Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: SHARON LEVINE, et al., From a decision issued by the Director, Seattle Department of Construction and Inspections.	)	Hearing Examiner File: MUP-19-004 – MUP-19-105 APPELLANT LEVINE'S RESPONSE TO APPLICANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

I. INTRODUCTION

Sharon Levine has lived in her home, next to the Project site, for 30 years. She is a retired teacher who deserves her day in front of the Hearing Examiner to present her case about the unconsidered and unmitigated probable adverse environmental impacts from the Applicant's Project proposal. The Project proposal will completely transform the site, remove an exquisite Exceptional Tulip tree when it could be retained, and replace a thriving collection of plants with impervious surfaces on a steep slope with a landslide history. SDCI's cavalier and superficial environmental review cannot be sustained under SEPA in light of these circumstances.

Ms. Levine's appeal of SDCI's SEPA Determination of Non-Significance (DNS) involves fact-intensive claims which the Applicant disputes. Because there remain genuine issues of material fact about the adequacy of SDCI's environmental review, Applicant's Motion to Dismiss and for Summary

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Judgment must be denied. Abundant evidence in the record indicates SDCI clearly erred in determining the Project will not result in probable adverse environmental impacts, all of which must be taken as true for the purposes of Applicant's motion.

II. LEGAL BACKGROUND

A. Summary Judgment and Motion to Dismiss Standards of Review.

"The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue of material fact. However, a trial is absolutely necessary if there is a genuine issue as to *any* material fact." *Jacobsen v. State*, 89 Wn.2d 104, 108 (1977) (emphasis original) (internal citations omitted). "Each party must furnish the factual evidence on which he relies." *Id*. "In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied." *Id*.

In ruling on a motion to dismiss, "[f]actual allegations are accepted as true, and unless it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would entitle him or her to relief, the motion to dismiss must be denied." *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 257-58 (2015) (internal citation omitted).

B. SEPA Review.

The purposes of SEPA are to (1) declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) stimulate the health and welfare of human beings; and (4) enrich the understanding of the ecological systems and natural resources important to the state and nation. RCW 43.21C.010. To achieve this end, an environmental impact statement (EIS) is required for proposals that have a "probable significant, adverse environmental impact." RCW

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43.21C.031; *see also* WAC 197-11-330. "RCW 43.21C.031 mandates that an EIS should be prepared when significant adverse impacts on the environment are 'probable,' not when they are 'inevitable.'" *King County v. Washington State Boundary Review Bd. For King Cnty.*, 122 Wn. 2d 648, 663 (1993).

The City of Seattle deems "Exceptional trees," such as the Tulip tree at the Project site, to have "unique historical, ecological, or aesthetic value [and] constitute an important community resource." SMC 25.11.020. In Seattle, potential damage to an Exceptional tree carries special SEPA implications for review of the underlying proposal. Director's Rule 16-2008, p. 4.

Review of the SEPA threshold determination is under a "clearly erroneous" standard. *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 195-96 (2000). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ancheta v. Daly*, 77 Wn.2d 255, 259-60 (1969). "[W]here a governmental agency makes a negative threshold determination, it must show 'that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.'" *Murden Cove Pres. Assoc v. Kitsap County*, 41 Wn.App. 515, 523 (Div. 1 1985) (quoting *Sisley v. San Juan County.*, 89 Wn.2d 78, 84 (1997)) (additional citations omitted).

For an appeal to the Seattle Hearing Examiner, the Examiner has a duty "to gather facts necessary for making [its] decision." HER 2.11. "Prior to issuing a decision on an appeal…, if the Hearing Examiner determines that information, analysis, or other material needed to satisfy the provisions of relevant law has not been provided, the Examiner may remand the matter for the addition of the requisite information, analysis, or other material." HER 2.23(b).

