Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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

I. RESPONSE

As discussed in the applicant's post-hearing brief, the appellants have failed to meet the high burden of demonstrating that the Director's Decision is clearly erroneous. Each of the Project's potential environmental impacts were disclosed to and considered by SDCI. The appellants failed to prove that the Project would result in probable significant adverse environmental impacts. And even if the Project would result in probable significant adverse impacts, the appellants failed to identify, much less demonstrate, that existing city, state and federal environmental regulations would be insufficient to mitigate those impacts. The appellants' closing statements will be discussed in turn below.

A. <u>Grant Protection for Trees: MUP 19-004 and 19-005.</u>

Ms. Grant raises 12 separate arguments in her closing statement that fail to demonstrate that the Director's Decision is clearly erroneous.

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1. The Hearing Examiner properly limited Ms. Grant's appeal issues to those explicitly raised in her appeal.

Ms. Grant argues that the Examiner improperly limited her testimony to those appeal issues that were specifically identified in her appeal. The Hearing Examiner has wide-ranging authority to limit the presentation of evidence at the hearing. In order to streamline the hearing and to avoid cumulative testimony, it was proper for the Examiner to direct the appellants to focus their testimony and questioning on the appeal issues raised in their own appeals. The Hearing Examiner should similarly limit the appellants' closing statements to the appeal issues raised in their appeals. Thus, any arguments concerning appeal issues raised by other appellants, or appeal issues that were not raised or were dismissed, should be disregarded by the Hearing Examiner.

2. Impacts related to storm water runoff were adequately disclosed to and considered by SDCI.

Ms. Grant's claim that the SEPA Checklist[1] inadequately discloses impacts to drainage patterns in the area is misplaced. SEPA Checklist 3(c)(3), quoted by Ms. Grant, states that: "Does the proposal alter or otherwise affect drainage patterns in the vicinity of the site? If so, describe." The applicant answered: "No, drainage patterns should remain essentially the same after the project is complete."[2]

Other SEPA Checklist items provide context to this response. For example, checklist item 3(c)(1) states: "Describe the source of runoff (including storm water) and method of collection and disposal, if any (include quantities, if known). Where will this water flow? Will this water flow into other waters? If so, describe." The applicant responded that: "Waste water is generally anticipated to be collected from buildings and impervious surface areas through the use of drains, gutters and downspouts that lead to bioretention planters and eventually flow into the city's storm sewer system. Domestic waste water will be connected

[1] Ex. 8.
[2] *Id.*, pg. 10.

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to the city's sanitary sewer system."[3] Checklist item 3(d) asks about: "Proposed measures to reduce or control surface, ground, and runoff water, and drainage pattern impacts, if any." The applicant answered that: "Drainage on site is intended to be controlled through the use of drains, gutters, and downspouts leading to bioretention planters and connections to the City of Seattle's sewer systems."[4] These disclosures flesh out the drainage and water runoff impacts in greater detail.

Ms. Grant refers to several exhibits and testimony that discuss the benefits of trees generally with respect to mitigation of water runoff. While this is true, generally, it ignores the specific testimony from Curtis Bigelow, the applicant and Project architect. Mr. Bigelow testified that the Project would have a complex drainage system consisting of footing drains, catch basins and bio-planters. He further testified that when the Project was complete, it would result in *less* water runoff than currently exists at the Premises. Michael Xue's testimony and Dean Griswold's testimony also confirm this fact.

3. The appellants failed to elicit any testimony that the trees being planted on the western parcel (2813 4th Avenue West) would not replace and exceed the Tulip Tree's existing tree canopy at maturity.

Ms. Grant claims that the trees being planted on the western parcel will not reach the canopy coverage identified on the landscaping plan.[5] While there was general testimony that the trees might not reach their full genetic potential based upon the size of the planting space, there was zero testimony that the trees would not reach the canopy size identified in the landscaping plan at maturity. The appellants did not introduce any evidence on what the anticipated tree canopy at maturity would be based upon the size of the planting area and other conditions. Moreover, the appellants failed to allege what the tree canopy would be at

[3] *Id.*
[4] *Id.*, pg. 11.
[5] Ex. 10, sheet L.1.

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maturity in an unlimited and unrestricted space versus the actual conditions in which the trees are being planted.

Ms. Grant argues that the tree canopy for the Fernleaf Beach tree was inaccurate because Ms. Peterson, the landscape architect, did not take into account the size of the planting area. This is not correct. The SDOT Approved Street Tree List[6] states that the planting strip should be at least 6 feet wide. Ms. Peterson testified that the planting area for the Fernleaf Beech is approximately 5 to 8 feet wide, which is within the parameters prescribed by SDOT[7]. A review of the scale provided on the landscaping plan reveals that the planting strip for the Fernleaf Beech is well in excess of 6 feet that SDOT recommends.

