BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal by SAVE THE MARKET ENTRANCE.ORG and THE NEWMARK BUILDING OWNERS ASSOCIATION From a Decision of the Director, Seattle Department of Construction and Inspections	MUP 20-003, 004 (S, SE, V, W) & S-20-002 Department Reference 3028428-LU SAVE THE MARKET ENTRANCE'S REPLY ON MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Respondents (collectively referred to in this brief as "the Applicant") have failed to provide any credible argument in support of upholding SDCI's DNS and design review decisions now that the Hahn Building has been designated as an historic landmark.

The findings in SDCI's MUP decision regarding the landmark status of the Hahn Building are incorrect. There's no dispute about that – everyone agrees that the finding of fact that the Hahn Building is not a landmark is no longer correct. SDCI's review of the First and Pike Proposal's impacts on historic resources and SDCI's design review were, therefore, based on an incorrect assumption that the Hahn Building is not a designated landmark. Because they are based on what

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we now know is incorrect information, the conclusions that were made by SDCI in that MUP decision should not and cannot stand as legally binding conclusions.

SDCI's current MUP decisions will obviously be erroneous if the Project is ultimately modified as a result of the landmark review process, but they are also erroneous even if the First and Pike Proposal stays exactly the same as it is now. As it stands, the current DNS does not assess the impacts of destroying an historic landmark – which is what will occur if the First and Pike Proposal goes forward unchanged. The design review decision does not take the landmark status of the Hahn Building into consideration. The Applicant's suggestion that the Examiner should uphold these substantive, binding legal decisions that are literally based on incorrect and incomplete findings and conclusions should be rejected.

II. THE MATERIAL FACTS ARE UNDISPUTED

The Applicant and SDCI failed to show that there is a dispute of material facts on the legal issues presented. STME presented three different legal issues in its Motion for Summary Judgment: (1) Whether the DNS and Design Review approvals must be withdrawn and reassessed after allowing the landmarks process to play out; (2) Whether the DNS must be withdrawn because the landmark status of the Hahn Building is significant new information and/or a substantial change to the Project; and (3) whether the DNS should be reversed and remanded to SDCI because it was based on inadequate and incomplete information and analysis. While the material facts that are relevant to each of those individual legal issues differ slightly in a few ways, there is so much overlap that we address it here once at the outset instead of repeating the undisputed three separate times below.

The material facts are not in dispute. Everyone agrees that Marketview Place Associates is proposing to demolish the historic Hahn Building and build a 14-story hotel in its place. Declaration

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of Claudia M. Newman (Feb. 3, 2021), Ex. A. SDCI issued its DNS and Design Review approvals for the Project on January 2, 2020 and there is no dispute that, in the SEPA analysis of project impacts to historic resources, the responsible official stated that the Hahn Building on the project site is not designated as an existing historical landmark and the Project is consistent with SMC ch. 25.12. Newman Dec., Ex. A at 42, 43. It is also undisputed that the Design Review decisions, which require existing landmarks to be considered under certain design guidelines, were issued based on the premise that the Hahn Building was not a designated landmark. *Id* at 2-37; *See eg.* DG A2 and B1.

There is no dispute that the Landmarks Preservation Board approved the designation of the Hahn Building as a landmark after the DNS was issued. *Cf.* STME Motion at 4-8 *with* Resp Br. at 5-9. And the parties agree that Marketview Place Associates must go through the review process set forth in SMC 25.12 before it can proceed with the First and Pike Proposal. *Id.* The parties also agree that, at this early stage in the process, it is impossible to predict what will happen to the First and Pike Proposal. *Cf* STME Motion at 11 *with* Resp Br. at 7. There may be major revisions, minor revisions, or no revisions at all. Indeed, that is exactly the point being made by STME and one of several reasons why the SDCI decisions must be withdrawn and reassessed later.