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III. ARGUMENT

The SDCI's Determination of Non-significance (DNS) failed to consider several probable, significant, adverse environmental impacts that require an environmental impact statement (EIS) and which the DNS leaves unmitigated. For any SEPA threshold determination, SDCI needed to consider alternative plans that protect the Exceptional Tulip tree, the cumulative impacts from the incremental demise of Seattle's Exceptional trees, misrepresentations in the Project's SEPA Checklist and the impact of other code violations proposed. Accepting all of Ms. Levine's allegations as true, and viewing the evidence in the light most favorable to Ms. Levine, the Examiner must conclude that a reasonable trier of fact could find that the DNS was clearly erroneous, and deny the Applicant's motion. At the very least, the expert opinions submitted in support of Ms. Levine's brief establish issues of material fact vis-à-vis the likelihood and significance of the Project's adverse environmental impacts, precluding summary judgment. With a battle of experts teed up for the hearing, summary dismissal of Ms. Levine's appeal at this early stage is improper. *See Ctr. For Envtl. Law & Policy v. Dep't of Ecology*, 196 Wn. App. 360, 367 (Div. 1 2016) (PCHB denied summary judgment, noting "there were disputed issues of material fact, because experts stated that 10/30 flows did not protect aesthetic values…"); *Elmer v. King County*, 2001 Wash. App. LEXIS 2249 at *7-8 (Div. 1, October 8, 2001) ("Where two competent experts disagree, creating a genuine issue of material fact, summary judgment is inappropriate." (citing *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 879 (1998)). The Examiner must deny Applicant's motion.

A. The DNS did not consider significant adverse cumulative impacts.

The DNS is clearly erroneous for failing to consider cumulative environmental impacts that taken together are significant and adverse by a preponderance of the evidence. "Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have

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very significant effects when taken together. This concept of cumulative environmental harm has received legislative and judicial recognition." *Hayes v. Yount*, 87 Wn.2d 280, 287-88 (1976) (internal citations omitted); *accord* WAC 197-11-060(4)(e); WAC 197-11-792(b)(iii).

On cumulative impacts, Applicant's Motion only argues that "The Decision confirms that SDCI relied on its experience and reviewed similar projects that helped form the basis for the determination of non-significance," without presenting any evidence on this issue. Applicant's Motion at 20:01-04 (citing DNS, p. 3). As elaborated below, there is a genuine issue of material fact as to the sufficiency of SDCI's "experience…with the review of similar projects" (DNS at 3) and to what extent SDCI actually considered the probable, adverse cumulative environmental impacts from the continual removal of Exceptional trees from Seattle's Lowrise zones, among others. Indeed, Applicant erroneously argues that SDCI's cumulative impact analysis should be limited to "the only two land use permits in the area…the ones that are being appealed in this proceeding." Applicant Motion at 20:04-05. Having limited its cumulative impacts analysis in this way, the DNS is clearly erroneous.

1. The DNS did not consider the future cumulative impact of allowing developers to circumvent the tree protection ordinance and unlawfully remove Exceptional trees.

It was clearly erroneous for SDCI not to consider the Project's conflict with Seattle's tree protection ordinance and for failing to consider the precedent for future actions of allowing the removal of an Exceptional tree despite that conflict. The tree protection ordinance requires proposals to retain Exceptional trees where accommodations can be made to save it. SMC 25.11.040.A.3 and 070.A.2. Yet, the erroneous DNS shows this restriction is routinely ignored without regard for its precedential effect. This pattern has serious environmental implications for our city that must be considered. SDCI's threshold determination leaves a critical question unanswered:

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> What is the cumulative environmental impact of an implicit city policy of approving proposals where precautions could be taken to protect an Exceptional tree, but where a developer motivated by profit chooses not to?

Without considering this question, SDCI erred in issuing a DNS for the Project proposal.

