BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

In re the Matter of the Appeal of KATHERINE M. LANDOLT, *ET AL*. from a SEPA Determination of Non-significance and Contract Rezone Recommendation issued by the Director, Seattle Department of Construction and Inspections.	Hearing Examiner File: Department Reference: 3033517-LU Clerk File: 314441 **APPLICANT'S MOTION TO DISMISS**

I. RELIEF REQUESTED

Katherine Landolt along with eight individuals ("Appellants") appealed SDCI's September 9, 2021 SEPA DNS and the associated recommendation on Applicant's proposed contract rezone ("Decision"), raising traffic, parking and other environmental concerns and requesting five mitigating conditions and preparation of an Environmental Impact Statement ("EIS"). The Hearing Examiner's appellate jurisdiction over Type IV Council Land Use decisions is strictly limited to challenges to the Director's SEPA threshold determination and related Type II decisions and interpretations. *See* SMC 23.76.052.A.&.D. Appellants failed to submit comments during the SEPA comment period, and they do not challenge any Type II decisions or interpretations as there are none. By failing to submit SEPA comments, Appellants lack standing and are barred from bringing this appeal. Pursuant to Hearing Examiner Rules ("HERs") 2.16 and 3.02, Applicant respectfully requests that the Hearing Examiner dismiss this appeal in its entirety.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

II. STATEMENT OF ISSUES

This motion raises two issues:

1. Whether this appeal should be dismissed for Appellants' failure to submit comments as required by SMC 25.05.545.B., because lack of comment by members of the public on environmental documents during the prescribed comment period is construed as lack of objection to the environmental analysis and a failure to exhaust administrative remedies? Yes.

2. Whether this appeal should be dismissed because Appellants did not raise any challenges to Director's Type II decisions and interpretations as required by SMC 23.76.052.A.&.D because there are no such decisions or interpretations here? Yes.

III. EVIDENCE RELIED UPON

Applicant relies on the Decision, Appellants' September 21, 2021 Appeal Statement and related materials ("Appeal") and the Declaration of Aaron M. Laing and exhibits thereto.

IV. STATEMENT OF MATERIAL FACTS

Applicant brings this motion on the following undisputed material facts:

- On November 18, 2010, Applicant submitted the subject contract rezone application, SDCI project number 3033517 ("Application"), which was deemed complete on November 27, 2010. *See* Laing Decl., **Exs. A & C**.
- On December 2, 2019 four large public notice signs were placed around the site's various street frontages, and on December 5, 2019, the City mailed notice and issued notice for the Application through the Land Use Information Bulletin ("LUIB"). *See* Laing Decl., **Exs. A-C**.
- The LUIB notice, mailed notice and large signs set a comment deadline of December 18, 2019, and the LUIB notice and mailed notice stated in relevant part:

> **SEPA Environmental Determination** - (This project is subject to the Optional DNS Process (WAC 197-11-355) and Early DNS Process (SMC 25.05.355). This comment period may be the only opportunity to comment on the environmental impacts of this proposal.
>
> . . . .
>
> SDCI is now using the Early Review Determination of Non-significance (DNS) process for all applications requiring a threshold determination when SDCI has reasonable basis to believe that significant adverse impacts are not likely, and the Director expects to issue a DNS for the proposal. The DNS is not final until

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

> it is published following consideration of all comments received during the comment period.
>
> The comment period for a project subject to an Early Review DNS may be the only opportunity to submit comment on the environmental impacts of the proposal. Mitigation measures may be imposed on projects subject to the Early Review DNS process After the close of the comment period, SDCI will review any comments and will either issue a DNS followed by an opportunity to appeal, or, if significant environmental impacts are identified, a DS/Scoping notice. Copies of the subsequent threshold determination for the proposal may be obtained upon request or from our electronic library at Seattle Services Portal.
>
> . . . .
>
> **Interpretations**
>
> A formal decision as to the meaning, application or intent of any development regulation in Title 23 (Land Use Code) or Chapter 25.09 (Regulations for Environmentally Critical Areas) is known as an "interpretation". Examples include questions of how structure height or setback is properly measured, or how a proposed use should be categorized.
>
> Interpretation may be requested by any party during the comment period as determined above. The request must be in writing, and accompanied by a $3,860.00 minimum fee payable to the City of Seattle (This fee covers the first ten hours of review. Additional hours will be billed at $386.00.). Interpretations on some issues may also be requested later, during the appeal period, if the project decision is appealed. Failure to request an interpretation can preclude raising the issue on appeal. Questions regarding the interpretation process may be sent to PRC@seattle.gov (please include "Interpretation Information" in the subject line) or by calling the message line at (206) 684-8467. Requests for interpretation may be submitted to the Seattle Department of Construction and Inspections, Code Interpretation and Implementation Group, 700 5th Av Ste 2000, P.O. Box 34019, Seattle, WA 98124-4019.

See Laing Decl., **Exs. A-C**.

- Between December 2, 2019 and January 1, 20202, the City received three public comments, two of which were submitted during the comment period. *See* Laing Decl., **Exs. A & C**. The City did not receive any other public comments or requests for interpretations prior to issuance of the Decision. *See id*., ¶ 8, **Ex. E**.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

- None of the Appellants submitted comments prior to the December 18, 20219 comment deadline or at any time during the City's review of the Application. *See* Laing Decl.,¶¶ 7-9 & **Ex. F**. As of this filing, at least seven of the nine Appellants, including Ms. Landolt, have confirmed in writing that they did not submit comments, which has been confirmed by the SDCI Planner assigned to this matter. *See id*.
- The Decision does not include any Type II decisions or interpretations. *See* Laing Decl.,¶ 10.

V. JURISDICTION & STANDARD OF REVIEW

This matter involves a Type IV Council Land Use decision, a contract rezone. *See* SMC 23.76.004.C. & Table A for 23.76.004; SMC 23.76.036.A.1. SDCI issued the Decision in accordance with SMC 23.76.050, including a SEPA threshold Determination of Nonsignificance ("DNS"). The Hearing Examiner's appellate jurisdiction over the Decision, including the DNS, is set forth in SMC 23.76.052.A.&D., which provide in relevant part:

> A. General—Consolidation With Environmental Appeal. The Hearing Examiner shall conduct a public hearing, which shall constitute a hearing by the Council, on all applications for Type IV Council land use decisions and any associated variances, special exceptions, and administrative conditional uses. At the same hearing, the Hearing Examiner shall also hear any appeals of the Director's Type II decisions and any interpretations.
>
> . . . .
>
> D. Appeal of Environmental Determination. Any person significantly interested in or affected by the Type IV Council land use decision under consideration may appeal the Director's procedural environmental determination subject to the following provisions:
>
> . . . .
>
> 4. Scope of Review. Appeals shall be considered de novo. The Hearing Examiner shall entertain only those issues cited in the written appeal that relate to compliance with the procedures for Type IV Council land use decisions as required in this Chapter 23.76 and the adequacy of the environmental documentation upon which the environmental determination was made.

(Underlining added.)

HER 3.02(a) provides that "An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

has jurisdiction or is without merit on its face, frivolous, or brought merely to secure delay."

