BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by SAVE MADISON VALLEY of Decisions Re Land Use Application, Design Review, and Code Interpretation for 2925 East Madison Street, Project 3020338-LU and 3028345	HEARING EXAMINER FILE: MUP 18-020 (DR, W) & S-18-011 SAVE MADISON VALLEY'S RESPONSE TO APPLICANT'S MOTION TO DISMISS

I. INTRODUCTION

This appeal is brought by Appellant Save Madison Valley ("SMV"), a community of neighbors who live, work, rent and own property near the project site and who are committed to the livability, safety, and vibrancy of the Madison Valley neighborhood. *See* Notice of Appeal at 3 (Aug. 6, 2018). The appeal challenges the Director's MUP decision issued on the East Madison Street Proposal ("Proposal"), a large, six-story building that is slotted to be constructed on a steep hill directly adjacent to the neighborhood. The MUP decision contains two elements—the City's threshold determination under SEPA (here, a determination of nonsignificnace or "DNS) and the Director's design review decision. The Notice of Appeal includes several issues pertaining to these two elements.

The Applicant, Velmeir Companies, now moves to dismiss several of these issues on the basis that they are not within the Examiner's Jurisdiction. *See* Applicant's Motion to Dismiss (Oct. 19, 2018)

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(herein, "Mot."). For the reasons below, the motion should be denied. All of the challenged issues are within the Examiner's jurisdiction and scope of review for this appeal. The Applicant's motion should be denied.

II. ARGUMENT

A. Appeal Issue 2(b) Regarding Consistency with the Citywide Design Guidelines Is Not Deficient.

Appeal Issue 2(b) alleges that the East Madison Street Proposal is inconsistent with the City of Seattle's Citywide Design Guidelines. As originally pleaded, Appeal Issue 2(b) read as follows:

> The East Madison Street Proposal is inconsistent with the Citywide Design Guidelines CS1, CS2, CS3, PL1, DC1, DC2, and DC3. SDCI and the Design Review Board misapplied and misconstrued these Design Guidelines when it recommended approval of the Proposal. SDCI erred when it concluded that the decision and recommendation of the Design Review Board was consistent with the Design Guidelines.

Notice of Appeal at 5 (Aug. 6, 2018). This appeal issue falls squarely within the Examiner's jurisdiction for appeals of Type II decisions—here, the Director's design review decision. *See* SMC 23.76.004, Table A. This issue also falls squarely within the scope of review for this appeal. *See* SMC 23.76.022.C.6 ("The Hearing Examiner shall entertain issues cited in the appeal that relate to . . . compliance with substantive criteria").

On September 13, 2018, the Applicant filed a motion for clarification, in which it asked the Examiner to direct SMV to "clarify, and describe with specificity how the proposal is inconsistent with Citywide Design Guidelines CS1, CS2, CS3, PL1, DC1, DC2 and DC3." *See* Motion for Clarification at 6 (Sept. 13, 2018). On September 20, 2018, SMV objected to this request, arguing, *inter alia*, that "A detailed description about *how* the proposal is inconsistent with Citywide Design Guidelines CS1, CS2, CS3, PL1, DC1, DC2, and DC3 is not necessary to make this specific objection complete and understandable." Save Madison Valley's Response to Motion for Clarification at 11

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(Sept. 20, 2018). SMV also argued that providing a detailed explanation at that early stage of the appeal would take an "enormous amount of time," and the Applicant is already aware of the issues, which were presented by SMV in its comment letters to the Design Review Board ("DRB"), and which are summarized in the DRB's recommendation report. *See id*.

On September 28, 2018, the Examiner resolved this dispute in her Order on Motion for Clarification. In that Order, the Examiner determined that Issue 2(b) was too vague and, to cure that defect, directed Appellant to identify the specific sub-policies within the Design Guidelines that are alleged to be violated. Below is the relevant excerpt from the Examiner's Order on Motion for Clarification:

> **SMV Appeal 2(b), p. 5:13-17**
>
> Applicant's Objection: The Applicant requests that the Appellant clarify how the proposal is alleged to be inconsistent with the design guidelines identified in the complaint.
>
> Examiner's Ruling: The Appellant cited the overall design concepts which are quite vague in nature. Below each concept are more specific policies that better define how a proposal might meet the overall architectural concept. The Examiner GRANTS the Applicant's motion on this issue and ***directs the Appellant to identify the policies which the Appellant believes are inconsistent with the proposal.***

Order on Motion for Reconsideration at 2–3 (Sept. 28, 2018) (emphasis added).

On October 12, 2018, SMV complied with the Examiner's direction by filing a clarification that identified the various sub-policies that are at issue in this claim. SMV's clarification of Issue 2(b) read as follows:

> The East Madison Street Proposal is inconsistent with the Citywide Design Guidelines CS1-B2, CS1-B3, CS1-C1, CS1-C2, CS1-D1, CS1-D2, CS1-E2, CS2-A1, CS2-A2, CS2-B1, CS2-B2, CS2-B3, CS2-D1, CS2-D2, CS2-D3, CS2-D4, CS2-D5, CS3-A1, CS3—A3, PL1-A1, PL1-A2, DC1-B1, DC1-C4, DC2-A1, DC2-A2, DC2-C3, and DC3-B3, DC3-C1, DC3-C3. SDCI and the Design Review Board misapplied and misconstrued these Design Guidelines when it recommended approval of the Proposal. SDCI erred when it concluded that the decision and recommendation of the Design Review Board was consistent with the Design Guidelines.

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Save Madison Valley's Clarification of Issues at 5 (Oct. 12, 2018). By adding this additional detail identifying specific sub-policies, SMV responded directly and in good faith to the Examiner's specific direction to "identify the policies which the Appellant believes are inconsistent with the proposal." Order on Motion for Reconsideration at 3.

Now, the Applicant argues that this claim should be dismissed because it lacks "any factual explanation of the project's alleged inconsistencies with each of the 29 enumerated guidelines," and because "[d]espite having had two opportunities to get it right, this laundry list approach does not give Velmeir the fair notice that is required by Washington law." Mot. at 7–8. These are, in essence, the same arguments that the Applicant made in its motion for clarification. *See, e.g.,* Velmeir's Reply in Support of Motion for Clarification at 3–4 (Sept. 25, 2018). Despite that these very same arguments were made before, the Examiner's Order did not direct SMV to provide a "factual explanation" of the inconsistencies. Instead, the order only directed SMV to identify the sub-policies at issue in this appeal. That is what SMV did.