Under WAC 197-11-330(3)(e)(iii) and (iv), in making a SEPA Threshold determination:

> …[T]he responsible officer **shall** take into account the following, that:
>
> …
>
> (e) A proposal may to a significant degree:
>
> …
>
> (iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; and
>
> (iv) Establish a precedent for future actions with significant effects…

This is not a discretionary rule and it requires SDCI to consider these factors in making its threshold determination. *In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 601-02 (2017) ("shall" is presumptively imperative). Without evidence in the record that SDCI fully considered the Project's compliance with Seattle's tree protection ordinance, or that it considered the precedent that SDCI's rubberstamp would set for future projects, the Examiner should find that the DNS is flawed. In fact, there is overwhelming evidence, including architectural drawings, demonstrating that the Exceptional tree and a design maximizing floor area can coexist. Declaration of Shannon Standish ("Standish Decl."), Exhibit 1. The expert declarations filed with Ms. Levine's Response establish that at a minimum there is a genuine issue of material fact about the Project's conflict with SMC 25.11.070 and the probable, significant adverse environmental impacts that future projects that remove Exceptional trees will have, cumulatively. *See generally* Standish Decl.; Declaration of Alan Haywood ("Haywood Decl.").

Had SDCI completed the required SEPA review, it would have found a probable significant, adverse environmental impact, necessitating an EIS. RCW 43.21C.031. The City of Seattle considers retaining Exceptional trees of such significant environmental benefit that it forbids the removal of any

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Exceptional tree unless there is no feasible design that could maximize allowable floor area, while saving the tree. SMC 25.11.070.A.2; *accord* SMC 25.11.010; SMC 25.11.040.A.3. Exceptional trees are so environmentally beneficial that the municipal code even allows adjustments and departures from relevant development standards (such as increases to allowable heights and FAR) in order to approve designs that save Exceptional trees. SMC 25.11.070.A.2. Under this tree protection ordinance, it is *unlawful* for the Director to permit removal of an Exceptional tree unless "the total floor area that could be achieved within the maximum permitted FAR and height limits…cannot be achieved while avoiding the tree protection area." — including through the allowable code adjustments and departures. *Id.* ("Director may permit the exceptional tree to be removed **only if**…" (emphasis added)); SMC 25.11.040.A.3 ("Tree removal or topping is prohibited in the following cases…"). Here, those conditions *can* be achieved while preserving the Exceptional Tulip tree, so the Director may not lawfully permit its removal. Standish Decl. at ¶¶ 4-6; Declaration of Alan Haywood at ¶ 11. Exhibit 1 to the Declaration of Shannon Standish provides conceptual alternative designs that achieve the total floor area permitted while avoiding the tree protection area, which she will further refine and testify to at the hearing in this matter. Standish Decl. at ¶6. For the purposes of Applicant's motion, the Examiner must accept these facts as true. *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 257-58 (2015); *Jacobsen v. State*, 89 Wn.2d 104, 108 (1977); Standish Decl. at ¶¶4-6. At the very least, the expert declarations supporting Ms. Levine's response create a genuine issue of material fact as to compliance with SMC 25.11.070.A.2.

There is no evidence in the record that SDCI even considered the possibility of retaining the tree with alternative development designs, as required, let alone that it considered the cumulative impacts of the precedent being set by not doing so. *See generally* Declaration of Alex Mason and Exhibits. It is the Applicant's initial burden to present evidence of alternative design consideration with its motion,

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which it failed to do. *Kennedy v. Sea-Land Serv.*, 62 Wn.App. 839, 856 (Div. 1 1991) ("Only after the moving party meets its burden of either producing factual evidence showing that it is entitled to judgment as a matter of law, or that there is an absence of evidence to prove a key portion of plaintiff's case does the burden shift to the nonmoving party." (citing *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 (1980) (additional citations omitted)); *Graves*, 94 Wn.2d at 302 ("[i]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials." (citation omitted)). Applicant's Motion does not argue that SDCI or the Applicant itself reviewed alternative design options that would meet the standards of SMC 25.11.070.A.2, so the motion must be denied. *Id.; see* Applicant's Motion to Dismiss at 5:18-6:07.[1] Indeed, had anyone conducted a meaningful analysis of alternative designs to save the Exceptional tree, they would have found that it is possible. Standish Decl. at ¶¶ 4-6 and Exhibit 1 thereto. This expert evidence disputes the unsupported statement in the DNS that "[t]he applicant submitted information demonstrating compliance with SMC 25.11.070.A.2," precluding summary judgment on this issue.