The Hearing Examiner may also 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). HER1.03 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). "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) (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." *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 than 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).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

VI. AUTHORITY & ARGUMENT

Appellants facially assert challenges to the DNS and request both mitigation and preparation of an EIS. Appellants did not submit SEPA comments (or any comments, timely or otherwise) or seek any interpretations or challenge Type II decisions and are thus barred from pursuing this appeal. Applicant moves to dismiss this appeal in its entirety on jurisdictional grounds as a matter of fact and law per CR 56.

A. Appellants did not Submit SEPA Comments as Required by Code, so this Appeal must be Dismissed as to any SEPA Issues.

As of this writing, seven of the nine Appellants have confirmed that they did not submit any comments (SEPA or otherwise) during SDCI's review of the Application, and public records and SDCI confirm that none of the Appellants submitted such comments. Having failed to submit SEPA comments, Appellants have not exhausted administrative remedies and/or lacks standing to assert SEPA issues or challenge the DNS, so this Appeal should be dismissed in its entirety.

SMC 25.05.545, Effect of no comment, provides in relevant part:

> B. Other agencies and the public. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of Section 25.05.510 (public notice) are met. Other agencies and the public shall comment in the manner specified in Section 25.05.550. . . .

(Underlining added.)

SMC 25.05.550, Specificity of comments, provides in relevant part:

> G. Citizen comments. Recognizing their generally more limited resources, members of the public shall make their comments as specific as possible and are encouraged to comment on methodology needed, additional information, and mitigation measures in the manner indicated in this Section 25.05.550.

(Underlining added.)

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

Here, Appellants have not submitted *any* SEPA comments in compliance with the requirements of SMC 25.05.550, which "shall be construed as lack of objection to the environmental analysis" by per SMC 20.05.545 and bars any SEPA appeal for failure to exhaust remedies. *See In the Matter of the Appeal of Stanfel, et al. of a Decision by the Director of SDCI*, MUP-20-021(W) & MUP-20-022(W)("If a member of the public does not submit a SEPA comment, subsequent appeal is foreclosed."), **Attachment A** hereto; *see also In the Matter of the Appeal of David E. Sherrard. of a Decision by the Director of SDCI*, MUP-21-002(DR), *Order on Motions to Dismiss and For Summary Judgment*, **Attachment B** hereto.

In the attached *Stanfel* decision, the Hearing Examiner concluded that failure to submit SEPA comments barred an appeal:

> 3. Effect of Failure to Comment. Alki Trail did not submit SEPA comment. The lack of comment "shall be construed as lack of objection to the environmental analysis."
>
> [G]iving effect to the words in the [SMC] 25.05.545(B) means that a SEPA appellant is required to exhaust administrative remedies by first commenting on the environmental document. He or she need not raise all the issues through the comment letter, but he or she must be a 'commenting citizen.' . . . . Other hearing bodies, including the Growth Management Hearings Board, Pollution Control Hearings Board, and Shorelines Hearings Board have required an appealing party to comment in order to appeal. Because Alki Trail did not, its lack of comment is fairly taken as a lack of objection, foreclosing its SEPA appeal.

(Underlining added.)

Similarly, the Hearing Examiner ruled in the attached *Order*:

> The Applicant's Motion argues, "Appellant has not submitted SEPA comment in compliance with the requirements of SMC 25.05.550, which 'shall be construed as lack of objection to the environmental analysis' by per SMC 20.05.545 and bars any SEPA appeal for failure to exhaust remedies.'" Appellant did not rebut this argument in response, and therefore this issue should be dismissed on this basis.

Applicant recognizes that the Hearing Examiner's prior rulings and decisions do not constitute precedent; however, SMC 25.05.545 and Washington case law are clear that

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

failure to avail oneself of an administrative remedy such as providing timely comment bars a subsequent appeal. *See Thompson v. City of Mercer Island*, 193 Wn. App. 653, 659-61, 375 P.3d 681 (2016)(holding failure to submit comments deprived appellant of standing); *Sterling v. County of Spokane*, 31 Wn. App. 467, 472-74, 642 P.2d 1255 (1982)(holding appellant lacked standing for failure to participate in required administrative process, which required "merely signing a petition"), *review denied*, 97 Wn.2d 1041 (1982).

In *Thompson*, the Court of Appeals affirmed the trial court's dismissal of a party on the basis the party lacked standing for failure to exhaust administrative remedies because the party "did not submit written comments response to the city's public notice of application" as required by the city's code. 193 Wn. App. at 660. As in *Thompson*, Appellants failed to submit comments during the SEPA comment period—or at all—, and thus failed to exhaust administrative remedies and lack standing to bring this appeal. There are no issues of material fact in dispute. *See* CR 56. Accordingly, the SEPA appeal must be dismissed in its entirety.

B. <u>Appellants did not Appeal any Type II Decision or Interpretation, so this Appeal must be Dismissed.</u>

Having failed to submit SEPA comments during the comment period (or at all), the sole remaining basis for which the Hearing Examiner *might* entertain an appeal here is a challenge to a Type II decision or to an interpretation. *See* SMC 23.76.05.A. Because there are no Type II decisions or interpretations challenged—or even to challenge—here, Appellants appeal must be dismissed.

SMC 23.76.004.B. provides in relevant part that "Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner," and Table A for 23.76.004 and SMC 23.76.006.C. provide a list of Type II decisions. The Application does not include a request for any permit, determination or approval that constitutes a Type II decision, and, accordingly, the

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

Appeal does not (and cannot) raise any challenge to any Type II decision.

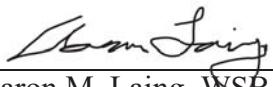
Further, SMC 23.88.020 provides the process for seeking land use interpretations and for appealing interpretations to the Hearing Examiner. No party has requested an interpretation or appealed an interpretation here. In the absence of any appeal of a Type II decision or interpretation, there is no other basis for the Hearing Examiner's jurisdiction over the Appeal. There are no issues of material fact in dispute. *See* CR 56. Applicant respectfully requests that it be dismissed in its entirety.

VII. CONCLUSION

The undisputed facts confirm that Appellants did not submit SEPA comments within the comment period, and there are no Type II decisions or interpretation at issue here. Appellants failed to exhaust administrative remedies and lack standing to bring this appeal. For the reasons herein, Applicant respectfully requests that the Hearing Examiner grant this motion and dismiss the appeal in its entirety.

Dated this 24th day of September, 2021.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 

Aaron M. Laing, WSBA #34453
Email: alaing@schwabe.com
1420 5th Avenue, Suite 3400
Seattle, WA 98101
Tel: 206.622.1711
Fax: 206.292.0460
Attorneys for Applicant / Owner Wallace Properties – Park at Northgate LLC

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

ATTACHMENT A

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

Office of the City Clerk

Monica Martinez Simmons, MMC, City Clerk

City of Seattle Hearing Examiner Decision

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Decision

In the Matter of the Appeal of KENNETH E. STANFEL; ALKI TRAIL NEIGHBORHOOD ASSN., and, S. NAGUIB of a Decision by the Director of the Seattle Department of Construction and Inspections

Hearing Examiner File: MUP-20-021 (W) & MUP-20-022 (W)
Associated File Numbers:
Department Reference Numbers: 3018178
Date: February 1, 2021
Type: SEPA
Examiner: SUSAN DRUMMOND

I. FINDINGS OF FACT

1. Background. Alki Trail Neighborhood Association and Mr. Naguib ("Alki Trail"); and, Mr. Stanfel, appealed Seattle Department of Construction and Inspections Master Use Permit approving a three-story mini-warehouse (self-storage) building with 15 parking spaces. The site, at 2328 Harbor Avenue SW, in West Seattle, is zoned for industrial use and permits the storage use outright, with the only discretionary land use approval required being the State Environmental Policy Act, Ch. 43.21C RCW (SEPA) determination. Appellant Mr. Stanfel alleged the Departments decision to issue a Determination of Non-Significance was error, as impacts associated with public views; shorelines; height, bulk, and scale; traffic and transportation; and, construction noise, presented probable, significant adverse environmental impacts. Alki Trail raised only the public view issue. The two appeals were consolidated and heard together.

