BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner File: **MUP-18-022 (W)**
DAVID MOEHRING ET AL.,	Department Reference: 3029611-LU
from a decision issued by the Director, Seattle Department of Construction and Inspections	**ORDER ON MOTION FOR SUMMARY JUDGMENT**

This matter concerns the appeal of a Seattle Department of Construction and Inspections ("Department" or "City") Director's State Environmental Policy Act ("SEPA") Determination of Non-Significance ("DNS"). An appeal was filed by David Moehring and neighbors adjacent to the proposal ("Appellants"). The applicant, Julian Weber ("Applicant"), filed a motion to dismiss the appeal ("Motion"). The Appellants filed a response to the motion, and the Applicant filed a reply to the response. The Hearing Examiner has reviewed the file in this matter including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

Summary Judgment and Burden of Proof

Quasi-judicial bodies, like the Hearing 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). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure ("HERs") states that for questions of practice and procedure not covered by the HERs, the Hearing Examiner "may look to the Superior Court Civil Rules for guidance."[1] Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "the moving party is entitled to a judgment as a matter of law." The Hearing Examiner "must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-833, 100 P.3d 791 (2004).

"A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case ... Once the moving party has met its burden, the burden shifts to the nonmoving party *to present admissible*

[1] Appellants argue that "[t]he motion for Summary Judgment must be denied as it is not identified as an option with the Seattle Municipal Code nor has it been identified within the Rules of the Hearing Examiner." Appellants' Response at 5. Appellants failed to consider HER 1.03, and fail to identify any requirement to list every type of motion possible under the civil rules in order for such motions to be heard by the Hearing Examiner. Under the rules identified above summary judgment motions have been heard in cases by Office of Hearing Examiner hearings officers, and by hearing officers in every jurisdiction in the state, for decades. Appellants may have been confused by the Hearing Examiner's statement at the second pre-hearing conference that the Office of Hearing Examiner intends to update the HER's in the future to specifically address summary judgment motions, this change will not be made to address whether such motions may be brought in this forum (as they are already allowed), but to provide a more extended period for briefing in association with such motions as provided for in the Civil Rules of Procedure.

evidence demonstrating the existence of a genuine issue of material fact. ... If the nonmoving party does not meet that burden, summary judgment is appropriate." *Indoor Billboard/Washington, Inc.* v. *Integra Telecom of Washington, Inc.,* 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (internal citations omitted) (emphasis added). "An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, *i.e.,* information as to ... a reality as distinguished from supposition or opinion." *Curran* v. *City of Marysville,* 53 Wn.App. 358, 367, 766 P.2d 1141 (1989), *quoting 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 of fact are insufficient to raise a question of fact. *Id.* "The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion than an issue exists without any showing of evidence." *Meissner* v. *Simpson Timber Co.,* 69 Wn.2d 949, 956, 421 P.2d 674 (1966) (citation omitted).

Appellants argue that summary judgment is inappropriate because "[t]he representative of the appellant, Mr. Moehring, is an architect and not an attorney. As such, any proposal of legal procedures outside of what is written within the Hearing Examiner rules or the Seattle Municipal Code as it pertains to administrative appeals should have little weight within this administrative hearing." Appellants' Notice of Appeal at 5. As indicated above, summary judgment motions are permitted within the rules of the Office of Hearing Examiner by reference to the Civil Rules of Procedure under HER 1.03. As to the qualifications of the Appellants' representative, no special dispensation is provided to non-attorney, or *pro se*, litigants in hearings. The Hearing Examiner "must treat pro se parties in the same manner it treats lawyers." *Edwards v. Le Duc*, 157 Wash.App. 455, 464, 238 P.3d 1187 (2010). "The court is under no duty to inform a pro se . . . [party] of the relevant rules of law . . ., and the [party] . . . must nonetheless conform to substantive and procedural rules." *State v. Bebb*, 108 Wash.2d 515, 524, 740 P.2d 829 (1987). See also, *State v. Vermillion*, 112 Wash.App. 844, 858, 51 P.3d 188 (2002), *State Farm Mutual Automobile Insurance Company v. Avery*, 114 Wash.App. 299, 310, 57 P.3d 300 (2002).

In addition to moving for summary judgment, the Motion moves to dismiss on the basis that the objections raised in Appellants' Notice of Appeal are without merit on their face. A motion to dismiss a claim on this basis is similar to a motion to dismiss under CR 12(b)(6).