The Applicant provides some additional factual detail about the potential outcome of the landmark process above and beyond what STME originally described in its motion, but STME doesn't dispute what they've added to the description of the process. In our motion, STME stated that Marketview Place Associates "will ultimately" be required to obtain a Certificate of Approval before it can make any alterations or changes to the Hahn Building. *See* Motion at 2. The Applicant took issue with this statement, claiming that it was "without support." Resp. Br. at 8. Considering that the code requires a Certificate of Approval before alterations can be made to a landmark, our

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statement was not "without support," but that's beside the point because it doesn't matter either way. SMC 25.12.080; SMC 25.12.670-835. Apparently, according to the testimony of Sarah Sodt, there have been cases in the past where the City has not required a Certificate of Approval because the process resulted in a "no controls" agreement. Declaration of Sarah Sodt (Feb. 16, 2021), ¶ 8. This was, presumably, because in those cases, the property owner demonstrated that applying controls would deprive the property owner of reasonable economic use of its property per SMC 25.12.590. For purposes of this summary judgment motion, we do not dispute Ms. Sodt's testimony. And, as explained below, this doesn't affect the outcome of our legal argument.

The Applicant's argument that there is a dispute of material facts is belied by statements in its own brief. Not only does the Applicant's Response Brief echo the same material facts that were presented in STME's brief, but it wraps up the discussion of facts with the assertion that STME "acknowledges" and "admits" the same facts. Resp. Br. at 8-9. That's exactly right – STME admits the same facts because the material facts on this issue are not in dispute.

Ultimately, there is no dispute that SDCI's MUP decision (1) contains demonstrably incorrect findings and conclusions about the landmark status of the Hahn Building (2) issues final legally binding conclusions on a development proposal despite that it is technically not in compliance with SMC 25.12; (3) issues final legally binding conclusions on a development proposal that may have to be significantly modified following review under SMC 25.12 if the City applies controls to preserve the Hahn Building and (4) reviews the historic, aesthetic, and other environmental impacts and design guideline consistency based on an incorrect finding that the Hahn Building is not a designated landmark.

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III. LEGAL AUTHORITY

A. The DNS and Design Review Approvals Must be Withdrawn and Reassessed After Allowing the Landmark Preservation Process to Play Out

SDCI's DNS and Design Review approvals for the First and Pike Proposal must be withdrawn in light of the new landmark designation of the Hahn Building. The Applicant's attempts to convince the Examiner to uphold SDCI's decisions and move forward with the hearing now are unconvincing.

First, the provisions in ch. 25.12 SMC require that the Landmark Preservation review process occur *before* MUP decisions (DNS and Design Review) are issued by SDCI. *See* SMC 25.12.690. This makes practical sense considering that SDCI should not and cannot conduct SEPA and design review of a development proposal before knowing what the final development proposal will actually be. No one can know what the final development will be until they know what the controls and incentives are for the designated landmark. While this case is unusual because the Hahn Building was designated as a landmark after the MUP Application was filed, that does not excuse the Applicant and the City from following the code requirements now that the building has been designated as a landmark. The Applicant and the City cannot ignore code requirements that apply to the development of historic landmarks simply because the landmark designation occurred after the Master Use Permit Application was submitted to SDCI.

The Applicant argues that SMC 25.12.690 does not apply here because in this case, no Certificate of Approval was required when the MUP application was submitted. Resp. Br. at 10. In defiance of the obvious intent of the code provisions (which is to ensure that the controls and incentives are determined before SEPA and design review), the Applicant argues, with no basis, that SMC 25.12.690 applies only when an SDCI permit application is filed for an action that

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requires a Certificate of Approval "at the time" that the application is filed. But SMC 25.12.690 does not say any such thing. SMC 25.12.690 states simply that "if an application is made to [SDCI] for a permit for an action which requires a certificate of approval, [SDCI] shall require the applicant to submit an application to the Board for a certificate of approval." This requirement is a mandatory requirement regardless of timing. If a development project requires a Certificate of Approval, then the application for the Certificate of Approval to remove a landmark must be filed when a MUP application for a development involving that same landmark is filed. That same provision states that submission of a complete application for a Certificate of Approval to the Board is required before the MUP application before the First and Pike proposal may be deemed complete. SMC 25.12.690.[1]