2. Hearing Proceedings.

2.1 Pre-Hearing Deadlines and Motion. At a pre-hearing conference, filing deadlines were established, including deadlines for motions, and witness and exhibit lists. The Applicant moved to dismiss the shoreline issue as the projectis outside shoreline jurisdiction (Exhibit 3011), and the Appellant Alki Trail, due to a failure to submit SEPA comment. The shoreline

issue, with respect to the project being outside shoreline jurisdiction, as later conceded, was dismissed, but the order allowed for Mr. Stanfel to identify shoreline policies and regulations relevant to environmental review, which he did. On the failure to comment, dismissal was denied due to disputed facts on whether effective comment had occurred. The denial was without prejudice, meaning a decision would be made after the hearing.

2.2 Hearing. The hearing was held remotely on November 20 and December 8, 2020. Mr. Shaw, Department Land Use Planning Supervisor, 700 5th Ave., Ste. 2000, Seattle, WA 98104, represented the Department. Mr. Morrison and Ms. Kaylor of McCullough Hill Leary, PS, 701 Fifth Avenue, Ste. 6600, Seattle, WA 98104, represented the Applicant, Harbor Storage LLC. Mr. Telegin of Bricklin & Newman, LLP, 1424 Fourth Avenue, Ste. 500, Seattle, WA 98101, represented the Appellant, Mr. Stanfel; and, Mr. Aramburu of Law Offices of J. Richard Aramburu, PLLC, 705 Second Avenue, Ste. 1300, Seattle, WA 98104-1797, represented Alki Trail.

2.3 Witnesses.

Appellants. Mr. Naguib, Mr. Stanfel, Mr. Steinbrueck (public view protection), Mr. Adams (architect), and Mr. Tilghman (traffic engineer).

Department. Mr. Houston (Department land use and transportation planner).

Applicant. Mr. Kispert (architect); Mr. Murphy (architect); Mr. Evans (landscape architect); Ms. Sarlitto (land use planner); Mr. Palmer, PE (traffic engineer); and, Mr. Warner (noise analyst).

2.4 Exhibits. The Clerks master index lists and renumbers admitted exhibits:

Appellant Stanfel: 1000-1026, 1100-1143;

Appellant Alki Trail: 1501-1569 (1559 is corrected landscape plan), and 1575-1589;

Department:1-29, and,

Applicant: 3000-3026, and 3031-3041.

All exhibits the parties identified consistent with pre-hearing order procedures were admitted at hearing outset, though with some reservations on exhibit scope. While subsequent objection was allowed, all were ultimately admitted. During rebuttal testimony, on the last hearing day, Alki Trail attempted to introduce a series of exhibits, provided to opposing counsel the night before. While the Examiner either admitted or allowed use of the photographs for illustrative purposes, the Examiner denied admission of the proposed state and federal guidelines on visual assessment. These should have been identified up front in the exhibit lists. Alki Trail did not identify specific sections and explain how they were necessary for rebuttal or impeachment, and why they were not earlier provided.

3. Site Visit. The Examiner visited the site on the afternoon of January 29, driving by but not entering the site. The visit provides context, not evidence.

4. Project Description. With its IG2-U85 zoning, and located near the Port of Seattles Terminal 5, the 54,00 square foot site is zoned for industrial use, and the self-storage use is allowed outright. The 85-foot height limit is for other commercial uses; a mini-warehouse has no height limit and design review is not required. The warehouse is 49.6 feet tall at its highest point, gradually dropping down to 32-34 feet, with modulation to break down the mass. Project Floor Area Ratio, or FAR, is about 2.41, under the 2.5 FAR requirement. The project is three floors plus a basement, totaling almost 130,000 square feet, with 15 parking stalls. The project is adjacent to Harbor Avenue SW, and to Alki Trail, but 500 feet from Jack Block park. Parking and loading are located away from the Trail, which is known for its Seattle skyline views, including a panoramic view from the Space Needle to the Smith Tower.

5. SEPA, Generally. SEPA review was completed through a SEPA Checklist and DNS issuance with the MUP. With SEPA, the question the Department considers is whether the project presents probable, significant adverse environmental impacts which cannotbe mitigated below significance through regulations and/or added mitigation. If such impacts cannot be mitigated, an EIS is prepared; if they can be, a DNS may issue. The Citys SEPA policies, SMC 25.05.675, provide the framework for evaluating probable significance.

6. SEPA/Public View Protection. The Citys public view protection policies provide: [I]t is the Citys policy to protect public views of significant natural and human-made features: the downtown skyline, from public places consisting of the specified viewpoints, parks, scenic routes, and view corridors, identified in Attachment 1. Private views are not protected (it is impractical to protect private views through project-specific review.). The Project is adjacent to a listed scenic route, which runs along Harbor Avenue for about one mile, with downtown skyline views. The Department analyzed the projects public view impacts, and requested additional protection from the Applicant. The updated View Study evaluated the one-mile-long Harbor Avenue scenic route.

The without Project views of the downtown skyline on Harbor Avenue adjacent to the Project are obscured by existing on-site structures, including the billboard on top of the existing Berg Scaffolding building; on-site trees and vegetation; off-site trees and vegetation, including in the Ports Jack Block Park; and, railcars on the BNSF rail line to the east.

The final View Study proposed mitigation for street-level views. The simulation was based on a photograph taken at eye-level height from Harbor Avenue right-of-way along the pedestrian trail, and a similar photo, but taken behind the Berg Scaffoldingbuilding. The photos were stitched together to simulate future downtown skyline views with the Project. The final View Study pulls back the Projects upper two stories at the southeast corner, which opens up visibility to at least two blocks of the downtown skyline. The chamfered corner is reflected in the MUP plans, and the building permit applications will be updated to conform with the MUP. Mitigation measures to address public views may include changes to a projects bulk or profile. The Department reviewed the revised plan and found

the downtown skyline view protection from Harbor Avenue SW consistent with the Citys SEPA policy. Ms. Sarlitto is a land use planner with experience with Seattle SEPA scenic route studies. She testified as to the City process of scenic route studies, which include:

Evaluating the scenic route as a whole;

Considering existing on-site structures and vegetation in the baseline condition; and,

Imposing mitigation options through on-site view opportunities.

Ms. Sarlitto confirmed the Project took this approach. She testified about her experience in evaluating other projects. The projects she identified resulted in some view blockage from an identified scenic route even with mitigation, but these blockages were not found significant. The extent of public view protection the project provides follows the public view protections the Department has required of other developments along identified scenic routes.

