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 SAVE MADISON VALLEY'S RESPONSE TO SDCI's MOTION FOR RECONSIDERATION

I. INTRODUCTION

For the reasons below, appellant Save Madison Valley ("SMV") opposes SDCI's Motion for Reconsideration (Mar. 7, 2019) (herein, "Mot.").

II. ARGMENT

A. SDCI Fails to Justify Its Untimely Submission of New Evidence.

Rule 3.20 of the Hearing Examiner Rules of Practice and Procedure ("Examiner Rules") provides that a motion for reconsideration may be granted when "newly discovered evidence of a material nature . . . could not, with reasonable diligence, have been produced at the hearing." Examiner Rule 3.20(a)(2). In its motion, SDCI invokes this rule as the basis for submitting new evidence challenging the Examiner's conclusion that the Responsible Official should have considered shadow impacts on the Mad P P-Patch under SEPA. In support, SDCI says that while the new evidence "was

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available at the time of the hearing in this matter," still "there was nothing in the testimony or exhibits that would have caused SDCI to research its existence prior to receipt of the Hearing Examiner decision." Mot. at 2.

But there was substantial testimony on this very issue and ample notice that we intended to raise it.

Save Madison Valley alerted SDCI early on of its specific intent to raise impacts on the P-Patch as part of its SEPA challenge. SMV's clarification of issues on appeal stated that the proposal would "significantly and adversely impact the Mad P-Patch community garden that is on property adjacent to the site and that is used heavily by the neighborhood." Save Madison Valley's Clarification of Issues (Oct. 12, 2018) at 4:2. That document also stated: "The Director erred in concluding that no further mitigation was warranted for the significant impacts that will be caused by the proposal." Id. at 4:26–5:1. The Notice of Appeal stated that SDCI erred in its exercise of substantive authority, including failure to adequately mitigate the impacts "pursuant to SMC 25.05.675." Notice of Appeal (Aug. 3, 2018) at 4:26.

Following a prehearing conference, the Hearing Examiner required the parties to file preliminary exhibit and witness lists on October 19, 2018. Amended Prehearing Order (Sep 14, 2018) at 1. In its preliminary witness list, SMV listed Wallis Bolz and described her expected testimony regarding the P-Patch as follows:

> Wallis Bolz. Ms. Bolz is a resident of [the] Madison Valley Neighborhood who lives near the proposed project site. If called, Ms. Bolz is expected to testify about the existing environment on and near the project site that will be affected by the East Madison Street Proposal, specifically with respect to the existing . . . Mad P-Patch garden. She will also testify about how the Proposal will significantly and adversely impact the Mad P-Patch community and describe the extent that the Director failed to collect the necessary and adequate information upon which to make a determination on

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> whether the proposal would have significant adverse impacts to the Mad P-Patch garden.

Telegin Dec., Ex. A at 3. Earlier, during project review, Ms. Bolz had submitted several letters to the Responsible Official raising the issue of shadow impacts, *see* Exs. 56 & 57, which the Director later acknowledged in the MUP decision. *See* Ex. 14 at 5, 17. SDCI knew this was an issue and that SMV intended to raise it at the hearing.

The Examiner's prehearing order required that the parties submit final witness and exhibit lists on November 20, 2018. Amended Prehearing Order at 2. The order stated: "Except for purposes of impeachment or rebuttal, only those witnesses and exhibits listed by the parties may be offered at the hearing." *Id*. at 1–2 (notes 1, 2, and 3). Despite having notice that SMV intended to challenge SDCI's SEPA determination with respect to impacts on the Mad P-Patch (and specifically, the failure to mitigate adequately per SMC 25.05.675), SDCI did not identify or produce the 2017 Memorandum of Agreement between SDOT and DON. Nor did it identify or produce a map of the P-Patch area that Mr. Mills could have created at that time, allegedly showing that the "panhandle" plots are not part of the P-Patch itself.

Save Madison Valley's final witness list identified Ms. Bolz as a witness again and repeated the same quote above that had been in its preliminary list about her expected testimony. The final witness list also identified a set of photographs of the Mad P-Patch. SMV provided copies of those photographs to SDCI on November 20, 2018, long before the hearing began. *See* Telegin Dec., B at 3.

