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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

APPELLANT’S REPLY IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT

I. AN EIS IS NECESSARY TO COMPLY WITH SEPA’S  
FUNDAMENTAL PURPOSE

The policy of [SEPA], which is simply to ensure via a ‘detailed statement’ the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect ‘threshold determination’ is made.

*Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 273, 552 P.2d 674, 678 (1976).

The applicant and Department still have made no attempt to address the fundamental flaw in their argument, *i.e.*, that their argument would torpedo SEPA’s efforts to assure that government decision makers are fully informed about the environmental impacts *before* those decisions are

1 made. The LPB, the City Council, and the Parks Department all have important decisions to make  
2 regarding this project. SEPA demands that important decisions like those which may result in  
3 significant adverse impacts be informed by the analysis in an environmental impact statement. The  
4 applicant and the City would deprive the LPB, the City Council, and the Parks Department of that  
5 analysis and have each of those bodies make their decisions without the “detailed statement” that  
6 SEPA requires. The respondents’ contentions are inconsistent with SEPA’s most basic purpose and  
7 should be rejected.  
8

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10 II. THE RESPONDENTS CONTINUE TO IGNORE THE  
11 DISTINCTION BETWEEN SEPA’S SUBSTANTIVE  
12 AUTHORITY AND PROCEDURAL DUTIES

13 The respondents continue to conflate SEPA’s procedural and substantive elements. The two  
14 are distinct. *See, e.g., Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 63 – 64 (1978). This  
15 distinction is reflected in Ecology’s and the City’s SEPA rules. Ecology’s rules detail the procedural  
16 requirements in chapter 197-11 WAC, Part Three and Part Four (WAC 197-11-300 through WAC  
17 197-11-460). The exercise of substantive authority is addressed separately in Part Seven (WAC  
18 197-11-650 through WAC 197-11-660). Likewise, the City code addresses procedural compliance  
19 primarily in chapter 25.05 SMC, subchapters III and IV (SMC 25.05.300 through SMC 25.05.460).  
20 The city’s exercise of its substantive authority is addressed separately in Subchapter VII (SMC  
21 25.05.650 through SMC 25.05.675).

22 Notably, the City code explains that a decisionmaker “may” deny or condition a proposal to  
23 “reduce” or eliminate its impacts. SMC 25.05.665.A.2. But the policies do not command the  
24 decisionmaker to exercise its substantive authority to assure that impacts are reduced below the  
25 significance threshold. That language simply is not there and that concept is not included anywhere  
26 in the code.

1 Here, the applicant (and Department) assert, repeatedly, that the LPO process will constitute  
2 “adequate” mitigation. Whether mitigation is adequate relates to the City’s substantive authority, to  
3 wit, whether the mitigation is “adequate” to address the City’s substantive concerns. That exercise  
4 of substantive authority is distinct from whether the mitigation reduces impacts below the  
5 significance threshold, negating the procedural duty to prepare an EIS. As the applicant says, the  
6 city code “**allows** the City to exercise substantive SEPA authority based on its specific policies,”  
7 Resp. at 4:23 (emphasis supplied), but stops short of asserting that the code commands the City to  
8 use that authority in a manner that eliminates all significant impacts.<sup>1</sup>

10 The test for issuing a DNS (or an MDNS) is not whether mitigation is “adequate.” The test  
11 is whether the impacts (after mitigation is imposed) are “significant.”

13 The applicant never asserts that the imposition of “adequate” mitigation will result in impacts  
14 that are less than “significant.” The City has not made that assertion either. In the absence of such  
15 an assertion (let alone proof), appellant’s summary judgment motion should be granted.

17 In its response, the applicant again concedes that mitigation resulting from the LPO process  
18 will not necessarily reduce impacts below the significance threshold. Indeed, the applicant concedes  
19 that that process will not necessarily result in any mitigation at all. Resp. at 5 (referring to mitigation  
20 the Landmarks Board “may (or may not)” impose. Instead, the applicant asserts that the process  
21 itself constitutes the mitigation. *See* Applicant Response at 5. “The mitigation is not the substantive  
22 conditions the Landmarks Board may (or may not) impose in a Certificate of Approval. It is the  
23 approval itself . . . “ Resp. at 5 (emphasis in original).

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26 <sup>1</sup> If, as the respondents contend, the City’s mitigation polices automatically assure the elimination of all  
significant impacts, , there never would be need to prepare an EIS.

1 This metaphysical process “mitigation” is irrelevant to the question at hand. The issue is  
2 whether the project will have significant adverse impacts to the designated historic landmarks. The  
3 Director concluded that “potential significant adverse impacts have been identified with regard to the  
4 proposed alterations to the designated features of the landmark.” Decision at 8. Those “alterations”  
5 are physical, not metaphysical. The LPO process itself (as opposed to mitigation measures  
6 generated by that process) will not change (mitigate) any of those planned physical alterations. The  
7 process “may (or may not)” result in mitigation conditions which reduce the impacts, but the process  
8 itself provides no relief. The applicant’s claim that the process – without regard to any mitigation  
9 measures that may (or may not) emanate from the process – is itself mitigation sufficient to reduce  
10 impacts below the significance threshold should be rejected.<sup>2</sup>

12 The applicant’s efforts to conflate SEPA’s substantive and procedural elements is evident  
13 throughout its brief. For instance, at the top of page 5, it quotes SMC 25.05.675.H.2.b which states  
14 that for historic landmarks, “compliance with the Landmarks Preservation Ordinance shall constitute  
15 compliance with the [City’s substantive SEPA policies].” Such statements reflect the applicant’s  
16 failure to acknowledge that the City’s exercise of its substantive SEPA authority is distinct from the  
17 procedural mandates imposed on the City to prepare an EIS when significant adverse impacts are  
18 forecast. This error pervades the applicant’s entire analysis and renders it wholly unpersuasive.

