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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, Projects 3020338 and 3028345

Nos. S-18-011; MUP-18-020

**APPLICANT'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

APPLICANT'S REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

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I. LEGAL ARGUMENT

In its Response, Save Madison Valley (“SMV”) attempts to create jurisdiction where none exists. While SMV is entitled to administratively appeal the design review component of the Director’s Type II MUP decision, the accompanying SEPA threshold determination, and SDCI’s Type I decision on the three development standards addressed in SDCI’s Code Interpretation, the Code does not create a vehicle for SMV to challenge the City’s entire design review process, the timing of the Director’s SEPA determination, the Director’s discretionary decision to forego exercise of substantive SEPA authority, or the efficacy of other duly enacted land use regulations.

As explained below, the allowed scope of SMV’s appeal is limited by SMC 23.76.006.C, which is an exclusive list of administratively appealable Type II decisions and by SMC 23.76.022.A, which establishes the Examiner’s administrative jurisdiction. Velmeir seeks dismissal of SMV’s issues that fall outside of SMC 23.76.006.C and SMC 23.76.022.A. TVC Madison Co. LLC (“Velmeir”) also seeks dismissal of Revised Issue 2(b) because SMV has failed to meet its burden of providing evidentiary factual support for its Revised Issue 2(b) allegations.

A. The Examiner’s Administrative Appeal Jurisdiction is Defined by SMC 23.76.022.A.

A hearing examiner “has only the authority granted it by statute or ordinance.” *HJS Dev. Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003); *Lejeune v. Clallam County*, 64 Wn.2d 451, 471, 823 P.2d 1144 (1992) (“Administrative tribunals are creatures of the legislative body that creates them and their power is limited to that which the creating body grants.” (citations omitted)).

The scope of the Seattle Hearing Examiner’s jurisdiction was extensively discussed in *End the Prison Industrial Complex (“EPIC”) v. King County*, 2018 Wn. App. Lexis 1258, 2018

1 WL 2418494 (Div. 1, May 28, 2018).¹ In *EPIC v. King County*, the Court of Appeals upheld the
2 Seattle Hearing Examiner’s determination that SMC 23.76.022.A establishes the Examiner’s
3 jurisdiction and that SMC 23.76.006 sets forth the *exclusive* list of Type II decisions that are
4 subject to administrative appeal. The Examiner reached his conclusion by construing
5 SMC 23.76.004, SMC 23.76.006, and SMC 23.76.022.A as follows:

6 But Footnote 1 to Table A confirms that it is SMC 23.76.006, not SMC
7 23.76.004, that “establish[es] the types of land use decision in each category.”
8 ***And SMC 23.76.006 controls not just what decisions are Type II, but of those,***
9 ***which may be administratively appealed. This construction is reinforced by***
10 ***SMC 23.76.022, which is the source of the Examiner’s jurisdiction over appeals***
11 ***of Type II decisions and confirms that “[a]ll Type II decisions listed in***
12 ***subsection 23.76.006.C may be appealed to the Hearing Examiner.***²

13 The language that the Examiner quoted as the source of the Examiner’s jurisdiction is
14 found in SMC 23.76.022.A.2.³ The Court agreed with the Examiner’s analysis, deeming it
15 “sensible” and “well-reasoned”. *Id.* at p. 13.

16 *EPIC v. King County* controls in the instant case. The Code makes clear that allowable
17 Type II appeals apply to the “***Director’s Decision***”. For example, SMC 23.76.004.B explains
18 that “Type II decisions are discretionary decisions ***made by the Director*** that are subject to an
19 administrative open record appeal hearing to the Hearing Examiner” (emphasis added)). In
20 short, per SMC 23.76.022.A, SMV can administratively appeal (i) SDCI’s Type I Code
21 Interpretation (SMC 23.88.020) and (ii) the Type II Director’s decisions listed in SMC
22 23.76.006.C. Of the twenty listed appealable Type II decisions, two are relevant to here:
23 SMC 23.76.006.C.1.a (determination of non-significance (DNS)) and SMC 23.76.006.2.e.
24 (design review decision).

25 ¹ The citizen’s group, EPIC, appealed SDCI’s decision to waive/modify the City’s structure width and setback
26 development standards for youth service centers and the SEPA conditions that SDCI had imposed. *EPIC v. King
County* at pp. 4-5. Because EPIC was challenging Director’s decisions that were not listed in SMC 23.76.006, the
Court affirmed the Examiner’s decision that he was without jurisdiction to hear an appeal of those issues.

