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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, Projects 3020338 and 3028345

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

APPLICANT'S CLOSING BRIEF

Applicant's Closing Brief

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I. INTRODUCTION

SDCI's July 23, 2018 MUP Decision evidences the Design Review Board's ("DRB's") thoroughness and SDCI's diligence in conducting the SEPA analysis and Code review for the Applicant's ("Velmeir's") proposed Madison Valley mixed-use development ("Project"). Based on the documents and testimony presented at the hearing, the Director's MUP Decision, SEPA threshold determination, and Code Interpretation should be affirmed.

II. LEGAL AUTHORITY

A. The Hearing Examiner Conducts a *De Novo* Review While According Substantial Weight to the Director's Decisions: This Standard of Review Imposes a High Burden on Save Madison Valley ("SMV").

The Hearing Examiner conducts a *de novo* review of the Director's Type 2 MUP decision and SEPA DNS determination while giving substantial weight to the Director's decisions. SMC 23.76.022.C.6 & .7; RCW 43.21C.090 (establishing the standard of review).

The substantial weight standard accords a measure of deference. The Seattle Hearing Examiner has interpreted "substantial weight" to mean "clearly erroneous." *See e.g., Livable Phinney*, HE File Nos. MUP-17-009 (DR, W), S-17-002 (July 24, 2017) (DNS and design review); *see also Cougar Mountain Ass'n v. King Cty.*, 111 Wn.2d 742, 747-750, 765 P.2d 264 (1988). Under this deferential standard, the Examiner may reverse SDCI's MUP, SEPA and Code Interpretation decisions only if the Hearing Examiner, on review of the entire record, is left with the definite and firm conviction that a mistake has been made. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001); *Cougar Mountain Ass'n v. King Cty.*, 111 Wn.2d at 758.

1. The "Substantial Weight" Standard Imposes a High Burden on SMV.

SMV cannot prevail if the evidence demonstrates only that reasonable minds might differ on a particular decision. *See e.g., CUCAC and Friends of UW Open Space, et al.*, HE File Nos. S-96-002, S-96-003, Conclusion 11 (July 15, 1996).

1 In the recent *Elizabeth Campbell* case, Examiner Vancil explained that an appellant
2 “*must meet the high burden of demonstrating the reasonable probability of the significant*
3 *impact which they allege . . . the probability of significant impacts must be demonstrated by*
4 *actual analysis and evidence showing a more than moderate impact.*” HE File No. W-18-002,
5 Conclusion 4, 11 (November 30, 2018) (emphasis in original). In an earlier case, Examiner
6 Vancil stated, “*This burden is not met when an appellant only argues that they have a concern*
7 *about a potential impact, and an opinion that more study or review is necessary.*” *Livable*
8 *Phinney*, HE File Nos. MUP-17-009 (DR, W), S-17-002, Conclusion 2 (July 24, 2017)
9 (emphasis added).

10 Here, SMV must meet the high burden of establishing that the Director committed clear
11 error in adopting the DRB’s unanimous recommendation to advance the Project out of the design
12 review process; that the Director committed clear error in determining that the Project’s
13 probable, significant, adverse environmental impacts had been analyzed and addressed; or that
14 the Director committed clear error in interpreting the Code’s height calculation methodology, or
15 the Code’s ECA relief from standards for development on legally graded, man-made steep
16 slopes.

17 **B. SMV Failed to Present Actual Evidence and Analysis Establishing Unanalyzed or**
18 **Unmitigated Probable Significant Adverse Impacts.**

19 In its appeal, SMV alleges that SDCI’s SEPA DNS determination violated SEPA for
20 failing to collect adequate information on approximately 13 elements of the environment and for
21 failing to address probable significant adverse impacts for approximately 47 elements of the
22 environment. Clarification of Issues (“Revised Appeal”) ¶¶ 1(a) and (b). As detailed below,
23 SMV’s allegations were refuted by the testimony of the City’s subject matter experts and
24 Velmeir’s consultant team.
25
26

1 **1. SEPA Does Not Require Consideration Of Speculative Impacts.**

2 SEPA does not demand a particular substantive outcome, *Glasser v. City of Seattle*, 139
3 Wn. App. 739, 741, 162 P.3d 1134 (2007), and SEPA does not require consideration of remote
4 or speculative impacts. WAC 197-11-060(4)(a); *Des Moines v. Puget Sound Reg'l Coun.*, 108
5 Wn. App. 836, 854-855 (1999). SEPA requires analysis of only those impacts that are
6 “probable”, meaning that they are reasonably likely to occur and have more than a moderate
7 effect on the environment. WAC 197-11-782.

8 To overturn SDCI’s DNS determination, SMV had the burden of proving that the Project
9 will have a *probable, significant, adverse, environmental impacts*. SMC 23.05.736. All five
10 elements must be proven. *See Livable Phinney*, HE File Nos. MUP-17-009, S-17-002 (July 24,
11 2017) (quoting *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719 47 P.3d 137 (2002))
12 (emphasis added).

13 **2. SEPA Does Not Require Duplicative Review Of Environmental**
14 **Considerations That Have Been Addressed By Other Development**
15 **Regulations.**

16 SEPA recognizes that certain analyses formerly cognizable under SEPA are now
17 performed under other regulatory schemes. *See e.g.*, RCW 43.21C.240 (avoiding duplicative
18 SEPA review if development regulations adequately address an impact); WAC 197-11-158
19 (SEPA/GMA project review integration); WAC 197-11-330(1)(c) (responsible official’s
20 independent evaluation includes consideration of mitigation required by other development
21 regulations).

22 The legislative intent behind RCW 43.21C.240 was to narrow SEPA review to “gaps”
23 that may exist in applicable law and to preclude duplicative SEPA review of potential project
24 impacts that are being addressed elsewhere. 1995 Wa. HB 1724 § 201(a). Thus when existing
25 regulations apply, that analysis and mitigation “*should not be duplicated by environmental*
26 *review under 43.21C RCW.*” *Id.* (emphasis added).

1 The Code follows the state mandate to avoid duplicative environmental review. SMC
2 25.05.665.D (Subject to limited exceptions, “where City regulations have been adopted to
3 address an environmental impact, *it shall be presumed that such regulations are adequate to*
4 *achieve sufficient mitigation . . .*”) (emphasis added); *see also* SMC 25.05.650.B (stating that the
5 purpose of the subchapter is to integrate the SEPA process with other laws and decisions); SMC
6 25.05.660.A.5 (same). Thus, the Code establishes a presumption that existing regulations
7 achieve sufficient mitigation unless the project is subject to one of seven exceptions set forth in
8 SMC 25.05.665.D.1-7.

9 As was demonstrated at the hearing, many elements of the Project including geotechnical
10 stability, shoring wall design, stormwater, building structural elements, including chamfering of
11 the commercial entrance to ensure pedestrian sight triangles, street trees, and off-site landscaping
12 are being addressed by development regulations outside of SEPA. *Moss*, 109 Wn. App. At 17
13 (“Planners may not impose additional mitigation measures on impacts that have been adequately
14 addressed elsewhere.”); *In re Jurisdiction of Exam’r*, 135 Wn. App. 312, 324-327, 144 P.3d 345
15 (2006) (SEPA appeal denied because existing regulations adequately mitigated impacts).

16 **3. The Project’s SEPA Checklist and Supporting Documentation Adequately**
17 **Identified the Project’s Expected Impacts.**

18 SDCI reviewed Velmeir’s Project under the City’s Early Review DNS process. SMC
19 25.05.355; WAC 197-11-355; Exhibit (“Ex.”) 14, p. 32 (MUP Decision). The Early Review
20 DNS process first required SDCI to analyze Velmeir’s environmental checklist and any
21 supporting documents “without requiring additional information from the applicant.” SMC
22 25.05.330.A.1.b.