One significant difference between the two types of motions is who has the burden of proof and how heavy that burden is. For example, under a motion to dismiss under CR 12(b)(6), the plaintiff does not have a heavy burden to avoid dismissal of the case. The plaintiff need not prove any facts; he or she merely needs to convince the decision maker that the facts set forth in the Notice of Appeal are sufficient to state a cause of action, if they are taken as true. *The only question posed by such a motion is whether the appellant's complaint states a legally sufficient claim.* In contrast, under a motion for summary judgment, it is the decision maker's role to determine whether the opposing party's evidence reveals a factual dispute. As indicated above, if after looking at the evidence a decision maker determines there are no disputed material facts and the moving party is entitled to judgment based on those facts, he or she will grant the motion.

Analysis

The Applicant moves for summary judgment on the basis of the following issues:

1. The Environmental Checklist was adequate as to the eleven checklist disclosures challenged by the Appellants.
2. The Appellants' issue concerning tree protection should be dismissed as it is not properly raised within the context of a SEPA appeal.
3. The Department adequately considered potential impacts of removing trees.
4. The arborist report presented to the City was adequate.
5. The Department had sufficient information to adequately consider the environmental impacts of the proposal.
6. The remedy of an Environmental Impact Statement ("EIS") is not available for a proposal which meets the size of the project.

Neither party submitted evidence under sworn declaration or affidavit, but instead simply added exhibits to their motions. As there is no record established in this matter yet, materials should have been submitted under affidavit or declaration. As neither party followed this standard, the Hearing Examiner will review exhibits in the briefing of both parties assuming admissibility of the documents.[2]

1. Adequacy of the SEPA Checklist

As an initial matter the Applicant's challenge to whether the Notice of Appeal issues concerning the SEPA Checklist are meritless on their face should be denied except with regard to SEPA Checklist items 5, 8, 10, and 11. All other issues in the Notice of Appeal concerning the SEPA Checklist state a legally sufficient claim to meet the minimal Notice of Appeal content requirements identified in the SMC and HER 3.01(d). Concerning identification of issues in a Notice of Appeal HER 3.01(d) only requires "[a] brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed," and this standard was satisfied by the Appellants' Notice of Appeal with regard to most of the SEPA Checklist issues.

The Notice of Appeal identifies 11 issues with regard to the SEPA Checklist.

Generally, where an appellant alleges that the Director did not have sufficient information to evaluate the proposal's environmental impacts and make a threshold determination, because the SEPA checklist contained errors, this issue will survive a facial challenge to the notice of appeal. However, on summary judgment where the motion shows that information was available to the Director as part of the environmental review in addition to the environmental checklist, mere error in the checklist

[2] While matters before the Office of Hearing Examiner allow hearsay evidence, such evidence is submitted under oath or affirmation, not simply provided to the Hearing Examiner with assumed adequacy.

(assuming the allegations are correct) may be insufficient cause a remand of the threshold determination. Appellants ultimate burden is to 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 determination, e.g. the checklist *and* other project documents.

WAC 197-11-330 provides:

> In making a threshold determination, the responsible official shall:
> (a) Review the environmental checklist, if used:
> (i) *Independently evaluating the responses of any applicant* and indicating the result of its evaluation in the DS, in the DNS, or on the checklist; and
> (ii) Conducting its initial review of the environmental checklist *and any supporting documents* without requiring additional information from the applicant.
> (b) Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (WAC 197-11-960), *and any additional information furnished under WAC 197-11-335 and 197-11-350.*

(emphasis added). While the environmental checklist is an essential part of the threshold determination, under SEPA it is not the exclusive source of information to be considered by the SEPA official.

SEPA Checklist Item #1
Appellants issue states:

> The rockery – most of which is within the street right-of-way – has not been addressed. The northeast corner of the site is a pre-designated steep slope ECA as noted within Item 6 below. The slopes of the rockery exceed 40-percent. In addition, the existing contour lines within the designated steep slope areas are equivalent to the spacing of contour lines outside the steep slope areas. This means a consistent steep slope rather than only a portion. See architectural drawings including section A4.1 and a visit to the site is recommended to confirm this document inconsistency.

Notice of Appeal at 4.

The Motion argues that this checklist item does not require disclosure of manmade features, and that even if it were required, and that information was not adequately captured in the checklist, additional review by the City during the DNS provided this information for consideration. The Appellants failed to rebut this presentation of evidence in their response. Therefore, under the standards of summary judgment this issue should be dismissed.

