

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:

DAVID MOEHRING

from a decision issued by the Director, Seattle
Department of Construction and Inspections.

Hearing Examiner File:
MUP-18-0022

Department Reference:
3029611-LU

APPLICANT AND OWNER'S
AMENDED MOTION TO DISMISS
LAND USE APPEAL AND FOR
SUMMARY JUDGMENT

COMES NOW the applicant, Julian Weber, and the property owner, Isola Real Estate VII LLC, by and through their undersigned attorneys, Brandon S. Gribben and Samuel M. Jacobs of Helsell Fetterman LLP, and moves the Hearing Examiner to dismiss this land use appeal with prejudice and for summary judgment.

I. INTRODUCTION AND RELIEF REQUESTED

This matter concerns a land use appeal of the Seattle Department of Construction and Inspections ("SDCI") Director's Determination of Non-Significance (the "Decision"¹) for the proposed development of a 6-unit and 3-unit rowhouse project on a 7,000 square foot parcel of property, under SDCI Project No. 3029611-LU (the "Project"). The Project is located at 2300 West Emerson Street in the Magnolia neighborhood of Seattle (the "Premises"). The Decision determined that the Project would not have a probable

¹ The Decision is attached as Exhibit A.

1 significant adverse impact upon the environment, determining that no Environmental Impact
2 Statement (“EIS”) would be required under the State Environmental Policy Act (“SEPA”)
3 for the Project. The Decision imposed no conditions under SEPA.

4 David Moehring, on behalf of himself and “with and for” Bonnie McDonald and
5 Richard Brownfield, (“Moehring”) filed an “Appeal to the Determination of Non-
6 Significance for the development of 2300 W Emerson Street and discretionary decision at
7 and EIS is not required under RCW 43.21.030(2)(c)” (the “Appeal”²). The issues raised by
8 Moehring on appeal are without merit on their face and are woefully insufficient to refute
9 the Decision. In addition, there are no issues of material fact that would preclude an award
10 of summary judgment. For these reasons, the Appeal must be dismissed in its entirety. In
11 addition to these substantive deficiencies, Moehring has failed to set forth facts that,
12 assuming *arguendo* are true, satisfy the high burden that would authorize the Hearing
13 Examiner to require an EIS – which is the sole relief sought by Moehring. Because the
14 Appeal has set forth facts that do not support the relief requested, the Appeal must be
15 dismissed for this reason as well.

16 II. STATEMENT OF FACTS

17 The Premises is located in the Magnolia neighborhood of Seattle and is zoned
18 Lowrise 1 (LR 1). Because of the size of the Project, it is subject to SEPA review under
19 SMC Chapter 25.05 et seq. On January 19, 2018, the Applicant submitted a SEPA
20 environmental checklist containing information about the potential impacts of the Project.
21 SDCI later annotated the SEPA checklist. The Project then went through a period of public
22 comments. After the public comment period and review by SDCI and other City
23 departments, the SDCI Director issued the Decision on September 13, 2017. The Decision
24 contained a Determination of Non-Significance, finding that the Project would not have

25 _____
² The Appeal is attached as Exhibit B.

1 significant adverse impacts upon the environment, and that an EIS was not required. The
2 Decision imposed no conditions on the Project. On September 26, 2018, Moehring filed the
3 Appeal.

4 **III. STATEMENT OF ISSUES**

- 5 1. Should the Appeal be dismissed where it is meritless on its face? **Yes.**
- 6 2. Should the Applicant be awarded summary judgment where there are no
7 issues of material fact and the Applicant is entitled to judgment as a matter of law? **Yes.**
- 8 3. Should the Appeal be dismissed where, assuming *arguendo* that Moehring's
9 objections to the Decision are true, they are insufficient to require an EIS – the sole relief
10 requested – because the facts alleged are insufficient to support such a drastic remedy? **Yes.**

11 **IV. EVIDENCE RELIED UPON**

12 This motion is based upon the Decision, the Appeal, the file in this matter, and the
13 exhibits attached hereto.

14 **V. AUTHORITY**

15 **A. Standard for Motion to Dismiss.**

16 Under Hearing Examiner Rules of Practice and Procedure (“HER”) 3.02(a), the
17 Hearing Examiner has authority to dismiss the Appeal “if the Hearing Examiner
18 determinates that it...is without merit on its face...” The objections raised by Moehring,
19 which will be discussed in turn below, are without merit on their face and should be
20 dismissed.

