

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeal of

**PROTECT VOLUNTEER PARK**

from a decision issued by the Director,  
Department of Construction and Inspections

Hearing Examiner File:  
**MUP-17-015 (W)**

Department Reference:  
3024753

**ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT**

Pursuant to the City's codification of SEPA and the SEPA rules,<sup>1</sup> the Department of Construction and Inspections ("Department") issued a Mitigated Determination of Nonsignificance ("MDNS") for a project proposed by the Applicant, Seattle Art Museum. The Applicant proposes to construct a three-story, 13,885 square foot addition to the Seattle Asian Art Museum located in Volunteer Park, on Capitol Hill. Both the museum and the park are designated City landmarks. The project includes interior and exterior alterations to the existing museum structure, with additions to the north and east sides of the structure.

**SEPA REVIEW**

The Department's analysis and decision issued for the proposal states that the Department's review process included: 1) review of the Applicant's initial SEPA Checklists and revised Checklists; 2) review of the applicant's Geotechnical Engineering Study, Tree Survey, Greenhouse Gas Emission Worksheet, Asbestos, Lead and Hazardous Materials Survey, Visibility Study, Lighting Impact Analysis Study, Transportation and Parking Assessment, and Draft [Landmark] Certificate of Approval Application;<sup>2</sup> 3) review of public comment letters on the application; 4) review of comment letters addressed to the Department of Neighborhoods' Landmarks Preservation Board; and 5) consultation with the Department of Neighborhoods concerning impacts to landmarks.<sup>3</sup>

The Checklist describes in some detail the proposed changes to the museum structure and the surrounding park site. The Department's decision states that "potential significant adverse impacts have been identified with regard to the proposed alternations to the designated features of the landmark." Concerning the identified impacts, the decision states that they "will be considered by the Landmark Board when it acts upon SAAM's application for a Certificate of Approval, and the Board may impose conditions to avoid or mitigate impacts if it decides to approve a Certificate of Approval. The Board's action on the Certificate of Approval constitutes compliance with SEPA

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<sup>1</sup> Chapter 43.21C RCW and Chapter 197-11 WAC, respectively.

<sup>2</sup> Documents listed in 1) and 2) of this paragraph are attached as exhibits to the Declaration of Abigail Pearl De Weese in support of the Applicant's Motion for Summary Judgment ("De Weese Declaration").

<sup>3</sup> De Weese Declaration, Exhibit A at 3-4.

for historic preservation purposes.”<sup>4</sup> The Applicant has been involved in the Certificate of Approval process for the last year.

### APPEAL

The Appellant, “Protect Volunteer Park,” appealed the Department’s MDNS. The Appellant contends that because the Department concluded from its SEPA review that the proposal “will have a significant adverse impact on the historic, cultural and landmark resources in Volunteer Park and the Seattle Art Museum building,” an environmental impact statement (“EIS”) should have been prepared to inform various City decisions on the proposal.<sup>5</sup> The appeal also states that the proposal “will cause significant adverse impacts in terms of traffic and parking; the height, bulk and scale of the construction; light and glare on public spaces; lose [sic] of plants and animal habitat; and public views.”<sup>6</sup>

### MOTIONS AND STANDARD OF REVIEW

The Appellant, Applicant, and Department have each filed a motion for summary judgment, and the motions were fully briefed. Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact.<sup>7</sup> Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure (“HERs”) states that for questions of practice and procedure not covered by the HERs, the Examiner “may look to the Superior Court Civil Rules for guidance.” Civil Rule 56(c) provides that a motion for summary judgment is properly granted where “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.”

A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case ... Once the moving party has met its burden, the burden shifts to the nonmoving party *to present admissible evidence demonstrating the existence of a genuine issue of material fact*. ... If the nonmoving party does not meet that burden, summary judgment is appropriate.<sup>8</sup> “An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, *i.e.*, information as to ... a reality as distinguished from supposition or opinion.”<sup>9</sup> Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact.<sup>10</sup> “The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion than an issue exists without any showing of evidence.”<sup>11</sup>

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<sup>4</sup> *Id.* at 8.

