

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In Re: Appeal by  
  
GRANT PROTECTION FOR TREES, *et al.*,  
  
of Decisions Re Land Use Application and  
Code Interpretation for 2813-2815 4<sup>th</sup> Ave.  
West

Hearing Examiner File  
MUP-19-004 – MUP-19-015  
  
3029801-LU & 3030630-LU

IVY ARAI TABBARA’S RESPONSE  
TO APPLICANT AND OWNER’S  
MOTION TO DISMISS LAND USE  
APPEAL AND FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

Appellant Ivy Arai Tabbara will be significantly and adversely impacted by the proposed two three-story townhouses and three three-story rowhouses, Projects 3029801 and 3030630 (“Multifamily Proposal”). Ms. Tabbara owns and lives in a single-family home directly adjacent to and abutting the Multifamily Proposal. *See* Declaration of Ivy Arai Tabbara In Support of Response to Applicant and Owner’s Motion to Dismiss Land Use Appeal and For Summary Judgment (“Tabbara Decl.”), at ¶ 2. Ms. Tabbara appealed the Analysis and Decision of the Director of Seattle of Construction and Inspection (SDCI) on the Land Use Application for the

1 Multifamily Proposal (MUP-19-12(W) & MUP-19-013(W)) (“Notice” or “Appeal”)<sup>1</sup> and also  
2 appealed the anticipated Code Interpretation related to those Projects (“Request”). Tabbara Decl.,  
3 Exs. A & B. That SDCI Decision with respect to SEPA and Design Review for this Multifamily  
4 Proposal falls within the purview of SMC 23.53.015A, SMC 23.41.018, SMC 23.41.012, SMC  
5 23.76.022, SMC 25.05.060, SMC 25.05.792, 25.05.330, SMC 25.05.660, 25.05.675, SMC  
6 25.11.070A.3, and SMC 25.09.090B. The code interpretation issues presented in the Appeal are  
7 within the Hearing Examiner’s jurisdiction via SMC 23.88.020. Ms. Tabbara’s Appeal is rooted  
8 on the basis that SDCI has made a discretionary Decision that involves risk to the health, safety  
9 and welfare of those potentially impacted by lack of sufficient and comprehensive review.  
10

11 On April 29, 2019, Applicant Curtis Bigelow and property owner Alex Mason  
12 (collectively “Developer”) filed a combined Motion to Dismiss Land Use Appeal and for  
13 Summary Judgment on allegedly all issues presented in Ms. Tabbara’s Notice of Appeal  
14 (“Motion”). Although not acknowledged by the Developer, Ms. Tabbara’s Notice of  
15 Appeal included an appeal of an SDCI Code Interpretation and that Request for Code  
16 Request for Code Interpretation is currently pending before SDCI. Developer’s Motion to  
17 Dismiss and for Summary Judgment should be denied in its entirety for the reasons  
18 presented below.  
19

## 20 II. ARGUMENT

### 21 A. Developer’s Motion Is A Motion to Dismiss, Not a Motion for Summary Judgment

22 The Developer’s Motion conflates two significantly different standards of review. It is well  
23 known the summary judgment standard is distinct from the motion to dismiss CR 12(b)(6) standard.  
24  
25  
26

---

<sup>1</sup> Ms. Tabbara also expressly adopted and incorporated the issues that were presented by all of the other Appellants in their appeals of the Multifamily Proposal. Tabbara Decl., Ex. A (Notice), p. 5.

1 Yet, the Developer merges and claims both standards apply while simply relying upon on a few  
2 pleadings in the record.

3  
4 **1. Motion to Dismiss Standard of Review**

5 The Developer's brought its Motion to Dismiss pursuant to Hearing Examiner Rules of  
6 Practice and Procedure (HER) 3.02. That Rule authorizes dismissal of all or part of an appeal that  
7 "fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without  
8 merit on its face, frivolous, or brought merely to secure delay." HER 3.02. This language reflects the  
9 language in Washington Superior Court Civil Rule (CR) 12(b)(6), which states that a defendant may  
10 file a motion to dismiss based on failure to state a claim upon which relief can be granted.

11 Defendants face a steep burden when moving to dismiss for failure to state a claim. "Dismissal  
12 under CR 12 should be granted sparingly and with care." *Swinomish Indian Tribal Cmty. v. Skagit*  
13 *Cty.*, 138 Wn. App. 771, 776, 158 P.3d 1179, 1181 (2007). Under CR 12(b)(6), the factual allegations  
14 in the notice of appeal must be accepted as true. *Eugster v. Wash. State Bar Assoc.*, 198 Wn. App.  
15 758, 763, 397 P.3d 131 (2017). Any conceivable set of facts consistent with the allegations in the  
16 complaint can be used to withstand a CR 12(b)(6) motion. *Halvorson v. Dahl*, 89 Wn.2d 673, 674,  
17 574 P.2d 1190, 1191 (1978).