21 **B. Standard for Summary Judgment.**

22 HER 2.16 authorizes other dispositive motions including motions for summary
23 judgment. “The object and function of summary judgment procedure is to avoid a useless
24 trial.” *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgment
25 is properly granted “if the pleadings, affidavits, depositions or admissions on file show that

1 there is no genuine issue as to any material fact, and that the moving party is entitled to
2 judgment as a matter of law.” *Balise*, 62 Wn.2d at 199; see *Capitol Hill Methodist Church of*
3 *Seattle v. City of Seattle*, 52 Wn.2d 359, 362, 324 P.2d 1113 (1958); CR 56(c). In ruling on a
4 summary judgment motion, it is the duty of the trial court to consider all evidence and all
5 reasonable inferences therefrom in the light most favorable to the nonmoving party. *Reed v.*
6 *Davis*, 65 Wn.2d 700, 705, 399 P.2d 338 (1965). If, from this evidence, reasonable people
7 could reach only one conclusion, the motion should be granted. *Wood v. City of Seattle*, 57
8 Wn.2d 469, 471, 358 P.2d 140 (1960).

9 A defendant who moves for summary judgment meets its initial burden and
10 summary judgment is appropriate where the defendant has demonstrated that an essential
11 element of the plaintiff’s claim has not been established. *Howell v. Spokane & Inland*
12 *Empire Blood Bank*, 117 Wn.2d 619, 624-25, 818 P.2d 1056 (1991). The burden then shifts
13 to the nonmoving party to set forth specific facts to demonstrate the existence of a material
14 issue of fact sufficiently rebut the moving party’s contentions. *Young v. Key Pharm., Inc.*,
15 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In her response, “the nonmoving party cannot
16 rely on the allegations made in its pleadings.” 112 Wn.2d at 226. “The nonmoving party
17 may not rely on speculation or argumentative *Young* assertions that unresolved factual issues
18 remain.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).
19 Rather, the nonmoving party’s response “by affidavits or as otherwise provided in this rule,
20 must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e). If the
21 plaintiff “fails to make a showing sufficient to establish the existence of an element essential
22 to that party’s case, and on which that party will bear the burden of proof at trial,” then the
23 trial court should grant the motion. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v.*
24 *Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Because there are no
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1 issues of material fact, the Examiner should award the Applicant summary judgment and
2 dismiss the Appeal.

3 **C. The Decision correctly concludes that the Project will not have a significant**
4 **adverse impact upon the environment.**

5 Only Projects that will have a significant adverse impact on the environment are
6 required to perform an EIS under RCW 43.21C.030(2)(c). Because SDCI correctly
7 concluded that the Project will not have a significant adverse impact upon the environment,
8 an EIS was not required. Moehring argues in his Appeal that the Applicant did not
9 adequately disclose the environmental impacts in the SEPA Environmental Checklist,³
10 which deprived SDCI from adequately determining the Project's impacts and, therefore,
11 SDCI should have required an EIS. For the reasons discussed below, SDCI had more than
12 sufficient information to analyze the Project's potential environmental impacts, Moehring's
13 objections are without merit on their face, and the Appeal should be dismissed.

14 Moehring alleges that there are 11 specific disclosures in the SEPA Environmental
15 Checklist that are inadequate. They are addressed in turn below.

16 1. SEPA Environmental Checklist Item #1.