² *EPIC v. King County*, at p. 13, emphasis added.

³ SMC 23.76.022.A.1 also confers jurisdiction over Type I decisions that are subject to a Code Interpretation.

1 SMV improperly asks the Examiner to allow appeal of additional issues and decisions
2 that are not listed on SMC 23.76.006.C or SMC 23.76.022.A. For example, in Appeal Issue 4(a),
3 SMV asks the Examiner to hear an appeal of Ch. 25.11 SMC—Seattle’s Tree Protection
4 Ordinance. In support of expanding jurisdiction, SMV points to the phrase “compliance with
5 substantive criteria” in SMC 23.76.022.C.6 (SMV Response, p. 10:13-26) arguing, without
6 authority, that this phrase transforms non-appealable processes or Code sections into listed
7 Type II Director’s decisions that are subject to appeal.

8 To reach this result, SMV ignores SMC 23.76.022.A, which sets forth administratively
9 “Appealable Decisions” and instead cites to SMC 23.76.022.C.6, which is a provision on the
10 “Scope of Review” of an appealable decision. A plain reading of SMC 23.76.022.C.6 shows that
11 it applies to appealable Type II decisions and allows appeal of the procedures, substantive
12 criteria, and SEPA compliance *for those appealable Type II decisions*. It does not expand the
13 Examiner’s jurisdiction to allow carte blanche appeals of decisions made pursuant to Ch. 25.11
14 SMC or other sections of the Code outside of those referenced in SMC 23.76.006.C and SMC
15 23.76.022.A. SMV’s proposed interpretation also conflicts with the Examiner’s and the Court’s
16 conclusion in *EPIC* that SMC 23.76.006.A is the source of the Examiner’s jurisdiction over
17 administrative appeals. *EPIC*, at p. 13.

18 Neither SMC 23.76.006.C nor SMC 23.76.022.A allow SMV to administratively
19 challenge Seattle’s Master Use Permit process or the timing of particular steps, such as design
20 review or SEPA, that occur within that process. Additionally, per SMC 23.76.006.C and
21 SMC 23.76.022.A, the Examiner does not have authority to administratively adjudicate the
22 legality or the validity of duly enacted land use Code provisions.

23 Assuming *arguendo* that the Examiner did have such authority, SMV’s claims are time-
24 barred, collateral attacks. Challenges to legislation must be brought in a timely manner under the
25 Growth Management Act (Ch. RCW 36.70A RCW) or the Land Use Petition Act (Ch. 36.70C
26

1 RCW). Statutory time limits on petitions for review are jurisdictional in nature. *Skamania*
2 *County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001). These statutory
3 time limits support Washington's strong policy of finality in land use decisions. *E.g. Chelan*
4 *County v. Nykreim*, 146 Wn.2d 904, 932-33, 52 P.3d 1 (2002); *Habitat Watch v. Skagit County*,
5 155 Wn.2d 397, 421, 120 P.3d 56 (2005).

6 Challenges brought after the expiration of deadlines for filing local administrative
7 appeals or after LUPA's 21-day time period constitute impermissible collateral attacks. *Habitat*
8 *Watch*, 155 Wn.2d at 410-11, 120 P.3d 56 (2005) (appellant could not challenge a previously
9 issued special use permit by challenging a subsequent grading permit); *Wenatchee Sportsmen*
10 *Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000) (appellant could not challenge a
11 previously adopted rezone by challenging a subsequent plat approval); *Samuel's Furniture v.*
12 *Dept. of Ecology*, 147 Wn.2d 440, 444, 54 P.3d 1194 (2002) (Ecology could not challenge a
13 shoreline permitting decision under its "enforcement authority" after expiration of LUPA's 21-
14 day appeal period).

15 As explained below, several SMV appeal issues challenge pre-decisional MUP processes
16 and/or the timing of SDCI's SEPA review. For reasons of jurisdiction and finality, these issues
17 are not administratively appealable.

