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BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by
SAVE THE MARKET ENTRANCE
of Decisions Re Land Use Application for 103
Pike Street, Project 3028428-LU

Hearing Examiner File:
MUP-20-003

**APPLICANT’S AND CITY’S JOINT
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT**

In Re: Appeal by
**THE NEWMARK BUILDING OWNERS
ASSOCIATION**
of The City of Seattle Department of
Construction and Inspections Land Use Decision
and SEPA Determination of Non-Significance
for Application No. 3028428-LU

Hearing Examiner File:
MUP-20-004

I. INTRODUCTION

In its motion for summary judgment (“Motion”), Appellant Save The Market Entrance (“STME”) fails to demonstrate that there is no genuine issue of material fact. STME’s argument is based solely on the fact that the Hahn Building has been designated. But landmark designation, by itself, has no effect on the Project. The decisions that will ultimately determine what can be done to the building have yet to be made. The City Council (“Council”) must still

1 make a decision about controls and incentives. Controls may not be placed on the Hahn
2 Building; if they are, they may affect only limited portions of the building façade, or they may be
3 more extensive. If controls are imposed, the Landmarks Preservation Board (“Board”) then must
4 decide whether to grant a Certificate of Approval for alterations to controlled features. The
5 Board may allow alteration of the building so that the Project may proceed as designed, may
6 approve the Project with only minor modifications to the design approved in the existing Master
7 Use Permit (“MUP”) or may require more extensive changes. No one can predict these future
8 decisions with certainty. There is a genuine issue of material fact as to what effect, if any, the
9 landmark process may ultimately have on the project (“Project”) subject to appeal.
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11
12 STME also fails to establish that it is entitled to judgment as a matter of law. STME
13 asserts that the landmark designation of the Hahn Building alone requires withdrawal of the
14 MUP for the Project. But STME provides no authority for the proposition that the mere
15 designation of a building as a landmark—without any accompanying controls and prior to any
16 decision on a Certificate of Approval—has any effect whatsoever on a previously issued MUP.
17 To the contrary, the opposite is true. The MUP, including the design review decision and State
18 Environmental Policy Act (“SEPA”) mitigated determination of nonsignificance (“MDNS”),
19 were properly issued and speculation about a series of future regulatory actions that may—or
20 may not—require unspecified changes to the Project has no legal effect.
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23 STME also asserts the MDNS must be withdrawn because designation of the Hahn
24 Building as a landmark is a change to the Project or significant new information indicating the
25 Project’s significant impacts to historic resources. Yet, the Project has not changed. The
26 designation is also not significant new information indicating significant adverse impacts to
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1 historic resources. Instead, the ultimate outcome of the landmark process is unknown. Summary
2 judgment based on speculation about what may happen is improper. Further, under the City’s
3 SEPA Overview Policy, the landmark process is presumed to provide adequate mitigation for
4 impacts to historic resources; it does not create impacts.
5

6 Finally, STME argues the MDNS was based on inadequate information because it did not
7 state that the Hahn Building was nominated as a landmark three weeks before the MUP was
8 issued. Yet, the nomination does not compel a result. Nomination initiates the landmarks
9 process, which is still ongoing, and provides mitigation for impacts to historic resources. STME
10 fails to meet its burden to show the Project will have significant adverse impacts and the
11 Examiner must reject its claim.
12

13 STME has failed to meet its burden to show there is no genuine issue of material fact and
14 it is entitled to judgment as a matter of law. The Applicant Jodi Patterson-O’Hare (“Applicant”)¹
15 and Respondent City of Seattle (“City”) jointly request that the Examiner deny STME’s Motion.
16

17 **II. AUTHORITY**

18 **A. STME has the burden to show there is no genuine issue of material fact and it is 19 entitled to judgment as a matter of law.**

20 Summary judgment “can be granted only if the pleadings, affidavits, depositions and
21 admissions on file demonstrate that there is no genuine issue of material fact and that the moving
22 party is entitled to judgment as a matter of law. [Citation omitted.] *Dombrosky v. Farmers Ins.
23 Co. of Washington*, 84 W. App. 245, 253, 928 P.2d 1127 (1996); *see also* CR 56.
24

25 “One who moves for summary judgment . . . must prove by *uncontroverted facts* that no
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27 ¹ Ms. Patterson-O’Hare is an agent of Marketview Place Associates, LLC, the property owner and real party in
28 interest in this appeal.