18  
19 In a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be  
20 denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle  
21 the plaintiff to relief on the claim. *Id. citing Brown v. MacPherson's*, 86 Wash.2d 293, 545 P.2d 13  
22 (1975); *Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291 (1975); *Hofto v. Blumer*, 74 Wash.2d 321,  
23 444 P.2d 657 (1968); *Barnum v. State*, 72 Wash.2d 928, 435 P.2d 678 (1967). Therefore, any  
24 hypothetical situation conceivably raised by the appeal defeats a motion to dismiss if it is legally  
25 sufficient to support the claim. *Id.* at 674-75.  
26

1           **2.       Motion for Summary Judgment Standard of Review**

2           After stating it had brought its Motion to Dismiss pursuant to HER 3.02(a) which contains  
3 language that is parallel to CR 12(b)(6), the Developer also cites HER 2.16 and CR 56(c) in support  
4 of its combined summary judgment motion. Motion at 4. It is well known that the summary judgment  
5 standard is significantly different from the CR 12(b)(6) standard. Under CR 56(c), a motion for  
6 summary judgment must be denied if the evidence presented shows there is a genuine issue as to *any*  
7 material fact. In making this determination, all facts are viewed in the light most favorable to the  
8 nonmoving party. *Volk v. DeMeerier*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016).  
9

10           Here, there is no basis to apply the summary judgment standard to the Developer's Motion.  
11 The Developer presents no evidence or relies upon unrelated evidence to support his challenge to Ms.  
12 Tabbara's claims. To support its arguments for dismissal of Ms. Tabbara's claims, the Developer  
13 attaches the Declaration of Alex Mason and accompanying exhibits that contained arguably material  
14 evidence about the Multifamily Proposal.

15           But looking closely at the Motion to Dismiss arguments that are specific to Ms. Tabbara's  
16 appeal issues, the legal argument presented, with two narrow exceptions, does not rely on the  
17 Declaration of Alex Mason or any of its accompanying exhibits. *See* Motion at 18-20. To the extent  
18 that the Motion presents legal argument, without relying on evidence outside of the pleadings, the  
19 motion to dismiss standard described above should be applied.  
20

21           Furthermore, the Declaration by Mr. Mason is titled "In Support of Applicant and Owner's  
22 Motion to Dismiss Land Use Appeal and For Summary Judgment," but references or cross-references  
23 only a couple pleading exhibits. Motion at 20, Ftnt. 25 (citing Mason Decl., Ex. I (City's Land Use  
24 Permit Map)); 6, 9 Ftnts. 4-5, 9-10, 12 (citing Mason Decl., Ex. C (Geotechnical Engineering Report));  
25 7, Ftnt. 6 (citing Mason Decl., Ex. D (SDCI Approved Request); 9, Ftnt. 11 (citing Mason Decl., Ex.  
26 E (City GIS map)). Three of these four exhibits, (Exs. C, D & E), all relate to Ms. Tabbara's pending

1 Request for Code Interpretation, *See* Tabbara Notice, at 4-5 (Issue Statement 2(c)). *See also supra*, at  
2 11-13, 15-18. For all four exhibits, Ms. Tabbara would like opportunity to cross examine on the issues  
3 and develop these facts related to cumulative impacts (Tabbara Notice at 4 (Issue Statement 2(a)(v))  
4 and Land Use Code Interpretation regarding Approved Request for Relief from Prohibition on Steep  
5 Slope Development (Tabbara Notice at 4-5 (Issue Statement 2(c)(i); Tabbara Decl., Ex. B (Tabbara  
6 Request at 1-3).

7  
8 Simply complaining that Ms. Tabbara's Appeal is too "conclusory" rings hollow. The  
9 Developer's Motion in no way rises to the level of summary judgment because it confuses Ms.  
10 Tabbara's Appeal and Request for Code Interpretation and lacks evidentiary support. As explained in  
11 more detail below, the Developer's Motion should be treated as being brought under CR 12(b)(6) and  
12 the standard for dismissal under that Rule, as described above, should be applied.

13 Even if the Examiner were to treat the Motion as one for summary judgment, the motion  
14 should be denied because Ms. Tabbara's Declaration, as well as others filed by the Appellants, show  
15 there is "a genuine issue as to any material fact." CR 56(c); *see also Billings v. Town of Steilacoom*,  
16 2 Wn. App. 2d 1, 28 n. 5, 408 P.3d 1123 (2017) (treating the motion as one for summary judgment  
17 under CR 25 if matters outside the pleading are presented to the court on a 12(b)(6) motion and if  
18 those matters are not excluded by the court).

19  
20 **B. Ms. Tabbara's Notice of Appeal Complies with HER 3.01 and Sufficiently Alleges**  
21 **Claims Upon Which Relief Can Be Granted**

22 **1. The Developer misconstrues HER 3.01, the straight-forward structure and**  
23 **detailed support for Ms. Tabbara's objections.**

24 In moving to dismiss Ms. Tabbara's claims in their entirety, the Developer's spends three  
25 pages cherry-picking language from her Appeal and then argues her issue statements or objections are  
26 simply too "conclusory," without any legal basis and zero or scant evidentiary support. Motion at 18-

21.