18 **B. The Code Establishes the MUP Process, Including SEPA Timing, and the Types of**
19 **Administrative Appeals Allowed Pursuant to SMC 23.76.006 and SMC 23.76.022.**

20 **1. The Design Review Process Occurs Before MUP Application is Allowed.**

21 The City's design review process is codified at Ch. 23.41 SMC. The Code makes clear
22 that the Design Review Board ("DRB") recommends and the Director decides.
23 SMC 23.41.008.F.1 (DRB makes a recommendation to the Director on whether to approve or
24 conditionally approve the project based on compliance with the guideline priorities);
25 SMC 23.41.008.F.2 ("[t]he Director shall consider the recommendations of the Design Review
26 Board when deciding whether to approve an application for Master Use Permit"); SMC

1 23.41.014.G.1 and 2, (“[a] decision on an application for a permit subject to design review
2 shall be made by the Director” and “[t]he Director’s design review decision shall be made as
3 part of the overall MUP decision for the project.”) *Id.* (emphasis added)⁴

4 DRB Early Design Guidance (“EDG”) and Recommendation meetings are held before an
5 applicant can apply for a MUP. This occurs so that the project design in the MUP application
6 reflects the DRB’s input. *E.g.* SMC 23.76.008.B (requiring a MUP pre-application meeting for
7 buildings subject to design review). Per SMC 23.76.010.D, the MUP application must contain
8 information required by the City’s SEPA regulations (Ch. 25.05 SMC). By application of SMC
9 23.76.006.C and SMC 23.76.022.A, this regulatory scheme is not subject to administrative
10 review.

11 **2. The Code Establishes the Timing for the Director’s SEPA Decision.**

12 For purposes of SEPA, the Code provides that a proposal exists when an agency is
13 presented with an application and the principal features of the proposal and its environmental
14 impacts can be reasonably identified. SMC 25.05.055.B. The Code also recognizes that
15 preliminary steps or decisions (for example, the DRB process) are sometimes needed before an
16 action is sufficiently definite to allow meaningful environmental analysis. SMC 25.05.055.B.1.

17 SMC 23.76.020.B.2 addresses the timing of decisions subject to environmental review
18 and provides that if no EIS is required, the Director’s MUP decision shall include an
19 accompanying SEPA DNS determination if one has not been issued previously.

20 Here, SDCI’s July 23, 2018 MUP Decision on Velmeir’s project includes the required
21 SEPA analysis and determination. MUP Decision, pp. 26-32. Thus, SDCI has met the
22 procedural requirements for integrating SEPA into the MUP Decision, and there is nothing in the
23 Code that allows SMV to pursue an appeal of the timing of SDCI’s SEPA review vis-à-vis the
24 DRB process or the Director’s choice not to exercise substantive SEPA authority. These issues

25 _____
26 ⁴ Even in the situation where four or more DRB members agree upon the recommendation, the Director retains discretion to reject the recommendation based on the criteria in SMC 23.41.008.F.3.a-d.

1 are outside of SMC 23.76.006.C and SMC 23.76.022.A, and therefore, cannot be
2 administratively appealed.

3 **C. Appeal Issues 2(a), 2(c), 2(d), 2(e), 2(f), and 4(a) Should Be Dismissed Because They**
4 **Are Not Appealable Decisions That Fall Within the Examiner's Jurisdiction.**

5 **1. Appeal Issue 2(a).**

6 In Appeal Issue 2(a), SMV contends that “[t]he Design Review Process violated SEPA
7 regulatory and case law requirements that disclosure and analysis of environmental impacts must
8 occur before a decision maker commits to a particular course of action.” SMV claims that
9 because the DRB issued its recommendation before SDCI’s SEPA analysis had been completed,
10 the DRB recommendation locked in the design and built momentum in favor of the project
11 without the benefit of SEPA. Notice of Appeal, p. 5. SMV concluded, “[t]o the extent that the
12 Seattle code requires this, we challenge those provisions as applied to this case.”

13 Per SMC 23.76.006.C and SMC 23.76.022.A, neither the DRB process, nor the timing of
14 SDCI’s SEPA review as it relates to that process, are administratively appealable Type II
15 Director’s decisions. Additionally, SMV is attempting to collaterally attack the MUP process
16 long after the regulations creating that process were adopted. This type of untimely collateral
17 attack is prohibited under Washington law. *Habitat Watch*, 155 Wn.2d at 410-11 (2005);
18 *Wenatchee Sportsmen Ass’n*, 141 Wn.2d at 181 (2000); *Samuel’s Furniture*, 147 Wn.2d at 444
19 (2002).

20 The Director’s decision on design review is set forth on pages 3-26 of the MUP Decision
21 on Velmeir’s project. SMC 23.76.006.C.2.e permits administrative appeal of that Director’s
22 design review decision, but it does not permit challenges to the legality of the Code’s design
23 review process or the timing of SDCI’s SEPA review in relation to that process.

