Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: GRANT PROTECTION FOR TREES, et al., from a decision issued by the Director, Seattle Department of Construction and Inspections.	Hearing Examiner File: MUP-19-004 – MUP 19-015 Department Reference: 3029801-LU & 3030630-LU APPLICANT AND OWNER'S MOTION TO DISMISS LAND USE APPEAL AND FOR SUMMARY JUDGMENT

COMES NOW the applicant, Curtis Bigelow, and property owner, 2813 4th Ave W LLC, by and through their undersigned attorneys, Brandon S. Gribben and Samuel M. Jacobs of Helsell Fetterman LLP, and moves the Hearing Examiner to dismiss this land use appeal with prejudice and for summary judgment.

I. INTRODUCTION AND RELIEF REQUESTED

This matter concerns six separate land use appeals of the Seattle Department of Construction and Inspections ("SDCI") Director's Determination of Non-Significance (the "Decision"[1]) for the proposed development of a 3-unit rowhouse project and 2-unit townhouse project, under SDCI Project Nos. 3029801-LU and 3030630-LU (together, the "Project"). The Project is located at 2813 and 2815 4th Avenue West in the Queen Anne neighborhood of Seattle (the "Premises"). The Decision determined that the Project would

[1] The Decision is attached as Exhibit A to the Declaration of Alex Mason ("Mason Decl.").

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not have a probable significant adverse impact upon the environment, determining that no Environmental Impact Statement ("EIS") would be required under the State Environmental Policy Act ("SEPA") for the Project.

Six separate neighbors appealed the Decision. The appeals were consolidated for consideration at a single hearing. Many of the issues raised by the appellants overlap and raise the same, or substantially similar issues. The issues raised by the appellants are without merit on their face and are woefully insufficient to refute the Decision. In addition, there are no issues of material fact that would preclude an award of summary judgment. For these reasons, the appeals must be dismissed in their entirety. In addition to these substantive deficiencies, the appellants have requested relief that either the Hearing Examiner does not have authority to grant, or is unsupported by the evidence. The appeals should be dismissed for this reason as well.

II. STATEMENT OF FACTS

The Premises is located in the Queen Anne neighborhood of Seattle and is zoned Lowrise 1 (LR1). Because of the size of the Project, it is subject to SEPA review under SMC Chapter 25.05 et seq. This Project was also subject to Streamlined Design Review. On February 15, 2018, Streamlined Design Review Design Guidance ("SDR Design Guidance") was issued by SDCI.[2] On July 7, 2018, the Applicant submitted a SEPA environmental checklist containing information related to the Project's potential impacts. SDCI later annotated the SEPA checklist. The Project then went through a period of public comments. After the public comment period and review by SDCI and other City departments, the SDCI Director issued the Decision on February 19, 2019.

The Decision contained a Determination of Non-Significance, finding that the Project would not have significant adverse impacts upon the environment, and that an EIS

[2] A copy of the SDR Design Guidance is attached as Exhibit B to the Mason Decl.

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was not required. SDCI did exercise its SEPA substantive authority under SMC 25.05.660 to condition the Project to mitigate environmental impacts. Specifically, SDCI is requiring a Construction Management Plan to address construction impacts to parking and traffic. The Decision was then appealed by six neighbors.

III. STATEMENT OF ISSUES

1. Should the appeals be dismissed where they are meritless on its face? **Yes.**

2. Should 2813 4th Ave W LLC be awarded summary judgment where there are no issues of material fact and it is entitled to judgment as a matter of law? **Yes.**

3. Should the appeals be dismissed where, assuming *arguendo* that the appellants' objections to the Decision are true, they are insufficient to support the relief requested? **Yes.**

4. Should the appeals be dismissed where the Hearing Examiner does not have jurisdiction to grant the relief requested? **Yes.**

IV. EVIDENCE RELIED UPON

This motion is based upon the Decision, the Appeals, the file in this matter, the Declarations of Alex Mason, and the exhibits attached thereto.

V. AUTHORITY

A. Standard for Motion to Dismiss.

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

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B. Standard for Summary Judgment.

HER 2.16 authorizes other dispositive motions, including motions for summary judgment. "The object and function of summary judgment procedure is to avoid a useless trial." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgment is properly granted "if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Balise*, 62 Wn.2d at 199; *see Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 362, 324 P.2d 1113 (1958); CR 56(c). In ruling on a summary judgment motion, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Reed v. Davis*, 65 Wn.2d 700, 705, 399 P.2d 338 (1965). If, from this evidence, reasonable people could reach only one conclusion, the motion should be granted. *Wood v. City of Seattle*, 57 Wn.2d 469, 471, 358 P.2d 140 (1960).

