CITY OF SEATTLE
OFFICE OF THE HEARING EXAMINER

In the Matter of the Appeal of: PROTECT VOLUNTEER PARK	Hearing Examiner File No.: MUP 17-015 Dept. Reference 3024753 **APPLICANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The Hearing Examiner should dismiss this appeal. In the main, the appellant proffers a statutory interpretation that turns Seattle's SEPA review framework on its head. Under Seattle's SEPA Overview Policy, the City's Department of Construction and Inspections ("SDCI") is *required to presume* that compliance with the Landmarks Preservation Ordinance, ch. 25.12 SMC ("LPO"), is sufficient mitigation for impacts to historic landmark resources. SDCI had no information giving it a reason to depart from the required presumption, so it correctly imposed compliance with the LPO as a condition to mitigate identified impacts to historic landmark resources. SDCI's decision is entitled to deference, and there is nothing in the record to overcome that deference. If anything, the record shows that SDCI was right to apply the mandated presumption and condition this project on compliance with the LPO. The LPO review process before the Landmarks Preservation Board ("Landmarks Board") is in fact reducing the project's impacts to historic landmark resources, exactly as Seattle's SEPA review framework intends.

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As for the remaining issues, the appellant has not met its burden to demonstrate a genuine issue of material fact. The appellant offers nothing more than speculation and opinion testimony from witnesses who would not qualify as experts on environmental impacts. It has not produced a single study or identified a single qualified expert to prove its contentions. The appellant has also failed to produce any evidence that the MDNS's treatment of impacts to historic landmark resources has actually harmed the appellant or any of its alleged members. While its witnesses speculate about impacts to other elements of the environment, none of the appellant's witnesses say anything at all about the project's impacts to historic landmark resources. At a minimum, the appellant lacks standing to challenge the MDNS as it pertains to historic landmark resources.

II. EVIDENCE RELIED UPON

This Reply Brief relies on the previously filed Declaration of Abigail DeWeese ("DeWeese Decl."); the Declaration of Sam Miller, dated May 15, 2017 ("Second Miller Decl."), and the other documents previously filed in this appeal.

III. AUTHORITY AND ARGUMENT

A. The appellant produced no evidence to overcome the presumption of sufficient mitigation required by Seattle's SEPA review framework.

The appellant appears to agree that a lead agency need not issue an environmental impact statement if it can at the outset identify measures that would mitigate significant adverse impacts to non-significant levels. *See* WAC 197-11-350. In that case, the lead agency must instead issue a determination of non-significance conditioned on compliance with the identified mitigation, known as a "mitigated determination of non-significance" or an "MDNS." *Id.*

That is precisely what SDCI did in this instance. SDCI found that this project has the potential for probable significant adverse impacts on historic landmark resources. It then recognized the presumption in Seattle's SEPA Overview Policy that, with a few exceptions, compliance with more specific statutory schemes is sufficient mitigation:

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> Many environmental concerns have been incorporated in the City's codes and development regulations. Where City regulations have been adopted to address an environmental impact, it *shall be presumed that such regulations are adequate to achieve sufficient mitigation* subject to the limitations set forth in subparagraphs D1 through D7 below.

25.05.665.D (emphasis added).[1] This presumption applies in both substantive and procedural SEPA decision-making. *See* SMC 25.05.650.B (purpose of SEPA rules includes integration of SEPA process with other laws and decisions); *see also* SMC 25.05.665.D.6 (lead agency may impose additional mitigation if project is vested to outdated regulation and new regulation was in effect before issuance of DNS or DEIS). When it comes to historic landmarks, there is a specific statutory scheme – the LPO. Accordingly, SDCI was required to presume that compliance with the LPO would mitigate adverse impacts to historic landmark resources unless one of the exemptions in SMC 25.05.665.D applied. SDCI had no evidence that an exemption applied, so it imposed compliance with the LPO as the only relevant condition of its MDNS.

