

1
2
3
4
5
6
7
8 CITY OF SEATTLE
9 OFFICE OF THE HEARING EXAMINER

10 In the Matter of the Appeal of:

11 PROTECT VOLUNTEER PARK

Hearing Examiner File No. MUP 17-015
Dept. Reference 3024753

12 **APPLICANT’S RESPONSE TO**
13 **APPELLANT’S MOTION FOR**
14 **SUMMARY JUDGMENT**

15 **I. INTRODUCTION**

16 Seattle’s SEPA framework presumes that compliance with the Landmarks Preservation
17 Ordinance, ch. 25.12 SMC (“LPO”), is adequate mitigation for a project’s impacts to historic
18 landmark resources. SMC 25.05.665.D. Consistent with this framework, the City’s Department of
19 Construction and Inspections (“SDCI”) determined in this case that compliance with the LPO will
20 adequately mitigate the project’s impacts to historic landmark resources. Accordingly, SDCI
21 imposed compliance with the LPO as a condition in the MDNS. This determination is consistent
22 with Seattle’s SEPA framework, and it is entitled to deference. Protect Volunteer Park, appellant,
23 has neither alleged nor presented any evidence to overcome the presumption in SMC 25.05.665.D
24 or the deference to which SDCI’s decision is entitled.

25 Instead, the appellant misconstrues Seattle’s SEPA review framework and suggests that it
26 cannot be consistent with state law unless there is a guarantee that the Landmarks Preservation

1 Board (“Landmarks Board”) will impose substantive conditions on this project. When it comes to
2 historic landmark resources, compliance with the LPO is all the SEPA framework requires. It
3 does not matter if the Landmarks Board imposes substantive conditions in its approval decision,
4 and the question whether this framework complies with state law is beyond the Hearing
5 Examiner’s jurisdiction. This appeal is also premature to the extent it seeks to challenge the
6 Landmarks Board’s decision with respect to this project.

7 The MDNS at issue is expressly conditioned on Seattle Art Museum, applicant, (“SAM”)
8 obtaining the Landmarks Board’s approval. If the Landmarks Board approves the project (with or
9 without conditions), its impacts are presumed to be adequately mitigated. That should be the end
10 of the analysis, and it should result in a dismissal. Accordingly, the Hearing Examiner should
11 deny the appellant’s motion for summary judgment and instead dismiss this appeal.

12 **II. EVIDENCE RELIED UPON**

13 This Response relies on the concurrently filed Declaration of Sam Miller, dated
14 May 15, 2017 (“Second Miller Decl.”), and other previously filed documents.

15 **III. STATEMENT OF FACTS**

16 SAM has applied for a certificate of approval from the Landmarks Board and, for almost a
17 year, has engaged in an intensive design-review process aimed at obtaining that approval. The
18 project design team, led by LMN Architects, has presented various aspects of the project to the
19 Landmarks Board or its Architectural Review Committee (“ARC”) on seven occasions to date.
20 Second Miller Decl. ¶ 2. As detailed below, the Landmarks Board’s members have provided
21 feedback, and SAM has refined and revised the project’s design in response on each occasion.

22 **A. ARC Presentation (May 27, 2016)**

23 SAM presented its initial design in May 2016 to the ARC. The ARC’s members were
24 generally supportive but concerned that the loading dock would block views. *Id.* ¶ 3.b. They also
25 stressed the importance of retaining the east gable and replacing cladding in kind. *Id.*

1 **B. ARC Presentation (June 24, 2016)**

2 SAM presented a revised design about a month later. *Id.* ¶ 4. It also presented alternatives
3 for the size of the Garden Court’s openings and cladding approaches. *Id.* ¶ 4.a. The ARC asked
4 for more options for the Garden Court’s openings, more information on the loading dock’s impact
5 to views, and more detail on the proposed exterior terrace. *Id.* ¶ 4.b.

6 **C. ARC Presentation (August 12, 2016)**

7 SAM presented the requested information as well as detail on changes to the auditorium,
8 ADA compliance, and landscaping in August 2016. *Id.* ¶ 5. The ARC was concerned at this
9 meeting that the terrace and glazing on the rear of the expansion intruded into the park and could
10 be misperceived as a competing entrance. *Id.* ¶ 5.b. It also continued to express concern about
11 view blockage by the loading dock. *Id.* In response, SAM scaled back the terrace and glazing and
12 moved the loading dock’s freight elevator. *Id.* ¶ 5.c.