A defendant who moves for summary judgment meets its initial burden and summary judgment is appropriate where the defendant has demonstrated that an essential element of the plaintiff's claim has not been established. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624-25, 818 P.2d 1056 (1991). The burden then shifts to the nonmoving party to set forth specific facts to demonstrate the existence of a material issue of fact sufficiently rebut the moving party's contentions. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In her response, "the nonmoving party cannot rely on the allegations made in its pleadings." 112 Wn.2d at 226. "The nonmoving party may not rely on speculation or argumentative *Young* assertions that unresolved factual issues remain." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Rather, the nonmoving party's response "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." CR 56(e). If the

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plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Because there are no issues of material fact, the Hearing Examiner should award 2813 4th Ave W LLC summary judgment and dismiss the appeals. Each appeal will be discussed in turn below.

C. Grant Protection for Trees: MUP 19-004 and 19-005.

The Grand Protection for Trees appeal raises six separate objections to the Decision: (a) the Applicant and SDCI did not review options to achieve maximum FAR that would allow retention of the Exceptional Tree, (b) the Streamline Design Review recommendations were ignored, (c) a thorough environmental evaluation was not conducted before SDCI granted an ECA waiver, (d) the number of rowhouses and townhouses proposed exceed the density allowed in an LR1 zone, (e) the allowable FAR was not properly applied, and (f) the design standard adjustments under SMC 23.41.018 and the departures under SMC 23.41.012 was not applied to the Project. Each of these objections will be discussed in turn below.

1. The SDR Design Guidance is a Type I decision under SMC 23.76.004 and is not subject to an appeal of a SEPA determination of non-significance.

The Decision states that: "The development proposed under [the Project] includes removal of an Exceptional Tulip tree. Per SMC 25.11.070.A, the proposal underwent Streamlined Design Review. Streamlined Design Guidance was provided on February 15, 2018. Streamlined Design Review is a Type 1 decision pursuant to SMC 23.76.00[6][3]." SMC 23.76.006(B)(12) states in relevant part, that: "The following decisions are Type I: Streamlined design review decisions pursuant to Section 23.41.018 if no development standard departures are requested pursuant to Section 23.41.012." While the SDR Design

[3] The Decision inadvertently refers to SMC 23.76.004.

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Guidance requested standard adjustments, there were no departures requested under SMC 23.41.012. Thus, the SDR Design Guidance is a separate Type I decision and may not be appealed as part of the SEPA determination of non-significance.

Grant Protection for Trees also claims that SDCI did not review alternative design options that would result in retention of the Exceptional Tree while maximizing FAR and that the SDR Design Guidelines were ignored. Because the SDR Design Guidance is a Type I decision, the first two objections to the Decision should be dismissed.

2. An environmental review was conducted before SDCI granted the ECA exemption.

Grant Protection for Trees claims, incorrectly, that an environmental review was not performed prior to SDCI issuing an ECA exemption. On December 19, 2017, Michael Xue, a Senior Geotechnical Engineer with PanGeo, issued a Geotechnical Engineering Report.[4] The report specifically addresses ECA Considerations and Site Stability.[5] The report concluded that the Project met the requirements for an ECA exemption because the (a) development is located on a steep slope erosion hazard area that has been created through previous legal grading activities, including but not limited to rockeries or retaining walls resulting from right-of-way improvements; and (b) the development is located on a steep slope erosion hazard area that is less than 20 feet in vertical rise and that is 30 feet or more from other steep slope erosion hazard areas. The report concluded that:

> A site reconnaissance was conducted on November 8, 2017. During our site reconnaissance, we did not observe obvious evidence of slope instability at the subject site including the slope areas. The existing house foundations are observed to be in a relatively good condition. Based on the results of our field exploration and the general topography at the site, it is our opinion that the site is currently stable. It is also our opinion that the proposed development as currently planned is geotechnically feasible and will not decrease the site stability and adversely impact the subject and surrounding properties, provided

[4] A copy of the Geotechnical Engineering Report is attached as Exhibit C to the Mason Decl.
[5] *See* page 4.

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that the recommendations presented in this report are properly incorporated into the design and construction of the project.

And with respect to development in the ECA, PanGeo concluded that:

> In our opinion, the subject steep slope meets criteria (b) and (c) for a Relief from Steep Slope Development. It is also our opinion that the currently proposed development can be constructed without adversely impacting the subject and surrounding properties, provided they are properly designed and constructed.

On February 5, 2018, over a month after the PanGeo report was issued, SDCI approved the Project's request for relief from prohibition on steep slope development.[6] Thus, Grant Protection for Trees claim that an environmental review was not conducted is without merit and that objection should be dismissed.

