BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by SAVE MADISON VALLEY of Decisions Re Land Use Application, Design Review, and Code Interpretation for 2925 East Madison Street, Project 3020338-LU and 3028345	HEARING EXAMINER FILE: MUP 18-020 (DR, W) & S-18-011 APPELLANT'S CLOSING BRIEF

I. INTRODUCTION

This appeal is brought by Appellant Save Madison Valley, a community of neighbors who live, work, rent and own property near the project site and who are committed to the livability, safety, and vibrancy of the Madison Valley neighborhood. The appeal challenges the Director's MUP decision issued on the Velmeir Proposal, a large, six-story building slotted for construction on a steep hill directly adjacent to the neighborhood.

The MUP decision has two components — the city's threshold determination under the State Environmental Policy Act ("SEPA"), chapter 43.21C.RCW, and the Director's design review decision pursuant to SMC 23.41.014.G. As discussed below, both of these components should be reversed and remanded. The threshold determination does not meet the standards required by SEPA and the project will result in significant adverse impacts on the neighborhood. The proposal also is not consistent with the city's design guidelines.

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II. OVERVIEW OF THE CASE

The Madison Valley neighborhood does not feel like many other neighborhoods in Seattle. Surrounded by green, the neighborhood sits in the valley of an old stream bed, with hillsides rising steeply to the west and north, where the Velmeir Proposal — the proposed multi-use structure at issue in this case — is slotted for development. The proposed structure would stretch more than 300 feet along Dewey Place East, a small residential road barely wide enough for two cars. It would tower more than 80 feet, top to bottom, dwarfing the single-family homes below. And it would eliminate a healthy stand of trees that are one of the most prominent features of the greenspace that curves around the valley walls, enveloping the neighborhood and providing a comforting respite from the cars and commerce along East Madison Street on the ridge above the neighborhood. The image below depicts the Madison Valley neighborhood as seen from the ridgeline above, near the northeast corner of the project site, looking southeast across the valley floor.

Image 1:
The Madison Valley Neighborhood
Source: Exhibit 4 at 2:33–2:41

The image above was spliced together from two different frames of the video submitted as Exhibit 4 (the walking tour with Mr. Murphy). The lines do not match up perfectly, but it is an accurate depiction of what one would see standing in the same location — a quaint residential neighborhood at the valley bottom, surrounded by trees and lush vegetation.

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At the hearing, the Examiner heard much testimony about the significance of the particular trees that will be cut down to make way for the Velmeir Proposal, some of which can be seen on the far right-hand side of the image above. The next image (Image 2) depicts the trees slotted for removal, towering high above Dewey Place East at the western end of the neighborhood. The trees are roughly the same height, top to bottom, as the structure proposed by Velmeir. *See* Hacker Testimony, Day 1.

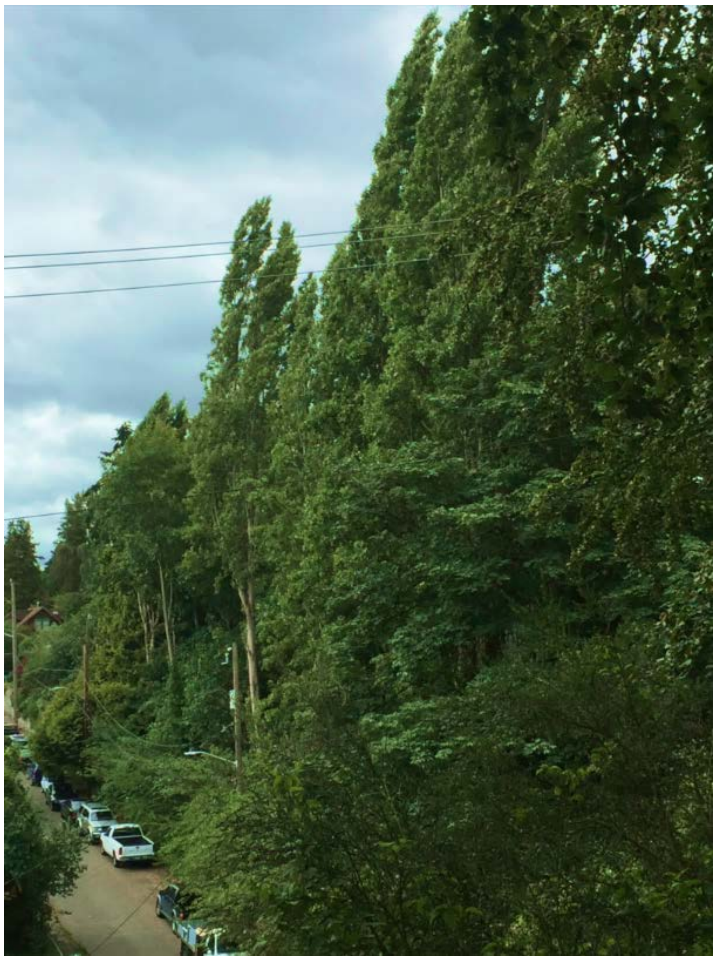

Image 2
Source: Exhibit 5

These trees are a defining element of the neighborhood, providing a needed buffer from the busy arterial and bustling commercial area along East Madison Street on the ridgeline above the neighborhood. As Tony Hacker explained, "it really does feel like a unique neighborhood. For one

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thing, we're very close to Madison Street, which is a business and commercial area right close to downtown. So, it's . . . an urban space, except right off of Madison is this green space which demarcates the residential and as a buffer to the residential neighborhood directly below." Hacker Testimony, Day 1, Part 2 at 16:00.[1] These trees are part of what draws people to live in the neighborhood. *See id*. at 16:45; Murphy Testimony, Day 1, Part 1 at 1:08:40.

The major role these trees play in the character and feel of the neighborhood would be apparent to anyone standing at the valley floor. But under Velmeir's proposal, they will be replaced with an enormous, six-story building containing nearly 26,000 square feet of commercial space, 82 apartments, six townhomes, and a busy garage entrance on Dewey. *See* Ex. 14 at 1; Ex. 12. Removing these trees will eliminate about a third of the natural environment that currently envelopes the neighborhood, shielding it from the more intensive commercial uses on the ridge above. Bolz Testimony, Day 4, Part 1.

The streets of the Madison Valley neighborhood, below the ridge that leads up to East Madison Street, are kid friendly, with children often playing basketball and other games in the street. *See* Ex. 5. And at the far end — where Dewey Place East meets East Mercer Street — is a community P-Patch, which the local residents worked for years to set up through the Seattle Department of Neighborhoods. *See* Bolz Testimony, Day 2. The "Mad P," as the P-Patch known, can be seen in on the left-hand side of the first image above (Image 1). Is a special place not only for people lucky enough to get a plot and grow crops, but for the many people who stroll through this area for pleasure, as part of a walking path that begins at the Mercer Steps connecting to Lake Washington Boulevard. *See id*. The image below depicts the P-Patch looking towards the project site. The car in the background is parked at the intersection of Dewey Place East and East Mercer

[1] In quoting specific testimony from the hearing, we cite to the hearing day (e.*g.,* Day 1, Day 2, etc.), the audio file containing the quote (Part 1, Part 2, etc.), and the time within the file (*e.g.,* 16:00).

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Street, the lowest point of the Valley floor, at the northern end of the Madison Valley neighborhood. As one witness explained at the hearing, "Madison Valley is *the* garden neighborhood of Seattle. People seem kind of obsessed with gardening and having that kind of connection with nature. I think it's really in the DNA of the neighborhood." Murphy Testimony, Day 1, Part 1 at 1:08:11 (emphasis added).

Image 3
Source: Ex. 54 at 1

The next image (Image 4) shows some of the lower plots of the P-Patch nearest to the Velmeir Proposal. They will be located within the shadow cast by the proposal, as depicted in Velmeir's final recommendation package to the Design Review Board. *See* Ex. 75 at 113.

Image 4
Source: Ex. 54 at 10

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A currently designed, the Velmeir Proposal would radically transform the neighborhood, replacing the greenspaces on the valley walls above the neighborhood with a monstrous, looming building. Below is an image of the nearly 1-acre project site from Velmeir's recommendation package to the Design Review Board, denoted in orange, overlaying an aerial photograph of the Madison Valley neighborhood and surrounding area. The structure would fill virtually every square foot of the site. *See* Ex. 12, Sheet C2.00. The sheer size of the structure would dwarf every other building in the area.[2]

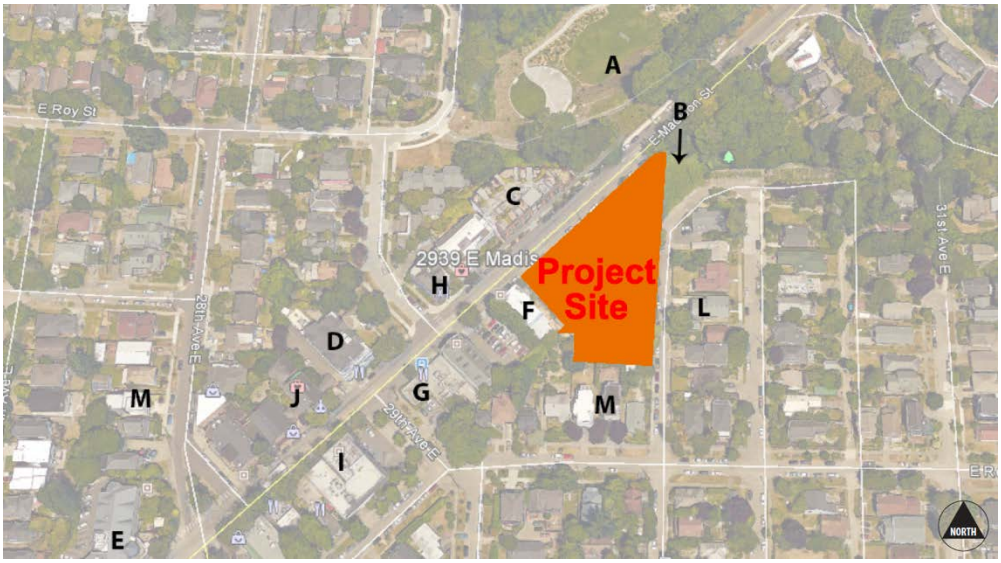

Image 5
Source: Ex. 75 at 70

The magnitude of the Velmeir Proposal can also be seen in the perspectival renderings in Velmeir's final recommendation package. For example, the images below (Images 6 and 7) show how the full structure will loom over the Madison Valley neighborhood at the valley floor, dwarfing everything else in sight, especially the single-family homes of the Madison Valley neighborhood in the lower right-hand corner of Image 6 (and in the upper center portion of Image 7).

[2] The first image in this brief (Image 1) was taken at roughly the same location as the point marked "B" in the image immediately below this note (Image 4). The letter "L" is located in the Madison Valley neighborhood at the valley floor.

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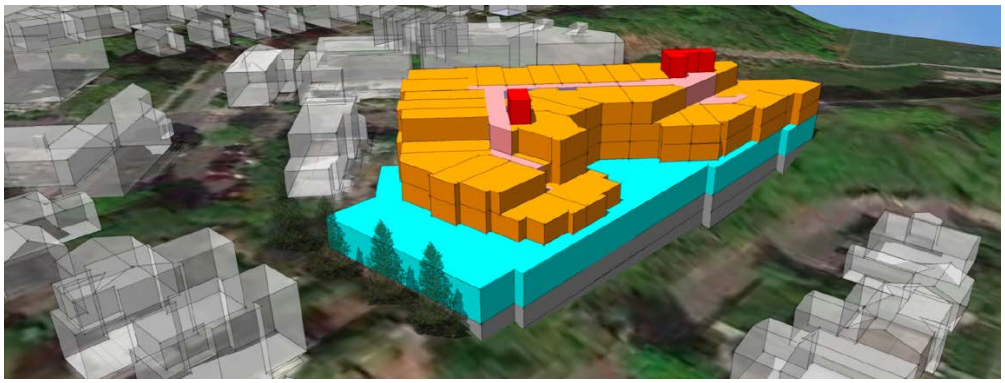

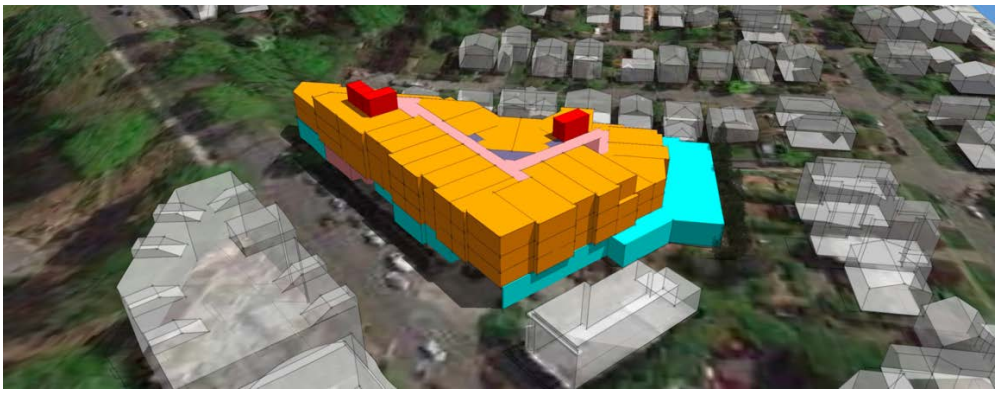

Images 6 & 7
Source: Ex. 75 at 85

And instead of the lush hillside that currently runs along Dewey Place East, and the tall poplars that have defined the aesthetic of the neighborhood for decades (Image 2), residents of the Madison Valley neighborhood will see the building façade depicted below, confronting them like a fortress on the hill. It is difficult to imagine a more dramatic change to the neighborhood.

