

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

In Re: Appeal by Reed Lyons,

From a decision issued by the Director,
Seattle Department of Construction and
Inspections

Hearing Examiner File:
MUP-19-006 – MUP 19-007
Department Reference:
3029801-LU & 3030630-LU

**APPELLANT LYONS' CLOSING
ARGUMENT**

I. INTRODUCTION AND ISSUES

This document is the appellant Lyons' Closing Argument in the matter of an appeal of the Seattle Department of Construction and Inspection ("SDCI") Directors Determination of Non-Significance ("DNS") for the proposed development of a 3-unit rowhouse and a 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 Seattle (the "Premises").

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

This document will attempt to convince the Hearing Examiner ("H.E.") that the process of approval of these projects has been flawed from the outset, that the SDCI Director flawed in his DNS and that an EIS could be required before the project is allowed to proceed.

Furthermore, the H.E. process appears to be flawed:

First, the planner, Allisson Whitworth, has minimal experience as a planner. Unfortunately, Ms. Whitworth was not available to testify in this hearing, even though she was the primary participant in the DNS. Furthermore, allowing a substitute witness, Mr. Rips, was objected to by Ms. Grant, but the objection was overruled. Evidently Ms. Whitworth has given birth, and is scheduled to return to work very soon. To not make her available greatly impedes the ability of the Appellants to mount a substantial defense to their case.

Second, the H.E. has demanded that Appellants not attempt to discuss "The Code". Every time a code was mentioned, the Applicant objected, and the objection was sustained. The SEPA checklist is the product of WAC 197-11 State SEPA Rules, and is administered in Seattle by SMC 25.05 Environmental Policies and Procedures. For the appellants to argue mistakes in following the rules, without being able to state the rules is ludicrous.

Finally, the H.E. asked the parties to abide by the "Hearing Examiner Rules of Practice and Procedure", when he himself is changing the rules. The parties were asked to submit final arguments by August 2, then, submit rebuttals to the final arguments on August 19.

Section 3.15 - Hearing Format of the Hearing Examiner Rules of Practice and Procedure ("H.E.R.S.") lists seven (7) distinct presentation functions to be followed. The H.E. has added an eighth step, a final rebuttal to the closing arguments.

Adding an eighth step to the proceedings is an advantage to the applicant and City and a disadvantage to the appellants. The Applicant has deep pockets, deep enough to hire council for already several months. The City has essentially unlimited access to city staff to provide free support for as long as the managers deem necessary. That staff is paid by us, the Citizens of Seattle, by our taxes and fees.

The appellants, on the other hand, are individual citizens who have limited resources, and most of whom are elderly, and on fixed incomes. The appellants are attempting to protect their property and the condition of the neighborhood and environment in which they live: There is no monetary reward for the appellants. The Appellants are undertaking this process at their own expense, to defend a noble, exceptional tree, which has no other protectors. In addition to the exceptional tree, there are numerous errors in the SEPA checklist that SDIC has overlooked. These items were overlooked because they were miss-represented by the Applicant's Architect, Bigelow.

The Applicant's motivation is only an attempt to make more money. The Applicant's cause is greed. He does not live in the neighborhood in question, and he obviously considers his profits to be more important than a neighborhood environment far from his home.

SDIC is attempting to retain their stature as a functional, professional governmental organization. They are attempting to save face, again at the expense of the appellants neighborhood environment, the Citizens of Seattle and the City's environment, in general.

II. SCOPE OF HEARING EXAMINERS PRELIMINARY ORDER TO DISMISS

In the "Applicant's and Owner's Motion to Dismiss Land Use Appeal and for Summary Judgment", council to the applicant noted that there are sixteen (16) separate objections by Lyons to the "appeal" (sic) "DNS". Council then addressed twenty-three (23) issues, including the appellant's Relief Request as the twenty fourth (24th) issue. In his Motion to Dismiss, council for the applicant overlooked eight (8) of the appellant's original thirty-one (31) issues.

Council for the applicant then re-numbered the applicants numbering system (which closely matched the SEPA checklist). This re-numbering exercise confused the issues and probably caused the oversight of the deletion of the appellant's aforementioned eight (8) missing issues. The eight issues not specifically discussed by the applicant's council are as follows:

4e & 4f

9b, 9c & 9d

11a, 11b & 11d

The H.E. "Preliminary Order to Dismiss ("H.E. Order")", outlined the items to be dismissed, and, fortunately, did not use the applicant's new numbering system. Of the appellant's eight (8) previously overlooked issues, items 5e, 11a and 11d were not discussed.