For several reasons, the Applicant's motion to dismiss Issue 2(b) should be denied. First and foremost, it would be unjust to dismiss this issue after SMV followed the exact directive specified in the Examiner's Order on Motion for Clarification. There, the Examiner noted that the original description of Appeal Issue 2(b) was too general because it cited only to the Design Guidelines' major umbrella concepts, and directed SMV to "identify" the specific sub-policies that are alleged to be violated." *See* Order on Motion for Reconsideration at 3 (quoted above). SMV fully complied with that Order. It would be unjust now to dismiss this issue for failing to do more in response to the very same arguments that the Applicant put forward in its original motion for clarification. In short, the Examiner has already determined how this issue should be clarified to bring it into compliance with

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the City's pleading requirements. It should not be dismissed now after we did exactly what the Examiner ordered.

Second, the "Washington law" cited by the Applicant appears to be the Washington Supreme Court's decision in *Pacific Shooting Park Association v. City of Sequim*, where the Court explained that "Washington is a notice pleading state and merely requires a simple concise statement of the claim and the relief sought." 158 Wn.2d 342, 352, 144 P.3d 276 (2006). *See also Dewey v. Tacoma Sch. Dist. No. 10,* 95 Wn. App. 18, 23, 974 P.2d 847 (1999) ("Under the liberal rules of procedure, pleadings are intended to give notice to the court and the opponent of the *general* nature of the claim asserted.") (emphasis added). In *Pacific Shooting Park Association*, the plaintiff's complaint did not meet this simple requirement because it failed entirely to include a claim for contractual interference with third parties, despite the plaintiff's attempt to argue such a claim at summary judgment. *See id*. In other cases cited by the Applicant, the plaintiff wholly failed to plead essential elements of the claim, or, indeed, the claim itself. *See Dewey,* 95 Wn. App. at 24 (plaintiff failed to plead two of five essential elements for First Amendment retaliation claim); *Lewis v. Bell,* 45 Wn. App. 192, 197, 724 P.2d 425 (1986) (in pleading claim for tort of outrage, plaintiff did not give fair notice of intent to argue separate tort of assault).

Unlike the plaintiffs in *Pacific Shooting Park Association* and other cases cited by the Applicant, Appeal Issue 2(b) is more than sufficient to satisfy Washington's general notice pleading standard (even though we are not in superior court). This is especially so when coupled with other documents attached to and incorporated into SMV's clarification of issues, including SMV's comment letter of May 23, 2017 to DCI, in which SMV provided the following explanation of how the proposal conflicts with specific elements of the Design Guidelines:

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> Quite obviously, a central design flaw is the building mass and the extent that it looms over the Dewey residences in the single-family zone adjacent to the project site. The height, bulk, and scale of the proposal is completely out of sync with Design Guideline CS2-B.1, CS2-C.2, CS2-D.l 1 and CS2-D.4. The project site is immediately adjacent to a less intensive zone. The proposed massive clearing and removal of trees and vegetation from the site is inconsistent with Design Guideline CS 1-D.1 and D.2. The proposal fails to respond appropriately to the context and site per the Design Guidelines CS1-C and CS2-B. Rather than respecting the topography, or using the site features to inform the design, this project eradicates the site topography and fabricates the "average grade" under the code's height provisions in a manner that ignores the slope entirely and is inconsistent with Design Guideline CSl -C.2. The building height and the removal of the tree buffer zone are inconsistent with the requirement for a transition between more and less intense zones in Design Guidelines CS2-D.3 and CS2-D.4.

Comment by Save Madison Valley to SDCI at 8 (May 23, 2017) (attached to SMV's Clarification of Issues; herein, "May 23, 2017 Comment"). Also relevant here is the DRB's own Recommendation Report, which summarized SMV's allegations regarding these and other conflicts. *See* Recommendation of the East Design Review Board at 2–4 (attached to SMV's Notice of Appeal). In short, the Applicant is well aware of these specific factual allegations and it is disingenuous for it now to claim ignorance and lack of notice, let alone that we have failed to state a claim under Washington's general notice pleading standard.

For similar reasons, Appeal Issue 2(b) also satisfies the requirement of HER Rule 3.01(d)(3) and SMC 23.76.022.C.3, which require the notice of appeal to state "specific objections." Appeal Issue 2(b), as clarified, is very specific about which Citywide Design Guidelines (and sub-guidelines) are alleged to be violated. The code does not require more, and the Examiner did not require more in her Order on Motion for Clarification.

Finally, the Applicant argues that Issue 2(b) should be dismissed because it alleges not only that the Director misapplied and misconstrued the Design Guidelines, but also that the DRB erred in doing so in its recommendation. *See* Mot. at 7.

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The Examiner has determined that SMV may not appeal the DRB's recommendation, only the Director's decision. *See* Letter from Ryan P. Vancil, Hearing Examiner, to Claudia M. Newman, Re: Appeal of Design Revie Board Recommendation for 2925 E Madison St. (Aug. 7, 2018). But allegations regarding errors in the DRB's recommendation are still relevant. The Director's decision is largely premised on and informed by the DRB's recommendation, thus evidence of errors in the recommendation are *ipso facto* evidence of errors the decision. These allegations also give notice that to the extent any party wishes to rely on the DRB's recommendation in support of the Director's ultimate decision, such reliance is misplaced because the recommendation is similarly flawed. There is no basis in the code for denying our right to give such notice, or to make our case on these points at the hearing.

B. Appeal Issue 1(e) Regarding the City's Failure to Properly Exercise its Substantive SEPA Authority Is Proper.

Appeal Issue 1(e) alleges that the City erred by failing to exercise its SEPA substantive authority to require additional mitigation measures to offset or reduce the proposal's significant adverse impacts. Appeal Issue 1(c) reads, in whole:

> SDCI erred in its exercise of its substantive authority under SEPA issues, including failure to adequately mitigate the significant adverse impacts described above pursuant to SMC 25.05.675 and other SEPA regulations. SDCI erred when it failed to consider and/or exercise its authority under those provisions to mitigate the proposal. SDCI failed to apply feasible mitigation that could be applied to this project as explicitly stated in SMC 25.05.675.

Notice of Appeal at 4–5. In response, the Applicant argues that this claim should be dismissed on the sole basis that an agency's exercise of SEPA substantive authority is discretionary, not mandatory. *See* Mot. at 8 (citing SMC 25.05.660.A and RCW 43.21C.060).

But the City's exercise of its SEPA substantive authority is clearly within the scope of review for this appeal: "The Hearing Examiner *shall* entertain issues cited in the appeal that relate to . . .