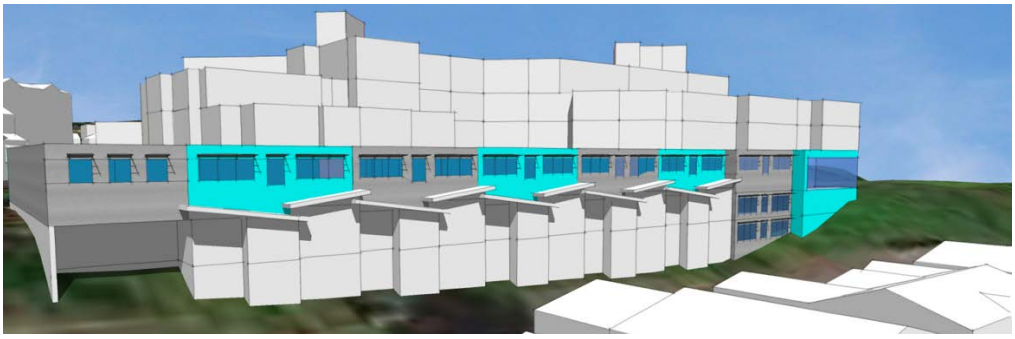

Image 8
Source: Ex. 75 at 94

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In the image above (Image 8), the Dewey Place East entrance to the residential parking garage can be seen on the right side of the structure (left side of the image), providing access to parking for residents of the 82 apartments and six townhomes slotted for development. This entrance will dramatically increase traffic in and around Madison Valley, together with the grocery store planned for the main commercial space. *See* Tilghman Testimony, Day 2. The residential parking garage entrance will be located approximately where the white van is depicted in the image below (showing current conditions). *See* Ex. 12, Sheet C2.00. As can be seen, the area is already tight for the few cars that use Dewey now.

Image 9
Source: Ex. 5

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Finally, one last image from Velmeir's design review recommendation package shows how the colossal structure will dominate the ridge above Madison Valley. The rendering below shows the proposal from the far side of East Madison Street, directly across from the point where Images 1 and 2 above were taken. The roofs of some of the single-family homes of Madison Valley can be seen on the left-hand side of the image, depicted in white. It is an understatement to say that the proposed structure will dominate the neighborhood from above.

Image 10
Source: Ex. 75 at 64

Unfortunately, we do not know exactly what the proposal will look like from much of the Madison Valley neighborhood. Velmeir provided renderings of the proposed structure as seen from East Madison Street, from the air, and from Dewey Place East (right next to the structure). *See generally* Ex. 75. But no renderings were provided showing how the structure will look from the ground at points further away on the valley floor — for example, along 30th Avenue East, one block over from Dewey. Mr. Murphy lives on 30th Avenue East, and explained that the wall of windows peering down on the neighborhood will feel intrusive, like an invasion of privacy. *See* Murphy Testimony, Day 1, Part 1 at 1:22:18. Even without renderings showing what the structure will look like from the vast majority of the neighborhood — precluding a definitive assessment of this issue

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— it is not hard to imagine that feeling, and how it will change the neighborhood. Now, the neighborhood feels like a different world, far away from the busy city in a lush, green valley. After the structure is built, it will feel like living in a fish bowl.

On July 23, 2018, the Seattle Department of Construction and Inspections ("DCI") issued its MUP decision for the Velmeir Proposal, approving the design recommended by the Design Review Board, and finding, under SEPA, that the proposal will "not have a significant adverse impact upon the environment." *See* Ex. 14. This includes impacts on the aesthetic character of the Madison Valley neighborhood, on the valley floor, more than 80 feet below the top of the massive new building. *See* Ex. 14 at 31.

In the sections below, we explain why the MUP decision was made in error. In several respects — for example, as it relates to stormwater impacts, impacts on the P-Patch, and construction impacts — the city's threshold determination simply does not reflect the type of rigorous, methodical analysis required by SEPA. In other areas — such as height, bulk, and scale impacts and impacts on the aesthetics and character of the Madison Valley neighborhood — the threshold determination not only lacks the requisite hard look, but is patently contrary to what is plain as day for all to see. The proposal will radically change the Madison Valley neighborhood by eliminating much of the green space that lines Dewey Place East, and which defines the neighborhood as a respite from the busy arterial and commercial spaces along East Madison Street. In place of the existing trees and other vegetation, there will be a colossal building standing high on the ridge above Madison Valley, looming over and completely changing the neighborhood.

III. OVERVIEW OF SEPA

SEPA is the legislative pronouncement of our state's policy regarding the environmental impacts of government decisions, and the mandate that government actors timely and thoroughly consider such impacts in the decision-making process. *See, e.g., Stempel v. Dept. of Water Resources*,

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82 Wn.2d 109, 118, 508 P.2d 166 (1973) (describing purposes of SEPA); *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 707, 601 P.2d 501 (1979) (same). In essence, SEPA is an environmental full-disclosure law. *Norway Hill Pres. & Prot. Ass'n v. King County Council,* 87 Wn.2d 267, 272, 552 P.2d 674 (1976). It requires cities and other government bodies to assess potential impacts of their decisions up front, and if those impacts might be significant, to undertake a thorough environmental study known as an Environmental Impact Statement ("EIS"), where those impacts must be analyzed and disclosed, and where alternatives and mitigation measures must be considered. *See generally* RCW 43.21C.030; WAC 197-11-400 to -440 (discussing contents of EIS). By requiring government actors to confront and explain the environmental impacts of their decisions, and to consider alternatives, SEPA aims to ensure that the future of our shared environment is shaped by deliberation, not default. *Stempel, supra,* 82 Wn.2d at 118. And it aims to do so in the widest possible way, requiring government actors to consider potential impacts on every element of the natural and built environments — including, *e.g.,* impacts on aesthetics, recreation, traffic, land use, and human safety. *See* WAC 197-11-444, -960 (addressing elements of the environment under SEPA).

To accomplish the goal of fully informed and transparent decision making, SEPA requires every government agency contemplating a decision that might affect the environment to issue a "threshold determination," the purpose of which is to determine whether an EIS is required. If the agency determines that there "will be no probable significant adverse environmental impacts from a proposal," then the agency issues a determination of nonsignificance ("DNS"), ending the requirement for full environmental study and an EIS. WAC 197-11-340(1). In contrast, if the proposal "*may* have a probable significant adverse environmental impact," then the agency must issue a determination of significance ("DS") and an EIS must be prepared — meaning, the agency must fully document and assess the adverse impacts likely to be caused, and consider alternatives

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to avoid or mitigate those impacts—and they must also consider and respond to public comments, making them accountable to their constituency. WAC 197-11-360(1) (emphasis added). *See also* WAC 197-11-330(4) ("If . . . the lead agency reasonably believes that a proposal *may* have a significant adverse impact, an EIS is required.") (emphasis added).

In applying this standard for when and under what circumstances an EIS is required, the word "may" is deliberate. In order to achieve fully informed decision-making that gives meaningful consideration to environmental impacts, SEPA requires an agency to issue its threshold determination early in the decision-making process, even if the proposal is still at the conceptual stage and impacts cannot be forecast with certainty. *See, e.g.* WAC 197-11-055(2) (requiring threshold determination to be issued "at the earliest possible point"); *Id*. at (4) (environmental review should be conducted "at the conceptual stage rather than the final detailed design stage"). At that stage, a DNS may only be issued if it is clear that there "will be no" significant adverse effects of the proposal — a high bar. WAC 197-11-340(1). If not — if there even "may" be a probable significant adverse impact — an EIS is required. WAC 197-11-360(1). That is the only way to ensure that environmental considerations, assessed through the specific mechanism of an EIS as required by SEPA, are timely infused into the decision-making process.

Guiding agencies in the threshold determination process, SEPA defines the term "significant" to mean "more than a moderate adverse impact on environmental quality." WAC 197-11-794. In turn, the common meaning of the word "moderate" generally denotes the concept of being "average in amount, intensity, quality, or degree." Oxford Living Dictionary, available at https://en.oxforddictionaries.com/definition/moderate. *See also* Hogness testimony, Day 5, Part 1 at 8:14 (agreeing that "moderate" means "average"). In other words, an EIS is required whenever impacts are more than average.

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Washington courts have observed that making that determination (whether impacts will be more than moderate) necessarily involves an element of judgment. However, "'the term 'significantly' has been defined to include the examination of *at least* two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.'" *Norway Hill Pres. & Prot. Ass'n, supra,* 87 Wn.2d at 277 (italics in original; quoting *Narrowsview Pres. Ass'n v. Tacoma,* 84 Wn.2d 416, 423, 526 P.2d 897 (1974)). *See also Conservation Northwest v. Okanogan County,* No. 33194-6-III, 2016 WL 3453666, *29 (June 16, 2016) (same).

By necessity, the significance determination is contextual and site specific, resting on the specific circumstances surrounding each government action and its physical setting. *See, e.g.,* WAC 197-11-330(3)(a–b) (observing "[t]he same proposal may have a significant adverse impact in one location but not in another location"); WAC 197-11-794 (instructing agencies that "[s]ignificance involves context and intensity . . . and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact."). Agencies are also instructed to consider factors like non-compliance with laws for the protection of the environment, and impacts on sensitive or special areas. *See* WAC 197-11-330(3)(e)(i–iii).

Not surprisingly, the Washington Supreme Court has observed that the threshold determination is likely the most important single step in the SEPA process. If a negative threshold determination is issued in error, the purposes of SEPA are thwarted by wrongfully avoiding the EIS requirement:

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> In order to achieve [SEPA's] public policy, it is important that an environmental impact statement be prepared in all appropriate cases. As a result, the initial determination by the "responsible official," *see* RCW 43.21C.030(2)(c), as to whether the action is a "major action significantly affecting the quality of the environment" is very important. The policy of the Act, which is simply to ensure via a "detailed statement" the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect "threshold determination" is made. The determination that an action is not a "major action significantly affecting the quality of the environment" means that a detailed impact statement of SEPA is not required before the action is taken or the decision is made.

Norway Hill Pres. & Prot. Ass'n, supra, 87 Wn.2d at 273.

In reviewing the validity of a threshold determination issued by the City of Seattle, the Seattle Municipal Code ("SMC") requires the Examiner to give "substantial weight" to the decision of the SEPA responsible official. *See* SMC 23.76.022.C.7. But SEPA still requires a searching review. As the Court of Appeals observed in *Boehm v. City of Vancouver*,

> the City must demonstrate that it actually considered relevant environmental factors before [issuing a DNS]. Moreover, the record must demonstrate that the City adequately considered the environmental factors in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA. Further, the decision to issue [a DNS] must be based on information sufficient to evaluate the proposal's environmental impact.

Boehm v. City of Vancouver, 111 Wn. App. 711, 718, 47 P.3d 137 (2002) (internal citations and footnotes omitted). *See also* WAC 197-11-335 (threshold determination shall be based on "information reasonably sufficient to evaluate the environmental impact of a proposal").

Ultimately, the threshold determination "must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Conservation Nw., supra,* 2016 WL 3453666 at *31 (quoting *Found. on Econ. Trends v. Weinberger,* 610 F. Supp. at 841). *See also Columbia Riverkeeper v. Port of Vancouver, USA,* 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) ("SEPA seeks to

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ensure that environmental impacts are considered and that decisions to proceed, even those completed with knowledge of likely adverse environmental impacts, are 'rational and well-documented.'") (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192).

When "information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies should obtain and include the information in their environmental documents." WAC 197-11-080 (1). If the costs of obtaining such information is exorbitant, or the means of obtaining it are not known, then the agency must prepare a worst-case analysis. WAC 197-11-080.

Nor may the threshold determination rely on "formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards." *Conservation Nw., supra,* 2016 WL 3453666 at *32. In other words, the agency must identify and assess potential environmental impacts up front, not just assume those impacts will be dealt with at a later stage of the decision-making process.

In some circumstances, SEPA allows an agency to bifurcate its SEPA analysis, choosing to assess some environmental impacts up front at the conceptual stage, but deferring consideration of other impacts to the final design stage when they are easier to forecast. This is known as "phased review." *See* WAC 197-11-060(5). In this case, however, the city's SEPA responsible official (Ms. Hogness) confirmed that the city is not using phased review for this project. *See* Hogness Testimony, Day 4, Part 4 at 58:53. Thus, the DNS issued for the Velmeir Proposal must be judged as the only threshold determination that will ever be issued for this project, and may only be upheld if it adequately considered all potential environmental impacts that the project may cause. In other words, the city cannot defend its threshold determination based on any further environmental review of the proposal that may occur down the road, at future stages of the permit process. All of

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the analysis required by SEPA must be performed now. All of the potential impacts must be fully considered.

In addition to requiring agencies to determine whether a proposal "may" have a probable significant adverse impact, necessitating an EIS, SEPA also grants authority to condition or deny a proposal based on its adverse environmental impacts. This is known as "substantive authority." *See* WAC 197-11-660. Seattle's policies for conditioning or denying a proposal under its SEPA substantive authority are located at SMC 25.05.665 (the "Overview" policy) and SMC 25.05.675 (addressing mitigation for specific types of impacts). The city has discretion as to when and whether to exercise its substantive authority. Nonetheless, it is within the Examiner's jurisdiction to determine whether such decisions are based on adequate analysis and consideration of the project's impacts. *See* Order on Motion to Dismiss at 3 (Nov. 19, 2018).