The Applicant repeatedly argues that this provision doesn't apply because the Project may not ultimately require a Certificate of Approval in the future. But what really matters here is the fact that the Project may require a Certificate of Approval in the future. If the Project does require a Certificate of Approval, then SDCI "shall" require Marketview Place to submit an application to the Board for a Certificate of Approval in conjunction with its MUP Application. SMC 25.12.690. The Applicant and SDCI cannot be excused from an explicit and clear code requirement simply because there's a chance it may not happen in the future. The only option is to place the existing MUP Application on hold until we know, one way or the other, whether a Certificate of Approval will be required.

The Applicant argues that STME is confusing the MUP decision with issuing the actual Master Use Permit. Resp. Br. at 10. They argue that if SDCI is not allowed to issue permits for the

[1] The Applicant's assumption that STME intended to cite SMC 25.12.690 to support this claim is correct. *See* Resp. Br. at 10.

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Project until after a possible future Certificate of Approval is issued, this still would not prevent the Examiner appeal from moving forward. This is incorrect. SMC 25.12.690 dictates what is required to occur when the MUP "application" is filed with SDCI, not when the Master Use Permit is issued. Marketview Place submitted its MUP Application for the First and Pike Proposal on June 8, 2018. Newman Dec., Ex. A. SMC 25.12.690 is, therefore, triggered if/when the Project requires a Certificate of Approval. Furthermore, SEPA and Design Review decisions are components of a Master Use Permit and it, therefore, makes no sense to pretend that the MUP itself (which is ministerially issued only after hearing examiner appeals conclude) is the "permit decision" that matters here. SMC 23.76.006.

The Applicant's technical arguments about SMC 25.12.690 make no sense when you consider the obvious legislative intent of this provision. The authors of those provisions had to have been well aware that it is impossible to predict how the outcome of the Landmarks Preservation process can affect a specific development proposal. The intent can be none other than ensuring that the development proposal is designed in a way that implements any controls that may be placed on the property to preserve the landmark before SDCI reviews a development proposal. The authors of SMC 25.12.690 clearly intended that the controls and incentives be established before MUP decisions are reviewed and issued by SDCI.

Second, the code requires that hearing examiner MUP decision appeals be consolidated with appeals of a Certificate of Approval. SMC 25.12.740. On this, the Applicant argues, again, that this provision doesn't apply because no Certificate of Approval was required when the MUP application was submitted and when the MUP decision was issued. And, they argue, again, that it doesn't apply because we don't know now whether a Certificate of Approval will be required for the Project in the future.

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The Applicant's interpretation of SMC 25.12.740(B) is incorrect. The plain language of that provision does not provide the exception that they've conjured up. That provision states that "when the proposed action that is the subject of the certificate of approval is also the subject of one or more related permit actions under review by [SDCI], then … the appeal of the certificate of approval shall not be heard until all of the time periods for filing administrative appeals on the other permits have expired." The provision states: "If one of more appeals are filed regarding other permits, then the appeal of the certificate of approval shall be consolidated with them and shall be heard according to the same timelines established for the other appeals." This requirement for consolidated appeals is not discretionary – it is a mandatory requirement. If a development project requires a Certificate of Approval, then the appeals of the DNS and Design Review must be consolidated with the appeals of the Certificate of Approval.

The applicant's reading of this provision makes no sense. Obviously, the intent of that provision is to require only one hearing examiner open record appeal on a project that combines appeals of all of the different administrative decisions together in the interest of judicial economy. If the Examiner adopts the Applicant's interpretation, we will go through an eight-day hearing now (for a project that may become moot after the landmarks process is concluded) and then have to go through another separate hearing some day in the future on the same project if the Certificate of Approval is required and appealed. That's clearly inconsistent with the legislative intent of SMC 25.12.740.