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failure to properly approve, *condition*, or deny a permit based on disclosed adverse environmental impacts." SMC 23.76.022.C.6. (emphasis added). By challenging the City's failure to exercise its SEPA substantive authority, we are challenging its failure to properly condition the project based on its known adverse impacts. The Examiner cannot dismiss an issue that is within the scope of review for this appeal.

Also relevant, SMC 23.76.022.C.6 provides that "[t]he Hearing Examiner shall entertain issues cited in the appeal that relate to . . . determinations of nonsignificance (DNSs)." Here, the City's decision to mitigate or not mitigate significant adverse impacts through its SEPA substantive authority—even if discretionary—is directly relevant to the validity of the City's DNS for this proposal. Discretionary or not, if there are significant adverse impacts that the City chose not to mitigate, then the DNS is invalid and a DS should have been issued. By the same token, if the City wishes to retain the DNS, instead of issuing a determination of significance ("DS"), then it must mitigate impacts to a non-significant level. In this way, too, the City's decision to not exercise its SEPA substantive authority is within the scope of review for this Appeal.

Last, the Applicant relies on the Examiner's recent decision in the *Escala* appeal, which the Applicant characterizes as rejecting a similar claim for the sole reason that "'[t]he Department's substantive authority to mitigate the height, bulk and scale impacts is discretionary . . . .'"). Mot. at 8 (quoting *Escala* decision at 7, ¶14). But that was not the full rationale for the Examiner's decision, which also asked whether the Director's decision to not invoke SEPA substantive authority was the product of informed decisionmaking, as SEPA requires. The following was the Examiner's conclusion on this issue in *Escala*:

> The Appellant argues that the Department erred in refusing to exercise its SEPA substantive authority to mitigate the height, bulk and scale impacts. The Department's substantive authority to mitigate the height, bulk and scale impacts is discretionary,

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> *and the record demonstrates that the Department fully considered the proposal's height, bulk and scale impacts through its review of the application materials, FEIS, Addendum and Design Review process. The Appellant did not provide clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated.*

Escala decision at 7, ¶14 (emphasis added).

As can be seen in the quote above (the part following the word "and"), the Examiner did not reject the *Escala* Appellants' claim on the sole basis that SEPA substantive authority is discretionary. He reviewed the issue of whether the City's decision was informed and based on a real evaluation of the issues—in other words, whether the City was in an actual position to "*judge* whether possible mitigation measures are likely to protect or enhance environmental quality," as the SEPA requires. *See* WAC 197-11-660(2) (emphasis added); SMC 25.06.660.B (same). Obviously, the City cannot "judge" what it does not know and has not adequately studied. Like the *Escala* appellants, we should be allowed to present our case that the City's decision, though discretionary, was arbitrary and made in ignorance of the facts. The City may have discretion, but that does not mean its decisions can be arbitrary and indiscriminate under SEPA.

It is also critical to note that the legal context of the *Escala* appeal is entirely different from the legal context of this appeal. In *Escala*, SDCI had issued a Determination of Significance (DS). *Escala* decision at 1. The appellants in that case were challenging the adequacy of an Environmental Impact Statement ("EIS"). *Id*. at 8–9, ¶26.a. This appeal is a challenge of a DNS. In this case, SDCI must show that it mitigated the impacts to an adequate degree to justify the issuance a DNS. If the impacts are not adequately mitigated, then SDCI was obligated under SEPA to issue a DS and prepare an EIS. The question of whether SDCI adequately mitigated significant impacts is squarely within the jurisdiction of the Hearing Examiner because if it did not, an EIS is required.

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C. Appeal Issue 4(a) Regarding Compliance with the City's Tree Protection Rules is Within the Examiner's Jurisdiction.

Appeal Issue 4(a) challenges the East Madison Street Proposal's compliance with the City's tree preservation rules at SMC Chapter 25.11. That issue reads:

> The East Madison Street Proposal is inconsistent with the tree removal restrictions set forth in Ch. 25.11 SMC. The proposed removal of trees does not comply with the requirements set forth in SMC 25.11.040; SMC 25.11.050; SMC 25.11.080; SMC 25.11.090. The applicant did not adequately identify the trees that are subject to the code limitations; did not meet the burden of proof required to justify removal of trees that are subject to code limitations; did not meet the canopy replacement requirements in the code; and did not meet the replacement and restoration requirements in the code.

Notice of Appeal at 7. The Applicant argues that this claim should be dismissed on the alleged basis that the City's determination of compliance with Chapter 25.11 of the SMC is an unappealable Type I decision, made in a correction letter on the Applicant's MUP application. *See* Mot. at 6.

Putting aside the issue of whether a correction letter can even be a "final" decision (regardless of type) before the City issues its ultimate decision to grant or deny the full application, and whether the correction letter can even be a separate "decision" under the City's consolidated permit review process, this issue is clearly relevant under the Examiner's jurisdiction.

Regarding the Examiner's jurisdiction, the Code states:

> The Hearing Examiner shall entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76, ***compliance with substantive criteria***, determinations of nonsignificance (DNSs), adequacy of an EIS upon which the decision was made, or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts, and any request for interpretation included in the appeal or consolidated appeal pursuant to Section 23.88.020.C.3.

SMC 23.76.022.C.6 (emphasis added).

As the code states explicitly, the City of Seattle Hearing Examiner has jurisdiction over issues of compliance with the substantive criteria in the Seattle Municipal Code when those issues are presented in an appeal of a Type II decision. Appeal Issue 4(a) falls squarely in that category: It

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challenges the East Madison Street Proposal's compliance with the code criteria in SMC Chapter 25.11. While some claims concerning a Type II project's consistency with the Code must be challenged through the Code Interpretation process, that requirement does not apply to claims of inconsistency with Chapter 25.11 of the Seattle Municipal Code.

The Hearing Examiner also has jurisdiction over this issue under SEPA. In describing the ways that a proposal may significantly affect the quality of the environment—and as a mandatory consideration in the threshold determination process—the State SEPA rules explain that "[a] proposal may to a significant degree . . .[c]onflict with local, state, or federal laws or requirements for the protection of the environment." WAC 197-11-330(3)(e)(iii). *See also* SMC 25.05.330.C.5.c (same). In other words, when determining whether a proposal will have significant adverse impacts, one relevant factor is whether it will conflict with other laws or requirements for the protection of the environment.