Ms. Grant's argument that the trees will not reach their full genetic potential is belied by Tulip Tree's size in relation to the restrictions that were identified on the Premises, including the concrete foundation and retaining wall. Both arborist who testified on behalf of the appellants (Stuart Niven and Alan Haywood) admitted that they did not identify the location of the Tulip Tree's root structure and could not opine on whether the tree was impeded by the physical limitations on the property. The size of the Tulip Tree's canopy lends credence to the tree canopy size identified in the landscaping plan for the new trees.

4. <u>The Fernleaf Beech, Paperbark Maple and Vine Maple trees' canopy at maturity is accurately identified in the landscaping plan.</u>

Ms. Grant repeats her argument that the replacement tree canopy at maturity is not accurate. The appellants bear the burden of proof. And the appellants did not introduce any evidence that the trees replacing the Tulip Tree would not achieve the canopy coverage identified in the landscaping plan.

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[6] Ex. 57.

[7] While SDOT does not have jurisdiction over the trees being planted on the Premises, it does have jurisdiction over the trees being planted in the City right-of-way.

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5. The Project will not result in probable significant adverse environmental impacts that will not be adequately mitigated by existing environmental regulations.

As an initial matter, Ms. Grant did not raise any issues concerning cumulative impacts and any arguments related to cumulative impacts in her closing statement should be disregarded. But even if Ms. Grant's arguments are reviewed on the merits, they fail.

Ms. Grant claims that the tree canopy in single family and multi-family zones is down and that the Project will result in less tree canopy coverage. As discussed above, the tree canopy coverage at maturity will exceed the existing tree canopy coverage provided by the Tulip Tree. Thus, the tree canopy coverage will increase, not decrease.

Ms. Grant further claims that if similar projects are approved, it will result in cumulative significant adverse impacts. On this claim, the appellants failed to present any evidence on other similar projects' impacts to the City's tree canopy. While Ms. Levine offered testimony about the before condition of certain projects, she admitted that she did not know the after condition in terms of the size, number and types of trees that were planted.

The Seattle 2016 LiDAR Canopy Cover Assessment[8] prepared by Seattle's Urban Forestry Team states that the canopy coverage goal for multi-family zones, which includes the LR1 zone that the Project is located in, is 20% by 2037. And the multi-family zone is already exceeding that canopy coverage goal by more than 10%.[9] This demonstrates that the City's existing regulations are sufficient to mitigate any potential adverse environmental impacts concerning the removal of trees.

[8] Ex. 25.
[9] *Id.*, pg. 25.

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6. SDCI adequately considered the amount of time that it would take for the new tree canopy to replace the Tulip Tree canopy.

The landscaping plan explicitly states that the replacement canopy size calculations will be at maturity. The City employs arborists, including Art Pederson, who are responsible for reviewing the plan sets that include the landscaping plan. There was no evidence that SDCI thought that the canopy replacement would be achieved at planting. And the landscaping plan complies with existing City regulations concerning the replacement of tree canopies for exceptional trees that are removed as a result of development.

7. The removal of the Tulip Tree and that effect on surrounding trees was adequately considered by SDCI.

Ms. Grant relies on the testimony of the appellants' arborists that the Tulip Tree has positive effects on other trees in the area to support the proposition that SDCI did not adequately consider those potential impacts. This is a red herring. While the Tulip Tree likely has positive effects on other trees, there was no testimony or other evidence that SDCI did not consider the potential impacts from removing the Tulip Tree or that existing regulations were insufficient to mitigate those potential adverse impacts.

8. The City keeps track of the tree canopy that includes the number of large trees and tree groves.

The appellants introduced documents that belie Ms. Grant's claim that the City does not keep track of trees that are removed during development. For example, the LiDAR study prepared by Seattle's Urban Forestry Team describes: (a) the tree canopy by geographic area, (b) the tree canopy by zone, (c) the percent of conifer trees (28%) vs. the percent of deciduous trees (72%), (d) the number of large trees (6,338) in the City, and (e) the number of tree groves in the City (3,188). The Report Highlights from the Office of the

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City Auditor states that the tree canopy coverage in Seattle was only 18% in 1996.[10] Thus, the tree canopy coverage has increased significantly during the past 20 years.

9. The appellants failed to present evidence on the cumulative impacts of other projects related to the removal of trees.

As discussed above, the appellants failed to present any evidence concerning the impacts of other similar prior or simultaneous developments. While Ms. Levine presented general testimony that there were other projects in the area where trees were removed, she failed to present *any* testimony on the type of development or the type of landscaping and trees that were planted.

10. All appeal issues related to Streamline Design Review and SMC 25.11 (Tree Protection Ordinance) concerning whether the Tulip Tree could be removed were dismissed.

Ms. Grant argues appeal issues that were dismissed by the Hearing Examiner. Whether or not the Tulip Tree could be retained through the use of adjustments or exceptions is not within the purview of the Hearing Examiner.