Mr. Stanfels lay testimony focused on view protection from private property, which SEPA does not protect. Mr. Naguib provided lay testimony, much based on altered photos. Architect Mr. Steinbrueck also testified. He has not authored a SEPA scenic route study and is not a landscape architect. He disagreed about what a pedestrian could see, but did not produce independent analysis refuting the Applicants methodology of simulating pedestrian downtown skyline views from Harbor Avenue. His assessment was based on an 11-year-old Google Earth photo that did not account for off-site vegetation growth. As a result, the assessment was not based on an accurate baseline condition. The exhibit also had scaling errors, including locating the Project footprint on public property.

The Applicants landscape architect Mr. Evans addressed Project landscaping. While the Japanese snowbell tree is not likely to grow to the heights Mr. Steinbrueck identified, the Applicant proposed revising the landscape plan to move the tree to the sites southeast corner. Mr. Evans testified that the landscape design would not adversely affect the view opportunities to the downtown skyline associated with the Project, but moving the tree could help enhance the downtown skyline view opportunity over the Projects life.

The Applicants view analysis was based on the pedestrian view experience, standing from Harbor Avenue in the with Project condition, factoring in the upper-level massing. The Department determined that based on the mitigation and the existing conditions near the project site which block downtown views even if the proposed structure were further modified, and consistent with other Department decisions, the project will not have a significant adverse impact on protected public views.

7. SEPA/Height, Bulk, and Scale. SEPA height, bulk, and scale concerns are subject to City SEPA Policy SMC 25.05.675. Height, bulk, and scale should be reasonably compatible with the general character of anticipated development and provide a reasonable transition between areas of less intensive zoning and more intensive zoning. A project need not be identical in height, bulk, or scale with existing structures. The Department may condition or deny a project to mitigate the adverse impacts of substantially incompatible height,

bulk, and scale. However, where City regulations have been adopted to address an environmental impact, as here, it shall be presumed that such regulations are adequate to achieve sufficient mitigation subject to seven exceptions.

D1: No city regulation. Inapplicable. Height, bulk and scale are regulated through SMC 23.50.022 (Height) and SMC 23.50.028 (Floor Area).

D2: Judicial invalidation of the regulation. Inapplicable.

D3: Site presents unusual circumstances such as substantially different site size or shape, topography, or inadequate infrastructure creating adverse impacts substantially exceeding those the code anticipates. Infrastructure is adequate and thesite is not atypical of other industrial parcels, [and] the size and shape were not unusual. The site is similar in size to other parcels in the IG2 zone. It is somewhat larger than the C1 and SF7200 parcels on Harbor Avenue SWs west side, but smaller than the parcel at 2349 Harbor Avenue SW, and similar in size to the parcel at 2325 Harbor Avenue SW. On balance, the sites size and shape is sufficiently similar to parcels in the surrounding area so does not result in height, bulk and scale impacts substantially exceeding those the code anticipates.

D4: The project presents unusual features, such as unforeseen design, technology, or a use not identified in code, resulting in adverse impacts substantially exceeding those the code anticipates. The mini-warehouse use is a common use, which the code permits outright. The project does not present unusual features not present in other mini-warehouses.

D5: Project location near a zone edge and creation of substantial problems of scale or use transition the code does not specifically address. The site is not on or near the edge of another zone. It is adjacent to other IG-2 zoned properties onall sides, including the IG-2 zoning directly across Harbor Avenue. Harbor Avenue SW borders the site, separating it from C1-55 and SF-7200 zoning. The right-of-way, coupled with zone boundary locations, means the site is separated from the C1-55 zone (a commercial zone) by 55 feet and from the SF-7200 zone by 160 feet. These separation distances distinguish the site from other City locations, where project sites may directly abut zone boundaries. The closest non-industrial zone to the site is C1-55, which would allow structures as tall as the project and potentially of a similar scale.

D6: Project vesting to regulation no longer reflecting City policy. The regulations vested to continue to reflect City policy.

D7: Undue impacts due to cumulative effects, SMC 25.05.670. There are not other developments in the project vicinity creating cumulative impacts per this code section.

The exceptions do not apply, so zoning regulations are presumed adequate to mitigate height, bulk and scale impacts. The Ports heavy industrial use is proximate to the site and historical zoning maps show industrial zoning in place for decades. Mr. Stanfel described the neighborhood as residential, but industrial land does surround the site. The C1 zoning across Harbor Avenue allows commercial buildings up to 55 feet in height and provides

transitions between industrial and residential zones to the west. The Project is 35 feet below the allowed height limit in the zone for commercial uses and complies with FAR (lot coverage) requirements.

Height, bulk and scale are assessed based on the entire surrounding context, including the development capacity of adjacent zones, distance between differently zoned properties, and natural features such as topography. The project is in the most intense zone in the vicinity, buffered by Harbor Avenue from the C1-55 zone, and the C1-55 zone provides another buffer to single family zones. It is natural to expect larger buildings in the more intense IG-2 zone than those in less intense C1-55 and residential zones.

The Project is 50 feet at its highest point; 15 feet taller than the three-story residences referenced by Mr. Adams and Mr. Stanfel. These residences are not directly adjacent or directly across the street from the Project, but south across Harbor Avenue. Other residences are separated from the Project by Harbor Avenue and C1 zoning and elevated above the Project by topography.

Mr. Adams testified the Project is incompatible in scale based on a study comparing the Project to a residential building across Harbor Avenue; a study he stated he prepared using Google Earth. In several images, the study places the nearby building adjacent to and directly across the street from the Project. Google Earth imagery distorts the vantage point to perceived scale, the study lacks trees to provide context for height, bulk and scale, and the study does not use the buildings current design. The project is across from other industrial and commercial zones, and Harbor Avenue SW right-of-way provides a reasonable transition between the zoning categories.

8. SEPA/Shoreline Impacts. The Project is outside shoreline jurisdiction. The question presented here is: though outside the shoreline area, under City policies and regulations, does the Project significantly affect the shoreline? The Planguides how the City will set rules for the development that goes in the citys shoreline areas. Mr. Stanfel identified several Comprehensive Plan shoreline element goals, policies and code provisions. However, view corridor requirements apply only within shoreline jurisdiction, and the identified goals and policies do not apply outside the shoreline area.

9. SEPA/Transportation.

9.1 SEPA Policies. The Citys SEPA Traffic and Transportation policies are

designed to minimize or prevent adverse traffic impacts which would undermine the stability, safety, and/or character of a neighborhood or surrounding areas. To determine traffic mitigation, the Department must consider a projects expected peak trafficand circulation pattern, weighed against factors such as public transit availability, existing vehicular and pedestrian traffic conditions, and accident history. Mitigation is imposed if warranted. The Department may require an analysis of construction traffic impacts and impose mitigation, including a construction transportation plan.

9.2 Project Trips. The Applicants traffic engineer conducted a transportation

impact analysis. The project will add 184 daily vehicle trips, which include 12 added trips in the AM peak hour and 21 in the PM peak hour. About 10% will be truck trips. These trips will be distributed to the surrounding roadway network. Due to the small number of Project trips, no LOS analysis was required to conclude the Project will not result in significant impacts. However, Mr. Palmer conducted traffic counts and a LOS analysis of the SW Spokane Street and Harbor Avenue SW intersection, where 70% of Project trips will go, and found the intersection has more than sufficient capacity.