Here, the City's tree protection rules at Chapter 25.11 of the SMC clearly are local laws "for the protection of the environment." *See* SMC 25.11.010.B. (rules intended, in part, "[t]o preserve and enhance City's physical and aesthetic character by preventing untimely and indiscriminate removal or destruction of trees"). The SEPA responsible official made specific findings on compliance with that chapter as part of the DNS. *See* MUP Decision at 31 (finding compliance SMC Chapter 25.11 as part of Director's consideration of impacts on plants and animals). And under the specific guidance of WAC 197-11-330(3)(e)(iii), compliance with the tree protection rules is directly relevant to the validity of the threshold determination. As a consequence, that issue also is also within the scope of review for this appeal as it "relate[s] to" the validity of the DNS. SMC 23.76.022.C.6.

Furthermore, SDCI's position that the regulations in the Seattle Municipal Code adequately mitigate the proposal's impacts also brings the question of consistency squarely within the Examiner's

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SEPA jurisdiction. *See* MUP Decision at 26 (quoting the City's SEPA policy at SMC 25.05.665 that "'where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation'"). If the project is not consistent with the code provisions, then the impacts are not adequately mitigated. As above, we should be allowed to present our case that the proposal will violate the City's tree protection rules and that the threshold determination was therefore issued in error.

D. Appeal Issue 1(d) Bringing an As Applied Challenge to SMC 25.05.675.G Is Within the Examiner's Jurisdiction.

Next, the Applicant requests dismissal of Appeal Issue 1(d), which challenges the Director's application of SMC 25.05.675.G, which contains the City's substantive SEPA mitigation policy for significant adverse height, bulk, and scale impacts. That rule authorizes the final decisionmaker to take several actions to mitigate such impacts, including limiting the proposal's height, modifying the proposal's bulk, and modifying or requiring additional setbacks. *See* SMC 25.05.675.G.2.b. However, the rule goes on to state that proposals that are approved through the design review process are "presumed" to not need additional mitigation, and that this presumption can only be rebutted with "clear and convincing evidence." SMC 25.05.675.G.2.c.

In our view, the presumption codified at SMC 25.05.675.G violates the State SEPA rules, which contain specific rules for determining when existing land use requirements (such as the Design Guidelines) provide adequate mitigation for project-specific impacts. To make such a determination, the SEPA rules require the responsible official to (a) determine whether the existing requirements were intended to mitigate the precise adverse impacts associated with the proposal, and (b) to determine independently whether existing land use rules and regulations in fact provide sufficient mitigation on a project-specific basis. *See* WAC 197-11-158(2)(b)(i, ii). In making that determination,

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SEPA does not authorize a "presumption" one way or the other. The matter is left to the informed, independent judgment of the SEPA responsible official.

SMC 25.05.675.G also violates WAC 197-11-330, which enumerates a number of issues for which the SEPA responsible official or the "decision maker" must make an independent, informed judgment, including the existence of significant adverse impacts in need of mitigation. *See also* WAC 197-11-660(2) (need for mitigation judged by final decision maker). By effectively delegating authority to the DRB to determine whether there are significant adverse impacts and whether mitigation is needed—an entity that is *neither* the responsible official *nor* the final decision maker—SMC 25.05.675.G again violates SEPA.

For these reasons, we may ultimately bring a facial challenge to the validity of SMC 25.05.675.G following the Examiner's resolution of this appeal. But that is not what we are doing here. Instead, Issue 1(d) explicitly contains an as-applied challenge to SMC 25.05.675.G, which is an entirely different creature from a facial challenge:

> SMC 25.05.675.G violates SEPA ***as it was applied to this proposal***. When combined with the reality of the Design Review process, this provision created an impossible burden on the public that is inconsistent with the intent and requirements of SEPA.

Notice of Appeal at 4 (emphasis added).

The Applicant asks for this issue to be dismissed, without citation to authority, on the conclusory basis that it is a "collateral attack" on SMC 25.05.675.G. But in reality, the issue is more nuanced.

Whatever the Examiner and parties believe about the bases for a facial challenge to SMC 25.05.675.G, that rule is clearly premised on an underlying factual assumption that the DRB will meaningfully engage and evaluate a proposal's height, bulk, and scale impacts during the design review process, and that the product of that meaningful review will be carried forward to the final

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threshold determination and decision. As a factual matter, Save Madison Valley will present evidence at the hearing to demonstrate that was not the case here. The DRB did not meaningfully evaluate the proposal's height, bulk, and scale impacts, and the Director did not independently evaluate those issues. As applied in this particular case, the factual predicate for applying the presumption at SMC 25.05.675.G has broken down and the underlying analysis required to justify the presumption has not occurred. *See* May 23, 2017 Comment at 11 (attached to Save Madison Valley's Clarification of Issues, discussing basis for as-applied challenge). This issue should not be dismissed and we should be allowed to present our as-applied challenge at the hearing.

E. Appeal Issue 3(c) Regarding the Applicant's Height Calculation Methodology May Be Dropped, But the Issue is Still Relevant Under SEPA.

Issue 3(c) challenges the Applicant's use of the height measurement methodologies at SMC 23.86.006.A, as approved in a land use code interpretation issued by the Director on July 23, 2018. *See* Notice of Appeal at 6, 7. The Applicant moves to dismiss this issue on the basis that SMC 23.86.006.A.2 contains two possible methodologies, and its decision to use one instead of the other is not appealable. *See* Mot. at 9 (arguing that "Velmeir's election between approved calculation methodologies is not an appealable issue"). If this issue were just about the Applicant's election between two allowable methodologies, we would agree. But it is not

Instead, the real problem identified in Issue 3(c) is that the particular way SMC 23.86.006.A was applied to the East Madison Street Proposal runs counter to the spirit and intent of that code section. Below, we explain the real, substantive problem identified in Appeal Issue 3(c) and why it is relevant. A detailed discussion of this issue may also be found at pages 7 to 8 of SMV's comment letter of May 23, 2017, which is incorporated by reference in Appeal Issue 1(b) alleging significant adverse height, bulk, and scale impacts under SEPA.

