

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**SAVE THE MARKET ENTRANCE;
and THE NEWMARK BUILDING OWNERS
ASSOCIATION**

Hearing Examiner File:
**MUP-20-003 (DR, S, V, W),
MUP-20-004 (S, SE, V, W)
& S-20-002**

Department Reference:
3028428-LU

From a Decision of the Director, Seattle
Department of Construction and Inspections

**ORDER ON MOTIONS
TO DISMISS**

I. Introduction

1. This matter consolidates two appeals of a Seattle Department of Construction and Inspections (“Department” or “City”) Director’s Decision (“Decision”) consisting of design review approval with departures and a Mitigated Determination of Nonsignificance (“MDNS” or “DNS”) issued pursuant to the State Environmental Policy Act (“SEPA”) for a 14-story hotel, apartment, retail, and restaurant project (“Project” or “Proposal”). The Project is proposed for a parcel (“Project Site”) that is currently occupied by a structure known as the Hahn Building. The appeals were filed by Save the Market Entrance (“STME”) and the Newmark Building Owners Association (“NBOA”) (collectively “Appellants”).
2. This decision concerns two motions. The first motion, filed by Applicant Jodi Patterson-O’Hare as an agent of Marketview Place Associates LLC (“Applicant”), is a motion for partial dismissal (“Applicant Motion”). Both STME and NBOA have filed responses in opposition to the Applicant Motion, and the Applicant has filed a reply. The second motion, filed by STME, is a motion for summary judgment (“STME Motion”) seeking reversal and remand of the Decision in its entirety. NBOA filed a response to the STME Motion concurring in all its arguments. Applicant and the City (collectively “Respondents”) jointly filed a response opposing the STME Motion, and STME filed a reply.
3. The Hearing Examiner has reviewed the file in this matter, including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated.

II. Standard of Review

4. Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure (“HERs”) states that for questions of practice and procedure not covered by the HERs, the Hearing Examiner “may look to the Superior Court Civil Rules for guidance.” Civil Rule 56(c) provides that a motion for summary judgment is properly granted where “the moving party is entitled to a judgment as a matter of law.” The Hearing Examiner “must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion.” *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-833, 100 P.3d 791 (2004).
5. “A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case ... Once the moving party has met its burden, the burden shifts to the nonmoving party *to present admissible evidence demonstrating the existence of a genuine issue of material fact*. ... If the nonmoving party does not meet that burden, summary judgment is appropriate.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (internal citations omitted) (emphasis added). “An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, *i.e.*, information as to ... a reality as distinguished from supposition or opinion.” *Curran v. City of Marysville*, 53 Wn.App. 358, 367, 766 P.2d 1141 (1989), *quoting Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact. *Id.* “The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.” *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 956, 421 P.2d 674 (1966) (citation omitted).

III. Background

6. The STME’s Motion argues that the Department’s DNS and design review approval must be withdrawn in light of the new designation of the Hahn Building as a landmark by the City of Seattle Landmarks Preservation Board (“Board”), which occurred on January 20, 2021. STME’s motion requests that the Hearing Examiner reverse the Department’s decisions that were issued for the Project and remand the matter back to the Department with an order to withdraw the DNS and issue a new SEPA threshold determination and design review decision after completion of the landmark designation process for the Hahn Building.