The fact that a Certificate of Approval may not be appealed in the future is not a valid argument for moving forward with the current MUP decision appeal now despite the consolidation requirement. When the code requires that Hearing Examiner appeals of different City decisions be consolidated, the hearing cannot be held on one decision until after the appeal deadline has passed

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for all of the decisions that must be heard together. Otherwise, that requirement for consolidation would be automatically violated if a future Certificate of Approval is appealed.

Now that SMC 25.12.690 and SMC 25.12.740 apply to the Project, SDCI must withdraw its existing SEPA and Design Review decisions and place the MUP Application on hold until it is established, one way or the other, whether a Certificate of Approval will be required and until the deadline for an appeal of that Certificate of Approval has passed.

The Applicant's characterization of STME's argument as being "essentially that a MUP decision must be withdrawn so that a hypothetical future appeal of a hypothetical future MUP decision can be consolidated with a hypothetical future appeal of a hypothetical future Certificate of Approval" misrepresents and misunderstands what is happening here. *See* Resp. Br. at 12. While the outcome of the Landmark Preservation process is not known at this time, the fact that Marketview Place Associates must go through the Landmarks Preservation process set forth in SMC 25.12 before it can proceed with the First and Pike Proposal is no hypothetical. The fact that the Hahn Building is now a designated landmark that must go through that process is not speculation. They have to go through that process. And there will be a defined end to that process. We will have answers and a final development proposal that is presumably in compliance with SMC 25.12. There is a potential that, as a result of that process, the City will apply controls to protect the Hahn Building. There is a potential that if the controls do not adequately protect the Hahn Building, STME or other interested persons will file an appeal of a Certificate of Approval or a failure to require a Certificate of Approval.

SDCI cannot review the Project's consistency with design guidelines and the significance of adverse environmental impacts (especially aesthetic and historic impacts) before it knows what the final development proposal will actually be. To add to that, it makes no sense to proceed with

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an eight-day hearing on a development proposal that may have to be significantly modified because it is not allowed by the City Council following the landmarks process.

B. STME Is Entitled to Summary Judgment on Its Claim that the DNS Must Be Withdrawn Due to Substantial Changes or Significant New Information

As STME demonstrated in our Motion for Summary Judgment, SEPA rules require that the DNS for the First and Pike Proposal be withdrawn because there are substantial changes to the proposal so that the proposal is likely to have significant adverse historic resource impacts. SMC 25.05.340(C)(1)(a).

The Applicant argues that there have been no changes to the First and Pike Proposal. Apparently, the Applicant believes that changes to a proposal that trigger this requirement are limited solely to changes to the proposed building design. But the Project also includes a proposal to completely destroy the Hahn Building. When the DNS was issued, the First and Pike Proposal proposed to destroy an existing building that was not a formally designated landmark. Now, the Project proposes to destroy a designated historic landmark in a manner that has not yet been reviewed for compliance with SMC 25.12. That is a substantial change to the proposal.

The fact that the provisions in SMC ch. 25.12 apply to the Hahn Building now is also a substantial change to the proposal. Those provisions did not apply to the Hahn Building when the DNS was issued. Now, they apply and the First and Pike Proposal is not yet in compliance with those requirements. Meanwhile, the current DNS claims that the First and Pike Proposal is consistent with SMC 25.12 on the erroneous grounds that the Hahn Building is not a designated landmark. This is a substantial change to the proposal and letting that erroneous DNS stand as the final legally binding threshold determination for the Project is insupportable.

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Even if these changes are not considered to be "substantial changes to the proposal," this change is undoubtedly "new information." SEPA rules require that a DNS be withdrawn when there is significant new information indicating the proposal's probable significant adverse environmental impacts. SMC 25.05.340(C)(1)(b). The Applicant argues that that the new information is just speculation on what might or might not happen in the future. The Applicant states: "This is not new information – these are guesses about what might or might not happen in the future." Resp. Br. at 13.