IV. ARGUMENT

The city's DNS and design review decisions are clearly erroneous. They are not supported by substantial evidence in light of the record as a whole and should be reversed and remanded for further analysis of the issues presented at the hearing, and in the sections below.

A. Aesthetic and Land Use Impacts

1. The Velmeir Proposal will have probable significant adverse aesthetic and land use impacts. These impacts are objective and undeniable.

First, it does not take a weatherman to know which way the wind blows. And it does not take an expert to see that the hulking new structure proposed by Velmeir — high on the ridge above Madison Valley — will have more than "moderate" impacts on the small, sheltered neighborhood on the valley floor. No matter how it is dressed up, or talked up by Velmeir, the proposal is a behemoth. It will still soar more than 80 feet above the valley floor like a fortress, and stretch more than 300 feet across the valley wall — longer than a typical residential city block. It will still be

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bigger than any other structure in the vicinity. And Velmeir is still chopping down a lush stand of trees that is perhaps the most prominent and important part of the expansive greenspace that surrounds the neighborhood. This is what significant impacts look like.

But while it does not take an expert to see that these impacts will be significant under SEPA, they can still be studied and evaluated in technical terms, as Mr. Steinbrueck, a licensed architect, testified at length on behalf of Save Madison Valley. A former member of the Seattle City Council, Mr. Steinbrueck has been directly involved in crafting the city's design guidelines and policies aimed at reducing these types of impacts. He has been in both the client position and the architect position in the city's design review process and is currently a City of Seattle Port Commissioner. His conclusion? Consistent with common sense, the Velmeir Proposal really will have significant adverse aesthetic impacts on the Madison Valley neighborhood.

One of Mr. Steinbrueck's major points was that aesthetic judgments are not always subjective — there are universals. For example, architects and other design professionals can reasonably disagree about how certain elements of a building's design will compliment or contrast with its surroundings, such as a preferred color, a type of shading or fenestration, or modulation. They can also reasonably disagree about whether the effects of these superficial design elements are positive or negative. But universally, we all understand that while a 50-story skyscraper "fits" aesthetically in downtown Seattle, it would have significant aesthetic impacts in a neighborhood of single-family homes, and that those impacts would be negative by all reasonable standards. *See* Steinbrueck Testimony, Day 1, Part 3. In turn, identifying significant adverse aesthetic impacts can be (and is) routinely done using professional knowledge, skill, practice, and architectural expertise. *Id*.

In this case, Mr. Steinbrueck testified that the architectural juxtaposition of the hulking new structure, soaring high above the Madison Valley neighborhood, will result in significant adverse

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aesthetic impacts flowing from the proposal's obvious height, bulk, and scale — quintessential concepts at the very core of design. *Id*., Day 3, Part 1. With a 320-foot vertical forward-facing façade and north-end height of over 80 feet — nearly as tall as the trees in Image 2, above — Velmeir's proposal is dramatically out of scale with the single-family neighborhood at the valley floor. *Id*., Day 1, Part 3. The uncamouflaged height and bulk of the proposal is massive in relation to the smaller neighborhood buildings below. *Id*. The looming effect and expansive facade stand in close proximity and naked contrast to the neighboring structures across Dewey Place East. *Id*. The mass, bulk and height of the podium are emphatically increased in their presence because of the added volume and visibility of two levels of garage structure. *Id*., Day 3, Part 1. Nor are the height, bulk, and scale of the proposal concealed by Velmeir's landscaping treatment, modest setbacks, modest facade modulation of color changes, or applique techniques on the Dewey side of the project. *Id*., Day 1. In short, there are two very different scales represented by the hulking proposal and smaller residential structures in the neighborhood below, and there should be no debate amongst design professionals that the former will have significant adverse impacts on the latter. *Id.*[3] The difference in height, bulk, and scale is clearly more than moderate.

Nor is it a subjective value judgment that removing every tree on the project site will contribute to the proposal's significant adverse effects. *See id*., Day 1; Cohen Testimony, Day 3, Part 2. Above, we discussed how the forested slope above Dewey creates a very quiet, very

[3] For example, Velmeir's architect criticized the accuracy of the 3D scale model we submitted (Ex. 2) to demonstrate the huge difference between the mass, bulk, and scale of the Velmeir Proposal, and the mass, bulk, and scale of the much smaller residential homes of the Madison Valley neighborhood. But his criticisms missed the forest for the trees. The model was a study in the massing and scale of the building in relation to the Dewey side of the project. Ex. 1 (Declaration of Shawn Ketchum Johnson). It was not meant to be a perfect depiction of every detail, nor to address the proposal's relationship to East Madison Street. *Id*. The scale of the structure is accurate, as is the site and surrounding topography. The scale of the homes is also accurate because Mr. Johnson provided the silhouettes of the houses, which were made to scale based on local measurements. *Id*., ¶ 5.

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beautiful, and very green park-like aesthetic that everyone in the neighborhood enjoys and values immensely. *See also* Exs. 3, 4 & 5; Murphy Testimony; Hacker Testimony. But that is not just our opinion. The city's own website describes at length its commitment to saving trees. Ex. 41; Cohen Testimony; Dugan Testimony. In turn, the city's Comprehensive Plan makes it abundantly clear that Seattle's trees make up a vitally important system that supports livable neighborhoods and is integral to the essential character of the "Emerald City." *See* Comp Plan at 133. Objectively, the trees that will be removed (depicted in Image 2, above) are a major part of the aesthetic character of the neighborhood. Cutting them down is an objectively significant adverse impact on the Madison Valley neighborhood.

Finally, the proposal's adverse aesthetic impacts can be viewed through the objective lens of zoning, and the inherent conflict between more and less intensive zones. The area to the east of the project site, including Dewey Place, 30th Avenue East, 31st Avenue East, and East Republican Street, is zoned SF 5000. *See* Ex. 14 at 1. Commercial uses are not allowed in this residential zone and the bulk regulations require significant setbacks (with yards), limited square footage, limited heights, and limited lot coverage. Ch. 23.44 SMC. Each home is surrounded by open space, and each relates in scale and mass to its neighbors. Steinbrueck Testimony, Day 1.

In contrast, the site of the Velmeir Proposal straddles two commercial zones where development standards differ significantly with respect to allowed uses, setbacks, open space, lot coverage density, and more. Steinbrueck Testimony, Day 3, Part 1. The commercial zoning of the project site allows far more intrusive and dense uses and development than is allowed in the single-family zone in Madison Valley. *See generally* Ch. 23.47A SMC.

Objectively, avoiding significant impacts that arise from this zoning conflict requires a gradual transition, without hard edges, in a way that is respectful and complementary to the Madison Valley neighborhood at the base of the hill. *See* Steinbrueck Testimony, Day 1. But here,

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Velmeir is proposing just the opposite. *Id*. The structure's height (over 80 feet) will be nearly double the stated limits for the two commercial zones covering the project site (30 to 40 feet). There is a stark lack of transition from the monolithic, bulky, multi-story, multi-use building proposed by Velmeir, to the small homes in the valley (currently, that transition is supplied by the trees, but they will be cut down). *Id*., Day 1, Part 3. In practical terms, there is no transition at all, only a jarring shift that allows the brunt of more intensive zoning impacts to fall unmitigated on the single-family neighborhood at the valley floor. *Id.*

In all, this is a case where expertise confirms common sense. The Velmeir Proposal will result in significant adverse aesthetic impacts on the Madison Valley neighborhood — flowing from the discordant mass, bulk and scale of the project in relation to the homes on the valley floor — and the city was clearly erroneous in concluding otherwise. One need only visit the neighborhood and review Velmeir's submissions to see the obvious, but it is also confirmed by a more technical analysis of height, bulk, and scale, the objective importance of tree canopy to neighborhood character, and contrasting zoning impacts apparent with this massive proposal.

2. Compliance with the city's development code does not obviate the need for an EIS. Nor does it mitigate impacts to a non-significant level.

As an apparent distraction from the obvious aesthetic and land use impacts of the Velmeir Proposal, witnesses for the city and Velmeir testified repeatedly that the enormous new structure will comply with the city's development code. This is also the tack taken by the city in its threshold determination, which relies almost entirely on code compliance to justify the DNS. *See* Ex. 14 at 26–32. The apparent upshot of this distraction is that by complying with the development code, the respondents posit they have reduced all impacts on the Madison Valley neighborhood to non-significant levels. But even assuming the proposal complies with the development code, such

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compliance does not provide sufficient mitigation in this particular case to obviate the need for an EIS.

Under SEPA, it is true that a city may, in some circumstances, determine that compliance with the local development code is a sufficient substitute for the environmental analysis required by SEPA. But to do so, the city must determine that the "specific probable adverse environmental impacts of the project" are "identified" in its applicable non-SEPA rules and regulations. *See* WAC 197-11-158(b)(i). In turn, the city must determine that the project's impacts are "adequately addressed" by those rules because (A) the rules avoid or otherwise mitigate the impacts to a non-significant level, or (B) because the non-SEPA rules represent the City Council's determination that certain levels of impacts are "acceptable." *Id*. at (ii). Here, for all of the reasons stated above about the Velmeir Proposal's aesthetic impacts on the Madison Valley neighborhood, compliance with the city's non-SEPA rules and regulations clearly does not "avoid or otherwise mitigate" the aesthetic impacts to a non-significant level — even assuming compliance, the impacts are still significant. Thus, in order to determine whether code compliance obviates need for an EIS in this case, the relevant question is (B), whether the city's non-SEPA rules and regulations represent a determination by the Seattle City Council that the proposal's impacts are acceptable.

To answer that question, it is appropriate to look to SMC 25.05.665.D, the city's overview policy on SEPA substantive authority, which defines when compliance with the development code will and will not suffice under SEPA — *i.e.,* when those impacts are "acceptable." Under that section, it is generally presumed that compliance with development regulations will adequately mitigate a proposal's impacts. But the rule also carves out exceptions when additional mitigation may be required. These exceptions include (1) when "[n]o city regulation has been adopted for the purpose of mitigating the environmental impact in question"; (2) when "[t]he project site presents unusual circumstances such as substantially different site size or shape, topography, or inadequate

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infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable city code or zoning"; and (3) when "[t]he project is located near the edge of a zone, and results in substantial problems of transition in scale or use which were not specifically addressed by the applicable city code or zoning." SMC 25.05.665.D.1, .3, & 5. When these exceptions apply, compliance with the development code is *not* sufficient to demonstrate that a project's impacts are acceptable. More mitigation may be required.

Here, every one of these exceptions applies. For example, notwithstanding the code's lofty language about preserving existing tree canopy in order to "preserve and enhance the City's physical and aesthetic character," SMC 25.11.010.B, no city code has been adopted for mitigating the aesthetic impact of losing the trees that Velmeir proposes to cut down. The existing tree canopy covers approximately 36 percent of project site and at least 39 of the existing trees are "significant," as that term is defined by code. Ex. 40 at 2.[4] There are three exceptional trees on the site, and thirteen of the trees slotted for removal collectively form an exceptional "grove." *See* Ex. 38; Cohen Testimony, Day 3, Part 2. In the code, the term "exceptional" denotes a tree or group of trees that, because of their unique historical, ecological, or aesthetic value, constitute an important community resource. SMC 25.11.080. *See also* Ex. 122 (explaining that an exception tree is one that "is rare or exceptional by virtue of its size, species, condition, cultural/historic importance, age, and/or contribution as part of [sic] grove of trees as determined by the method discussed below."). Yet, there is no rule or regulation that mitigates the aesthetic impact of losing these rare and exceptional trees. Because "[n]o city regulation has been adopted for the purpose of mitigating the environmental impact in question" — here, loss of significant and exceptional trees on the project site — the proposal's aesthetic impacts are not automatically deemed to be "acceptable," and city

[4] The applicant's arborist concluded that the trees found on site were in overall good condition - mostly in fair to good health and structural condition. *See* Ex. 40 at 2.

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may not presume that code compliance alone is sufficient to mitigate impacts to a non-significant level.

It is also clear that the "[t]he project site presents unusual circumstances such as substantially different site size or shape, topography, or inadequate infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable city code or zoning." SMC 25.05.665.D.3. For example, the project parcel is irregular, with a footprint that is a trapezoidal triangular shape in the north-south direction. The oddly-shaped development parcel is also significantly larger than other parcels in the area, and the proposed structure will fill virtually the entire lot, allowing it to dwarf nearly every other structure in the vicinity. These are "unusual circumstances" where compliance with the code does not demonstrate that the impacts are acceptable.

Similarly, the steep slope on the project site is not linear, but curved, allowing Velmeir to exploit an apparent blind-spot in the city's methodologies for calculating the allowable height limit. As Mr. Steinbrueck explained in his testimony, and as we explained in our response to Velmeir's motion to dismiss, the city's development code provides two different methodologies for calculating height — one intended for relatively flat ground where the height limit is measured from the average grade for the entire building (*see* SMC 23.86.006.A.1), and one intended for sloped ground where different segments of the building are given different absolute height limits based on the average grade for that segment (*see* SMC 23.86.006.A.2). The stated intent of the latter methodology — used by Velmeir — is to "permit the structure to respond to the topography of the lot." SMC 23.86.006.A.2. *See also* Steinbrueck Testimony, Day 3, Part 1 (explaining that the goal of the second methodology is to minimize the contrast between the slope and the building, and to allow the latter to respond harmoniously to the former).