23 SMV challenged the completeness of the SEPA checklist, ignoring the fact that SDCI’s
24 threshold determination is based on the compendium of information submitted while the Project
25 was undergoing environmental review. Moreover, SEPA does not require that a SEPA checklist
26 include detailed technical information. To the contrary, applicants are directed to prepare the

1 checklist to the best of their knowledge, in most cases from the applicant's own observations or
2 project plans, "without the need to hire experts." WAC 197-11-960; SMC 25.05.960; *Brown v.*
3 *Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).

4 Under SEPA, the agency independently evaluates each item on the checklist and may call
5 for further information if the agency cannot make its threshold determination based on its initial
6 review of the checklist. See WAC 197-11-100; WAC 197-11-315; WAC 197-11-335. In this
7 case, as evidenced by many exhibits submitted at the hearing, SDCI had the necessary technical
8 studies on hand at the time it made its SEPA threshold determination.

9 **4. The Hearing Testimony And Exhibits Evidence That SDCI Adequately**
10 **Analyzed And Mitigated Each Element Of The Environment.**

11 **a. Geotechnical.**

12 SDCI Geotechnical Engineer, Rob McIntosh, testified that existing unsuitable fill soil on
13 the Project site could be removed and the Project could be constructed without undue
14 geotechnical risk. See Ex. 14, p. 28 (MUP Decision). Characterizing Velmeir's geotechnical
15 materials, Mr. McIntosh testified, "they did a really good, the reports were quite thorough."¹
16 Velmeir's geotechnical reports characterized subsurface soil and groundwater conditions and
17 provided preliminary foundation and temporary shoring recommendations.

18 The geotechnical reports also established the Project site's eligibility for relief from the
19 City's ECA development standards due to the presence of lawfully-created, man-made steep
20 slopes. See e.g. Ex. 89 (Clifton grading application) Ex. 91 (grading permits) Ex. 92 (SDOT
21 street grade profiles); see also Ex. 83 (SDCI approval of ECA relief from standards); Ex. 101
22 (Velmeir's application for relief from standards); Exs. 89, 90, 91 (evidence of prior legal grading
23 activity); and Ex. 151 (historical research on City's creation of Madison Street and Mr. Clifton's
24 historic fill of the Project site).

25 ¹ Robert McIntosh Testimony, Day 5, Part 2, at 5:13-5:18; see also Ex. 80 (Geotechnical MUP Report, 11/17/2015);
26 Ex. 81 (Geotechnical MUP Report, 3/25/2016); Ex. 82 (Geotechnical Engineering Services, 8/9/2017); Ex. 84 (ECA
Corrections, 5/15/2017); and Ex. 85 (Response to Correction Notice, 7/24/2017).

1 Matt Smith, Velmeir's geotechnical engineer, testified that the existing soils on the site
2 are unacceptable for constructing a new building and must be removed.² See Ex. 86 (Bearing
3 Contours Map). Mr. Smith explained that there is nothing unique about this site with respect to
4 the proposed excavation and shoring, and that City requirements will be met and monitored
5 throughout.³ He testified that the Project will actually enhance the stability of the slope over its
6 current condition because it will remove unstable fill soil and replace it with an engineered
7 soldier pile wall and building foundation.

8 Velmeir's structural engineer, Sandro Kodama, explained that the temporary shoring
9 system and structural building frame are designed to resist all loads imposed upon them.⁴ Mr.
10 Kodama opined that he is confident that excavation can be done without adversely impacting the
11 surrounding area. Mr. Kodama also testified that the hill-climb stairs will be stable and designed
12 pursuant to the geotechnical engineer's recommendations.

13 City geotechnical engineer Rob McIntosh agreed with Mr. Smith and Mr. Kodama. Mr.
14 McIntosh testified that he is confident that the Project will comply with applicable geotechnical
15 regulations, and that compliance will be further refined during the building permit process.

16 **b. Shadows.**

17 SMV lay witness Wallis Bolz raised concerns about possible shadow impacts to the
18 community P-Patch garden. Ms. Bolz stated that she had both sent letters and testified at the
19 DRB meetings about her concerns. SDCI Planner Magda Hogness testified that SDCI staff and
20 the DRB were aware of Ms. Bolz' concerns. See Ex. 14, pp. 5, 15-17 (MUP Decision).
21 Velmeir's project architect, Charles Strazzara, testified that the DRB process included a City-
22 required shadow study that demonstrated that the Project does not negatively impact the
23 residential backyards that front Dewey Place or the P-Patch. See Ex. 71, pp. 20-22 (EDG3
24

25 ² Matthew Smith Testimony, Day 5, Part 4, beginning at 00:27:00.

26 ³ Mr. Smith testified that a surveyor will monitor the site twice a week, they will prepare a weekly summary and submit it to the City, and will make daily field reports for the City to review.

⁴ Sandro Kodama Testimony, Day 6, Part 1, testimony beginning at 01:06:00.

1 Packet) (illustrating that the only time that the Project casts a shadow on the P-Patch is during
2 the winter months when the entire valley is in shadow). Ms. Hogness concluded that the
3 Project's shadow impacts did not rise to a level of significance that warranted mitigation under
4 SEPA.

5 **c. Construction and Noise.**

6 SMV lay witness Tony Hacker expressed concern about noise and construction impacts.
7 Ms. Hogness explained that the MUP Decision expressly conditions the Project to provide a
8 Construction Management Plan to address construction-related impacts. SMC.25.05.675.B; Ex.
9 14, p. 27 (construction impacts), p. 28 (asbestos and lead dust control) (MUP Decision).

10 Velmeir's acoustic engineer, Bill Stewart, testified that the Project will comply with the
11 Seattle's noise regulations (Ch. 25.08 SMC) and will not create significant adverse impacts to the
12 neighborhood.⁵ Mr. Stewart explained that the Project's noise-generating mechanical equipment
13 will be screened and monitored to ensure compliance with Ch. 25.08 SMC.

14 **d. Trees.**

15 Both the City's reviewing arborist, Art Pedersen, and SDCI planner Ms. Hogness
16 confirmed the detailed analysis submitted by Velmeir's arborist, Sean Dugan. *See* Ex. 41
17 (Arborist Report 10/21/2016); Ex. 40 (Arborist Report revised 7/1/2016); Ex. 45 (Arborist
18 Response dated 9/15/2016 to Correction Notice #1); Ex. 46 (Tree Canopy Calculations); Ex. 47
19 (Correction Notice #1 dated 7/28/2016); Ex. 48 (Correction Notice #1 dated 10/3/2016); Ex. 49
20 (Correction Notice #2 dated 10/25/2016); and Ex. 50 (Correction Notice #3 dated 7/10/2017).

21 Mr. Dugan testified that he is an accredited arborist and that he works with Seattle's tree
22 protection regulations (Ch. 25.11 SMC and Director's Rule 16-2008) on a weekly, if not daily,
23 basis.⁶ He explained his professional opinion that the removal of unstable fill soils, toe-of-slope
24 retaining wall, foundation construction, alteration of groundwater hydrology, and dedication of a

25
26 ⁵ Bill Stewart Testimony, Day 5, Part 4, beginning at 00:00:22.

⁶ Sean Dugan Testimony, Day 6, Part 2, beginning at 00:51:25.

1 City-required right-of-way will all negatively impact the long-term survivability of the existing
2 on-site vegetation. Based on Mr. Dugan's DR 16-2008 Risk Assessment, the City ultimately
3 concluded that the Project site complied with the Ch. 25.11 SMC, that the existing trees on site
4 did not qualify as exceptional trees and could be removed, and that the appropriate mitigation
5 was installation of replacement landscaping. *See* Ex. 49 (Correction Notice #2); Ex. 14, pp. 30-
6 31 (Plants and Animals) (MUP Decision).