<sup>5</sup> Notice of Appeal at 3

<sup>6</sup> *Id.* at 4, ¶7.

<sup>7</sup> *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979).

<sup>8</sup> *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (internal citations omitted) (emphasis added).

<sup>9</sup> *Curran v. City of Marysville*, 53 Wn. App. 358, 367, 766 P.2d 1141 (1989), quoting *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

<sup>10</sup> *Id.*

<sup>11</sup> *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 956, 421 P.2d 674 (1966) (citation omitted).



### Standing

The Applicant challenges the Appellant's standing to bring an appeal under SEPA. Because this issue is jurisdictional, it must be addressed first. SMC 25.05.680.A.1 provides that the SEPA appeal procedures for proposals that require a MUP for which the Department is the lead agency under SEPA are found in SMC 23.76.022. That section states that "appeals may be initiated by any person significantly affected by or interested in the permit." However, SEPA is a state law that is administered at the local level by local jurisdictions. The applicable state statute, RCW 43.21C.075(4), authorizes appeals by persons "aggrieved by agency action" and is controlling.

SEPA grants an aggrieved person the right to judicial review of an agency's compliance with its terms. *Harris v. Pierce County* 84 Wn. App. 222, 232, 928 P.2d 1111 (1996) ... "A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests SEPA protects, and (2) the party must allege an injury in fact."<sup>12</sup>

The zone of interests protected by SEPA is extensive, and the first part of the standing test "is easily met in environmental suits because of the abundance of laws affecting use of our natural resources."<sup>13</sup> The appeal in this case addresses standing with the following statement: "The appellant represents a broad range of business owners, property owners, and residents in the vicinity of Volunteer Park and users of the park from throughout the city. The decision significantly and adversely affects the appellant and its members' interests in maintaining the landmark character of Volunteer Park." In response to the Applicant's motion, the Appellant filed declarations from seven of its members. Those declarations allege that their (in some cases, longstanding) use of the park will be endangered due to the proposal's allegedly significant adverse impacts on views, open space, vegetation, light/visibility, transportation and parking, and plant and animal habitat. The interests the Appellant's members seek to protect are within the zone of interests protected by SEPA.

The "injury in fact" element of the standing test for SEPA is satisfied when an appellant alleges that the challenged action will cause "specific and perceptible harm' ... A sufficient injury in fact is properly pleaded when a property owner alleges 'immediate, concrete and specific' damage to property, even though the allegation may be "speculative and undocumented."<sup>14</sup> In *Leavitt v. Jefferson County*, the court "[assumed] Leavitt [had] established standing for purposes of review" although "Leavitt's alleged impacts are speculative and undocumented; they are possible, not necessary, impacts of the Board's adoption of the Code. However, the claimed impacts are within the interests protected by SEPA and *Leavitt alleges that they will directly impact her property and*

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<sup>12</sup> *Lands Council v. Washington State Parks and Recreation Com'n.*, 176 Wn. App. 787, 799, 309 P.3d 734 (2013) quoting *Kucera v. State Dep't of Transp.*, 140 Wn. 2d 200, 212, 995 P.2d 63 (2000).

<sup>13</sup> *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn. 2d 862, 866, 576 P.2d 401 (1978). See *Lands Council v. Washington State Parks and Recreation Com'n. supra*.

<sup>14</sup> *Kucera v. Department of Transp. supra* at 213 quoting *Leavitt v. Jefferson Cnty.*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994).

*interests.*"<sup>15</sup> In the present case, the Appellant's members have stated how the impacts of the proposal will directly affect their SEPA-protected interests. Therefore, they have standing to bring this appeal. In addition, the interests that the Appellant seeks to protect in this case are obviously germane to its purpose, and none of the claims raised in the appeal require the Appellant's members' participation.<sup>16</sup> The Appellant has demonstrated that it meets the test for standing under SEPA. The Applicant's motion to dismiss the appeal for lack of standing is **DENIED**.