9.3 Trail Blockage. The Project reduces site access from two points to one point to

mitigate potential safety impacts to Trail users. The Project driveway has sufficient length for three vehicles to queue without blocking the Trail. The City required additional analysis, and in response, the Applicant submitted a Trail Study. The Trail Study provides pedestrian and bicycle Trail use data collected during peak AM and PM hours on two partly sunny September days. On the busier of the two periods, there were 53 bicycles and 35 pedestrians during the PM peak hour. Assuming reasonable travel speeds, a bicycle will cross the driveway in 2.5 seconds and a pedestrian in 10.3 seconds. The probability of a bicycle or pedestrian interacting with a vehicle at the Project access point is less than 1.5% or 54 seconds during the PM peak hour, so the analysis concluded there were not significant adverse Trail use impacts. Vehicles are not obstructed when entering the site and will not block the trail beyond the time necessary for crossing.

The Appellant argues Trail volumes would be higher at other times of the year, so the impacts were understated. The Applicants traffic analysis was based on counts reflecting time periods with the potential for reasonably high volumes of trail use and peak times. Somewhat greater levels of trail usage on busier days could cause somewhat more trail users being briefly inconvenienced by exiting traffic but, in the Departments assessment, not rising to a level of significance. And, if SDOT implements improvements that increase trail usage, at that time, the agency would likely address potential Trail crossing impacts. Mr. Palmer responded that the counts were taken on a mild, partially sunny day in September, representing an average trail condition, which is appropriate for a traffic study. Mr. Naguib confirmed the Trail is busy on sunny days, regardless really of the month.

9.4 Collision Data. Appellants witness, Mr. Tilghman, did not conduct his own

independent quantitative traffic analysis, but raised concerns that the TIA did not consider collision data. Mr. Palmer testified that he considered 2013-2020 data, which shows a low number of collisions in the Project vicinity, with only two bicycle collisions, and none on the Trail. Mr. Tilghman identified 13 crashes on Harbor Avenue SW in the project vicinity over a five-year period. Mr. Houston explained this does not meet the Seattle Dept. of Transportation threshold of five crashes a year for identifying a high-accident roadway segment, indicating unusual traffic safety concerns are not present.

9.5 Traffic Volumes. Mr. Tilghman testified that the TIA did not consider traffic

volumes on Harbor Avenue and estimated that Harbor Avenue was congested, carrying 1,500-1,600 PM peak hour trips. Mr. Palmer conducted traffic counts at the Harbor Avenue SW and SW Spokane Street intersection, which showed volumes at about half that. Mr. Tilghman later described SDOT traffic counts during three months in 2017 which showed seasonal variation in traffic volumes, with higher volumes in July and August, but did not demonstrate how higher background traffic volumes in two months of the year would cause the Project itself to have a significant impact. The traffic volumes he used were taken from SDOT 2018 traffic reports, and apply to Harbor Avenue SW in general, so were not necessarily collected near the project site.

9.6 Speeding. Mr. Tilghman testified that the TIA did not consider speeding on

Harbor Avenue. He did not provide evidence of speeding in the Project vicinity and analysis on how such a background condition would cause the Project to have significant impacts. Mr. Palmer testified that even if speeding occurs, the Project will not result in significant adverse traffic impacts due to the low number of PM peak hour Project trips and the fact there is more than adequate stopping sight distance, allowing oncoming cars to stop or slow as a vehicle exits the Project driveway if needed.

9.7 Sight Distance. The City has not adopted standards for exiting sight distance.

The proposed driveway reflects a common situation along Harbor Avenue SW, including at Saltys to the north, which generates more traffic than the project. There is also adequate sight distance for vehicles exiting the Project to see oncoming bicycles or pedestrians on the Trail. And, there is ample stopping sight distance for oncoming vehicles to stop or slow as a vehicle exits the Project driveway. Also, SDOT has the authority to prohibit parking adjacent to the driveway if it believes this is needed to improve sight distance.

9.8 Driveway/Street Alignment. Mr. Tilghman asserted that because the Project

driveway is offset from Fauntleroy Avenue it may cause traffic conflicts. City standards do not require driveway/street alignment. It is common for driveways to not be aligned with streets and is an existing condition at the Project site. The PM peak hour volume of traffic making left turns from the Project is very low, and it is anticipated that when vehicles leaving the driveway encounter a car entering or exiting Fauntleroy Avenue they will avoid each other, as in similar situations elsewhere.

9.9 Trail User Safety. Mr. Tilghman testified that the driveway/street alignment

situation will interfere with pedestrians crossing the street though this is an existing condition. The Project is not expected to generate pedestrians and will generate a few PM peak hour trips so will not result in significant adverse impacts to pedestrians crossing the street. Mr. Stanfel suggested that a crosswalk and light be placed here, but the Project does not require it. Mr. Tilghman agreed signal warrants are not met at this location.

9.10 Construction Traffic. The Department requested information on construction-

related transportation mitigation. The Applicant included these measures, which include management of construction trucks and parking by the contractor, and SDOT approval of any work in the right-of-way. The Decision found that increased trips, including by trucks,

are expected during construction activity, but the increase will be small and temporary and will not warrant additional mitigation. Mr. Palmer indicated that construction vehicles would utilize the arterial adjacent to the Project, Harbor Avenue SW, and that construction traffic is commonly addressed in a construction management plan approved by SDOT after MUP approval. SDOT can require mitigation through its permit review, such as flaggers for the Alki Trail crossing, if deemed necessary, though substantial construction impacts are not expected.

10. SEPA/Construction Noise. The Citys SEPA Policy provides that [w]here City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation subjectto seven exceptions. None of the exceptions apply, and the code provides that Ch. 25.08 SMC effectively addresses most noise impacts. The City determined code requirements were sufficient, so did not require additional mitigation.

Lay opinion was provided that construction noise would have significant effects. Mr. Warner, an acoustical engineer, provided a report and testimony, showing construction will increase noise levels by about 3 dBA over the quietest daytime hours, an increase barely discernable and well below allowed construction noise limits. Mr. Warner modeled noise from site construction and concluded it would be consistent with the existing ambient environment, confirming the Seattle Noise Code sufficiently mitigated noise impacts. Construction transportation impacts are limited as the site has direct access to the Harbor Avenue SW arterial, which prevents trucks from circulating through residential neighborhoods. The site is large enough to allow for construction staging and construction worker parking.

11. Failure to Comment. Alki Trail (Mr. Naguib and Alki Trail Neighborhood Association) did not submit SEPA comment. If a member of the public does not submit a SEPA comment, subsequent appeal is foreclosed. Alki Trail Neighborhood Association was not incorporated until August 28, 2020, a year after the SEPA comment period closed. Because it did not exist during the comment period, it could not have submitted comment. Mr. Naguib also did not comment. However, he coordinated on comment with another Appellant, Mr. Stanfel.