SEPA Checklist Item #2
Appellants issue states:

> reference Seattle's official landslide information2 maps along with subsequent updates by the SDCI Director. There was at least one recorded landslide at most one block from the Subject Property and another three landslides within three blocks south of the Subject Property. Other checklists prepared for the Department include incidences within such proximities. The applicant's response may be an attempt to avoid further questioning or investigation from the Department or from triggering a need for an EIS.

Notice of Appeal at 4.

The Appellants support this issue with a link showing a map of the City of Seattle Landslide Prone Areas. No landslide prone areas are indicated on the map for the property or adjacent properties. The Appellants' argument is based on the presence of a landslide within approximately a block of the proposal and three landslides within three blocks of the proposal. The Applicant does not directly challenge the Appellants' implication that these landslides are "in the immediate vicinity" of the proposal. Instead the Applicant cites to a geo-tech report submitted for the project that found the Premises is not in a potential slide area. With the question as to whether landslides between one and three blocks away are considered "in the immediate vicinity" of the proposal left unanswered, under the standards of summary judgment, the Applicant has failed to meet its burden to demonstrate that there is no disputed issue of material fact remaining concerning this issue, and as to this issue the motion should be denied.[3]

SEPA Checklist Item #3
Appellants issue states:

> With a lot of 7,000 square feet, the designated yard areas is only 925 sq. ft. (sheet A1.1) which could suggest as high as 85% impervious surfaces. The building structures account for at least 2,600 square feet of the impervious area (sheet A2.0). The nine parking spaces (sheet A1.0) account for another 1,100 square feet of the impervious area as well as the paved drive areas between the spaces. There is no record of civil engineering documents identifying permeable pavement or the pavement attributes. This is open-ended and could result in significant storm water issues at a busy arterial intersection with low visibility due to the street slope of Emerson to the east. A visit to the site would confirm these concerns.

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[3] The Applicant also argues that reference to the City of Seattle Landslide Prone Areas map demonstrates that this item and issue were before the Department as part of the environmental review. The mere fact that a document is sourced from the City does not demonstrate that its contents were considered by the City as part of DNS review.

Notice of Appeal at 4.

The Appellants' issue essentially seems to claim that City's analysis failed to adequately identify a potential significant impact concerning storm water. The Applicant responds that the application process disclosed the level of impervious surfaces, and that the proposal is subject to City stormwater regulations. The Appellants' response to the motion does not respond to these arguments. Therefore, the Appellants have failed to meet their burden under summary judgment, and this issue should be dismissed.

SEPA Checklist Item #4
Appellants issue states:

> Referencing the inadequate arborist report and the conflicts between the architectural drawings and the landscape drawings, there is more than one significant tree that will be lost. As many as four significant trees have buildings being constructed within the code-defined root feeder zone. Excavations for building foundations also extend another 3 to 5 feet beyond the edge of the proposed building that even further carve into the root feeder zones. This conflict has not been addressed or identified within the Checklist. Reference the appeal inadequacies of the drawings below, Part C.

Notice of Appeal at 4.

The Appellants' argument essentially indicates that the checklist failed to adequately identify impacts to significant trees by not accurately identifying such trees in association with the proposal. In the Motion, the Applicant alleges that:

> It is undisputed that SDCI: (a) visited the Premises and saw the number and type of trees; (b) received an arborist report identifying the type and location of the trees; (c) issued a correction notice[7] requesting identification of the trees in the right-of-way and asking the arborist to consult with SDOT Forestry regarding the right-of way trees; and (d) received a response to its correction notices[8] addressing each of the items raised by SDCI.

Motion at 8. The Motion also includes copies of referenced materials. Thus, the Applicant demonstrates that the SEPA official had information available to analyze the four significant trees on site in addition to the checklist. The Appellants' response to the motion states:

> The submitted exhibits with the Motion indicated the Applicant's architect referencing an email to SDOT, but that email has not been attached. In fact, discovery and interrogatory of the responsible SDOT arborist has been provided in Exhibit 'P' to clearly demonstrate that SDOT has not been consulted as of the date that the DNS was issued on September 13, 2018. This is a key issue. The record of Exhibit 'P' shows that the SDOT arborist

> clearly required information to show how the buildings could be constructed without encroaching on the tree's root feeder zone. There is no evidence that that question has ever been appropriately answered.

These conflicting presentations of evidence concerning matters considered by the Department concerning trees favors the Appellants where, under summary judgment, if there remains an issue of genuine material fact summary judgment is inappropriate. The Motion should be denied as to this issue.