### SEPA Determination

#### Legal Framework

RCW 43.21C.240 provides, in relevant part, as follows:

#### **Project review under the growth management act.**

(1) If the requirements of subsection (2) of this section are satisfied, a county, city, or town reviewing a project action shall determine that the requirements for environmental analysis, protection, and mitigation measures in the county, city, or town's development regulations and comprehensive plans adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws and rules, *provide adequate analysis of and mitigation for* the specific adverse environmental impacts of the project action to which the requirements apply. ...

(2) A county, city, or town shall make the determination provided for in subsection (1) of this section if:

(a) In the course of project review, including any required environmental analysis, the local government considers the specific probable adverse environmental impacts of the proposed action and determines that these specific impacts *are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan, subarea plan element of the comprehensive plan, or other local, state, or federal rules or laws*; and

(b) The local government *bases or conditions its approval on compliance with these requirements or mitigation measures*.

Emphasis added. WAC 197-11-158 implements this statute and provides, in relevant part:

#### **SEPA/GMA project review—Reliance on existing plans, laws, and regulations.**

(1) In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection, and mitigation measures in the GMA county's/city's development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or

<sup>15</sup> *Leavitt v. Jefferson County supra* at 679 (citation omitted) (emphasis added).

<sup>16</sup> *See International Ass'n. of Firefighters v. Spokane Airports*, 146 Wn.3d 207, 213, 45 P.3d 186 (2002).



rules, *provide adequate analysis of and mitigation* for some or all of the specific adverse environmental impacts of the project.

Emphasis added.

SMC 25.05.665 sets forth the City's SEPA Overview Policy. It reads, in relevant part, as follows:

A. Purpose of the SEPA Policies.

1. It is the City's policy to protect the environment and provide for reasonable property development while enhancing the predictability of land-use regulation. In order to provide predictability, *it is the City's intent to incorporate environmental concerns into its codes and development regulations to the maximum extent possible.*

....

B. Relationship to Other City Policies. Nothing in these SEPA policies shall diminish the independent effect and authority of other environmentally related policies adopted by the City. Such City policies shall be considered together with these SEPA policies to guide discretionary land use decisions ... Such adopted City policies may serve as the basis for exercising substantive SEPA authority with respect to a project only to the extent that they are explicitly referenced herein.

....

D. Relationship to City Codes. 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.<sup>17</sup>

Emphasis added.

The City's regulations addressing a MDNS are found in SMC 25.05.350. Subsection C of that section reads, in pertinent part: "if the lead agency specifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is ... conditioned to include those measures, the lead agency shall issue a DNS."

The City has addressed historic preservation in Chapter 25.12 SMC and in the City's SEPA policies. SMC 25.05.675.H states as policy background that the preservation of historic buildings and sites "is important to the retention of a living sense and appreciation of the past" and that "[h]istoric buildings are protected by the Landmarks Preservation Ordinance, as administered by the Landmarks Preservation Board."<sup>18</sup> SMC 25.05.675.H.2 sets out the associated SEPA policies.

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<sup>17</sup> None of the limitations in SMC 25.05.665.D.1 through D.7 apply to the present proposal.

<sup>18</sup> SMC 25.05.675.H.1.a and H.1.c.

SMC 25.05.675.H.2.a states that “[i]t is the City’s policy to maintain and preserve significant historic sites and structures,” and SMC 25.05.675.H.2.b states that “[f]or projects involving structures or sites which have been designated as historic landmarks, *compliance with the Landmarks Preservation Ordinance shall constitute compliance with the policy set forth in subsection H2a above.*”<sup>19</sup>

The first listed purpose of the Landmarks Preservation Ordinance is to “designate, preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect significant elements of the City’s cultural, aesthetic, social, economic, political, architectural, engineering, historic, or other heritage, consistent with established long-term goals and policies of the City.”<sup>20</sup> The Landmarks Preservation Board is composed of 11 members, and includes two architects, one of whom may be a landscape architect; two historians; a representative from the City Planning Commission; a structural engineer; a representative from the field of real estate management; a representative from the field of finance, and three additional members. All members must have “a demonstrated sympathy with the purposes of” the Landmarks Preservation Ordinance.<sup>21</sup> Before alterations or significant changes may be made to any controlled features of a landmark or landmark site, the written authorization, known as a “certificate of approval,” must be obtained from the Landmarks Preservation Board.<sup>22</sup>

