

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeals of  
**SAVE MADISON VALLEY**

Hearing Examiner Files:  
**MUP-18-020 (DR, W) &  
S-18-011**

from approval of a land use application and a land  
use interpretation issued by the Director, Seattle  
Department of Construction and Inspections

**ORDER ON  
MOTION TO DISMISS**

Applicant TVC Madison Co. LLC (“Velmeir’s”) moves for partial summary judgment, claiming that some of the issues brought by Appellant Save Madison Valley’s (“SMV”) in this appeal are outside of the Hearing Examiner’s jurisdiction. Respondent Director of the Department of Construction and Inspections (“Department”) joined Velmeir’s motion. SMV filed an opposition brief, and Velmeir filed a reply brief.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated. Having considered the evidence in the record, the Deputy Hearing Examiner (“Examiner”) enters the following order.

Background

Appellants challenge the Master Use Permit (“MUP”) Decision and Code Interpretation issued by the Department approving Velmeir’s mixed use development of a grocery store, townhomes, and residential apartment units. The project is located in the Madison Valley neighborhood.

The MUP Decision included: (1) design review conditions, based on a design review process pursuant to Chapter 23.41 SMC; and (2) environmental conditions, pursuant to review under the State Environmental Policy Act (“SEPA”). The Code Interpretation resolved three issues with respect to code compliance: 1) Whether the project meets the requirements of SMC 25.09.180.B.2 for relief from prohibition of development on steep slope critical areas; 2) Whether the development proposal complies with pertinent sections of Chapter 25.09 SMC regarding removal of trees and other vegetation from the site; and 3) Whether the average grade level of existing lot grades was properly calculated under SMC 23.86.006.A.2.

Velmeir moves to dismiss Issues 1(d) and 1(e) related to State Environmental Policy Act (“SEPA”) compliance, and Issues 2(a), 2(b), 2(c), 2(d), 2(e), and 2 (f), all pertaining to design review. It also moves to dismiss Issue 3(c) which deals with height calculation, and Issue 4(a), related to tree removal restrictions. Because the issues raised by Velmeir are primarily issues of law, a motion to dismiss is an appropriate vehicle to challenge these claims.

Standard of Review

Quasi-judicial bodies, like the Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Velmeir filed a motion to dismiss pursuant to Hearing Examiner Rules of Practice and Procedure (“HERs”) 3.02 and CR 12(b)(6), which permits a defendant to file a motion to dismiss for “failure to state a claim upon which relief can be granted.” A motion to dismiss is made on the pleadings and dismissal is based upon only the legal pleadings filed in the case.

### Analysis

Each of these four groupings of issues are analyzed below.

#### 1. Should Issue 1 (d) and (e) be dismissed? (SEPA Issues)

Issue 1(d) states: *SMC 25.05.675.G violates SEPA as applied to this proposal. When combined with the reality of the Design Review process, the provision created an impossible burden on the public that is inconsistent with the intent and requirements of SEPA.*

Issue (e) states: *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.*

Issue 1(d): Velmeir argues that (1)(d) should be dismissed because it presents a collateral attack on an adopted code provision and is not a Type II decision or code interpretation that falls within the Hearing Examiner’s jurisdiction.

SMV argues that SMC 25.05.675.G violates SEPA, both facially and as applied. SMV argues that the presumption of the validity of a project approved under the design review process in SMC 25.05.675.G.2.c is in conflict with the duty of the responsible official under WAC 197-11-158(2)(b)(i) & (ii).

Velmeir is correct in arguing that the Examiner has no jurisdiction under the Code to determine whether SMC 25.05.675.G conflicts with SEPA. The Examiner’s task is to review this decision under the legislative framework adopted by the Seattle City Council. There is no delegation of authority by code for the Examiner to determine whether a code conflicts with state law. While that issue may be addressed by a court reviewing this decision, it cannot be addressed in this forum.

Velmeir’s challenge to Issue 1(d) is **GRANTED**. The Examiner will **DISMISS** Issue 1(d), noting that if this matter is appealed to the Superior Court, the SMV has preserved its challenge.

Issue 1(e): Velmeir argues that Issue 1(e) should be dismissed because the Department’s exercise of substantive SEPA authority is discretionary. SMV points out that SMC 23.76.022.C.6 specifically provides:

Scope of Review. Appeals shall be considered de novo. 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 requests for an interpretation included in the appeal or consolidated appeal pursuant to Section 23.88.020.C.3.

(Emphasis added). Velmeir misinterprets the Findings and Decision in *Escala Owners Association*, MUP 17-035 (DR, W) (May 2, 2018). There the Examiner noted that the Director's substantive authority to condition or deny is discretionary and concluded that the authority was properly exercised. *See id* at p.17, para. 14. Obviously in making that conclusion, the Examiner reviewed the exercise of substantive authority.