24 **2. Appeal Issue 2(c).**

25 SMV Appeal Issue 2(c) contends that Velmeir’s proposal is inconsistent with the DRB’s
26 direction and requirements, allegedly because design changes that were required by the DRB

1 were not properly addressed.

2 In addition to ignoring the fact that the DRB ultimately unanimously found that the
3 proposal was consistent with the priority design guidelines and responded appropriately to the
4 residential uses on Dewey Place E., (*see* MUP Decision pp. 18 & 24), the DRB's
5 recommendation, and the project's compliance with it, are not administratively appealable. The
6 Seattle Hearing Examiner already decided this issue the last time SMV's attorney brought it up
7 in *In re Appeal by Escala Owners Association of Decisions Re Land Use Application for 1933 5th*
8 *Avenue, Project 3019699*, at p. 20, ("*Escala*");

9 Contrary to the Appellant's assertions, the DRB does not have decision-making
10 authority. Instead, it is a recommending body, and *the Director retains final*
11 *decision making authority with regard to design review and to SEPA.*

12 *Escala*, p. 20 (emphasis added).

13 Regarding design review, the administratively appealable decision is the Director's MUP
14 Decision, not the DRB's recommendation. SMC 23.76.006.C.e and SMC 23.76.022.A.2. Thus,
15 alleged failures in the DRB's process, recommendation, or the DRB's SEPA compliance are not
16 administratively appealable and Appeal Issue 2(c) should be dismissed.

17 3. Appeal Issue 2(d).

18 In Appeal Issue 2(d), SMV attempts to appeal the "Design Review Board's decisions"
19 and the alleged lack of meaningful public process. SMV concludes: "The Design Review Board
20 may have violated SMC 23.41.014 to the extent that members of the Board did not review the
21 written public comments that were submitted regarding design review issues."

22 The extent of public participation in the design review process, or the Design Review
23 Board's compliance with the Code's public participation requirements are not administratively
24 appealable issues per *EPIC, Escala*, SMC 23.76.006.C, and SMC 23.76.022.A. As noted in
25 *Escala*, the DRB is a recommending body, with the Director retaining final decision-making
26 authority. *Escala* at p. 20. The DRB does not make decisions, and even if it did, those decisions
are not administratively appealable under SMC 76.26.006.C and SMC 23.76.022.A.

1 **4. Appeal Issue 2(e).**

2 SMV Appeal Issue 2(e) contends that the Design Review Board’s decisions “were made
3 in error because they were not informed by environmental review as is required by SEPA.”
4 Again, SMV contends that DRB “decisions” should not have been made until after SEPA was
5 completed, and that “[t]o the extent that SDCI argues that the Seattle code required the process
6 that was followed in this case, this appeal challenges the relevant code provisions that were
7 applied.”

8 The DRB’s recommendation is not an appealable decision; the timing of SDCI’s SEPA
9 review vis-à-vis the DRB’s recommendation is not administratively appealable; and SMV’s
10 attempted blanket appeal of the MUP procedures established in Ch. 23.76 SMC is not
11 administratively appealable. Thus, Appeal Issue 2(e) should be dismissed on jurisdictional
12 grounds per SMC 23.76.006.C, SMC 23.76.022.A, *EPIC* and *Escala* and because *Habitat Watch*,
13 *Samuel’s Furniture*, and *Wenatchee Sportsmen* prohibit untimely collateral attacks on adopted
14 land use regulations and decisions.

15 **5. Appeal Issue 2(f).**

16 SMV Appeal Issue 2(f) contends that the DRB’s recommendation violated SEPA
17 conditions that SDCI should have imposed and “the recommendation itself violated SEPA.”

18 This issue should be dismissed for two independently sufficient reasons: First, SEPA
19 does not demand a particular substantive result in government decision-making. *Glasser v. City*
20 *of Seattle, Office of Hearing Exam’r*, 139 Wn. App. 728, 742, 162 P.3d 1134 (2007); *Moss v.*
21 *City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). Second, purported deficiencies in
22 the DRB’s recommendation are not administratively appealable per SMC 23.76.006.C and
23 23.76.022.A and Appeal Issue 2(f) violates the ruling in *Escala*, which distinguishes between a
24 DRB recommendation and an appealable Type II Director’s decision. In this case, the only
25 administratively appealable SEPA decision is the Director’s DNS. SMC 23.76.006.C.1.a.
26

1 **6. Appeal Issue 4(a).**

2 SMV Appeal Issue 4(a) claims that Velmeir’s development proposal is inconsistent with
3 tree protection requirements of Ch. 25.11 SMC (Seattle’s Tree Protection Ordinance). SDCI’s
4 October 25, 2016 decision that the project complied with Ch. 25.11 SMC is not administratively
5 appealable as Ch. 25.11 SMC is not listed under SMC 23.76.006.C or SMC 23.76.022.A.
6 Additionally, Ch. 25.11 SMC is not subject to code interpretation. SMC 23.88.020 (restricting
7 code interpretations to development regulations in Title 23 or Chapter 25.09). Therefore,
8 because the Code does not authorize the Hearing Examiner to hear appeals related to the
9 application of Ch. 25.11 SMC, Appeal Issue 4(a) should be dismissed.