1 genuine issue of material fact exists.” *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 22, 586
2 P.2d 860 (1978) (emphasis in original). “Once the moving party has submitted adequate
3 affidavits, the burden shifts to the nonmoving party to set forth specific facts that sufficiently
4 rebut the moving party’s contentions and disclose the existence of a material issue of fact.
5 [Citation omitted.]” *Dombrosky, supra*, 84 Wn. App. at 253.
6

7 On the other hand, “if the moving party has failed in its burden to establish entitlement to
8 judgment as a matter of law, summary judgment is denied, even if the nonmovant has not
9 submitted evidence to the contrary.” *Hiatt v. Walker Chevrolet Co.*, 64 Wn. App. 95, 98, 822
10 P.2d 1235 (1992).
11

12 “The court must consider all facts submitted and all reasonable inferences from them in
13 the light most favorable to the nonmoving party. [Citation omitted.] * * * The court should
14 grant the motion only if, from all the evidence, reasonable persons could reach but one
15 conclusion. [Citation omitted.]” *Dombrosky, supra*, 84 Wn. App. 245.
16

17 STME has failed to meet its burden. STME offers only speculation about future
18 regulatory decisions, which is insufficient to meet its burden to show no genuine issue of
19 material fact, and failed to show it is entitled to judgment as a matter of law.

20 **B. STME fails to show it is entitled to summary judgment on its claim that the MUP**
21 **must be withdrawn and reassessed after the landmarks process is complete.**

22 STME asserts that the MUP must be withdrawn and reassessed after the entire landmarks
23 process plays out. Motion, pp. 9-12. Yet the outcome of the landmarks process is uncertain as
24 STME itself acknowledges. In addition, STME provides no authority to support its assertion that
25 the designation of a landmark invalidates previously issued MUP decisions. STME fails to show
26 there is no genuine issue of material fact or that it is entitled to judgment as a matter of law.
27

1 **1. There are genuine issues of material fact regarding the outcome of the**
2 **landmarks process.**

3 Once a structure is designated as a landmark by the Board, the next step is for Board staff
4 to engage with the owner regarding the negotiation of controls and incentives to the structure.
5 Seattle Municipal Code (“City Code” or “SMC”) 25.12.490. “Controls” are defined as “specific
6 restrictions as may be imposed by a designating ordinance, upon the alteration or the making of
7 significant changes of specific features or characteristics of a landmark site or landmark that are
8 designated for preservation by such designating ordinance.” SMC 25.12.090. Controls are
9 specifically negotiated for each landmark based on its unique considerations and designated
10 features. Declaration of Sarah Sodt (“Sodt Declaration”), ¶5. A Certificate of Approval by the
11 Board is required before changes to a controlled feature may be approved. SMC 25.12.670.
12

13 If the Board staff and owner reach a written agreement about the scope of controls and
14 incentives, the Board staff submits the agreement to the Board for approval. SMC 25.12.500. If
15 the Board approves the agreement, the controls and incentives agreement is transmitted to
16 Council for final action to designate the site or structure as a landmark by ordinance. SMC
17 25.12.510.
18

19 Controls (or any other application of the landmark process) may not “deprive any owner
20 of a site, improvement or object of a reasonable economic use of such site, improvement or
21 object.” SMC 25.12.580; *see also* SMC 25.12.590. This requirement may result in approval of a
22 “no controls” agreement which allows the demolition of a structure without the need for
23 Certificate of Approval. “No controls” agreements have been approved on multiple prior
24 occasions. Sodt Declaration, ¶15.
25

26 If the Board staff and owner cannot reach agreement on controls and incentives, or the
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1 Board disapproves the agreement reached by the Board staff and owner, the Board files its own
2 recommendations on controls and incentives with the Examiner. SCM 25.12.520. In addition,
3 the owner or any interested party may submit an objection to the Board’s recommendation on
4 controls and incentives to the Examiner. SMC 25.12.535. If no objections are filed, the Board
5 transmits its recommendation to the Council and the Examiner takes no action. If objections are
6 filed, the Examiner holds a hearing to make recommendations on the proposed controls and
7 incentives. SMC 25.12.540. The Examiner may not make any recommendations on controls
8 that would “prevent the owner from realizing a reasonable return on the site, improvement or
9 object.” SMC 25.12.570. The Hearing Examiner’s recommendations are transmitted to the
10 Council. SMC 25.12.610.