1 In addition to providing insufficient factual or legal bases in challenging Ms. Tabbara's  
2 Appeal, the Developer misconstrues her issue statements or objections, the level of specificity  
3 sufficient to satisfy HER 3.01, and the abundant pleadings buttressing the Appeal. Under HER  
4 3.01(d), an appeal must contain the following:

- 5  
6 (1) Identification of the matter being appealed, including the number of the application or  
7 departmental action, and the applicant name and property address where applicable;
- 8 (2) A brief statement as to how the appellant is significantly affected by or interested in  
9 the matter appealed;
- 10 (3) A brief statement of the appellant's issues on appeal, noting appellant's specific  
11 objections to the decision or action being appealed;
- 12 (4) The relief requested, such as reversal or modification;
- 13 (5) Signature, address, telephone and facsimile numbers, and electronic mail address of  
14 the appellant and the appellant's designated representative, if any.  
15

16 To start, the Developer's Motion concedes Ms. Tabbara satisfies HER 3.01 except for  
17 subsection (3) regarding "specific objections." Motion at 18-20. HER 3.01(3) requires a "brief  
18 statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or  
19 action being appealed." In arguing Ms. Tabbara's issue statements or objections lack specificity under  
20 HER 3.01(3), the Motion restates her general objections, but discounts or misconstrues the discussion  
21 containing brief factual and legal support for each issue statement or objection. For example, Ms.  
22 Tabbara's first objection is set forth in Section 2(a) and provides: "The Decision by the Director of  
23 SDCI to issue a Determination of Non-Significance (DNS) was made in violation of the State  
24 Environmental Policy Act (SEPA), ch. 43.21A, and state and local regulations implementing that law  
25 for the following reasons." Tabbara Decl., Ex. A (Notice), pp. 3-4.  
26

1 Next Ms. Tabbara provides five subsections (i)-(iv) to Section 2(a) explaining how the  
2 Decision was erroneous factually and legally. These five subsections generally discuss how:

- 3 • The Director did not require or collect the necessary information;<sup>2</sup>
- 4 • The various probable significant adverse impacts from Multifamily Proposal;<sup>3</sup>
- 5 • The City's regulations do not adequately address or mitigate the environmental impacts of the  
6 Proposal;<sup>4</sup>
- 7 • The Director erred in concluding no further mitigation was warranted for the significant  
8 impacts;<sup>5</sup>
- 9 • The Director erred in concluding the SDR process resulted in sufficient review and mitigation  
10 of the height, bulk, and scale impacts of the Proposal;<sup>6</sup>
- 11 • The height, bulk and scale of the Proposal will cause certain adverse impacts;<sup>7</sup>
- 12 • The design guidelines do not adequately address or mitigate the adverse impacts;<sup>8</sup>
- 13 • There was clear and convincing evidence that the height, bulk and scale impacts documented  
14 through environmental review were not adequately mitigated by design review;<sup>9</sup>
- 15 • The Director erred in concluding the Proposal design is compatible with the height, bulk, and  
16 scale of the existing older homes in the neighborhood;<sup>10</sup>
- 17 • SDCI erred in its exercise of its substantive authority under SEPA issues, including failure to  
18 adequately mitigate the significant adverse impacts described in Ms. Tabbara's objection  
19  
20  
21

22  
23 <sup>2</sup> See, e.g., Tabbara Decl., Ex. A (Notice), p. 3 (Section 2(a)(i)).

24 <sup>3</sup> *Id.* at 3 (Section 2(a)(i) and 2(a)(ii)).

25 <sup>4</sup> *Id.* at 3 (Section 2(a)(ii)).

26 <sup>5</sup> *Id.* at 3 (Section 2(a)(ii) and 2(a)(iii)).

<sup>6</sup> *Id.* at 3 (Section 2(a)(iii)).

<sup>7</sup> *Id.* at 3 (Section 2(a)(iii)).

<sup>8</sup> *Id.* at 3 (Section 2(a)(iii)).

<sup>9</sup> *Id.* at 3 (Section 2(a)(iii)).

<sup>10</sup> *Id.* at 3 (Section 2(a)(iii)).

- 1 pursuant to SMC 25.05.675 and other SEPA regulations. For example, SMC 25.05.675.G.2  
2 allows for increasing the setbacks, limiting the height, modifying the bulk, or repositioning;<sup>11</sup>  
3
- 4 • SDCI failed to adequately analyze, disclose and mitigate the cumulative impacts that the  
5 Proposal will have along with other developments that are in the pipeline to be permitted to  
6 be in the areas with respected the impacts discussed in Ms. Tabbara’s objection, including,  
7 environmental health, land use, height/bulk/scale, traffic, transportation, public facilities (the  
8 alley), and construction impacts;<sup>12</sup> and
  - 9 • SEPA requires that SDCI conduct a cumulative impacts study of impacts that will be caused  
10 by the known developments that are proposed in the immediate area.<sup>13</sup>