17 The Appeal alleges that the Applicant's response to checklist question B.1.b (What is
18 the steepest slope on the site (approximate percent slope?)) is insufficient because it does not
19 address the slope of the rockery, which is primarily located on the right-of-way. As an
20 initial matter, the checklist requires information related to the Premises, not the abutting
21 right-of-way. Second, the response specifically addresses the rockery and states that:
22 "Barring areas retained by rockery, and excluding existing site stairs, 22%."

23 The purpose of this question is to determine the natural geographic features of the
24 Premises, not manmade features. Even if the checklist required disclosure of man-made

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³ The annotated SEPA Environmental Checklist is attached as Exhibit C.

1 features on the site and in the adjoining right-of-way, that information was disclosed to
2 SDCI during the permitting process and was considered by SDCI when it issued the
3 Decision.

4 SMC 25.05.330 – Threshold determination process – states that:

5 An EIS is required for proposals for legislation and other major actions
6 significantly affecting the quality of the environment. The lead agency
7 decides whether an EIS is required in the threshold determination process, as
8 described below.

9 A. In making a threshold determination, the responsible official shall:

10 1. Review the environmental checklist, if used:

11 a. Independently evaluating the responses of any applicant and indicating the

12 result of its evaluation in the DS, in the DNS, or on the checklist, and

13 b. Conducting its initial review of the environmental checklist and any
14 supporting documents without requiring additional information from the
15 applicant;

16 A preliminary assessment site visit (“PASV”) was required for this Project and an SDCI
17 representative visited the Premises. Photographs of the Premises were also uploaded to
18 SDCI’s permitting website.⁴ The photographs clearly disclose the rockery and steps. Thus,
19 the information was adequately disclosed to SDCI and considered by the Director when the
20 Decision was issued.

21 2. SEPA Environmental Checklist Item #2.

22 Next, Moehring argues that the Applicant’s response to checklist question B.1.d (Are
23 there surface indications or history of unstable soils in the immediate vicinity?) is deficient
24 because the Applicant responded “none.” Despite Moehring’s allegations to the contrary,
25 there is no history of landslides or unstable areas in the immediate vicinity. This is
confirmed by Dean Griswold, SDCI’s geotechnical reviewer for the Project, and the Land
Use Report for the Premises.⁵ Mr. Griswold and the Land Use Report confirm that the
Premises is not in a potential slide area and there have not been any known slide events.

⁴ Photographs of the Premises along with the PSV request is attached as Exhibit D.

⁵ The Land Use Report is attached as Exhibit E.

1 This is also supported by Moehring's own Appeal. The SDCI document linked to in the
2 Appeal further supports the lack of a known slide event in the area.⁶ There is a complete
3 absence of a known slide event in or immediately near the Premises.

4 3. SEPA Environmental Checklist Item #3.

5 In response to checklist question B.1.g (About what percent of the site will be
6 covered with impervious surfaces after project construction (for example, asphalt of
7 buildings)?), the Applicant disclosed in the SEPA Environmental Checklist that the
8 Premises will be covered in approximately 55% of impervious surfaces. The Applicant also
9 disclosed that he was working with the civil engineer to confirm the pavement permeability,
10 which could result in less than 55% of impervious surfaces.

11 Moehring identifies that the building footprint and parking spaces will result in
12 approximately 3,700 square feet of imperious surface, which is less than the 55% disclosed
13 by the Applicant. There will be a separate drainage and grading review that will take place
14 during the building permit review process. During this phase, SDCI will confirm that the
15 Project drainage complies with the applicable ordinances. The purpose of the SEPA
16 Environmental Checklist is to disclose potential environmental impacts, not to disclose the
17 specific type of materials that will be used during the construction of the Project.

18 4. SEPA Environmental Checklist Item #4.