13 Upon transmitting the Hearing Examiner’s recommendation to the Council, there is a
14 further appeal opportunity before the Council. SMC 25.12.620. The Council’s decision must be
15 supported by the applicable law—including the protection of the owner’s reasonable economic
16 use of the site—and substantial evidence. SMC 25.12.630.C. The Council may: (a) affirm the
17 Hearing Examiner’s recommendations and adopt an ordinance implementing those controls and
18 incentives for the landmark; (b) modify the proposed controls and incentives and adopt an
19 ordinance implementing the modified controls and incentives provisions for the landmark; or (c)
20 reject the Board’s or Hearing Examiner’s recommendations on controls and incentives and adopt
21 an ordinance without controls and incentives. SMC 25.12.640. Under the final Council
22 scenario, demolishing a structure would be allowed without a Certificate of Approval. Sord
23 Declaration, ¶10.

26 On January 20, 2021, the Board designated the Hotel Elliott/Hahn Building at 103 Pike

1 Street in Seattle, Washington (“Hahn Building”) as a landmark by vote of 6 to 1. The Board’s
2 designation is limited to the exterior of the Hahn Building; no interior features were designated.
3 *Id.*, ¶10, Ex. A. On February 2, 2021, the City’s Acting Historic Preservation Officer sent a copy
4 of the Board’s designation report and request to participate in controls and incentives
5 negotiations to the Hahn Building’s owners. *Id.*, ¶11, Ex. B. On February 9, 2021, the Hahn
6 Building owners’ attorney confirmed the ownership’s intention to participate in the controls and
7 incentives negotiation. *Id.*, ¶12, Ex. C.

9 The Board staff and Hahn Building ownership will now proceed with negotiations on
10 potential controls and incentives for the Hahn Building. These negotiations are ongoing; it is
11 impossible to predict the outcome at this early stage. The potential outcomes vary. The Board
12 staff may agree with the Hahn Building owners’ contention that landmark designation deprives
13 ownership of reasonable economic use of the Hahn Building and propose “no controls” that
14 would allow for the demolition of the existing structure without any requirements for a
15 Certificate of Approval. Or the Board staff and ownership may agree on controls and incentives
16 that would require Certificate of Approvals for alterations of the existing exterior features of the
17 Hahn Building. It is impossible to predict how the Board may react to either of these potential
18 outcomes, and what, if any appeals to the Examiner or Council may arise. Each controls and
19 incentives negotiation is unique based on site specific conditions and factors. Given these facts,
20 it is speculative to predict outcomes of the Hahn Building controls and incentives negotiation,
21 and whether a Certificate of Approval will ultimately be required for demolishing the Hahn
22 Building. *Id.*, ¶13.

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26 There are two components to the MUP under review, design review and SEPA. If no
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1 controls are imposed, no modifications to the design review decision will be necessary. If
2 controls are imposed, then modification to the design may—or may not—be necessary,
3 depending on the scope of the controls and the alterations allowed by the Board through a
4 Certificate of Approval. If there are modifications to the design, they may be approved through a
5 minor MUP revision, which leaves the previously approved MUP in place with modifications, or
6 a major MUP revision may be needed. Thus, there are multiple scenarios under which no
7 modification to the design review decision, or only minor modifications, will be required. At
8 this time, it is impossible to know whether any modification to the design will be needed in the
9 future or the scope of any future modification, and any predictions about these uncertain future
10 events are speculative. Declaration of David Kelley (“Kelley Declaration”), ¶8-9. Whether
11 modifications to the SEPA decision at may be needed in the future, and the speculative nature of
12 that inquiry, are discussed in Section II.C of this brief.