The Applicant argues these claims should be dismissed because it is a complaint against the SDR Design Guidance, not a SEPA issue. Applicant's Motion at 6:04-07. But WAC 197-11-330(3)(e)(iii) and (iv) clarify that adherence to the tree protection ordinance and the precedential effect of felling the Exceptional tree in this case are both imperative for a SEPA threshold determination. The probable cumulative environmental impacts from continued undermining of the tree protection

[1] To the extent Applicant is granted a Reply on its motion and submits an alternative plan that would retain the Exceptional tree, the Examiner should not consider it without an opportunity for Ms. Levine to address it. Moreover, any such alternative plan that does not provide the same floor area as the Applicant's preferred alternative would be flawed. First, such a plan would inappropriately choose to retain parking instead of moving units to the alley lot line. Second, such a plan would incorrectly restrict the tree protection area to the Exceptional tree's drip line. SMC 25.11.050.B allows soil disturbance up to "one-third of the area within the outer half of the area within the drip line." *See* Haywood Decl. at ¶ 11 (providing a plan to protect tree roots during construction).

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ordinance are significant and adverse, necessitating an Environmental Impact Statement (EIS). Haywood Declaration at ¶ 10; RCW 42.21C.031(1).

The tree protection ordinance codifies that Exceptional trees are, by definition, of "unique historical, ecological and aesthetic value constitut[ing] an important community resource…" SMC 25.11.020; *accord id*. at .010.E (ordinance's purpose is "[t]o especially protect exceptional trees"). Under the standards set and findings made by the City Council, Exceptional trees provide significant environmental benefit and it follows that their removal would have probable significant adverse environmental impacts. *Id*. The Director's failure to consider the cumulative impacts of Exceptional tree removal in Seattle was clearly erroneous. *Hayes v. Yount,* 87 Wn.2d at 287-88.

There are a number of essential, unanswered questions for a threshold determination that would not be difficult to answer, and which SDCI has the tools to ask the Applicant to answer. *See e.g.* WAC 197-11-100(2) (agency may require research by the applicant). For example:

- How many Exceptional trees have been removed from Lowrise zones in the last 30 years?
- How many parcels in Lowrise zones currently have Exceptional trees?
- How many of those parcels do not utilize all of its permitted floor area?
- How many of those trees are broad leafed trees vs. conifers?
- How many of the broad leafed trees are Tulip trees?

For too long, Seattle's Exceptional trees have dwindled without sufficient assessment of the cumulative environmental impacts of the gradual decline of the city's Exceptional tree stock. The situation has reached such a disturbing point that people are seeking out the few remaining Exceptional trees in the city in order to witness their majestic beauty before they are all gone. *See* Levine Decl., Exhibit 3. This is not how the tree protection ordinance is supposed to play out and ignoring the ordinance has significant environmental consequences. The shrinking overall stock of Seattle's Exceptional trees demonstrates the tragic insufficiency of considering the environmental impact of

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removing these trees in a piecemeal fashion. Only when SDCI considers the environmental impact of Exceptional tree removal cumulatively will the extent of its adverse significance be understood. Having failed to do so, the SEPA threshold determination was clearly erroneous.

2. The DNS did not consider the cumulative impacts to Ms. Levine's local environment.

Applicant's Motion argues that any adverse impact to the environment on Ms. Levine's property is "speculative" and that, in any case, SMC Chapter 25.11 will be applied later. Applicant Motion at 22:09-14. Applicant ignores that the SEPA process is designed to address "probable" impacts, not certain ones. *King County v. Washington State Boundary Review Bd. For King Cnty.*, 122 Wn. 2d 648, 663 (1993). It is the duty of SDCI to consider cumulative impacts to Ms. Levine's environment in order to quantify whether uncertain adverse impacts are "probable" and its failure to do so was clearly erroneous.

