno's attempted appeal of the DPD permit
12 revision. The issue whether the rooms are dwelling units for purposes of SMC Chapter 5.73 is
13 ripe for a decision by the Council.

14 OH had, and the Council has, all the information needed to decide the issue. And the
15 issue is not the fluctuating inconsistencies between the unit numbers identified in Juno's request
16 for a tax exemption and the DPD permit, in the application of OH Director's Rule 1-2013, but
17 whether substantial evidence exists that the "sleeping rooms" in the Juno project are not dwelling
18 units.

19 **4. Conclusion**

20 OH believes that substantial evidence exists to support OH's decision that the 40 sleeping
21 rooms being constructed in the Juno project do not constitute "dwelling units" for purposes of
22

23 _____
¹⁰ Juno's appeal, pages 5-6.

1 SMC 5.73. Therefore, OH requests that its decision denying Juno's request for a property tax
2 exemption be affirmed.

3 DATED: February 10, 2013.

4 PETER S. HOLMES
Seattle City Attorney

5 By:



6 ROBERT D. TOBIN, WSBA #7517

7 Assistant City Attorney
8 *Attorneys for Respondent*
9 *Seattle Office of Housing*

1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the State of Washington that, on this
3 day, I caused to be served upon the following party, at the address stated below, via the method
4 of service indicated, a true and correct copy of the foregoing document:

5 Jessica M. Clawson X Via hand delivery (ABC-Legal Messengers, Inc.)
6 McCullough Hill Leary, PS _____ Via U.S. Mail, 1st Class, Postage Prepaid
7 701 Fifth Ave., Suite 6600 _____ Via Facsimile
8 Seattle, WA 98104-7006 _____ Via Email
9 *Attorneys for Appellant*

10 the foregoing being the last known address of the above-named party.

11 DATED: February 10, 2014, at Seattle, Washington.

12 
13 _____
14 ROSIE LEE HAILEY