15 STME’s statement that the Applicant “will ultimately be required to obtain a Certificate
16 of Approval” before making alterations to the Hahn Building (Motion, p. 2) is without support.
17 This will only be the case if controls are placed on the building, a future event that has yet to
18 occur. Indeed, STME acknowledges that multiple decisions remain to be made as part of the
19 landmark process. *Id.*, p. 10. STME also admits the outcome of those decisions is uncertain,
20 stating that the Applicant “may” be required to modify the Project, and that it is “possible” that
21 controls “could” require preservation of the entire exterior of the building, and that only “if these
22 controls are adopted” will the Applicant need to make substantial changes to the Project. *Id.*, p.
23 11. STME also acknowledges, “[w]e cannot know what the extent of modifications to the
24 current proposal will be until the entire landmark process . . . plays out.” *Id.* STME asserts the
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1 Project is “potentially moot or inapplicable.” *Id.* (emphasis added). *See also* Declaration of
2 Eugenia Woo, ¶6 (“I cannot predict exactly what those controls will ultimately be . . .”; “We
3 cannot know what the extent of modifications to the current proposal will be until the entire
4 landmark process . . . plays out.”).

5
6 Yet, the potential for something to occur in the future cannot be the basis for a motion for
7 summary judgment. Instead, the moving party must demonstrate through “uncontroverted facts”
8 that there is no genuine issue of material fact. *Duckworth, supra*, 91 Wn.2d 22. STME fails to
9 show there is no genuine issue of material fact.

10 **2. STME fails to establish it is entitled to judgment as a matter of law.**

11 STME asserts that the designation of the Hahn Building as a landmark requires
12 withdrawal of the MUP decision. Yet STME provides no authority that supports this novel
13 proposition.
14

15 First, STME asserts that “[s]ubmission of a complete application for a certificate of
16 Approval to the Board is required before the MUP application for the First and Pike Proposal
17 may be deemed complete.” Motion, pp. 10-11. STME cites SMC 25.12.670 and SMC
18 25.12.720, neither of which make this statement. *Id.* STME apparently intends to cite SMC
19 25.12.690, but this section does not support STME either. This section states:
20

21 If an application is made to the Seattle Department of Construction and
22 Inspections for a permit for an action which requires a certificate of approval,
23 the Director of the Seattle Department of Construction and Inspections shall
24 require the applicant to submit an application to the Board for a certificate of
25 approval. Submission of a complete application for a certificate of approval to
the Board shall be required before the permit application to the Seattle
Department of Construction and Inspections may be determined to be complete.

26 SMC 25.12.690.
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1 On its face, this section addresses the required process when a Seattle Department of
2 Construction and Inspections (“SDCI”) permit is sought for an action that requires a Certificate
3 of Approval at that time. In that case, the application for a Certificate of Approval must be
4 submitted before the SDCI permit is deemed complete. SMC 25.12.690 does not address the
5 situation before the Examiner in this case. Here, when the MUP application was submitted, no
6 Certificate of Approval was required. The notice of MUP application was issued on August 6,
7 2018. Kelley Declaration, Ex. A. Then, as today, it was unknown whether a Certificate of
8 Approval would ever be required for the Project.
9

10 Second, STME claims that “SDCI cannot issue any permits for the First and Pike
11 Proposal until the time has expired for acting upon the Certificate of Approval or a Certificate of
12 Approval has been issued.” Motion, p. 11. STME cites SMC 25.12.670 and SMC 25.12.720,
13 neither of which make this statement. *Id.* Again, STME apparently intends to cite SMC
14 25.12.690, but misreads the City Code. As previously discussed, this section applies when an
15 SDCI permit is sought for an action that requires a Certificate of Approval at that time. Here, the
16 Project does not require a Certificate of Approval and may never require one. Nothing in this
17 section requires SDCI to pause review of a MUP because the Project may—or may not—require
18 a Certificate of Approval in the future.
19

20 Also, STME is confusing the MUP decision with issuing the actual permit. Under SMC
21 23.76.020, SDCI issues notice of its MUP decision. Certain types of MUP decisions, including
22 the one here, are then subject to appeal to the Examiner. SMC 23.76.022. The MUP is approved
23 for issuance only after the Examiner appeal is resolved. SMC 23.76.028.C. So, even if STME
24 were correct that SDCI cannot issue permits for the Project until after a possible future
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1 Certificate of Approval is issued—which it is not—this still would not prevent the Examiner
2 appeal from moving forward. Instead, it would only preclude issuing the MUP following the
3 Examiner’s decision in this case.