7 City Arborist Art Pedersen testified that had he seen something clearly erroneous in Mr.
8 Dugan's arborist reports, he would have "called that out."⁷ He explained the City's duty to
9 balance development with tree retention, and he acknowledged that Mr. Dugan's materials were
10 consistent with DR 16-2008 and appropriately identified the trees that would be hazardous after
11 construction. Mr. Pedersen explained that DR 16-2008 is intended to identify the survivability of
12 trees "up front" and he agreed with Mr. Dugan's Risk Assessment conclusion that the existing
13 on-site vegetation should be removed.

14 Ms. Hogness confirmed that she reviewed tree issues with two SDCI arborists to ensure
15 the Project's consistency with the Code and that SDCI reviewer Seth Amhein determined that no
16 additional mitigation would be required beyond the Code-required replacement landscaping.⁸

17 SMV's arborist, Ms. Tina Cohen, testified to her dissatisfaction with SDCI's acceptance
18 of the Risk Assessment and replacement landscaping mitigation. Ms. Cohen conceded that she
19 had not performed her own Risk Analysis and she had not prepared an arborist's report. Ms.
20 Cohen acknowledged that none of her opinions were shared with either the DRB or SDCI during
21 the design review or MUP review and were presented for the first time at the hearing.⁹

22 Mr. Dugan testified that, in his expert opinion, the removal of existing vegetation will not
23 produce significant adverse impacts, particularly in light of the mitigation that will be
24

25 ⁷ Art Pederson Testimony, Day 3, Part 3, at 1:08:05.

26 ⁸ Magda Hogness Testimony, Day 4, Part 2, beginning at 00:01:00.

⁹ Cross examination of Tina Cohen by Patrick Mullaney, Day 3, Part 3, beginning at 11:00.

1 accomplished through the replacement landscaping, which will result in an overall increase in
2 tree canopy at maturity.¹⁰

3 In addition to SDCI's technical review of tree issues under Ch. 25.11 SMC, the DRB
4 reviewed the Project for consistency with the Design Guidelines as they relate to trees and
5 canopy replacement. Velmeir's architect, Mr. Charles Strazzara, provided the DRB with
6 information regarding the existing site vegetation, summaries of the arborist's reports, and
7 alternative building configurations that might preserve existing vegetation. *See e.g.* Ex. 63, pp.
8 9-11 (EDG1 Proposal); Ex. 67, pp. 6-7, 44-46 (EDG2 Proposal); Ex. 71, pp. 49-50, 72-72; Ex.
9 75, pp. 88-91 (Recommendation Proposal).

10 In its Recommendation, the DRB made an informed design decision concerning the on-
11 site trees, and it supported their removal and installation of replacement landscaping. Ex. 77,
12 p.19 (Recommendation Meeting Report). This Recommendation was carried over into SDCI's
13 MUP Decision. Ex. 14, p. 25 (MUP Decision).

14 Thus, the decision to allow removal of existing on-site vegetation was reviewed by both
15 SDCI's technical experts and the DRB. Both reviewing bodies agreed with the concept of
16 allowing complete removal of existing vegetation to be mitigated by installation of replacement
17 landscaping. There was no clear error in these consensus decisions.

18 **e. Landscape Architecture.**

19 Velmeir's landscape architect, Scott Evans, testified that the Project landscaping includes
20 many native plants, which were requested by the DRB during the Design Review process.¹¹

21 Mr. Evans followed SDOT arborist Bill Ames' recommendations on street tree selection
22 and planter sizes. *See* Ex. 123 (emails between Scott Evans and Bill Ames). He confirmed that
23 the Project exceeds the City's Green Factor requirement and that the Project's replacement
24 landscape exceeds the Code's 1:1 replacement ratio by providing replacement canopy at a 3:1

25
26 ¹⁰ Sean Dugan Testimony, Day 6, Part 2, beginning at 00:51:25

¹¹ Scott Evans Testimony, Day 6, Part 3, beginning at 00:27:13.

1 ratio (4,717 existing/15,000 replacement). When street trees and off-site landscaping are added
2 in, the Project will replace approximately 14,500 square feet of existing canopy with 40,000
3 square feet of replacement canopy (2.75:1 ratio).

4 Mr. Evans refuted Ms. Cohen's concerns regarding choice of trees, testifying that the
5 plantings were appropriate for their intended locations around the Project site and were good
6 candidates for long-term survivability with proper maintenance. Mr. Evans stated that the
7 replacement native vegetation, particularly in the hill climb stairs area, will remove a mono-
8 culture of Himalayan blackberry and create a food source for songbirds and other wildlife. He
9 concluded by saying that the sizes of planters and soil volumes are appropriate and adequate, and
10 that the replacement landscaping will be an improvement over the site's current vegetation.

11 **f. Wildlife Habitat.**

12 SMV provided testimony from lay witness Andrew Kirsch on his observations of wildlife
13 (primarily songbirds) at the Project site. Velmeir presented the report and testimony of wildlife
14 biologist, Jim Keany. In his Habitat Assessment Report (Ex. 53), Mr. Keany confirmed that the
15 site is not mapped or designated as a habitat conversation or environmental critical area, and is
16 not subject to any special regulations effecting wildlife.

17 Mr. Keany's professional opinion is that the Project site is not part of a larger urban
18 forest or wildlife corridor. It does not house any rare or uncommon plants or wildlife. Its current
19 habitat value is poor, with an invasive species understory. *See* Ex. 53 (Habitat Assessment
20 Report). Mr. Keany further testified that none of the birds Mr. Kirsch identified are rare or
21 threatened—they are common species with no protections required by WDFW or the City. As a
22 result, Mr. Keany concluded that there is no regulatory impediment or significant adverse impact
23 from the removal of the existing vegetation. He concluded that, while there will be a temporal
24 displacement of wildlife during construction, the vegetation removal and mitigation with
25 replacement landscaping will not result in significant adverse environmental impacts to wildlife
26

1 species and plant life as there is other available habitat and the site can be re-populated once the
2 replacement landscaping is installed.

3 **g. Traffic.**

4 City traffic engineer John Shaw evaluated the traffic information prepared by Velmeir's
5 traffic engineer, Edward Koltonowski of Gibson Traffic Consultants ("GTC"). Mr. Shaw
6 concluded that Mr. Koltonowski's traffic impact analyses showed that the Project traffic met the
7 City's LOS requirements and would not adversely affect vehicular or pedestrian safety. *See* Ex.
8 14, p. 31 (Transportation), p. 32 (SEPA condition requiring Velmeir to provide flaggers to
9 facilitate truck loading) (MUP Decision). Mr. Shaw testified that the City reviewed the
10 following traffic data for its threshold determination:

- 11 • Ex. 94 (Traffic Impact Analysis dated June 2016)
- 12 • Ex. 95 (Updated Traffic Impact Analysis dated May 2017)
- 13 • Ex. 96 (GTC Response to Tilghman Memo)
- 14 • Ex. 97 (SDCI Correction Notice)
- 15 • Ex. 98 (PCC Truck Count Information) and
- 16 • Ex. 99 (truck turning movements)

17 Mr. Shaw explained that the City encourages the use of the ITE methodology, which was
18 used in the GTC traffic impact studies. Mr. Shaw testified that he does not believe the Project is
19 likely to have significant adverse impacts related to traffic or parking. And, if unanticipated
20 impacts were to arise, they could be mitigated through additional City action (such as
21 introducing a left-turn waiting lane, a double-left turn lane, or prohibiting left turns onto Madison
22 Street during certain times during the day). He did not foresee any safety hazards or significant
23 impacts to pedestrians.

24 Mr. Koltonowski explained that the GTC traffic impact studies included several factors
25 that increased their conservancy. *See, e.g.* Ex. 95, p. 3 (May 2017 Traffic Report). First, GTC
26 used double the ITE trip generation rate for the grocery store use.¹² Second, GTC did not

¹² Edward Koltonowski Testimony, Day 7, Part 1, at 25:20-27:02.