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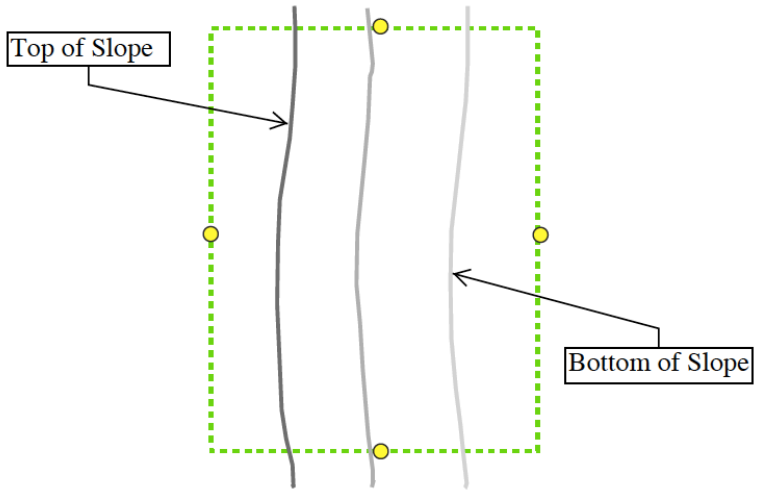
SMC 23.86.006 contains two methodologies for measuring the height of a structure for purposes of applying the code's height limitations. The first, codified at SMC 23.86.006.A.1, is the default methodology. It provides that height shall be measured as the distance between "average grade" and the top of the structure, where "average grade" is defined as the average existing grade elevations at the mid-point of each exterior wall. Below is an illustration of how this methodology would apply to a structure located on a slope, as depicted from a bird's-eye perspective. In the figure below, the structure is represented by the green dashed box. The four yellow dots show the four points on the structure's exterior walls that must be measured to determine "average grade." And the grey irregularly shaped contour lines represent the slope of the ground, with the top of the slope on the left and the foot of the slope on the right:

Fig. 1



One problem with this methodology is that it is not well suited to structures on sloped land. Below is a cross-sectional diagram of how this methodology works on slopped land as depicted in Director's Rule 4-2012:

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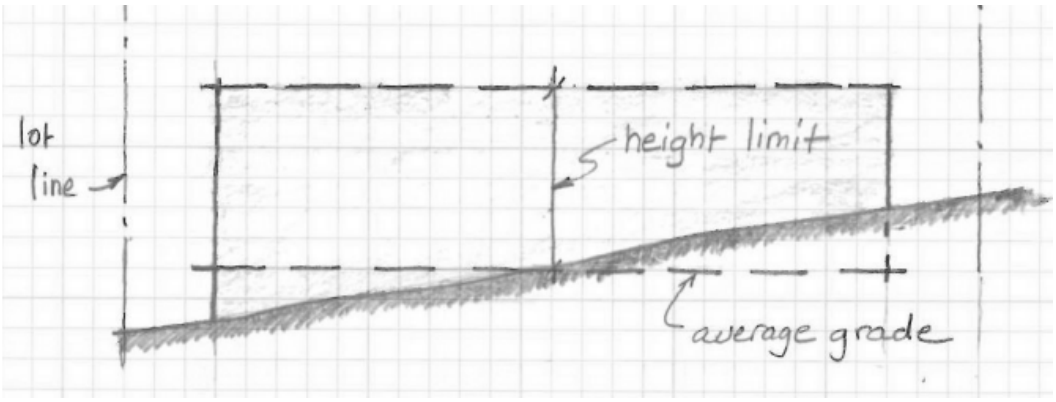
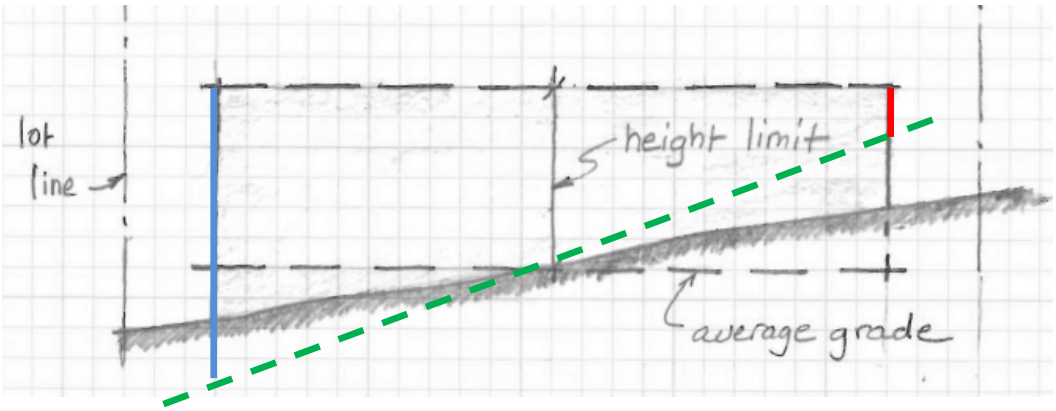
Fig. 2



Director's Rule 4-2012 at 2 (Feb. 27, 2012). As can be seen in the image above, the first methodology results in a single height limit for the entire structure. And when the slope increases (as represented by the green dashed line in the figure below), facades at the uphill end of the structure will need to be reduced (the red line), while facades at the downhill side may increase (the blue line).

Fig. 3



Id. (red and blue lines added). Obviously, this dynamic will become more extreme as the slope gets steeper and steeper.

The second height-calculation methodology is codified at SMC 23.86.006.A.2 and is intended to result in structure designs that are more harmonious with the underlying topography. Under this second methodology, the structure is divided into imaginary, rectangular segments, and each segment

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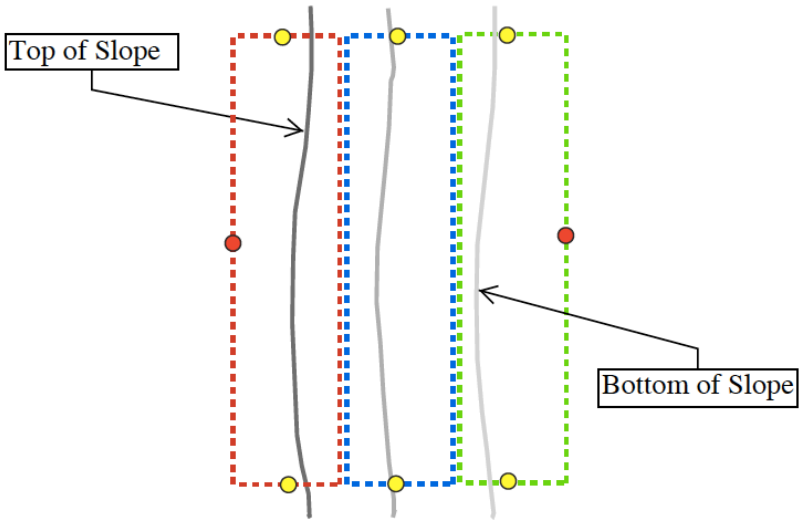
is measured independently "to permit the structure to respond to the topography of the site." SMC 23.86.006.A.2. Below is another bird's-eye illustration of how this second methodology applies to structures on sloped land. In the image below, the red, blue, and green dashed boxes represent the three imaginary segments of the structure, and the yellow dots depict the points that define "average grade." Note here that, unlike the first methodology, only two sides of each segment are measured. The uphill and downhill sides of the structure, depicted by the red dots, are not measured. *See* SMC 23.86.006.A.2.