The issues remaining for the appellant Lyons are, then, as follows:

1a, 1b, 1d

3a, 3b

4e

6a

11a, 11d

12a, 12b and Narrative E

III. APPELLANTS FINAL ARGUMENTS FOR REMAINING ITEMS

1. Earth

- a. SEPA checklist (exhibit 8) page 4, item 1d asks if there are any indications or history of unstable soils in the vicinity. As Mish testified, the street right-of-way has previously had sink-holes develop due to the large amount of groundwater flowing underground on the hillside. The original development was named "Spring Brook Addition" because there are numerous springs and wetlands located in the neighborhood. Although ground water was not encountered in the earth boring holes undertaken for the soils report, many of the underground springs are seasonal. Development of the site could disturb and/or exacerbate existing ground water channels, and for that reason, a report on the extent of the groundwater should be provided to prevent future damage from ground water. Neither Bigelow nor Xhe were aware of these recent occurrences under direct examination by Lyons. Since this was not mentioned in the SEPA checklist, Ms. Whitworth was not aware of the issue, which might have impacted her evaluation and subsequent decision.

Since groundwater was not mentioned in the SEPA checklist, and it has caused unstable soils in the vicinity, the SEPA checklist should be corrected and re-submitted to SDCI for re-evaluation by the planner.

- b. SEPA checklist (exhibit 8) page 4, item 1d asks if there are any indications or history of unstable soils in the vicinity. The SEPA checklist response discussed the 1986 landslide, and noted the slide occurred approximately 2 blocks away.

The Geotech report (exhibit 30) page 4, indicated that the past landslide activity was "less than two blocks away", but the SDCI landslide activity overlay map (exhibit 32) shows that the recent landslide activity and the resulting GIS overlay indicating slide prone areas was actually about one hundred ten (110) feet away from the Project. Under direct examination, Xhe admitted that the slide was really only ½ block away, and that the area designated as slide prone on exhibit 32 is actually the 110 feet from the property as Lyons had stated. Cross examination by Gribben noted that the exact location address of the 1986 slide was noted in the Geotech report, therefore the incorrect information given by the Geotech and Architect is not an issue. However, the data listed is not consistent and it is not known if Ms. Whitworth was aware of the exact location of the stated address.

For these reasons, the Geotech report should be corrected and the corrected information inserted into a revised SEPA checklist for re-evaluation by the planner.

- c. (Dismissed)
- d. The Geotech report (exhibit 30) and SDCI reviews failed to consider the soil displacement and erosion that may occur to the Subject Property and the adjacent properties as a result of clearing and construction on the Subject Property, especially relative to rockery spanning between properties.

While the Geotech report (exhibit 30) page 15 briefly discusses Surface Drainage and Erosion considerations, it does not specifically discuss how and where the surface drainage will be directed to: To a holding tank? To the city combined Sewer? Onto the street?

Additionally, in the SEPA checklist (exhibit 8) page 5, response 1.h, Bigelow notes that the construction will be undertaken in the summer, while the Geotech Report (exhibit 30) page 14 "Wet Weather Earthwork" and the testimony by Xhe notes that the construction could be done in the winter. The testimony presented by Xhe and Bigelow is conflicting and vague. For that reason, the SEPA checklist should be corrected and re-submitted to SDCI for re-evaluation by the planner.

2. Air

a. (Dismissed)

3. Water

- a. Surface water: The SEPA checklist (exhibit 8) page 7, item 3a1, asks if there is any surface water in the vicinity? Bigelow's note states that there is no surface water near the site. On direct examination, both Bigelow and Xhe were un-aware of the wetlands shown on the SDCI GIS overlay map (exhibit 32).

SEPA checklist (exhibit 8) page 7, item 3a2 asks if there is surface water within 200 feet. Lyons testimony says the wetland behind his house is about 200 feet away, but no one knows because the actual delineation of the wetland has not been undertaken, nor submitted as evidence.

On cross examination of Lyons, Gribben asks Lyons to measure the distance shown on the map, which Lyons noted was about 211.2 feet. However, what Gribben has overlooked is that the actual boundaries of the wetland in question are only estimated on the GIS overlay. The actual boundary of a wetland can only be ascertained by a wetland delineation report, undertaken by a licensed wetland consultant. Such a report has not been introduced as evidence in this matter.