Applicant's argument about future application of the tree protection ordinance also overlooks the fact that its Project proposal describes complete removal of virtually all vegetation on the Project site, substantial earth-moving work right up Ms. Levine's property line, and displacement of soil with concrete to such an extent that it threatens the viability and potential of the proposed replacement vegetation. Haywood Decl. at ¶ 9. SDCI purportedly reviewed the Project as proposed, not as it might be altered down the line through future application of SMC Chapter 25.11, so any future review is irrelevant to SDCI's threshold determination. With evidence in the record that the Project will cumulatively cause probable, significant adverse impact to Ms. Levine's environment, there is a genuine issue of material fact on this question.

SDCI did not investigate the condition of the environment on Ms. Levine's adjacent property and thus could not have considered the Project's cumulative, probable adverse impacts to it. Evidence

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shows that the Project will damage Ms. Levine's rockery (which is stabilizing an ECA steep slope area), plants, and trees through soil displacement, root damage, loss of sunlight and other adverse impacts. Haywood Decl. at ¶¶ 16-18. SDCI was clearly erroneous in its failure to consider the cumulative effect of these environmental impacts on Ms. Levine's property, including damaged aesthetics. With a genuine issue of material fact on this question, the Examiner must deny Applicant's Motion.

3. The DNS did not consider the cumulative impacts from other developments in the vicinity that have and will remove trees.

SDCI did not consider the impacts of Applicant's tree removal in the context of other projects in the vicinity that have or will also remove trees. For example, SDCI did not consider:

- 11 rowhouses replaced 1 SFR at W. Barrett Street and 5th Ave. West (A large fruit orchard was destroyed.)
- 5 rowhouses replaced 2 SFRs in the 2600 block of 3rd Ave. West (Several large trees were destroyed.)
- 11 rowhouses replaced 2 SFRs in the 2800 block of 3rd Ave. West (3 trees were destroyed.)
- 3 rowhouses replaced 1 SFR in the 3000 block of 3rd Ave. (1 " Exceptional " tree was lost to construction)
- 19 townhouses are proposed across from the cemetery along West Barrett Street (If approved- will allow destruction of many, large maple and other big trees).
- 2 acre site along West Barrett St. - where cemetery, maintenance shed is now located - has been sold for development. (Many big trees are likely to be removed.)
- A complex of 5 rowhouses, 2 townhouses and 1 SFR replaced a small triplex at 4th Ave. West and West Fulton Street (A row of trees and a lot of other foliage was destroyed.)
- 3 rowhouses replaced a small duplex on west Fulton Street - below 5th Ave. West (A big tree was cut down.)

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Levine Decl., ¶ 13. Without considering the cumulative impacts of this widespread tree removal, SDCI clearly erred.

4. The DNS did not consider the impacts of the Project's conflicts with density and FAR limits and the precedential effect it establishes.

SDCI also erred for failing to consider conflicts with Seattle's density and FAR limits. WAC 197-11-330(3)(e)(iii) and (iv). According to the SDR Guidance, Parcel A is 2,958 square feet, which is insufficient area for two townhouses under SMC 23.45.512.A. Under the relevant standard, Lot A would need to be at least 2,960 square feet after applying footnote 2 of SMC 23.45.512, Table A, which Lot A is not. Moreover, the Project proposal for the Lot A townhouses exceed the 0.9 FAR allowed by SMC 23.45.510, Table A. SDCI did not consider the Project's conflicts with these rules and the precedential effect of allowing projects with similar conflicts in the future. WAC 197-11-330(3)(e)(iii) and (iv). SDCI clearly erred.

B. The DNS did not consider the SEPA Implications of Director's Rule 16-2008.

The DNS was clearly erroneous for failing to follow Director's Rule 16-2008 in making its threshold determination. Rule 16-2008 provides that "during environmental assessment of development applications," "Exceptional trees should be considered under the first and third categories listed above." Director's Rule 16-2008, p. 4 (SEPA Implications). Those categories are:

1) Rare, uncommon, unique or exceptional plant or wildlife habitat; or

3) Habitat diversity for species (plants or animals) of substantial aesthetic, educational, ecological or economic value.