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The specifics of using the city's second height calculation methodology is illustrated in Director's Rule 4-2012, which shows how the building is supposed to respond to the slope by measuring the average grade at the mid-point of each imaginary section of the building. The relevant diagram from Director's Rule 4-2012 is excerpted below, showing how the rule allows a building to step down the hillside:

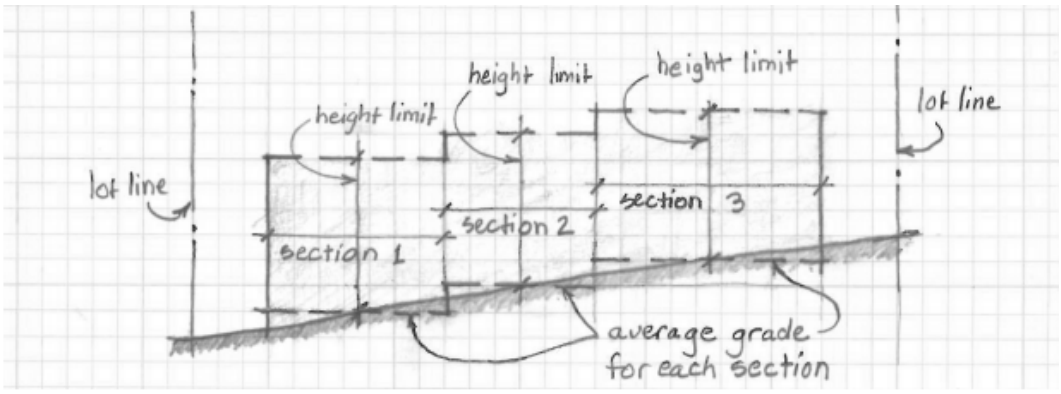

Figure 1
Source: Ex. 134 (Director's Rule 4-2012 at 6)

The image above is a cross-sectional diagram, and obviously does not contemplate that the slope might be irregularly shaped in a more complex way. But in this case, the slope that runs the length of the entire project site also curves through site like the letter "C." This north-south curvature of the slope, and how it affected Velmeir's height calculation, is illustrated at page 15 of Exhibit 87, the Department's code interpretation. We also provided an illustrative figure in our response to Velmeir's motion to dismiss (reproduced below). *See* Save Madison Valley's Response to Applicant's Motion to Dismiss at 19 (Oct. 31, 2018) (herein, "Rep. to Mot. to Dismiss"). As explained in our response, the grey lines of the following figure represent the steep slope along Dewey Place East. The red and green boxes illustrate the imaginary segments of the proposal under SMC 23.06.006.A.2. And the yellow dots represent the points where Velmeir measured the average ground elevation to determine the absolute, altitudinal limits for each segment.

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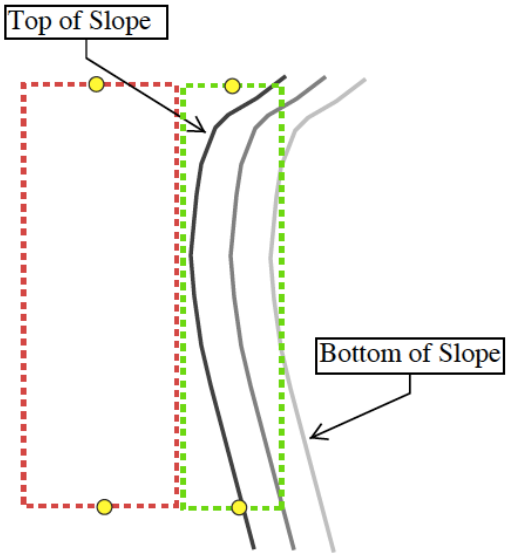

Figure 2
Source: Resp. to Mot. to Dismiss at 19
See also Ex. 87 at 15

As Mr. Steinbrueck explained, and as illustrated in the diagram above, one of the results of the Velmeir's use of the city's second height calculation methodology, for this particular building on this particular site, is that the height limit does not "step down" the slope to the Madison Valley neighborhood, as intended by SMC 23.86.006.A.2 and Director's Rule 4-2012. Because both measurement points for the green segment are located at or near the top of the slope (not on the slope itself), the average grade of that section does not reflect the sloped topography of the site, resulting in an allowable height at the base of the slope that is nearly double the limit for this zone (80 feet instead of 40 feet). *See* Resp. to Mot. to Dismiss at 19; Steinbrueck Testimony, Days 1 & 3. This result runs counter to the plain intent of the methodology.

Indeed, one of the ironies of Velmeir's use of the second height methodology on the irregularly-shaped slope is that, if Velmeir had not proposed such a huge building running the entire expanse of the slope north to south — but had instead proposed a building more in keeping with the scale of the surrounding area — the same methodology would have resulted in a much lower

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absolute height limit for the portion of the building on the slope. *See* Resp. to Mot. to Dismiss at 21–22 (Fig. 7).[5]

In the order on Velmeir's motion to dismiss, the Examiner ruled that the proposal complies with the letter of the city's second height calculation methodology at SMC 23.86.006.A.2. *See* Order on Motion to Dismiss at 7 (Nov. 19, 2018). But the odd result in this case, resulting from the unusual curvature of the slope in tandem with the massive scale of the proposed building, does not suggest that this was envisioned by the City Council when it adopted that methodology. If anything, the extreme result of allowing Velmeir's use of the second methodology to completely avoid the rule's "desired outcome"[6] shows that the impacts from this project "substantially exceed those anticipated by the applicable city code or zoning." SMC 25.05.665.D.3. As above, code compliance is not a substitute for SEPA, the purpose of which is to ensure that all significant adverse impacts are thoroughly studied and effectively mitigated even if they fall through the cracks of the local development code — in this case, by complying with the letter, but not the spirit or intent, of the city's second height calculation methodology.

Finally, for the reasons discussed above, it is clear that "[t]he project is located near the edge of a zone, and results in substantial problems of transition in scale or use which were not specifically addressed by the applicable city code or zoning," SMC 25.05.665.D. 5, which also indicates that the proposal's aesthetic and land use impacts were not deemed to be "acceptable" by the City Council within the meaning of WAC 197-11-158. As noted above, the juxtaposition of the

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[5] Another irony is that under the Seattle Municipal Code, development is typically prohibited on steep slope areas, unless the applicant demonstrates that it meets certain exceptions. *See* SMC 25.09.180. On the grounds that Velmeir met one of those exceptions, the City granted a waiver of the prohibition against developing on steep slopes. *See* Ex. 87 at 12. So, while Velmeir is relying the slope to use a methodology that allows it to pretend that the average grade is at the top of the slope, the plan is to ultimately remove the slope entirely to make room for more a bulkier, more massive building. In this way, not only does the Velmeir Proposal not respond to the natural topography — it will completely remove the natural topography.

[6] Order on Motion to Dismiss at 7.

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two radically different zones at issue in this case (the commercial zones encompassing the project site and the single-family zone of the neighborhood at the base of the valley) will cause significant adverse impacts if not buffered by an adequate transition. Yet, not meaningful transition has been provided, and the zoning code is silent on this issue. Because the zoning code do not "identify" and "adequately address" these impacts, again, compliance with the code does not mean that the proposal's impacts are acceptable, or that further mitigation is not required. *See* WAC 1970-11-158(2)(b)(i, ii).

In the end, the result is the same as above, notwithstanding the proposal's compliance with the city's development code. The project will have significant adverse aesthetic and land use impacts on the Madison Valley neighborhood nestled in the valley below the colossal new building, consistent with common sense and the neighborhood's obvious contrast with the massive height, bulk, and scale of the proposal. This is so notwithstanding the proposal's alleged compliance with the development code, which in no way demonstrates that the impacts are "acceptable." WAC 1978-11-158(2)(b)(ii)(B). If anything, loopholes and blind-spots in the code demonstrate that the specific impacts of this project require additional SEPA review precisely because they would otherwise fall through the cracks. *See* RCW 43.21C.240 (SEPA intended to serve as a "gap-filler" for use when development regulations do not adequately address adverse impacts to the environment").

3. The respondents' reliance on SMC 25.05.675.G — limiting the city's substantive SEPA authority for projects approved through the design review process — is misplaced.

As a corollary to their arguments about code compliance, and as suggested by much of their testimony at the hearing, we expect the respondents to argue in their briefs that the city is precluded by SMC 25.05.675.G from imposing additional mitigation measures to offset the proposal's significant adverse height, bulk, and sale impacts. That provision contains the city's substantive

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SEPA policies on height, bulk, and scale impacts, stating when the city can and cannot exercise its substantive authority to mitigate such impacts. It is relevant here both because it explains the goal of the city's design guidelines and height, bulk, and scale regulations (*e.g.,* to "provide for smooth transition" between zones, and to "preserve the character of individual City neighborhoods"), and because it changes the burden on such issues for projects approved through the city's design review process (as was the Velmeir Proposal).

In relevant part, SMC 25.05.675.G provides:

> Height, bulk and scale
>
> 1. Policy background
>
> a. The purpose of the City's adopted land use regulations is to provide for smooth transition between industrial, commercial, and residential areas, to preserve the character of individual City neighborhoods, and to reinforce natural topography by controlling the height, bulk, and scale of development.
>
> b. However, the City's land use regulations cannot anticipate or address all substantial adverse impacts resulting from incongruous height, bulk, and scale. For example, unanticipated adverse impacts may occur when a project is located on a site with unusual topographic features or on a site which is substantially larger than the prevalent platting pattern in an area. Similarly, the mapping of the City's zoning designations cannot always provide a reasonable transition in height, bulk, and scale between development in adjacent zones.
>
> 2. Policies
>
> a. It is the City's policy that the height, bulk, and scale of development projects should be reasonably compatible with the general character of development anticipated by the goals and policies set forth in the Land Use Element, Growth Strategy Element, and Shoreline Element of the Seattle Comprehensive Plan; the procedures and locational criteria for shoreline environment redesignations set forth in Sections 23.60A.060 and 23.60A.220; and the adopted land use regulations for the area in which they are located, and to provide for a reasonable transition between areas of less intensive zoning and more intensive zoning.

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> b. Subject to the overview policy set forth in Section 25.05.665, the decisionmaker may condition or deny a project to mitigate the adverse impacts of substantially incompatible height, bulk, and scale. Mitigating measures may include but are not limited to:
>
> 1) Limiting the height of the development;
>
> 2) Modifying the bulk of the development;
>
> 3) Modifying the development's facade including but not limited to color and finish material;
>
> 4) Reducing the number or size of accessory structures or relocating accessory structures including but not limited to towers, railings, and antennas;
>
> 5) Repositioning the development on the site; and
>
> 6) Modifying or requiring setbacks, screening, landscaping, or other techniques to offset the appearance of incompatible height, bulk, and scale.
>
> c. The Citywide design guidelines (and any Council-approved neighborhood design guidelines) are intended to mitigate the same adverse height, bulk, and scale impacts addressed in these policies. A project that is approved pursuant to the design review process is presumed to comply with these height, bulk, and scale policies. This presumption may be rebutted only by clear and convincing evidence that height, bulk, and scale impacts documented through environmental review have not been adequately mitigated. Any additional mitigation imposed by the decisionmaker pursuant to these height, bulk, and scale policies on projects that have undergone design review shall comply with design guidelines applicable to the project.

SMC 25.05.675.G.

Citing the last section of this provision, we expect the city and Velmeir to argue that additional mitigation is simply prohibited (notwithstanding our views of the proposal's impacts) because we have not demonstrated by clear and convincing evidence that compliance with the design guidelines did not adequately mitigate the proposal's adverse aesthetic impacts. For many reasons, they would be wrong.

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a. The Velmeir Proposal is inconsistent with the Design Guidelines.

First, as Mr. Steinbrueck testified, the proposal is *not* consistent with many of the city's design guidelines, which is itself compelling evidence that, in this case, the design review process did not "adequately mitigate" the proposal's significant adverse impacts resulting from its height, bulk, and sale, within the meaning of SMC 25.05.675.G. Mr. Steinbrueck prepared a list of all of the design guidelines with which the proposal is inconsistent. *See* Ex. 15. During his testimony, he highlighted some of the most egregious violations.

The purpose of the city's design guidelines is to define the qualities of architecture, urban design, and public space that make for successful projects and communities and to serve as a tool for guiding individual projects to meet those expectations. *See* Seattle Design Guidelines at iv (Dec. 2013). The first section of the guidelines addresses the "Context and Site" of a proposal. The Context and Site guidelines state, in part:

> **CS1 Natural Systems and Site Features**. Use natural systems and features of the site and its surroundings as a starting point for the project design. …
>
> CS1 C. TOPOGRAPHY
>
> **1. Land Form:** Use natural topography and/or other desirable land forms or features to inform the project design.
>
> **2. Elevation Changes**: Use the existing site topography when locating structures and open spaces on the site. Consider "stepping up or down" hillsides to accommodate significant changes in elevation.

Seattle Design Guidelines at 2.

As Mr. Steinbrueck pointed out and as the 3D scale model (Ex. 2) shows us, the Proposal is not consistent with this guideline. Velmeir plans to completely eradicate the natural topography of the slope on the site and replace it with a built form that does not reflect the current slope.

