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BEFORE THE HEARING EXAMINER  
OF THE CITY OF SEATTLE

In the Matter of the Appeal of  
PROTECT VOLUNTEER PARK.,  
of a Determination of Non-Significance  
Certificate of Approval issued by the  
Department of Construction and  
Inspections for Construction in Volunteer  
Park

Hearing Examiner File: MUP 17-015  
Department Reference: 3024753

RESPONSE TO APPLICANT’S AND  
DEPARTMENT’S MOTIONS FOR  
SUMMARY JUDGMENT

I. INTRODUCTION

The Department and applicant (collectively “the respondents”) have each filed a motion for summary judgment focused on the same issue raised in our motion for summary judgment, to wit, whether the probable adverse significant impacts of the project on the historic and cultural landmarks are necessarily eliminated by the Landmark Preservation Board’s review process. In addition, the applicant raises two other issues. This memorandum responds to all of the issues raised by each of the respondents.

At the outset, we note that the applicant’s motion includes a statement of facts, many of which are immaterial to the issues raised by its motion. We will not bother to demonstrate that many of those facts are in dispute, inasmuch as they are not relevant to the issue currently presented. We

1 certainly plan to dispute many of those factual allegations at the hearing on the merits, if one is  
2 necessary.<sup>1</sup>

3 II. THE LANDMARK PRESERVATION BOARD PROCESS DOES NOT ENSURE  
4 THAT THE PROJECT'S IMPACTS WILL BE INSIGNIFICANT

5 A primary issue presented by our Notice of Appeal is whether the project's acknowledged  
6 significant adverse impacts to the historic and cultural landmarks will necessarily be avoided by use  
7 of the Landmark Preservation Ordinance (LPO) review process. We have addressed that issue in  
8 some detail in our own motion and will not repeat most of that discussion here. We incorporate it by  
9 reference to refute the arguments made by the applicant and the Department.  
10

11 The error in the respondents' analysis of the issue is reflected in the applicant's statement of  
12 the issue presented. In that issue statement, the applicant first states that the "LPO review process  
13 ensures compliance with the City's SEPA policy regarding impacts to historic landmark resources."  
14 Notably absent from that statement (or any other portion of the applicant's brief) is a claim, let alone  
15 proof, that the City's SEPA historic landmark policy is intended to assure that the project will not  
16 have significant adverse impacts on a historic landmark. As we demonstrated in our summary  
17 judgment motion, that statement is missing from the applicant's brief because the Board is not  
18 mandated to condition or deny a Certificate of Approval to avoid all significant impacts. In the  
19 absence of such a mandate, reference to the Board's review process does not assure that all  
20 significant impacts will be avoided.  
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24 <sup>1</sup> By way of example, we note that, contrary to the applicant's assertions, we expect to demonstrate at the  
25 hearing (if a hearing is necessary) that the public supported a renovation of the existing facility, not an expansion; that  
26 SAM is leasing eight floors to Nordstrom and could recover that space for far less cost and less environmental impact than  
the current project; that many museums facing similar space constraints and impact on public open space have opted to  
expand down, not out (the Musee du Louvre in Paris being one of the many examples); and that the City prepared an EIS  
for a proposed Conservatory expansion in Volunteer Park in the 1990s that would have had many of same types of  
impacts as the current proposal in terms of traffic, parking, noise and other issues.

1           Likewise, the applicant states its first issue as: “Should the Hearing Examiner dismiss this  
2 appeal because SDCI’s determination that the LPO review process is adequate is consistent with  
3 SEPA and the City’s Code?” But the issue presented by our appeal is not whether the LPO review  
4 process is consistent with SEPA and the City Code. The issue is whether the LPO review process  
5 assures that significant impacts will be avoided. And, as stated before, the LPO process is not  
6 designed to assure that.  
7

8           The applicant and the Department must concede that the LPO process does not mandate any  
9 particular level of residual impacts that remain after conditions are attached to a Certificate of  
10 Approval. Indeed, that process could result in significant modifications to a historic landmark or  
11 even its destruction. Clearly, that would be a significant adverse impact. Merely complying with  
12 the LPO process is not a guarantee that significant adverse impacts will be avoided.  
13

14           The applicant quotes SMC 25.05.660 which provides that an agency generally shall not  
15 impose mitigation under SEPA beyond that specified in other code provisions specific to the  
16 particular impacts. That code section does not assure that the mitigation provided by other code  
17 sections will eliminate all significant adverse impacts (and, to repeat yet again, the specific code  
18 section referenced here (the LPO ordinance) does not assure an absence of significant adverse  
19 impacts either).  
20

21           Indeed, SMC 25.05.660 simply buttresses our position: Even if the City were to determine  
22 that the LPO process will leave adverse significant impacts in place, SMC 25.05.660 will preclude  
23 the City from imposing additional mitigation to avoid those significant impacts.