Id. Under Rule 16-2008, removal of an Exceptional tree that meets these criteria would be a significant adverse environmental impact under SEPA, absent adequate mitigation. As certified Arborist Alan Haywood testified, the Exceptional Tulip tree meets these criteria, and the purported mitigation proposed would not mitigate the significant environmental harm from its removal. Haywood Decl at ¶¶

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7-9. As Mr. Haywood explained, Tulip trees of this size are extremely rare in the Pacific Northwest, its unusual flowers provide nectar for species such as hummingbirds and insects, and the tree provides uncommon habitat for cavity-nesting birds. *Id*. The rareness of the Exceptional Tulip tree also makes it stand out among others, making it aesthetically appealing and valuable for educational purposes. *Id*. The Applicant submitted no information on which SDCI could have considered the categorical impacts identified by the Director's Rule. *Compare with In re Appeal of Maple Leaf Cmty. Council Exec. Bd.*, Seattle Hearing Examiner File MUP-08-014 (September 2, 2008), at ¶ 35 (Applicant's wildlife habitat consultant analyzed these criteria).

At bottom, there are a genuine issues of material fact as to whether SDCI considered the impacts Rule 16-2008 identifies and whether its conclusion from any such consideration was clearly erroneous. The Examiner should deny Applicant's Motion on that basis.

C. The DNS interpretation of the SDR Guidance was clearly erroneous.

It was clearly erroneous for SDCI to ignore key parts of the SDR Guidance report during SEPA review. The SDR Guidance was one of the main sources of information on which SDCI purportedly based its DNS, but the SDR Guidance evidences probable adverse environmental impacts and includes environmental recommendations that SDCI subsequently ignored in making its SEPA threshold determination. Viewing the evidence in the light most favorable to Ms. Levine, this was clearly erroneous, precluding summary judgment.

In several places, Applicant's Motion misrepresents Ms. Levine's appeal as complaints against the SDR Guidance document, arguing that "[t]o the extent Ms. Levine raises objections to the design review process, she was required to appeal the SDR Design Guidance…" Motion at 23:19-21. But there are critical recommendations within the SDR Guidance that Ms. Levine agrees with, but which SDCI erroneously disregarded in the SEPA process. In particular, the SDR Guidance describes a

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hierarchy of preferable outcomes vis-à-vis the environmentally significant Exceptional Tulip tree, in order to mitigate environmental impact:

1) First, the tree should be retained.

2) Second, if retention is not feasible, SDCI should consider relocating the tree.

3) Third, if retention is not feasible and relocating the tree is not possible, SDCI should consider a large-caliper sculptural specimen tree as a replacement for the Exceptional Tulip tree.

SDR Guidance at 3 and 5 (filed as Exhibit B to the Mason Declaration). Having failed to consider these alternatives, the DNS was clearly erroneous.

1. SDCI did not consider whether the Exceptional tree could be retained as the SDR Guidance instructed.

The SDR Guidance states: "The Design Guidelines recommend the retention of significant on-site landscaping such as Exceptional trees. **Staff strongly supports retention of the Exceptional tulip tree**." SDR Guidance at 3 (emphasis added). There is no evidence in the record justifying SDCI's departure from this strongly worded recommendation in making its threshold determination. Despite the SDR Guidance, SDCI failed to consider requiring the Applicant to retain the Exceptional tree, as explained above at section III.A.1.

The Examiner must accept Ms. Standish and Mr. Haywood's expert testimony as true for Applicant's Motion and find that a reasonable trier of fact could conclude that retaining the Exceptional tree is feasible and a necessary mitigation measure for any valid DNS. Indeed, the only evidence the Applicant presented on the Exceptional tree actually supports *keeping* the tree. *See* Mason Decl., Exhibit G ("**Tree #2 [the Exceptional Tulip tree] is required to be retained and protected through development**" (emphasis added)). This is in stark contrast to other project proposals where Exceptional tree removal was premised on a detailed arborist report describing the tree's declining

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(206) 860-2883

health and poor prognosis. *See e.g. In re Application of David Fuchs*, Seattle Hearing Examiner Decision 3023260, File CF-314356 (June 5, 2018) at ¶ 23. Here, when the Applicant's own arborist concludes the Exceptional tree must be retained, there was no basis for SDCI to conclude retention is not feasible.