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Steinbrueck Testimony, Day 1, Part 3. There is no attempt to step down in a manner that reflects the current natural topography of the site. *Id.*

Mr. Strazzara, the developer's architect, testified that the building will reflect the existing natural slope because the top floors are stepped back from the property line at Dewey Place East. But that "step-back" does not reflect the topography. The natural slope today begins at street level along Dewey and slopes away from the single-family homes until it reaches its full height at around 30 to 40 above the valley floor. From there, it plateaus into a large area of relatively flat ground level with East Madison Street. In contrast, the proposed "step back" on the sloped portion of the hill is even higher than the plateau at the top, jutting out toward the single-family family homes at the valley floor. Today, there is a natural slope. Tomorrow, there will be a solid wall up to 40-feet high right on Dewey — just as high (but closer) than the top of the slope is today.

The proposed "step-back" also affects only a portion of building. At the north end of the building, the elevation of the proposed structure reaches heights of over 80 feet above the valley floor, looming dramatically over the single-family neighborhood. *See, e.g.,* Images 6–8, above; Ex. 2; Ex. 75 at 16–17. In this way, the step-back is a fiction for the most prominent part of the building. The proposal does not gracefully step down the hillside, as envisioned by the guidelines quoted above. The entire 320-foot long vertical forward-facing façade, with portions at the north end as high as 80 feet, towers over Dewey Place and the single-family residential neighborhood.[7]

[7] We also note that the applicant's images of the "step-back" showing the "Madison to Dewey massing" are misleading, suggesting that the top floors are all set back approximately 56 feet. *See e.g.*, Ex. 58 at 26. If the applicant had intended to present an accurate picture of the setbacks, we would have three or more different graphics of different cross sections at the northern, middle, and southern portions of the project, not just one cross-sectional diagram at the center of the project where the setback just happens to be most significant. By clearly depicting only the most flattering portions of the "set back," the images used to inform the Design Review Board of the project's design impacts are clearly misleading, undermining any reliance by the city on the "presumption" at SMC 25.05.675.G.

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Additional guidelines in the "Context and Site" section address urban pattern and form. They state, in part:

> **CS2 Urban Pattern and Form**
>
> Strengthen the most desirable forms, characteristics, and patterns of the streets, block faces, and open spaces in the surrounding neighborhood.
>
> CS2 A. LOCATION IN THE CITY AND NEIGHBORHOOD
>
> **1. Sense of Place**: Emphasize attributes that give Seattle, the neighborhood, and/or the site its distinctive sense of place. Design the building and open spaces to enhance areas where a strong identity already exists. . . .

As Mr. Steinbrueck explained, this guideline refers to the physical built features of the neighborhood that define its character. Steinbrueck Testimony, Day 1, Part 4. It also has been entirely disregarded. *Id*. The physical built features of the Madison Valley neighborhood include backyards and open spaces, gardens, rhythm and pattern of multiple low-height structures (one- and two-story houses). *Id*. The proposal simply does not respond in a complimentary or supportive way to any of these built features of the Madison Valley neighborhood. *Id*. Instead, it looms over the neighborhood and dwarfs them like a fortress on a hill.

Another relevant design guideline calls for the avoidance of "a monolithic presence":

> CS2 B. ADJACENT SITES, STREETS, AND OPEN SPACES
>
> **1. Site Characteristics**: Allow characteristics of sites to inform the design, especially where the street grid and topography create unusually shaped lots that can add distinction to the building massing.
>
> CS2 C. RELATIONSHIP TO THE BLOCK
>
> . . .
>
> **3. Full Block Sites**: Break up long facades of full-block buildings to avoid a monolithic presence. Provide detail and human scale at street-level, and include repeating elements to add variety and rhythm to the façade and overall building design.

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As Mr. Steinbrueck testified and as the evidence shows, there is no sense in which the Velmeir Proposal avoids a monolithic presence. The imposing, 320-foot façade, with its above-ground parking structure along Dewey, shallow faux townhouse appliques, opaque walls at the ends, and minimal landscaping is largely unbroken in the horizontal plane and exceeds in length a typical full city residential block. Steinbrueck Testimony, Day 1. In turn, buildings bear a direct relationship in scale to street widths they face. *Id.* Here, the proposal's monolithic presence is amplified by its adjacency to Dewey Place East, which is only half the size of a typical 60-foot street right of way. *Id*. The proposal does not avoid a monolithic presence. It *is* a monolithic presence. *See* Images 6–8, above.

Additional guidelines call for a smooth transition between zones, and to use changes in existing topography to help make that transition successful:

> CS2 D. HEIGHT, BULK, AND SCALE
>
> **1**. **Existing Development and Zoning**: Review the height, bulk, and scale of neighboring buildings as well as the scale of development anticipated by zoning for the area to determine an appropriate complement and/or transition….
>
> **2**. **Existing Site Features**: Use changes in topography, site shape, and vegetation or structures to help make a successful fit with adjacent properties; for example, siting the greatest mass of the building on the lower part of the site or using an existing stand of trees to buffer building height from a smaller neighboring building.
>
> **3. Zone Transitions**: For projects located at the edge of different zones, provide an appropriate transition or complement to the adjacent zone(s). Projects should create a step in perceived height, bulk and scale between the anticipated development potential of the adjacent zone and the proposed development.

Seattle Design Guidelines at 4.

Here, while the commercial zoning of the project site (NC-2P 30/40) is intended to be pedestrian in scale, the sheer size of the site (40,000 square feet), coupled with the steep slope and

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minimal setbacks from Dewey, allow for a huge, out of scale, single building that stands in stark contrast to the residential, small-lot, low-scale neighborhood in Madison Valley. In turn, on the Dewey side where an abrupt edge condition exists (in topography and land use zones), the change in zoning from SF 5000 to NC-2P 30/40 is separated only by a substandard, 30-foot street right of way, and is further accentuated by the more than 30-foot change in elevation between Dewey and East Madison Street. Steinbrueck Testimony, Day 1. As discussed above, the proposal exploits an aberration in the topography and irregular lot configuration to achieve what is, in reality, a looming, 80-foot building above the neighborhood. No transition has been attempted and the proposal does little to mitigate these height, bulk, and scale impacts in relation to the edge condition and change in zoning.

For these and other reasons explained by Mr. Steinbrueck, the proposal is not consistent with the city's design guidelines. Not only does this demonstrate that the city's decision to simply adopt the DRB's recommendation was made in error under SMC 23.41.014.G, it demonstrates that any reliance on the presumption at SMC 25.05.675.G is misplaced. Far from showing in this case that the proposal, through compliance with the design guidelines, has effectively mitigated its adverse height, bulk and scale impacts, its non-compliance is evidence of why those impacts are so significant in the first place. *See, e.g.,* WAC 197-11-330(3)(e)(iii) (observing that a proposal may "to a significant degree . . . [c]onflict with local, state, or federal laws or requirements for the protection of the environment").

b. The Velmeir Proposal does not comply with the Design Review Board's recommendation for a year-round evergreen buffer.

Not only does the Velmeir Project conflict with several design guidelines, it also conflicts with specific recommendations of the Design Review Board to mitigate the loss of tree canopy on the site.

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The Design Review Board acknowledged that adverse aesthetic impacts would be caused by the removal of the existing canopy of trees on the project site. Ex. 14 at 10. At the second EDG meeting, the Board acknowledged the public's concern with tree canopy loss and stated that the amount of landscape buffer was an important item for Velmeir to address. *Id*. at 10. The Board recommended studying the depth of the setback and seriously examining the potential to save some of the existing trees. *Id.* At the third EDG meeting, the Board deferred to the applicant's arborists conclusion that they could not save the trees and stated that they would like to see the addition of new evergreens along the Dewey frontage to provide a year-round landscape buffer. *Id*. at 14. Ultimately, at the final Recommendation meeting, the Board approved of the proposed design which, they claimed, showed "evergreen trees and planting designed to provide year-round buffer." *Id*. at 18.

But the Board was wrong. As we demonstrated at the hearing, Velmeir's landscape plan does not, in fact, include evergreen trees that will provide a year-round buffer along Dewey.

Velmeir is proposing to plant about fourteen Parrotia Persica along the Dewey side of the proposal. *See* Ex. 12 at L0.01. But as Ms. Cohen explained, this is not an evergreen species. Instead, Parrotia Persica are wide-spreading deciduous trees, which means they will lose their leaves in fall and will not provide a year-round buffer for the single-family homes along Dewey. Cohen Testimony, Hearing Day 3, Parts 2 & 3. In contrast, the only evergreens that are being proposed along Dewey are three Arbutus Marina, small ornamental trees that will decorate the doorways of only three of the proposed townhomes. Mr. Evans' testimony overall made clear that the goal of the landscaping along Dewey was to provide appealing yards for the townhomes, not to buffer the building from the single-family homes in the Madison Valley neighborhood. *See* Evans Testimony, Day 6. There is no plausible argument that Velmeir is even attempting to provide a year-round

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evergreen landscape buffer, despite that the Design Review Board believed it was necessary to mitigate the aesthetic impacts of losing tree canopy on the project site.

To give the Examiner a more concrete sense of how Velmeir's use of deciduous trees instead of robust evergreen trees to screen the proposal's Dewey façade, the image on the left below (Image 11) is from page 33 of Velmeir's recommendation package to the Design Review Board, depicting what the Dewey façade would look like with the selected trees fully leafed out. In Velmeir's words, the image shows a "residential zone transition w/ generous setbacks & lush layered landscaping." Ex. 75 at 33. Note that all of the large trees in front of the façade are Parrotia Persica, which will drop their leaves in the fall. *See* Ex. 12, Sheet L1.31.

In contrast, the image on the right (Image 12) shows the same perspective but with the trees removed, more closely resembling what the same view would look like in late fall and winter when the leaves have dropped. The difference is significant. The "lush layered landscaping" will only help to mitigate the façade's imposing, wall-like impacts on the neighborhood during part of the year.

Image 11
Source: Exhibit 75 at 33

Image 12
Source: Ex. 75 at 59

But the landscape plan is unlikely to succeed anyway. As Ms. Cohen testified based on her years of working in horticulture and on other development sites, it is likely that many of the trees depicted on Velmeir's landscape plan will need to be removed before they reach maturity.

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See Cohen Testimony, Day 3. This is true, for example, of the Port Orford cedars, which are 100-foot trees. *Id*. Indeed, the Port Orford cedars are not even sold in the nursery trade because they are so susceptible to root disease (and, in this case, will be planted in narrow planters with not enough root space to survive). *Id.* It is true of the incense cedars, which grow to about 60 to 70 feet in an urban setting but will be planted only 11 feet apart — too close for healthy growth. *Id.* And it is true of the massive European beech trees along the Madison façade. *Id*. If any of these trees make it to maturity, their size alone will likely cause damage to the building and infrastructure because they are not given adequate space. *Id*. But they are likely to be removed long before that, anyway.

In short, Velmeir's landscape plan may appear to screen the proposal and its significant adverse height, bulk, and scale impacts, but that is only on paper. In reality, many of the trees will not survive and the plan is likely to fail, leaving the proposal's adverse impacts either entirely unmitigated, or under-mitigated with a future, as-yet-unknown landscape plan that will actually work in the space it is given — if that is even possible.

For the same reasons, the approved landscape plan is unlikely to satisfy the city's tree canopy and tree replacement requirements at chapter 25.11 of the SMC. Although they look good on paper, many of the proposed tree plantings will be dead or removed long before they reach maturity, contrary to assumptions in the city's threshold determination. *See* Ex. 14 at 31 ("The landscape plan proposes new trees that will replace and exceed the canopy of the existing trees at maturity. No mitigation beyond the Code-required landscaping is warranted under SMC 25.05.675.N.").

c. Even assuming compliance with the city's design guidelines, the Velmeir Proposal has not been adequately mitigated under SEPA.

Finally, even assuming, *arguendo*, that the proposal complies with the city's design guidelines (which it does not), we have still demonstrated by clear and convincing evidence that

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the design review process did not result in mitigation adequate to reduce the proposal's impacts to a non-significant level within the meaning of SMC 25.05.675.G.2.c. Much of that evidence is addressed above. But is noteworthy that the proposal's adverse aesthetic impacts, flowing from its dramatic height, bulk, and scale, are precisely the types of impacts called out by SMC 25.05.675.G as needing additional mitigation.

As quoted above, SMC 25.05.675.G provides an example of when significant adverse impacts may be expected to fall through the cracks of the city's development code — specifically, "when a project is located on a site with unusual topographic features or on a site which is substantially larger than the prevalent platting pattern in the area," or when "the City's zoning designations [do not] provide a reasonable transition in height, bulk, and scale between development in adjacent zones." SMC 25.05.675.G.1.b. The city's design guidelines are expected to fill these cracks. But the cracks still exist with the Velmeir Proposal, notwithstanding its alleged compliance.

Sitting high on an unusually-shaped ridgeline above the Madison Valley neighborhood, on lot that is much larger than the prevalent platting pattern, the proposal will loom over the valley below, taking advantage of unforeseen loopholes and blind spots in the development code, at the site of an unmitigated transition between two completely different zones. The impacts will be stark and significant. If the proposal complies with the design guidelines, then clearly, the guidelines did not do their job.

To truly mitigate the Velmeir Proposal's significant adverse height, bulk, and scale impacts to levels that are not significant, the proposal would need to incorporate a more gradual terracing and stepping back of the building from the Dewey elevation in a way that actually responds to the existing slope, and that provides a smooth transition between the two uses. *See* Steinbrueck Testimony, Day 3, Part 1.Effective mitigation would require a more significant ground-floor

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setback on the Dewey side and a requirement that a healthier, fuller, deeper buffer of evergreen trees be planted with the goal of truly screening the building from the single-family neighborhood (instead of making promises to plant trees that will not survive). *Id*.