20 The respondents reference the code’s presumption that mitigation developed through the  
21 LPO process is deemed “adequate.” Adequate for what? The presumption is in the code section  
22 addressing the exercise of the City’s substantive authority. The presumption stated is that the  
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24 <sup>2</sup> If the significant impacts at issue were psychological harm suffered by Seattle citizens by the failure of  
25 the City to utilize a process that addressed impacts to the historic resources, then perhaps the process itself – without more  
26 – could be viewed as mitigation of *those* psychological impacts. But, of course, this case is not about psychological  
impacts associated with the lack of an adequate process. The contention that the process itself, without more, is adequate  
mitigation for the physical impacts to the landmarks is wholly misplaced.

1 mitigation developed through the LPO process is an adequate exercise of the City's substantive  
2 authority. But that is different than a presumption that the mitigation will reduce impacts to a non-  
3 significant level. Neither respondent can bring themselves to make such a statement, because such a  
4 statement is not supported by the words or structure of the Code – and that reticence is underscored  
5 by the applicant's admission that the LPO process may "or may not" result in any mitigation at all.  
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7 Petitioner's motion should be granted.

8 III. THE APPLICANT'S IRRELEVANT DIGRESSIONS SHOULD BE  
9 IGNORED

10 The applicant's brief includes three parts which are wholly irrelevant. First, the applicant  
11 goes on at length describing the LPO process currently underway. Those details add nothing to the  
12 discussion. The issue is whether the City can be assured that the LPO process will result in  
13 mitigation that will reduce impacts below the threshold of significance. Nothing in the lengthy  
14 description of the ongoing LPO process for this project addresses that issue. No matter how  
15 elaborate the process, the respondents are not claiming that the process will necessarily reduce  
16 impacts below the significance threshold. Without such a claim (and proof of such a claim), the  
17 respondents' arguments fail.  
18

19 Second, the applicant cites cases about court's deferring to agency SEPA decisions. Resp. at  
20 5. Those cases are irrelevant. They concern situations where factual determinations were in dispute.  
21 In *Anderson v. Pierce County*, 86 Wn. App. 290 (1997), the county had imposed 54 mitigation  
22 conditions to eliminate all significant adverse impacts. When pressed, the challenger could not cite a  
23 single impact that remained significant after the mitigation was applied. *Id.* at 305. The challenger's  
24 "skepticism about the effectiveness of some mitigation measures is speculative at best and does not  
25 provide a basis for holding the MDNS to be 'clearly erroneous.'" *Id.*  
26

1 Likewise, in *Moss v. City of Bellingham*, 109 Wn. App. 6, 23 - 24 (2001), the court found:  
2 “Notably, although appellants complain generally that the impacts were not adequately analyzed,  
3 they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated  
4 will cause significant environmental impacts warranting an EIS.”

5  
6 Thus, in both cases, deference was employed in resolving factual disputes regarding the  
7 magnitude of the impacts that remained after mitigation was imposed. But our motion does not raise  
8 a factual issue. Our motion presents an issue of law: Where the only mitigation imposed to address  
9 an acknowledged significant impact to historic resources is a process, with no assurance that changes  
10 to the proposal will result, does reference to the process alone constitute mitigation sufficient to  
11 eliminate all significant impacts? We think the answer to that question must be in the negative.

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13 Third, the applicant concludes its brief with an attack on an argument we did not make. The  
14 applicant claims that the Hearing Examiner lacks authority to review the City’s process for imposing  
15 substantive mitigation. We never raised that issue. The applicant’s discussion of that issue is  
16 irrelevant.<sup>3</sup>

17 IV. CONCLUSION

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19 For the foregoing reasons and the reasons set forth in our prior briefs, summary judgment  
20 should be granted and this matter remanded to the Department for preparation of an EIS.

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22 \_\_\_\_\_  
23 <sup>3</sup> The applicant also cites a Hearing Examiner decision in the *Alliance for a Livable Denny Triangle* case  
24 (MUP 14-016). In that partial summary judgment ruling, the Examiner was reviewing the adequacy of an environmental  
25 impact statement that had been prepared. There is no environmental impact statement under review in this case. The  
26 decision has no relevance for that reason alone.

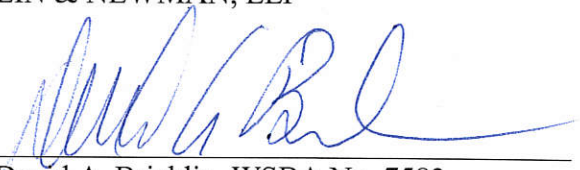
In addition, in that case, the EIS was challenged because it failed to address the project’s compliance with  
affordable housing requirements in Chapter 23.49 SMC. The decision concluded that a brief discussion in the EIS of a  
monetary contribution to low income housing under SMC 23.49.012 was sufficient and that no further analysis in the EIS  
was required under SEPA. Order on Motions to Dismiss and for Partial Summary Judgment at 7. That conclusion has  
nothing to do with the issues presented here.

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Dated this 19<sup>th</sup> day of May, 2017.

Respectfully submitted,

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