2. SDCI did not consider whether the significant trees could be relocated.

Next, the SDR Guidance indicates "Consider relocating significant trees and vegetation if retention is not feasible." Mason Decl, Exhibit B at 5. Even assuming SDCI assessed whether retention of significant trees is "feasible" (which it did not), there is no evidence in the record that it considered relocating significant trees, including but not limited to the Exceptional Tulip tree. On an issue of such environmental importance, this failure was clearly erroneous.

3. SDCI did not consider a large-caliper sculptural specimen tree as a replacement for the Exceptional Tulip tree.

The SDR Guidance then indicates that if the Exceptional tree is removed, "**staff strongly recommends providing significant replacement tree canopy on site, beyond the minimum tree replacement requirements in SMC 25.11.090**. **Consider a large-caliper sculptural specimen tree** in the courtyard area…" Mason Decl., Exhibit B at 3 (emphasis added). First, Mr. Haywood testified that due to the changes to the subsurface at the site and the density of buildings, the proposed tree replacements will not result in equal canopy cover upon maturity. Haywood Decl. at ¶ 9. Accepting this as true, a reasonable trier of fact could conclude that SDCI's DNS was premised on an incorrect conclusion and was clearly erroneous, precluding summary judgment. Second, there is no evidence in the record that SDCI considered a large-caliper replacement tree, as instructed. Applicant's proposal did not include a large-caliper replacement tree, and Mr. Haywood's testimony confirms that such

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Seattle, Washington 98112
(206) 860-2883

replacement trees are available. Haywood Decl. at ¶ 13; SEPA Checklist at 12 (referencing only "small trees" for planting). Thus, SDCI's failure to consider that mitigation measure was clearly erroneous.

D. The DNS did not consider GHG impacts from removal of trees.

The DNS erroneously limited its greenhouse gas impact analysis to construction activities and material manufacturing, without considering the lost carbon sequestration from Exceptional tree removal. *See* DNS at 4 and 6 (Greenhouse Gas Emissions). As Mr. Haywood explains, replacements for the Exceptional tree will not make up for lost CO_2 sequestration from the lost Exceptional tree, as demonstrated by the USDA Forest Service-created iTree online tool. Haywood Decl. at ¶ 12. Under SEPA, SDCI needed to consider this lost carbon sequestration from the Project and determine its significance. WAC 197-11-444(1)(b)(iii). Failing to do so was clearly erroneous.

E. The SEPA Checklist erroneously indicated the project would not affect the potential use of solar energy by adjacent properties.

The SEPA Checklist incorrectly stated "No" to the question "Would your project affect the *potential* use of solar energy by adjacent properties? If so, generally describe." Mason Exhibit F at 14 (emphasis added). In fact, the project would affect the potential use of solar energy on Ms. Levine's property, which is directly to the north of the proposed 35-foot buildings. Levine Decl. at ¶ 10. With this fact concealed from the SEPA Checklist, SDCI failed to consider the environmental impact of this fact, and its DNS was therefore clearly erroneous. *See* SMC 25.05.340.C.1.c (SDCI shall withdraw DNS if it was procured by lack of material disclosure).

F. The SEPA Checklist did not disclose nearby wetlands and surface waters.

The SEPA Checklist failed to disclose delineated wetlands in the immediate vicinity of the Project site. Levine Decl., Exhibit 1 (Seattle GIS map with site and wetlands); SEPA Checklist at 7.

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(206) 860-2883

These wetlands are about one block down slope from the Project site, which is under 200 feet away, approximately the same distance as the known landslide in the vicinity. Levine Declaration at ¶¶ 9, 16, 18 and Exhibits 5 and 7. The SEPA Checklist asked the Applicant about wetlands and unstable soils "in the immediate vicinity," but it only disclosed the landslide location, not the wetlands, despite their equivalent proximity. It was erroneous for the Applicant to conceal the existence of the wetlands, which are approximately the same distance from the site as the landslide area. Due to the varying seasonal groundwater elevations beneath the project site, its probable hydrological connectivity with the nearby wetlands, and the probable interaction between the known landslide and the wetlands, SDCI should have considered probable impacts to the wetlands. *See* Mason Decl, Exhibit C at 4.