24           Likewise, the applicant cites SMC 25.05.665.D which creates a presumption that regulations  
25 are adequate to achieve “sufficient mitigation.” But “sufficient” mitigation is not the same as the  
26 mitigation necessary to avoid all significant adverse impacts. Nowhere has the applicant cited a

1 code section that provides that mitigation imposed by the LPO (or any of the other substantive  
2 mitigation policies) *must* reduce impacts below the level of significance.

3         The applicant and Department’s argument also overlooks that environmental review in this  
4 case will be used not simply to make project-specific permitting decisions, but also will be used to  
5 guide a proprietary decision by the Parks Department and a zoning code text amendment decision by  
6 the City Council. The Parks Department proprietary decision and the City Council’s legislative  
7 decision are not subject to the code provisions cited by the respondents. Those code sections impose  
8 limits on permitting agencies, not the City Council when exercising its legislative power or Parks  
9 when exercising its proprietary authority. SMC 25.05.665.B expressly provides that “[n]othing in  
10 these SEPA policies shall diminish the independent effect and authority of other environmentally  
11 related policies adopted by the City. Such City policies shall be considered together with these  
12 SEPA policies to guide discretionary land use decisions such as conditional uses **and legislative**  
13 **actions such as rezones**, adoption of area plans and **siting of City facilities.**” (Emphasis supplied.)  
14 Analysis of the impacts and alternatives in an EIS could (and should) be used by the City Council  
15 and Parks when they exercise their discretionary authority “independent” of the restrictions on using  
16 that information to inform their substantive SEPA decisions. The respondents’ narrow permitting  
17 perspective ignores these other much broader facets of the decisions yet to be made by other City  
18 entities.  
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22         Last, the applicant raises a straw man argument, suggesting that we really meant to contend  
23 that the Department cannot issue a threshold determination until after the completion of the LPO  
24 review process. Appl. Motion at 10. That is not our contention. Rather, we have demonstrated that  
25 the Department has determined that the project will generate significant adverse impacts, but has  
26 wrongly concluded that those adverse impacts will assuredly be avoided through the LPO review

1 process. Because the LPO review process is not designed to assure the avoidance of all significant  
2 adverse impacts, the Department's reliance on that process to avoid issuance of a determination of  
3 significance now was in error. We are not asking for a delay of the threshold determination. We are  
4 asking that the threshold determination be made now and that it be made in the affirmative.  
5

6 The Department begins its argument by framing the question in these terms: "Did the City  
7 comply with its [SEPA substantive] environmental policies and SEPA by issuing an MDNS on  
8 condition that a Certificate of Approval first be obtained from the Landmark Preservation Board  
9 prior to the issuance of the MUP?" (Emphasis supplied.) We do not question whether the  
10 Department's decision to require review via the LPO is consistent with the City's SEPA substantive  
11 environmental policies. That part of the issue statement is not germane to this appeal. The issue we  
12 have raised relates to the City's procedural obligations under SEPA, specifically, whether the City  
13 complied with SEPA when it issued an MDNS for a project with known significant impacts on  
14 condition that a Certificate of Approval first be obtained from the LPB. That issue focuses on the  
15 City's compliance with SEPA's procedural mandate (to prepare an EIS for projects that have  
16 probable significant adverse impacts), not limits on exercising the City's substantive SEPA  
17 authority. As we have stated before, the MDNS conditions approval on review by the Landmarks  
18 Preservation Board, but because the Board's process does not assure elimination of all significant  
19 impacts, that condition does not satisfy SEPA's procedural requirement that an MDNS be issued  
20 only if the mitigation will assure the absence of significant adverse impacts.  
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23 Likewise, the Department writes: "Ecology's SEPA rules provide that if the City identifies  
24 historic preservation mitigation measures on an applicant's proposal that would allow it to issue a  
25 DNS, and the proposal is conditioned to include those specific measures, the City shall issue a  
26 DNS." Dept. Mot. at 5 (emphasis supplied). We do not question the validity of the statement in the

1 abstract. Rather, we question the existence of the conditional predicate. Neither the City nor the  
2 applicant have demonstrated that the “historic preservation mitigation measures” (*i.e.*, LPO review)  
3 will assure the absence of significant adverse impacts and, therefore, merely going through the LPO  
4 review process “would [not] allow [the City] to issue a DNS.”

