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 OBJECTION AND MOTION TO STRIKE SMV'S UNAUTHORIZED SUR-REPLY

I. INTRODUCTION

Save Madison Valley ("SMV") respectfully requests that the Examiner deny Velmeir's self-styled "Objection and Motion to Strike SMV's Unauthorized Sur-Reply" (Nov. 9, 2018) (herein, "Obj."). As we requested in our e-mail of November 8, 2018, attached hereto as Appendix A, the Examiner should strike the new arguments advanced in Velmeir's reply in support of its motion to dismiss. Velmeir has attempted to fundamentally re-write its original motion from one based on legal pleading standards, to a summary judgment argument based on factual burden-shifting under CR 56. In this way, it attempts to penalize us for not presenting admissible evidence under a standard it never argued. Having committed to a particular line of argument in its motion to dismiss, Velmeir should not be allowed to bend the rules and advance an entirely different argument in its reply.

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II. ARGUMENT

On October 19, 2018, Velmeir filed a motion to dismiss 10 issues in SMV's appeal statement. *See* Applicant's Motion to Dismiss (Oct. 19, 2018) (herein, "Mot. to Dismiss"). Among them, Velmeir moved to dismiss Issue 2(b), which alleges that the project is inconsistent with the city's design guidelines. Velmeir's argument on that score was plain as day. It alleged our appeal statement did not meet the pleading requirements at SMC 23.76.022.C.3.a and HER 3.01(d)(3), which require every appeal statement to state "specific objections" to the challenged decision. *See* Mot. to Dismiss at 7. That was clearly a challenge based on legal pleading requirements, which in turn must be judged by applying those requirements to the four corners of the pleading.

If there were any doubt about the nature of Velmeir's motion to dismiss Issue 2(b), it is resolved by Velmeir's arguments about "fair notice," "insufficient pleadings," and Washington's liberal notice pleading standard. *See id*. at 8. Velmeir was arguing (and is still arguing) that it needs information about our claim so that it can properly respond at the hearing, and it thinks that information should have been put in the appeal statement. Agree or disagree, that is an argument about legal pleading requirements, not about the factual merits.

And if there were any more doubt Velmeir was arguing about legal pleading requirements, it is resolved by the heading of the section where Velmeir made those arguments, which it styled as a motion to dismiss "for failure to state a claim upon which relief can be granted." *Id*. at 7. We all know from law school that a motion to dismiss for failure to state a claim is assessed on the four corners of the pleading — it is about pleading standards, not proof.

For the reasons stated in our response to Velmeir's motion to dismiss, we disagree that the ultimate facts underlying Issue 2(b) need to be spelled out in the pleading itself. *See* Save Madison Valley's Response to Applicant's Motion to Dismiss at 2–5 (Oct. 31, 2018) (herein, "SMV Resp.").

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In support, we cited the Examiner's ruling on Velmeir's earlier motion for clarification, in which the Examiner resolved the exact same legal arguments put forward by Velmeir. *See* Order on Motion for Clarification (Sept. 25, 2018). After that ruling, we promptly responded to the Examiner's order that we identify the specific policies and sub-policies of the Design Guidelines that we believe are inconsistent with the proposal. *See id*. at 3; Save Madison Valley's Clarification of Issues at 5 (Oct. 12, 2018). It would be unfair to dismiss Issue 2(b) for not saying more when we did exactly what the Examiner ordered, in response to the very same arguments about the pleading requirements at SMC 23.76.022.C.3.a and HER 3.01(d)(3).

But one thing Velmeir cannot do is pretend it filed a motion it never wrote. Unlike its motion to dismiss Issue 2(b), which focused exclusively on the pleading requirements of SMC 23.76.022.C.3.a and HER 3.01(d)(3), its reply attempted to entirely re-caste the nature of its motion as one challenging Issue 2(b) on the facts. Velmeir's new argument is that it "shifted the burden" to us under CR 56, and that we failed to meet our charge by coming forward with admissible evidence to create a triable issue of fact. *See, e.g,* Applicant's Reply Memorandum in Support of Motion to Dismiss at 9–10 (Nov. 7, 2018) (arguing, *inter alia*, that "After Velmeir's Motion to Dismiss raised the absence of factual support for SMV's design guideline allegations, the burden shifted to SMV to 'set forth specific facts showing that there is a genuine issue for [hearing].") (quoting *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 225–26 (1989)); *see also id*. at 10 (arguing that under the CR 56 standard, we were required to "go beyond mere assertions and allegations and present factual evidence to support each element of [our] claim," and that the evidence must be "admissible" — *i.e.,* not contained in a pleading).