3. The Project complies with the number of rowhouses and townhomes allowed in an LR1 zone. And in any event, that objection is not subject to an appeal of a SEPA determination of non-significance.

Grant Protection for Trees' claim that the Project does not comply with the LR1 density requirements is not a valid objection to the Decision. The Decision concerns a SEPA environmental determination under SMC Chapter 25.05; it does not authorize the construction of any buildings. Thus, it is not a valid objection to the Decision and it should be dismissed.

Even though zoning review is not part of the Decision, the Project complies with the LR1 density requirements. 2813 4th Ave W LLC is seeking to develop a 3-unit rowhouse at 2815 4th Avenue West, which is a 3,386 square foot lot. In an LR1 zone there is no density limit for rowhouses on lots 3,000 square feet or greater.[7] Because 2815 4th Avenue West is larger than 3,000 square feet, there is no density limit for rowhouses on that property.

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[6] SDCI's Approved Request for Relief from Prohibition on Steep Slope Development is attached as Exhibit D to the Mason Decl.

[7] *See* SMC 23.45.512.

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2813 4th Ave W LLC is also seeking to develop a 2-unit townhouse at 2813 4th Avenue West, which is a 2,961 square foot lot. In an LR1 zone one townhome is allowed for every 1,600 square feet. If, however, the density calculation results in a fraction over .85, then one additional unit is allowed.[8] 2,961 divided by 1,600 equals 1.850625. Thus, 2813 4th Ave W LLC is entitled to build two townhomes on this lot. Even if the zoning issues raised by Grant Protection for Trees could be raised in the appeal of a SEPA determination of non-significance, which it cannot, the objection should still be dismissed because the Project complies with the zoning allowed under the SMC.

4. The amount of FAR allowed is not a valid objection to a SEPA determination of non-significance.

Similar to Grant Protection for Trees' objection that is addressed in Section C.3 above, the amount of FAR allowed under the zoning code is not a valid objection to a SEPA determination of non-significance. Again, the Decision does not authorize the construction of any buildings, nor does it prescribe the allowable FAR. So, it is not a valid objection to the Decision and should be dismissed.

5. The adjustments and departures allowed under SDR are not appealable in a SEPA determination of non-significance.

As an initial matter, there were no departures permitted by the SDR Design Guidance. While the SDR Design Guidance provided adjustments for side setbacks, adjustments are approved as a Type I decision. As discussed in Section C.1 above, the SDR Design Guidance is a separate Type I decision and may not be appealed as part of the SEPA determination of non-significance. This objection is not valid and must be dismissed.

Each of Grant Protection for Trees' objections to the Decision are without merit and the entire appeal should be dismissed.

[8] *Id.*

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D. Reed Lyons: MUP 19-006 and 19-007.

Mr. Lyons raises 16 separate objections to the appeal that will be addressed in turn below.

1. Earth

Mr. Lyons claims that a report should be issued on the extent of any groundwater in the street abutting the Project because the development could disturb underground water channels. As discussed above, the PanGeo geotechnical report specifically addresses "Subsurface Exploration" and "Site Geology and Subsurface Conditions."[9] The PanGeo report states that:

> Groundwater was not encountered in our test borings at the time of excavation. It should be noted that groundwater elevations and seepage rates are likely to vary depending on the season, local subsurface conditions, and other factors. Groundwater levels and seepage rates are normally highest during the winter and early spring (typically October through May).

The PanGeo report addresses the specific concerns raised by Mr. Lyons concerning the groundwater. The potential impacts were disclosed to and considered by SDCI prior to issuing the Decision. And Mr. Lyons does not allege that the City's existing regulations are insufficient to mitigate potential impacts to the groundwater. This objection is without merit and should be dismissed.

Mr. Lyons then claims that the SDCI GIS map shows that there was a recent landslide about 110 feet away from the Project and that the PanGeo report should be corrected because it identified a landslide "at 2904 4th Avenue West, approximately one block northeast of the subject site."[10] As an initial matter, the City GIS map[11] indicates that the center of the landslide is approximately 270 feet from the Project. So, any discrepancy between the 110 feet and 240 feet is de minimus and would not have any effect on the SEPA

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[9] *See* Report, pg. 3-4.
[10] *See* Report, pg. 4-5.
[11] The City GIS map is attached as Exhibit E to the Mason Decl.

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determination of non-significance. The SEPA checklist also disclosed the exact location of the landslide. In addition, SDCI is presumed to know the information in its GIS mapping system, including the exact distance from the Project to the landslide.