11. The Director's Decision was based upon adequate disclosure of potential environmental impacts.

The SEPA checklist contained accurate information despite Ms. Grant's contrary assertions. First, as discussed in Section A.2 above, the drainage and stormwater runoff were accurately disclosed.

Second, Curtis Bigelow testified that he personally visited the site and identified each of the birds that he saw in the SEPA Checklist. While Ms. Grant testified that she saw different birds on her property, she admitted that she did not see any of those birds on the Premises.

[10] Ex. 27, pg. 5.

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Third, the applicant accurately identified invasive animal species in item 5(e) of the SEPA Checklist.[11] The fact that the applicant also identified invasive plants is immaterial.

Fourth, as an initial matter, the Shoffner Consulting arborist report was prepared as a requirement for the lot boundary adjustment. It was not required under SEPA. The reference to the arborist report in the SEPA Checklist[12] is in response to whether any other environmental information had been prepared for the Project. Regardless, SDCI was aware of the trees located on the Premises. Mr. Rips testified that Ms. Whitworth would have visited the Premises. And Art Pederson, SDCI's arborist, testified that he did visit the Premises. So, SDCI was clearly aware of the number and types of trees on the Premises.

Fifth, the SEPA Checklist acknowledges that the Project "[m]ay impact private views from adjacent neighbors."[13]

Sixth, the SEPA Checklist discloses that there is an exceptional tree on the Premises that will be removed.[14]

12. SMC 25.05.675 permits the SDCI Director, not the Hearing Examiner, to condition or deny a project to mitigate its adverse impacts.

Ms. Grant claims that because SMC 25.05.675 refers to a decisionmaker that the Hearing Examiner has authority to mandate that the Tulip Tree be retained. That is not correct. SMC 25.05.730 defines the decisionmaker as: "the agency official or officials who make the agency's decision on a proposal." The Hearing Examiner is not considered a decisionmaker under SEPA, SMC Chapter 25.05.

[11] Ex. 8, pg. 13.
[12] *Id*., pg. 2.
[13] *Id*., pg. 23.
[14] *Id.*, pg. 11.

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

Mr. Lyons organizes his closing statement by his remaining appeal issues that primarily concern the SEPA checklist. These appeal issues will be discussed below and will follow the numbering system employed by Mr. Lyons for ease of reference.

1. Earth: Issue No. 1(a)

The failure to mention the presence of groundwater in the SEPA Checklist does not render it inaccurate. As an initial matter, there is no specific SEPA Checklist item that asks whether underground water is present. Regardless, the PanGeo report[15] discussed the boring holes that were performed during November and stated that: "Groundwater was not encountered in our test borings at the time of excavation. It should be noted that groundwater elevations and seepage rates are likely to vary depending on the season, local subsurface conditions, and other factors. Groundwater levels and seepage rates are normally highest during the winter and early spring (typically October through May)." Despite the test borings being performed in November, no groundwater was discovered. And the appellants failed to introduce any evidence that groundwater has ever been present at the Premises.

2. Earth: Issue No. 1(b)

The exact location of the prior landslide event was disclosed to SDCI. The PanGeo report[16] identifies the *exact* address of the landslide. So does the SEPA Checklist.[17] The Decision drafted by Ms. Whitworth specifically states that this information was reviewed by her and supports the DNS. The SDCI GIS Web Map[18] reveals that the distance from the northeast corner of the Premises to the known slide event is .055 miles, or 290.4 feet. This is well in excess of the 110 feet claimed by Mr. Lyons.

[15] Ex. 30.
[16] Ex. 30, pg. 4.
[17] Ex. 8, pg. 4.
[18] Ex. 32.

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3. Earth: Issue No. 1(d)

As discussed in Section A.2 above, the SEPA Checklist discloses and identifies the drainage systems generally and describes how the waste water will be collected. As Mr. Lyons acknowledges, the PanGeo report has a specific section titled "Surface Drainage and Erosion Consideration." SEPA does not require a full description of the drainage system that will be implemented on a particular development. That will be addressed by SDCI during its review of the construction permit.

Mr. Lyons goes on to argue that there was conflicting evidence on when the construction work would begin. SEPA Checklist item 1(f) states: "Could erosion occur as a result of clearing, construction, or use? If so, generally describe." The applicant answered: "Yes, erosion could occur during construction. Erosion control measures will be in place, and site work is anticipated to occur during the summer months when rain is less likely."[19] The applicant said the work was "anticipated" to occur during the summer months. Mr. Xue, the Project's geotechnical engineer, testified that the work "could" take place during the winter months because of the stable soils that are present. These statements are not in conflict with each other.

4. Water: Issue No. 3(a)

SDCI was aware of the location of the wetlands, which are further than 200 feet from the Premises. The applicant, Curtis Bigelow, testified that he walked on and around the Premises and did not discover any surface water. Mr. Rips testified that Ms. Whitworth would have reviewed the City's GIS Map. The SDCI GIS Web Map[20] discloses that the distance from the northeast corner of the Premises to the nearest edge of the nearest wetland is .04 miles, or 211.2 feet. Mr. Lyons claims that the specific boundaries of the wetlands are only an estimation. But Mr. Lyons failed to provide any evidence or testimony that the

[19] *Id*., pg. 5
[20] Ex. 32.