As Velmeir well knows, the burden of proof "shifts" under CR 56 only after "the moving party demonstrates the absence of an issue of material fact." Mot. to Dismiss at 2–3 (citing *Young*, 112

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Wn.2d at 225–26). In other words, "[t]he burden of proving, by uncontroverted facts, that no genuine issue exists is upon the moving party." *LaPlante v. State*, 85 Wn. 154, 158 (1975). Here, Velmeir, the moving party, never even attempted to make that showing. It never challenged us to come forward with admissible evidence to prove our claim. It never presented admissible evidence that our claim should fail on the merits. It only argued that our pleading is not specific enough to satisfy the pleading requirements at SMC 23.76.022.C.3.a and HER 3.01(d)(3), a legal argument that does not "shift" the factual burden of proof under CR 56, or require us to produce any admissible evidence in response. *See, e.g.*, Tegland, 14A Wash. Prac., Civil Procedure § 25.2 (2d ed.) (explaining that, in order to support a motion for summary judgment, "[e]vidence must be gathered, evaluated, and presented, and legal issues must be thoroughly briefed, in much the same manner as would be done at trial.").

Attempting to glean what is not there from the tea leaves of its own motion, Velmeir now says it was always making a fact-based summary judgment argument against Issue 2(b), challenging us to come forward with admissible facts and evidence to prove our claim (not simply that we should have alleged more in our pleading). *See* Obj. at 4–5. In support, it points to a simple statement of the burden-shifting that occurs under CR 56, made in a section of its motion in which it was simply describing the standard of review and where it also explained the standard of review under CR 12(b)(6) (failure to state a claim). *See* Obj. at 4 (quoting Mot. to Dismiss at 1–2). It also points to a single parenthetical, following its citation to *Pacific Northwest Shooting Park Association v. City of Sequim*, 158 Wn.2d 342 (2006), in which it described that case as standing for the proposition that "insufficient pleadings cannot survive summary judgment." Obj. at 4–5 (quoting Mot. to Dismiss at 8).

But the "standard of review" section of Velmeir's motion did not state which of its ten challenges fell under CR 56, and which fell under CR 12(b)(6). For that, we had to look at the actual arguments in Velmeir's motion. And the *only* argument Velmeir made with respect to Issue 2(b) was

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that our pleading failed to satisfy the legal pleading requirements at SMC 23.76.022.C.3.a and HER 3.01(d)(3), which does not remotely resemble an attempt to shift the fact-based burden of proof under CR 56. Whether Velmeir thought the CR 56 burden-shifting standard applied to any other issues, it certainly did not make that argument for Issue 2(b). It raised purely legal issues.

Similarly, while Velmeir referenced "summary judgment" in its parenthetical for the *Pacific Northwest Shooting* case (surrounded, of course, by its real argument about pleading standards), the issue in that case was purely legal. Like Velmeir's motion, *Pacific Northwest Shooting* was really about pleading requirements, not the burden shifting that occurs under CR 56 when a party actually attempts to prove, "by uncontroverted facts, that no genuine issue exists" for hearing. *LaPlante*, 85 Wn. at 158.

In *Pacific Northwest Shooting*, the plaintiff attempted to survive summary judgment by making up an entirely new claim that it never pleaded, trying in that way to side-step the motion altogether. *See Pacific Northwest Shooting,* 158 Wn.2d at 352 ("PNSPA now urges this court to consider its new interference argument as if that were what it had argued all along"). Admittedly, that dispute arose in the general context of a motion for summary judgment, but it was still about pleading requirements, not about anyone trying to shift the burden of proof on the new claim, which only appeared after the motion was filed.

Here, if Velmeir wants to call its motion one for summary judgement, so be it — after all, summary judgment motions *can* involve the very same, purely legal issues that are ripe for review under CR 12(b)(6). At least, they can when the facts are not in dispute, as can be seen in *Pacific Northwest Shooting*. Our point here is that the only issue Velmeir argued in its motion was the wholly legal one that we did not meet the pleading requirements at SMC 23.76.022.C.3.a and HER 3.01(d)(3).

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That legal issue must be judged by the four corners of the pleading. Velmeir did not even attempt to make a fact-based argument to shift the burden of proof under CR 56.

Of course, none of this means that we are engaging in some type of "Kafkaesque hearing-by-ambush," Obj. at 2, where Velmeir has no way to find out the factual basis of Issue 2(b). If Velmeir really wanted to shift the burden of proof to us under CR 56, and to flush out the evidence we intend to use at the hearing, then it should have done what the rule requires by presenting admissible evidence of why *it* thinks the project complies with the referenced design guidelines. That would have shifted the burden to us to come forward with admissible evidence to the contrary, as CR 56 envisions. Velmeir may protest that such an approach would have required additional work, but it is Velmeir's choice as to what type of motion it files, the costs it is willing incur, and the risks it is willing to take. *See* Tegland, *supra* (explaining "[f]rom a financial point of view, a motion for summary judgment is a substantial but calculated risk. The client invests a considerable amount of money in a motion for summary judgment, in the hope of avoiding an even costlier trial."). Here, Velmeir chose the odd but cheap route of attacking the legal sufficiency of our pleading after we did exactly what the Examiner directed in her Order on Motion for Clarification. If Velmeir should be angry at anyone for not knowing the evidentiary bases for our claims going in to the hearing, it should be angry at its own attorneys for not doing the work to flush them out.