The next objection raised by Mr. Lyons is that the ECA steep slope exemption is flawed because the steep slope was not the result of legal grading activities. No support is offered for this allegation. Both the PanGeo report and Scott Pawling, SDCI's ECA reviewer, confirm that the ECA steep slope is the result of legal grading activities. The PanGeo report also confirms that the Project is subject to an ECA exemption because the steep slope area "is less than 20 feet in vertical rise and that is 30 feet or more from other steep slope erosion hazard areas." Mr. Lyons does not claim that the Project is not entitled to an ECA exemption for this reason.

Finally, Mr. Lyons argues that the geotechnical report failed to consider the soil displacement and erosion that may occur from the construction of the Project. Again, the PanGeo report addresses "Surface Drainage and Erosion Considerations."[12] Each of Mr. Lyons' "Earth" objections are without merit and should be dismissed.

2. Air

Mr. Lyons alleges that the Exceptional Tree will aspirate more carbon dioxide than the replacement trees for "probably decades." Even assuming that this claim is true, it is not a valid objection because Mr. Lyons does not allege any impacts that were not considered by SDCI when it issued the determination of non-significance. And the does not claim that additional mitigation is warranted. The record is replete with references to the Exceptional Tree and the fact that the Project will be planting new trees that "will replace and exceed the

[12] *See* report, pg. 15.

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canopy of the existing tree at maturity."[13] Thus, not only were the impacts disclosed to SDCI, but the impacts of removing the Exceptional Tree will be completely mitigated.

3. Water

Mr. Lyons claims that the storm water runoff is inadequately described and considered and that the underground water has not been investigated. As discussed in Section D.1 above, the underground water was investigated and addressed in the PanGeo report and public comments. For these reasons, the objection is without merit and should be dismissed.

4. Plants

First, Mr. Lyons claims that the annotated SEPA checklist[14] fails to recognize the Exceptional Tree. The SEPA checklist acknowledges the Exceptional Tree in multiple places. For example, the checklist references the arborist report provided by Shoffner Consulting,[15] which identifies the Exceptional Tree, and further states that the Project proposes to remove "vegetation including exceptional Tulip Tree."[16]

Second, Mr. Lyons argues that SDCI failed to request reasonable alternatives that could allow retention of the Exceptional Tree. For the reasons discussed in Section C.1 above, whether SDCI requested alternative site plans is not part of this appeal.

Third, Mr. Lyons argues that the landscaping calculations were provided for each separate property when it should have been provided for both properties. This is an appeal of two separate permits and there is no authority that the calculations should have been combined.

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[13] *See* Decision, pg. 7
[14] The annotated SEPA checklist is attached as Exhibit F to the Mason Decl.
[15] The Shoffner Consulting Arborist Report is attached as Exhibit G to the Mason Decl.
[16] *See* SEPA checklist, pg. 3, ¶11.

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Fourth, Mr. Lyons claims that the arborist did not consider the trees in the designated ECA area. That is not correct. The arborist report identifies the location of trees on the Premises, including the ECA area. Thus, Mr. Lyons' objections to "Plants" is without merit and should be dismissed.

5. Energy and Natural Resources

Mr. Lyons alleges that the Project will affect the potential use of solar energy by the abutting property to the north. This is entirely speculative given that the neighboring property does not use solar energy. Regardless, the size and scope of the Project was disclosed to SDCI and the impacts were considered. For example, the SEPA checklist specifically addresses "Aesthetics,"[17] which includes the Project's elevation. The plan sets submitted to SDCI also disclosed the Project's height, bulk and scale.

6. Land and Shoreline Use

Mr. Lyons argues that the Project is designed as if no ECA exists. As discussed at length in Section C.2 above, the Project was properly granted an ECA exemption.

7. Housing

Mr. Lyons argues that during SEPA review there was no consideration given to the improvements that might be need to ensure that the dead-end alley met SDOT regulations. The SEPA checklist addresses this issue. Paragraph 14(d) states that: "The Alley behind the site will require improvements (paving). It is currently gravel and in relatively poor condition." The alley improvements will be addressed during the building permit review process and is not appealable as part of the Decision.

8. Aesthetics

Mr. Lyons claims that improved views from the property to the west is questionable. The SEPA checklist disclosed the size and scale of the Project and acknowledged that it:

[17] *See* ¶10.

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"May impact private views from adjacent neighbors."[18] This is not a valid objection because the potential impacts were disclosed and Mr. Lyons does not allege that additional mitigation is warranted.

9. Transportation

Mr. Lyons raises a host of issues related to the current condition of the alley and claims that the alley condition does not allow an increase in FAR under SMC 23.45.510(c). As discussed in Section D.7 above, the SEPA checklist acknowledges that the alley will need to be improved and that will be addressed during the building permit review. Further, any issues related to allowable FAR are not appealable from the Decision and will be addressed during the building permit review.