19 In response to checklist question B.4.b (What kind and amount of vegetation will be
20 removed or altered?), the Applicant responded that one tree will be removed along with
21 shrubs and grass to be disturbed during construction with planting replacement to be
22 coordinated with the landscape architect. Moehring argues that the Project will likely result
23 in the loss of more than one tree. In support of this argument, he relies on sheet A 1.0 of the
24 Applicant's plan set. Regardless of the number of trees that will ultimately be removed, the

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⁶ The City of Seattle Landslide Prone Areas (along with a close up of the Premises) is attached as Exhibit F.

1 potential impacts of the Project were disclosed. It is undisputed that SDCI: (a) visited the
2 Premises and saw the number and type of trees; (b) received an arborist report identifying
3 the type and location of the trees; (c) issued a correction notice⁷ requesting identification of
4 the trees in the right-of-way and asking the arborist to consult with SDOT Forestry
5 regarding the right-of way trees; and (d) received a response to its correction notice⁸
6 addressing each of the items raised by SDCI. So, SDCI had extensive information about the
7 Project and its potential impact on the trees located on the Premises and in the abutting
8 right-of-way.

9 SEPA is concerned with the Project's potential environmental impacts. The
10 Decision does not authorize the Applicant to remove any trees. SMC Chapter 25.11, the
11 Tree Protection Ordinance, governs the protection of trees on development sites and
12 prescribes the circumstances under which trees may be removed. Furthermore, SMC Title
13 15 governs the removal of trees in the right-of-way that SDOT has authority over. The only
14 question before the Examiner is whether the potential environmental impacts were
15 disclosed, which they were.

16 5. SEPA Environmental Checklist Item #5.

17 The Applicant responded to checklist question B.8.a (What is the current use of the
18 site and adjacent properties? Will the proposal affect current land uses on nearby or
19 adjacent properties?) by answering that the "current use is multi-family residence, adjacent
20 properties are multi-family residential." Moehring argues that the adjacent properties are
21 zoned SF 5000 and that the height bulk and scale of the development must be considered
22 within an EIS.

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25 ⁷ A copy of the SDCI correction notice is attached as Exhibit G.

⁸ A copy of the Applicant's correction response is attached as Exhibit H.

1 As an initial matter, there is no basis for requiring an EIS because an LR1 zone abuts
2 a SF 5000 zone. That is quite common. Second, SDCI was well aware that the Premises
3 abutted a SF 5000 zone when it issued the Decision. In fact, the first page of the Decision
4 describes the vicinity zoning as having SF 5000 to the south and to the west of the Premises.

5 6. SEPA Environmental Checklist Item #6.

6 In response to checklist question B.8.h (Has any part of the site been classified as a
7 critical area by the city of county?), the Applicant disclosed that there was a tiny portion of
8 steep slope in the northeast section of the Premises. SDCI then provided an annotation to
9 the checklist clarifying that the Premises is not mapped as a steep slope. Moehring argues
10 that SDCI's annotation that the Premises is not mapped as a steep slope undermines the
11 requirement to disclose steep slopes. This is not correct. SDCI's determination that there is
12 not a steep slope on the Premises is based upon site specific information. The Land Use
13 Report,⁹ which is generated based upon the City's most up to date information, concludes
14 that there is not a steep slope on the Premises. This fact is confirmed by SDCI's
15 geotechnical expert, Dean Griswold.

16 Mr. Griswold also reviewed the surveyor's topographical survey and concluded that
17 the Premises did not contain at least 10 feet of elevation difference with slopes averaging 40
18 percent or steeper.¹⁰ Even if there was a steep slope on the Premises, which there is not, that
19 (mistaken) fact was disclosed by the Applicant to SDCI.

20 7. SEPA Environmental Checklist Item #7.

21 The Applicant responded "none" in response to checklist question B.10.b (What
22 views in the immediate vicinity would be altered or obstructed?). Moehring objects to this
23 response on the basis that the Project will obstruct private views. SDCI, however, is not
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25 ⁹ See Ex. E.