4 Third, STME claims that the MUP must be withdrawn because the City Code requires
5 that appeals of MUPs and Certificates of Approval must be consolidated. Motion, p. 11. Again,
6 this claim fails. STME’s argument is based solely on SMC 25.12.740. This section discusses
7 appeals of Certificates of Approval. The Board’s decision on a Certificate of Approval may be
8 appealed to the Hearing Examiner. SMC 25.12.740.A. If such an appeal is filed, then:
9

10 B. When the proposed action that is the subject of the certificate of approval is
11 also the subject of one or more related permit applications under review by
12 the Seattle Department of Construction and Inspections, then the appellant
13 must also file notice of the appeal with the Seattle Department of
14 Construction and Inspections, and the appeal of the certificate of approval
15 shall not be heard until all of the time periods for filing administrative
16 appeals on the other permits have expired . . . If one or more appeals are
17 filed regarding the other permits, then the appeal of the certificate of
18 approval shall be consolidated with them and shall be heard according to the
19 same timelines established for the other appeals . . .

20 C. The applicant for the certificate of approval may elect to have the appeal
21 proceed immediately rather than postponed for consolidation with appeals of
22 related permit decisions, if the applicant agrees in writing that the Seattle
23 Department of Construction and Inspections may suspend its review of the
24 related permits, and that the time period for review of those permits shall be
25 suspended until the Hearing Examiner issues a decision on the appeal of the
26 certificate of approval.

27 SMC 25.12.740.B, C.

28 As is evident from the first line of subsection B, this section addresses the required
process when a Certificate of Approval and another permit action are under review
simultaneously. In that case, the appeals of the Certificate of Approval and the MUP must be
consolidated, with some exceptions. SMC 25.12.740 does not address the situation before the

1 Examiner in this case. Here, when the MUP application was submitted and when the MUP
2 decision was issued, no Certificate of Approval was required. Even today, it is impossible to
3 know whether a Certificate of Approval will be needed for the Project.

4 STME's argument is, essentially, that the MUP decision must be withdrawn so that a
5 hypothetical future appeal of a hypothetical future MUP decision can be consolidated with a
6 hypothetical future appeal of a hypothetical future Certificate of Approval. There is no support
7 in SMC 25.12.740 for this attempt to "claw back" the MUP decision to await a future regulatory
8 process that may never occur.

9
10 Even if the Examiner finds some merit to STME's claim that the MUP appeal for the
11 Project must be consolidated with any future hypothetical Certificate of Approval, this would not
12 require withdrawal of the MUP. Rather, the proper remedy would be to stay the pending MUP
13 appeal until after: (1) the City Council decides not to impose controls; or (2) the City Council
14 imposes controls and the Board issues a decision on a Certificate of Approval, and the time for
15 appeal passes, whichever is later. If no controls were imposed, or if no appeal of the
16 hypothetical future Certificate of Approval were filed, then the MUP appeal could proceed
17 independently. If the hypothetical future Certificate of Approval were appealed, then the MUP
18 appeal would be consolidated with that appeal at that time.

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21 In sum, none of the authority relied on by STME supports its arguments. STME fails to
22 show that it is entitled to judgment as a matter of law on its claim that the MUP decision must be
23 withdrawn. The Examiner must reject STME's claim.

24
25 **C. STME fails to show it is entitled to summary judgment on its claim the DNS must be**
26 **withdrawn due to substantial changes or significant new information.**

27 STME asserts that the MDNS must be withdrawn under SMC 25.05.340 because the

1 designation of the Hahn Building as a landmark is a substantial change to the Project so that it is
2 likely to have significant adverse impacts on historic resources and significant new information
3 indicating the Project’s significant impacts to historic resources. Motion, pp. 12-14. STME fails
4 to demonstrate no genuine issue of material fact or that it is entitled to judgment as a matter of
5 law.
6

