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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

10 In Re: Appeal by

11
12 WARWICK CORP.

13 from the February 16, 2023 City of Seattle
14 Analysis and Decision of the Director of the
15 Seattle Department of Construction and
Inspections.

Hearing Examiner File:
MUP-23-003 (DD, DR)

Department Reference
3026266-LU

APPLICANT’S MOTION TO DISMISS

16
17 **I. INTRODUCTION AND RELIEF REQUESTED**

18 This is an appeal of a Master Use Permit (“MUP”) granted for Respondent Jodi Patterson
19 O’Hare o/b/o AMLI Development Company LLC (“Applicant”) to develop a multifamily
20 residential building with retail and parking (“Project”) in the Downtown neighborhood of Seattle
21 (“City”). The February 16, 2023 Analysis and Decision (“Decision”) issued by the City contains
22 the City’s decision to approve the design of the Project under the City’s Design Review process
23 and a Determination of Nonsignificance (“DNS”) under the State Environmental Policy Act
24 (“SEPA”).
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1 Warwick Corporation (“Appellant”) filed a Notice of Appeal (“Notice”) that contains
2 five claims. Claim 1 asserts that the Decision violates Appellant’s property rights under the
3 United States Constitution and the “principles of Magna Carta.” Notice at 1. Although the
4 Notice does not reference SEPA, Appellant confirmed during the March 28, 2023 prehearing
5 conference held in this matter that Claims 2, 3, 4, and 5 are challenges to the DNS.
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7 For the reasons stated below, all of these claims must be dismissed. Claim 1 must be
8 dismissed in full because the Examiner is not authorized to adjudicate challenges to the Seattle
9 Municipal Code (“SMC” or “Code”) or constitutional claims. Claims 2 and 3 must be dismissed
10 in full because SEPA exempts residential projects from appeal on the basis of traffic and
11 transportation. RCW 43.21C.501; SMC 25.05.608.H. Claims 4 and 5 must be dismissed
12 because they concern impacts to the transportation, light, and aesthetics elements of the
13 environment, and SEPA exempts residential projects from appeal on these bases. *Id.* Those
14 portions of Claims 4 and 5 that are not exempt under RCW 43.21C.501 must be dismissed
15 because they are unsupported by the Code.
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17 **II. STATEMENT OF FACTS**

18 **A. The Project**

19 The Project is a 44-story, 461-unit apartment building with retail and parking for 307
20 vehicles. Decision at 1. It will be located at 2025 5th Avenue, on property (“Project Site”) at the
21 corner of 5th Avenue and Lenora Street in in Downtown Seattle. *Id.* The Project Site is
22 currently occupied by a one-story commercial structure and surface parking lots. *Id.*
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1 **1. Design Review**

2 The Project was reviewed through the City’s Design Review process. Decision at 2-25.
3 The Downtown Design Review Board (“Board”) discussed the Project in a February 21, 2017
4 Early Design Guidance meeting; an April 3, 2018 First Recommendation meeting; a July 10,
5 2018 Second Recommendation meeting; and a September 4, 2018 Third Recommendation
6 Meeting. Decision at 2-10. At the Third Recommendation meeting, the Board unanimously
7 recommended approval of the Project with no conditions. Decision at 24. The recommendation
8 included one departure related to the depth of overhead weather protection canopies based on the
9 location of street trees. Decision at 10.
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11 After the Third Recommendation meeting, the Director of the Seattle Department of
12 Construction and Inspections (“SDCI”) reviewed the Board’s decision and recommendation and
13 found it consistent with the City’s adopted Design Review Guidelines. Decision at 25. The
14 Director approved the Project’s design subject to consistency with the materials represented to
15 the Board. Decision at 31.
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17 **2. SEPA**

18 The Project was also reviewed under SEPA. The Applicant completed and submitted a
19 SEPA checklist (“Checklist”) with accompanying technical reports and analysis, and SDCI
20 reviewed and annotated the Checklist. Decision at 25. The Decision summarizes the City’s
21 consideration of relevant environmental impacts. Decision at 25-32.
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23 Regarding transportation impacts, the Applicant submitted a Transportation Impact
24 Analysis (“TIA”) prepared by Heffron Transportation, Inc. Decision at 30. The TIA analyzed
25 expected trip generation from the Project and potential effects on area intersections. The TIA
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1 also discussed the Project’s plan to take loading and residential parking access off the alley that
2 runs behind the Project Site between Lenora and Virginia Streets. *Id.* The Decision discusses
3 measures that will be employed to mitigate potential traffic impacts in the alley, including
4 development of a loading bay, scheduling requirements for loading and tenant move-in, a
5 recessed staging area for garbage and recycling bins, and posted parking restrictions in the alley.
6 *Id.* These measures are included in the DNS as mitigating conditions.
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8 Regarding other impacts discussed in Appellant’s appeal, the DNS states:

9 *Historic Resources*

10 The site is located adjacent to the Seattle Monorail and the Sheridan Apartments both
11 designated historic landmarks. The Department of Neighborhoods reviewed the proposal
12 for compliance with the Landmarks Preservation requirements of SMC 25.12 and did not
13 recommend changes to the proposed design (Landmarks Preservation Board letters,
reference number LPB 273/19).

14 The existing structure (Nara Grill) on site is more than 50 years old. The structure was
15 considered in the 2007 Downtown Historic Resources Survey and Inventory, and was
16 included in Category 4. Structures in Category 4 have been so altered that they would not
qualify as Seattle landmarks and no landmark nomination is required.

17 Per the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations
18 to mitigate impacts to historic resources are presumed to be sufficient, and no further
conditioning is warranted per SMC 25.05.675.H.

19 *Height, Bulk, and Scale*

20 The proposal completed the design review process described in SMC 23.41. Design
21 review considers mitigation for height, bulk and scale through modulation, articulation,
22 landscaping, and façade treatment.

23 Section 25.05.675.G.2.c of the Seattle SEPA Ordinance provides the following: “The
24 Citywide Design Guidelines (and any Council-approved, neighborhood design
25 guidelines) are intended to mitigate the same adverse height, bulk, and scale impacts
26 addressed in these policies. A project that is approved pursuant to the Design Review
27 Process shall be presumed to comply with these Height, Bulk, and Scale policies. This
presumption may be rebutted only by clear and convincing evidence that height, bulk and
scale impacts documented through environmental review have not been adequately

mitigated. Any additional mitigation imposed by the decision maker pursuant to these height, bulk, and scale policies on projects that have undergone Design Review shall comply with design guidelines applicable to the project.”

The height, bulk and scale of the proposed development and relationship to nearby context have been addressed during the Design Review process. Pursuant to the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations to mitigate height, bulk and scale impacts are adequate and additional mitigation is not warranted under SMC 25.05.675.G.

Light and Glare

SMC 25.05.675.K provides policies to minimize or prevent adverse impacts created by light and glare. The applicant provided a light and glare analysis (EA Engineering, Science, and Technology, Inc., SEPA Checklist Appendix E - Solar Glare Analysis). In accordance with the suggested potential mitigation measures for light and glare impacts to surrounding sites, the applicant has maintained a pallet of materials that are not highly reflective, provided building modulation, included street trees and pedestrian scale lighting; the design was subject to Design Review. No adverse impacts are anticipated for motorists on 5th Avenue, and no mitigation is warranted under SMC 25.05.675.K.

Public Views

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The proposed development does not block views of any nearby historic landmarks in a manner inconsistent with the pattern of existing development.

No adverse impacts to protected public views are anticipated and additional mitigation is not warranted under SMC 25.05.675.P.

Shadows on Open Space

SMC 25.05.675.Q provides policies to minimize shadow impacts on certain designated open spaces downtown, including Westlake Plaza. The applicant provided a shadow analysis (EA Engineering, Science, and Technology, Inc., SEPA Checklist Appendix F – Shadow Analysis), which demonstrated that the proposed development will not contribute additional shading to Westlake Plaza. No mitigation is warranted under SMC 25.05.675.Q.

Decision at 28-29.

1 Based on its analysis of these impacts and the others discussed in the Decision, the City
2 determined that the Project would not have a probable significant adverse impact on the
3 environment and issued the DNS.