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distance of 211.2 feet was not accurate. In fact, Mr. Lyons testified that the distance was about 200 feet, which is consistent with the distance identified in the City's GIS Map.

5. Water: Issue No. 3(b)

The appellants failed to offer any expert testimony concerning groundwater or aquifers in the area. While they offered general testimony describing water damage to the street and other properties in the area, they did not offer any testimony that there was groundwater present at the Premises. This claim is belied by the PanGeo report and deep borings that were taken during the rainy month of November that did not discover any groundwater.

6. Plants: Issue No. 4(e)

The SEPA Checklist does not require disclosure of vegetation or trees on adjacent properties. The Shoffner arborist report was submitted as part of the lot boundary adjustment. Regardless, concerns about the Project's potential impacts to trees on and near the Premises were raised in the public comments and considered by SDCI. Moreover, Mr. Rips testified that Ms. Whitworth would have visited the Premises where she would have seen the adjacent properties and the trees located thereon.

Mr. Lyons claims that the neighboring trees have critical root zones that encroach onto the Premises and that they must be protected. This is not correct. There is no allegation that there are exceptional or otherwise protected trees on the neighboring properties. And a property owner has an absolute right to remove tree branches or roots that are encroaching onto their property. *See Mustoe v. Ma*, 193 Wn. App. 161, 165, 371 P.3d 544, 546 (2016).

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7. Transportation: Issue No. 14(a)[21]

The appellants failed to provide any expert testimony that the alley would not be able to provide access to the Project. There was, however, testimony that Ms. Levine and her tenants use the alley and drive past the Premises to access her property. The appellants offer no explanation for why the alley is suitable for Ms. Levine and her tenants, but not for the Project's future owners. In any event, the SEPA Checklist acknowledges that: "Vehicular access to the site will be from the existing gravel alley."[22] And that: "The Alley behind the site will require improvements. It is currently gravel and in poor condition."[23] In addition, the Decision acknowledges the many public comments that were: "Concerned with the condition of the alley."[24]

8. Transportation: Issue No. 14(d)[25]

Mr. Lyons is raising issues with potential SDOT requirements to improve the alley. These issues are irrelevant to the SEPA DNS. Any issues related to alley improvement will be addressed during the street improvement permit and construction permit review process.

9. Public Services: Issue No. 15(a)[26]

The appellants failed to offer any evidence that there will not be adequate fire protection for the Project. Regardless, that is not a potential environmental impact that is subject to the SEPA DNS. While Mr. Lyons attempts to frame this as an issue related to impacts on public services, it is not.

[21] This is issue number 11(a) in the appeal.
[22] *Id*., pg. 27.
[23] *Id*., pg. 28.
[24] Ex. 4, pg. 3.
[25] This is issue number 11(d) in the appeal.
[26] This is issue number 12(a) in the appeal.

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10. Public Services: Issue No. 15(b)[27]

Again, the appellants offered no testimony concerning low water pressure or the distance of the nearest fire hydrants. Nor was there any testimony concerning a recent fire along the ship canal. The applicant did introduce a Water Availability Certificate ("WAC")[28] into evidence, which confirms that the existing water system in sufficient to supply water to the Project. The WAC makes no mention of low or insufficient water supply in the area.

11. Incomplete and uncoordinated arborist evaluation: Issue No. E

Mr. Lyons makes arguments concerning appeal issues that were dismissed, including whether the exceptional Tulip Tree could be retained while maximizing FAR. Because these appeal issues were dismissed, this argument should be disregarded.

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

The Mishes make three primary arguments in their closing brief: (a) the Tulip Tree could have been retained while maximizing FAR, (b) the Tulip Tree results in numerous environmental benefits, and (c) concerns about underground aquifers.

First, all appeal issues related to whether the Tulip Tree could be removed, whether the applicant could maximize the Project's FAR through adjustments or exceptions and compliance with SMC Chapter 25.11 were previously dismissed. All of Mr. Mish's arguments related to the previously dismissed appeal issues should be disregarded by the Hearing Examiner.

Second, there is no dispute that the Tulip Tree has environmental benefits, just as all trees do. The questions before the Examiner is (a) whether potential adverse environmental impacts related to the removal of the Tulip Tree were adequately disclosed to SDCI, and (b)

[27] This is issue number 12(b) in the appeal.
[28] Ex. 58.

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whether the Project will result in probable significant adverse environmental impacts that will not be sufficiently mitigated by existing environmental regulations.

On the first question, it is undisputed that SDCI was aware of the potential impacts related to the removal of the Tulip Tree. The Tulip Tree's removal was disclosed in the SEPA Checklist. And the overwhelming majority of the public comments, both written and oral, concerned the Tulip Tree's removal.