7 First, there have been no changes to the Project. STME’s argument appears to be that
8 there might be future changes to the Project, if controls are imposed and if the Board does not
9 grant a Certificate of Approval allowing the Project to move forward, either as proposed or with
10 minor modifications that do not require a new MUP. But these potential future outcomes are
11 hypothetical and speculative at this time. Currently, the Project remains as proposed, with no
12 changes. STME cannot obtain summary judgment based on speculation about what might—or
13 might not—happen in the future.
14

15 Second, the designation of the Hahn Building, by itself, does not constitute significant
16 new information indicating the Project’s probable significant adverse environmental impact.
17 STME’s argument is based on speculation about what might or might not happen in the future.
18 STME states that the owner “may” be required to modify or withdraw the Project in the future.
19 Motion, p. 13. STME also states that the Project may move forward as proposed. *Id.* STME
20 does not acknowledge the possibility that the Project may move forward with only minor
21 modifications following issuance of a Certificate of Occupancy, in which case the existing MUP
22 would remain in place with those modifications, but this is also one possible future outcome.
23 Kelley Declaration, ¶9. This is not new information—these are guesses about what might or
24 might not happen in the future. Guessing about future possibilities cannot support a motion for
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1 summary judgment where the moving party must show no genuine issue of material fact. The
2 Examiner must reject STME’s claim on this basis alone.

3 STME also asserts that designating the Hahn Building as a landmark “means that the
4 First and Pike Proposal is likely to have significant adverse impacts to historic resources.”
5 Motion, p. 13. STME argues that if the Applicant is allowed to proceed with the Project, this
6 will constitute a significant adverse impact since it will allow demolition of a landmark. *Id.*
7 STME also argues that, if the Project is allowed to move forward before the controls and
8 incentives process is complete, that would violate SMC Chapter 25.12. *Id.*

9
10 As previously discussed, there are a wide range of potential outcomes that may result
11 from the landmarks process, from demolishing the Hahn Building to a minor modification to the
12 Project to retain some aspect of the façade, to a more significant modification of the Project.
13 These outcomes are all uncertain and speculative. The possibility that one outcome—the total
14 demolition of the building—might or might not occur in the future does not support the granting
15 of summary judgment.
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17
18 Also, as a matter of law, compliance with the landmarks regulations is not creating a new
19 significant adverse impact—to the contrary, compliance with the landmarks process qualifies as
20 mitigation. Under the City’s SEPA Overview Policy, “[m]any environmental concerns have
21 been incorporated in the City’s codes and development regulations. Where City regulations have
22 been adopted to address an environmental impact, it shall be presumed that such regulations are
23 adequate to achieve sufficient mitigation,” subject to limited exceptions that are inapplicable
24 here.¹ SMC 25.05.665.D. The City’s substantive SEPA policy on historic preservation, SMC
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26
27 ¹ STME has not argued that any of these exceptions apply, and cannot do so for the first time on reply.

1 25.05.675.H, first sets out the policy background relating to historic preservation. This section
2 then states, “[f]or projects involving structures or sites which have been designated as historic
3 landmarks, compliance with Chapter 25.12 shall constitute compliance with the policy set forth”
4 previously. Under these sections, the fact that the Hahn Building has been designated a
5 landmark and will go through the landmarks process set out in SMC Chapter 25.12 does not
6 mean that a new impact is created; instead it means that the process designed to provide
7 mitigation for impacts to historic resources will occur.
8

9 In addition, despite STME’s unsupported allegation to the contrary, there is no legal
10 possibility that the building will be demolished before the conclusion of the landmarks process.
11 SMC 25.12.670 prohibits “alterations of significant changes” to “specific features or
12 characteristics” of a building that are “identified in the approved nomination, or the Board report
13 on designation, or subject to controls in a controls and incentives agreement or a designating
14 ordinance, whichever is most recent.” Essentially, this section prohibits physical construction
15 activity until after the landmarks process is complete. STME’s allegation that the building may
16 be prematurely demolished if the MUP appeal proceeds is contrary to the Code.
17
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19 STME fails to demonstrate that there is no genuine issue of material fact or that it is
20 entitled to judgment as a matter of law. The Examiner must deny STME’s request for summary
21 judgment on its claim that the DNS must be withdrawn.
22

23 **D. STME fails to show it is entitled to summary judgment on its claim that the MDNS
24 was based on “inadequate information.”**

25 STME claims the MDNS should be reversed and remanded to SDCI because it was based
26 on inadequate information. Motion, pp. 14-17. Specifically, STME claims the MDNS was not
27 based on sufficient information because it accurately stated the Board declined to designate the
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1 Hahn Building on two prior occasions but did not state that the Hahn Building was nominated for
2 landmark status three weeks before the MUP was issued. Motion, pp. 16-17. STME fails to
3 demonstrate no genuine issue of material fact or that it is entitled to judgment as a matter of law.