Ms. Bolz testified over the course of two days (December 12 and 13, 2018) almost exclusively about impacts on the P-Patch. Magda Hogness, the SEPA Responsible Official, then testified over the course of two days (December 13 and 14, 2018). During that time, and in response to cross

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examination about shadow impacts on the P-Patch, the Responsible Official raised the same defense now presented in SDCI's motion — namely, that SDCI was not required to consider these impacts in its threshold determination process because the P-Patch is not a "park" within the meaning of SMC 25.05.675.Q. *See* Hogness Testimony, Day 4, Part 4. Aside from that testimony, SDCI did not seek leave to submit any new exhibits to substantiate its defense.

Nor did SDCI research or seek leave to present new evidence *during the next six weeks* when there was a break in the hearing from December 17, 2018 to February 5, 2019. During that time period, SDCI had ample opportunity to research the issue long after it was fully fleshed out in exhibits *and* testimony at the hearing — including testimony of the Responsible Official.

There is no basis for concluding that SDCI could not, with reasonable diligence, have discovered its new evidence in time for consideration at the hearing. The simple fact is that SDCI lost on the P-Patch issue, and its disappointment in that result is its sole justification for offering new evidence now, long after the record has closed. But that is not a valid basis under the rules.

Nor is new evidence justified under Rule 3.20(a)(4), authorizing reconsideration to correct a "[c]lear mistake as to a material fact." SDCI cites this rule as an alternative basis for submitting new evidence. But the word "mistake" presumes that the evidence was presented at the hearing, but misunderstood or mis-judged by the Examiner. It does not allow a party to present new evidence that was never considered at the hearing, let alone "mistaken" by anyone.

B. Save Madison Valley Is Extremely Prejudiced by the City's Untimely Submission of New Evidence, Which Should Be Stricken from the Record.

In addition to not meeting the standard at Rule 3.20(a)(2) for presentation of new evidence on reconsideration, SDCI's motion is also highly prejudicial. Under SMC 3.02.090.D, "[o]pportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved."

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Here, SDCI's belated submission of new evidence, which it could have discovered months ago with reasonable diligence, substantially prejudices SMV's ability to respond to the factual issues presented in the motion for reconsideration. SMV has no opportunity to cross examine Mr. Mills or other SDCI witnesses. For all we know, there could be another MOA that amends the one attached to SDCI's motion to say that all P-Patch gardens are, in fact, now permanent. There could be a title document that singles out the Mad P-Patch from others that speaks to this issue. We simply do not know and we will have no opportunity to investigate and/or rebut this document in any meaningful way.

For example, SDCI argues that the Memorandum of Agreement submitted as Exhibit A to the motion proves that the P-Patch is a "temporary" use, not a "permanent" use as required by SMC 23.84A.030 (definition of "Parks and open space"). But notwithstanding SDOT's use of the word "temporary," it is unclear how this differs from other park properties across the city. Had SDCI timely disclosed the memorandum — either before the hearing or during the six-week break in the middle of the hearing — we could have investigated restrictions on other park properties to determine if they, like the P-Patch, could be closed or abolished under certain circumstances. If so, that would prove that to be "permanent," a park use does not literally have to extend into perpetuity. But having failed to timely submit its new evidence, we (and the Examiner) are left only to guess at that issue.

We also could have investigated or questioned SDCI witnesses about whether SDOT has ever shut down a P-Patch; or if, in practical reality, P-Patches are permanent features of the neighborhoods in which they are located, notwithstanding that SDOT could ultimately require their closure. Because SDCI failed to timely submit its new evidence, we are foreclosed from that inquiry, too.

SDCI's motion is also accompanied by a map allegedly showing that the western "panhandle" of the P-Patch is not really part of the P-Patch (as if the gardeners are no more than trespassers). *See* Declaration of William K. Mills (Mar. 7, 2019), Attachment B. However, as described in the

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accompanying Declaration of Wallis Bolz, the Department of Neighborhoods has formally recognized half the panhandle plots since 2001, and the other half since 2006. *See* Declaration of Wallis Bolz in Support of Save Madison Valley's Response to SDCI's Motion for Reconsideration (March 14, 2019), ¶¶ 2–14 (and exhibits thereto).

But regardless, the foundation for SDCI's new map is devoid of any and all credibility. Mr. Mills claims that he prepared Attachment B, but provides no information about where the underlying data came from, how current that data is, or its accuracy. The statement that he "frequently reviews the Department Geocortex mapping data" tells us nothing about his experience or capacity to prepare an accurate map of the area of the P-Patch. And this is being submitted after the record closed and after a decision has been made. SMV has no opportunity to cross examine Mr. Mills or other SDCI witnesses to challenge the reliability and credibility of SDCI's new map.