On the second question, Mr. Mish devotes a significant portion of his closing statement to discussing the general benefits of trees. Regarding the specific impacts from removing the Tulip Tree, Mr. Mish argues that it could result in slope instability and increased water runoff. Mr. Griswold and Mr. Xue, both of whom are licensed geotechnical engineers, confirmed that the Project would result in greater slope stability and less water runoff than the present condition of the Premises with the Tulip Tree. Mr. Mish also discusses water issues with his and his neighbors' properties. Again, there was no discussion of water issues on the Premises. And Mr. Mish acknowledges that he has not had any further water issues at his property once he had a drainage system installed.

Mr. Mish further argues that the trees that will be planted on the Premises are not sufficient to mitigate the impact from the loss of the Tulip Tree. As discussed above, the landscaping plan confirms that the replacement canopy will exceed the Tulip Tree canopy at maturity. While there was testimony that the new trees would not reach their full genetic potential due to the physical limitations imposed by the Project, there was no testimony that the new trees would not provide the canopy size identified in the landscaping plan.

Lastly, Mr. Mish claims that SDCI did not consider impacts resulting from the alleged underground aquifers. Again, there was no testimony that there were underground aquifers at the Premises. The PanGeo boring samples confirmed that water was not present during one of the wettest months of the year. There was no evidence presented, much less

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argument, that existing environmental regulations would not be sufficient to mitigate any potential impact to the aquifer, assuming one is located on the Premises.

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

The crux of Ms. Tabbara's argument is that the two parcels should have been reviewed together under SEPA and streamline design review because they are functionally related. Regarding SEPA review, the two parcels were reviewed as a single Project. The first page of the Director's Decision[29] under "Summary of Proposal" identifies the master use permit for both parcels: permit number 3029801-LU and 3030630-LU. So, both parcels were reviewed as a single project for purposes of SEPA.

Neither parcel was required to go through streamline design review. Only the western parcel, 2813 4th Avenue West, voluntarily went through streamline design review because of the exceptional Tulip Tree. The eastern parcel, 2815 4th Avenue West, was exempt from streamline design review because it is being developed with rowhouses. *See* TIP 238B.[30] The western parcel was not required to go through streamline design review because it is only being developed with two townhouse units.[31] Even though the two parcels are functionally related, neither parcel was required to go through streamline design review because rowhouses are exempt from streamline design review and streamline design review is only required for developments with three or more townhouse units.

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

Ms. Levine raises 24 issues in her closing statement that will be discussed below.

1. The SEPA Checklist was accurate and complete.

Ms. Levine argues that the SEPA Checklist did not contain accurate information concerning (a) the nearby wetlands, (b) sinkholes in the street, (c) the exceptional Tulip

[29] Ex. 4.
[30] http://www.seattle.gov/DPD/Publications/CAM/cam238B.pdf.
[31] *Id.*

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Tree, and (d) the location of the previous landslide. This is not correct. Mr. Rips testified that Ms. Whitworth would have reviewed the City's GIS Map, which would have revealed the location of the wetlands – that are located over 200 feet from the Premises. The sinkholes in the street (that were repaired by the City prior to the SEPA Checklist) were disclosed to SDCI in the public comments. The exceptional Tulip Tree was disclosed in Section A.11 of the SEPA Checklist[32] as well as in the numerous public comments. And the location of the previous landslide was disclosed in the SEPA Checklist and the PanGeo report.[33] This location would also have been known to Ms. Whitworth when she reviewed the City's GIS Map.

2. Any adverse environmental impacts related to removal of the exceptional Tulip Tree will be sufficiently mitigated by the City's existing environmental regulations.

While the appellants' two arborists testified about the Tulip Tree's environmental benefits, any impacts related to the tree's removal will be sufficiently mitigated. Devin Peterson, the landscape architect, testified about the landscaping plan[34] she prepared and that the replacement tree canopy at maturity would exceed that of the Tulip Tree. While the appellants' arborist testified that the replacement trees would not likely reach their full genetic potential, there was no testimony that the replacement trees would not achieve the canopy coverage identified in the landscaping plan. This is sufficient mitigation for the removal of the Tulip Tree.

The appellants' arborist also offered general testimony about the benefits that the Tulip Tree provides to soil stability and water runoff. The appellants' arborist admitted that they were not geotechnical engineers and the appellants failed to call one as a witness. SDCI and the applicant called two geotechnical engineers, Dean Griswold and Michael Xue,

[32] Ex. 8, pg. 2.
[33] Ex. 30.
[34] Exs. 10, 28 and 56; *see* sheets L.0, L.1 and L.2.

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who testified that the site would be more stable after the Project was constructed and that there would be less water runoff.

3. Removal of the exceptional Tulip Tree under Streamline Design Review is not before the Hearing Examiner. And only the western lot was subject to SDR.