5  
6 Last, the Department makes a reference to a Hearing Examiner decision in the “Save Our  
7 Square” case. Department Mot. at 6. The petitioners in that case did not raise the same issue raised  
8 by this Notice of Appeal. In *Save Our Square*, the SEPA Responsible Official relied on the  
9 anticipated review by the Pioneer Square Preservation Board to avoid significant impacts. But  
10 unbeknownst to the Responsible Official, the Director of Neighborhoods would ignore the Board’s  
11 recommendations. *Save Our Square* argued that the threshold decision was in error because the  
12 Responsible Official assumed the Board’s recommendation would be accepted. *Save Our Square*  
13 did not present the argument at issue here: that the Responsible Official could not rely on the  
14 Board’s review process as justification for disregarding the Responsible Official’s own finding of  
15 significant adverse impacts. Thus, the Examiner’s decision in that case did not address that issue  
16 and, therefore, the Examiner’s decision in that case has no bearing on the issue presented here.

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18 For all the foregoing reasons and the reasons set forth in our own motion, the respondents’  
19 SEPA motions should be denied.

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21 III. APPELLANT HAS EVIDENCE TO SUPPORT THE ALLEGATIONS IN  
22 PARAGRAPH 7 OF THE NOTICE OF APPEAL

23 We acknowledge that the applicant has a minor burden in moving for summary judgment on  
24 the basis that the party with the burden of proof lacks any evidence to support its claims. *See, e.g.*,  
25 *Laplante v. State*, 85 Wn.2d 154 (1975). However, it also is true that in responding to such a  
26 motion, the burden on the party with the original burden of proof is relatively slight, too. All that



1 need be done at this stage is for the party with the burden of proof to demonstrate that they have  
2 some evidence to support their claim. It is not necessary at this stage to demonstrate that that  
3 evidence will or will not persuade the Examiner that factual findings should be made one way or the  
4 other.

5  
6 In response to this challenge from the applicant, we have obtained declarations under oath  
7 from a host of Protect Volunteer Park witnesses who have attested to facts which, if found to be so  
8 by the Examiner, demonstrate that the project will cause significant adverse impacts with regard to  
9 noise, traffic (including parking and safety), vegetation (impacts to the Park's magnificent beeches, a  
10 specimen redwood and several large cedars), aesthetics, light (both excessive light in the evening  
11 and new shaded areas during the day), glare, recreation, open space, and views. *See* Declarations of  
12 Davidson, Colwell, Urmston, Sheilan, Alleman, Hecht, and Bakamis. These declarations provide  
13 ample support for appellant's claims regarding these other project impacts. None of these claims  
14 should be dismissed at this stage of the proceeding.

#### 16 IV. THE APPELLANT HAS STANDING

17 The applicant (but not the Department) challenges the standing of Protect Volunteer Park to  
18 pursue this appeal. As will be seen by review of the declarations submitted in response to this  
19 allegation, it is sad, if not infuriating, to have to respond to this kind of motion. No one can seriously  
20 question whether the neighbors of a park, who use the park on a regular basis, have standing to  
21 challenge a project of this type in the park.

22  
23 The applicant acknowledges that a group like Protect Volunteer Park has standing if any of  
24 its members have standing. We submit herewith the declarations of numerous members of the group  
25 who have documented in some detail the significant adverse impacts they will suffer if this project  
26 goes forward. *Id.* We will not waste more time addressing this issue in this memorandum. We

1 simply ask that the Examiner review those declarations and reach the obvious conclusion that the  
2 appellant's members have standing to bring this action.

3  
4 V. CONCLUSION

5 For the foregoing reasons, the respondents' motions for summary judgment should be denied  
6 in all respects.

7 Dated this 15<sup>th</sup> day of May, 2017.

8 Respectfully submitted,

9 BRICKLIN & NEWMAN, LLP

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11 By: 

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13 David A. Bricklin, WSBA No. 7583  
14 Attorney for Appellant  
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