Finally, SDCI's new evidence will be highly prejudicial if there is a superior court appeal. Like any other appellant, SDCI and the applicant should be required to defend their view of whether the P-Patch is a park based on the evidence and testimony at the hearing. But now if they file an appeal, they will be able to cite the SDOT memorandum and map attached to SDCI's motion, as an end-run around the limitation on new evidence on appeal. That is highly unfair and prejudicial. To remedy the situation, we ask that the Examiner not only deny SDCI's motion, but strike SDCI's new evidence from the record entirely.

C. The P-Patch Meets the City's Definition of "Parks or Open Space," Despite the Theoretical Possibility that SDOT Could Someday Close the P-Patch.

Even if the Examiner were to consider SDCI's new evidence, still the fact that SDOT might someday close the P-Patch and open the unimproved portions of East Mercer Street do not prove that

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the P-Patch is not a "park" — *i.e.,* that it is not permanently dedicated to recreational, aesthetic and educational uses.

For this point, we turn to Seattle Ordinance 118477, also known as Initiative 42, a copy of which is attached as Exhibit C to the accompanying Declaration of Bryan Telegin. Initiative 42 was passed in 1997 to limit the city's ability sell park properties or to change park properties to another use. In particular, it was passed in response to the city's attempt to sell a portion of Bradner Playfield (a park) to a private developer. *See* Telegin Dec., Ex. D (discussing history of Initiative 42).

The city's attempted sale of Bradner Playfield in 1997 itself shows that simply because something is a "park," does not necessarily mean it can never be changed to another use (after all, it took an initiative to stop that transaction). And while Initiative 42 places restrictions on the city's ability to sell park property or change it to another use, it still allows the city to do so under certain conditions. Section 1 of Initiative 42 is quoted below:

> Section 1: All lands and facilities held now or in the future by The City of Seattle for park and recreation purposes, whether designated as park, park boulevard, or open space, shall be preserved for such use; and no such land or facility shall be sold, transferred, or changed from park use to another usage, unless the City shall first hold a public hearing regarding the necessity of such a transaction and th[e]n enact an ordinance finding that the transaction is necessary because there is no reasonable and practical alternative and the City shall at the same time or before receive in exchange land or a facility of equivalent or better size, value, location, and usefulness in the vicinity, serving the same community and the same park purposes.

Telegin Dec., Ex. C at 1–2. In essence, this provision of Initiative 42 shows that the city can, in fact, sell park property or change it to a non-park use provided it first holds a public hearing, finds there are no practicable alternatives, and provides replacement property. These conditions may be stringent, but they still prove that to be "permanently" dedicated to park use under SMC 23.84A.030 does not mean

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that the park use can never end. Like the P-Patch, any park can be sold, transferred, or changed to a non-park use.

In turn, Section 3 of Initiative 42 carves out certain transactions involving park land that would otherwise fall under the prohibitions in Section 1 (*i.e.,* that would be a prohibited sale, transfer, or change of use), but that are specifically exempted from the requirements in that section. Among them — the opening of an unimproved street on park land for street use.

> Section 1 also permits by duly enacted ordinance after a public hearing and without providing replacement property: a transfer to the federal, state, or county governments for park and recreation uses; the reversion of right-of-way continuously owned by a City utility; ***the opening of an unimproved street for street use***; a sub-surface or utility easement compatible with park use; and franchises or concessions that further the public use and enjoyment of a park.

Telegin Dec., Ex. C at 2. Under Section 3 of Initiative 42, any park lands currently occupying unimproved street spaces could be taken out of park use and developed as part of the city's road system. The only requirement would be the city's first holding a public hearing, and then approving the transaction by a "duly enacted ordinance" — a set of requirements that would present virtually no obstacle whatsoever.

But how does that differ from the Mad P-Patch? It is true the P-Patch is built on SDOT property, predominately on the unimproved portions of East Mercer Street. It is true SDOT could someday choose to close the P-Patch and open the road. Yet, the same is true for any unimproved road currently used for park purposes under Section 3 of Initiative 42. And under the plain terms of Section 1 of the Initiative, *any* park could be taken out of park use, but that does not change their current status. Like the P-Patch, they may still remain park lands for as long as any of us are alive, and are treated as such.

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The fact that SDOT could someday close the Mad P-Patch does not prove that the P-Patch is not a park — *i.e.,* that it is not permanently dedicated to recreational, aesthetic, and educational uses within the meaning SMC 23.84A.030. If true, unwavering permanence were the standard, no park lands in the city would qualify. All of them can be sold, transferred, or changed to non-park uses. Yet, they are all parks.