The Examiner possesses jurisdiction to review the Director's decision to place, or not place, conditions on a permit decision pursuant to SEPA. Velmeir's challenge to Issue 1(e) is DENIED.

2. Should Issues 2(a), 2(b), 2(c), 2(d), 2(e), and 2 (f) be dismissed? (Design Review Issues)

Issue 2: *The Recommendation of the Design Review Board and the Director's Decision to approve that Recommendation were made in error and should be reversed for the following reasons:*

- a. *The Design Review process violated SEPA regulatory and case law requirements that disclosure and analysis of environmental impacts must occur before a decision maker commits to a particular course of action. SEPA review must inform decision makers and the public of environmental impacts before decisions are made. In direct violation of the law, the Design Review Board's decisions were not informed by SEPA. The Design Review Board issued its Final Recommendation at its September 13, 2017 meeting, before SEPA review had been completed. The Design Review Board improperly made decisions that locked in the design during the Design Review process before SEPA review was conducted. The Board's recommendation unlawfully built momentum in favor of the facility without the benefit of environmental review in violation of SEPA. The Design Board's action also improperly limited the choice of alternatives before SEPA review was conducted. To the extent that the Seattle code requires this, we challenge the legality of those provisions as applied to this case.*
- b. *The East Madison Street Proposal is inconsistent with the Citywide Design Guideliens 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, 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.*

- c. The Proposal is inconsistent with the Design Review Board's direction and requirements. The project should not have been approved because, to a significant degree, the 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. The Board had expressed multiple concerns, which are outlined in the attached MUP Decision, that were not ultimately adequately addressed by the applicant.*
- d. The Design Review Board decisions were made in error and were not fully informed because the Design Review process did not allow for meaningful public participation as was described in detail in the comment letters submitted on behalf of SMV by its representative. The Design Review Board did not review the written public comments that were submitted regarding design review issues.*
- e. The Design Review Board decisions were made in error because they were not informed by environmental review as is required by SEPA. As a matter of law, design review decisions should not have been made until after the SEPA process was completed. To the extent that SDCI argues that the Seattle code required the process that was followed in this case, this appeal challenges the relevant code provisions as they were applied.*
- f. SDCI erred when it approved the Design Review Board recommendation because the recommendation conflicted with conditions and mitigation that should have been applied by SDCI pursuant to SEPA and because the recommendation itself violated SEPA.*

Velmeir argues that Issues 2(a), 2(c), 2(d), 2(e), and 2 (f) must all be dismissed because they are not administratively appealable decisions. SMV, Velmeir argues, is improperly attempting to challenge the Design Review Board's process, when the only challenge that may be brought is to the Director's decision.

As Velmeir points out, the Design Review Board (DRB) is a recommending body, not a decisionmaker. SMC 23.41.008.F states:

F. Design Review Board recommendation

- 1. The Design Review Board shall determine whether the proposed design submitted by the applicant complies with the guideline priorities. The Board shall recommend to the Director whether to approve or conditionally approve the proposed project based on compliance with the guideline priorities, and whether to approve,

- condition, or deny any requested departures from development standards.
2. The Director shall consider the recommendations of the Design Review Board when deciding whether to approve an application for a Master Use Permit.
  3. If four or more members of the Design Review Board agree in their recommendation to the Director, and if the Director otherwise approves a Master Use Permit application, the Director shall make compliance with the recommendation of the Design Review Board a condition of permit approval, unless the Director concludes that the recommendation of the Design Review Board:
    - a. Reflects inconsistent application of the design review guidelines;
    - b. Exceeds the authority of the Design Review Board;
    - c. Conflicts with SEPA conditions or other regulatory requirements applicable to the project; or
    - d. Conflicts with requirements of local, state, or federal law.

(Emphasis added). As can be clearly discerned from the underlined text above, the DRB only possesses authority to recommend, and the Director is only required to consider the DRB's recommendation in imposing design review conditions on the applicant. The Director is even given guidelines for review of the Board's decision in the instance where there are four or more members in agreement.

The Examiner is tasked with reviewing the Director's decision, not the DRB recommendation. The Director makes a judgment on design review conditions which may be appealed to the Examiner. *See* SMC 23.76.006.C.2.e. As the Examiner possesses only that jurisdiction expressly delegated by code, there can be no assumption of jurisdiction over the DRB recommendation process where there is none stated in the Code. *See Chausee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

With that context in mind, Issues 2(a), 2(c), 2(d), and 2 (e) all attack the DRB's process and recommendation. As indicated above, the Examiner has no jurisdiction over those matters. The jurisdiction of the Examiner is solely over the Type II Decision and the matters addressed in SMC 23.76.006.C. The scope of the review of an appeal is clearly elucidated in SMC 23.76.022.C.7.