Mr. Stanfel forwarded to Mr. Naguib comment he had submitted, which Mr. Naguib shared with his neighbors. Also, Mr. Naguibs partner, Ms. Heimerl and a co-resident at 2401 Harbor Avenue SW, submitted comment, and Mr. Gabriels comments expressed Mr. Naguibs concerns. These comments do not state they were being submitted on Mr. Naguibs behalf. Ms. Heimerls comment states I would like to share the reason why I believe a 3-story storage unit should not be built, and voices general opposition to the Project but does not mention SEPA or any element of the environment. As it is not a SEPA comment, and was not submitted for Mr. Naguib, Mr. Naguib did not comment. The comment from Mr. Gabriel also does not mention Mr. Naguib, so cannot be considered his comment.

II. CONCLUSIONS OF LAW

1. Jurisdiction and Review Standard. The Hearing Examiner has jurisdiction over appeals of Type II Master Use Permit decisions. The Directors Decision is given substantial weight. The decision is thus reviewed for clear error, meaning that to reverse, the Examiner must be left with the definite and firm conviction the Director erred. There must be facts or evidence demonstrating significant adversity.

2. SEPA. The zoning code permits the use outright, and prescribes its allowed bulk and scale. The use is within an industrial zone, and does not directly abut incompatible uses or zones. It is understandable that the Appellants prefer other uses than that proposed, but the Examiner does not make policy. To reverse the Departments SEPA Decisions, Appellants must demonstrate there is a probable, significant adverse impact not addressed by regulation. The impact assessment is governed by SMC 25.05.675, which includes an assessment of context.

The site is within an industrial zone, is surrounded by similar zoning, and other zones and Harbor Avenue right-of-way provide buffering. Downtown skyline views are not optimal at this location due to blockage by vegetation and the settings industrial features, but the Applicant did evaluate impacts and pulled back the building to mitigate impacts. The current structure, which no party argued was aesthetically appealing, or did not block views, is being removed and landscaping added. The Applicant clarified that although not required, it would move the Japanese snowbell tree, so a clarification on this point is appropriate.

The project is outside shoreline jurisdiction and the evidence did not substantiate, even if the identified policies/regulations applied, the project would significantly and adversely impact the shoreline. Construction noise is mitigated by code and distance, and the evidence did not substantiate impacts of probable significance. The project does not contribute significant traffic or add to pedestrian activity, and the evidence did not substantiate that Trail use would be significantly impacted. During construction, the City's Department of Transportation can incorporate additional mitigation as needed, and this can be clarified.

Under the City's SEPA policy structure, which relies to a large degree on the code for mitigation, while the Project is not without impact, evidence was not presented substantiating significant adversity. The use is one contemplated at this location, and mitigation has been incorporated beyond what the code requires to further address impacts.

3. Effect of Failure to Comment. Alki Trail did not submit SEPA comment. The lack of comment "shall be construed as lack of objection to the environmental analysis."

[G]iving effect to the words in the MSC 25.05.545(B) means that a SEPA appellant is required to exhaust administrative remedies by first commenting on the environmental document. He or she need not raise all the issues through the comment letter, but h e or she must be a 'commenting citizen.'

No comments identified Alki Trail or indicated they were being submitted on its behalf. While Alki Trail did communicate with other parties on the project, a non-commenting party cannot appeal solely because it communicated with others who did comment.Other hearing bodies, including the Growth Management Hearings Board, Pollution Control Hearings Board, and Shorelines Hearings Board have required an appealing party to comment in order to appeal. Because Alki Trail did not, its lack of comment is fairly taken as a lack of objection, foreclosing its SEPA appeal.

DECISION

The Departments Decision is upheld, and the appeals denied, with these clarifications:

1. The landscape plan will reflect the Applicants commitment to adjusting the Japanese snowbell planting outside the potential viewshed.

2. As appropriate, SDOT can require mitigation through its permit review, such as flaggers for the Alki Trail crossing.

Absent a timely appeal, this decision is final.

Entered February 1, 2021.

_____/s/_Susan Drummond_____

Susan Drummond

Hearing Examiner Pro Tempore

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision isissued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: POBox 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

Seattle City Council

Office of the Mayor

Office of the City Clerk

Address: 600 4th Ave, 3rd Floor, Seattle, WA, 98104

Mailing Address: PO Box 94728, Seattle, WA, 98124-4728

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ADA Notice (americans-with-disabilities-act)

Privacy Policy (tech/initiatives/privacy/about-the-privacy-program)

Notice of Nondiscrimination (civilrights/civil-rights/title-vi-notice-of-nondiscrimination)

ATTACHMENT B

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner File: **MUP-21-002 (DR)**
DAVID E. SHERRARD	Department Reference: 3033823-LU
from a decision issued by the Director, Seattle Department of Construction and Inspections	**ORDER ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT**

The Director of the Seattle Department of Construction and Inspections ("Department" and "City") rendered a design review decision under Project No. 3033823-LU ("Decision"). Appellant David Sherrard ("Appellant") filed a timely appeal of the Decision. The City filed a Motion for Partial Dismissal ("City's Motion") against the appeal. The applicant Natasha Morris ("Applicant") filed a Motion to Dismiss the appeal ("Applicant's Motion"). The Appellant filed a response to the Motions. The City and Applicant filed replies to the Appellant's response. 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.

Type II decisions listed in SMC 23.76.006.C are subject to an administrative open record appeal. SMC 23.76.022.A.2. Design review decisions (with certain exceptions not applicable here) are among the decisions appealable to the Examiner. SMC 23.76.006.C.2.e. By contrast, Type I decisions may be subject to administrative review only through a land use interpretation pursuant to SMC 23.88.020. SMC 23.76.022.A.1.

SMC 23.76.022.C.6 provides:

> The Hearing Examiner shall entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76, compliance with substantive criteria, determinations of nonsignificance (DNSs), adequacy of an EIS upon which the decision was made, or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts, and any requests for an interpretation included in the appeal or consolidated appeal pursuant to Section 23.88.020.C.3.

Appellant's Notice of Appeal lists fourteen issues, each of which is challenged by either or both the City's Motion and/or the Applicant's Motion. Each issue is listed below, and treatment of that issue based on the parties' briefing arguments follows.

> **1. The public notices do not provide adequate public access to the project file, including the, application plans, decision, and other additional information related to the project, such that the public can reasonably access materials and therefore interested parties are prevented from presenting their view because of the failure to adequately disclose the details of the proposal and deprived the public and the decision maker of the opportunity to reach an "informed" decision.**

Appellant's Notice of Appeal Issue 1 does not reference any section of Chapter 23.76 and fails to identify any specifically required procedure for Type II decisions regarding access to project files that Appellant alleges has been violated. Public access to project files is not an issue within the jurisdiction of the Hearing Examiner to consider. Appellant's briefing seems to attempt to construe this issue as a challenge to the form of the notice itself, but the issue as stated in the Notice of Appeal is clearly directed at concerns related to access to the project files even if this is stated in the context of the notice. This is not an issue within the jurisdiction of the Hearing Examiner to consider. Notice of Appeal Issue 1 is **DISMISSED**.