10. Public Services

Mr. Lyons claims that the Seattle Fire Department would have issues accessing the Project and that there are water pressure issues. The Project's potential impacts to the public services were disclosed during SEPA review. And any issues related to compliance with the fire code will be addressed during the building permit review process.

11. Utilities

Mr. Lyons claims that the side sewer serving the property to the north was not addressed. This claim does not fall within the scope of SEPA review and should be dismissed.

12. The SEPA checklist is adequate.

Mr. Lyons makes various statements in this section, but are not cogent objections to the Decision. Further, many of the statements made in this section were addressed in the sections above.

[18] See ¶10(a) and (b).

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13. The plan sets are complete and accurate. Regardless, they do not have a bearing on the Decision.

Mr. Lyons argues that the plan sets are incomplete and inaccurate because they do not address the tree protection areas in the right-of-way. As an initial matter, SDOT has jurisdiction over the trees in the right-of-way, not SDCI. More to the point, tree protection measures are considered during the building permit review process under SMC Chapter 25.11 (Tree Protection Ordinance) and are not valid objections to the Decision. The plan sets disclosed the Project's potential impacts to the trees, both on the Premises and abutting areas, which were considered by SDCI.

Mr. Lyons then reasserts his prior objection that the geotechnical report is inadequate. He does not, however, describe how or why the PanGeo report is lacking. For the reasons discussed in Section D.1 above, this objection is without merit.

14. The SDR Design Guidance is a Type I decision under SMC 23.76.004 and is not subject to an appeal of a SEPA determination of non-significance.

Mr. Lyons claims that alternative plan configurations that could have resulted in retention of the Exceptional Tree were not considered. For the reasons discussed in Section C.1, this objection is without merit.

15. The Lot Boundary Adjustment complies with applicable law and, in any event, is not an appropriate objection to this Decision.

Finally, Mr. Lyons claims that the lot boundary adjustment[19] performed for the Premises did not comply with the SMC. Under SMC 23.76.006, a lot boundary adjustment is a Type I decision. The lot boundary adjustment was approved and recorded in August 2018 and the time to appeal that decision has long since passed.

[19] The lot boundary adjustment is attached as Exhibit H to the Mason Decl.

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16. Even assuming each allegation and objection raised by Mr. Lyons is true, he has not made allegations that warrant the first request for relief requested. And the Hearing Examiner does not have authority to award the remaining relief requested.

Mr. Lyons identifies three forms of relief: (a) vacation of the Decision, (b) an analysis demonstrating the maximum retention of trees, including the Exceptional Tree, and (c) confirming the Project complies with SMC Chapter 23.84A and 23.24.045.

First, Mr. Lyons does not raise valid objections to the Decision. If, however, the Hearing Examiner determines that any of the objections are valid, assuming they are true, they are woefully insufficient to warrant vacation of the Decision.

Second, analyzing whether there are alternative configurations that could maximize the retention of existing trees is not relief that the Hearing Examiner has jurisdiction to grant. The SDR Design Guidelines are not part of this appeal and neither are the tree protection measures under SMC Chapter 25.11.

Third, issues related to SMC Chapter 23.84A (Definitions) and SMC 23.24.45 (Unit lot subdivisions) are not valid objections to the Decision.

Because Mr. Lyons has failed to raise valid objections that would warrant vacation of the Decision, and requested relief that the Hearing Examiner does not have authority to award, his appeal must be dismissed.

E. Charles and Clarissa Mish: MUP 19-008 and 19-009.

The Mishes raise five objections to the Decision: (a) the LR1 zoning does not allow five units to be built, (b) the alley will result in the new owners parking on the street, which will reduce the parking for the Mishes, and may prevent fire trucks from accessing the alley, (c) the removal of the Exceptional Tree is protected by the SMC, (d) the City has a duty to preserve green space, which includes the Exceptional Tree, and (e) concerns over building near the underground stream.

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1. The Project complies with the number of rowhouses and townhomes allowed in an LR1 zone. And in any event, that objection is not subject to an appeal of a SEPA determination of non-significance.

The Mishes first objection to the Decision was addressed in Section C.3 above, and for those reasons it should be dismissed.

2. Issues related to the alley improvement will be addressed during the building permit review and are not valid objections to the Decision.

As discussed in Sections D.7 and D.9 above, issues related to the alley were disclosed in the SEPA checklist and will be addressed during the building permit review. They are not valid objections to the Decision and should be dismissed.

3. The removal of the Exceptional Tree was addressed in the SDR Design Guidance, which is a Type I decision, and not a valid objection to the Decision.

As discussed in Section C.1, D.3 and D.4 above, this objection is without merit and should be dismissed.

4. The Mishes' claim that the City has an obligation to preserve reasonable amounts of green space is not a valid objection to the Decision.