Velmeir requests summary dismissal of Issue 2(b) on the grounds that, as written, it "does not give Velmeir the fair notice that is required by Washington law." *Applicant's Motion to Dismiss* at 8, lines 1-4 (October 19, 2018). SMV provided clarification of this issue as ordered by the Examiner in the Order on Motion for Clarification by identifying each guideline it claims the proposal violates. SMV has met the bare minimum requirements of notice pleading; Velmeir's motion for summary dismissal of Issue 2(b) is DENIED.

As indicated from the discussion above regarding the appeal of the DRB process and recommendation as beyond the Examiner's jurisdiction, Issue 2(b) is only partially beyond the scope of the Examiner's jurisdiction. Below is a strikethrough version of the that issue that comports with matters within the Examiner's jurisdiction:

- b. 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, 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.~~

Issue 2(f) is also only partially within the jurisdiction of the Examiner. Below is an edited version of the issue that comports with matters within the Examiner's jurisdiction:

- f. SDCI erred when it approved the Design Review Board recommendation in the Decision because the recommendation conflicted with conditions and mitigation that should have been applied by SDCI pursuant to SEPA ~~and because the recommendation itself violated SEPA.~~

Finally, the preamble to Issue 2 must also be amended in accordance with the jurisdiction of the Examiner to read:

~~The Recommendation of the Design Review Board and the Director's Decision to approve that~~ the Design Review Board's Recommendation ~~were~~ was made in error and should be reversed for the following reasons:

The Appellant will be ordered to limit its presentation on Issues 2(b) and 2(f) to the above issues as amended. Venmeir's motion is GRANTED in part and DENIED in part. The Examiner will DISMISS Issues 2(a), 2(c), 2(d), and 2(e) and will partially DISMISS Issues 2(b) and 2(f) as indicated above.

3. Should Issue 3(c) be dismissed? (Height Restrictions)

Issue 3(c) states: *The Director's construction and application of SMC 23.86.005.A.2 was made in error. That section should be construed as outlined in detail in the Request for Land Use Code Interpretation as submitted by Claudia Newman on May 23, 2018. That Request is attached and incorporated into this appeal. In this case, the applicant's methodology is inconsistent with the spirit and intent of the code provision. Velmeir used the presence of the slope to its advantage to get extra height and then proposed to remove the slope completely. The structure does not "respond" to the topography of*

*the lot, it exploits the topography to its advantage to gain extra square footage and then removes the slope entirely so that the building ends up being built at a height that exceeds the appropriate height for the zone.*

Velmeir argues that both SMC 23.86.006.A.2 and Director's Rule 4-2012 provide the applicant with the discretion to select between the allowed height calculation methodologies, and this was correctly explained in Code Interpretation 17-004.

SMV's argument tracks the paragraph quoted above (Issue 3(c)) and characterizes it as both a code interpretation issue and a SEPA issue (already preserved in Issue 1 and not challenged by Velmeir). Therefore, this order will only deal with Issue 3(c), which challenges the code interpretation.

The code provision allows the applicant to modify the calculation of structure height in the manner opted by Velmeir "to permit the structure to respond to the topography of the lot." SMV argues that the result is a building that does not "respond to the topography of the lot" and therefore the Code Interpretation incorrectly allowed Velmeir to use the optional methodology for calculating height.

The language in the code does not mandate that the structure must respond to the topography of the lot. It is instead expressly permissive. While it introduces a desired outcome for calculating height restrictions, it does not require the Applicant to demonstrate that usage of the methodology allows the proposal to "respond to the topography of the lot."

Velmeir's challenge to Issue 3(c) is **GRANTED**. The Examiner will **DISMISS** Issue 3(c).

#### 4. Should Issue 4(a) be dismissed? (Tree Protection)

Issue 4(a) states: *The East Madison 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.*

Velmeir argues that Issue 4(a) must be dismissed, because the code does not provide an avenue for appeal of decisions under SMC Chapter 25.11. SMV argues that the Hearing Examiner does have jurisdiction under SMC Chapter 23.76.022.C.6, which is quoted above, in that it references "substantive criteria".

Although the language could be clearer, the phrase "substantive criteria" appears to relate only to Type II decisions, which is also referenced in the same sentence. This grant of jurisdiction does not provide broad authority to allow for Examiner review of virtually any section of the code

containing substantive criteria related to development. The review of tree protection under SMC Chapter 25.11 also does not occur through appeal of the “Correction Letter” submitted by Velmeir in its motion materials, nor is it a permissible topic for land use interpretations. SMC 23.