11 Similarly, Ms. Tabbara’s Appeal explains the specific impacts on her as a result of the  
12 Multifamily Proposal, including but not limited to, tree removal, land use, privacy, view, aesthetic  
13 height/bulk/scale, public facilities (alley), environmental health (toxic materials, lead, sewage  
14 disposal, and rat abatement), and traffic impacts. Tabbara Decl., Ex: A (Notice), pp. 2-3. Ms.  
15 Tabbara’s Appeal further describes how the removal of trees and vegetation on the site and  
16 development of the property will likely adversely affect the steep slope on her property. *Id.* at 2. And  
17 Ms. Tabbara’s Appeal recognizes there are known hazards near the site, including a sink hole in the  
18 street and landslides on the steep slopes within 300 feet of the site. *Id.* at 2.

20 Despite these fulsome statements and the straight-forward structure of Ms. Tabbara’s  
21 objections, the Developer claims that “Ms. Tabbara’s conclusory statements and failure to  
22 particularize a specific objection to the Decision is fatal to her appeal.” Motion at 19. Instead the  
23 Developer wrongly views each subsection to objection (2)(a) in a vacuum, attacking each subsection  
24 as an independent objection. Motion at 18-20. The Developer’s attempt to slice, dice and regurgitate  
25

26

---

<sup>11</sup> *Id.* at 3 (Section 2(a)(iv)).  
<sup>12</sup> *Id.* at 3 (Section 2(a)(v)).  
<sup>13</sup> *Id.* at 3 (Section 2(a)(v)).

1 limited portions of Ms. Tabbara's objection 2(a) is nonsensical and lacks any legal authority. Ms.  
2 Tabbara's Appeal objections provide more than sufficient detail and satisfy HER 3.01(3).  
3

4 **2. The Developer discounts the voluminous pleadings discussing adverse impacts.**

5 Despite the Developer's repeated complaints that Ms. Tabbara has not presented sufficient  
6 evidence of adverse impacts, the pleadings reveal plenty of contradictory evidence. There is no  
7 mystery about the history and voluminous record of how we got here. The neighbors impacted by the  
8 Multifamily Proposal have submitted approximately 54 comment letters outlining specific adverse  
9 impacts, including but not limited to the following issues:

- 10 • Removal of the exceptional tulip tree and other mature trees, destabilization, and tree canopy;
- 11 • ECA steep slope and destabilization;
- 12 • Height/bulk/scale;
- 13 • Cumulative impacts of "maximized" projects to "quality of life" for Seattleites;
- 14 • Evidence of underground streams throughout the hillside;
- 15 • Inadequate notice via SDR;
- 16 • Proposed design is not site- and neighborhood-sensitive;
- 17 • Overcrowding, noise, traffic, parking and construction issues;
- 18 • Soil and ground stability of adjoining homes;
- 19 • Access from the West Parcel also will encroach into dripline and limits the recycling and trash  
20 area;
- 21 • Proposed project will construct buildings that will tower over all existing adjacent properties  
22 ... block all sunlight for at least half of the day... the tenants will peer down into adjacent  
23 properties completely removing any of our yard privacy, and the height of the buildings  
24 proposed for the west side is completely out of context with adjacent properties;
- 25
- 26

- 1 • Proposed development is not in keeping with the design of the surrounding homes regardless
- 2 of the “projection windows” for which an exemption is being requested;
- 3 • The alley is not wide enough to allow five parking spots and meet code requirements;
- 4 • Risks to fire separation;
- 5 • Both projects are on the same parent lot and are functionally related;
- 6 • Evidence of previous slide activity on the larger hillside;
- 7 • Setback departures or exceptions are not in line with existing homes on the block;
- 8 • Five proposed dwellings violate LR1 zoning;
- 9 • Low fire and hydrant water flow issues;
- 10 • Demolition, toxic materials and rat abatement;
- 11 • Developer’s Geotech report fails to evaluate the impacts when the land is stripped of all
- 12 foliage, trees and especially the roots of the exceptional tulip tree. The Geotech report does
- 13 not study the impacts to adjacent properties on the same hill. The Geotech report’s “over-
- 14 excavation” conclusion will negatively impact adjacent properties and the development site.
- 15 The Geotech report did not drill deep enough to reach the sources of the underground streams.
- 16 The Geotech report evaluated the construction site in its current state where it is 80% covered
- 17 in plant material, but the site will probably only have 15% or 20% of greenery after
- 18 development;
- 19 • Inadequate tree replacement and site restoration; and
- 20 • There is no mitigation plan for the developer.
- 21
- 22
- 23

24 Tabbara Decl., Ex. D (comment letters).

25 Additionally, Ms. Tabbara, with the support of the other Appellants and neighbors, requested  
26 and were granted a public meeting under SMC 23.76.015.A.3. Tabbara Decl., at ¶ 8, Ex. E. At that

1 May 24, 2018 public meeting, Ms. Tabbara, other Appellants and neighbors provided oral and written  
2 comments to the SDCI Planner about the significant adverse impacts from the Proposal. *Id.*