Ms. Levine argues that SDCI should have considered both parcels when determining whether the exceptional Tulip Tree could be saved. As an initial matter, all appeal issues related to SDR and whether the Tulip Tree could be removed were dismissed by the Hearing Examiner. Regardless, only the western parcel voluntarily submitted to SDR because of the exceptional tree. The eastern parcel was not subject to SDR because rowhouses are exempt.[35]

4. Impacts related to removal of the exceptional Tulip Tree will be sufficiently mitigated.

Ms. Levine argues that SDCI failed to consider a range of mitigation that would have allowed the Tulip Tree to be retained. SDR and SMC Chapter 25.11 – the Tree Protection Ordinance – are the exclusive City regulations that govern when an exceptional tree may be removed. As discussed above, all appeal issues related to compliance with SDR or SMC Chapter 25.11 were dismissed.

5. SDCI considered cumulative impacts when it issued the DNS.

Ms. Levine claims that SDCI failed to consider cumulative impacts related to the removal of trees. In support of this claim, Ms. Levine refers to Exhibit 40 which contains a list of several recent developments and several developments in the pipeline. During the hearing, Ms. Levine did not know the number or types of trees and other vegetation that had been replanted at the various properties. The burden rests on Ms. Levine to demonstrate that the Project will result in probable significant adverse cumulative impacts that will not be

[35] *See* TIP 238B.

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adequately mitigated by existing environmental regulations. SDCI has a wide-range of existing environmental regulations that govern developments and prescribe the number and type of trees and other vegetation that must be planted in a new development. Ms. Levine failed to present any evidence that these existing environmental regulations are not sufficient to mitigate any cumulative environmental impacts related to removal of trees from the Premises. The Director's Decision clearly states that SDCI's "experience of the lead agency with the review of similar projects form the basis for [the SEPA] analysis and decision."[36] Thus, SDCI considered impacts from other projects when it issued the DNS.

6. Concerns about precedential impacts of the DNS is not a valid objection to the Decision.

Ms. Levine's concerns that affirming the Director's Decision will result in establishing precedence is not a valid objection to the Decision.

7. Director's Rule 16-2008 clarifies the definition of an exceptional tree.

Ms. Levine argues that the Director's Decision is erroneous because it failed to consider Director's Rule 16-2008.[37] The purpose of that Director's Rule, however, is to "clarify the definition of 'exceptional tree.'" There is no dispute that the Tulip Tree is designated by the City of Seattle as an exceptional tree. The City has a well thought-out and carefully crafted ordinance, SMC Chapter 25.11 and SMC 23.41.018, that prescribes the circumstances under which an exceptional tree may be removed. All appeal issues concerning the tree protection ordinance and streamline design review have been dismissed.

8. Roots of Design's landscaping plan complies with the City's regulations and will mitigate any environmental impacts from removing the Tulip Tree.

Next, Ms. Levine argues that there are issues with the landscaping plan. She supports this position by misstating the testimony of Alan Haywood. While Mr. Haywood

[36] Ex. 4, pg. 3.
[37] Ex. 2.

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did testify that the trees being planted on the property might not reach their full genetic potential, he did *not* testify that the new trees would not reach the canopy coverage identified in the landscaping plan. And Mr. Haywood did not state that "removing the 'Exceptional Tree' will have a probable, significant adverse impact on the environment,"[38] as Ms. Levine claims.

9. Again, Roots of Design's landscaping plan complies with the City's regulations and will mitigate any environmental impacts from removing the Tulip Tree.

Ms. Levine raises similar arguments to those raised in section 8 above. She relies on Mr. Niven's testimony that the removal of trees will cause erosion and adverse environmental impacts. No geotechnical experts testified on the appellants' behalf. And Mr. Niven admitted that he was not familiar with the Project and did not know what type of drainage system would be installed. Conversely, Mr. Griswold and Mr. Xue testified that the site would be more stable and result in less water runoff after the Project was complete and the drainage systems are installed.

10. The Project will not result in probable significant adverse impacts to Ms. Levine's property.

While Ms. Levine raised numerous unsubstantiated concerns about impacts to her property, she failed to demonstrate that existing environmental regulations were insufficient to mitigate the Project's potential environmental impacts to her property. Ms. Levine's concerns include slope instability, erosion and damage to trees on her property. While Mr. Haywood testified that the Project could have potential impacts to Ms. Levine's property, he did *not* testify that the Project would result in probable significant adverse environmental impacts. Nor did he testify that existing environmental regulations were insufficient to mitigate any potential impacts. Mr. Haywood admitted that he was not a geotechnical

[38] *See* Ms. Levine's Closing Arguments, 11:6-7.

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engineer and was not aware of the specific building designs of the type of drainage system being implemented. Conversely, Mr. Griswold and Mr. Xue testified that the Project would result in a more stable site with less water runoff.

11. The Project will not have an adverse environmental impact on the trees and other vegetation located on Ms. Levine's property.