Also, in response to Checklist Item #B.3.a, Applicant incorrectly stated that surface water is not located near the site. In fact, the site is just uphill from the Fremont Cut, and there are historic and current surface water streams that flow downhill from the project site. Levine Declaration at ¶¶ 9, 17 and Exhibit 6. Impact to these waters, including seasonal streams, were not disclosed and were not considered.

G. The SEPA Checklist did not disclose probable releases of mold spores and other toxics.

In response to Checklist Item #B.2.a, Applicant failed to disclose air emissions from demolition that are likely, including mold spores, asbestos and lead. Levine Declaration at ¶¶ 5, 8, 11. In response to Checklist Item #B.7.a, the Applicant incorrectly denies that there are any environmental health hazards that could occur as a result of the proposal. And in response to Checklist Item #A.10, when asked about needed permits, Applicant failed to list asbestos, lead or mold removal permissions. Levine Declaration at ¶¶ 5, 8, 11. It is critical to address these conditions so as not to harm surrounding residents and properties. The SEPA Checklist fails to disclose the potential for mold spore, lead and

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asbestos exposure. *Id*. Even if SDCI noted the potential for lead or asbestos exposure, it never noted or considered environmental impacts from this mold mobilization and did not set conditions on the DNS to mitigate those impacts.

H. The SEPA Checklist is incomplete and contains false information in other ways.

Checklist Item #A.8 of the SEPA Checklist asks to list any environmental information that has been prepared or will be prepared directly related to the proposal. Mason Declaration, Exhibit F at 2. In response, Applicant stated "None," failing to list any environmental information related to its proposal. This was obviously wrong. In addition to its Tree Inventory and Geotechnical Engineering Report, there is also environmental information about nearby environmental conditions (such as the known landslide event 110 feet from the Project site) and nearby development that relate to this proposal. Levine Decl. at ¶¶ 4, 6, 13. These needed to be disclosed and considered.

In response to Checklist Item #B.1.d, Applicant misrepresented the proximity of the nearby landslide event to the Project site. The Checklist indicates the slide was "approximately two blocks from the site," but in reality, the slide was approximately the distance of five houses, or about one city block. Levine Decl. at ¶¶ 4, 6. Such a close landslide, considered with the substantial earth moving and vegetation clearing described would have a probable, significant adverse environmental impact.

In response to Checklist Item #B.1.g, Applicant misrepresents the percent of the site that will be covered with impervious surfaces after construction. Applicant says "Approximately 76% of the site will be covered by building or paving." This not only misrepresents what the plan set shows, but it also fails to consider compacted soils and other impervious surfaces other than buildings or paving. Levine Decl. at ¶ 7.

In response to Checklist Item #B.10.b, the Applicant incorrectly states that the view of Lake Washington and the Aurora Bridge from the house behind will likely be improved with the removal of

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the tree. This is factually incorrect. The rear neighbor is in a SF 5000 zone and currently has a view of the beautiful Exceptional Tulip tree, with territorial views for the part of the year when there are no leaves on the tree. When the near 40-foot townhouses are constructed, the neighbor will only be able to see the huge structure and will lose views of nature, trees and the neighborhood. In addition, the neighbor on the south side will lose expansive views of Seattle to the north because of the new building blocking her windows. *Id*. at ¶ 12.

Viewing these inadequacies in the SEPA Checklist together, a reasonable trier of fact could conclude that SDCI failed to consider probable adverse environmental impacts.

IV. CONCLUSION

For the foregoing reasons, considering the evidence in the light most favorable to Ms. Levine, a reasonable trier of fact could conclude that SDCI's threshold determination was clearly erroneous. Applicant's motion must therefore be denied.

Respectfully submitted this 13th day of May, 2019

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date, I sent true and correct copies of the foregoing and all supporting documentation (Levine Declaration and Exhibits, Haywood Declaration and Exhibits and Standish Declaration and Exhibits) to each person listed below by E-Mail.

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