10 **7. Clarified Appeal Issue 2(b).**

11 SMV’s “clarified” Appeal Issue 2(b) (“Revised Issue 2(b)”) by listing 29 Citywide
12 Design Guidelines that the DRB and SDCI allegedly “misapplied and misconstrued.” The
13 portion of Revised Issue 2(b) that relates to the DRB’s application or construction of the Design
14 Guidelines in its recommendation is subject to dismissal because the DRB’s recommendation is
15 not an appealable decision per SMC 23.76.006.C, SMC 23.76.022.A, *EPIC*, and *Escala*.

16 The portion of Revised Appeal Issue 2(b) that applies to SDCI is subject to dismissal
17 because, despite ample opportunity to do so, SMV has failed to provide specific material facts
18 linking a particular aspect of Velmeir’s project to the 29 allegedly violated design guidelines.

19 Velmeir brought its Motion to Dismiss under Hearing Examiner Rules (“HERs”) 1.03,
20 3.01(d)(3), and 3.02(a). Motion to Dismiss, p. 2. These rules allow summarily dismissal per CR
21 12 and CR 56. After Velmeir’s Motion to Dismiss raised the absence of factual support for
22 SMV’s design guideline allegations, the burden shifted to SMV to “set forth specific facts
23 showing that there is a genuine issue for [hearing].” *Young v. Key Pharmaceutical, Inc.*, 112
24 Wn.2d 216, 225-226, 770 P.2d 182 (1989).

25 In its Response, SMV argues that the Hearing Examiner should not dismiss Revised Issue
26 2(b) because SMV complied with the Hearing Examiner’s Order on Clarification by listing

1 additional guidelines. SMV Response, p. 4: 6-15. SMV's purported compliance with the
2 Hearing Examiner's Order on the Motion to Clarify does not insulate it from having to make the
3 requisite showing to survive summary dismissal of Revised Issue 2(b).

4 SMV's bare recitation of design guidelines falls far short of the necessary showing to
5 survive summary judgment, which requires a plaintiff to go beyond mere assertions and
6 allegations and present factual evidence to support each element of its claim. *Roger Crane &*
7 *Assocs., Inc. v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994).

8 In *Roger Crane*, the court explained the required factual showing as follows:

9 Affidavits submitted in support of, or in response to, a summary judgment motion
10 must set forth facts that would be admissible in evidence. CR56(e). Unless an
11 affidavit sets forth facts, evidentiary in nature, that is, information as to "what
12 took place, an act, an incident, a reality as distinguished from supposition or
13 opinion", the affidavit does not raise a genuine issue for trial. *Grimwood v.*
University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517
(1988). Ultimate facts, conclusions of fact, or conclusory statements are
insufficient to raise a question of fact. *Grimwood*, at 359-60.

14 Here, SMV has failed to present evidentiary facts to support the claimed violations of the
15 29 listed design guidelines. SMV's Response cites to a SMV comment letter dated May 23,
16 2017 and pages 2-4 of the DRB's Recommendation Report, but these materials do not address
17 Velmeir's final proposal that SDCI approved in the design review component of the Director's
18 Type II MUP Decision.

19 SMV's May 23, 2017 comment letter preceded the subsequent changes to the proposal
20 that were presented at the September 12, 2017 DRB Recommendation meeting. Iterative
21 versions of Velmeir's proposal are not subject to appeal. SMC 23.76.006.C (authorizing
22 administrative appeal of the design review component of the Director's Type II MUP Decision).
23 Furthermore, SMV's May 23, 2017 comment letter says nothing about 21 of the design
24 guidelines cited in SMV's Revised Appeal Issue 2(b) (Design guidelines CS1-B2, CS1-B3, CS1-
25 E2, CS2-A1, CS2-A2, CS2-B2, CS2-B3, CS2-D2, CS2-D5, CS3-A1, CS3-A3, PL1-A1, PL1-A2,
26

1 DCI-B1, DC1-C4, DC2-A1, DC2-A2, DC2-C3, DC3-B3, DC3-C1, and DC3-C3 are not
2 discussed in the May 23, 2017 comment letter).