13 **D. Landmarks Board Presentation (October 5, 2016)**

14 After four months of revision, SAM presented the project to the full Landmarks Board in
15 October 2016. Despite prior revisions to the loading dock, the Landmarks Board remained
16 concerned about views and suggested further study. *Id.* ¶ 6.b. The Landmarks Board also wanted
17 SAM to simplify the terrace further, and it requested additional enhancements in the park that
18 would offset the terrace’s impacts to the park. *Id.*

19 **E. Landmarks Board Presentation (December 7, 2016)**

20 SAM presented a revised design and the requested studies in December 2016. *Id.* ¶ 7. The
21 revisions included additional upgrades to pathways in the park, including rehabilitation of original
22 Olmsted-designed paths. *Id.* ¶ 7.a. Focusing on the balance between the need for this project and
23 its impact to historic landmark resources, the Landmarks Board requested information about
24 SAM’s programmatic objectives as well as further study on reducing the size of the park lobby
25 and more subdued options for the Garden Court’s openings. *Id.* ¶ 7.b.

1 **F. ARC Presentation (February 24, 2017)**

2 SAM presented the additional information at the ARC meeting in February 2017. This
3 included designs for a smaller freight elevator, view studies, circulation alternatives for the
4 Garden Court, and site design and path improvements. *Id.* ¶ 8.a. The ARC asked for continued
5 study on the Garden Court openings and park lobby. *Id.* ¶ 8.b. It also asked about the viability of
6 an underground expansion as an alternative option. *Id.*

7 **G. ARC Presentation (April 19, 2017)**

8 SAM presented these requested studies and additional design information, including a
9 study of the underground option, in April 2017. *Id.* ¶ 9. The ARC expressed support for SAM's
10 revised design of the Garden Court's openings and park lobby. *Id.* ¶ 9.b. It also acknowledged
11 that an underground expansion was not viable and would undermine the historic fabric of the
12 original building. *Id.* Based on this feedback, SAM's design team is refining the design to reduce
13 Garden Court's openings and has reduced the park lobby, which will now carry through into the
14 actual construction documents. *Id.* ¶ 9.c.

15 On May 10, 2017, the National Parks Service issued a conditional approval for the project
16 with conditions that SAM's current designs and plans will satisfy. *Id.* ¶ 10. Though it hopes to be
17 near a decision, SAM expects the Landmarks Board's review and revision process to continue
18 until the Landmarks Board grants (with or without conditions) or denies a certificate of approval.

19 **IV. AUTHORITY AND ARGUMENT**

20 **A. The MDNS mandates compliance with the LPO, which is presumed to be sufficient
21 mitigation under Seattle's SEPA review framework.**

22 As an initial matter, the appellant seems to misunderstand what Seattle's SEPA review
23 framework requires. The City incorporates environmental concerns into its code to the maximum
24 extent possible, and it allows the City to exercise substantive SEPA authority based on its specific
25 policies. *See* SMC 25.05.665.A.1-2. The relevant policy in this case relies on the LPO:
26

1 For projects involving structures or sites which have been designated as
2 historic landmarks, compliance with the Landmarks Preservation Ordinance
shall constitute compliance with the [City's SEPA policies].

3 SMC 25.05.675.H.2.b. Consistent with its approach to substantive SEPA authority, Seattle's SEPA
4 procedural framework also defers to more specific statutes. In particular, it presumes compliance
5 with a specific law addressing an element of the environment is adequate mitigation for impacts to
6 that element of the environment. SMC 25.05.665.D. In this case, the element at issue is historic
7 landmark resources, and the more specific law is the LPO. SMC 25.05.675.H. The LPO requires
8 an applicant to obtain a certificate of approval before making any alternation or significant change
9 to a historic landmark resource. SMC 25.12.670. Once an applicant obtains a certificate of
10 approval, it is deemed to have adequately mitigated impacts to historic landmark resources.

11 In this case, SDCI has determined that compliance with the LPO is adequate mitigation for
12 the project's impacts to historic landmark resources. That determination is based in part on the
13 presumption established in SMC 25.05.665.D, and it is entitled to deference. *Anderson v. Pierce*
14 *County*, 86 Wn. App. 290, 936 P.2d 432 (1997). Accordingly, the "clearly erroneous" standard
15 applies to this decision. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).
16 This requires the Hearing Examiner to have a definite and firm conviction that a mistake has been
17 made. *Id.* The appellant has presented no allegations or evidence that would overcome the
18 presumption in the code or the deference to which SDCI's code-based decision is entitled.