D. Even if the P-Patch Is Not a Park within the Meaning of SMC 25.05.675.Q, SDCI Was Still Required to Consider Impacts on the P-Patch under SEPA.

Even if the Mad P-Patch is not a park within the meaning of SMC 25.05.675.Q, that still does not justify reversing the Examiner's decision.

First, as we discussed in our closing brief, and during cross examination of the Responsible Official, shadow impacts on the P-Patch could still be mitigated under SMC 25.05.675.J., the city's residual "Land Use" SEPA policy. *See* SMV Closing Brief at 53–54. Under that section, "[i]t is the City's policy to ensure that proposed uses in development are reasonably compatible with surrounding uses," a concept that would clearly include impacts on the P-Patch from the large new structure proposed by Velmeir. SMC 25.05.675.J.2.a. In turn, this SEPA policy gives the decisionmaker broad authority to "condition or deny a project to mitigate adverse land use impacts resulting a proposed project." SMC 25.05.675.J.2.a, b. Even if the P-Patch is not a "park" within the meaning of SMC 25.05.675.Q, it is still a type of land use. Impacts from incompatible uses — including shadow impacts — may still be mitigated under SMC 25.05675.J.

Second, even if impacts on the P-Patch could not be mitigated at all, still they must be evaluated and disclosed as part of the threshold determination process — something the Responsible Official said she did *not* do because she did not believe she had authority to mitigate those impacts.

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Under SEPA, the primary task of the lead agency is to identify and evaluate the environmental impacts of a proposal, and to issue a threshold determination as to whether any of those impacts are likely to be significant. *See* RCW 43.21C.033; WAC 197-11-310. The threshold determination must consider impacts on a range of environmental elements, including formal *and* informal recreational opportunities (not just formally designated parks). *See* WAC 197-11-444; WAC 197-11-960 (Question 12.a). The threshold determination is also supposed to consider unique impacts that may not have been previously addressed in the city or county's land use regulations. *See, e.g.,* RCW 43.21C.030 (requiring consideration of "presently unquantified environmental amenities"). In short, all environmental impacts must be evaluated during the threshold determination process. There are no exceptions. If an impact is anticipated to be significant, an EIS is required even the city or county cannot mitigate it.

In contrast, SEPA substantive authority is voluntary — both in the sense that cities and counties are not required to actually mitigate a proposal's impacts under SEPA, and in the sense that they are not required to adopt policies giving themselves that authority (a prerequisite to exercising SEPA substantive authority at all). *See* WAC 197-11-660.

But there is no provision of SEPA allowing a city or county to ignore an impact for purposes of the threshold determination and EIS requirement simply because it has opted not to mitigate it, or failed to adopt a specific substantive SEPA policy relating to that impact. That would be completely antithetical to the core purpose of SEPA to force evaluation and disclosure of all significant adverse impacts — a requirement that cannot be waived.

Here, even if the city cannot mitigate shadow impacts on the Mad P-Patch, the P-Patch is still an important neighborhood amenity that contributes significantly to the local human environment. It

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is still an important recreation area, formally designated or not. And the impacts may still be significant, which must be evaluated and disclosed as part of the threshold determination process.

Because the Responsible Official did not evaluate shadow impacts on the P-Patch under SEPA, the threshold determination should be reversed. It does not matter why those impacts were ignored. The fact that they were violates SEPA.

III. CONCLUSION

As representatives of Save Madison Valley testified at the hearing, this appeal has required tremendous community resources. Save Madison Valley has been diligent in its presentation of issues, evidence, and testimony. The same cannot be said of SDCI's motion. There is simply no excuse for SDCI's waiting until after the record closed, and after Examiner issued her decision, to present its new evidence at this late date.

It is also frustrating for members of Save Madison Valley to have to expend additional resources combating the frivolous argument that the panhandle plots are not actually part of the P-Patch — when the city itself recognized part of the panhandle in 2001, and the rest of it in 2006. *See generally* Bolz Declaration. Instead of relying on the city's Geocortex map, the veracity of which is unknown, Mr. Mills could have simply inquired about that issue with the Department of Neighborhoods. He would have discovered that those plots have been formally recognized (and rented) for a long time.

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For all of the reasons above, the Examiner should deny SDCI's motion for reconsideration.

Dated this 14th day of March, 2019.

Respectfully submitted,

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