3 SMV's Response also cites to pages 2-4 of the DRB's Recommendation Report,⁵ but the
4 DRB Report does not, as SMV alleges, discuss design guideline "conflicts." SMV Response, p.
5 6:9-17. SMV's citation to the DRB Report is misleading at best because the cited section
6 identifies public comments from the first EDG meeting, which occurred on July 13, 2016. SMV
7 Response, p. 4:13. SDCI's MUP Decision came over two years later, after three EDG meetings
8 and a Recommendation meeting that, as shown on p. 25 of the DRB Report, resulted in
9 unanimous DRB approval for the project. Thus, the DRB Report provides no factual support for
10 SMV Revised Issue 2(b).

11 Revised Appeal Issue 2(b) also fails to comply with SMC 25.05.680.B.2's requirement
12 that an appeal "set forth in a clear and concise manner the alleged errors in the decision."
13 Additionally, both SMC 23.76.022.C.3.a and Hearing Examiner Rule 3.01(d)(3) required SMV
14 to set forth "specific objections" to the challenged decision.

15 HER 3.02(a) and 1.03 allow the Hearing Examiner to apply CR 12(b)(6) or CR 56 to
16 summarily dispose of an issue. Whether considered under CR 12(b)(6), CR 56, HER 1.03, HER
17 3.01(d)(3), HER 3.02(a) or SMC 23.76.022.C.3.a, SMV has failed to meet its burden of
18 providing evidentiary facts to support its assertion that Velmeir's proposed development violates
19 29 City-wide design guidelines. Therefore, the portion of Revised Issue 2(b) that applies to
20 SDCI should also be dismissed.

21 **8. Appeal Issue 1(e).**

22 SMV Appeal Issue 1(e) alleges that SDCI erred by failing to exercise its substantive
23 SEPA authority to mitigate alleged project impacts. In its Response, SMV argues that the
24 Hearing Examiner should not dismiss its substantive SEPA¹ argument because
25

26 ⁵A copy of the DRB Report is attached to SMV's Notice of Appeal.

1 SMC 23.76.022.C.6 provides the Hearing Examiner with jurisdiction over SDCI's discretion to
2 exercise substantive SEPA authority. SMV Response, pp. 7:25-8:16. To support its argument,
3 SMV selectively quotes a portion of SMC 23.76.022.C.6 out of context but omits critical
4 language. The portion of SMC 23.76.022.C.6 quoted in SMV's Response (pp. 7-8) is shown in
5 *italics*. The omitted language is in bold:

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

14 The omitted language shows that SMC 23.76.022.C.6 is harmonized with
15 SMC 23.76.006 and SMC 23.76.022.A because SMC 23.76.022.C.6's scope of review applies to
16 "Appealable Decisions", which are Type I decisions subject to administrative review through
17 code interpretation (SMC 23.76.022.A.1) and Type II decisions listed in SMC 23.76.006.C
18 (SMC 23.76.022.A.2). Per *EPIC*, the Examiner's jurisdiction is established by
19 SMC 23.76.022.A, not SMC 23.76.022.C.6, and there is simply no authority to support SMV's
20 requested expansion of administratively appealable decisions. *EPIC*, at p. 13.

21 Appeal Issue 1(e) also fails because SDCI's exercise of substantive SEPA authority is
22 discretionary. *Escala*, at p. 17, ¶14 ("[t]he Department's substantive authority to mitigate the
23 height, bulk and scale impacts is discretionary. . . ."). See also, SMC 25.05.665.A.2 (decision-
24 maker *may* condition or deny a project based on substantive SEPA policies).

25 SMC 25.05.700.C.1 &2 explain the difference between "may" and "shall" as used in the
26 Code for purposes of SEPA:

In these rules:

1. "Shall" is mandatory.
2. ***"May" is optional and permissive and does not impose a requirement.***
(Emphasis added).