This is a general nonspecific statement and not a valid objection to the Decision. To the extent the Mishes are claiming that the City is obligated to retain the Exceptional Tree, that may only be challenged through an appeal of the SDR Design Guidance that the Mishes failed to do.

5. The potential impacts to underground water was disclosed in the SEPA checklist and PanGeo report.

As discussed in Sections D.1 and D.3 above, potential impacts to underground water was disclosed to and considered by SDCI.

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6. The Hearing Examiner does not have jurisdiction to award the majority of the relief requested by the Mishes. And the Mishes have failed to demonstrate that they are entitled to the relief that the Hearing Examiner does have jurisdiction to grant.

The Mishes request four forms of relief: (a) that the Hearing Examiner require SDCI to analyze whether there is an alternative site plan that could result in retention of the Exceptional Tree, (b) that the Hearing Examiner require SDCI to reduce the number of dwelling units from 5 to 4, (c) that the Hearing Examiner require SDCI to confirm that the alley justifies the proposed floor area and is adequate for parking and emergency vehicles, and (d) that the Hearing Examiner require SDCI to address potential issues related to underground storm water.

The Hearing Examiner does not have jurisdiction to grant the first three requests for relief. As discussed in Section D.1 above, the PanGeo report discloses potential impacts to the underground water, which were considered by SDCI. Issues related to the underground water and drainage were also disclosed to SDCI in the public comments.[20] Furthermore, the Mishes do not allege that the City's regulations are insufficient to mitigate any potential impacts to the underground water. Thus, the Mishes have failed to demonstrate that they are entitled to the fourth request for relief. For all of these reasons, the Mishes' appeal should be dismissed.

F. Peter and Sandra Brust: MUP 19-010 and 19-011.

The Brusts fail to identify any objections to the Decision whatsoever. They simply rely on "the issues that have been presented by other appellants in the other appeals filed in this matter."[21] This statement is woefully insufficient to sustain an appeal. HER 3.01(a) states that: "Compliance with Rules. All appeals must comply with these Rules and with the requirements established in the law under which the appeal is filed." HER 3.01(d)(3) states

[20] *See* Decision, pg. 3.
[21] *See* Brusts' Notice of Appeal, pg. 3.

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that: "Contents. An appeal must be in writing and contain the following: A brief statement of the appellant's issues on appeal, *noting appellant's specific objections* to the decision or action being appealed." (emphasis supplied).

The Brusts may not rely on other appeals filed in this matter and are required under the HER to state their "specific objections" to the Decision. Because the Brusts' Appeal fails to comply with the HER, it must be dismissed. In addition to failing to note their specific objections, the Brusts fail to request any specific relief. Under HER 3.01(d)(4), the Brusts' Appeal must state: "The relief requested, such as reversal or modification." The Brusts do not request any specific relief and merely state that: "Appellants request any and all additional relief that is necessary to address and alleviate the errors raised by the objections to the Decision[] that are present in Appellant's [sic] appeal." Because the Brusts do not request any specific relief, and simply refer to their nonexistent objections to the Decision, their Appeal must be dismissed for this reason as well.

G. Ivy Arai Tabbara: MUP 19-012 and 19-013

Ms. Tabbara raises five objections to the appeal: (a) the Decision did not comply with SEPA, (b) the SDR Design Guidance was made in error, (c) the Approved Request for Relief from Prohibition on Steep Slope Development was made in error, (d) the Project is inconsistent with SMC Chapter 25.11 because 2813 4th Ave W LLC did not satisfy the requirements for obtaining approval to remove the Exceptional Tree, and (e) Ms. Tabbara incorporates the other issues raised by the other appellants in this matter. For the reasons discussed below, these objections are without merit and should be dismissed.

1. The Decision complied with SEPA and Ms. Tabbara asserts only conclusory objections to the Decision, which is insufficient to support her appeal.

Ms. Tabbara argues in subsection (a)(i) that the Director did not require or collect information related to a host of potential impacts related to "steep slopes, tree removal, land

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use, privacy, views, traffic, public facilities (the alley), environmental health (including toxic materials, lead, sewage disposal, and rat abatement) and aesthetics (including height, bulk, and scale)."[22] In the next sentence Ms. Tabbara seems to suggest that this information was provided but that it was somehow "inadequate, misleading, incomplete, and incorrect."[23] Ms. Tabbara's conclusory statements and failure to particularize a specific objection to the Decision is fatal to her appeal. As discussed above, HER 3.01(d)(3) mandates that the appellant note their "specific objections to the decision."