In addition, the SEPA checklist (exhibit 8) all pages, has a footer that notes that the document was last revised in 2016. Since that time, the wetland section of the ECA code (SMC 25.09) have been extensively re-written (ordinance 125248 dated 1/30/2017). The 200-foot distance questioned in the SEPA checklist (exhibit 80, page 7, item 2 has been re-evaluated in ordinance 125248, and types of wetlands have been re-addressed in the ordinance. This revised wetland code was instituted before the applicant's original application for the project.

Since this portion of the SEPA checklist itself is incorrect and the responses from the Applicant contained conflicting data, the SEPA checklist should be re-written and re-submitted to SDCI for reconsideration by the planner.

- b. Section 3b of the SEPA checklist (exhibit 8) page 9, discusses Ground Water. The SEPA checklist (exhibit 8) page 9, item 1 asks if water be drawn out of or discharged into a well? Item 2 asks if waste material will be discharged into the ground. Existing underground aquifers have not been discussed, investigated or even questioned. This is again a shortcoming of the existing SEPA checklist. Groundwater is often considered as a water table, however, in this neighborhood, groundwater is in the form of underground springs and channels that not only feed the neighborhood wetlands, but also cause damage to the street and the existing houses across the street.

The houses that experienced the damage from ground water were not new houses. They are nearly 100 years old. Evidently, the groundwater channels and springs sometimes

change course and can cause damage where previously there was no problem. In addition, the construction of a new structure may impact the course of existing springs. If a new foundation is built on a spring, the ground water would be diverted to foundation drains, which would in turn be directed to the city sewers. While the combination sewers in the neighborhood may handle the additional flow, the spring that is diverted to the sewer may be the very source of water that charges the existing wetlands, and the wetlands could dry up.

For these reasons, the SEPA checklist is deficient in its design. The SEPA checklist should address the impacts of springs in the groundwater section. The results of a thorough groundwater investigation should be included in the SEPA checklist and the results provided to SDCI for re-evaluation by the planner.

4. Plants:

The near adjacency of the proposed construction will result in foundation excavations (at 1H:1V cut) that will intrude into the existing trees' critical root zone on the adjacent lot to the north. SDCI normally considers the critical root zone of adjacent trees that are not on the site. This proposal did not address adjacent trees. If a critical root zone extends onto the subject property, it must be considered and mediated.

The SEPA checklist (exhibit 8) pages 11 and 12, does not address trees adjacent to the site, nor the location of their critical root zones. In addition, the testimony of Art Pederson noted that he had not even looked at the east parcel during his brief site visit.

This is clearly an oversight by the city arborist. The information contained in the SEPA checklist (exhibit 8) pages 11 and 12, does not address adjacent trees, and thus does not provide necessary information to the planner who must make the evaluation.

The SEPA checklist should be re-written to include the information about adjacent trees and re-submitted to SDCI for re-evaluation by the planner.

5. Animals (no issues)

6. Energy and Natural Resources

- a. The development will affect the potential use of solar energy by the adjacent property to the north. As stated in Lyons' testimony, he does not consider himself qualified to evaluate the possibility of installing solar panels, so he has excused himself from further discussion in that matter.

7. Environmental Health: (No issues)

8. Land and shoreline use: (Dismissed)

9. Housing: (Dismissed)

10. Aesthetics: (Dismissed)

11. Light and Glare: (No issues)

12. Recreation: (No issues)

13. Historic and Cultural Preservation: (No issues)

14. Transportation (Lyons headings 11)

- a. SEPA checklist (exhibit 8) page 27, item a, notes that "Vehicular access to the site will be from the existing gravel alley". While the plan for accessing new parking spaces from the alley may appear feasible in two dimensional drawings, the grades of the existing alley have not been taken into account. The parking spaces shown on the drawings will not be accessible due to extreme slope of the existing alley, which has not been addressed.
- b. (Dismissed)

- c. (Dismissed)
- d. Although the response shown on the SEPA checklist (exhibit 8) page 28, item d, notes that the alley will require improvements, simply stating that the alley needs improvement does not a solution make. SDOT will require the grades to be revised dramatically and will require surface water control which normally requires the installation of catch basins, which would necessarily require the extension of the sewer up Fulton Street, because long side sewer extensions in the right of way are no longer allowed in the city of Seattle.

The SEPA checklist (exhibit 8) page 28 item d, notes "alley behind the site will require improvements (paving)", but in reality, what is required is grading, drainage and then paving. The SEPA checklist response needs to be re-written and re-submitted to SDCI for re-evaluation by the planner.