SEPA Checklist Item #5
Appellants issue is identified as:

> Q: B. 8. A. Land and shoreline use - What is the current use of the site and adjacent properties? Will the proposal affect current land uses on nearby or adjacent properties? If so, describe.
> A: Current use is a multi-family residence, adjacent properties are multi-family residential.
> Appellant Concern: per architectural drawings, the property also is adjacent to Single Family SF-5000 zones. The height, bulk and scale of this development must be considered within an EIS accordingly.

Notice of Appeal at 5.

The Notice of Appeal fails to identify an inadequacy in the environmental review with this issue, and summarily argues that the adjacency of the types of zoning cited requires an EIS with no supporting legal reference or identification of a significant impact that would require such an analysis. For these, reasons this issue should be dismissed.

SEPA Checklist Item #6
Appellants issue is identified as:

> Q: B. 8. h. Has any part of the site been classified as a critical area by the city or county? If so, specify.
> A: Yes, there is a tiny portion of Steep Slope in the Northeast corner of the site.
> SDCI comment: "Site is not mapped as an environmentally critical area." LMK 8/29/18
> Appellant Concern: SDCI comment undermines the requirements and the site survey information indicates steep slopes along the entire lot along West Emerson Street.

Notice of Appeal at 5.

The Motion argues:

> SDCI's determination that there is not a steep slope on the Premises is based upon site specific information. The Land Use Report, which is generated based upon the City's most up to date information, concludes that there is not a steep slope on the Premises. This fact is confirmed by SDCI's geotechnical expert, Dean Griswold.

Motion at 8.

In response, the Appellants summarily state "[t]he single-page geotechnical report dated September 13, 2017 referenced within the Motion of Dismiss (Exhibit L) is woefully inadequate for a property with the geographic and topographical characteristics." This mere allegation is not sufficient to establish the presence of disputed material fact. Therefore, the Appellants have failed to meet their burden under summary judgment, and this issue should be dismissed.

SEPA Checklist Item #7
Appellants issue states:

> According to the drawings and checklist, the properties to the north of the Subject Property will have their views of the Elliott Bay and Downtown Seattle obstructed by a long wall of nine rowhouses as tall as 39 feet – 11 inches. The DNS was based on no impacts to views being altered or obstructed.

Notice of Appeal at 5.

The Applicant argues in the Motion:

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

Motion at 8.

> The basic purpose of SEPA's command for environmental review is to require governments to fully consider environmental and ecological factors when taking actions that significantly affect the quality of the environment.

Public Utility District No. 1 of Clark County v. Pollution Control Hearings Board, 137 Wash.App. 150, 158, 151 P.3d 1067 (2007).

> While SEPA does not demand a particular substantive result in government decision-making, SEPA does require that 'environmental amenities and values be given appropriate consideration in decision making.'

Anderson v. Pierce County, 86 Wash.App. 290, 300, 936 P.2d 432 (1997).

The mere fact that the Code does not address private views does not exempt a proposal from SEPA review for significant environmental private view impacts that may be associated with the proposal. SEPA is a full disclosure environmental review statute, and is not limited by outcomes that may or may not be addressed under local code. The Motion should be denied as to this issue.

SEPA Checklist Item #8
Appellants' issue concerning this item states "Given the above, no mediation of the obstructed views are being considered." This fails to state a legally sufficient claim, and should be dismissed. With this issue Appellants' fail to identify an inadequacy in the DNS, and the term "mediation" has no application in this context.

SEPA Checklist Item #9
The Appellants' issue states:

> As the existing three dwelling property is increased to a nine dwelling property, the Applicant suggests that each additional dwelling will have just two occupants. This miscalculation is off by a magnitude of two. Whether it is 12 persons or 24 persons being added to the site, the Department has failed to recognize that this response is inadequate. The significant increase in the number of occupant planned for this lot will also have an impact to the locally provided public services and actual demand.

Notice of Appeal at 6.

The Motion summarily argues "SDCI was aware of the size and number of units and, therefore, was well aware of the potential range of new residents and their potential impacts on public services." The Motion fails to substantiate this claim with any reference to the record or other evidence, and should be denied on this basis.

SEPA Checklist Item #10
Appellants' issue concerning this item states "[g]iven all of the above, the remaining portions of the SEPA Checklist should not be excluded." With this issue Appellants' fail to identify an inadequacy in the DNS. This issue fails to state a legally sufficient claim, and should be dismissed.

SEPA Checklist Item #11
Appellants' issue concerning this item states "[g]iven the above, no mediation of the obstructed views are being considered." This fails to state a legally sufficient claim, and should be dismissed. With this issue Appellants' fail to identify an inadequacy in the DNS, the term "mediation" has no application in this context, and the term "obstructed views" is not applicable.