¹⁰ A copy of an email from Mr. Griswold to Ms. King confirming the lack of a steep slope on the Premises is attached as Exhibit I; a copy of the topographic survey is attached as Exhibit J.

1 concerned with, and does not have jurisdiction over, unprotected views of neighboring
2 property owners; SDCI is concerned with, and has jurisdiction over, SEPA view corridors.
3 The Land Use Report confirms that there are not any SEPA scenic routes within 100 feet of
4 the Premises.¹¹ SMC 25.05.675.P specifically identifies “Public View Protection” as one of
5 the environmental impacts to be considered under SEPA. Even if SDCI was concerned with
6 impacts to the views of private property owners, these impacts were disclosed in the
7 Applicant’s plan set, which details the height, bulk and scale of the Project. If Moehring is
8 able to discern the potential impacts to the neighboring property owners’ views, then so is
9 SDCI.

10 8. SEPA Environmental Checklist Item #8.

11 The Applicant responded “none” to checklist question B.10.c (Proposed measures to
12 reduce or control aesthetic impacts, if any?). Moehring objects to this disclosure on the
13 basis that it ignores the fact that private views of property owners in the vicinity might be
14 impacted. Again, the Applicant has no duty to mitigate for its Projects’ potential impacts to
15 its neighbors’ unprotected views.

16 9. SEPA Environmental Checklist Item #9.

17 In response to checklist question B.15.a (Would the project result in an increased
18 need for public services (for example: fire protection, police protection, public transit, health
19 care, schools, other)?), the Applicant stated that there was a potential 12 person increase to
20 all public services, but unlikely any increase in actual demand. Moehring objects that this
21 disclosure is inadequate and suggests that there will be an increase of 24 persons as a result
22 of the Project. SDCI was aware of the size and number of units and, therefore, was well
23 aware of the potential range of new residents and their potential impacts on public services.

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¹¹ A map detailing the SEPA Scenic Routes within 100 feet of the Premises is attached as Exhibit K.

10. SEPA Environmental Checklist Item #10.

The Applicant responded “none” to checklist question B.15.b (Proposed measures to reduce or control direct impacts on public services, if any). For the reasons discussed in item number 9 above, Moehring’s objection to this response is unavailing.

11. SEPA Environmental Checklist Item #11.

Finally, Moehring claims that the checklist is incomplete because the Applicant did not complete pages 32 – 36. These pages are the supplemental sheet for non-project actions. Because this is not a non-project action, the Applicant was not required to complete pages 32 through 36.

D. The Applicant’s plan sets are complete and accurate. Regardless, they do not have a bearing on the DNS and whether an EIS should be required for the Project.

Moehring argues, without any evidence, that “there is no room for the new building foundations to clear the existing right of way (ROW) designated tree root protection areas.”¹² As an initial matter, SDOT has jurisdiction over the trees in the right-of-way, not SDCI. More to the point, tree protection will be addressed during the review of the construction permit under SMC Chapter 25.11 – the Tree Protection Ordinance.

Next, Moehring claims that a SEPA evaluation was not conducted to determine if protection of the trees is possible. This is the province of the construction permit review process, not a SEPA environmental determination. The purpose of SEPA is to disclose potential environmental impacts to determine if the City’s regulation is sufficient to address them. The SEPA Overview Policy – SMC 25.05.665.D – states that: “Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation...” The Tree Protection Ordinance – SMC 25.11 – specifically addresses the retention and protection of trees on the

¹² Appeal, 6:19-20.

1 Premises. SMC 25.11 acknowledges that the removal of street trees are governed by Title
2 15 of the SMC.¹³ Moehring has failed to allege, much less demonstrate, that the existing
3 tree protections under SMC Chapter 25.11 and SMC Title 15 are inadequate and that
4 additional restrictions should be applied to the Project.