- e. (No issues)
- f. (No issues)
- g. (No issues)
- h. (No issues)

15. Public Services (Lyons heading 12)

- a. The SEPA checklist (exhibit 8) page 30, item a, notes no impact to public services. However, the proposed western townhouses will be inaccessible from the street, and in the event of a fire, the current inaccessible dead-end alley will prevent long emergency vehicles access, due to the abrupt change in grade, and will prevent access for fighting fires.

This issue relates back to item 14 previously discussed. Again, this is an issue that has not been addressed by the SEPA checklist, nor by council of the applicant. The SEPA checklist should be revised to address this issue and re-submitted to SDCI for re-evaluation by the planner.

- b. As was evident in fighting a recent fire along the ship canal, this location on Queen Anne hill at an elevation of 206 ft. has low water pressure. The nearest fire hydrants are located at the corners of W. Fulton and 4th Ave. W. (180 feet from the NE corner of Subject Property) and W. Armour and 4th Ave. W. (110 feet from SE corner of Subject Property). As such, a 200-foot hose length from either hydrant would not be adequate to fight a fire at the westernmost proposed residences. This is a public service issue that was not addressed by the SEPA checklist (exhibit 8). The SEPA checklist should be revised to reflect this lack of information and re-submitted to SDCI for re-evaluation by the planner.

16. Utilities: (Dismissed)

C. Inadequate Evaluation of the SEPA Checklist: (Dismissed)

D. Inaccurate, incomplete and uncoordinated drawings to define limits of areas affected: (Dismissed)

E. Incomplete and uncoordinated arborist evaluation

Regarding the removal of the Exceptional Tulip tree, the developer did not pursue the required 3 or 4 alternatives which could allow building the same amount of FAR without removing the Exceptional tree. Applicant Levine hired an architect to research and provide multiple alternative designs that would retain the FAR and retain the tree. However, the architect was not allowed to testify because of objections by Gribben. Testimony by Moehring discusses the single alternative shown on sheet G1.5 of the latest plan set (exhibit 10). This single alternative demonstrates that the Department did not consider the required multiple options for removal of the exceptional tree. For illustrative purposes, Moehring's testimony demonstrated an alternative that allowed the tree to be

retained without affecting the FAR (exhibit 5). Not only was this exhibit presented in this hearing, it was originally presented at the public meeting held in May of 2018. The DNS also fails to evaluate the impacts of removing protections for significant trees on the steeply sloped right-of-way.

F. Non-compliant Lot Boundary Adjustment: Dismissed

IV. RELIEF REQUESTED

By HER 2.03, the Hearing Examiner has jurisdiction to decide appeals. By HER 2.23(b), the Hearing Examiner may remand the matter for the addition of the requisite information, analysis, or other material needed to satisfy all of the provisions of relevant law, which have not been completed in this particular case. The Hearing Examiner has conducted a public hearing on the appeals and may affirm, modify, or reverse the Department's decision.

- a. I request the vacation of the SEPA Analysis and subsequent DNS.
- b. I request the SEPA checklist be corrected and revised to include all pertinent information including, potential groundwater issues, potential slide activity, description of construction surface drainage and containment, acknowledgement and impact of neighborhood wetlands, acknowledgement and impacts of existing groundwater and associated potential damage, acknowledgement and mitigation of neighboring tree critical root masses extending onto the subject property, acknowledgement and alternatives regarding the alley improvements, acknowledgement of impacts to City Services and utilities and finally, a discussion of the numerous alternative designs that could retain the exceptional tree while retaining the requested FAR. These aforementioned issues are cumulative issues and indicate the need for re-evaluation of the SEPA checklist.
- c. I request that the H.E. demand of SDCI to provide an alternative planner, one with more experience, to be appointed to review the revised SEPA checklist and consult on the redress of the DNS, and that the replacement planner NOT be Mr. Rips, who is obviously prejudiced in his involvement and testimony of record.
- d. I finally request such other relief as may be warranted by the appeals of my fellow appellants, Tabbara, Grant, Mish and Levine as providing additional cumulative issues which indicate a re-writing and re-evaluation of the SEPA checklist, and the subsequent redress of the DNS.

Thank you for your consideration on these matters.

Filed by the Appellant this 2nd day of August, 2019.

By: Reed Lyons
Reed Lyons

BEFORE THE HEARING EXAMINER

FOR THE CITY OF SEATTLE

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the State of Washington, that on this date, August 2, 2019, the following documents were sent for delivery to the following parties by electronic mail:

Closing Statements; Lyons Appeal; Hearing Examiner file MUP-19-006 – MUP-19-007

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DATED: August 2, 2019



Reed Lyons