SDCI's threshold decision is entirely consistent with Seattle's SEPA review framework, and it is entitled to deference. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The appellant has the burden of demonstrating that the decision was clear error. *Id.*; *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). The appellant has fallen far short of that mark. The appellant has produced no evidence to establish that any of the seven situations listed in SMC 25.05.665.D applies here. If anything, the record establishes instead that the LPO's approval process is functioning exactly as Seattle's SEPA review framework envisions. For the last year, Seattle Art Museum ("SAM") has been working with the Landmarks Board in iterative design review and revision process that has resulted in several material design changes and reductions in scale. *See* Second Miller Decl. ¶¶ 3-9. The appellant has not rebutted these facts with evidence of its own, and it has not overcome the presumption mandated in Seattle's SEPA policies or the deference due to SDCI's decision to follow those policies as written.

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[1] The appellant argues, with no supporting authority or evidence, that the phrase "sufficient mitigation" does not mean mitigation sufficient to reduce significant impacts to non-significant levels. (App.'s Resp. Br. at 3-4.) The appellant never explains what else the phrase could possibly mean.

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Instead of meeting its burdens, the appellant simply turns the presumption in Seattle's SEPA review framework on its head: "Neither the City nor the applicant have demonstrated that the 'historic preservation mitigation measures' (*i.e.* LPO review) will assure the absence of significant adverse impacts and, therefore merely going through the LPO review process 'would not allow the City to issue a DNS.'" (App. Resp. at 6.) This argument is contrary to a well-settled principle of statutory interpretation: "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). It is neither the City's nor SAM's burden to prove that compliance with the LPO will assure the absence of significant adverse impacts.[2] Rather, Seattle's SEPA review framework requires SDCI to presume as much, and if it finds no basis for concluding otherwise, SDCI must determine that compliance with the LPO is sufficient mitigation for impacts to historic landmark resources. The Hearing Examiner has also recognized in prior decisions that Seattle's SEPA framework generally requires nothing more than compliance with specific statutes as adequate mitigation for impacts to elements of the environment. *See Alliance for a Livable Denny Triangle, et al.*, MUP 14-016 (Seattle Hearing Examiner May 13, 2015) (Order on Motions to Dismiss and for Partial Summary Judgment) at 7.

The correct application of Seattle's SEPA review framework is the one SDCI undertook – compliance with the LPO was presumed to mitigate significant impacts to historic landmark resources to non-significant levels, and the MDNS was conditioned on compliance with the LPO because there was no basis for departing from the initial presumption. SDCI's decision is entitled to deference, and the appellant has produced no evidence or argument to overcome that deference. The appellant's arguments on this issue fail as a matter of law, and its assignment of error on the MDNS as to the treatment of historic landmark impacts should be dismissed.

[2] Also, SEPA does not require an elimination of all adverse impacts for an MDNS to issue – it requires only mitigation of significant impacts to non-significant levels. *See Anderson*, 86 Wn. App. at 303.

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B. There is no genuine issue of material fact on the other assignments of error.

The Hearing Examiner should also dismiss the other assignments of error, in paragraph 7 of the Notice of Appeal, because the appellant has not produced evidence creating a genuine issue as to any material fact. In its response, the appellant should have supplied "specific facts showing that there is a genuine issue for trial." *Young v. Key Pharm. Inc.*, 112 Wn.2d 216, 227, 770 P.2d 182 (1989). Such specific facts are distinguished from the opinions of non-experts and must be "evidentiary in nature." *Jones v. State Dept. of Health*, 170 Wn.2d 338, 365, 242 P.3d 825 (2010). "Ultimate facts or conclusions are insufficient." *Id.* Likewise, the appellant cannot rely on mere speculation, argumentative assertions, or having its affidavits accepted at face value. *See Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The appellant filed seven declarations, but none establishes specific facts establishing a genuine factual dispute over impacts related to traffic and parking, height, bulk, and scale, light and glare on public spaces, loss of habitat, or public views. Instead, all of the declarations are conclusory, speculative, and argumentative. The declarations are further rife with inadmissible opinion testimony from non-experts. The appellant has not offered any studies or other empirical data to support its claim of significant adverse impacts. In order to show exactly how the appellant has failed to meet its burden, we address each alleged significant impact briefly:

Traffic and Parking: The appellant's declarations conclude, with no supporting empirical data, that there will be increases in traffic and parking demand. They also contend, again with no supporting data or analysis that "the parking study was flawed in its timing and seasonal limitations." Davidson Decl. ¶ 9; Hecht Decl. ¶ 5. This testimony is inadmissible speculation and opinion, and it is not enough to create a genuine issue or justify a full hearing on impacts to traffic and parking.