That is not correct. The "new information" is not "guesses about what will happen in the future," the "new information" is the fact that the Hahn Building is a designated landmark and the property owner must now go through the Landmarks Preservation process before the First and Pike Proposal can be approved. That fact that the Proposal now includes a proposal to completely destroy a designated landmark and has to go through a process that may result in major modifications to the Proposal is pretty much the epitome of "new information." This new information has direct implications to SDCI's SEPA analysis of probable significant adverse historic resource impacts of the proposal.

What the Applicant doesn't seem to understand is: the DNS needs to be withdrawn and reassessed because of this new information even if there are no changes made at all to the First and Pike Proposal following the landmarks process. The current DNS for the First and Pike Proposal was based on the finding that "the existing structure (Hahn Building) on the project site…is not designated as an existing historical landmark." Newman Dec., Ex. A at 42-43. SDCI also concluded that the First and Pike Proposal complied with the Landmarks Preservation requirements of SMC 25.12. As of now, this stands as the legally binding and final SEPA decision for the Project. Meanwhile, neither of those findings and conclusions are true anymore. The Hahn Building is a

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formally designated as a landmark. We have a seventy-seven (77) page report that was prepared by Northwest Vernacular, which contains a meticulous and detailed description of the historic setting of the Project site and a deeply researched and documented assessment of the historic context and significance of the Hahn Building. Newman Dec., Ex. D. We also now have a twenty-three (23) page long Report on Designation issued by the Landmarks Preservation Board, which contains considerable information about the historic context and setting of the Han Building. Newman Dec., Ex. B. When you compare Ex.'s B and D to the environmental checklist and the DNS assessment of historic impacts, it's plainly evident that, even if the First and Pike Proposal remains as is, the current DNS does not adequately assess the impacts to historic resources.

The Applicant argues that compliance with the landmark regulations "is not creating a new significant adverse impact" and, in fact, compliance with the landmarks process qualifies as mitigation of the impacts to historic resources. Resp. Br. at 14. First of all, STME is not arguing that the fact that it will "go through the landmarks process" itself will create a significant adverse impact to historic resources. It is the complete destruction of an historic landmark that may have a probable significant adverse impact to historic resources.

Second, the question of whether compliance with the landmarks process will ultimately mitigate the probable significant adverse historic impacts of this Project is not for lawyers writing a brief to determine. Notably, that statement was made with no citation and there is no evidence in the record to support that conclusion. That statement is basically a "threshold determination" and that is precisely what the SEPA responsible official has not yet decided, but must still decide. In fact, that's what we are seeking with this appeal. Under WAC 197-11-158, the SEPA responsible official must identify the historic resource impacts after reviewing the updated information and then determine whether those impacts have been mitigated under SMC 25.12 after the landmarks

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process has concluded. It is frankly remarkable that the Applicant would issue what amounts to a threshold determination in one sentence in a brief with no citation and without having had the City staff actually conduct a SEPA review of this very issue itself. There has been no analysis by SDCI to support the Applicant's claim in its brief that, in this case, compliance with SMC 25.12 adequately mitigates the probable significant adverse impacts of the First and Pike Proposal to the Hahn Building.

The fact that there is no legal possibility that the building will be demolished before the conclusion of the landmarks process is irrelevant to the issue presented. *See* Resp. Br. at 15. STME is challenging the SEPA assessment of what the impacts will be *when the building is demolished*. The fact that the demolition won't occur until later is always true in SEPA appeals – the focus is on the analysis of the impacts of doing something in the future. In sum, STME has demonstrated that it is entitled to judgment as a matter of law on this issue.

C. STME Is Entitled to Summary Judgment on Its Claim that the MDNS Was Based on Inadequate Information

Regarding STME's direct challenge to the DNS assessment of historic impacts on appeal before the Examiner, the Applicant argues that the burden is on the appellant to produce affirmative facts or evidence in the record demonstrating that the Project as mitigated will cause significant environmental impacts. Resp. Br. at 16. The Applicant states that "mere complaints, without the production of affirmative evidence proving significant adverse impact are insufficient to satisfy an appellant's burden of proof under SEPA." In support of these claims, they cite two Washington appellate decisions: *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (2002) and *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001). *Id*.