4 **B. Decision and Appeal**

5 Appellant is the owner of the Warwick Hotel, which is located across the alley to the
6 southwest of the Project Site. Appellant timely appealed the Decision on March 1, 2023. As
7 authorized by the City of Seattle Hearing Examiner Rules of Practice and Procedure (“HER”)
8 and by the Examiner during the March 28, 2023 prehearing conference in this matter, Applicant
9 now seeks dismissal of this appeal.
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11 **III. STATEMENT OF ISSUES**

12 The issues raised in this motion are whether the Examiner should dismiss Claim 1, which
13 is outside the Examiner’s jurisdiction, and whether the Examiner should dismiss Claims 2, 3, 4,
14 and 5 because they concern issues not subject to appeal under RCW 43.21C.501 and otherwise
15 fail to state claims on which relief may be granted.
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17 **IV. EVIDENCE RELIED UPON**

18 This motion relies on the papers and pleadings in this matter, including the Notice of
19 Appeal and its attachments, and the Declaration of John Shaw (“Shaw Declaration”) submitted
20 concurrently with this motion.
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22 **V. AUTHORITY**

23 **A. The Examiner may dismiss a claim over which the Examiner lacks jurisdiction or**
24 **that is without merit on its face.**

25 “Any party may request dismissal of all or part of an appeal by motion pursuant to HER
26 3.17.” HER 5.04(a). “A party may move to dismiss an appeal, in whole or in part, if . . . [t]he
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1 Examiner lacks jurisdiction, in whole or in part, over the appeal; [t]he appeal is frivolous or
2 without merit on its face; or [o]ther grounds established by law exist.” HER 3.17(j). “Examiner
3 jurisdiction is limited to matters identified in the Seattle Municipal Code or assigned to the
4 Hearing Examiner by ordinance or other City Council action.” Hearing Examiner Rules of
5 Practice and Procedure (“HER”) 3.01(b). “A party or the Examiner may raise issues concerning
6 Examiner jurisdiction at any time.” HER 3.01(c).

8 **B. Claim 1 must be dismissed because the Examiner lacks jurisdiction over challenges**
9 **to the Code and constitutional claims.**

10 In Claim 1, Appellant alleges that due to City zoning requirements, construction of the
11 Project will effectively impose a limitation on Appellant’s ability to redevelop its own property
12 or to expand the structures currently located there. Appellant claims that it will “therefore have
13 part of its floor areas or air rights ‘confiscated’ by the Project” and that this is “a violation of the
14 principles of Magna Carta, which is the underlying foundation of the Bill of Rights and the US
15 Constitution.” Notice at 1. Appellant asserts that this would result in the equivalent of a taking
16 and therefore “should not be permitted without due process and appropriate compensation.”
17 Notice at 2. Appellant also suggests that approval of the Project would result in a reduction of
18 Appellant’s “right to build on its land to the fullest possible extent permitted by law reduced,
19 removed or infringed,” in violation of the 14th Amendment to the United States Constitution. *Id.*
20 Claim 1 must be dismissed because it is a challenge to the Code and because it is based on the
21 Constitution, not the Code. The Examiner does not have jurisdiction over either type of claim.

