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6 BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

7 In Re: Appeal by

8 SAVE MADISON VALLEY

9
10 of Decisions Re Land Use Application, Design
11 Review, and Code Interpretation for 2925 East
Madison Street, Projects 3020338 and 3028345

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

**APPLICANT’S OBJECTION AND
MOTION TO STRIKE SMV’S
UNAUTHORIZED SUR-REPLY**

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13 **I. RELIEF REQUESTED**

14 On Thursday, November 8, 2018, attorneys for Save Madison Valley (“SMV”) sent an e-
15 mail communication to the Examiner that amounts to a sur-reply (“Sur-Reply”) that is not
16 authorized by the Examiner’s September 14, 2018 Amended Pre-Hearing Order (“Pre-Hearing
17 Order”) p. 2, ¶7-9. The Applicant, TVC Madison Co. LLC (“Velmeir”), asks the Hearing
18 Examiner to strike SMV’s unauthorized Sur-Reply. Should the Examiner choose to entertain the
19 merits of SMV’s Sur-Reply, Velmeir has the additional objections set forth below.

20 **II. ANALYSIS**

21 **A. SMV’s Sur-Reply Violates the Examiner’s Pre-Hearing Order and Should be
Stricken.**

22 A sur-reply that is filed in violation of the applicable procedural rules is subject to a
23 motion to strike. *Vultic v. McKissic*, 2013 Wn.App. Lexis 2825, 2013 WL 6633942 (Div. 1
24 December 12, 2013) (sur-reply filed to dispute factual issues after the other party filed its reply
25 brief was stricken for being unauthorized by the procedural rules). Here, the controlling
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APPLICANT’S OBJECTION AND MOTION
TO STRIKE SUR-REPLY- 1

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1 procedural rules are the Examiner's Pre-Hearing Order, p. 2, ¶7-9, which provided for a motion,
2 a response, and a reply for dispositive pre-hearing issues.

3 If SMV had a legitimate objection, the proper procedure would have been for SMV to
4 seek leave to file an additional pleading. If that motion had been granted, SMV would have been
5 entitled to present its substantive arguments. Instead, SMV chose the highly irregular course of
6 presenting additional legal and factual arguments in an email, without prior leave and in
7 violation of the dispositive briefing procedures in the Pre-Hearing Order. *See Armentero v.*
8 *Knowles*, 2010 U.S. Dist. LEXIS 111244, pp. 1-2, 2010 WL 4157101 (E.D. CA October, 18,
9 2010) ("The local rules of the court do not provide for the filing of sur-replies regarding motions.
10 Because plaintiff did not seek leave to file his sur-reply . . . it will be stricken." (citation
11 omitted)).

12 **B. The Allegations In SMV's Sur-Reply are Inaccurate and Misleading.**

13 SMV's protest of prejudice regarding Velmeir's request to dismiss Revised Issue 2(b)
14 rings hollow. SMV apparently finds no prejudice in its refusal to articulate the factual bases for
15 its claim that the version of Velmeir's project that was reviewed in SDCI's MUP Decision
16 violates 29 City-wide design guidelines. Without knowing the specific aspect(s) of Velmeir's
17 project that allegedly violate each design guideline, Velmeir's architect and other experts cannot
18 meaningfully prepare for the hearing in violation of Velmeir's right to due process.
19 *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050, cert. denied, 115 S. Ct. 663,
20 130 L. Ed. 2d 598 (1994) (the fundamental requirement of due process is notice and the
21 opportunity to be heard).

22 Velmeir's request for the factual bases for SMV's design review claims has been in this
23 case from its inception, and SMV has had multiple opportunities to provide the requested
24 information. Instead, SMV has made a calculated decision to pursue a Kafkaesque hearing-by-
25 ambush approach on its design review issues.