4 The Examiner must give substantial weight to SDCI's decision to issue an MDNS. RCW
5 43.21C.090; SMC 23.76.022.C.7. This requirement mandates application of the "clearly
6 erroneous" standard. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 19, 31 P.3d 703 (2001).
7 Under the clearly erroneous standard, reviewing bodies do not substitute their judgments for
8 those of the agency and may invalidate the decision only when left with the definite and firm
9 conviction that a mistake has been committed. *Id.* at 13.

10 STME relies on the principle that an MDNS "must be based on information reasonably
11 sufficient to evaluate the environmental impact of a proposal." Motion, p. 15. But,
12 notwithstanding this requirement, the burden is on the appellant to produce affirmative "facts or
13 evidence in the record demonstrating that the project as mitigated will cause significant adverse
14 environmental impacts." *Moss*, 109 Wn. App. at 23-24. Mere complaints, without the
15 production of affirmative evidence proving significant adverse impact, are insufficient to satisfy
16 an appellant's burden of proof under SEPA. *Boehm v. City of Vancouver*, 111 Wn. App. 711,
17 719-720, 47 P.3d 137 (2002). Here, STME has not demonstrated that there will be significant
18 adverse impacts to a historic resource. Instead, STME has shown only that when the MDNS was
19 issued the Hahn Building had been nominated, the landmarks process is still ongoing and the
20 process may have multiple outcomes. Compliance with the landmarks process is presumed
21 adequate mitigation for impacts to historic resources. SMC 25.05.665.D; SMC 25.05.675.H.
22 The fact that the building was nominated before the MUP was issued is insufficient to meet
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1 STME’s burden of proof to show significant adverse impacts.

2 STME also asserts that SDCI should have waited until the landmark process was
3 complete to issue the MDNS. Motion, pp. 16-17. STME provides no authority for this
4 proposition. As previously discussed, there is no Code provision requiring SDCI to put a MUP
5 application “on hold” pending the outcome of the landmarking process. *See also Lodis v. Corbis*
6 *Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2012) (“courts may assume that where no
7 authority is cited, counsel has found none after diligent search); *State v. McNeair*, 88 Wn. App.
8 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the
9 argument lacks merit).
10

11 Finally, STME asserts that the alleged “inadequate” information had “real consequences”
12 because “incomplete” information could undermine the public comment process and “complete”
13 information could lead to Project changes or mitigation. Motion, p. 17. Yet, SDCI issued public
14 notice and solicited comment on August 6, 2018, well before the nomination occurred. Kelley
15 Declaration, Ex. A. There was nothing incomplete about the notice when it was issued. With
16 regard to project changes and mitigation, none were made or warranted as the result of the fact
17 that the building was nominated. The outcome of the landmarks process is uncertain and
18 speculative now and that was even more true when the MUP was issued. SDCI properly issued
19 the MUP and relied on the landmarks process itself to mitigate impacts, as provided by the City’s
20 substantive SEPA policies. SMC 25.05.665.D; SMC 25.05.675.H.
21

22 STME fails to demonstrate that there is no genuine issue of material fact or that it is
23 entitled to judgment as a matter of law. The Examiner must deny STME’s request for summary
24 judgment on its claim that the MDNS was based on inadequate information.
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1 **III. CONCLUSION**

2 STME has failed to meet its burden to show there is no genuine issue of material fact or
3 that it is entitled to judgment as a matter of law. The Examiner must deny STME’s motion for
4 summary judgment. In the alternative, if the Examiner finds any merit to STME’s claim that this
5 appeal should await conclusion of the landmarks process, then the Applicant and City request the
6 Examiner stay this appeal until the process is complete.
7

8 DATED this 17th day of February, 2021.

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