7. Respondents argue in response that Appellants have not established the absence of a genuine issue of material fact because the effect of the landmark designation on the design of the Project, and the corresponding likelihood of impacts to the Hahn Building, has not yet been determined.
8. As stated in the Code and affirmed by the declarations of Eugenia Woo (attached to the STME Motion) and Sarah Sodt (attached to Respondents' response), now that the Hahn Building has been designated as a landmark by the Board, the Board staff will begin the process of negotiating with the owner regarding controls and incentives for the structure. SMC 25.12.490. Once controls have been imposed for a specific feature of a landmark, a Certificate of Approval must be granted by the Board before that feature may be changed. SMC 25.12.670. Controls may not "deprive any owner of a site, improvement or object of a reasonable economic use of such site, improvement or object." SMC 25.12.580. This requirement has resulted in the Board approving "no controls" agreements for sites in the past, which would allow for the demolition of a structure without a Certificate of Approval.
9. If the Board staff and the owner of the Project Site reach an agreement about the scope of controls and incentives to be imposed, the agreement is submitted to the Board and then to the Council for approval. SMC 25.12.500, 25.12.510. If the staff and owner do not agree, or if the Board disapproves an agreement, the Board files its own recommendations on controls and incentives with the Office of the Hearing Examiner. SMC 25.12.520. The Hearing Examiner will conduct a hearing on the recommendation as well as any objections that are submitted by interested parties. SMC 25.12.535, 25.12.540. Based on the hearing, the Hearing Examiner will make a recommendation on proposed controls and incentives, which may not "prevent the owner from realizing a reasonable return on the site, improvement, or object." SMC 25.12.570. The Hearing Examiner's recommendations are transmitted to the Council, which may affirm, modify, or reject them. SMC 25.12.610, 25.12.620, 25.12.630, 25.12.640. If the Council rejects the Board's or Hearing Examiner's recommendation and adopts an ordinance that imposes no controls on the property, demolition is allowed without a Certificate of Approval.
10. The Hahn Building was designated a landmark by the Board on January 20, 2021, and the negotiation process between Board staff and the building owner is ongoing. The parties agree that the outcome of this process could result in the imposition of controls or in the imposition of no controls. The parties agree that if controls are placed on the Hahn Building, Applicant will be required to obtain a Certificate of Approval before making changes to controlled features and that if no controls are placed on the Hahn Building, no Certificate of Approval will be required. The parties further agree that the designation of the Hahn Building will prevent the owner from making immediate changes to the designated features and from demolishing the building until the landmarks process has been completed. Their dispute is, essentially, whether the City's environmental and design review processes must be restarted while that takes place. Appellants argue that the

Decision must be reversed. The Applicant and City argue that summary judgment is inappropriate due to the unknown nature of future landmark decisions and that the STME Motion should be denied.

IV. SMC 25.05.340

11. SMC 25.05.340 states that the lead agency shall withdraw a DNS if:

- a. There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts; [or]
- b. There is significant new information indicating a proposal's probable significant adverse environmental impacts; ...

12. SMC 25.05.794 defines "significant" as "a reasonable likelihood of more than a moderate adverse impact on environmental quality. . . . Significance involves context and intensity . . . The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact Section 25.05.330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact."

13. The Applicant and City argue that there have been no substantial change to the Proposal. However, the Applicant and City are defining "proposal" too narrowly, to include only the proposed final built structure. Under SMC 25.05.784:

'Proposal' means a proposed action. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants. A proposal exists at that state in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated. (See Section 25.05.055 and subsection 25.05.060.C). A proposal may therefore be a particular or preferred course of action or several alternatives. For this reason, these rules use the phrase "alternatives including the proposed action." The term "proposal" may therefore include "other reasonable courses of action," if there is no preferred alternative and if it is appropriate to do so in the particular context.

In this case, the original proposed action was to approve a 14-story hotel, apartment, retail, and restaurant project, and in an inherent part of that proposed action - the existing building was proposed to be demolished. Now that proposal has changed to a proposal to demolish not just an existing building but an existing *landmark* building by virtue of the City's designation.

14. The City did not undertake adoption of an ordinance to designate and control landmarks simply so that they could be treated as any other structure in the City in the context of proposed construction. The purpose of the City's landmark ordinance is to address the Council's determination that:

the protection, enhancement, perpetuation and use of sites, improvements and objects of historical, cultural, architectural, . . . significance, located within the City, are required in the interest of the prosperity, civic pride and general welfare of the people; and further finds that the economic, cultural and aesthetic standing of this City cannot be maintained or enhanced by disregarding the heritage of the City and by allowing the unnecessary destruction or defacement of such cultural assets.

SMC 25.12.020.A.