3 In sum, there is no question Ms. Tabbara's Section 2(a) issue statements or objections raise  
4 claims upon which relief can be granted and the Developer has not met its steep burden for dismissal.  
5

6 **3. Developer's argument for dismissal of issue 2(d) in the Notice of Appeal misstates**  
7 **Ms. Tabbara's issue statement and conflates her challenge with the SDR decision.**

8 As was mentioned above, Ms. Tabbara's Notice of Appeal statement of issues is organized  
9 with four main objections, with subsections under each of those main objections that identify the issues  
10 with specificity. The first main objection, under Section 2(a), asserts that the Director's decision to  
11 issue a DNS under SEPA was in error. Several subsections follow, all of which present SEPA issues.  
12 The second objection, under Section 2(b) asserts that the code interpretation (which is pending) is  
13 issued in error with respect to design review. Several subsections follow, all of which present design  
14 review issues. The third objection, under Section 2(c) asserts that the code interpretation was issued  
15 in error with respect to steep slope issues. Finally, the fourth objection, under Section 2(d), asserts  
16 that the Director erred in approving the project because it is inconsistent with tree removal restrictions  
17 in SMC Chapter 25.11.  
18

19 In its Motion to Dismiss, the Developer requests that the Examiner dismiss the issue presented  
20 in Section 2(a)(iii) of the Notice of Appeal on the grounds that the SDR Design Guidance is a Type I  
21 decision. Motion at 20. This argument misunderstands Ms. Tabbara's objection. The issue presented  
22 in Section 2(a)(iii) of the Notice of Appeal states:

23 The Director erred in concluding that the Streamlined Design Review Process resulted  
24 in sufficient review and mitigation of the height, bulk, and scale impacts of the  
25 proposal. The height, bulk, and scale of the proposal will cause significant adverse  
26 aesthetic and land use impacts. The design guidelines do not adequately address or  
mitigate the adverse impacts of the proposal. There was clear and convincing evidence  
that height, bulk, and scale impacts documented through environmental review were  
not adequately mitigated by design review. It was error for the Director to conclude

1 that the design is compatible with the height, bulk, and scale of the existing older  
2 homes in the neighborhood.

3 Tabbara Decl., Ex. A (Notice), p. 3.

4 This issue is a challenge of the Decision to issue a DNS under SEPA, not the SDR Guidance.  
5 SDCI is obligated, as a matter of law, to disclose, assess, and mitigate the probable environmental  
6 impacts under SEPA. In this case, SDCI concluded that the SDR review process resulted in sufficient  
7 review of height/bulk/scale impacts under SEPA. Tabbara Decl., Ex. C (Director's Decision). Ms.  
8 Tabbara's Section 2(a)(iii) claims this is not true. The SDR process did not result in sufficient SEPA  
9 review and mitigation. Tabbara Decl., Ex. A (Notice), p. 3. SEPA regulations, particularly SMC  
10 25.05.675.G addresses this. Indeed, SMC 25.05.675.G.1 expressly provides "policy background" for  
11 "height, bulk and scale:"

12  
13 (a) The purpose of the City's adopted land use regulations is to provide for smooth transition  
14 between industrial, commercial, and residential areas, to preserve the character of individual  
15 City neighborhoods, and to reinforce natural topography by controlling the height, bulk, and  
16 scale of development.

17 And SMC 25.05.675.G.2 further provides specific mitigating measures, including:

- 18 1) Limiting the height of the development;
- 19 2) Modifying the bulk of the development;
- 20 3) Modifying the development's façade including but not limited to color and finish  
21 material;
- 22 4) Reducing the number or size of accessory structures or relocating accessory structures  
23 including but not limited to towers, railings, and antennas;
- 24 5) Repositioning the development on the site; and
- 25 6) Modifying or requiring setbacks, screening, landscaping, or other techniques to offset the  
26 appearance of incompatible height, bulk, and scale.

27 That same Section states:

28 The Citywide design guidelines (and any Council-approved neighborhood design guidelines)  
29 are intended to mitigate the same adverse height, bulk, and scale impacts addressed in these  
30 policies. A project that is approved pursuant to the design review process is presumed to  
31 comply with these height, bulk, and scale policies. This presumption may be rebutted only  
32 by clear and convincing evidence that height, bulk, and scale impacts documented through  
33 environmental review have not been adequately mitigated. Any additional mitigation  
34 imposed by the decisionmaker pursuant to these height, bulk, and scale policies on projects

1 that have undergone design review shall comply with design guidelines applicable to the  
2 project.

3 SMC 25.05.670.G. This is a SEPA provision in the Seattle Code. Ms. Tabbara's challenge, which is  
4 addressing the error of the Director with respect to the requirements of this provision, squarely falls  
5 within the SEPA jurisdiction of the Examiner. A challenge to the SDR decision itself would concern  
6 whether the proposal is consistent with the Design Guidelines, not whether the DNS was issued in  
7 error. All of the issues challenging the SDR Decision, which is a Type I decision, are stated in Section  
8 2(b). Tabbara Decl., Ex. A (Notice,) p. 4. A SEPA decision is a Type II decision and there is no  
9 dispute that the Examiner has jurisdiction over that decision. The Developer's arguments to the  
10 contrary have no merit.