In subsection (a)(ii), Ms. Tabbara restates her objections from subsection (a)(i) and argues that the Director erred by not requiring further mitigation based upon the purported impacts from the Project. Again, Ms. Tabbara does not identify any specific Project impact that was not disclosed or identify any further mitigation that is warranted beyond what the City code requires.

In subsection (a)(iii), Ms. Tabbara argues that the SDR Design Guidance was insufficient to mitigate height, bulk and scale impacts. As discussed in Section C.1 above, the SDR Design Guidance is a separate Type I decision and may not be appealed as part of the SEPA determination of non-significance. In addition, Ms. Tabbara does not identify any specific aspect of the SDR Design Guidance that is insufficient.

In subsection (a)(iv), Ms. Tabbara argues that SDCI failed to require additional mitigation that is allowable under SMC 25.05.675. While Ms. Tabbara identified potential mitigation that is allowable under this ordinance, she fails to identify the specific adverse impacts, the City regulations that are insufficient to mitigate the impacts, and the additional mitigation allowed under SEPA that should have been required.

[22] *See* Appeal. Pg. 3.
[23] *Id.*

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In subsection (a)(v), Ms. Tabbara claims that SDCI failed to address cumulative impacts from other projects in the pipeline. The Decision confirms that SDCI relied on its experience and reviewed similar projects that helped form the basis for the determination of non-significance.[24] Furthermore, a review of the City's permit map reveals that the only two land use permits in the area are the ones that are being appealed in this proceeding.[25]

2. The SDR Design Guidance is a Type I decision under SMC 23.76.006 and is not subject to an appeal of a SEPA determination of non-significance.

As discussed in Section C.1 above, the SDR Design Guidance, which is a Type I decision, was not appealed by anyone, including Ms. Tabbara. And it may not be appealed as part of the Decision.

3. SDCI's Approved Request for Relief from Prohibition on Steep Slope Development was properly approved and complied with the SMC.

Ms. Tabbara claims that the Approved Request for Relief from Prohibition on Steep Slope Development was issued in error. For the reasons stated in Sections C.2 and D.1 above, that objection is without merit.

4. The tree protection measures under SMC Chapter 25.11 are not subject to appeal of a SEPA determination of non-significance.

Ms. Tabbara claims that the Project violates SMC Chapter 25.11. As discussed in Section C.1 and C.13 above, this objection is without merit and should be dismissed.

5. An appellant may not rely on other objections to the Decision raised by other appellants.

Ms. Tabbara improperly seeks to rely on objections raised by other appellants. As discussed in Section F above, this objection is improper and should be dismissed.

[24] *See* Decision, pg. 3.
[25] The City's Land Use Permit Map is attached as Exhibit I to the Mason Decl.

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6. The Hearing Examiner does not have jurisdiction to award the majority of the relief requested by Ms. Tabbara. And Ms. Tabbara has failed to demonstrate that she are entitled to the relief that the Hearing Examiner does have jurisdiction to grant.

Ms. Tabbara requests three specific forms of relief: (a) that the Hearing Examiner remand back to SDCI for further analysis, (b) reversal of the SDCI Design Guidance, and (c) reversal of the pending Land Use Code Interpretation.

First, Ms. Tabbara has failed to identify any specific impacts that were not disclosed to and considered by SDCI or that those impacts warrant additional mitigation under SEPA. Second, the Hearing Examiner does not have jurisdiction to reverse the SDR Design Guidance because that decision is not appealable as part of the SEPA determination of non-significance. And third, Ms. Tabbara's request that the Hearing Examiner overturn SDCI's code interpretation is premature because it has not yet been issued by SDCI. For all of these reasons, Ms. Tabbara's appeal should be dismissed.

H. Sharon Levine: MUP 19-014 and 19-015

Ms. Levine's objections to the Decision is a near carbon-copy of Mr. Lyons' objections to the Appeal. For the reasons discussed in Section D above, the same or substantially similar objections raised in Ms. Levine's Appeal should be dismissed. The additional objections raised by Ms. Levine will be discussed in turn below.

1. Air

In subsection 2(a), Ms. Levine claims that SDCI did not require 2813 4th Ave W LLC to safeguard against asbestos, lead or other contaminants during demolition. This statement ignores the fact that federal, state and local regulations require that all asbestos and other hazardous materials be removed prior to demolition.[26] The Decision specifically states that asbestos and lead, if found at the Premises, must be removed in accordance with

[26] *See* TIP 337; Puget Sound Clean Air Agency regulations; Department of Labor and Industries regulations; and Environmental Protection Agency regulations.

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numerous local, state and federal regulations.[27] Because Ms. Levine does not allege that the existing federal, state and local regulations are insufficient and this objection should be dismissed.