Because effective mitigation was not provided, the DNS is invalid. The city erred in determining that further mitigation is unnecessary. Both components of the MUP decision (design review and SEPA) are clearly erroneous and should be remanded. The city should be directed to prepare an EIS so that alternatives are developed, studied, and disclosed, mitigation measures are more fully fleshed out, and the full magnitude of the proposal's impacts are clearly and publicly disclosed to facilitate a truly informed decision by the city. The impacts will be more than moderate, and that is what SEPA requires.

B. The Velmeir Proposal Will Have Probable Significant Adverse Traffic and Transportation Impacts That Have Not Been Adequately Mitigated.

Closely related to its significant adverse height, bulk, and scale impacts, the Velmeir Proposal also will have significant adverse traffic impacts — both on the quiet residential streets along the valley floor (where the residential garage entrance will be located), and on East Madison Street on the commercial ridgeline above (where the entrances to the commercial garage for the grocery store and loading bay will be located).

At only 18 feet wide, Dewey Place East is a very narrow street. Tilghman Testimony, Day 2. It operates more like an alley than a roadway, and is currently used only for garbage collection and access to four single-family garages. *Id*. There is very little traffic on Dewey, with only 10 peak hour trips and 100 daily trips total. *Id*. It is hear that Velmeir plans to put the entrance to the residential garage, adding 343 new daily trips, essentially the same as if the city had approved a new, 82-home subdivision. *Id.* As explained by Mr. Tilghman, this increased traffic will completely alter the character and use of Dewey and adjacent residential roads, and lead to additional

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pedestrian conflicts along Dewey, Republican, and 30th Avenue East. *Id.* It will also add additional traffic to a known hazard area, the blind corner at the end of Dewey where the road turns east onto Mercer near the P-Patch. *Id*. It defies credulity that adding the equivalent of a new, 82-home subdivision, with ingress and egress only off Dewey, will not have "more than moderate" impacts on the Madison Valley neighborhood at the base of the hill. What once was a quiet street with access to only four homes will now be the only point of vehicular access for 82 households.

On East Madison, the impacts will be similarly severe. As Mr. Tilghman explained, grocery stores are one of the most traffic-intensive uses in an urban environment; and for that reason, are often located on corner lots where they can have access from two or more streets and better distribute incoming and outgoing traffic. *Id*. That is not the case here, where the proposed grocery store will have only one point of access, for both customers and deliveries, on a single, crowded city arterial — East Madison Street. *Id*.

As a result, the design and use of the commercial entrance on Madison will cause significant safety and congestion issues. *Id*. For example, the applicant's own traffic report concludes that the commercial exit will operate at an LOS F, indicating that there will be jammed conditions in the garage, excessively long delays, and vehicles unable to move as they try to exit. Ex. 33 at 5, 31. That is a significant adverse traffic impact, *id*., and the applicant's excuse that this is an "internal issue" ignores that these problems are likely to spill out onto East Madison. *See* Tilghman Testimony, Day 2. Among other things, the extreme traffic congestion within the commercial garage — created as too many cars try to exit at the same time — is likely to frustrate drivers, push them to take chances they normally would not take, increasing the likelihood of pedestrian conflicts

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and traffic accidents. *Id*.[8] There also is no support for the idea that somehow "internal" traffic problems are exempted from SEPA. It is a grocery store open to the public, coming and going on East Madison, not a private living room.

The design of the loading bay also will create serious conflicts between cars entering the site and trucks using the loading area. *Id.* The site design has cars entering the loading dock in order to enter the parking lot, precluding customers from using that entrance when delivery trucks are attempting to enter. *Id*.; Ex. 27. Mr. Tilghman testified that this would create confusion and safety issues for customers, increasing congestion and back-ups on Madison — an issue that is entirely ignored in Velmeir's traffic analysis. Tilghman Testimony, Day 2.

Finally, the East Madison entrance and exit do not even meet minimal safety requirements of the city's development code. There is no code-required sight-triangle at the driveway, as required by SMC 23.54.030.G. The garage driveway also has a substandard width. The plans show 18 feet, but the code requires 22 feet for a commercial driveway. *See* 23.54.030.D.2.a.2. At the hearing, the applicant's traffic expert indicated that these problems would be fixed. But no new plans were submitted.

As noted above, for a DNS to be sustained, the agency must produce a record that demonstrates that it adequately considered the environmental factors in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA. *Boehm*, supra, 111 Wn. App. at 718, *citing Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814 (1978); *see also Anderson v. Pierce Cy*., 86 Wn. App. 290, 302 (1997). Here, it is evident from reviewing the Decision (Ex. 14), and from the testimony of the responsible official, that the impacts described above were not addressed. The

[8] A new plan, exhibit 26, shows a single lane exiting the site. That will create even more delay for cars that are exiting the site with even longer delays, increasing the adverse impact to a level of service that may be unbearable for people leaving the site.

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city's decision and testimony focused almost exclusively on LOS levels at nearby intersections, unrelated to many of the adverse impacts addressed by Mr. Tilghman. Those impacts will be significant. Tilghman Testimony, Day 2.

To truly mitigate the Velmeir Proposal's traffic and transportation impacts to non-significant levels, sufficient to justify a DNS, the city should have imposed two additional mitigation measures. First, consistent with SMC 25.05.675.R, the city could have, and should have, required all vehicular traffic to enter and exit the project site from East Madison Street. Dewey Place East is simply too small to accommodate the increased traffic associated with the 82 new residential units proposed by Velmeir. Requiring that all access to the site be at East Madison constitutes effective mitigation that should have been required for the proposal.

Second, because the current proposal is too large and too intensive to eliminate traffic and transportation impacts on East Madison (even with the split of entrances between Madison and Dewey), the city should have conditioned the Velmeir Proposal to reduce the overall size and/or scale of the project per its authority in SMC 25.05.675.R.2.f.ii (allowing the decisionmaker to reduce the size and/or scale of a proposal if other mitigation measures would be inadequate). To our knowledge, no other mitigation measures would suffice to reduce the Madison-side impacts to a non-significant level, and none were offered at the hearing.

Because the Velmeir Proposal will have significant adverse traffic impacts that were not adequately studied and disclosed, and because the city failed to mitigate the proposal's impacts to non-significant levels, the DNS should be reverse and remanded for further mitigation pursuant to SMC 25.05.675.R — or, alternatively, for the production of an EIS with a true alternatives analysis.

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D. The Threshold Determination Is Not Based on Reasonably Sufficient Information to Assess the Proposal's Stormwater Impacts.

At the outset of this brief, we wrote about the unique environment of the Madison Valley neighborhood and how the hills and lush vegetation surrounding it make the valley floor such a unique respite from the busy arterial and commercial spaces of East Madison Street. But those same features, especially the unique topography sloping down to an area adjacent to the P-Patch at the end of Dewey and 31st Avenue East (an area known as the "Mercer bowl") have also contributed to a history of tragedy.

In December of 2006, on the eve of Hanukkah, a rain storm descended on Seattle. Stormwater collected and rushed down East Madison Street at the top of the ridge above Dewey Place, overwhelming the inlets to the city's combined stormwater system, which had become clogged with leaves and debris. *See* Ex. 20 at xii (explaining that inlets in front of the City People's Garden Center had become clogged with leaves and debris, preventing stormwater from entering the city's combined stormwater system). From there, the water cascaded down the hillside toward Dewey, blew out a retaining wall located near the southern edge of the Velmeir Proposal, and flooded the Madison Valley neighborhood. *Id*. Also contributing to the flood event, silt and other material washed into the Mercer bowl from higher grounds, clogging the street drains in the low spot of the neighborhood and preventing water pooling there from draining into the city's stormwater system. *Id*. at 6-3.

One neighbor — Kate Fleming — was killed. She drowned in her basement from the sudden flood of water pouring into her home near the Mercer bowl. The site of Kate Fleming's home, which has since been torn town, can be seen in Image 1 at the beginning of this brief, just across from the P-Patch on the left.

Kate Fleming's death was the most tragic consequence of the flood, but it was not the only consequence. Power was knocked out to the Madison Valley Neighborhood for eight days. Hacker

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Testimony, Day 1, Part 2 at 1:17:44. Basements were filled with water and homes were damaged. *Id*. at 1:19:02. Dewey Place was covered in debris from the wall blow-out. *See* Ex. 9 (photos of flood aftermath). And Mr. Hacker's wife and six-year-old son were nearly killed, making it home just in time to avoid being crushed by rock and debris. *See id*., Day 1, Part 2 at 1:08:20. To say the event was traumatic is an understatement.

A year after the tragic death of Kate Fleming, the city commissioned a report by CH2M Hill (Ex. 20) to study the cause of the flood. Among other things, the CH2M Hill Report — which no witness for the city or Velmeir read prior to this appeal — contains a diagram depicting the path the flood took through the neighborhood after pooling on East Madison, in part due to inlets clogged with leaves and debris. *See* Ex. 20, Fig. ES-3. As can be seen in that diagram, the north end of the Madison Valley neighborhood is especially vulnerable to flooding, as it comprises the low point of the valley. In the years that followed, the city installed additional inlets adjacent to the low point on East Madison Street where the water escaped downhill to Dewey (and more storage tanks downstream from those inlets in the arboretum). It is possible that these improvements will prevent another flood during a storm similar to what occurred in 2006. But no witness for the city or Velmeir was willing to testify that there is not a risk of the inlets becoming clogged again. And Velmeir proposes to plant several large beech trees along the front of the new building along Madison, which will drop their leaves in the fall, increasing the likelihood that even the new storm drains will become clogged just like the last ones, contributing to a future flood under similar circumstances. *See* Ex. 75 at 34.[9]

[9] At the hearing, the responsible official testified that she was aware of these trees, and that they may clog the drains in East Madison, but that SDOT would have evaluated this issue as part of a separate review. But when pressed, she acknowledged she did not know if SDOT actually did so. *See* Hogness Testimony, Day 4, Part 4 at 56:37 (Q: "And did SDOT look at this issue in relation to the possibility of flooding?" A: "I'm not sure.").

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Because the Madison Valley Neighborhood has already experienced such a tragic and traumatic flood event, it is imperative that the city provide a credible and well-documented assessment of potential stormwater impacts in its threshold determination for the Velmeir Proposal. As noted above, every threshold determination must "indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Conservation Nw., supra,* 2016 WL 3453666 at *31 (quotation omitted). That requirement is heightened in this case due to the history of tragedy and flooding in this particular neighborhood. *See, e.g.,* WAC 197-11-794 (instructing lead agency to weigh the severity of potential impacts along with their likelihood of occurrence). Indeed, it is precisely because of the Hanukkah Eve storm of 2006 — and neighbors raising that issue during the SEPA comment period — that the SEPA responsible official determined that this proposal should receive more extensive stormwater review at the MUP stage in comparison to other projects throughout the city. *See* Hogness Testimony, Day 4, Part 4 at 52:55.[10]

Yet, it appears the city did virtually no relevant analysis of this issue under SEPA. We say this because no one but Velmeir knew what the actual stormwater plans are for the proposal.

In its stormwater report (Exhibit 19), Navix — Velmeir's stormwater consultant — stated that the proposal would discharge stormwater runoff to a 15-inch pipe beneath East Madison Street. *See* Ex. 19 at 9. The Navix report described this 15-inch pipe as "capacity constrained," *see id*. at 4, denoting that it is too small for current and anticipated loads. *See* Spangenberg Testimony, Day 2; *See*

[10] The need for a detailed, methodical stormwater analysis under SEPA is also heightened by the impacts of climate change, which are likely to increase the severity and frequency of heavy winter storms in the Seattle area. *See* Ex. 21 at 5-2 (explaining that "[c]urrent research is consistent in projecting an increase in the frequency and intensity of heavy rain events"); Ex. 23 at 2 ("Rainfall is expected to become more intense in many parts of the world, including the Pacific Northwest"). As Mr. Spangenberg explains, one of the effects of climate change is that what used to be a 100-year storm (like the one that killed Kate Fleming) may occur much more frequently than under current projections, necessitating increased measures to guard against future major flood events. *See* Spangenberg Testimony, Day 2.

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also SMC 22.801.040 (defining "capacity-constrained system" to mean a system that has "inadequate capacity to carry existing or anticipated loads"). The Navix report also stated that "[i]n the event of a larger storm, the [proposal's stormwater] system may fail," causing runoff from the project site to "overflow to the west into East Madison Street." Ex. 19 at 13. As Mr. Spangenberg, SMV's stormwter expert testified, the city cannot reasonably conclude that there will be no significant adverse stormwater impacts without first assessing (a) the degree to which the 15-inch pipe under Madison is capacity constrained, and (b) at what point water will begin flowing from the project site into East Madison Street, potentially exacerbating future flood events like the one that occurred in 2006. *See* Spangenberg Testimony, Day 2.[11]

In response to Mr. Spangenberg's testimony, the city's stormwater expert, Ms. Courtenay, testified that the 15-inch pipe beneath East Madison Street is sufficient to convey stormwater runoff generated by the Velmeir Proposal. *See* Courtenay Testimony, Day 5, Part 1. For her part, the SEPA responsible official deferred to Ms. Courtenay entirely, stating that she did no stormwater analysis of her own (though, she never even asked Ms. Courtenay how the proposed stormwater system might react to a storm like the one that occurred in 2006, *see* Hogness Testimony, Day 4, Part 4 at 53:14). In turn, Ms. Courtenay's analysis was premised on her understanding — shared by Save Madison Valley and reflected in the Navix Report and final MUP plan set, exhibit 12 — that Velmeir would, in fact, be discharging to the 15-inch pipe under East Madison. *See* Courtenay Testimony, Day 5, Part 1 at 51:18 (explaining that "[f]low control will be provided, and it will be discharged to the combined

[11] As Mr. Spangenberg explained, the risk of exacerbating future flood events is also increased by the possibility that the project will increase hydrostatic groundwater pressure on current retaining wall that replaced the one that blew out in 2006. *See* Spangenberg Testimony, Day 2, Part 2 at 40:14. The applicant attempted to rebut this testimony by citing the sub-surface drainage system planned for the Velmeir Proposal. *See* Ex. 80 at 13. However, no information was provided showing that the sub-surface drainage system was designed to accommodate increased flood flows, or to intercept the specific waters putting pressure on the retaining wall during a flood event.