1 discount trip generation with internal capture, which is commonly done for mixed use projects.¹³
2 Finally, GTC assumed that an additional 15% of local commercial trips would travel south down
3 29th Avenue, Republican Street, and Dewey Pl. In short, GTC's analysis of commercial traffic
4 was conservatively based on 115% of double the expected ITE rate.¹⁴

5 Regarding the dual access configuration (residential entrance on Dewey Pl./commercial
6 entrance on Madison St.), Mr. Shaw testified that impacts on transportation and parking would
7 be minimal, and he does not anticipate any unmitigated safety issues or vehicle/pedestrian
8 conflicts.

9 With respect to Madison St., Mr. Shaw stated that the City had received adequate
10 information concerning the commercial access there: multiple trip generation calculations were
11 done, pedestrian crossings were analyzed, and truck counts and turning information were
12 provided.

13 Mr. Shaw confirmed that there is no City LOS standard for private driveways, and if the
14 private driveway operates at LOS F, it refers to delay in seconds, and does not infer a traffic
15 impact. Mr. Shaw concluded that any congestion at the Project's Madison St. entrance would
16 occur on private property and would not be a significant adverse impact to the City's road
17 network that is cognizable under the City's regulations.

18 Concerning Dewey Pl., Mr. Shaw testified that he had no reason to believe an additional
19 20-30 cars during the PM peak hour would increase any risk of pedestrian or vehicular accidents
20 in that area: the dual-access solution results in only 16% of the Project's generated traffic
21 traveling on Dewey Pl., which is not a high volume of additional trips, and not a substantial
22 impact to a street that currently operates at LOS A.

23 Mr. Koltonowski explained that with Project traffic, all of the studied intersections will
24 operate at LOS C or better, which exceeds the City's LOS E requirement. Regarding the
25

26 ¹³ *Id.* at 30:55 – 33:20.

¹⁴ Edward Koltonowski Testimony, Day 7, Part 1, at 25:20-26:55; 30:55–33:20.

1 Madison St. driveway design, he opined that either a single or two exit lane configuration are
2 functional and that both would operate at LOS C or better during non-peak hours and at LOS F
3 during the PM peak hour, with the main difference being an increase in on-site delay for exiting
4 vehicles with the single exit lane configuration. He does not believe that the single exit lane
5 configuration is unsafe or creates a significant adverse impact. He stated that the anticipated
6 delay at the Project's Madison St. entrance is consistent with exit delays typically experienced at
7 other locations around the City where traffic exits a building onto a high traffic volume street
8 during rush hour.¹⁵

9 Regarding Dewey Pl., Mr. Koltonowski explained that, because of current low traffic
10 volumes, the addition of the Project's residential traffic will not adversely impact Dewey Pl. or
11 30th Avenue. To address concerns raised by SMV traffic consultant Ross Tilghman, Mr.
12 Koltonowski performed additional traffic counts at the 29th Avenue/Arthur St., 30th
13 Avenue/Republican St., 32nd Avenue/Republican St. intersections.¹⁶ The additional traffic
14 counts confirmed his earlier conclusions that there are no vehicular or pedestrian safety issues
15 and that these intersection will continue to operate at LOS A during the PM peak hour with
16 Project traffic.

17 **(1) Mr. Koltonowski and Mr. Strazzara Explained That All**
18 **Applicable Sight Triangle Requirements Are Met For The**
19 **Project.**

20 Mr. Koltonowski testified that, from a traffic engineer's perspective, there are two
21 relevant sight requirements: a 15-foot sight triangle for vehicles entering a public roadway and a
22 requirement for vehicle stopping sight distance along the road center line.¹⁷ Both of these
23 metrics are met by the Project.

24 ¹⁵ Edward Koltonowski Testimony, Day 7, Part 1, at 34:50 – 35:10 (no safety impact with either exit configuration);
25 01:15:30 (same).

26 ¹⁶ *Id.* at 01:23:41.

¹⁷ Charles Strazzara Testimony, Day 7, Part 3 at 23:37 – 23:54 (“[T]he triangles he [Edward] was speaking to are
vehicular view triangles and those definitely fall more out of my expertise. Those are for traffic engineers to look at

1 A third City requirement is for a 10-foot pedestrian sight triangle for vehicles exiting a
2 parking garage onto a public sidewalk. Because this sight triangle is created by the building's
3 entrance design, it falls within the purview of the Project architect, Mr. Strazzara.¹⁸

4 Mr. Strazzara explained that the DRB placed two conditions on Velmeir's requested
5 Code departures to allow split vehicular access: 1) reduce the width of the Madison St. curb cut
6 to the minimum necessary and 2) include dual access doors on the Madison St. entrance to allow
7 screening of the truck loading dock when it was not in use. *See* Ex. 14, p. 20 (MUP Decision).

8 Mr. Strazzara explained that, following the DRB Recommendation meeting, Velmeir
9 continued working with both SDOT and SDCI on curb cut size, access lanes, and the Madison
10 entrance configuration. Because the Madison St. entrance design was in flux, the Madison St.
11 garage-entrance sight triangles were included on the Project's revised building permit plan set
12 that is currently undergoing SDCI review. Mr. Strazzara also explained that the DRB had
13 suggested other design elements to enhance pedestrian safety. *See* Ex. 14, p. 20 (#2) (MUP
14 Decision). As a result, in addition to the entrance pedestrian sight triangles, the Project will
15 incorporate tactile paving, wide-angle mirrors, and possibly a sensory alert system, thereby
16 exceeding the Code's requirements.¹⁹

17 **h. Groundwater and Stormwater.**

18 SMV presented testimony from Tony Hacker and Tom Spangenberg.²⁰ Mr. Hacker is not
19 a professional engineer or stormwater expert. Mr. Spangenberg is a professional engineer but he
20 did no analysis and prepared no reports on the Project's proposed stormwater system; he has also
21 never designed a stormwater system for a mixed-use development.

22
23
24 and that's for how a car sees another car in the roadways and he kind of explained that, one being from the
25 centerline and one being from the curb.")

26 ¹⁸ Charles Strazzara Testimony, Day 7, Part 3, at 23:30, 23:54 – 24:26.

¹⁹ Charles Strazzara Testimony, Day 7, Part 3, at 31:55.

²⁰ *See* Tony Hacker Testimony, Day 1, Part 2, beginning at 00:05:44; Tom Spangenberg Testimony, Day 2, Part 1,
beginning at 00:00:56; (recalled), Day 7, Part 4, beginning at 00:37:40.

1 Both Mr. Hacker and Mr. Spangenberg's testimony centered around a catastrophic
2 December 2006 rainfall event that claimed the life of an area resident. However, what both Mr.
3 Hacker and Mr. Spangenberg failed to acknowledge was the effect of the major upgrades to the
4 area stormwater system that the City installed after the December 2006 storm, which included
5 installation of additional catch basins on Madison St. and the creation of an additional four
6 million gallons of stormwater detention capacity.²¹

7 City drainage reviewer, Ede Courtenay, and Project civil engineer, Joe Taflin, testified
8 that the Project's stormwater detention system is safe, meets Code requirements, and will not
9 contribute to a catastrophic discharge of surface or groundwater.²²

10 Ms. Courtenay explained that the City-produced Preliminary Assessment Report or
11 "PAR," provides the drainage requirements for a project, and that a PAR was prepared for this
12 project. *See* Ex. 79 (PAR). She testified that the Project was legally permitted to discharge its
13 stormwater to either a 15-inch main in Madison St. or an 8-inch main in Dewey Pl. and that the
14 specifics of the stormwater system are not analyzed during the MUP process and would be
15 analyzed during subsequent City review.