1 **1. The Factual Bases for SMV’s Design Review Claims was Raised in Velmeir’s**
2 **Request for Clarification.**

3 At the September 13, 2018 Pre-Hearing Conference, Velmeir filed a Motion for
4 Clarification that included the following request regarding the seven design review guidelines
5 then-listed in SMV Appeal Issue 2(b):

6 **SMV Appeal Statement 2(b), p. 5:13-17:**

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

13 **Velmeir Request For Clarification:**

- 14 i. *Please clarify, and describe with specificity how the proposal is inconsistent with*
15 *Citywide Design Guideline CS1, CS2, CS3, PL1, DC1, DC2, and DCS3.*

16 In its Response to the Motion for Clarification, pp. 10-11, SMV claimed that its design
17 review claims were “complete and understandable.” SMV refused to provide the requested
18 factual specificity. Instead, SMV argued that providing the facts “was not necessary” and would
19 require too much time and effort. SMV’s proposed solution was to have Velmeir sift through
20 hundreds of comment letters that had been submitted over the course of two years to figure
21 things out for itself. *Id.*

22 In its Reply on the Motion for Clarification, Velmeir again explained that SMV should
23 articulate how the project was allegedly inconsistent with the cited design guidelines so that both
24 SDCI and Velmeir could meaningfully prepare for the hearing. Velmeir Reply on Motion for
25 Clarification (pp. 1-2). On September 28, 2018, the Examiner granted SMV’s Motion for
26 Clarification as it applied to Appeal Issue 2(b). Order on Motion for Clarification, pp. 2-3.

 SMV’s Clarification of Issue 2(b) (“Revised Issue 2(b)”), which it filed on October 12,
2018, compounded the problem with its original Issue 2(b). Again, SMV provided no factual

1 linkage between a specific aspect of the project reviewed in the City's MUP Decision and the
2 allegedly violated design guidelines. Instead, SMV merely expanded the list of design
3 guidelines from 7 to 29. SMV Clarification of Issues, p. 5.

4 **C. Velmeir's Motion for Dismissal Articulated the Legal Bases for Dismissing SMV's**
5 **Claims.**

6 Velmeir's October 19, 2018 Motion to Dismiss specifically referenced summary
7 judgment pursuant to CR 56 as a basis for dismissing SMV's claims:

8 Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue
9 summarily where there is no genuine issue of material fact. *Kettle Range*
10 *Conservation Grp. v. Department of Natural Res.*, 120 Wn.App. 434, 456, 85
11 P.3d 894 (2003). *HER 1.03(c) states that for questions of practice and*
12 *procedure not covered by the HERs, the Examiner "may look to the Superior*
13 *Court Civil Rules for guidance." Civil Rule 56(c) provides that a motion for*
14 *summary judgment is properly granted where "there is no genuine issue as to*
15 *any material fact and ... the moving party is entitled to a judgment as a matter*
16 *of law." The moving party must demonstrate the absence of a dispute over an*
17 *issue of material fact. City of Lakewood v. Pierce Cty.*, 144 V/n.2d 118, 125,30
18 P.2d 446 (2001) (citations omitted). *Once the moving party demonstrates the*
19 *absence of an issue of material fact, the burden shifts to the nonmoving party to*
20 *"set forth specific facts showing that there is a genuine issue for [hearing]."*
21 *Young v. Key Pharm, Inc.*, 112 Wn.2d 216, 225-226, 77 0 P. 2d 182 (1989).

22 Motion to Dismiss, pp. 1-2 (emphasis added).

23 Regarding the SDCI portion of Revised Issue 2(b), Velmeir again pointed to the lack of factual
24 support for SMV's design guideline allegations and cited to *Pacific Shooting Park Ass'n* for the
25 proposition that "*insufficient pleadings cannot survive summary judgment*". *Id.* at 8 (emphasis
26 added).

Specifically, the Motion to Dismiss provided:

Here, SMV lists 29 Design Guidelines that the project allegedly violates without
providing any factual explanation of the project's alleged inconsistencies with
each of the 29 enumerated guidelines. Despite 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. *Pacific Shooting Park Ass'n v. City of Sequim*, 158
Wn.2d 342, 352-3,144P.3d276 (2006) (insufficient pleadings cannot survive

1 summary judgment).

2 Motion to Dismiss, p. 8.

3 Velmeir concluded that Revised Issue 2(b) was “insufficient and therefore ripe for summary
4 dismissal.” *Id.*

5 In its Response to the Motion for Clarification, SMV understood that its failure to
6 provide factual support for its design review claims was the key issue. In fact, SMV spent five
7 pages of its Response arguing that it was not obligated to provide the requested facts. Response
8 to Motion to Dismiss, pp. 2-7.