It may be relevant to the Director’s decision on design review. The Department, in one of its “Tip” Sheets (Tip Sheet 242), indicates that SMC Chapter 23.41 is part of the regulatory framework for tree protection. The issue of tree protection was discussed by the DRB and a recommendation was made to the Director, which was in turn adopted as part of the Director’s Decision:

2. **Trees and Replacement Canopy:** The Board discussed the removal of trees and recognized the public’s concern for the loss of the significant mature planting, however, the Board continued to support a replacement landscape buffer. For the buffer, the Board approved the proposed design which showed evergreen trees and planting designed to provide year-round buffer. (CS-D-1, CS2-B, DC3-C, DC3-D)

The Director adopted the recommendations of the DRB, so “the full substance of the recommendation”<sup>1</sup> is assumed to be part of the Director’s Decision. In addition, SMV has appealed this issue as a part of its DNS appeal in Issue 1, as SMV has detailed in its response brief.

Whether review of the conditions imposed through design review and SEPA relate specifically to compliance with SMC Chapter 25.11 is another layer beyond this analysis. The Seattle Municipal Code is designed specifically to limit appeals of some administrative decisions and it may very well be that there is no administrative appeal of decisions made under the tree protection ordinance. The Examiner therefore will reserve ruling on dismissal of Issue 4(a) and direct the parties to introduce evidence at hearing to either demonstrate a linkage of the requirements of the SMC Chapter 25.11, or a lack thereof, to the Director’s Decision.

### Order

Velmeir’s motion to dismiss is **GRANTED** in part and **DENIED** in part.

1. The following issues brought by Save Madison Valley are **DISMISSED** in their entirety: (1)(d), (2)(a), (2)(c), (2)(d), (2)(e), and 3(c).

2. The following issues brought by Save Madison Valley are **DISMISSED** in part and will read as follows:

Issue 2: ~~The Recommendation of the Design Review Board and the Director’s Decision to approve that the Design Review Board’s Recommendation~~ ~~werewas~~ made in error and should be reversed for the following reasons:

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<sup>1</sup> Under SMC 23.41.014.F, when four members of the DRB are in agreement on the recommendation, the Director is required to issue a decision “which incorporates the full substance of the recommendation of the Design Review Board,” unless he or she makes specified findings otherwise (as detailed in the code).

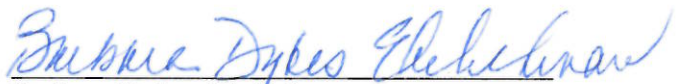


- b. The East Madison Street Proposal is inconsistent with the Citywide Design Guidelines CS1-B2, CS1-B3, CS1-C1, CS1-C2, CS1-D1, CS1-D2, CS1-E2, CS2-A1, CS2-A2, CS2-B1, CS2-B2, CS2-B3, CS2-D1, CS2-D2, CS2-D3, CS2-D4, CS2-D5, CS3-A1, CS3-A3, PL1-A1, PL1-A2, DC1-B1, DC1-C4, DC2-A1, DC2-A2, DC2-C3, DC3-B3, 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.
- f. SDCI erred when it approved the Design Review Board recommendation in the Decision because the recommendation conflicted with conditions and mitigation that should have been applied by SDCI pursuant to SEPA ~~and because the recommendation itself violated SEPA.~~

SMV is instructed to limit its presentation at hearing on these issues accordingly.

3. The Examiner reserves ruling on the Motion to Dismiss with respect to Issue 4(a) and directs the parties to introduce evidence at hearing to either demonstrate a linkage of the requirements of the SMC Chapter 25.11, or a lack thereof, to the Director's Decision. SMV must demonstrate that linkage by a preponderance of the evidence, or Issue 4(a) will be dismissed.

Entered this 19<sup>th</sup> day of November, 2018.



Barbara Dykes Ehrlichman  
Deputy Hearing Examiner  
Office of Hearing Examiner  
P.O. Box 94729  
Seattle, Washington 98124-4729  
Phone: (206) 684-0521  
FAX: (206) 684-0536


**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss and Order on Motion to Strike** to each person listed below, or on the attached mailing list, in the matters of **Save Madison Valley**. Hearing Examiner Files: **MUP-18-020 (DR, W) & S-18-011** in the manner indicated.

<b>Party</b>	<b>Method of Service</b>
<b>Appellant Legal Counsel</b> Claudia Newman newman@bnd-law.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
<b>Applicant Legal Counsel</b> Jeremy Eckert jeremy.eckert@foster.com  Patrick Mullaney patrick.mullaney@foster.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
<b>Department</b> Magda Hogness SDCI magda.hogness@seattle.gov  William Mills SDCI william.mills@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: November 19, 2018

  
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 Alayna Johnson  
 Legal Assistant