5 **E. SDCI adequately considered the potential impacts from removing trees and the**
6 **potential impacts on the Premises.**

7 Moehring claims that the DNS is insufficient because SDCI did not consider any
8 reports concerning the removal of trees and the potential impacts that might have on the
9 Premises. This, too, is incorrect. As discussed above, the Premises is *not* located on a steep
10 slope, nor have there been any recent landslides in the immediate vicinity. In addition to
11 these lack of risk factors, the Applicant provided SDCI with the plan sets, a geotechnical
12 report,¹⁴ and an arborist report.¹⁵ Thus, all of the issues raised by Moehring were disclosed
13 to, and considered by, SDCI.

14 **F. The arborist report is sufficient and adequately discloses the number and type**
15 **of trees on the Premises and abutting right-of way.**

16 Moehring concludes his Appeal by denigrating the fact that the arborist is from
17 Bothell, claiming that he is not qualified to evaluate trees, and alleging that he provided
18 unreliable information to SDCI. In support of these specious allegations, Moehring points to
19 the lack of photographs included in the arborist report yet, tellingly, does not reference any
20 requirement that photographs be included. As discussed above, SDCI has performed a
21 preliminary assessment site visit and has numerous photographs of the property. The
22 Decision does not authorize the removal of any trees, much less exceptional trees. SMC
23 Chapter 25.11 governs tree protection and prescribes the circumstances under which trees
24 may be removed. The Tree Protection Ordinance will be applied to the Project during the

25 ¹³ See SMC 25.11.030.G

¹⁴ The geotechnical report is attached as Exhibit L.

¹⁵ The arborist report is attached as Exhibit M.

1 review of the construction permit. Moehring goes on to argue that the arborist failed to
2 recognize the impact of tree removal in the steep slope right-of-way, but, again, the Premises
3 is not located on a steep slope. And Moehring fails to allege that the tree protection
4 measures under Chapter 25.11 are insufficient.

5 **G. Moehring fails to demonstrate that the Director had insufficient information to**
6 **evaluate the Project's potential environmental impacts.**

7 To meet the high burden of proof under SEPA, Moehring must present evidence of
8 the Project's probable significant adverse environmental impacts. *Boehm v. City of*
9 *Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002); *Moss v. City of Bellingham*, 109
10 Wn. App. 6, 23, 31 P.3d 703 (2001). "Significance" is defined as a "reasonable likelihood
11 of more than a moderate adverse impact on environmental quality." WAC 197-11-794.

12 In the *Matter of the Appeal of 7300 Woodlawn Ave NE Condominium Homeowners*
13 *Association et al.*, MUP 17-002, Examiner Vancil held that a determination of non-
14 significance was appropriate for a six-story, mixed-use building with commercial space and
15 45 residential units.¹⁶ In affirming the Director's Decision and determination of non-
16 significance, Examiner Vancil held that:

17 The burden of proving the inadequacy of a threshold determination is
18 high...This burden is not met when an appellant only argues that they have
19 concern about a potential impact, and an opinion that more study is necessary.¹⁷

20 Examiner Vancil goes on to rule that:

21 The Appellants alleged that the Director had insufficient information to
22 evaluate the proposal's environmental impacts and make a threshold
23 determination, because the SEPA checklist contained errors. However, mere
24 error in the checklist (assuming the allegations are correct) is insufficient cause
25 to remand a threshold determination. Appellants must demonstrate that the
Director had insufficient information to evaluate the proposal's environmental
impacts in the context of the *entire* record considered in the threshold

¹⁶ A copy of the Findings and Decision is attached as Exhibit N.