9 SMV’s first argument was that it should be excused from providing the factual support
10 for its design review claims because “the Examiner’s Order [on the Motion for Clarification] did
11 not direct SMV to provide a “factual explanation” of the inconsistencies.” *Id.* at p. 4. SMV’s
12 second argument was that its May 23, 2017 comment letter and the DRB’s Recommendation
13 Report were more than sufficient factual support for its design review claims. Response to
14 Motion to Dismiss, pp. 5-6.

15 In its Reply, Velmeir pointed out that SMV’s reliance on the May 23, 2017 comment
16 letter and the DRB Recommendation were red-herrings because the comment letter did not even
17 address 21 of the 29 claimed design review violations and the cited portion of the DRB’s
18 Recommendation contained a summary of public comments that occurred in June 2016, over two
19 years, and several design iterations, before SDCI’s MUP Decision. *See Reply on Motion to*
20 *Dismiss*, pp. 10-11.

21 Velmeir’s Motion to Dismiss asserted that Revised Issue 2(b) was required to contain
22 sufficient facts to provide Velmeir was fair notice of SMV’s design review claims, and without
23 those facts, Revised Issue 2(b) was subject to summary dismissal per *Pacific Shooting Park*
24 *Ass’n*. *Pacific Shooting Park Ass’n* stands for the propositions that (i) a complaint that fails to
25 give the defending party fair notice of a claim is insufficient and (ii) such claims are subject to
26 dismissal on summary judgment. *Pacific Shooting Park Ass’n*, 158 Wn.2d 342, 350-53. In

1 *Pacific Shooting Park Ass'n*, the plaintiff's tortious interference claim was dismissed on
2 summary judgment because the plaintiff had failed to give the City fair notice of the claim in the
3 complaint. *Id.* at 352-53.

4 In its Motion to Dismiss, Velmeir explained the burden shifting that occurs when the
5 moving party shows an absence of material fact, and it cited to *Pacific Shooting Park Ass'n* for
6 the proposition that, like the deficient complaint in *Pacific Shooting Park Ass'n*, SMV Revised
7 Appeal Issue 2(b) had no factual support and was therefore ripe for summary dismissal. Motion
8 to Dismiss, pp. 1-2, and 7.

9 SMV is represented by sophisticated land use counsel who had ample time to respond to
10 Velmeir's Motion to Dismiss. If SMV was uncertain, it could have elected to provide the facts
11 to support its design review allegations, or it could have asked either Velmeir or the Examiner
12 for clarification. Instead, SMV chose to continue relying upon the argument that it was not
13 required to provide any factual bases for its design review claims. SMV's election not to provide
14 factual support for it claims is subject to King County LR 56(e), which in relevant part, provides:

15 When a motion for summary judgment is made and supported as provided in this
16 rule, an adverse party may not rest upon the mere allegations or denials of a
17 pleading, but a response, by affidavits or as otherwise provided in this rule, must
18 set forth specific facts showing that there is a genuine issue for trial. If the adverse
19 party does not so respond, summary judgment, if appropriate, shall be entered
20 against the adverse party.

21 Here, SMV has known for months that Velmeir objected to SMV's continued refusal to
22 explain how the version of Velmeir's proposal that was reviewed by SDCI in its MUP Decision
23 allegedly violated 29 design guidelines. Instead of providing the facts, SMV would prefer to
24 surprise Velmeir and SDCI at the hearing and ensure that Velmeir's architect and other experts
25 have no prior opportunity to prepare a response to SMV's design review allegations.

26 SMV's failure to provide Velmeir the fair notice that is required by Washington law
renders Revised Issue 2(b) subject to summary dismissal as a matter of law in accord with

1 *Pacific Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350-3,144P.3d276 (2006). There
2 was nothing inappropriate with Velmeir seeking such dismissal in its Motion to Dismiss.

3 **III. CONCLUSION**

4 For the forgoing reasons, Velmeir respectfully requests that the Examiner strike SMV's
5 Sur-Reply and rule on the Motion to Dismiss.

6
7 DATED this 9th day of November, 2018.

8 *Patrick J. Mullaney (via e-signature)*
9 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 9, 2018, I E-filed with the City of Seattle Hearings Examiner and caused to be served:

1. APPLICANT’S OBJECTION AND MOTION TO STRIKE SUR-REPLY;

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

DATED this 9th day of November, 2018, at Seattle, Washington.

Patrick J. Mullaney via e-signature
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