Ms. Levine did not present any evidence from an expert witness who is qualified to opine on slope stability issues. While Mr. Haywood testified that the Project could have an impact on the vegetation located on Ms. Levine's property, there was no testimony or evidence that there would be probable adverse impacts to the vegetation. There is a host of existing environmental regulations that govern construction of the Project. And Ms. Levine failed to elicit any testimony or produce any evidence that mentions, much less demonstrates, that those regulations are not sufficient to mitigate any potential adverse impacts to her property.

12. There was no credible evidence that the Project would affect Ms. Levine's use of solar panels on her property.

As an initial matter, Ms. Levine does not currently use solar energy and did not testify that she has any plans to install solar panels in the future. Ms. Levine did not produce a shadow study or otherwise introduce evidence from an expert witness that the Project would affect her theoretical use of solar energy. Ms. Levine did testify, however, that the towering 60-foot Tulip Tree provides extensive shade on her property. Furthermore, concerns about shadow impacts were provided in the public comments and considered by SDCI when it issued the Decision.[39] Even assuming that the Project would affect the use of solar energy on Ms. Levine's property, which she failed to demonstrate that it would, a minor error in the SEPA Checklist is not fatal to the Decision because SDCI received public comments expressing concerns about shadow impacts. Furthermore, SDCI was aware of the

[39] Ex. 4, pg. 3.

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scope of the Project and any potential impacts to the adjoining neighbors' potential use of solar energy.

13. There are no wetlands or surface waters in the immediate vicinity of the Project.

SEPA Checklist item 3(a)(1) asks if there is "any surface water on or in the immediate vicinity of the site."[40] Mr. Rips testified that "immediate vicinity" does not refer to any specific distance. Mr. Bigelow testified that he walked the Premises and the immediate area and did not see any surface water. SEPA Checklist item 3(a)(2) asks if there will be any work within 200 feet of any surface water.[41] As discussed above in Section B(4), the distance from the northeast corner of the Premises to the nearest edge of the nearest wetland is 211.2 feet. Thus, the SEPA Checklist is accurate.

14. The SEPA Checklist and PanGeo report accurately identified the location of the nearby known landslide event.

The exact location of the prior landslide event was disclosed to SDCI. The PanGeo report[42] and the SEPA Checklist[43] both identify the *exact* address of the landslide. In addition, the SDCI GIS Web Map[44] reveals that the distance from the northeast corner of the Premises to the known slide event is .055 miles, or 290.4 feet.

15. The prior sinkholes in 4th Avenue West were disclosed to SDCI in the public comments.

Ms. Levine alleges that there were previously sinkholes in 4th Avenue West near the Premises. The appellants acknowledge that the damage to the street that was allegedly caused by an aquifer was repaired long before the SEPA Checklist was submitted to SDCI. Because the sinkhole had been repaired, there was nothing to disclose to SDCI. Regardless,

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[40] Ex. 8, pg. 7.
[41] *Id*.
[42] Ex. 30, pg. 4.
[43] Ex. 8, pg. 4.
[44] Ex. 32.

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there is no specific SEPA Checklist item where the applicant would be required to disclose a prior sinkhole in the street, or that it might have been caused by an aquifer. And, in any event, the sinkhole was disclosed to SDCI in the public comments.

16. No evidence was presented that the single-family home located at the Premises contained lead, asbestos, mold or other toxins.

The appellants failed to produce any evidence, beyond mere speculation, that the existing home on the Premises contained any toxic chemicals, including lead, asbestos or mold. In fact, Ms. Levine acknowledges that there has been "asbestos removal on the property."[45] Ms. Whitworth annotated the SEPA Checklist and stated that there was: "Potential for lead or asbestos exposure during demolition of existing structure." Thus, potential environmental contaminants were known to SDCI.

The Director's Decision acknowledges potential contaminants and specifically identifies the existing environmental regulations that govern the removal and disposal of those contaminants. For example, the Director's Decision states that if asbestos is identified on site that it must be removed in accordance with the Puget Sound Clean Air Agency ("PSCAA") and City requirements.[46] The Decision further provides that: "PSCAA regulations require control of fugitive dust to protect air quality."[47] Finally, the Decision confirms that if lead is identified on site that it is regulated by a wide-range of regulations, including "the Toxic Substances Control Act (TSCA), Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X), Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Resource Conservation and Recovery Act (RCRA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) among others."[48] Thus, each of Ms. Levine's concerns are addressed by the Director's

[45] *See* Levine Closing Arguments, 17:14.
[46] Ex. 4, pg. 5.
[47] *Id.*
[48] *Id.*

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Decision. And Ms. Levine fails to allege, much less prove, that the existing environmental regulations, of which there are many, are insufficient to mitigate the environmental impacts.