Fig. 4



The intended result of this second methodology is to create a series of steps that follow the slope of the land, as can be seen in the following cross-sectional diagram from Director's Rule 4-2012:

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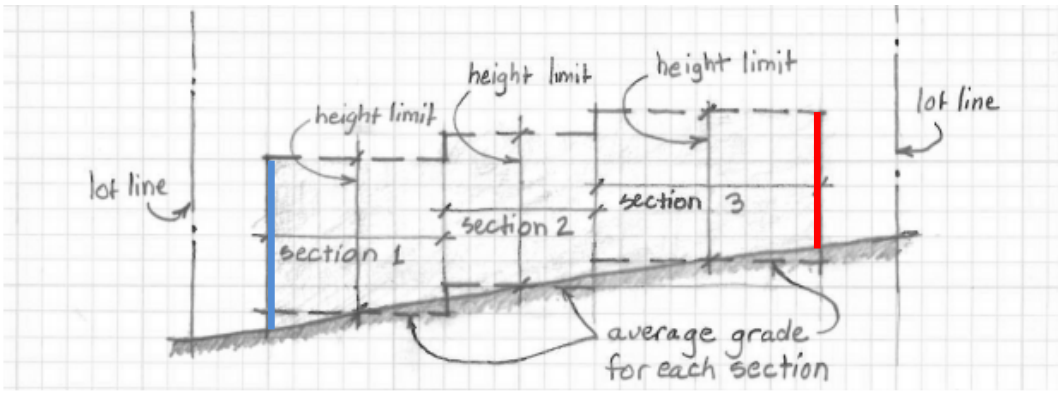
Fig. 5



Director's Rule 4-2012 at 6 (red and blue lines added). Note here that the extreme downhill side of the building (depicted in blue) will be shorter than when using the first height-calculation methodology (*see* Fig. 3), and the uphill side (in red) will be taller (*see id.*) due to the different "average grade" calculations for each segment.

In this case, the development parcel includes a tall, steep hill that slopes down to the Madison Valley neighborhood at its base. And the proposed six-story building will span the entire stretch of the slope, top to bottom, with a large façade facing the neighborhood.

The image below illustrates in a general way how the slope curves through the project site, and how the applicant applied the second height calculation methodology described above. We do not intend this illustration to be an exact representation, but it does illustrate the salient points of our argument.[1] As can be seen, the slope curves through the project site like a crescent. In applying the second height calculation methodology, the Applicant broke the structure into two segments (depicted by the green and red dashed boxes), and then measured the average grade at the middle of the outside edges of those segments (depicted by the yellow dots). The Examiner will note that while much of the

[1] A more accurate image of the slope and how the Applicant applied the height calculation methodology may be found at page 15 of the Department's code interpretation, which is attached as an exhibit to SMV's Notice of Appeal.

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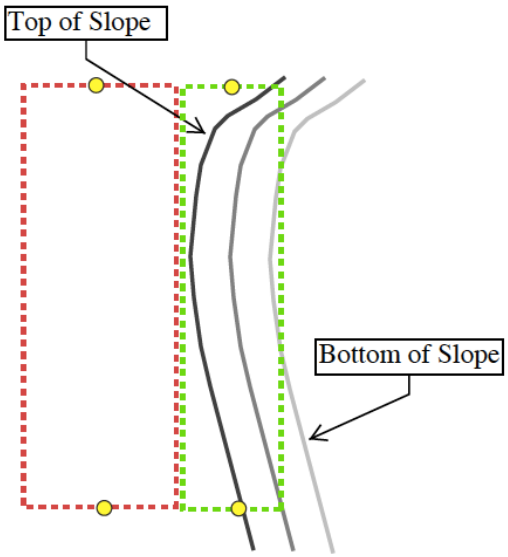
green segment is directly over the slope, the particular curve of the slope from north to south (top to bottom in the image below) allowed the Applicant to measure average grade at two points that are located at or near the top of the slope, on relatively flat land, rather than on the slope itself.

Fig. 6



One of the results of the Applicant's use of this methodology, for this particular building, is that the height limit does not "step down" the slope to the Madison Valley neighborhood, as intended by SMC 23.86.006.A.2 and Director's Rule 4-2012 (*see* Fig. 5 above). Because both measurement points for green segment are located at or near the top of the slope (not on the slope itself), the "average grade" of that section does not reflect the sloped topography of the site, resulting in an allowable height at the base of the slope that is nearly double the limit for this zone. *See* Save Madison Valley's Clarification of Issues at 3 (Appeal Issue 1(b)). This result runs counter to the plain intent of the second methodology, which is "to permit the structure to respond to the topography of the site." SMC 23.86.006.A.2.

By the same token, the portion of the structure in the red box is allowed to be much taller than would be allowed under the first methodology. Had the first methodology been used, the Applicant

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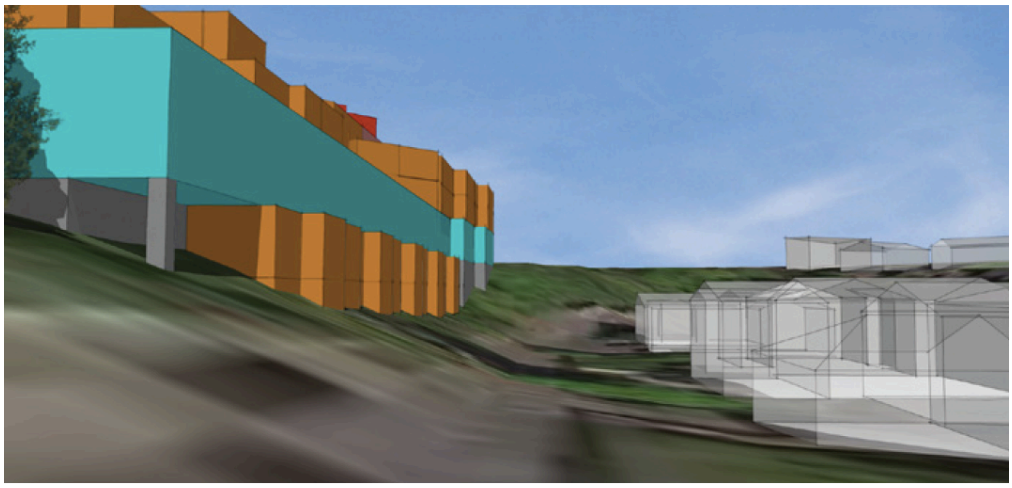
would have been required to include the far eastern side of the building at the base of the slope (the right side of the green box) in the average-grade calculation. That likely would have lowered the average grade for the whole and resulted in a lower absolute height limit. *See supra,* Figs. 3 & 5.