1 The Director's decision not to exercise substantive SEPA authority is not a listed as
2 appealable Type 2 decision in SMC 23.76.006.C. While SMC 23.76.006.C.2.o allows for
3 administrative appeal of the Director's decision to exercise substantive SEPA authority to
4 approve, condition or deny a project based on SEPA policies, if such decisions are integrated
5 with the decisions listed in subsections 23.76.006.C.2.a-23.76.C.2.m, SMC 23.76.006.C.2.o does
6 not authorize an administrative appeal when the Director chooses not to exercise substantive
7 SEPA authority. Therefore, SMV has no right to administrative appeal of Appeal Issue 1(e).⁶

8
9 **9. Appeal issue 1(d).**

10 SMV Appeal Issue 1(d) alleges that the enacted code provision that sets out Seattle's
11 height, bulk, and scale substantive SEPA policies, "SMC 25.05.675.G[,] violates SEPA as it was
12 applied to this project." SMC 25.05.675.G.2.c recognizes that the Citywide design guidelines
13 are intended to mitigate the same height, bulk, and scale impacts as addressed in the City's SEPA
14 policies; that a project that is approved pursuant to the design review process is presumed to
15 comply with these height, bulk, and scale policies; and that this presumption may be rebutted
16 only by clear and convincing evidence that these have not been adequately mitigated.

17 As stated earlier, exercise of substantive SEPA authority is discretionary. SMC
18 25.05.665.A.2; SMC 25.05.700.C.2 ("May is optional and permissive and does not impose a
19 requirement"). Moreover, to avoid arbitrary decision-making, as a prerequisite to exercising

20
21 ⁶ SMV argues that is *Escala* the Examiner rejected the appellant's claims because SDCI's
22 exercise of substantive SEPA authority was discretionary and SDCI considered the project's
23 height, bulk and scale in the SEPA and design review processes. Response, 8:17-9:16. In the
24 MUP Decision for Velmeir's project, SDCI considered height, bulk and scale under both the
25 design review and SEPA sections. See MUP Decision, p. 18 and MUP Decision, pp. 29-30.
26 Because the SEPA DNS and the design review components of the MUP Decision are
administratively appealable under SMC 23.76.006.C.1.a and 006.C.2.e, SMV can have its day in
court on those issues. But, that does not give SMV the right to bring an unauthorized appeal of
the Director's decision to forego the exercise of substantive SEPA authority to impose additional
height, bulk and scale conditions on Velmeir's project.

1 substantive SEPA authority, SDCI would have been required to “specifically describe the
2 adverse environmental impacts and either outline mitigation measures or specifically state why
3 such measures are insufficient.” *Hayes v. City of Seattle*, 131 Wn.2d 706, 716-17, 934 P.2d 1179
4 (1997).

5 Here, SDCI did not identify any such unmitigated impacts, and it elected not to exercise
6 its discretionary, substantive SEPA authority. Instead, the Director found that “[c]ompliance
7 with applicable codes and ordinances is adequate to achieve sufficient mitigation of most long-
8 term impacts and no further conditioning is warranted.” MUP Decision, p. 29. The Director also
9 specifically analyzed the height, bulk and scale of the Velmeir’s project concluding:

10 The height, bulk, and scale of the proposed development and relationship to
11 nearby context have been addressed through the Design Review process.
12 Pursuant to the Overview policies in SMC 25.05.665.D the existing City Codes
13 and regulations to mitigate height, bulk, and scale impacts are adequate and
14 additional mitigation is not warranted under SMC 25.05.675.G.

15 MUP Decision, p. 30.

16 SMV Issue 1(d) is subject to dismissal because it presents an untimely, collateral attack
17 on an adopted code provision. In this administrative appeal, SMV has no right to challenge the
18 legality of SMC 25.05.675.G or the Director’s decision not to exercise substantive SEPA
19 authority to address height, bulk, and scale issues that were addressed in the design review
20 process. Additionally, Appeal Issue 1(d) does not raise an administratively appealable issue
21 pursuant to SMC 23.76.006.C, SMC 23.76.022.A, *EPIC* and *Escala*.

22 **10. Appeal Issue 3(c).**

23 SMV Appeal Issue 3(c) alleges that “the Director’s construction and application of SMC
24 Section 23.86.006.A.2 was made in error” and “[t]he applicant’s methodology is inconsistent
25 with the spirit and intent of [SMC 23.86.006.A.2].” SMV does not contest that Velmeir’s height
26 calculation (i.e. average grade calculation) complies with the letter of the Code.