19 Instead, the appellant seems to argue that an approval under the LPO cannot by itself be
20 adequate mitigation because the five decision-making criteria behind an approval decision are
21 only "to be taken into account" and are not "mandates." See SMC 25.12.750. The appellant's
22 argument here belies a misunderstanding of the applicable mitigation. The mitigation is not the
23 substantive conditions the Landmarks Board may (or may not) impose in a certificate of approval.
24 It is the approval itself, which is mandated by the LPO before one may make any alteration or
25 significant change to a historic landmark resource. The review and approval process in the LPO is
26 required even when only minor alterations to landmark structures are proposed, and it ensures that

1 every project affecting historic landmarks meets the LPO's primary purpose: to "designate,
2 preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect
3 significant elements of the City's cultural, aesthetic, social, economic, political, architectural,
4 engineering, historic or other heritage, consistent with the long-term goals and policies of the
5 City." SMC 25.12.020 (emphasis added). The Landmarks Board's approval is itself the mitigation
6 because the approval process is the mechanism by which the purpose of the LPO is achieved.

7 This kind of deference to specific statutory schemes has long been an integral part of the
8 Seattle's SEPA review framework, and the Hearing Examiner has affirmed it in the past. In
9 *Alliance for a Livable Denny Triangle, et al.*, MUP-14-016, the City determined that compliance
10 with the Tenant Relocation Assistance Ordinance, ch. 22.210 SMC, was adequate mitigation for
11 the project's impacts to housing. The appellants argued that this was inadequate mitigation. The
12 Hearing Examiner dismissed the argument because, among other things, "it is the City's intent to
13 incorporate environmental concerns into its codes and development regulations to the maximum
14 extent possible" and "under SMC 25.05.675.I, the City's SEPA policy on housing, mitigation for
15 housing impacts is limited to compliance with the Tenant Relocation Assistance Ordinance,
16 Chapter 22.210 SMC." *Livable Denny Triangle*, MUP 14-016 (Seattle Hearing Examiner May 13,
17 2015) (Order on Motions to Dismiss and for Partial Summary Judgment) at 7. The appellant here
18 presents the same argument. The result should be the same. Under SMC 25.05.675.H, the City's
19 SEPA policy on historic landmark resources, mitigation for impacts to historic landmark
20 resources is limited to compliance with the LPO.

21 It is undisputed that SAM has been working with the Landmarks Board to obtain approval
22 for almost a year. SAM's design team has presented designs, revisions, and information on seven
23 occasions. SAM will continue to do so until the Landmarks Board issues a certificate of approval.
24 The Landmarks Board will not issue a certificate until it is satisfied that the project is consistent
25 with the criteria in SMC 25.12.270 and the Secretary of Interior's Standards for Rehabilitation
26 and Guidelines for Rehabilitating Historic Buildings. In other words, it will not issue a certificate

1 of approval until it concludes that SAM’s project complies with the LPO. That is all Seattle’s
2 SEPA review framework requires.

3 **B. Questions of consistency with state law and the LPO are beyond the scope of review**
4 **available in this forum at this time.**

5 The appellant may doubt the consistency of Seattle’s SEPA framework with state law or
6 the efficacy of the Landmarks Board’s review and decision on this project, but this is neither the
7 place nor the time to raise such arguments. The Hearing Examiner has no jurisdiction to review
8 Seattle’s SEPA review framework for consistency with state law, and the Landmarks Board’s
9 decision on SAM’s application is not yet ripe for review.

10 **1. The Hearing Examiner does not have authority to review Seattle’s SEPA**
11 **framework for consistency with state law.**

12 The Land Use Code grants the Hearing Examiner authority to review only “Type II”
13 decisions. SMC 23.76.004.B.¹ Legislative action on Seattle’s SEPA policies is not a “Type II”
14 decision. *See* SMC 23.76.006.C. Instead, the City Council has recognized that reviewing Seattle’s
15 SEPA policies for compliance with state law is the purview of our courts:

16 Appeal provisions in SEPA are found in RCW 43.21C.060, 43.21C.075,
17 43.21C.080, 43.21C.420, and WAC 197-11-680. The following provisions
18 attempt to construe and interpret the statutory and administrative rule
19 provisions. In the event a court determines that code provisions are
20 inconsistent with statutory provisions or administrative rule, or with the
21 framework and policy of SEPA, the statute or rule will control. Persons
22 considering either administrative or judicial appeal of any decision that
23 involves SEPA are advised to read the statutory and rule sections cited
24 above.

25 SMC 25.05.680 (emphasis added). The Hearing Examiner’s role is to review SDCI’s threshold
26 determination for consistency with the City’s implementation of SEPA, which is expressed in the
27 Land Use Code and Title 25 (Environmental Protection and Historic Preservation). The Hearing
28 Examiner should dismiss this appeal to the extent it is a challenge to the SEPA framework itself.

29 ¹ The Land Use Code also authorizes the Hearing Examiner to make “Type III” decisions. SMC 23.76.004.B. This
30 appeal does not involve a Type III decision. *See* SMC 23.76.004 (Table A) (listing Type III decisions).