15. The designation as a landmark of the structure proposed to be demolished by the Project is a substantial change to the original proposal at issue for purposes of SMC 25.05.340.a.
16. The proposal to demolish the Hahn Building to make way for the Project, if it proceeds, is reasonably likely to have significant adverse environmental impacts to this newly designated landmark – the building designated as a landmark would be demolished. There is no dispute among the parties, and no genuine issue of material fact, that reasonably likely outcomes for the proposal include demolition of the existing landmark, even after the Chapter 25.12 landmark process is completed.
17. Even if the very real possibility that the existing structure will be demolished is not a *de facto* significant impact for purposes of summary judgment, in support of the STME Motion, Ms. Woo declared:

If Marketview Place Associates is allowed to proceed with its current proposal to demolish the historic landmark Hahn Building and build, in its place, a 14-story hotel building despite the landmark designation, that development will have more than a moderate adverse impact on the historic landmark that is the Hahn Building. If the new replacement project is allowed to proceed before the controls and incentives process is complete, then the demolition of the designated Hahn Building will be in violation of SMC Chapter 25.12. This will cause significant adverse impacts to the Hahn Building since demolition is a final solution, thus depriving the neighborhood, community, and city of an important historic and cultural resource that has been formally designated as a landmark.

- Woo Declaration, ¶7. Ms. Woo's testimony demonstrates that the impact of destroying the Hahn Building would likely be significant. The Applicant provided no evidence to counter this. Therefore, based on the record for the STME Motion, summary judgment is appropriate on this issue.
18. The Applicant and City highlight that SMC 25.05.675.H.2.b provides, "For projects involving structures or sites which have been designated as historic landmarks, compliance with Chapter 25.12 shall constitute compliance with the policy set forth in subsection 25.05.675.H.2.a above." However, both parties also strenuously argue in briefing that any outcome under Chapter 25.12 is, in their opinion, purely speculative at this point. In this case, where the parties agree that the process for compliance with Chapter 25.12 is not completed, and therefore compliance can only be demonstrated up to an incomplete point in the procedure, it would be improper to rely on this SEPA policy. Therefore, additional SEPA review concerning probable significant impacts to historic resources is necessary for a current threshold determination to be issued – particularly if the threshold determination is to be issued at this time.¹
19. Pursuant to SMC 25.05.340, the City must withdraw the DNS at issue in this matter, because the new designation of the Hahn Building as a landmark is a substantial change to the Proposal, and coupled with the Proposal's plan to demolish that landmark, the Proposal is reasonably likely to have significant adverse environmental impacts in the form of the permanent loss of a historic landmark.

V. Prima Facie Compliance with the Procedural Requirements of SEPA

20. SMC 25.05.330 directs that, in making the threshold determination, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact" If the responsible official "reasonably believes that a proposal may have" such an impact, an environmental impact statement is required. SMC 25.05.360.
21. SEPA requires "actual consideration of environmental factors before a DNS can be issued." *Norway Hill Preservation and Protection Ass'n. v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). 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." *Id.* at 276 (citation omitted).
22. "One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no

¹ Alternatively the Department could wait until completion of the Chapter 25.12 process for this newly designated landmark before issuing a new threshold determination, at which time reliance on this policy may be appropriate.

land-use changes would occur as a direct result of a proposed government action . . . [A] proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action.” *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) (citations omitted).

23. SMC 25.05.055.B and B.1.a provide:

The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

24. [t]he fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

WAC 197–11–055(2)(a)(i).

25. With regard to SEPA analysis of impacts to historic resources the Decision states:

The existing structure (Hahn Building) on the project site is more than 50 years old and is not designated as an existing historical landmark. Preceding the submission of the MUP application to SDCI, the City’s Landmarks Preservation Board voted to deny the nomination of the Hahn Building for designation as a landmark (Landmarks Preservation Board letter, reference number LPB 764/14).

The project site is across the street and southwest from a designated historic landmark (Eitel Building – 1501 2nd Avenue). The Department of Neighborhoods (DON) reviewed the proposal for compliance with the Landmarks Preservation requirements of SMC 25.12 and did not recommend changes to the proposed design (Landmarks Preservation Board letters, reference number LPB 83/19). Per the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations to mitigate impacts to historic

resources are presumed to be sufficient, and no further conditioning is warranted per SMC 25.05.675.H.

The DNS clearly did not consider the landmark designation of the Hahn Building. Instead the Decision relies on a set of facts completely contrary to the landmark status, including that the Hahn Building was “not designated as an existing historical landmark,” and that the “City’s Landmarks Preservation Board [had] voted to deny the nomination of the Hahn Building for designation as a landmark.”