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main, *the majority of it being the 15-inch main in Madison*") (emphasis added). That is where things stood at the close of the city's case in chief.

But all that went out the window when Velmeir's stormwater expert, Mr. Taflin, testified that Velmeir would *not* be discharging *any* stormwater to the 15-inch pipe under East Madison Street. Instead, he testified that all stormwater from the Velmeir Proposal will be discharged to an 8-inch side-sewer adjacent to Dewey. *See* Taflin Testimony, Day 6. This is contrary to Velmeir's own stormwater report. *See* Ex. 19 at 9 ("All storm water will be connected to the existing 15[-inch] combined sewer system in Madison"). It is also contrary to the approved MUP plan set. *See* Ex. 12, Sheet C2.00 (depicting stormwater connection to 15-inch pipe under Madison). In an effort to explain this undisclosed change to the proposal's stormwater system, Mr. Taflin explained that Velmeir made the decision to jettison the 15-inch pipe as early as January of 2018, but that he had no control over what plans were submitted to the city as part of the MUP process — including the most recent plan set dated April 30, 2018 (Ex. 12), still depicting the main stormwater connection at Madison. Unfortunately, neither the city nor Velmeir offered any exhibits depicting the new connection to the 8-inch pipe adjacent to Dewey. They did not offer any exhibits demonstrating any analysis of that pipe's capacity to safely convey stormwater generated by the Velmeir Proposal. Nor was there any testimony that anyone at the city involved in the city's SEPA review was aware of this change (even if revised plans did exist somewhere).

As noted above, a threshold determination must be supported by "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335. We respectfully submit that this rule requires the SEPA responsible official, at the very least, to know where Velmeir intends to send its stormwater. The record is clear that the city performed its SEPA analysis on the basis of a mistaken assumption that Velmeir would send its stormwater to the 15-inch pipe under Madison — an assumption supported by Velmeir's own plan set and stormwater report. On

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this basis alone, the DNS should be remanded for a new determination in light of Velmeir's actual plans.

But it gets worse. At the hearing, Mr. Taflin testified (a) that he has not actually inspected the 8-inch pipe adjacent to Dewey, and (b) that he does not know how the system would behave during a storm like the one that occurred in 2006. Asked about the latter issue, he testified simply "yeah, I can't comment on that." Taflin Testimony, Day 6, Part 1.

Frankly, if there is *any* question the Examiner should want answered about the Velmeir Proposal, it is how would the system actually proposed by Velmeir handle a storm like the one that occurred in December of 2006? As Mr. Spangenberg testified, it is not a matter of if, but when another major storm will occur with the potential to overwhelm the system and lead to another major flood event in the Mercer Bowl. *See* Spangenberg Testimony, Day 2. We should know what the result might be.

And indeed, SEPA provides a framework at WAC 197-11-080 for how to answer that question. Under that section, if essential information is incomplete or unavailable, then the agency must either (a) go out and get that information, or (b) if the cost is exorbitant or the means of getting the information are speculative or not known, then the agency must perform a worst-case analysis. *See* WAC 197-11-080(1, 3). In his rebuttal testimony, Mr. Spangenberg explained that there are, in fact, ways of determining how the proposed stormwater system would handle an event like the one that occurred in 2006, either by running actual rainfall data of the 2006 storm through Mr. Taflin's stormwater model, or by reviewing the 158-year synthetic data set that Mr. Taflin used in his model to see if any of the storms represented in that data are similar enough to the 2006 storm to draw a credible conclusion (notwithstanding that the data set predates the 2006 storm by four years). *See* Spangenberg Rebuttal Testimony, Day 7. If neither of those options are available, the city could, in

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fact, perform a worst-case analysis and it may need to increase the level of protection to guard against another tragic event in the future. *Id*.

Here, however, not only did Velmeir stay quiet until the end of the hearing about what its actual plans are (allowing SMV and the city to engage in a prolonged discussion of potential impacts based on their shared assumption that Velmeir would use the 15-inch pipe under Madison, an issue that is now moot); and not only did Velmeir completely fail to offer any exhibits or record evidence of how the system actually being proposed will handle a storm like the one that occurred in 2006; there is no evidence that the city or Velmeir did a worst-case analysis, as required by WAC 197-11-080. Under these circumstances — where literally no attempt was made to answer what may perhaps be the most critical question of the case, and where the city's SEPA responsible official did not even know where Velmeir intended to discharge its stormwater — it cannot be said that the DNS represents the type of methodical, well-reasoned, rational, and well-documented analysis that SEPA requires.

The DNS is not supported by information that is sufficient to assess the proposal's adverse environmental impacts. The DNS should be reversed and remanded for further analysis of stormwater impacts, and specifically to address how the system actually being proposed would handle a storm like the one that killed Kate Fleming in 2006.

E. The Threshold Determination Is Not Based on Sufficient Information Regarding Impacts to the P-Patch, a Significant Community Resource.

Above, we included two images and a brief discussion of the Mad P-Patch at the northern end of the Madison Valley neighborhood. *See* Images 3 & 4. As Wallis Bolz testified, the P-Patch is an important "recreational opportunity" in the neighborhood where people walk, garden, and play. Bolz Testimony, Day 3, Part 4 at 1:01:37. *See also* Hacker Testimony, Day 2. But the significance of the P-Patch to the neighborhood runs much deeper.

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The P-Patch was started in 2001 as a part of a community effort to stop illicit behavior that had become an all-to-common problem in an otherwise pleasant neighborhood, including illegal dumping and prostitution at the corner of 30th and Mercer — the dead-end northern terminus of the neighborhood. *See* Bolz Testimony, Day 3, Part 4 at 48:16. In an effort to better their community, neighbors approached the Department of Neighborhoods about establishing the P-Patch, as part of a strategy of replacing undesirable activities with desirable ones. *Id*. at 51.13. The neighborhood received a grant, the Department began leasing the land from SDOT, and today the P-Patch has a two-year wait list. *Id*. at 50:30. The P-Patch also "annually donates several hundred pounds of fresh organic produce to local food banks and is valued highly by the Madison Valley community as a peaceful and beautiful public space open to anyone who wishes to enjoy it." Ex. 56 (Email from Wallis Bolz to Magda Hogness). *See also* Ex. 57 (same); Ex. 54 at 8 (P-Patch sign inviting the public to "Come enjoy the garden").

These positive attributes are exactly what the P-Patch program was designed to be. As described by the Department of Neighborhoods, "All P-Patch gardens are open to the public to enjoy and are used as restorative spaces, learning and idea incubators, and gathering spaces."[12] They are "a space where neighbors come together to grow community and steward — plan, plant and maintain — a piece of open space." Ex. 56. The Department of Neighborhoods also describes P-Patches as "[f]ostering an environmental ethic and connecting nature to people's lives."[13] In these ways, P-Patches not only fit the description of a community garden. They fit the city's definition of a park. *See* SMC 23.84A.030 (defining "parks and open space" to mean "a use in which an area is permanently dedicated to recreational, aesthetic, and educational or cultural use and generally is characterized by

[12] *See* Seattle Department of Neighborhoods, About the P-Patch Program, *available at* <https://www.seattle.gov/neighborhoods/programs-and-services/p-patch-community-gardening/about-the-p-patch-program>;

[13] *See* Seattle Department of Neighborhoods, About the P-Patch Program, *supra*, note 12.

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its natural and landscape features. A parks and open space may be used for both passive and actives forms of recreation.").

The P-Patch faces many potential impacts from the proposal, including noise, dust, and traffic from construction — all of which may disrupt recreational opportunities at the P-Patch, and those who garden there, for the entire duration of the construction period. *See* Bolz Testimony, Day 4, Part 1 at 15:36. Longer-term impacts include increased traffic from the 82 additional homes slotted for development, which may pose safety hazards. *Id*. at 18:14. But most glaringly, Velmeir's behemoth will block the light.

The image below is from Velmeir's recommendation package to the Design Review Board. It is one of Velmeir's solar vignettes depicting shadow impacts on adjacent lands. This specific image shows the shadow that will be cast by the Velmeir Proposal during the spring and fall equinoxes, which occur annually during March and September, at 4:00 p.m. in the afternoon. *See* Bolz Testimony, Day 4, Part 1 at 26:17. At 4:00 p.m. on the equinoxes, the massive structure will cast its shadow across entire western portion of the P-Patch, including the plots depicted above in Image 4.

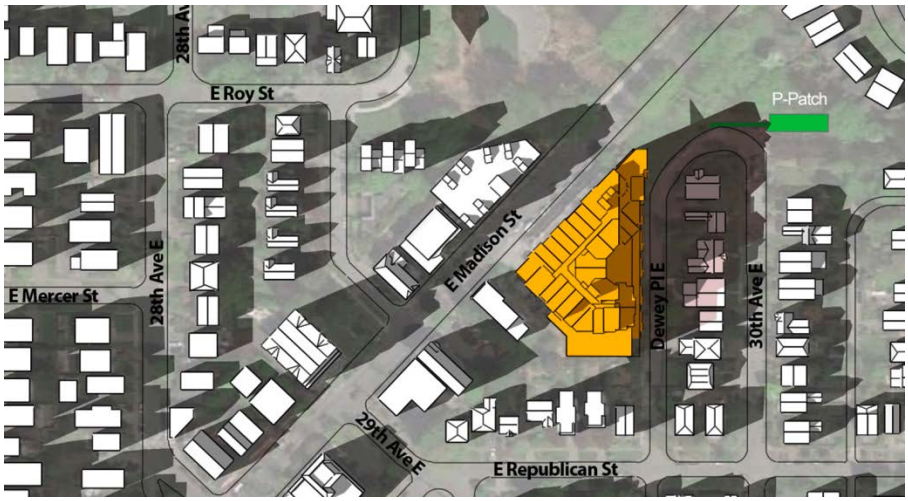

Image 13
Source: Ex. 75 at 113

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During the spring and fall equinoxes, Ms. Bolz explained that P-Patchers are busy planting and harvesting crops. Staring in February before the spring equinox, planting begins for the first harvest in April, including peas and lettuce, and there is a friendly competition to see who can be the first in the garden each year. Bolz Testimony, Day 4, Part 1 at 7:00. By March, P-Patchers are busy turning cover crops. *Id*. And at the other end of the growing season, during the fall equinox, September is obviously a "big harvest month." *Id*. at 10:02. Some people even grow heartier crops like brassicas year-round — including during winter. *Id*. at 8:55. Comparing these timelines to the shadow studies produced by Velmeir, we know the massive structure will cast a shadow over a significant portion of the P-Patch when the garden is in active use (March and September). We know the shadow will persist through winter afternoons (covering the entirety of the P-patch). *See* Ex. 75 at 114. But we not know exactly when the shadows will begin (will the fall shadow start in August, a month before the fall equinox?). We do not know how many months the shadows will persist (will the spring shadow extend through April or May?). Nor do we know the time of day when the shadow begins (will it start at 3:00 p.m., or at 2:00 p.m.?). *Id*. at 113–14.

Remarkably, despite Velmeir's knowledge of the P-Patch and the community's concerns, Velmeir did not disclose these potential impacts in its SEPA checklist. Even when prompted to disclose all "designated and informal recreational opportunities" in proposal's vicinity, Velmeir did not mention the P-Patch. *See* Ex. 8 at 26. Nor is the P-Patch mentioned in the SEPA component of the city's MUP decision. There is simply no evidence that impacts on the P-Patch were considered as part of the city's SEPA review.

When asked why the city did not consider these impacts under SEPA, the responsible official testified that she did not believe the city has authority to mitigate shadow impacts on the P-Patch under SMC 25.05.675.Q, titled "Shadows on Open Spaces." But not only did that answer confuse the difference between the city's duty to determine if impacts will be significant, on the one hand, and

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whether it has authority to mitigate those impacts, on the other, the responsible official was wrong on the law. That code provision explains that "[a]ccess to sunlight, especially in Settle's climate, is an amenity of public open spaces." SMC 25.05.675.Q.1.a. It goes on to give the city authority to mitigate shadow impacts on "publicly owned parks" outside downtown Seattle. *See* SMC 25.05.675.Q.2.a.i. As noted above, the P-Patch satisfies the city's broad definition of a park as "a use in which an area is permanently dedicated to recreational, aesthetic, and educational or cultural use and generally is characterized by its natural and landscape features." SMC 23.84A.030. The Department of Neighborhood's own description of a P-Patch as an area dedicated to education, passive recreation, and connection to nature clearly fit that bill.

In turn, not only does SMC 25.05.675.Q give the city authority to mitigate impacts on the P-Patch, it says what the city must do to evaluate those impacts in the first place:

> The decisionmaker shall assess the extent of adverse impacts and the need for mitigation. The analysis of sunlight blockage and shadow impacts shall include an assessment of the extent of shadows, including times of the year, hours of the day, anticipated seasonal use of open spaces, availability of other open spaces in the area, and the number of people affected.