11 At a fundamental level, even if the issue presented in Section 2(a)(iii) challenge the design  
12 review decision itself instead of the SEPA decision, this argument is not compelling because, for some  
13 unknown reason, the Developer's motion ignores the fact that the Notice of Appeal includes an appeal  
14 of Ms. Tabbara's Request for Code Interpretation, which in turn brought this Type I decision into the  
15 Hearing Examiner's jurisdiction. *See also infra*, at 11-13; *supra*, at 15-18.

17  
18 **4. Ms. Tabbara's Objection 2(a)(iv) regarding the SDCI's failure to properly  
exercise its substantive SEPA authority is proper.**

19 Similarly, Ms. Tabbara's Objection 2(a)(iv) alleges that SDCI erred by failing to exercise its  
20 SEPA substantive authority to require additional mitigation measures to offset or reduce the  
21 Multifamily Proposal's significant adverse impacts. Tabbara Notice, at 3. Consistent with SMC  
22 25.05.675.G, *infra*, at 7-8, 12-13, Objection 2(a)(iv) reads, in part:

23  
24 SDCI erred in its exercise of its substantive authority under SEPA issues, including failure to  
25 adequately mitigate significant adverse impacts described above pursuant to SMC 25.05.675  
26 and other SEPA regulations ... As one example, G.2 allows increasing the setbacks, limiting  
the height of the development, modifying the bulk of the development, or repositioning the  
development on the site to address and mitigate the significant impacts of the proposal.

1 *Id.* SDCI's exercise of SEPA substantive authority is clearly within the scope of review for Ms.  
2 Tabbara's Appeal: "The Hearing Examiner *shall* entertain issues cited in the appeal that relate to...  
3 failure to properly approve, condition, or deny a permit based on disclosed adverse environmental  
4 impacts." SMC 23.76.022.C.6. By challenging SDCI's failure to exercise its SEPA substantive  
5 authority, Ms. Tabbara is challenging its failure to properly condition the Multifamily Proposal based  
6 on its known adverse impacts. The Examiner cannot dismiss an issue that is within the scope of review  
7 for this Appeal.  
8

9 Notably, SMC 23.76.022.C.6 provides that "[t]he Hearing Examiner shall entertain issues  
10 cited in the appeal that relate to ... determinations of nonsignificance (DNSs)..." Here, SDCI's  
11 decision to mitigate or not to mitigate significant adverse impacts through its SEPA substantive  
12 authority – even if discretionary – is directly relevant to the validity of SDCI's DNS for this  
13 Multifamily Proposal. Discretionary or not, if there are significant adverse impacts that SDCI chose  
14 not to mitigate, then the DNS is invalid and a determination of significance (DS) should have been  
15 issued. By the same token, if SDCI wishes to retain the DNS, instead of issuing a DS, then it must  
16 mitigate impacts to a non-significant level. So SDCI's decision to *not* exercise its SEPA substantive  
17 authority is within the scope of review for this Appeal.  
18

19 Nevertheless, the Developer argues that this claim should be dismissed on the bases Ms.  
20 Tabbara failed to identify the specific adverse impacts, SDCI regulations are insufficient to mitigate  
21 the impacts, and the additional mitigation allowed under SEPA that should have been required.  
22 Motion at 19. In reading the full issue statements, objections, pleadings, including the abundant  
23 comment letters, and accepting those statements as true per the CR 12(b)(6) standard, Ms. Tabbara  
24 asserts valid legal claims. *See, e.g., infra*, at 5-11. While it's technically unnecessary to go further  
25 than that, the evidence presented also shows that there is a genuine issue as to any material fact. In  
26 viewing the facts in the light most favorable to the nonmoving party, Ms. Tabbara, the Developer has

1 failed to meet its steep burden to dismiss for failure to state a claim. Under these circumstances, the  
2 Motion must be denied.

3  
4 **C. Developer Ignores Ms. Tabbara's Code Interpretation Request Regarding SDR Design  
Guidance and Steep Slope**

5 The Developer wrongly asserts "the SDR Design Guidance, which is a Type I decision, was  
6 not appealed by including, Ms. Tabbara." Motion at 20. This is not true. Consistent with SMC  
7 23.88.020, Ms. Tabbara correctly filed an Appeal with the Hearing Examiner at the same time as filing  
8 the Request for Code Interpretation. Land use interpretations under SMC 23.88.020.B provides, in  
9 part: "Any request for interpretation shall be filed with the Director accompanied by the required fee."

10 Similarly, SMC 23.88.020.C.3.c states, in part:

11  
12 [A]n appeal of a Type II decision to the Hearing Examiner ... may include a request that the  
13 Director issue in writing an interpretation of specified code sections, combined with an appeal  
14 of such interpretation ... A request for interpretation made pursuant to this subsection  
15 23.88.020.C.3.c shall state with specificity: 1) How the Director's construction or application  
of the specified code sections is in error; and 2) How the requester believes those sections  
should be construed or applied.