2. Water

In subsection 3(c), Ms. Levine claims that SDCI failed to consider wetlands at the base of the ECA that is located on the Premises. This claim is without merit. SDCI's GIS map clearly demonstrates that there are no wetlands near the Project.[28]

3. Plants

In subsection 4(e), Ms. Levine alleges that her trees "may be injured." This speculative statement does not allege that potential impacts were not disclosed to and considered by SDCI, or that additional mitigation under SEPA is warranted. Furthermore, any tree protection measures for trees located on the Premises, on the abutting properties, and in the right-of-way, will be addressed during the building permit review process. That is when SDCI will apply the tree protection measures under SMC Chapter 25.11.

In subsection 4(g), Ms. Levine claims that the SMC requires that some trees be retained within each lot. While this is not an accurate statement of what the SMC requires, and no specificity is provided, the removal of any trees will be addressed under SMC Chapter 25.11 during the building permit review phase.

In subsection 4(h), Ms. Levine argues, without evidence, that the "likely" tree grove was not given consideration under the tree protection requirements. As an initial matter, the arborist report that was reviewed by SDCI's arborist, confirmed that there was no tree grove located on the Premises. Further, the tree protection requirements under SMC Chapter

[27] *See* Decision, pg. 5.
[28] A screen shot of SDCI's GIS map is attached as Exhibit J to the Mason Decl.

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25.11 are implemented during the building permit review and are not valid objections to the Decision.

4. Animals

Ms. Levine claims that certain birds and animals will suffer negative impacts from the loss of trees and foliage. This claim, too, is without merit. As discussed throughout this motion, the Project will be planting new trees that "will replace and exceed the canopy of the existing tree at maturity."[29] The potential impacts of removing the Exceptional Tree will be completely mitigated by replanting trees that will *exceed* the Exceptional Tree's canopy.

5. Environmental Health

Similar to the claims raised in Section H.1 above, Ms. Levine claims that there will be negative impacts related to lead, asbestos and other contaminants during construction. For the reasons stated in Section H.1 above, this objection is without merit and should be dismissed.

6. Aesthetics

Ms. Levine claims that views will be obstructed by removal of the Exceptional Tree and the height of the Project. These impacts were disclosed in the SEPA checklist and were raised in the voluminous public comments. The Project also went through Streamlined Design Review and received the SDR Design Guidance. A project that is approved through design review is presumed to comply with the Height, Bulk and Scale policies. To the extent Ms. Levine raises objections to the design review process, she was required to appeal the SDR Design Guidance, which she failed to do.

7. Public Services

In subsection (c), Ms. Levine argues that the plan sets do not show an emergency vehicle access easement. This is a land use and zoning issue, does not concern the Project's

[29] *See* Decision, pg. 7

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impacts on the environment, and does not fall within the scope of SEPA review. SMC 25.05.665 (SEPA policies – Overview), Subsection D (Relationship to City Codes) states that: "Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation..." Even if this was an appropriate objection to the Decision, the SMC requires access for emergency vehicles. Specifically, SMC Chapter 23.53 (Requirements for Streets, Alleys, and Easements) sets forth the requirements for emergency vehicle access. Thus, this objection is without merit and should be dismissed.

8. Ms. Levine requests the same form of relief as Mr. Lyons and, for the same reasons, Ms. Levine's appeal should be dismissed

For the reasons stated in Section D.16 above, Ms. Levine has not made allegations that warrant the first request for relief requested. And the Hearing Examiner does not have authority to award the remaining relief requested.

VI. CONCLUSION

For the six appellants to survive this motion to dismiss, the Hearing Examiner must conclude that (a) they have independently raised a valid objection to the Decision, and (b) they have independently requested relief that (i) the Hearing Examiner has jurisdiction to grant, and (ii) directly relates to a valid issue that the specific appellant raised on appeal. In other words, even if a particular appellant raises a valid issue on appeal, but did not request relief directly related to that issue that the Hearing Examiner has authority to grant, or vice versa, then the motion to dismiss must be granted, and the appeal dismissed.

HER 3.02(a) allows the Hearing Examiner to dismiss an appeal prior to the hearing if the appeal fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, is without merit on its face or is frivolous. The appeals fail to raise a valid objection

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to the Decision and are without merit on its face. Even assuming each of the appellants' objections were true and valid, they are inadequate to sustain the relief requested.

Finally, HER 2.16 allows the Hearing Examiner to award summary judgment to the moving party. 2813 4th Ave W LLC is entitled to summary judgment because there are no issues of material fact. Thus, it is respectfully requested that the Hearing Examiner affirm the Decision, including the determination of non-significance, and dismiss the appeals with prejudice.

Respectfully submitted this 29th day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 29, 2019 the foregoing document was sent for delivery on the following party in the manner indicated:

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