16 Ms. Courtenay and Mr. Taflin agreed that the Project's stormwater system will improve
17 the site's handling of stormwater over existing conditions, as the current building lacks any
18 stormwater detention, and as a result, stormwater sheet-flows down the steep slope to Dewey
19 Pl.²³ In contrast, once built, stormwater from the Project site will be collected from the site's
20 impervious surfaces and piped into a large rainwater reuse/vault system. The discharge from the
21 vault will be metered to meet the City's requirements.

22 Ms. Courtenay opined that all of the stormwater will be routed from the site to the City's
23 5-foot diameter combined main, and that all potential stormwater impacts will be addressed by
24

25 ²¹ *See generally* Ede Courtenay Testimony, Day 5, Part 1, at 46:39.

26 ²² *See* Ede Courtenay Testimony, Day 5, Part 1, beginning at 00:37:52; Joe Taflin Testimony, Day 6, Part 1,
beginning at 00:10:00.

²³ *See generally* Ede Courtenay Testimony, Day 5, Part 1, at 50:30; Joe Taflin Testimony, Day 6, Part 1, at 44:50.

1 application of the City's stormwater regulations.²⁴ Further, based on the post-2006 system
2 improvements, she believes that a repeat of the December 2006 event would be highly unlikely
3 and that Project stormwater would not contribute to surface water flooding on Dewey Pl.²⁵

4 Mr. Taflin stated his professional opinion that the Project will not result in unmitigated
5 adverse environmental impacts with regard to flooding on Dewey Street or groundwater
6 redirection to abutting properties.²⁶ He explained that the stormwater collection system had been
7 sized, per City requirements and the geotechnical engineer's recommendation, to include
8 expected volumes of groundwater that will be intercepted by the building's foundation drains.
9 See Ex. 14, p. 29 (MUP Decision). Because the Project site's stormwater will be collected and
10 metered through the 8-inch main to the City's 5-foot collector, both Ms. Courtenay and Mr.
11 Taflin found no basis for SMV's concern that the Project may exacerbate flooding on Dewey
12 Pl.²⁷

13 **5. SMV Failed To Prove That SDCI Erred When It Elected Not To Exercise Its**
14 **Substantive SEPA Authority.**

15 Per WAC 197-11-660(1)(b)&(e), substantive SEPA mitigation must be linked to specific,
16 adverse environmental impacts of the proposal that are clearly identified in an environmental
17 document and that are not otherwise addressed by existing regulations. Before requiring
18 substantive SEPA mitigation, SDCI must consider whether other regulations would mitigate an
19 identified significant impact. SMC 25.05.660.A.5. If SDCI determines that another regulation
20 addresses the impact, the City must refrain from exercising its substantive SEPA authority. SMC
21 25.05.660.A.7. Thus, SDCI's decision whether to exercise substantive SEPA authority is
22 prescribed unless certain pre-conditions are met. SMC 25.05.660.

23 SMV may argue that SMC 25.05.665.D.3 and D.5 compelled SDCI to exercise
24 substantive SEPA authority because, in SMV's opinion, the Project site presents unusual

25 ²⁴ See generally Ede Courtenay Testimony, Day 5, Part 1, beginning at 50:30.

26 ²⁵ *Id.*

²⁶ See Joe Taflin Testimony, Day 6, Part 1, at 49:09.

²⁷ See Joe Taflin Testimony, Day 6, Part 1, at 47:25.

1 circumstances or results in substantial problems of zone transition or use that were not
2 specifically addressed by the Code.

3 Both SDCI Planner Magda Hogness and Project architect Charles Strazzara testified that
4 there is nothing extraordinary or unique about the Project site that would require exercise of the
5 City's substantive SEPA authority and that development on sloped sites or near zone edges is a
6 common occurrence in Seattle.

7 Furthermore, several existing City development regulations address site transition. First,
8 the site is split-zoned, NC3-30 and NC3-40, evidencing the City Council's intent to reduce
9 structure height for the immediately-adjacent residential properties to the south. Second, the
10 Project was subject to full design review. The DRB addressed height, bulk, and scale at each of
11 the three EDG meetings before unanimously concluding that Velmeir had done a good job of
12 addressing its height, bulk and scale guidance and responding to the residential uses located
13 across the street on Dewey Pl.

14 Through the design review process, the DRB selected several priority guidelines that
15 specifically focused on zone transitions and building massing for sites that are large, unusually
16 shaped, or contain varied topography (*e.g.* Design Guidelines CS1-C (topography); CS2-B
17 (adjacent sites); CS2-B.1 (site characteristics), CS2-D (height, bulk and scale); CS2-D.3 (zone
18 transitions) CS2-D.2 (existing site features), and DC2-A (massing), referenced in Ex. 14, p. 6
19 (EDG 1); p. 10 (EDG 2); pp. 13-14 (EDG 3) and p. 18 (REC) (MUP Decision's DRB
20 discussion).

21 With regard to height, bulk, and scale impacts, the Code sets up a double presumption
22 that SMV has failed to overcome. In addition to the requirement of affording substantial weight
23 to the Director's threshold determination, SMC 25.05.675.G.2.c provides that the City's Design
24 Guidelines are intended to mitigate the same adverse height, bulk, and scale impacts as the City's
25 substantive SEPA policies. As a result, a project that is approved pursuant to the design review
26 process is presumed to comply with the City's substantive SEPA height, bulk, and scale policies.

1 This presumption may be rebutted only by **clear and convincing evidence** that height, bulk and
2 scale impacts documented through environmental review have not been adequately mitigated. *Id.*

3 The “clear and convincing” evidence standard requires that the evidence be substantially
4 more likely to be true than untrue and that the fact-finder be convinced that the contention is
5 highly probable. *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S.Ct. 2433 (1984).

6 Here, SDCI planner Magda Hogness testified that the DRB’s analysis of the Project’s
7 height, bulk, and scale was considered and incorporated into the Director’s SEPA
8 determination.²⁸ Ms. Hogness stated that she was satisfied that the iterative design review
9 process worked and that the Project had been carefully studied and thoughtfully considered.

10 She explained that the DRB considered height, bulk, and scale at each of the three EDG
11 meetings and at the Recommendation meeting. In response to DRB guidance, Mr. Strazzara
12 addressed potential height, bulk, and scale impacts by reducing the overall heights of the
13 building tiers, setting the upper floor massing back from Dewey Pl., incorporating setbacks and
14 landscaping, and adding residences along the Dewey Pl. building façade. Ms. Hogness further
15 testified that the DRB was fully informed regarding its authority to impose further mitigation to
16 address height, bulk and scale, but it chose to forgo imposing additional mitigation beyond what
17 it had already required. Instead, in approving the Project, the DRB concluded that:

18 The Board acknowledged the public’s concern with the height, bulk and scale of
19 the proposal and recognized the site and change of topography as challenging.
20 ***However, the Board concluded the applicant has done a thoughtful job of
modifying the proposal to respond to the context and previous guidance.***

21 Ex. 14, p. 18 (MUP Decision) (emphasis added).

22 Project architect Charles Strazzara testified that the building footprint shrunk in response
23 to the DRB’s design guidance and the project was intentionally set back and stepped down so
24 that the upper floor occupied only 40% of the allowed building envelope. In addition,
25 landscaping was incorporated at street level and on the upper floors to further help break up the

26 ²⁸ Magda Hogness Testimony, Day 4, Part 2, beginning at 00:01:00.

1 building's mass. Mr. Strazzara concluded that several of the mitigation techniques listed in SMC
2 25.05.675.G.2.b were implemented on the Project through the design review process.

3 **6. Based On The Weight Of The Evidence Presented At The Hearing, SMV Has**
4 **Failed To Demonstrate Clear Error In The Director's SEPA DNS**
5 **Determination.**

6 The hearing testimony and voluminous exhibits evidence that the Project was subject to
7 thorough environmental review by SDCI's technical team. SMV singled out the Madison St.
8 garage entrance and the Project's stormwater system to contend that dangerous, unanalyzed
9 conditions had somehow slipped through the cracks.