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These statements are incorrect and the cited cases, *Boehm* and *Moss*, do not stand for the proposition that is suggested by the Applicant. The central question in a SEPA appeal is whether the agency has complied with SEPA's base-line procedural requirements. The lead agency is obligated to consider all relevant environmental factors before issuing an MDNS. RCW 43.21C.030. Washington courts have repeatedly articulated what this standard requires:

> For the MDNS to survive judicial scrutiny, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal's environmental impact.

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176 (2000) *citing Anderson v. Pierce County,* 86 Wn. App. 290, 302 (1997) *citing Pease Hill Cmty. Group v. County of Spokane,* 62 Wn. App. 800, 810 (1991) *citing Sisley v. San Juan County,* 89 Wn.2d 78, 85 (1977) *quoting Juanita Bay Valley Cmty. Ass'n v. City of Kirkland,* 9 Wn. App. 59, 73 (1973). *See also* WAC 197-11-335 (threshold determination must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal"); SMC 25.05.335 (same).

Ultimately, the threshold determination "must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Conservation Nw. v. Okanogan County,* 194 Wn. App. 1034, 2016 WL 3453666 at *31 (2016) (unpublished nonbinding authority per GR 14.1) (quoting *Found. on Econ. Trends v. Weinberger,* 610 F. Supp. 829, 841 (D.D.C. 1985)). "SEPA seeks to ensure that environmental impacts are considered and that decisions to proceed, even those completed with knowledge of likely adverse environmental impacts, are 'rational and well-

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documented.'" *Columbia Riverkeeper v. Port of Vancouver, USA,* 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192).

This legal doctrine is echoed in the cases that were cited by the Applicant. Indeed, the exact quote that is provided above was stated, word for word, in *Moss v. City of Bellingham*. *See Moss*, 109 Wn. App. at 23 (quoting *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997)). Similarly, the *Boehm* court articulated the following standard of review in a challenge to the City of Vancouver's DNS, and where the city itself was the respondent (not the appellant):

> *[T]he City must demonstrate* that it actually considered relevant environmental factors before [issuing a DNS]. Moreover, the *record must demonstrate* that the City adequately considered the environmental factors in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA. Further, the decision to issue [a DNS] *must be based* on information sufficient to evaluate the proposal's environmental impact.

Boehm v. City of Vancouver, 111 Wn. App. at 718 (internal citations and footnotes omitted; emphasis added). As the plain language of this quote indicates, the *Boehm* court was evaluating whether the city met *its* burden of demonstrating adequate consideration of environmental impacts. This is further clarified by the section heading for that part of the decision. *See Boehm*, 111 Wn. App. at 719 (Section Heading: "Did the City satisfy *its* burden of demonstrating prima facie compliance with SEPA's procedural requirements?") (emphasis added). Thus, the standard of review articulated in *Boehm* focuses on whether the agency's SEPA analysis is adequate. Not whether the appellant was able to prove a particular impact.

The *Boehm* court went on to observe that the appellants failed to prove significant adverse impacts. But that was only *after* the court first reviewed the city's environmental analysis and found it to be sufficient. Specifically, the *Boehm* court was contrasting what it viewed as a thorough environmental review by the city, on one hand, with a lack of evidence to the contrary by the

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appellant, on the other. *See id*. at 719 ("The City also prepared an Environmental Review Report describing the project's potential environmental impacts and required mitigation measures. *In contrast*, the Boehms presented no evidence regarding any probable significant adverse environmental impacts of the project.") (emphasis added). The court was not announcing a new rule that an appellant must always prove significant adverse impacts notwithstanding any deficiencies or shortcomings in the city's SEPA analysis.