SMC 25.05.675.Q.2.c. Applied here, the city did not investigate anticipated seasonal use of the P-patch. It did not evaluate the availability of other open spaces or the number of people affected. Nor does it know — except at 4:00 p.m. during the equinoxes and winter — when and to what extent the proposal will shade the P-Patch. It simply failed to investigate these issues because it thought (wrongly) that it had no authority to mitigate the impacts, even if they are likely to be significant.

And indeed, even if the P-Patch were not considered a park within the meaning of SMC 25.05.675.Q, the city would still have substantive authority to mitigate these impacts under SMC 23.05.675.J — the city's residual "Land Use" SEPA policy — under which "[i]t is the City's policy to ensure that proposed uses in development projects are reasonably compatible with surrounding

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uses," and where "the decisionmaker may condition or deny a project to mitigate adverse land use impacts resulting from a proposed project." SMC 25.05.675.J.2.b. This broadly-worded grant of authority would clearly allow the city to mitigate adverse impacts on the P-Patch, a component of the "land use" element of the environment under SEPA. *See, e.g.,* SMC 25.05.444.B.2 (classifying recreation and agricultural crops under the land use element of the environment); WAC 197-11-444(2)(b) (same).

Because the city has not demonstrated prima facie compliance with SEPA with respect to impacts on the P-Patch, an important recreational amenity with deep ties to the neighborhood's history, the DNS should be reversed and remanded with instructions for the city evaluate those issues in accordance with SMC 25.05.675.Q and the procedural requirements of SEPA.[14]

F. The City Cannot Avoid Current Consideration of Construction Impacts Based on an Assumption that Applicable Standards Will Be Met in the Future.

Construction impacts are a major concern for Save Madison Valley. As Mr. Hacker testified, the construction phase of the project will involve excavating virtually the entire hillside within the nearly 1-acre project site, producing an immense amount of traffic on Dewey Place East. *See* Hacker Testimony, Day 1, Part 3 at 6:22 (estimating that removing this amount of material, totaling about 150 million pounds of dirt and debris, would require approximately 27,000 dump truck loads to and from the project site). With this dramatic increase in traffic by large vehicles, the neighborhood is likely to experience increased dust and noise. *Id*. Power may be lost to portions of the neighborhood, as one of the utility poles will need to be removed. *Id*. at 8:25. And the neighborhood is concerned about an

[14] During her cross-examination, the Responsible official also opined that Save Madison Valley did not raise impacts on the P-Patch in its notice of appeal. But Save Madison Valley did clearly raise "land use" impacts in issues 1.a and 1.b. *See* Notice of Appeal at 4. As noted above, recreation and agricultural crops are both components of the "land use" element of the environment. *See* WAC 197-11-444(2)(b); SMC 25.05.444.B.2. The city did not request clarification of Issues 1.a or 1.b (nor did Velmeir) and the P-Patch is clearly within the scope of those issues.

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invasion of rats, which currently occupy the site but are sure to flee to new homes as the hillside is torn down. *Id*. at 10:07.

Perhaps most concerning from a long-term health perspective, the SEPA responsible official received a comment letter from an epidemiologist working for King County, warning her that the project site likely contains lead and PCBs, hazardous materials that could enter the environment during demolition of the existing on-site structure. *See* Ex. 11 (explaining that the project site is "assumed" to contain lead risks, and that "[b]uildings constructed between 1929 and 1979 often contain poly-chlorinated biphenyls (PCBs) in the form of window caulking and paint, and we assume this building contains PCB risks as well."). King County's epidemiologist also noted that these risks were not disclosed on Velmeir's SEPA environmental checklist. *See id.* ("The applicant does not mention lead or PCB hazards under question 7(a5)."). Later, the responsible official signed off on that portion of the checklist, notwithstanding the omission. *See* Ex. 8 at 19 (initialing Velmeir's statement that "[n]o environmental health hazards [are] expected from [the] proposed project").

In its threshold determination, the city opted to exercise its SEPA substantive authority to mitigate some (but not all) of these impacts. In particular, the city invoked SMC 25.05.675.B to require the future production of a construction management plan, to mitigate the impacts of construction-related vehicular traffic. *See* Ex. 14 at 27. For other construction-related impacts — including noise, mud and dust, and the potential release of lead and asbestos (but not PCBs, which are not mentioned) — the city determined that compliance with other, non-SEPA rules and regulations will be sufficient to mitigate those impacts to non-significant levels. *See id*. at 27–28.

The city's approach to these impacts might have been acceptable had the construction management plan actually been prepared (not simply required at some future date), and had the city actually evaluated the likelihood that this project will be able to comply with the cited rules and regulations. As it stands, however, the decision does little more than list relevant code sections and

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assume the project will comply — an approach that violates SEPA's mandate for a searching, realistic, and methodical assessment of potential impacts. *See Conservation Nw., supra,* 2016 WL 3453666 at *32 (threshold determination may not rely on "formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards").

Indeed, the cursory nature of the city's SEPA review of these issues is apparent from just how little it knows about them. For example, at the hearing, counsel for Save Madison Valley questioned the responsible official about potential impacts from lead, asbestos, and PCBs. The following exchange took place after the responsible official asserted that existing rules and regulations would be sufficient to mitigate any potential impacts from a release:

> Q (Telegin): Did you know if there is lead on the project site?
>
> A (Hogness): I do not.
>
> Q: Do you know if there's asbestos?
>
> A: I do not.
>
> Q: Do you know if there's PCBs?
>
> A: I do not.
>
> Q: How do you know there's not going to be an impact?
>
> A: Because people are required by law to follow these rules.
>
> Q: And do you know if those rules will be sufficient in this case?
>
> A: The decision says that it will mitigate the impacts associated with contamination.
>
> Q: The decision we're challenging, right?
>
> A: Correct.

Hogness Testimony, Day 4, Part 4 at 1:02:50. In this exchange, not only is it surprising that the responsible official does not know if lead or PCBs are present (after the warning from King County), it is also striking that the responsible official could not explain the efficacy of the non-SEPA rules and

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regulations except to point out that the threshold determination "says [they] will mitigate the impacts associated with contamination." This type of circular, superficial analysis does not pass muster under SEPA.

The responsible official was similarly unknowledgeable when it came to the issue of rats. After testifying that Velmeir would need to develop a "rat abatement plan" — a requirement not mentioned in the threshold determination — the responsible official admitted, again, that she did not know if the plan would actually be effective:

> Q (Telegin): You talked about a rat abatement plan?
>
> A (Hogness): Yes.
>
> Q: Where does that come from?
>
> A: That's required by code.
>
> Q: Okay, do you know if it always works?
>
> A: I do not.
>
> Q: Do you know how many rats are on the project site?
>
> A: I do not.

Hogness Testimony, Day 4, Part 4 at 1:04:38. Again, this type of superficial analysis — with no actual knowledge of site conditions or whether the plan will be effective — does not satisfy SEPA.

Finally, on the issue of noise impacts, the only evidence in the record came from Bill Stewart, Velmeir's noise expert. But Mr. Stewart admitted that he is "not currently hired or involved with mitigating construction noise from this site during construction." Stewart Testimony, Day 5, Part 1 at 17:05. When asked directly whether there would be significant adverse noise impacts, he responded "I can't say." *Id*. at 17:25. And surprisingly, Mr. Stewart even admitted that his own testimony was irrelevant under SEPA: "There's nothing that's relevant to this case for what I've done so far." *Id*. at 15:10.

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Because the threshold determination effectively defers consideration of construction-related traffic impacts to a later date (when the construction management plan is prepared), and blindly assumes compliance with non-SEPA rules and requirements for all other construction-related impacts (with virtually no knowledge of whether they will be effective), the DNS is clearly erroneous and should be remanded for further review under SEPA.

G. The Threshold Determination Is Based on a Myopic and Overly Narrow Evaluation of Wildlife Impacts.

Finally, it is not just the trees and greenspace that the Velmeir Proposal will remove. With them goes habitat used by more than 38 species of birds that currently use the site. Many of these species are listed in the copy of the SEPA checklist annotated by Mr. Hacker, collecting observations from local community members. *See* Ex. 8 at 12–14. Andrew Kirsh, a life-long birder and member of the Mad P-Patch, also testified about the wide array of species that use the project site, many of which are songbirds and neotropical migrants. *See* Kirsh Testimony, Day 3, Part 4. Three of those species — Wilson's warbler, the pine siskin, and brown creeper — are included on a list maintained by Cornell Labs of common species in steep decline." *Id*. at 22:00. *See also* Ex.52. They are not threatened or endangered within the meaning of state and federal statutes designed to protect the most imperiled of species. But to be on the list, at least 50 percent of the species' global population must have disappeared in the last 40 years. Kirsh Testimony, Day 3, Part 4 at 22:00. Photos of the birds observed by Mr. Kirsh were admitted as Exhibit 51, also showing the habitat that will be lost.

One of the major points of Mr. Kirsh's testimony was to rebut Velmeir's wildlife report, which generally characterizes the project site as "fragmented," "isolated," and "degraded." *See generally* Ex. 23. We wanted the Examiner to see that the site is actually full of life. It is vibrant. Because that is how the community experiences it. As Mr. Hacker described it, Madison Valley "is

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a very quiet place with a lot of birds." Hacker Testimony, Day 1, Part 2 at 18:58. That is the character of the neighborhood.

It was very clear at the hearing that Mr. Keany, Velmeir's wildlife expert, did not see the neighborhood the same way. He testified that he was really only interested in documenting species that nested on the project site, and that he was not interested in visiting more than once (contrary to recommendations made in the literature he cited, calling for multiple visits over the course of a year). *See* Keany Testimony, Day 6. He did not explain why his focus was so narrow or how it relates to SEPA. But he did at least explain that when he called the site "fragmented" because it is separated from the Washington Park Arboretum by East Madison Street, he was only referring to mammals. Birds, in contrast, can fly to the arboretum as they can to any other part of the large, expansive greenbelt that flows generally from the arboretum, to the project site, along Dewey and past the P-Patch, and then east along Lake Washington Boulevard, enveloping the Madison Valley neighborhood along the way.

On cross, he also retracted a statement he made when questioned by Velmeir's attorney about the aesthetic qualities of the project site, and the city's SEPA policy at SMC 25.05.675.2.a calling for the protection of wildlife habitat of substantial aesthetic value. He admitted he was not qualified to speak to that issue.

But that *is* the fundamental issue in this case. The massive new building will loom over the neighborhood like a fortress, 300-feet wide with 82 apartments plopped on top and a large busy grocery store filling its main commercial belly. The trees that form the most prominent part of the greenspace around and above the neighborhood will be lost, and the hill will be dug out for a parking garage on Dewey. And part of what will be lost is an area known and experienced as a place full of birds, by the people who live there and love it, not by people who do not want to visit more than once. The full texture of the loss in all its enormity should be considered, including the

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birds. And indeed, that is why the city's SEPA policies recognize that many birds in urban spaces, even common ones, are valued for their aesthetics, not just their biology. *See* SMC 25.05.675.N.1.b (observing that "[m]any species of birds, mammals, fish, and other classes of animals and plants living in the urban environments are of aesthetic, educational, ecological and in some cases economic value."). But it appears that played no role in the city's decision here.

V. CONCLUSION

One of SEPA's core policies is to "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." RCW 43.21C.030. The SEPA rules go on to say that environmental review must be contextual, considering the unique physical setting of each proposal and does not lend itself to a formula or quantifiable test. The magnitude and duration of impacts must also be considered, and even marginal impacts may be collectively significant. *See* WAC 197-11-330(3), -794. For every proposal having even a single impact that is more than moderate, an EIS must be prepared to develop and examine alternatives and potential mitigation measures. *See* RCW 43.21C.030(c); WAC 197-11-794(1).

It is difficult to square this clear expression of the law with the city's determination of non-significance. Velmeir's giant proposal will dwarf every other structure in the area, on both sides of Madison for blocks in every direction. It will sit on a hard line between two completely different zones. It will tower over Madison Valley with mass and bulk that are completely out of scale with the homes below, the magnitude of which can be instantly understood by lay people and experts alike. Some of the massive façade on Dewey will be screened, but by trees that will lose their leaves for much of the year, leaving it completely exposed. Dewey will be transformed into a driveway for 82 new homes. And as for duration, these impacts will last forever. These are the things that can be quantified, and are objective. But eliminating a 300-foot expanse of trees that are the most

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prominent feature of the surrounding greenspace will also completely change the character and quality of the neighborhood. And it will shade and have other impacts on the Mad P-Patch, where gardening is baked into the DNA of the neighborhood. These impacts on the quality and character of the neighborhood may be less quantifiable, but they are no less real.

The city's conclusion that these impacts are not more than moderate is a farce. It may be true, as the SEPA responsible official testified, that this project has been studied more than any other she is aware of. But the simple fact is that the impacts are significant and must be evaluated and disclosed through the specific mechanism of an EIS, which SEPA requires for every government action that has even a single impact that is more than moderate.

For all of the reasons above, the MUP decision should be reversed in its entirety, inclusive of the threshold determination and the Director's design review decision. The matter should remanded with instructions to either impose additional mitigation measures that will reduce the impacts to a non-significant level and comply with the city's design guidelines, or to produce an Environmental Impact Statement as the law requires.

Dated this 20th day of February, 2019.

Respectfully submitted,

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