22 “The City of Seattle Hearing Examiner has jurisdiction only over appeals the Seattle
23 Municipal Code assigns to it.” *Thomson*, HE File No. MUP-22-002, Order on Partial Dismissal
24 Motion (May 2, 2022) at 1. “The Hearing Examiner’s jurisdiction must derive entirely from
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1 specific directives within the Code.” *Cesmat*, HE File Nos. MUP-19-026 and S-19-001, Order
2 on Motion to Dismiss and for Summary Judgment (September 12, 2019) at 1 (citing *Chaussee v.*
3 *Snohomish County Council*, 38 Wn. App. 630, 636 (1984)). As relevant here, the Code provides
4 the Examiner with jurisdiction over administrative appeals of a MUP “that relate to compliance
5 with the procedures for Type II decisions as required in this Chapter 23.76, compliance with
6 substantive criteria, determinations of nonsignificance (DNSs), . . . or failure to properly
7 approve, condition, or deny a permit based on disclosed adverse environmental impacts.” SMC
8 23.76.022.C.6.
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10 These limitations on Examiner jurisdiction bar the adjudication of Claim 1 for two,
11 independently sufficient reasons. First, the claim is not actually a challenge to the Project;
12 rather, it is a challenge to Code-established ordinances that Appellant believes would improperly
13 limit its future ability to develop its own property. Because Appellant asserts that these Code
14 requirements would conflict with its constitutional rights, its claim “is, therefore, a challenge to
15 the Code itself.” See *Fischer Studio Condominium Building Owners Association*, HE File No.
16 MUP-21-004, Order on Motion to Dismiss (May 5, 2021) at 5. “Such challenges of the Code are
17 not within the jurisdiction of the Hearing Examiner.” *Id.*; accord, e.g., *Cesmat*, *supra*, at 1
18 (Examiner lacks jurisdiction over challenge to a Director’s Rule).
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20 Second, the Examiner lacks authority to adjudicate challenges based on the United States
21 Constitution or the Magna Carta. Courts have consistently affirmed hearing examiner
22 determinations that they lack the authority to review constitutional claims when such authority is
23 not expressly included in the relevant city ordinances. E.g. *Miller v. City of Sammamish*, 9 Wn.
24 App. 2d 861, 873 n.2, 447 P.3d 593 (2019); *Exendine v. City of Sammamish*, 127 Wn. App. 574,
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586–87, 113 P.3d 494, 500 (2005). Here, no such authority is provided to the Examiner by the Code. SMC 23.76.022.C. The fact that constitutional claims have been addressed by courts, as stated in the Notice, does not bear on the Examiner’s jurisdiction. “[T]he Examiner can only address Code consistency.” *Magnolia Community Council*, HE File Nos. MUP-21-016 and MUP-21-017, Order on Applicant’s Motion to Dismiss (June 28, 2021) at 2. “No Code provision is identified the project does not comply with.” *Id.* at 5. Therefore, “[t]his issue should be dismissed.” *Id.*

C. Claims 2 and 3 (in full) and Claim 4 (in part) must be dismissed because the Examiner lacks jurisdiction over SEPA transportation claims.

The Examiner lacks jurisdiction over Appellants’ SEPA claims regarding transportation impacts under RCW 43.21C.501. These are Claims 2 (“Traffic congestion”) and 3 (“Use of the Alley Way”), as well as Claim 4 to the extent it concerns traffic hazards and alley access.

RCW 43.21C.501 provides:

(1) Project actions described in this section that pertain to residential, multifamily, or mixed-use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 are exempt from appeals under this chapter on the basis of the evaluation of or impacts to the following elements of the environment, provided that the appropriate requirements for a particular element of the environment, as set forth in subsections (2) and (3) of this section, are met.

(2)(a) Transportation. A project action pertaining to residential, multifamily, or mixed-use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 is exempt from appeals under this chapter on the basis of the evaluation of or impacts to transportation elements of the environment, so long as the project is:

(i)(A) Consistent with a locally adopted transportation plan; or
(B) Consistent with the transportation element of a comprehensive plan; and

(ii)(A) A project for which traffic or parking impact fees are imposed pursuant to RCW 82.02.050 through 82.02.090; or
(B) A project for which traffic or parking impacts are mitigated by an ordinance, or ordinances, of general application adopted by the city or town.

1 (b) The exemption under this subsection (2) does not apply if the department of
2 transportation has found that the project will present significant adverse impacts to the
3 state-owned transportation system.

4 RCW 43.21C.501 is jurisdictional in nature and does not allow for the pendency of an appeal
5 that conflicts with its exemption. The City has adopted an equivalent exemption in the Code.
6 SMC 25.05.680.H.

7 For the reasons stated in the attached Declaration of John Shaw, a City transportation
8 planner of 26 years experience, the Project meets the criteria established by RCW 43.21C.501.
9 The Project is a multifamily, mixed-use project. Decision at 1. The Department of
10 Transportation has not found that the Project will present significant adverse impacts to the state-
11 owned transportation system. Shaw Declaration ¶ 3. For these reasons and those stated below,
12 the Examiner lacks jurisdiction over Appellant's SEPA claims to the extent they raise
13 transportation impacts.
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16 **1. The Project meets the criteria in RCW 43.21.C.501(2)(a)(i)(B).**