Thus, the correct legal standard of review of a DNS focuses on the adequacy of the city's analysis — *i.e.*, whether it demonstrates prima facie compliance with SEPA and whether it is based on sufficient information—not whether the appellant is able to prove significant adverse impacts. In order for SDCI's DNS to survive review, the respondents must (a) demonstrate prima facie compliance with the procedural requirements of SEPA, and (b) the DNS must be based on sufficient information to evaluate the proposal's environmental impacts. No Washington appellate opinion has ever endorsed the respondents' position that proof of significant adverse impacts is the requisite standard for reversing and remand a DNS. *See, e.g., Conservation Nw. v. Okanogan County,* 194 Wn. App. 1034, 2016 WL 3453666 at *31 ("Okanogan County impliedly argues that the CNW and MVCC must show that environmental damage is inevitable at one or more specific locations. We read no such requirement into the SEPA process. We also note that the opponent of a governmental action holds no burden to show the possibility of environmental damage.").

Of course, as the appellant, STME bears the burden of proof. But our burden is to prove that the current DNS does not comply with the procedural requirements of SEPA or that the DNS is not based on sufficient information. As we demonstrated in our Motion for Summary Judgment, that burden is easily met here. *See* STME Motion at 16-17. The DNS for the First and Pike Proposal was inadequate and incomplete regarding impacts to historic resources. *Id*.

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Furthermore, to the extent a SEPA appellant does have a burden to prove significant adverse impacts (*after* the court reviews a lead agency's environmental analysis and found it to be sufficient), that burden is to prove that such impacts *may* be probable—not that they *are* probable. WAC 197-11-360(1); SMC 25.05.360 (same). *See also* WAC 197-11-330(4) ("If . . . the lead agency reasonably believes that a proposal *may* have a significant adverse impact, an EIS is required.") (emphasis added); SMC 25.05.330.D ("If . . . the lead agency reasonably believes that a proposal *may* have a significant adverse impact, an EIS is required.") (emphasis added). This is clear not only from these State and local SEPA regulations, but also the case law interpreting those regulations. *See Conservation Nw., supra,* 2016 WL 3453666 at *30 ("If the local government decides that a proposal '*may* have a probable significant adverse environmental impact,' the agency issues a determination of significance and identifies the areas on which an environmental impact statement must focus.") (emphasis added; citing RCW 43.21C.031 and WAC 197-11-360(1)); *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 422, 225 P.3d 448 (2010) ("But if the director decides that a proposal 'may have a probable significant adverse environmental impact,' the agency issues a determination of significance and identifies the areas an environmental impact statement must focus on.") (quoting WAC 197-11-360(1) and RCW 43.21C.031; emphasis added); *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 53, 252 P.3d 382 (2011) ("SEPA warrants a DS if 'the responsible official determines that a proposal may have a probable significant adverse environmental impact.'") (quoting WAC 197-11-360(1); emphasis added).

In this case, there is no genuine dispute that there "may" be probable significant adverse impacts to historic resources caused by the Project. Eugenia Woo testified in her Declaration that if Marketview Place is allowed to proceed with its current proposal to demolish the historic

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landmark Hahn Building, that development will have more than a moderate adverse impact on historic resources. Woo Declaration, ¶7. Indeed, as we said in our Motion, if destroying a designated historic landmark is not a significant adverse impact to historic resources, it's hard to imagine what would be. The Applicant provides absolutely no evidence to support a claim that destroying the Hahn Building will not have significant adverse impacts to historic resources. In fact, they don't really address the issue at all.

The Applicant repeats the statement that "compliance with the landmarks process is presumed adequate mitigation for impacts to historic resources." Resp. Br. at 16. As we discussed above, there is no evidence in the record to support this statement and it is precisely the determination that the SEPA responsible official is required to consider, but has not yet done.

IV. CONCLUSION

STME has demonstrated that there is no genuine issue of material fact and it is entitled to judgment as a matter of law on the issues presented. As a result, STME requests that the Examiner grant its Motion for Summary Judgment.

Dated this 26th day of February, 2021.

Respectfully submitted,

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By: _____

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