10 However, as SDCI Senior Planner Bill Mills testified, the MUP process is just one
11 milestone in the City's ongoing project review, and it is not uncommon that specific details are
12 addressed later in the process after SDOT Street Improvement Plan approval or building permit
13 plan submission.²⁹

14 The fact that a complete stormwater design had not been submitted at the time of MUP
15 review does not create a fatal flaw. Ms. Courtenay's testimony shows that the City had adequate
16 information to understand the proposed stormwater system and that the City found no issue with
17 it. Likewise, the fact that the Project architect was continuing to work with SDCI and SDOT on
18 the precise configuration of the Madison St. entrance does not mean that a significant, adverse
19 impact went unanalyzed. To the contrary, Mr. Strazzara testified that the entrance sight triangles
20 are included in the revised building plan set and that the Project is going above Code
21 requirements by including other pedestrian safety design features, including tactile paving and
22 wide-angle mirrors.³⁰

23 Based on the weight of the evidence presented at the hearing, SMV has failed to meet its
24 burden to demonstrate clear error in the Director's SEPA DNS determination. As a result the
25 Director's Decision should be affirmed.

26 ²⁹ Bill Mills Testimony, Day 7, Part 4, beginning at 00:28:20.

³⁰ Charles Strazzara Testimony, Day 7, Part 3, at 31:55.

1 **C. The Director’s MUP Decision Appropriately Incorporated the DRB’s Unanimous**
2 **Recommendation Approving The Project.**

3 In its clarified appeal issues, SMV challenged the Project’s compliance with 29 Design
4 Guidelines. Revised Appeal, ¶2.b. As a preliminary matter, several of SMV’s design guideline
5 challenges are subject to summary dismissal. At the hearing, SMV’s architect, Mr. Peter
6 Steinbrueck, failed to provide *any* testimony regarding twenty of the Design Guidelines listed in
7 SMV’s appeal: (CS1-B2, CS1-B3, CS1-E2, CS2-A1, CS2-A2, CS2-B2, CS2-D4, CS2-D5, CS3-
8 A1, CS3-A3, PL1-A1, PL1-A2, DC1-B1, DC1-C4, DC2-A1, DC2-A2, DC2-C3, DC3-B3, DC3-
9 C1, or DC3-C3).³¹ Additionally, Mr. Steinbrueck testified regarding several other allegedly
10 violated Design Guidelines (CS3-A2, DC1-C1, DC1-C2, DC2-B2, DC2-C1, DC2-C2, DC2-D1,
11 DC3-C2, DC3-D1, DC3-D2, DC3-D3 and DC4-D4). However, *none* of these Design Guidelines
12 were included in SMV’s Revised Appeal.

13 SMV has abandoned its appeal of the guidelines for which it presented no evidence, and
14 Mr. Steinbrueck’s testimony regarding additional Design Guidelines that were not properly
15 appealed should be stricken. *Seattle First-Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230,
16 243, 588 P.2d 1308 (1978) (issues not raised on appeal deemed abandoned); Hearing Examiner
17 Rule 3.01(b) and (d) (issues must be raised in timely notice of appeal).

18 **1. The Design Guidelines Are Not Prescriptive And Set The Stage For**
19 **Flexibility And Dialog During the Design Review Process.**

20 The Director’s Design Review Decision is afforded “substantial weight.” SMC
21 23.76.022.C.7. Again, the burden is on SMV to prove that the Director’s Design Review
22 Decision was clearly erroneous—i.e. SMV must present actual analysis and evidence
23 establishing a definite and firm conviction the Director erred in accepting the DRB’s unanimous
24 recommendation approving the Project.

25 SMV carries a heavy burden for the design review portion of its appeal because the
26 Design Guidelines are not prescriptive regulations. Rather, in contrast to the prescriptive

³¹ In fact, no SMV witness testified about these appealed guidelines.

1 regulations in SMC Title 23, the Guidelines “set the stage for flexibility and dialogue during
2 project review.” Design Guidelines, Introduction, p. iv. The Guidelines also explain that there is
3 not one correct way to achieve compliance. Instead, the Guidelines instruct applicants, Design
4 Review Boards, and other reviewers to “use their judgment and discretion in determining which
5 approaches and strategies are particularly applicable to a given project.” Design Guidelines,
6 Introduction, p. v.

7 If, as occurred here, four or more DRB members agree on the recommendation, the
8 Director is obligated to make compliance with that recommendation a condition of MUP
9 approval unless the recommendation is inconsistent with the application of the design review
10 guidelines, conflicts with SEPA conditions, is contrary to state law, or exceeds the DRB’s
11 authority. SMC 23.41.008.F.3.

12 **2. Mr. Steinbrueck’s Opinion Is Not Evidence That The Director Committed**
13 **Clear Error By Adopting The DRB’s Unanimous Recommendation.**

14 The Director’s MUP Decision includes 23 pages of analysis on the design review process
15 detailing the public input, the DRB’s designation of priority Design Guidelines, and Velmeir’s
16 iterative responses to the DRB’s direction. *See* Ex. 14, pp. 3-26 (MUP Decision). Throughout
17 the design review process, the DRB designated 42 Design Guidelines as priority guidelines for
18 the Project. *Id.*, pp. 20-24.

19 In adopting the DRB’s Recommendation in the MUP Decision, SDCI concluded:

20 The Director agrees with the Design Review Board’s conclusion that the proposed
21 project and conditions imposed result in a design that best meets the intent of the
22 Design Review Guidelines and accepts the recommendations noted by the Board.

23 * * * *

24 The Director is satisfied that all the recommendations imposed by the Design
25 Review Board have been met.

26 *Id.*, p. 25 (MUP Decision).

Mr. Steinbrueck provided his opinion that the design review process failed to address
aesthetic and height, bulk, and scale impacts. He disagreed with SDCI’s conclusion that the

1 DRB process resulted in a Project that was consistent with the Design Guidelines and satisfied
2 the DRB's recommended conditions.

3 As stated previously, Mr. Steinbrueck did not address most of the Design Guidelines
4 listed in SMV's Revised Appeal, and he inexplicably testified about Design Guidelines that
5 SMV had not appealed. Additionally, he failed to address many of the Design Guidelines that
6 the Board designated as priority guidelines, which informed the evolution of the Project as it
7 progressed through the design review process. *Compare* Ex. 15 (Peter Steinbrueck's selected
8 Design Guidelines) *with* Ex. 14, pp. 20-24, (MUP Decision, listing DRB priority guidelines).

9 On cross-examination, Mr. Steinbrueck acknowledged he had attended some of the DRB
10 EDG meetings and made presentations to the DRB on SMV's behalf. He conceded that
11 architects often disagree over the best way to respond to the design guidance and that there were
12 a number of devices that an architect could use to respond effectively to particular guidance.

13 Mr. Steinbrueck was uncertain of whether SMV's 3-D model accurately represented the
14 building that SDCI reviewed during the MUP process and he was unaware of the upper story
15 landscaping features that Velmeir has included in the building design. Although he was
16 concerned about "loopholes and artifices," Mr. Steinbrueck conceded that he had no technical
17 issue with Velmeir's average grade calculation and that he had not independently performed an
18 average grade calculation for the Project.

19 **3. SDCI Planner Magda Hogness Testified To The Thoroughness Of The**
20 **Design Review Process.**

21 SDCI Senior Land Use Planner Magda Hogness is a licensed architect and certified land
22 use planner.³² She holds Masters Degrees from the University of Washington in both
23 architecture and urban planning. Prior to her employment with the City, she served on the East
24 Design Review Board.

25
26 ³² Magda Hogness Testimony, Day 4, Part 2, at 7:28.

1 Ms. Hogness guided Velmeir through the design review process, was present at the
2 meetings, prepared the DRB guidance documents, reviewed draft responses and made
3 recommendations to ensure that the design revisions were consistent with the DRB's direction.