16 Furthermore SMC 23.88.020.G provides, in part:

17 The appeal of an interpretation, where permitted, shall be in writing and shall state specifically  
18 why the applicant believes the interpretation to be correct... The Hearing Examiner may  
19 affirm, reverse or modify the Director's interpretation either in whole or in part or may remand  
the interpretation to the Director for further consideration...

20 There is no question, the Hearing Examiner has jurisdiction over this Appeal. The Developer's  
21 arguments that Ms. Tabbara cannot appeal SDR Design Guidance and SDCI approved the request for  
22 relief from prohibition on steep slope both ignore her Request for Code Interpretation, filed  
23 simultaneously with and also referenced within her Notice of Appeal.<sup>14</sup> Tabbara Decl., Exs. B  
24  
25  
26

<sup>14</sup> Any attempt by Developer to amend or resuscitate its Motion on Reply should be viewed as waiver.

1 (Request); A (Notice), pp. 4-5. The Request and Appeal explain how the SDR conclusions and steep  
2 slope code interpretation under SMC 25.09.090B were made in error.<sup>15</sup> *Id.*

3  
4 **D. The Examiner Has Jurisdiction Over Tree Protection Measures Under SMC 25.11**

5 At the outset, the Developer's Motion did not identify what Issue it is challenging. Motion at  
6 20. The Developer's reasoning is unclear because it also claims the removal of the exceptional tulip  
7 tree is subject to Streamlined Design Review and therefore an unappealable Type I decision. Motion  
8 at 5-6. For reasons discussed above and below, that argument is flawed. *Infra*, at 11-13, 15. To the  
9 extent the Developer's argument addresses any Issues or Objections raised in Ms. Tabbara's Appeal,  
10 Sections 2(b)(2) or 2(b)(3), then those arguments were raised via the Request for Code Interpretation.  
11 *Infra*, at 11-13, 15.

12  
13 If the Developer is challenging Ms. Tabbara's Issue Statement or Objection 2(d) in the Appeal,  
14 its reasoning again falls short. Tabbara Decl., Ex. A (Notice), p. 5. Ms. Tabbara's Objection 2(d)  
15 provides:

16 The Multifamily Proposal is inconsistent with the tree removal restrictions set forth in Ch.  
17 25.11 SMC. The applicant did not meet the burden of proof required to justify removal of  
18 trees that are subject to code limitations and did not meet the replacement and restoration  
19 objections and issues that are presented above.

20 *Id.* The Developer appears to argue that this Issue should be dismissed on the alleged basis the SDCI's  
21 determination of compliance with Chapter 25.11 of the SMC is an unappealable Type I decision.  
22 Under the Code, this Issue is clearly relevant under the Examiner's jurisdiction:

23 The Hearing Examiner shall entertain issues cited in the appeal that relate to compliance with  
24 the procedures for Type II decisions as required by this Chapter 23.76, *compliance with*  
25 *substantive criteria*, determinations of nonsignificance (DNSs), adequacy of an EIS upon  
26 which a decision was made, or failure to properly approve, condition or deny a permit based  
on disclosed adverse environmental impacts, and any request for interpretation included in this  
appeal or consolidated appeal pursuant to Section 23.88.020.C.3.

<sup>15</sup> SDCI has raised issues regarding Ms. Tabbara's Request for Code Interpretation, but the Developer's Motion neither mentions nor addresses this Request.

1 SMC 23.76.022.C.6 (emphasis added). Therefore, The Hearing Examiner has jurisdiction over issues  
2 of compliance with the substantive criteria in the Seattle Municipal Code when those issues are  
3 presented in an appeal of a Type II decision. Ms. Tabbara's Issue or Objection 2(d) falls squarely in  
4 that category: It challenges the Multifamily Proposal's compliance with SMC Chapter 25.11. Tabbara  
5 Notice at 5. While some claims concerning a Type II project's consistency with the Code must be  
6 challenged through the Code Interpretation process, that requirement does not apply to claims of  
7 inconsistency with SMC Chapter 25.11.  
8

9 The Examiner also has jurisdiction over this issue under SEPA. In determining whether a  
10 proposal will have significant adverse impacts, one relevant factor is whether it will conflict with other  
11 laws or requirements for the protection of the environment. The State SEPA rules explain that "[a]  
12 proposal may to a significant degree ... [c]onflict with local, state, or federal laws or requirements for  
13 the protection of the environment." WAC 197-11-330(3)(e)(iii). *See also* SMC 25.05.330.C.5.c  
14 (same).