To give the Examiner a sense of the result, the image below is from the Applicant's recommendation package submittal to the DRB. *See* Declaration of Bryan Telegin (Oct. 31, 2018). It depicts the edge of the proposed structure along the base of the slope (the blue and gold building). Across the street (on the right) are single-family homes in the Madison Valley neighborhood (in translucent grey). The result is a fortress looming over the neighborhood.



In the image above, the slope can also be seen curving to the right in the background, around the back of the single-family residences, as depicted at the top of Figure 6 above.

And to give a sense of the change that this will cause in the neighborhood, below is another image from the Applicant's recommendation package depicting the project site from approximately the same vantage point. *See id*. The red line denotes the project site, and is included in the original image. As can be seen, there will be a dramatic change from lush foliage to hard surfaces and tall walls looming over the neighborhood.

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A particular irony of the Applicant's use of the second methodology can also be seen in the fact that if a slightly narrower structure had been proposed, the downhill façade of the building would have been subject to a lower height limit, as depicted in the figure below. This is because the measurement points (the yellow dots) would have been located on the slope, not on higher ground at the top of the slope. It is counter-intuitive that a much wider structure would be allowed to have an even taller façade simply because it is so wide that it runs the entire length of the slope. That should result in a lower façade, not a taller one, to reduce impacts on the neighborhood.

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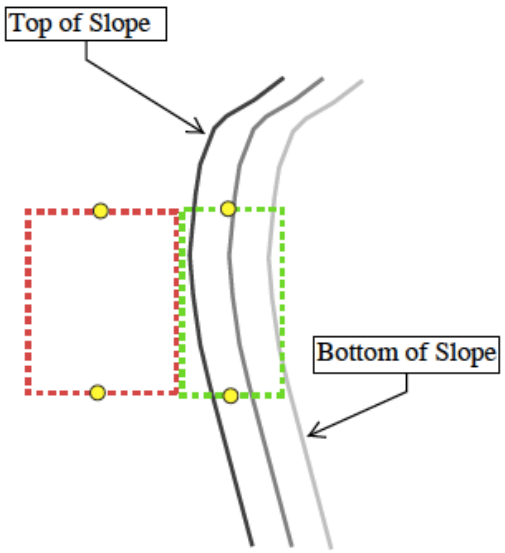
Fig. 7



Finally, the Applicant is not planning to build the structure on the slope, but instead to completely remove the slope and to construct the base of the structure at a much lower grade, approximately level with the homes in the Madison Valley neighborhood at the base of the hill. In other words, the design of the structure does not "respond" to the slope, but rather will eliminate the slope altogether. *See* Notice of Appeal at 7 (alleging that "[the Applicant] used the presence of the slope to its advantage to get extra height and then proposed to remove the slope completely").

In this case, SMV raised these issues in its code interpretation request dated May 23, 2017 (attached to SMV's Notice of Appeal), arguing that the building design does not respond to the slope as the rule envisions. The Director disagreed with that argument in his land use code interpretation (also attached to the Notice of Appeal), concluding, in part, that "[a]ny building built on this property best responds to site topography by measuring height from the higher elevations that predominate over most of the property and were created by the previous grading of the site." SDCI Interpretation No. 17-004 at 14, ¶9 (July 23, 2018). This conclusion about what type of design "best responds" to site topography is tied specifically to the plain language of SMC 23.86.006.A.2, which explains that the

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purpose of the second height calculation methodology is "to permit the structure to respond to the topography of the site." We should be allowed to challenge the Director's conclusion on that issue in his final code interpretation.

But even if the Examiner were to grant the Applicant's specific request to dismiss Issue 3(c) as it relates to the Director's code interpretation, it is important to note that its misuse of the second height calculation methodology would still be relevant under SEPA. Among other things, Issue 1(b) in this appeal alleges that the structure's eastern façade, at the downhill end of the slope, will have significant adverse impacts on the Madison Valley neighborhood. It will loom over the neighborhood, block light, cast shadows, create more noise, and will have other aesthetic impacts on the neighborhood. *See* Save Madison Valley's Clarification of Issues at 3. Appeal Issue 1(b) also incorporates SMV's comment letter of May 23, 2017, which addresses the Applicant's misuse of the second methodology, which in turn allowed such a massive façade in the first place. *See* May 23, 2017 Comment at 7–8.

It is our experience that, when faced with alleged adverse impacts that are also governed by specific land use regulations, developers and local jurisdictions typically argue that compliance with the regulations is sufficient to address the adverse impacts, or that the adverse impacts have been allowed by the local legislative body. But as discussed above, in those situations SEPA requires the Responsible Official to determine, on a case by case basis, whether compliance with the local code is sufficient to mitigate the precise project-specific impacts that are at issue, and whether the project-specific impacts were foreseen when the land use regulations were adopted. *See* WAC 197-11-158(2)(b)(i, ii).

Applied here, we do not believe the result in this case—a massive façade looming over the Madison Valley neighborhood—was the intent of the second height calculation methodology at SMC

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23.86.006.A.2. Should the Applicant or City rely on SMC 23.86.006.A.2 in any way to prove that these impacts will not be significant, that they are allowed, or that they are envisioned or intended under the code, we should be allowed to prove otherwise. We should also be allowed to present evidence on the Applicant's misuse of the second methodology as it demonstrates that the proposal will "to a significant degree . . .[c]onflict with local, state, or federal laws or requirements for the protection of the environment." WAC 197-11-330(3)(e)(iii). *See, e.g.,* May 23, 2017 Comment at 8 (arguing that "[t]his ruse essentially paved the way for a six-story building on a site zoned NS2P-30 and NC2P-40"). The Proposal is not in accord with the plain intent of the City's second height calculation methodology and the Examiner should hear our case on that issue. It relates not only to the validity of the Director's code interpretation, but also the DNS.

F. Appeal Issues 2(a), 2(c), 2(d), 2(e), and 2(f) Regarding the Director's Design Review Decision are Within the Examiner's Jurisdiction.

Last, the Applicant requests dismissal of Appeal Issues 2(a), 2(d), 2(e), and 2(f), which allege various errors and defects in the design review process before the DRB. *See* Mot. at 3–6. The Applicant argues that all of these issues should be dismissed because the DRB's recommendation is not an appealable Type II decision, and is therefore not within the Examiner's jurisdiction. *See id.* at 6 ("In summary, appeal issues 2(a), 2(c), 2(d), 2(e), [and] 2(f) . . . should be dismissed as a matter of law because the they are not administratively appealable.").