1 SMC 23.86.006.A.2 authorizes two options for calculating average grade “*at the*
2 *discretion of the applicant.*” SDCI’s Code Interpretation, p. 13, para 8, explains that Velmeir’s
3 average grade calculation complied with the Code:

4 As pointed out in the request for interpretation, the optional method allows the
5 applicant to avoid using the very low grades at or near the base of the slope
6 adjacent to Dewey Place East in the average grade calculation. While this method
7 does add some height to the proposed structure on the downhill side, *both the*
8 *Code and the Director’s Rule very clearly provide the applicant the discretion to*
9 *both choose the optional measurement method and then choose the side that*
10 *they divide into smaller segments.* The Code language and particularly the
11 Director’s Rule suggested that the purpose is to encourage buildings to “better
12 follow the topography” and that the side to be divided into segments is “usually a
13 side that is generally parallel to the direction of the slope.” By choosing the
14 northern line of the site as the side to be divided into segments, the applicant did
15 follow the guidance in DR 4-2012, as this line, approximately perpendicular to
16 East Madison Street and Dewey Place East, is a side parallel to the direction of
17 the slope, which is downhill perpendicular to the two streets. Even if this was not
18 the case, neither the Code, nor the rule compels the applicant to choose a
19 particular side that was divided.

20 Code Interpretation, para. 8, pp. 13-14 (emphasis added, underlining in original).

21 Here, there is no allegation that Velmeir failed to comply with the Code’s provisions for
22 calculation of average grade. To the contrary, this issue was thoroughly vetted with SDCI early
23 in the process, long before MUP application, because SMV raised it at the DRB EDG meetings.

24 Velmeir contacted SDCI to confirm that its calculation was correct and provided the
25 calculation to the DRB in Velmeir’s EDG packets (*See*, October 7, 2016 email from SDCI
26 Senior Land Use Planner Art Pederson to project architect Lucas Branham, attached as Exhibit 1
to the Declaration of Patrick J. Mullaney (“Mullaney Decl.”); EDG #2 Summary, showing
average grade calculation and upper floor setback from Dewey Place E. compared to allowable
zoning envelope, attached as Mullaney Decl. Exhibit 2; and the addition of the townhomes on
the Dewey Place frontage and upper floor setback as shown in the DRB September 13, 2017
Recommendation meeting packet, Mullaney Decl. Exhibit 3).

1 These documents evidence that SDCI confirmed the Velmeir's average grade calculation
2 and that Velmeir's proposed building is designed to have townhomes on Dewey Place East to
3 match the residential uses on the opposite side of the street and to step back the upper floors to
4 respond to topography and locate the bulk of the building's mass on the East Madison Street
5 frontage.

6 SMV's Response attempts to manufacture new SEPA issues by appealing the Code's
7 technical average grade calculation. *See e.g.*, SMV Response, p. 20: 21-25. Here, the sole issue
8 before the Hearing Examiner is whether Velmeir correctly applied the Code to calculate the
9 building's allowed height. Velmeir was entitled to utilize the height calculation methodology in
10 SMC 23.86.006.A.2, and while SMV might not like the result, Velmeir's election between
11 allowed calculation methodologies is not an appealable issue under *EPIC*, *Escala*, SMV
12 23.76.006.C and SMV 23.76.002.A. Therefore, Appeal Issue 3(c) should be dismissed.

13 II. CONCLUSION

14 The issues presented in SMV's administrative appeal of the Director's Type II MUP
15 Decision must comply with SMC 23.76.006.C to confer jurisdiction on the Examiner pursuant to
16 SMC 23.76.022.A. SMV Appeal Issues that fall outside of SMC 23.76.006 and
17 SMC 23.76.022.A are ripe for summary dismissal as a matter of law.

18 Regarding Revised Issue 2(b), the portion of this issue that relates to the DRB's
19 recommendation is subject to dismissal because the DRB's recommendation is not an appealable
20 decision listed in SMC 23.76.006.C. The portion of Revised Issue 2(b) that addresses SDCI's
21 MUP Decision is also subject to dismissal as a matter of law because, despite having ample
22 opportunity, SMV has failed to provide evidentiary factual support for its Revised Issue 2(b)
23 allegations. For these reasons, Velmeir respectfully requests that the Examiner grant its motion
24 and dismiss the SMV Appeal Issues identified in Velmeir's Motion to Dismiss.

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DATED this 7th day of November, 2018.



Patrick J. Mullaney, WSBA #21982

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DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on November 7, 2018, I E-filed with the City of Seattle Hearings Examiner and caused to be served:

- 1. APPLICANT’S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS;
- 2. DECLARATION OF PATRICK MULLANEY IN SUPPORT OF MOTION TO DISMISS.

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- via ECF

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

DATED this 7th day of November, 2018, at Seattle, Washington.



 Suzanne Nelson, Legal Assistant