4 Ms. Hogness testified that the design review process was respected fully.³³ She said that
5 the NC3 zoning on the Project site contemplated and permitted both the mix of uses and a
6 building of the scale proposed by Velmeir, even though the site was adjacent to a residential
7 zone.³⁴ The thoroughness of the design review process is evidenced by Exs. 63-78 and 126-141.

8 Reviewing Ex. 68 (October 18, 2016 guidance memorandum for EDG2), Ms. Hogness
9 explained that she tried to be as clear as possible in explaining to the DRB that its authority
10 included requesting modification to height, bulk and scale, even if the building was Code-
11 complaint for height.³⁵

12 In response to a question from the Hearing Examiner, Ms. Hogness confirmed that the
13 Board was aware of its authority,³⁶ and that by the time of the Recommendation meeting the
14 DRB was satisfied with Velmeir's response to the DRB's height, bulk, and scale guidance:

15 **Hearing Examiner:** I am sorry. I just want to ask a question. You keep repeating
16 that you have given this guidance. Can you provide information on how the Board
responded to that?

17 **Ms. Hogness:** Certainly. I wanted to make sure they knew that they had the
18 authority to require additional setbacks or additional transitions in height, bulk,
19 and scale of the proposal. So, each time the Board, because there was a lot of
20 public comment related to height calculations and how height would be
21 calculated, and that is a zoning issue, to give them guidance on their authority and
22 what they could do. The Board responded in the first EDG meetings by asking for
23 more setbacks and transitions in height, bulk, and scale. And in the
24 Recommendation meeting they were satisfied, for the most part.

25 **Hearing Examiner:** So they acknowledged your discussion and that's how they
26 responded?

23
24 ³³ Magda Hogness Testimony, Day 4, Part 3, at 26:31.

25 ³⁴ *Id.* at 1:46:10.

26 ³⁵ Magda Hogness Testimony, Day 4, Part 2, at 58:43, 1:21:45, and 1:51:17.

³⁶ Magda Hogness Testimony, Day 5, Part 1, at 38:10 (In response to a question on whether the DRB was adequately informed about its authority and ability to regulate the project through the Design Guidelines, Ms. Hogness testified that, in her memos she clearly articulated the Board's authority).

1 **Ms. Hogness:** Right. It was very clear that the Board could always ask for more.

2 **Hearing Examiner:** Alright. Thank you.³⁷

3 Ms. Hogness explained that the Project followed the Priority Guidelines identified by the
4 DRB³⁸ and that she spent approximately 200 hours shepherding the Project through the design
5 review process.³⁹ Ms. Hogness testified that with regard to analysis of height, bulk, and
6 scale, the Project was thoroughly reviewed and conditioned:

7 I would say that the Design Review Board, their review of the project, specifically
8 the massing, height bulk and scale, has been the most thorough project I've
9 encountered to date as a senior land use planner. So, and I've reviewed projects
10 that are located downtown. I've reviewed projects that have undergone rezone.
11 I've reviewed projects that are also adjacent to a single family transition. This
12 particular project has had four design review board meetings, the benefit of four
13 design review board meetings and I think that's a testament that shows a lot of the
14 modulation and the transition in stepped topography to the Dewey frontage really
15 has been resolved throughout that process. Typically, projects go through two
16 meetings, sometimes three. But this is, I've never had a proposal that has gone
17 through so much review."⁴⁰

18 Finally, Ms. Hogness agreed that the DRB's iterative process worked and that the Project
19 had "been carefully studied and thoughtfully considered."⁴¹

20 **4. Project Architect Charles Strazzara Explained How The Project Met Each
21 Of The 29 Design Guidelines Challenged By SMV.**

22 Velmeir's architect, Charles Strazzara, explained several design-related aspects of the
23 Project.⁴² First, he dispelled SMV's concern about moving and delivery trucks on Dewey Pl.,
24 explaining that the Project's apartment units would have a moving center and package delivery
25 area that are accessed from Madison St., and garbage pickup would be split, with commercial
26 collection on Madison St. and residential collection stored internally until the garbage truck

37 *Id.* at 1:52.

38 Magda Hogness Testimony, Day 4, Part 3, at 24:45.

39 *Id.* at 27:57.

40 *Id.* at 28:25.

41 *Id.* at 38:20.

42 Charles Strazzara Testimony, Day 7, Part 3, beginning at 00:08:00

1 arrived on Dewey Pl.⁴³ Mr. Strazzara estimated approximately eight refuse truck trips per week
2 on Dewey Pl. (two recycling and two garbage trucks twice per week).⁴⁴

3 Mr. Strazzara testified that Velmeir voluntarily met with SMV several times prior to
4 initiating the design review process and that he and his team spent approximately 1,600 hours
5 preparing drafts, responding to DRB guidance, and modifying the Project.⁴⁵ Mr. Strazzara
6 complimented Ms. Hogness for the thorough job she did in vetting alternatives and preparing the
7 Project's design team for the DRB EDG meetings.⁴⁶

8 During his testimony, Mr. Strazzara discussed how the Project met each of the 29 Design
9 Guidelines that SMV had challenged. *See* Ex. 149 (Charles Strazzara's Presentation). He
10 explained how the "like for like" concept evolved that resulted in the townhomes and the
11 residential vehicle entrance being located on Dewey Pl. while the Project simultaneously created
12 a commercial frontage and commercial vehicle entrance on Madison St.⁴⁷

13 Regarding the on-site vegetation, Mr. Strazzara explained that in addition to working
14 with the City's technical experts, Velmeir also presented information to the DRB about the
15 design options that possibly could preserve some of the existing trees. Exhibit 137 is a
16 compendium of the various tree-related materials that were presented to the DRB during the
17 EDG process. It included a tree survey, table of trees, building massing options, and a summary
18 of the arborist's studies. *Id.* Mr. Strazzara explained the unsuitable on-site soils and the
19 arborist's conclusion that Code-compliant construction, dedication of the right-of-way,
20 groundwater interception, and construction of a required retaining wall along the Dewey Pl.
21 frontage would all negatively impact long-term tree survivability. Ultimately, the DRB
22 concluded:

23
24 ⁴³ Charles Strazzara Testimony, Day 7, Part 3, at 10:05 – 13:35.

25 ⁴⁴ *Id.*

26 ⁴⁵ Charles Strazzara Testimony, Day 7, Part 3, at 40:40 – 45:45.

⁴⁶ *Id.* at 48:00 – 49:05.

⁴⁷ *Id.* at 1:26:30.

1 The Board acknowledged the public's concern for the loss of the
2 significant mature plantings, however, the Board deferred to the
3 arborist study as reviewed and approved by the City and supported
4 the arborist's findings recommending the removal of the canopy.

5 Ex. 14, p. 14 (MUP Decision).

6 **D. The DRB Process and Recommendation, As Incorporated Into The MUP Decision,
7 Should be Respected and Affirmed.**

8 As evidenced by the public comment summaries in the MUP Decision (Ex. 14, pp. 3-5,
9 7-10, 11-13, and 14-16) SMV had ample opportunity to express its concerns and opinions on
10 how the Project should be modified to comply with the Design Guidelines.

11 It is also apparent that the DRB considered and incorporated public comment into its
12 guidance. For example, as reported in Ex. 14, p. 6 (MUP Decision), at EDG1, "[t]he Board
13 acknowledged the public's concern with the height, bulk and scale of the proposal and agreed
14 that the massing needed further transition along Dewey and the single-family zone," and "[t]he
15 Board unanimously agreed with public comment that additional setbacks should be provided to
16 respond to the site topography and transition to the single family zoning."