2. Adequacy of Tree Protection Analysis

The Appellants challenge the adequacy of the DNS on the basis that the SEPA evaluation has not been conducted to determine if tree protection is possible, and that the City staff member who will be responsible for inspecting tree protection at the time of construction, as of September 21, 2018, "had no information or knowledge of this project or DNS." Notice of Appeal at 6. These issues fail to raise an issue concerning the adequacy of the environmental review required by SEPA, and should be dismissed as they are not appropriately raised in the context of a SEPA appeal.

3. Adequacy of Geo-tech Analysis

The Notice of Appeal alleges that "geotechnical evaluation of this site is woefully inadequate to discern the impacts to trees and slopes caused during construction," and alleges specific errors. Notice of Appeal at 7.

The Motion does not appear to address this as a separate issue, but does defend the adequacy of the geo-tech report in various portions of the Motion as it presents the report as adequate information to support the DNS analysis. In their response to the Motion, Appellants simply repeat the allegation as stated in the Notice of Appeal, and do not provide any evidence that a genuine issue of material fact remains concerning this issue. The Appellants' issue should be dismissed.

4. Adequacy of the Arborist Report

The Notice of Appeal alleges that the arborist report provided for the proposal was insufficient to support the DNS analysis, and therefore the DNS analysis itself was inadequate. The Applicant provides argument as to the sufficiency of the arborists report, and the Appellants respond with argument as why the report is deficient. The Applicant's arguments are not so strong that when read in the light most favorable to the non-moving party there is no remaining issue of genuine fact as to this issue – this is a classic dispute of facts that neither party sets forth with clearly convincing argument. Therefore, the Motion should be denied as to this issue.

5. Environmental Impact Statement as Remedy

The sole remedy sought by the Appellants is an Environmental Impact Statement ("EIS"). The Applicant argues that "[t]o claim that a 9-unit residential development merits a determination of significance and preparation of an EIS is simply without merit on its face and is subject to dismissal under HER 3.02(a)." The proposal is not exempt from SEPA review. Therefore, it is subject to all appropriate SEPA procedures, including the possibility of the requirement of an EIS if the environmental analysis identifies a significant impact that cannot be mitigated. While such a possibility is remote, there is nothing that exempts a project of this size from that possibility as a matter law as claimed by the Applicant, and the Motion's argument in this respect should be denied.

While the Notice of Appeal alleges multiple faults with the City's DNS analysis (often more in the context of a Code violation complaint than a SEPA inadequacy) it does not seek the remedy of remand for additional or more adequate SEPA analysis. Instead it seeks the sole remedy of an EIS. In seeking the remedy of an EIS the Appellants must argue in the Notice of Appeal, and show in the response to the Motion that they are prepared to demonstrate with evidence that the proposal is reasonably likely to result in significant negative environmental impacts that cannot be mitigated. Only if there was a finding that there were such impacts by the Director, or on review by the Hearing Examiner, could the result of an EIS be compelled. In this case, the Notice of Appeal makes clear reference only to "significant storm water issues," and then identifies other "impacts." Even were the Hearing Examiner to assume that reference to other impacts was intended to identify significant impacts, the Notice of Appeal is almost completely lacking in identifying what those impacts are and how the project is reasonably likely to generate such impacts. Even where the Notice of Appeal meets the limited requirements of noticing other parties about such issues, when the Motion was filed the Appellants were required to argue and demonstrate how they will be prepared at hearing to demonstrate the likelihood of significant negative environmental impacts. Instead of responding to this challenge, Appellants argued issues related to inadequacies in the record, and the procedures undertaken as part of the DNS review. Appellants failed to adequately argue and produce evidence to show that they could meet their burden of demonstrating the likelihood of any significant negative environmental impact. Where Appellants made allegations that such impacts might occur, or dismissed the Motions arguments by indicating they would present adequate evidence at the hearing, this was not sufficient to meet their burden when examined under summary judgement. On this basis the appeal should be dismissed.

The Applicant's motion for summary judgment is **GRANTED**, and appeal of MUP-18-022 is **DISMISSED**. The hearing on this matter set for January 22, 2019 is cancelled.

Entered this 11th day of January, 2019.

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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 for Summary Judgment** to each person listed below, or on the attached mailing list, in the matter of **David Moehring**. Hearing Examiner File: **MUP-18-022 (W)** in the manner indicated.

Party	Method of Service
Appellant David Moehring dmoehring@consultant.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
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Dated: January 11, 2019

Bonita Roznos
Executive Assistant