17 The Project is consistent with the transportation element of the Comprehensive Plan. The
18 law is well established that "[a] comprehensive plan is not more than a general policy guide."
19 *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43-44, 873 P.2d 498 (1994) (despite the fact that
20 a landfill is not a residential use, proposed landfill was not "so incompatible with the rural-
21 residential designation as to be proscribed by the comprehensive plan"). The Plan reiterates the
22 principle that goals and policies are not mandatory and must be considered all together. Shaw
23 Declaration ¶ 4. Here, the Project is consistent with multiple goals and policies of the Plan's
24 Transportation Element and with the Transportation Element as a whole. Shaw Declaration ¶¶
25 4-14.
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1 The Examiner has previously concluded, based on similar evidence, that projects are
2 consistent with the Transportation Element for purposes of the RCW 43.21C.501 exemption.
3 *See Fischer Studio, supra*, at 7-11; *Thomson, supra*, at 2; *Escala Owners Association*, HE No.
4 MUP-19-031, Findings and Decision at 10. The *Escala* decision was subsequently appealed to
5 the Court of Appeals, which affirmed the Examiner’s conclusion, based on Mr. Shaw’s
6 testimony, that “the project is consistent with the City’s comprehensive plan because it
7 exemplifies the precise development contemplated by the City’s transportation policy focusing
8 on density, multimodal transportation options, and pedestrian safety.” *Escala Owners Ass’n v.*
9 *City of Seattle*, No. 82568-2-I (unpublished), 2022 WL 2915536 at *10, review denied, 200
10 Wn.2d 1019, 520 P.3d 966 (2022).
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13 For the same reasons as provided in these cases, this Project is consistent with the
14 transportation element of the Comprehensive Plan and satisfies RCW 43.21.C.501(2)(a)(i)(B).
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16 **2. The Project meets the criteria in RCW 43.21.C.501(2)(a)(ii)(B).**

17 The project is “[a] project for which traffic or parking impacts are mitigated by an
18 ordinance, or ordinances, of general application adopted by the city.” RCW
19 43.21.C.501(2)(a)(ii)(B). “Mitigation” under SEPA is defined to include a range of responses,
20 including “avoiding the impact,” “minimizing impacts,” “rectifying the impact,” “reducing or
21 eliminating the impact over time,” “compensating for the impact,” and/or “monitoring the
22 impact.” SMC 25.05.768.
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24 Here, traffic and parking impacts of the Project are mitigated by numerous City
25 ordinances of general application. Shaw Declaration ¶¶ 15-17. The framework of ordinances
26 described by Mr. Shaw is consistent with well-established SEPA policy, which authorizes
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jurisdictions to determine that local regulations sufficiently mitigate particular impacts. *In re Jurisdiction of Exam'r*, 135 Wn. App. 312, 325, 144 P.3d 345, 351 (2006) (“SEPA allows counties to determine that a project's environmental impact will be mitigated through its own development regulations, rather than through the EIS process, to meet SEPA requirements.”); RCW 43.21C.240(4)(b) (local policies “shall be considered to adequately address an impact” if the city “has designated as acceptable certain levels of service, land use designations, development standards, or other land use planning” measures).

RCW 43.21C.501 does not require that the traffic or parking impacts mitigated by a City ordinance or ordinances are those impacts alleged by an appellant. Here, however, the ordinances cited by Mr. Shaw mitigate precisely those impacts – including alleged impacts to the alley, traffic congestion, and safety. Shaw Declaration ¶¶ 15-17.

As with subsection (2)(a)(i)(B), the Examiner has previously concluded (and the Court of Appeals has affirmed), based on similar evidence, that projects are consistent with this criterion and entitled to the exemption from SEPA transportation appeals. *See Fischer Studio Building, supra*, at 7-11; *Thomson, supra*, at 2; *Escala Owners Association*, HE No. MUP-19-031, Findings and Decision at 10; *Escala Owners Ass'n*, 2022 WL 2915536 at *10. As in those cases, the Project’s traffic and parking impacts are mitigated by generally applicable ordinances, and the Project is consistent with RCW 43.21C.501(2)(a)(ii)(B).

3. Transportation claims must be dismissed.

For the reasons stated above, Claims 2 and 3 must be dismissed in full. Both claims relate entirely to “impacts to transportation elements of the environment” as defined by RCW 43.21C.501(4)(b) – specifically, they relate to “impacts to transportation systems; vehicular

1 traffic; . . . parking; movement or circulation of people or goods; and traffic hazards.” *See*
2 Notice at 2. The Project cannot be appealed on these bases.