> **2. The Early Design Guidance meeting on October 30, 2017 was performed for a proposal not meeting current zoning standards in violation of RCW 36.70B.070, SMC 23.76.010, SMC 23.76.026.C.2 and SDCI Early Design Guidance Proposal Packet Checklist Worksheet. In addition, the alleged rezone application was not complete at the time of the Early Design Guidance Meeting.**

The question of whether the Project complied with "current zoning standards" at the EDG stage is not a subject of the Director's Type II design review Decision. SMC Chapter 23.41 does not make a project's compliance with development standards a subject of either the Board's recommendation or the Director's design review decision. Determination that a proposal complies with development standards is a Type I decision. SMC 23.76.006.B.1. Type I decisions may be subject to administrative review only through a land use interpretation pursuant to SMC 23.88.020. SMC 23.76.022.A.1. No interpretation was sought in this matter. Therefore, the Hearing Examiner lacks jurisdiction over Appellant's claim that the Early Design Guidance meeting was improperly performed for a project not meeting current zoning standards. Notice of Appeal Issue 2 is **DISMISSED**.

> **3. Notice for the Early Design Guidance process was not performed in accordance with requirements of SMC 23.76.010.**

The Hearing Examiner declines to dismiss this issue on the basis of standing as argued in Applicant's Motion.

Applicant's Motion argues, "Appellant's third issue lacks any reference to a specific section or sections of the cited code provision Appellant asserts was violated as required by HER 3.01(a)&(d)(1)(3)." The Seattle Office of Hearing has consistently held that HER 3.01 does not require pleading of specific Code sections.

To the degree this issue is characterized as a challenge to the Design Review process under Chapter 23.41 SMC, the Hearing Examiner lacks jurisdiction over this issue, and it will not be considered at hearing.

The Applicant's Motion with regard to Notice of Appeal Issue 3 is **DENIED**.

> **4. An additional Early Design Guidance process for the revised 75-foot proposal was not scheduled in accordance with SMC 23.41.014.B.2 and SMC 23.41.014.C. Outreach documentation was submitted in April 2019 but was not considered at an Early Design Guidance Meeting as required by codes and guidelines.**

The Appellant asserts that procedural prerequisites for the design review process set forth in Chapter 23.41 SMC were not met. Consequently, according to the Appellant, the Board acted outside its authority in making its recommendation on the proposal. The Appellant challenges compliance with scheduling requirements and submission of documentation to the Board, which are procedural issues. However, procedural requirements under Chapter 23.41 are not within the Examiner's jurisdiction in an appeal of a design review decision. *See* SMC 23.76.022.C.6. Notice of Appeal Issue 4 is **DISMISSED**.

> **5. The lack of an additional Early Design Meeting for the 75-foot proposal deprived the public within 200 feet of the proposal of Public Notice in accordance with requirements of SMC 23.76.010.**

The Hearing Examiner declines to dismiss this issue on the basis of standing as argued in Applicant's Motion. The Seattle Office of Hearing has consistently held that HER 3.01 does not require pleading of specific Code sections.

To the degree this issue is characterized as a challenge to the Design Review process under Chapter 23.41 SMC, the Hearing Examiner lacks jurisdiction over this issue, and it will not be considered at hearing.

The Applicant's Motion with regard to Notice of Appeal Issue 5 is **DENIED**.

6. Notice of the Design Review Application was not posted in the form of a large sign as required by SMC 23.76.010 depriving members of the general public the opportunity to comment or establish a record of comment allowing appeal.

The Hearing Examiner declines to dismiss this issue on the basis of standing as argued in Applicant's Motion. The Seattle Office of Hearing has consistently held that HER 3.01 does not require pleading of specific Code sections.

To the degree this issue is characterized as a challenge to the Design Review process under Chapter 23.41 SMC, the Hearing Examiner lacks jurisdiction over this issue, and it will not be considered at hearing.

The Applicant's Motion with regard to Notice of Appeal Issue 6 is **DENIED**.

7. Public comments were not provided to the Design Review Committee in a timely manner nor fully and accurately therefore depriving them of the means to meet the mandate of SMC 23.41.008.A.1, SMC 23.41.014.C.2, SMC 23.41.014.D.1 and 23.41.014.F.1. to consider public comments.

The Appellant asserts that procedural prerequisites for the design review process set forth in Chapter 23.41 SMC were not met. Consequently, according to the Appellant, the Board acted outside its authority in making its recommendation on the proposal. The Appellant challenges compliance with the mandatory Board review of written public comments. However, procedural requirements under Chapter 23.41 are not within the Examiner's jurisdiction in an appeal of a design review decision. *See* SMC 23.76.022.C.6. Notice of Appeal Issue 7 is **DISMISSED**.

8. The Director did not provide the Design Review Committee the Director's review of the project's design and consistency with the guideline priorities, and recommendation required by SMC 23.41.014.F.1 and therefore deprived the Design Review Board of critical information needed to perform substantive review pursuant to SMC 23.41.014 in the limited time available to the Board.

The Appellant asserts that procedural prerequisites for the design review process set forth in Chapter 23.41 SMC were not met. Consequently, according to the Appellant, the Board acted outside its authority in making its recommendation on the proposal. The Appellant challenges compliance with the Director's procedural responsibilities to provide certain information to the Board. However, procedural requirements under Chapter 23.41 are not within the Examiner's jurisdiction in an appeal of a design review decision. *See* SMC 23.76.022.C.6. Notice of Appeal Issue 8 is **DISMISSED**.

9. The Design Review Board (DRB) did not fulfill its obligation in SMC 23.41.008A.2. to "Determine whether a proposed design submitted by an applicant does or does not comply with the guideline priorities."

This issue challenges the Board's procedure with regard to SMC 23.41.008.A.2. The Hearing Examiner has jurisdiction to review the Director's Decision, but not the Board's recommendation and/or its process in reaching it. The Appellant seems to suggest that this issue should be construed to assume it is a challenge to the Decision, but the issue as stated does not say that, and the Appellant is constrained by the language used in the Notice of Appeal as to the issues it has raised. The Hearing Examiner lacks jurisdiction over Appellant's claim that the Board failed to determine compliance with guideline priorities. Notice of Appeal Issue 9 is **DISMISSED**.

10. The Director's design review decision on page 26 misreferences, misapplies, and misconstrues the requirements of Section 23.41.014.F and G of the Seattle Municipal Code describing the content of the SDCI Director's decision; misrepresents and misconstrues the requirements of SMC 23.41.008.F..2 and 3; and misrepresents and misconstrues the recommendation of the Design Review Board.

SMC 23.41.008.F.3 provides that "[i]f four or more members of the Design Review Board agree in their recommendation to the Director, and if the Director otherwise approves a Master Use Permit application, the Director shall make compliance with the recommendation of the Design Review Board a condition of permit approval," unless the Director concludes that the recommendation of the Design Review Board meets certain criteria. In this case, only three members of the Design Review Board attended the final recommendation meeting and provided recommendations. Thus, as City argues, SMC 23.41.008.F.3 does not appear to apply in this case.

As stated, the issue concerns the Director's Decision, but to the degree this issue is characterized as a challenge to the Design Review process under Chapter 23.41 SMC, the Hearing Examiner lacks jurisdiction over this issue, and it will not be considered at hearing.

SMC 23.76.022.C.3.a governs the filing of appeals to the Hearing Examiner and requires that "[s]pecific objections to the Director's decision and the relief sought shall be stated in the written appeal." HER 3.01 similarly requires "A brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed."

Given these strictures it appears that Appellant's Notice of Appeal Issue 10 should be dismissed, but the Hearing Examiner will hear argument on this issue at the hearing on May 24, 2021.