Height, bulk, and scale: The appellant's declarations opine that the project will "act as a 'guard tower'." Urmston Decl. ¶3. This a subjective layperson's opinion, with no admissible evidence behind it. This testimony does not create the kind of factual dispute that would require a

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full-blown hearing on the height, bulk, and scale of SAM's project.

Light and glare: The appellant's declarations conclude that the glazing on the project will "cast an intrusive glare across the east side of the park" and that the project will cause shadows. Davidson Decl. ¶ 6; Bakmis Decl. ¶ 6; Colwell Decl. ¶¶3-6. None of these witnesses conducted an empirical study or developed their opinion using a recognized methodology for analyzing light and glare. It does not appear that any of these witnesses are qualified to render an admissible expert opinion on the subject. In contrast, the SEPA checklist contains shadow, and light and glare studies prepared by industry professionals that document impacts, and the MDNS determined there are no significant impacts. DeWeese Decl. Ex. A at 11-12; Ex. I Fig. 22-25. The appellant's testimony is, again, mere speculation that does not raise a genuine issue or a basis for a full evidentiary hearing on light and glare.

Plant and animal habitat: The appellant's declarations are also full of lay opinions, but devoid of actual admissible facts, on tree impacts. *See* Davidson Decl. ¶ 5 ("Drip line-defined root zone protection is nowhere near adequate to protect the mature beeches…"); Hecht Decl. ¶ 6. The SEPA checklist includes a construction plan for tree preservation, which is why SDCI concluded that the project will have no significant adverse impact on tress (so long as SAM complies with the construction plan). DeWeese Dec., Ex. A at 9. There is no reason to hold a full evidentiary hearing on impacts to plants and animals.

Public views: Finally, the appellant's declarations speculate that the project will "break up long views;" that "near and distant views of trees would be spoiled;" and that more of the building will be seen. Urmston Decl. ¶3, Davidson Decl. ¶5, Sheilan Decl. ¶ 4. One declaration also opines that "there will be much less of an open space environment/landscape feel…." Bakamis Decl. ¶ 7. None of these witnesses appear to have conducted a reliable view study, and none seem qualified to offer expert opinions on impacts to views. Moreover, their personal opinions do not actually reveal a deficiency in SDCI's threshold determination – which expressly recognizes some view blockage will occur. DeWeese Decl., Ex A at 10. There is no reason to hold an evidentiary

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hearing on view impacts or on any of the other assignments of error in paragraph 7 of the Notice of Appeal.

C. The appellant lacks standing with respect to historic landmark resources.

Finally, the appellant has failed to establish its standing to appeal SDCI's decision with respect to historic landmark resources. Despite filing seven declarations, the appellant has failed to show an immediate, concrete, and specific injury related to the interest it seeks to protect in this appeal. *See Trepainer v. City of Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992). This appeal is focused primarily on historic landmark resources, but no witness has shown (or even alleged) an injury from the project's impact on historic landmark features in the Park or on the museum building. One's status as a taxpayer, park user, or resident of Seattle is not enough to establish standing. *See Chelan County v. Nykrim*, 146 Wn.2d 904, 936, 52 P.3d 1 (2002) (abstract interests shared with the general public are not enough to establish standing). Here, the appellant has made no showing whatsoever of how it in particular (as opposed to the general public) will be injured by the project's impact to historic landmark resources. The Hearing Examiner should dismiss the appellant's main assignment of error (if not the entire appeal) for lack of standing.

IV. CONCLUSION

The appellant had the burden of showing that SDCI's decision here is clear error. It has failed to do so. The appellant also had the burden of establishing its standing. It has failed that burden with respect to historic landmark resources (if not all assignments of error). There are no genuine issues of material fact. Indeed, the undisputed record demonstrates that SDCI applied Seattle's SEPA review framework exactly as written, and that framework is working exactly as envisioned.

The Hearing Examiner should dismiss this appeal as a matter of law.

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