3 Likewise, Claim 4 must be dismissed in part. The title of Claim 4 includes the word
4 “access,” and its allegations that the alley will become a “wind tunnel increasing the risk of
5 accidents” and that the “narrowness of the lane could also hinder any efforts to fight the spread
6 of any fire,” *see* Notice at 3, appear to be allegations of impacts to transportation elements of the
7 environment. To the extent they concern traffic accidents and access to the alley, these
8 allegations are outside the scope of issues that may be appealed under SEPA. Claim 4 must be
9 dismissed to the extent it concerns transportation.
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11 **D. The remainder of Claim 4 must be dismissed.**

12 The non-transportation-related portions of Claim 4 must also be dismissed.

13 The claim begins by alleging that the Project “would remove 80% of sunlight from the
14 hotel.” Notice at 3. This claim must be dismissed under RCW 43.21C.501(3)(b), which
15 provides that a multifamily or mixed-use development is “exempt from appeals under this
16 chapter on the basis of the evaluation of or impacts to the light and glare element of the
17 environment, so long as the project is subject to design review pursuant to adopted design review
18 requirements at the local government level.” Here, the Project was subject to design review.
19 Decision at 2-25. The Court of Appeals recently affirmed that RCW 43.21C.501(3)(b) exempts
20 projects from appeals alleging that they will block sunlight to adjacent projects. *Fischer Studio*
21 *Bldg. Condo. Owners Ass’n v. City of Seattle*, 524 P.3d 708, 713 (Wash. Ct. App. 2023). Claim 4
22 must be dismissed to the extent it alleges light-related impacts.
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1 The claim also alleges that the Project “would render the space above the narrow alley
2 into a wind tunnel increasing the risk of accidents and fire hazard” and that “the creation of a
3 wind tunnel should be seriously looked into with a professional study being completed prior to
4 considering the project further,” and that “[i]n the event of a major earthquake, the damages will
5 become catastrophic.” Notice at 3. These allegations must be dismissed because they do not
6 claim any probable significant adverse impacts, only possible impacts and the opinion that more
7 study should be conducted. “To meet its burden of proof under SEPA, the Appellant must
8 present actual evidence of probable significant adverse impacts from the proposal.” *Escala*
9 *Owners Association*, HE File No. MUP-17-035, Amended Findings and Decision (June 12,
10 2018) at 14 (citing *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002);
11 *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001)). “This burden is not met
12 when an appellant only argues that they have a concern about a potential impact, or an opinion
13 that more study or review is necessary.” *Id.* Here, because Appellant’s allegations relate only to
14 concerns and the opinion that more analysis is necessary, the claims cannot provide a basis for
15 reversal of the DNS.
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19 In addition, Appellant’s claims concerning a “wind tunnel” must be dismissed for the
20 independent and equally sufficient reason that SEPA does not require analysis or mitigation of
21 wind impacts. “Appeals are limited to procedural and substantive compliance with SEPA.”
22 SMC 25.05.680.I. Procedurally, “[a]nalysis of environmental considerations under RCW
23 43.21C.030(2) may be required *only* for those subjects listed as elements of the environment (or
24 portions thereof).” RCW 43.21C.110(1)(f) (emphasis added). Likewise, under the Code, “[t]he
25 content of environmental review [f]or the purpose of deciding whether an EIS is required, is
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1 specified in the environmental checklist, in Sections 25.05.330 and 25.05.444.” SMC
2 25.05.060.B.2; *see also, e.g.*, SMC 25.05.330 (threshold determination must be based on “the
3 environmental checklist” and “any additional information furnished under Section 25.05.335”);
4 SMC 25.05.335.A (agency that requires additional information may “[r]equire an applicant to
5 submit more information *on subjects in the checklist.*”) (emphasis added). Under SEPA,
6 “environment” “means, *and is limited to*, those elements listed in Section 25.05.444, as required
7 by RCW 43.21C.110(1)(f).” SMC 25.05.740 (emphasis added). And “[e]nvironmental impacts”
8 are “effects upon the elements of the environment *listed in Section 25.05.444.*” SMC 25.05.752
9 (emphasis added); *see also Appeal of Seattle Mobility Coalition*, HE File No. W-18-013,
10 Amended Findings and Decision (Oct. 24, 2019) at 7 (“SEPA environmental review is limited to
11 analysis of potential impacts to the natural and built environment. Elements of the environment
12 to be considered under SEPA review are listed in SMC 25.05.444.”).