> **11. In the decision, the Director makes no specific factual findings and conclusions and did not address in his decision the mandate of compliance with the specific design guidelines cited in the decision and to achieve the purpose and intent of this Chapter 23.41 specifically in regard to Greenlake Neighborhood Design Guidelines and Seattle Design Guidelines The decision merely listed applicable guideline headings. In the absence of a specific findings of fact and conclusions, the Director's decision cannot be given substantial weight.**

The Appellant's call for the Director to make specific findings of fact is not supported by Code. Even if such a requirement were an improvement on the Design Review process, the Hearing Examiner does not have jurisdiction over issues that are not a violation of the standing Code. Notice of Appeal Issue 11 is **DISMISSED**.

> **12. The Director did not address specific requirements of the Property Use and Development Agreement (PUDA) for the site providing in Section 2.j that on-site parking be adequate to meet all project-generated demand. No amendment or rescission of the PUDA has been approved pursuant to 23.76.060.C. The analysis of parking demand does not establish adequate parking for the range of uses that may be developed on the site.**

Chapter 23.41 does not make compliance with a PUDA a subject of either the Board's recommendation or the Director's design review Decision. *See* SMC 23.41.008.F.1, SMC 23.41.014.G. In addition, the list of appealable Type II decisions in SMC 23.76.006.C does not include a decision regarding a project's compliance with a PUDA. The Hearing Examiner lacks jurisdiction over Appellant's claim that the Director failed to "address specific requirements" of a Property Use and Development Agreement (PUDA) regarding adequacy of parking. Notice of Appeal Issue 12 is **DISMISSED**.

> **13. The original Notice of Application specified a State Environmental Policy Act (SEPA) review was required. Page 2 of the decision states that "…as a result of subsequent amendments to the City's SEPA Ordinance the proposed development is exempt from SEPA review." No citation is provided, however this presumably is based on "Table A for SMC 25.05.800 Exemptions for Residential Use" that establishes an exemption level of 200 for urban villages that have not exceeded plan estimates and 20 for those who have. There is no documentation that this criteria is met at the date of the decision.**

The Hearing Examiner declines to dismiss this issue on the basis of standing as argued in Applicant's Motion.

The Applicant's Motion argues, "Appellant has not submitted SEPA comment in compliance with the requirements of SMC 25.05.550, which 'shall be construed as lack of objection to the environmental analysis' by per SMC 20.05.545 and bars any SEPA appeal

for failure to exhaust remedies." Appellant did not rebut this argument in response, and therefore this issue should be dismissed on this basis.

Both the City and Applicant argue that the Hearing Examiner lacks jurisdiction over the Decision that the proposal is exempt from SEPA. Appellant also did not rebut this argument in response, and therefore this issue should be dismissed on this basis.

Notice of Appeal Issue 13 is **DISMISSED**.

> **14. The finding that the proposal is exempt from SEPA review is not in compliance with SMC 25.05.800.A.2.i that provides that said regulations shall " assure that development does not exceed growth estimates without SEPA review." Furthermore, Director's Rule 16-2019 provides that "SDCI will not apply a higher exemption level if new projects will cause growth estimates to be exceeded." The subject proposal includes 155 dwelling units and therefore this new project will cause growth estimates to be exceeded, therefore it is not exempt from SEPA review and a Threshold Determination is required pursuant to SMC 25.05.310.[1]**

The Hearing Examiner declines to dismiss this issue on the basis of standing as argued in Applicant's Motion.

The Applicant's Motion argues, "Appellant has not submitted SEPA comment in compliance with the requirements of SMC 25.05.550, which 'shall be construed as lack of objection to the environmental analysis' by per SMC 20.05.545 and bars any SEPA appeal for failure to exhaust remedies." Appellant did not rebut this argument in response, and therefore this issue should be dismissed on this basis.

Both the City and Applicant argue that the Hearing Examiner lacks jurisdiction over the Decision that the proposal is exempt from SEPA. Appellant also did not rebut this argument in response, and therefore this issue should be dismissed on this basis.

Notice of Appeal Issue 14 (15 in Notice of Appeal numbering) is **DISMISSED**.

Appellant's Notice of Appeal Issues 3, 5, and 6 remain to be adjudicated at hearing, and the Hearing Examiner will hear additional argument on the Motions concerns Notice of Appeal 10 at the outset of the hearing on May 24, 2021.

The City's Motion to Strike Appellant's Motion for Summary Judgment is **GRANTED**. Appellant's Motion for Summary Judgment does not conform to the Prehearing Order issued for this matter on February 24, 2021. Appellant, along with all parties at the prehearing conference was asked if he intended to file any prehearing motions, and

[1] The Notice of Appeal characterizes this issue as issue number 15, but does not list an issue 14.

indicated that he did not. The Preahearing Order was issued following the conference, and parties must adhere to schedules set in such orders.

Appellant filed a Motion to Suspend Scheduling Pending Hearing Examiner's Orders ("Motion to Suspend") on the various motions that had been filed on May 6, 2021. Given the Hearing Examiner's issuance of this Order, and the now narrowed scope of the appeal, the Hearing Examiner sees no need to suspend the hearing schedule (parties should have been proceeding with compliance with the schedule in the face of not having a decision from the Hearing Examiner anyway – filing of various motions does not suspend a case calendar). While not adequately briefed for the Hearing Examiner to make a determination, the Motion to Suspend references a delay in discovery between the parties. Appellant is asked to consider how or if the delay in discovery relates to the remaining issues, and if a relevant delay in discovery remains, this should be addressed by a separate motion.

Entered May 6, 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 and for Summary Judgment** to each person listed below, or on the attached mailing list, in the matters of **DAVID E. SHERRARD**, Hearing Examiner Files: **MUP-21-002 (DR)** in the manner indicated.

Party	Method of Service
Appellant David E. Sherrard 206-450-2606 desherrard@yahoo.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Applicant Natasha Morris Collins Woerman 206-245-2100 nmorris@collinswoerman.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Applicant Legal Counsel Aaron Laing Schwabe Williamson & Wyatt 206-407-1553 alaing@schwabe.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department David Landry SDCI 206-684-5318 david.landry@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Department Legal Counsel Jeffrey Weber City Attorney's Office 206-684-8200 jeff.weber@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Mailing Alicia Reise City Attorney's Office 206-684-8284 alicia.reise@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: May 6, 2021

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

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 24th day of September, 2021, I arranged for service of the foregoing APPLICANT'S MOTION TO DISMISS and Attachments A & B thereto to the parties to this action as follows:

By:

- ☐ U.S. Postal Service, ordinary first class mail
- ☐ U.S. Postal Service, certified or registered mail, return receipt requested
- ☐ hand delivery
- ☐ facsimile
- ☒ electronic service
- ☒ other (specify) Hearing Examiner e-File

To:

City of Seattle Hearing Examiner
Hearing.Examiner@seattle.gov

Appellant
Katherine M. Landolt
206-412-2992
kwalker@blarg.net

Department
Carly Guillory
SDCI
206-684-0720
carly.guillory@seattle.gov

Department Legal Counsel
TBD

Mailing
Erika Ikstrums
SDCI
206-684-3160
erika.ikstrums@seattle.gov

Aaron M. Laing, WSBA #34453

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
US Bank Centre
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
206.622.1711