While SMV recognizes that the Hearing Examiner previously ruled that the DRB's recommendation is not an appealable Type II decision, there is no dispute that the Director's design review decision, in the MUP decision itself, *is* an appealable Type II decision. And in deciding whether the Director erred, and whether and how much the Examiner should defer to the Director's judgment on the issue of compliance with the Design Guidelines, it matters whether the Director was required

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by the code to accept the DRB's recommendation; or, alternatively, whether he was free to consider other viewpoints, such as SMV's, and to exercise his own discretion.

Under former SMC 23.41.014.F.2 (now codified in substantially similar form at SMC 23.41.008.F.3), the Director is generally required to accept the DRB's recommendation, without change, if four or more members of the DRB recommend approval. But the Director is not required to accept the recommendation if it "[r]eflects inconsistent application of the design review guidelines," if it "[e]xceeds the authority of the Design Review Board," if it "[c]onflicts with SEPA conditions or other regulatory requirements applicable to the site," or if it "[c]onflicts with the requirements of state or federal law." Former SMC 23.41.014.F.2.a–d. *See also* MUP Decision at 24. In these circumstances, where the DRB's recommendation is defective under the law, the Examiner may exercise his own discretion and judgment as to whether the proposal complies with the Design Guidelines.

Appeal issues 2(a), 2(d), 2(e), and 2(f) all relate to these standards. For example, Issues 2(a), 2(e), and 2(f) allege that the DRB's recommendation violated SEPA, in particular by locking in the project design—or at the very least, building critical momentum—before the city's SEPA analysis was complete.[2] *See* Notice of Appeal at 5–6. In other words, these issues allege that the DRB's recommendation violated WAC 197-11-070 and SMC 25.05.070 ("Limitations on actions during SEPA review"), which prohibit any action before an agency's final threshold determination is issued that would limit the range of alternatives. Also violated are WAC 197-11-055 and SMC 25.05.055 ('Timing of the SEPA process"), which require the threshold determination to be issued "at the earliest

[2] Issue 2(f) also alleges that the Director's acceptance of the DRB's recommendation because the recommendation conflicts with conditions and mitigation that should have been required under SEPA. *See* Notice of Appeal at 6.

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possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2). *See also* WAC 197-11-055(4) (threshold determination should be issued "at the conceptual stage rather than the final detailed design stage").

As a practical matter, the DRB's design recommendation illegally locked in the choice of alternatives before the threshold determination was made and the threshold determination was issued too late because the proposal's environmental impacts could reasonably be identified at the DRB recommendation stage. Resolution of these issues is directly relevant under former SMC 23.41.014.F.2 and the validity of the Director's decision because they relate to whether the DRB's recommendation "[c]onflicts with the requirements of state or federal law"—namely, SEPA.[3]

Similarly, Appeal Issue 2(c) alleges that when the DRB issued its recommendation, it ignored design changes that it required earlier in the design review process. *See* Notice of Appeal at 5 (Issue 2(c): alleging that "design changes that were required by the Board in the Early Design Guidance meetings were not properly addressed by or responded to by the applicant," and "[t]he Board had

[3] The Applicant also argues that Issue 2(e) should be dismissed because SEPA applies only to an agency's "final decision," not interim actions like the DRB's recommendation. Mot. at 5 (emphasis in original). But clearly, SEPA also places limits on interim actions before the final threshold determination is made (*see* WAC 197-11-070 and SMC 25.05.070) and requires the threshold determination to be issued early in the process, not after critical momentum has built and alternatives have been locked in (*see* WAC 197-11-055 and SMC 25.05.055). Applying these code provisions requires an inquiry into the facts—*e.g.,* whether the proposal at the DRB recommendation stage was "sufficiently definite to allow meaningful environmental analysis," Mot. at 5 (quoting WAC 197-11-055(2)(a)(ii))—and should not be resolved at this early stage of the appeal.

Relatedly, the Applicant argues for dismissal of Issue 2(f) on the basis that it violates the code's consolidated permit review process and is "inconsistent with state law." Mot. at 6 (citing RCW 36.70B.060 and WAC 365-196-845). But the Applicant offers mere conclusions on these issues, without any argument or analysis. These conclusory allegations should be rejected. *See, e.g., State v. Elliot,* 114 Wn.2d 6, 15 (1990) ("This court will not consider claims insufficiently argued by the parties."); *State v. Tsimerman,* No. 70760-4-I, 2015 WL 4231824, *1 n.1 (July 13, 2015) ("We need not consider arguments that are unsupported by meaningful analysis and authority."). Without a modicum of argument and analysis, we literally have no idea why the Applicant thinks Issue 2(f) violates state law or the city's consolidated permit review process.

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expressed multiple concerns . . . that were not ultimately adequately addressed by the Applicant"). In essence, this issue alleges "inconsistent application of the design review guidelines," another factor for determining whether the Director was bound to accept the DRB's recommendation. Former SMC 23.41.014.F.2.a.

Finally, Issue 2(d) alleges that the DRB did not allow for adequate public participation and violated SMC 23.41.014, which details a number of public participation requirements in the design review process. *See* SMC 23.41.014.B–A. This, too, is relevant under former SMC 23.41.014.F.2 because it bears on whether the recommendation "[e]xceed[ed] the authority of the Design Review Board," and whether it conflicts with "other regulatory requirements." Former SMC 23.41.014.F.2.b–c.

In short, Appeal issues 2(a), 2(d), 2(e), and 2(f) are all relevant to the factors at former SMC 23.41.014.F.2—*i.e.,* whether the DRB's recommendation conflicted with SEPA, whether it reflected inconsistent application of the Design Guidelines, and whether it exceeded the DRB's authority. In turn, those factors determine whether the Director was required to accept the DRB's decision, or whether he was empowered to make his own decision based on his own judgment. And knowing the answer to that question is directly relevant to whether and how much the Examiner should defer to the Director or if the Director, in turn, improperly deferred to the DRB's recommendation. These issues clearly "relate" (an exceedingly broad term) to whether the Director properly determined that the proposal will comply with "substantive criteria"—namely, the Design Guidelines. SMC 23.76.022.C.6. As above, these issues are within the Examiner's jurisdiction and SMV should be allowed to present its case.

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III. CONCLUSION

For the reasons above, the Applicant's motion to dismiss should be denied. All of the challenged issues are within the Examiner's jurisdiction for this Type II appeal.

Dated this 31st day of October, 2018.

Respectfully submitted,

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