When we received Velmeir's reply, we were concerned about its dishonest attempt to re-caste its motion into something it was not, and we felt time was of the essence to raise this issue with the Examiner — hence our e-mail of November 8, 2018. But our e-mail was not a "sur-reply." It was a request to strike Velmeir's new summary judgment arguments, just as Velmeir now wants to strike our e-mail. We believe we acted prudently, and rightly, and within the bounds of the Examiner's rules of procedure.

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Ultimately, when a person is caught bending the rules, they have two options. They can face the truth and take their knocks. Or they can double down with indignance. We know the stakes may be high for Velmeir, but that does not justify it taking the second path.

The truth is Velmeir never made a "burden shifting" argument under CR 56 with respect to Issue 2(b). Its attempt to entirely re-caste its argument as something it was not, to hold us to a standard it never argued, is wrong and prejudicial. The Examiner should strike the new arguments in Velmeir's reply that attempt to shift the burden of proof to SMV. The only issue should be whether the four corners of our appeal statement comply with the specific pleading requirements at SMC 23.76.022.C.3.a and HER 3.01(d)(3), a legal issue, not a factual one.

III. CONCLUSION

The Applicant's objection and motion should be denied. Velmeir's new summary judgment arguments should be stricken.

Dated this 15th day of November, 2018.

Respectfully submitted,

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By: _____

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APPENDIX A

Subject: Appeal of Save Madison Valley - MUP-18-020, S-18-011: Request to Strike New Arguments in Applicant's Reply in Support of Motion to Dismiss

Date: Thursday, November 8, 2018 at 4:40:56 PM Pacific Standard Time

From: Bryan Telegin

To: Johnson, Alayna

CC: Claudia M. Newman Henry, Peggy Cahill, Bricklin & Newman, LLP, Mills, William, patrick.mullaney@foster.com, Jeremy Eckert, Nikea Smedley, Hogness, Magda, Suzanne Nelson

BCC: Tony Hacker

Madam Examiner,

On October 19, 2018, the Applicant filed a motion to dismiss several issues in the above-referenced appeal. Among other things, the Applicant moved to dismiss Issue 2(b), which alleges that the project is inconsistent with several provisions of the Seattle Design Guidelines. *See* Applicant's Motion to Dismiss at 7–8 (Oct. 19, 2018). The stated basis for the Applicant's challenge to Issue 2(b) was that it does not include enough information to satisfy the particular pleading requirements at SMC 23.76.022.C.3 and Hearing Examiner Rule 3.01(d)(3) (requiring "specific objections"). The Applicant also argued that the appeal statement did not provide "fair notice" of the claim under Washington's general notice-pleading standard. *See id.* at 8.

On October 31, 2018, this office filed a response to the Applicant's motion on behalf of Appellant Save Maddison Valley. With respect to Issue 2(b), we argued that we satisfied the specific pleading standards at SMC 23.76.022.C.3 and HER 3.01(d)(3), as well as Washington's standard notice pleading requirement. *See* Save Madison Valley's Response to Applicant's Motion to Dismiss at 2–7 (Oct. 31, 2018). In part, we referenced certain documents that were attached to our appeal statement (and a later pleading clarifying the appeal issues), which under CR 10(c) are considered parts of the pleadings themselves. Our point in referencing those other documents was to show that the Appellant's focus only on the text of the appeal statement (not the attachments) was too narrow for purposes of judging the adequacy of the pleading in its entirety.

Yesterday, the Applicant filed its reply, and it has significantly changed the scope and nature of its motion.

In its reply, not only is the Applicant arguing that we failed to meet particular *pleading* requirements—an argument that can and should be resolved within the four corners of the pleading itself—it is now alleging that we should have offered *affidavits* and *evidence* in order to survive a purported motion for summary judgment on the merits. This can be seen at page 10 of the reply, where the Applicant argues that "SMV's bare recitation of design guidelines falls far short of the necessary showing to survive summary judgment, which requires a plaintiff to go beyond mere assertions and allegations and present factual evidence to support each element of the claim." Applicant's Reply Memorandum in Support of Motion to Dismiss at 10 (Nov. 7, 2018). The Applicant goes on to argue that "SMV has failed to present evidentiary facts to support violations of the 29 listed design guidelines." *Id*. at 11.

In this way, the Applicant is essentially attempting to re-write its original motion. Whereas the original motion raised only issues with the applicable pleading standard, the Applicant is now attempting to portray the original motion as a challenge on the merits—*i.e.,* as alleging not only that we failed to *plead* facts, but also that we failed to *prove* facts (and that we were required come forward with

affidavits and other evidence outside the pleadings to do so).

This is extremely prejudicial. If the Applicant wanted to move for summary judgment on the merits, instead of simply raising certain pleading standards, it could have and we could have responded accordingly. Having chosen not to do so, the Applicant's new arguments on the merits should be stricken and the only issue should be weather we met the particular pleading requirements imposed by the Seattle Municipal Code and HER 3.01(d)(3).

If you prefer that we present this issue in a formal motion, please let us know. But the Applicant should not be permitted to recast the entire nature of its motion, and then hold us to a standard it never presented.

Sincerely,

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Of Attorneys for Appellant Save Madison Valley

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