17 Following EDG2, the DRB "recognized the applicant's effort to date and supported the
18 changes including the additional setbacks provided." Ex.14, p. 10 (MUP Decision). Again
19 recognizing public concern, the DRB requested further transition of the building massing to
20 respond to the single family zone. *Id.*; *see also* EDG 2 Priorities and Recommendations 2.c
(DRB affirmed public comment regarding the pedestrian experience on Dewey Pl.).

21 By EDG3, while acknowledging the public comments regarding height, bulk and scale,
22 the DRB concluded that the Project had adequately addressed height, bulk, and scale impacts:

23 [T]he massing development is responsive to previous guidance and
24 that the design, overall, is on the right track. The Board strongly
25 supported the rearrangement of uses, specifically the addition of
26 townhouse units on the Dewey frontage as the use better reflects
the residential character of the neighborhood, provides an
intentional transition to the surrounding single family zoning and
better responds to the existing topography.

Ex. 14, p. 13, EDG3 Priorities and Board Recommendation 1 (MUP Decision).

1 Thus, the record before the Examiner is that SMV and other members of the public had
2 ample opportunity to comment on the Project, that the DRB incorporated public comment into its
3 guidance, and that Velmeir responded to that guidance by modifying the Project. SMV has not
4 presented actual evidence that either the DRB’s process or its substantive recommendation was
5 flawed or that SDCI’s adoption of that recommendation was clearly erroneous.

6 Affirming SDCI’s Design Review decision, and the Board Recommendation that
7 underlies it, is particularly important in the design review context because the overall design
8 review goal to “foster design excellence in private development of new multifamily and
9 commercial projects . . .” is not readily quantifiable. Design Guidelines, Introduction, p. iii. As
10 the Design Guidelines note: “Design excellence takes many forms and can be measured in
11 various ways.” *Id.* The Design Guidelines enable dialogue, provide a common language, and
12 “serve as the basis for fair and consistent recommendations by the Design Review Boards. . .”
13 Design Guidelines, Introduction, p. iv.

14 Here, the DRB was comprised of several design professionals, and Velmeir was entitled
15 to rely on the DRB’s interpretation and application of the Design Guidelines. To conclude
16 otherwise would create an arbitrary and subjective process that would violate Washington’s
17 requirement that neither an applicant nor government officials may be constitutionally required
18 or allowed to guess at the meaning of land use design requirements. *Anderson v. City of*
19 *Issaquah*, 70 Wn. App. 64, 75-78, 851 P.2d 744 (1993) (design review regulations and process
20 must provide effective and meaningful guidance).

21 The DRB was well within its discretion to make the design recommendations that guided
22 the Project’s compliance with the Design Guidelines. The fact that SMV or Mr. Steinbrueck are
23 dissatisfied with how the Project ultimately evolved is not a legally sufficient reason to overturn
24 SDCI’s decision to adopt the DRB’s well-reasoned recommendation. *Maranatha Mining, Inc. v.*
25 *Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990); *Sunderland Servs. v. Pasco*, 127
26 Wn.2d 782, 797, 903 P.2d 986 (1995).

1 **E. SDCI's Code Interpretation Was A Proper Application Of Former SMC**
2 **25.09.180.B.2.b's ECA Relief From Standards And SMC 23.86.006 Average Grade**
3 **Calculation Methodology.**

4 The Director's Land Use Code Interpretation ("Interpretation," at Ex. 87) must be
5 afforded substantial weight, and should be upheld. SMV failed to provide meaningful evidence
6 to refute the Director's conclusions or to demonstrate that the Interpretation is contrary to any
7 Code provision or policy. The Interpretation presents a logical evaluation and application of the
8 relevant development standards.

9 **1. ECA Relief From Standards.**

10 The Project site qualified for relief from ECA standards because the steep slope was
11 created from man-made fill in association with City street improvements and lawful prior
12 grading. SMC 25.09.180.B.2. As a result, as SDCI Senior Planner Bill Mills confirmed in
13 testimony, the critical areas requirements for vegetation retention are not applicable. SMC
14 25.09.060.B, 25.09.180.D, 25.09.320.A.3.b, and 25.09.320.A.3.d.⁴⁸

15 Interpretation Conclusion 1 states that the Project was reviewed by two SDCI
16 geotechnical engineers—Mr. Jim Mattoon and Mr. Rob McIntosh—for compliance with the
17 ECA relief from standards criteria. Ex. 87, p. 11, Conclusion 1. Based on the analysis of the
18 City's GIS system, street grade profiles, and historic grading permits, both reviewers concluded
19 that the on-site steep slope met the requirements for relief from ECA development standards.
20 *See Ex. 87.*

21 Interpretation Conclusion 5 explains that because the steep slope is eligible for relief
22 from ECA development standards, the ECA-associated restrictions on development and
23 vegetation removal do not apply. Ex. 87, p. 12, Conclusion 5. To find otherwise would render
24 Section 25.09.180.B.2 "meaningless". *Id.* At Interpretation Conclusion 6, the Director similarly
25 concluded that regulations for trees and vegetation removal and replanting in SMC 25.09.180.D
26 and 25.09.320A.3.b do not apply to portions of the site that are eligible for redevelopment. Ex.

⁴⁸ Bill Mills Testimony, Day 5, Part 2, beginning at 00:34:13.

1 87, p. 12-13, Conclusion 6. These regulations are intended to restrict development or other land
2 disturbing activities within environmental critical areas that are non-disturbance areas. However,
3 if an area is eligible for development, it is not an ECA, and tree and vegetation removal are
4 allowed. *Id.* The Director concluded that to find otherwise would effectively disallow the relief
5 the Project is entitled to.

6 **2. The Project Architect Properly Applied SMC 23.86.006 And DR 4-2012 To**
7 **Calculate The Project Site's Average Grade.**

8 Project architect Charles Strazzara testified that he followed DR 4-2012 (Ex. 134) to
9 calculate the site's average grade and that, early in the process, SDCI planner, Art Pederson,
10 confirmed that the average grade calculation had been done correctly. Ex. 136 (email to Lucas
11 Branham).⁴⁹

12 Mr. Strazzara also stated that, contrary to SMV's assertion, the Project architects did not
13 look for some advantage by using topographical dog-ears on the steep slope.⁵⁰ Instead, they
14 followed the DR 4-2012 methodology of cutting the property into rectangles running
15 perpendicular to the slope. After SMV raised this allegation, Mr. Strazzara re-ran the average
16 grade calculation using three rectangles instead of two. Ex. 135. The result was substantially the
17 same as the prior calculation and allowed construction of the MUP-approved Project, which is
18 below the maximum allowable building height.⁵¹

19 **F. Velmeir Renews Its Request For The Examiner To Dismiss SMV Appeal Issue 4(a).**

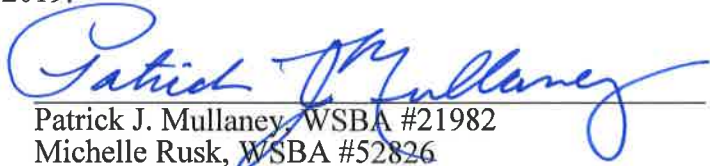
20 Velmeir renews its request for summary dismissal of SMV's appeal issue 4(a) because
21 the City's determination that Velmeir's arborist had provided an appropriate DR 16-2008 Risk
22 Assessment, which allowed for the removal of existing site vegetation under Ch. 25.11 SMC
23 (Tree Protection Ordinance), is a non-appealable Type I decision. *See* Ex. 49 (SDCI Correction
24 Letter agreeing with arborist's risk assessment).

25 ⁴⁹ *See also* Charles Strazzara Testimony, Day 7, Part 3, at 16:20-17:55; 21:45 – 23:10.

26 ⁵⁰ *See* Charles Strazzara Testimony, Day 7, Part 3, at 18:40 – 19:10.

⁵¹ Charles Strazzara Testimony, Day 7, Part 3, at 19: 24 - 20:22.

1 DATED this 20th day of February, 2019.

2 

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