17. SEPA Checklist item A(8) is accurate.

Ms. Levine argues that the response to item A(8) is not accurate because it only identifies the Shoffner Tree Inventory and the PanGeo Report and that: "Environmental factors need to be disclosed and thoroughly evaluated by SDCI."[49] The SEPA Checklist item requests environmental information that has or will be prepared; it does not ask for disclosure of environmental factors. Regardless, Ms. Levine fails to allege what other environmental information should have been disclosed in response to that SEPA Checklist item.

18. Existing environmental regulations are sufficient to mitigate any impacts related to increased usage of the alley.

Ms. Levine argues that increased usage of the alley will result in an increase in dust. There was testimony that the existing alley is currently used by Ms. Levine, her tenants, and other neighbors that reside along the alley. There was no testimony that the current usage results in a harmful amount of dust. Ms. Levine claims that: "Mitigations are needed to compensate for dust dispersal."[50] She ignores the fact that mitigation is being required. SEPA Checklist item 14(d) states that: "The Alley behind the site will require improvements (paving). It is currently gravel and in relatively poor condition."[51] Ms. Levine fails to acknowledge this fact or identify what further mitigation should be required.

19. The location of the Project's fence is not before the Hearing Examiner.

Ms. Levine claims that if the fence is extended to the alley that there will be sightline issues for Ms. Levine and her tenants. Firstly, there was no evidence about the location of

[49] *See* Levine Closing Arguments, 18:5.
[50] *Id*., 18:18.
[51] Ex. 8, pg. 28.

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the fence. Second, Ms. Levine did not present any evidence demonstrating that if a fence was installed up to the alley that it would block the views of people traveling south on the alley. Third, there are existing City regulations that govern access and alley improvements that are sufficient to ensure that the alley is safe for travel. Ms. Levine has failed to demonstrate that they are not adequate.

20. The Project will not result in probable adverse environmental impacts related to light and glare.

Ms. Levine's complaints about shadows from the building and issues related to solar panels have been addressed above. Regarding Ms. Levine's concerns about light illuminating from the Project, Mr. Bigelow testified that the light would remain on the Premises and would not illuminate Ms. Levine's property. She failed to offer any evidence to the contrary.

21. The Project will not result in probable adverse environmental impacts related to aesthetics.

Ms. Levine complains that the Project will have roof decks, will block her unprotected views, and will have a sidewalk near the common property line. The Project is exactly the type of development that City Council envisioned when it rezoned this property to LR1 over 20 years ago. While Ms. Levine has voiced general complaints about this type of development, she has failed to demonstrate that (a) the Project does not comply with existing regulations, or that (b) existing regulations are insufficient to mitigate probable adverse environmental impacts.

22. Appeal issues related to fire protection were previously dismissed.

As an initial matter, Ms. Levine attempts to introduce new hearsay evidence concerning what the Fire Department told her about the Project. These statements should be stricken and disregarded by the Hearing Examiner. Next, Ms. Levine raises issues related to

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low water pressure that were previously dismissed by the Hearing Examiner.[52] Regardless, unsubstantiated allegations about low water pressure were addressed above in Section B(10). As discussed above, the appellants failed to introduce any evidence that there is not sufficient water flow in the abutting water system. And that allegation is rebutted by the SPU generated WAC.[53]

23. Appeal issues related to identification of the sanitary and sewer systems were previously dismissed. And Ms. Levine failed to present evidence that excavation would damage the existing side sewer.

Ms. Levine alleges that SDCI failed to identify the routing of the sanitary and sewer systems. These appeal issues were already dismissed by the Hearing Examiner.[54] Ms. Levine further alleges that excavation on the Premises could impact the existing side sewer. There was no evidence on the location of the side sewer, much less that excavation would damage the side sewer, which she admits would be a "marginal" impact.[55]

24. The Hearing Examiner has already ruled, both in his preliminary order and final oral ruling at the hearing, that compliance with SMC Chapter 25.11 – the Tree Protection Ordinance – is not appealable as part of the Director's Decision.

This issue has been briefed at length. For the sake of brevity, the applicant relies on its prior arguments in support of its position that compliance with SMC Chapter 25.11 may not be appealed from the DNS.

II. CONCLUSION

The appellants face an extremely high burden to prove that the Director's Decision is clearly erroneous. They failed to meet this burden. The Project is exactly the type of development that City Council envisioned when it rezoned the Premises to LR1 over 20 years ago. The appellants failed to demonstrate that there were any environmental impacts

[52] *See* Levine appeal issues 15(a), 15(b) and 15(c).
[53] Ex. 58.
[54] *See* Levine appeal issue 16(a).
[55] See Levine Closing Arguments, 21:28.

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that were not disclosed to or considered by SDCI. They equally failed to prove that there are probable significant environmental impacts *and* that existing city, state and federal environmental regulations are insufficient to mitigate those impacts. The Hearing Examiner should affirm the Director's Decision and dismiss the appeals.

Respectfully submitted this 19th day of August, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 19, 2019 the foregoing document was sent for delivery on the following party in the manner indicated:

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