26. The Declaration of David Kelley Dated February 16, 2021 (“Kelley Declaration”) at 2 ¶5 states that a “true and correct copy of the SDCI Notice of MUP Application is attached as Exhibit A to this Declaration.” Exhibit A to the Kelley Declaration provides notice for the DNS at issue in this matter, indicating “This comment period may be the only opportunity to comment on the environmental impacts of this proposal.” The notice also identifies “Other permits that may be needed which are not included in this application,” and lists both “Building Permit,” and “Demolition Permit.” Thus, the City is fully aware of the plans for demolition of the existing structure, and plans for such demolition are not so speculative that the impacts of such demolition cannot be meaningfully evaluated at this time without a more specific development plan.
27. In its response to the STME Motion, the City has taken the stance that the current DNS is adequate and that consideration of the probable significant environmental impacts associated with the reasonably possible demolition of a designated City landmark either does not warrant review or that such review can be applied at some later period in the process. Neither position comports with the procedural precepts of SEPA. The City cannot possibly fulfill its duty to show *prima facie* compliance with the procedural requirements of SEPA when the DNS did not consider the current facts that the Hahn Building is a designated City landmark and that while not a certainty, the Proposal includes reasonably probable outcomes that would result in the demolition of that landmark. Further, this potential outcome of demolition is not so speculative or unspecific that the City cannot process these outcomes through the required SEPA analysis at this time. The environmental effects of the proposal in the context of a designated landmark can be meaningfully evaluated at this time without a more specific development plan. For these reasons, the STME Motion with regard to SEPA review should be granted, and this matter should be remanded to the Department to issue a new threshold determination.
28. The Hearing Examiner, based on review of the motions and their associated submissions, is left with the definite and firm conviction that a mistake has been committed by City’s failure to account for the landmark designation of the Hahn Building as part of the SEPA review for the proposal at issue.

VI. Design Review

29. There are two components to the MUP under review, design review and SEPA. SEPA has been addressed above. If no controls are imposed, no modifications to the design review decision will be necessary. If controls are imposed, then modification to the design may—or may not—be necessary, depending on the scope of the controls and the alterations allowed by the Board through a Certificate of Approval. If there are modifications to the design, they may be approved through a minor MUP revision, which leaves the previously approved MUP in place with modifications, or a major MUP revision may be needed. Thus, there are multiple scenarios under which no modification to the design review decision, or only minor modifications, will be required. At this time, it is impossible to know whether any modification to the design will be needed in the future, or the scope of any future modification, and any predictions about these uncertain future events are speculative for purposes of design review.
30. STME asserts that the designation of the Hahn Building as a landmark requires withdrawal of the MUP decision. However, while this might be procedurally cleaner, the Code cited by STME does not support its proposition that the Hearing Examiner has the authority to compel this outcome. At this point in time, the MUP decision may need modification after the Proposal moves through the Chapter 25.12 landmark process, but it also may not, and without this certainty, the Hearing Examiner is not in a position to require that the MUP decision be withdrawn.

VII. Applicant Motion to Dismiss Issues

31. The Applicant Motion seeks dismissal of several SEPA related issues and some design review issues raised by the Appellant. Due to the Hearing Examiner's determination on the STME Motion with regard to the DNS, there is no need to address the Applicant Motion issues concerning SEPA as they are now moot, and with regard to these issues, the Applicant Motion should be dismissed.
32. The Hearing Examiner will convene a prehearing conference with the parties to determine a path forward for the aspects of this matter that are not addressed by this decision, including but not limited to the disposition of the project design review and, the Code interpretation, and the Applicant Motion issues concerning seeking dismissal of certain design review appeal issues.

The STME Motion is **GRANTED** in part and **DENIED** in part, and the Applicant Motion is **DISMISSED** in part.

Entered this 9th day of April, 2021.

/s/Ryan Vancil
Ryan Vancil, Hearing Examiner

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motions to Dismiss** to each person listed below, or on the attached mailing list, in the matters of **SAVE THE MARKET ENTRANCE.ORG, ET AL.**, Hearing Examiner Files: **MUP-20-003 (DR, S, V, W), MUP-20-004 (S, SE, V, W), & S-20-002** in the manner indicated.

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Dated: April 9, 2021

/s/ Galen Edlund-Cho
Galen Edlund-Cho
Legal Assistant