15 Here, the City's tree protection rules under SMC Chapter 25.11 are local laws "for the  
16 protection of the environment." *See* SMC 25.11.010.B (explaining how rules intended, in part, "[t]o  
17 preserve and enhance City's physical and aesthetic character by preventing untimely and  
18 indiscriminate removal or destruction of trees"). The SEPA responsible official made specific findings  
19 on compliance with that chapter as part of the DNS.<sup>16</sup> *See* Tabbara Decl., Ex. C (Decision), p. 7  
20 (finding compliance with SMC Chapter 25.11 as part of the Director's consideration of impacts on  
21 plants and animals). And under the specific guidance of WAC 197-11-330(3)(e)(iii), compliance with  
22 tree protection rules is directly relevant to the validity of the threshold determination. Consequently,  
23 that issue is also within the scope of review for this Appeal as it "relate[s] to" the validity of the DNS.  
24  
25 SMC 23.76.022.C.6.  
26

---

<sup>16</sup> Indeed, that SEPA responsible official expressly noted in the DNS, that the site "include[es] one exceptional tree." *See* Tabbara Decl., Ex. C (Decision), p. 7.

1 Moreover, SDCI's position that the regulations in the Seattle Municipal Code adequately  
2 mitigate the Multifamily Proposal's impacts also brings the question of consistency within the  
3 Examiner's SEPA jurisdiction. See Tabbara Decl., Ex. C (Decision), p. 4 (quoting the City's SEPA  
4 policy at SMC 25.05.665 that "*where City regulations have been adopted to address an environmental*  
5 *impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation*"). If  
6 the project is not consistent with Code provisions, then the impacts are not adequately mitigated. As  
7 above, Ms. Tabbara should be allowed to present her case that the Multifamily Proposal will violate  
8 the City's tree protection rules and that the threshold determination was therefore, issued in error.  
9

10 **E. There Is No Prohibition Against Relying on Other Appellants' Objections**

11 The Developer argues, without any legal authority, Ms. Tabbara cannot rely on objections  
12 raised by other Appellants. Motion at 17-18, 20. Ms. Tabbara's Appeal meets the requirements of  
13 HER 3.01. *Infra*, at 5-9. The six appeals have been consolidated and there is no legal basis to prohibit  
14 Appellants from adopting another appellant's specific objections. The Developer's attempt to sever  
15 the Appellants' related claims is baseless.  
16

17 In sum, Ms. Tabbara has stated valid legal claims, supported by conceivable facts, with respect  
18 to the Multifamily Proposal, identified in the Notice of Appeal and Request for Code Interpretation.  
19 And the Developer has not met its steep burden for dismissal for failure to state a claim. Dismissal of  
20 Ms. Tabbara's claims is inappropriate.  
21


22 **III. CONCLUSION**

23 For the above-stated reasons, appellant Ms. Tabbara respectfully requests that the Examiner  
24 deny the Developer's Motions for Dismissal and for Summary Judgment.  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Dated this 13<sup>th</sup> day of May, 2019.

Respectfully submitted,

By:   
Ivy Atai Tabbara

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached: (1) Ivy Arai Tabbara's Response to Applicant and Owner's Motion to Dismiss Land Use Appeal and for Summary Judgment; (2) Declaration of Ivy Arai Tabbara's Declaration in Support of Response to Applicant and Owner's Motion to Dismiss Land Use Appeal and for Summary Judgment; and (3) exhibits to each person listed below, or on the attached mailing list, in the matter of *Grant Protection for Trees, et al.*, Hearing Examiner File: MUP-19-004(W) – MUP-19-015(W) by electronic mail.

**Appellants**

Suzanne Grant  
Suzgrant206@gmail.com

Reed Lyons  
ardvarkeng@gmail.com

Peter & Sandra Brust  
packer.football@gmail.com

Sharon Levine  
sweetumsseattle@yahoo.com

Charles & Clarissa Mish  
ecmish@aol.com

**Appellant Legal Counsel for Sharon Levine**

Marc Zemel  
marc@smithandlowney.com

Knoll Lowney  
knoll@smithandlowney.com

Kai McDavid  
officemanager@smithandlowney.com

**Applicant**

Curtis Bigelow  
CURTISBIGELOW@MSN.COM

Alex Mason  
[Alex@mgtbuilders.com](mailto:Alex@mgtbuilders.com)

**Applicant Legal Counsel**

Brandon Gribben  
[bgribben@helsell.com](mailto:bgribben@helsell.com)

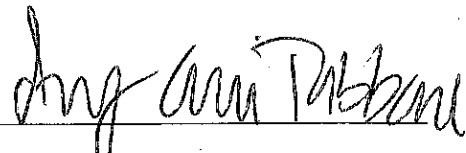
Sam Jacobs  
[sjacobs@helsell.com](mailto:sjacobs@helsell.com)

**SDCI Department**

Allison Whitworth  
[Allison.whitworth@seattle.gov](mailto:Allison.whitworth@seattle.gov)

Bruce Rips  
[Bruce.rips@seattle.gov](mailto:Bruce.rips@seattle.gov)

DATED: May 13, 2019.

A handwritten signature in black ink, appearing to read "Ivy Arai Tabbara", written over a horizontal line.

Ivy Arai Tabbara