¹⁷ See, Ex. N, Decision, ¶6.

determination, e.g. the checklist and other project documents.¹⁸ (emphasis in the original)

Even if the SEPA checklist errors alleged by Moehring were correct, Moehring has failed to demonstrate that the Director did not have sufficient information to evaluate the potential environmental impacts. It is undisputed that the documents uploaded to SDCI's website, including the project plans and survey, were available to and considered by SDCI when it issued the Decision. As noted above, mere mistakes in the SEPA Environmental Checklist are insufficient to remand a determination of non-significance if the environmental impacts were considered by SDCI. Because Moehring has failed to demonstrate that SDCI did not consider the potential environmental impacts, the Appeal should be dismissed.

H. Assuming all facts in favor of Moehring, the Hearing Examiner does not have authority under SMC 25.05.680 to require SDCI to prepare an EIS for the Project. Thus, the relief requested is without merit on its face, there are no issues of material fact, and the Appeal should be dismissed.

In the Appeal, Moehring seeks the following relief: "That the Hearing Examiner vacate the Determination of Non-Significance with instructions to [] SDCI to prepare an Environmental Impact Statement [] to adequately address the environmental impacts and mitigation to meet the objective of providing adequate protections to Seattle's right-of ways and the nearby residents." Moehring raises numerous objections to the Decision. For the reasons discussed above, each of these objections are without merit and should be dismissed. If, however, each of the objections raised by Moehring were found to be valid, they are still woefully insufficient to require an EIS for the Project. In other words, assuming that every single objection raised by Moehring was correct, there would still not be any basis for requiring an EIS, which is the sole relief requested.

There is absolutely no precedent for requiring an EIS for a small 9-unit rowhouse. In fact, there is no precedent for requiring an EIS for much larger projects, including mixed-use

¹⁸ *Id.*, ¶7.

1 buildings with commercial space and over 50 residential units. To claim that a 9-unit
2 residential development merits a determination of significance and preparation of an EIS is
3 simply without merit on its face and is subject to dismissal under HER 3.02(a). It is also
4 subject to dismissal on summary judgment.

5 **VI. CONCLUSION**

6 For Moehring to survive this motion to dismiss, the Hearing Examiner must
7 conclude that (a) Moehring has raised a valid objection to the Decision, and (b) he has
8 requested relief that (i) the Hearing Examiner has jurisdiction to grant, and (ii) directly
9 relates to that valid issue raised on appeal. In other words, even if Moehring raises a valid
10 issue on appeal, but has not requested relief directly related to that issue that the Hearing
11 Examiner has authority to award, or vice versa, then the motion to dismiss must be granted,
12 and the Appeal dismissed.

13 HER 3.02(a) allows the Hearing Examiner to dismiss an appeal prior to the hearing if
14 the appeal fails to state a claim for which the Hearing Examiner has jurisdiction to grant
15 relief, is without merit on its face or is frivolous. The Appeal fails to raise a valid objection
16 to the Director's Decision and is without merit on its face. Even assuming each of
17 Moehring's objections were true and valid, they are inadequate to sustain the relief
18 requested – that SDCI be required to prepare an EIS for the Project. HER 2.16 allows the
19 Hearing Examiner to award summary judgment to the moving party. The Applicant is
20 entitled to summary judgment because there are no issues of material fact. Thus, it is
21 respectfully requested that the Hearing Examiner affirm the Decision and DNS and dismiss
22 the Appeal with prejudice.

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1 Respectfully submitted this 7th day of December, 2018.

2
3 HELSELL FETTERMAN LLP

4 By: s/ Brandon S. Gribben

5 Brandon S. Gribben, WSBA No. 47638

6 Samuel M. Jacobs, WSBA No. 8138

7 Attorneys for the Applicant and Owner

CERTIFICATE OF SERVICE

I, Gennifer Holland, certify under penalty of perjury under the laws of the State of Washington that the above pleading was served on the parties listed below via the indicated method:

David Moehring
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- ☐ Via first class U. S. Mail
- ☐ Via Legal Messenger
- ☐ Via Facsimile
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DATED this 7th day of December, 2018.

s/Gennifer Holland
Gennifer Holland, Legal Assistant