13
14 Accordingly, the City’s procedural obligations under SEPA are limited to consideration
15 of elements of the environment as expressly listed in SMC 25.05.444 and WAC 197-11-444.
16 These elements do not include “wind” or “wind tunnels.” Similarly, “appeals of substantive
17 compliance shall be limited to the specific environmental policies contained in Section
18 25.05.675.” SMC 25.05.680.I. There is no mention of wind or wind tunnels in SMC 25.05.675
19 either. Appellant’s wind-related SEPA claims lack a basis in the Code and must be dismissed.
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22 **E. Claim 5 must be dismissed.**

23 Claim 5 is entitled “Historic Resources and Compatible Scale.” Notice at 3. It states that
24 the Project is located adjacent to the Warwick Hotel and near the Cinerama movie theater, and it
25 alleges that the Project “would completely over shadow this area and deprive it of its historic
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1 significance.” *Id.* The Notice also alleges that “[t]he different height and size of the buildings
2 are such that it would pose a threat to ‘compatible scale within an area’, a principle embedded in
3 the General Purpose and General Provisions of the Land Use Code.” *Id.* This claim must be
4 dismissed because it alleges aesthetic impacts and because it seeks substantive mitigation that the
5 Code does not allow.
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7 First, as with transportation- and light-related claims, claims based on impacts to
8 aesthetics are exempt from appeal as long as a project has been subject to design review. RCW
9 43.21C.501(3)(a). Appellant’s claims related to “compatible scale” and the “height and size of
10 the buildings” are allegations of aesthetic impacts. Thus, because the Project was subject to
11 design review, Claim 5 must be dismissed to the extent it raises these claims.
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13 Second, there is no basis for Appellant’s claims related to historic resources. As noted
14 above, “[a]ppeals are limited to procedural and substantive compliance with SEPA,” and
15 “[a]ppeals of substantive compliance shall be limited to the specific environmental policies
16 contained in Section 25.05.675.” SMC 25.05.680.I. Claim 5 does not allege procedural
17 noncompliance with SEPA; instead, the appeal requests that the City “reject” the MUP based on
18 the height and size of the Project. Notice at 3. This is a request for the City to use its substantive
19 authority to condition (or deny) the Project based on potential impacts to historic resources.
20 However, the City’s substantive environmental policies, as contained in SMC 25.05.675, rejects
21 this approach. Instead, SMC 25.05.675.H.2 provides for the City to use its substantive authority
22 when a project is proposed on a site designated as a historic landmark (subsection b); when a
23 project is proposed involving a structure that is not yet designated as a landmark but that appears
24 to meet the criteria (subsection c); when a project is proposed “adjacent to or across the street
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1 from a designated site or structure” (subsection d); or when a project is proposed on a site “with
2 potential archaeological significance” (subsection e). None of those situations exists here. As
3 reflected in the Decision, the City reviewed the adjacent designated landmarks, which do not
4 include the Warwick Hotel or the Cinerama, and determined that no changes to the Project were
5 required. Decision at 28.¹ The City also determined that the structure currently on the Project
6 Site is not eligible for designation. *Id.* The Code does not provide a basis for Appellant’s claim
7 that the Project should be conditioned to avoid historic-resources impacts to adjacent, non-
8 designated structures. Claim 5 must be dismissed.

11 VI. CONCLUSION

12 The Applicant respectfully requests that the Hearing Examiner dismiss this appeal in full.

13 DATED this 13th day of April 2023.

14 s/Courtney A. Kaylor, WSBA #27519
15 s/David Carpman, WSBA #54753
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25 ¹ City online records confirm that the building currently on the Project Site, the Cinerama, and the Warwick Hotel
26 are not designated landmarks. See [https://www.seattle.gov/neighborhoods/historic-preservation/city-](https://www.seattle.gov/neighborhoods/historic-preservation/city-landmarks/landmarks-list)
27 [landmarks/landmarks-list](https://www.seattle.gov/neighborhoods/historic-preservation/city-landmarks/landmarks-list) (landmarks list); [https://www.seattle.gov/neighborhoods/historic-preservation/city-](https://www.seattle.gov/neighborhoods/historic-preservation/city-landmarks/landmarks-map)
28 [landmarks/landmarks-map](https://www.seattle.gov/neighborhoods/historic-preservation/city-landmarks/landmarks-map) (landmarks map (last visited April 12, 2023)).