SMC 25.05.330.B addresses the threshold determination process, which the Department uses to determine whether an environmental impact statement (“EIS”) is required for a proposal. This section requires the Department to review and independently evaluate the responses to the SEPA checklist, document the result of its evaluation in the DS or DNS or on the checklist, determine whether the proposal is likely to have a probable significant adverse environmental impact, and consider “mitigation measures which an agency or the applicant will implement as part of the proposal, *including any mitigation measures required by the City’s development regulations or other existing environmental rules or laws.*”<sup>23</sup> If the Department “specifies mitigation measures on a proposal that would allow it to issue a DNS, and the proposal is ... conditioned to include those measures,” the Department “shall issue” a MDNS.<sup>24</sup>

## Analysis

As stated above, the Department determined from its SEPA review that “potential significant adverse impacts” had been identified concerning “proposed alternations to the designated features of the landmark,”<sup>25</sup> and acknowledged that the impacts would be considered by the Landmarks Preservation Board in the context of its action on the Appellant’s application for a Certificate of

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<sup>19</sup> Emphasis added.

<sup>20</sup> SMC 25.12.020.B.

<sup>21</sup> SMC 25.12.270.

<sup>22</sup> SMC 25.12.080; SMC 25.12.670.

<sup>23</sup> Emphasis added.

<sup>24</sup> SMC 25.05.350.C.

<sup>25</sup> The Department’s finding is notably different from the Appellant’s characterization of it. See “Appeal” at page 2 above.



Approval. The Department concluded that “the Board’s action on the Certificate of Approval would constitute compliance with SEPA for historic preservation purposes.”<sup>26</sup>

In its motion for summary judgment and response to the Department’s and Applicant’s motions, the Appellant asserts that because significant adverse impacts to historic resources were identified, an EIS was required under RCW 43.21C.030.<sup>27</sup> Citing WAC 197-11-350(3), the Appellant argues that the mitigating condition imposed by the Department in the MDNS at issue, requiring the Applicant to obtain a Certificate of Approval from the Landmarks Preservation Board, does not assure that all significant impacts to historic preservation will be reduced below the level of significance and thus, the MDNS was issued in error.

The Appellant’s argument ignores the RCW, WAC, and City Code sections, set forth above, that must be read together with RCW 43.21C.030 and WAC 197-11-350(3). The City has “to the maximum extent possible, incorporated environmental concerns into its codes and development regulations.”<sup>28</sup> As authorized by RCW 43.21C.240 and WAC 197-11-158,<sup>29</sup> SMC 25.05.665.D specifies that “[w]here City regulations have been adopted to address an environmental impact, *it shall be presumed that such regulations are adequate to achieve sufficient mitigation*.”<sup>30</sup> Under SMC 25.05.675.H, the City has determined that the Landmarks Preservation Ordinance, as administered by the Landmarks Preservation Board, protects historic buildings and sites, and that compliance with that ordinance constitutes compliance with the City’s policy “to maintain and preserve significant historic sites and structures.”<sup>31</sup>

The Appellant argues that this policy covers only SEPA’s substantive requirement concerning imposing mitigation, but it is broader than that. As addressed in RCW 43.21C.240, and set forth in WAC 197-11-158(1), the City may “determine that the requirements for environmental analysis, protection, and mitigation measures in ... development regulations adopted under chapter 36.70A RCW, and in other applicable local ... laws or rules, *provide adequate analysis of and mitigation for* some or all of the specific adverse environmental impacts of the project.”<sup>32</sup> In SMC 25.05.675.H, the City has determined that the Landmarks Preservation Board process “provide[s] adequate analysis of and mitigation for” historic preservation impacts, and thus meets both the procedural and substantive requirements of SEPA. The Department and Applicant are entitled to judgment on this issue as a matter of law.

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<sup>26</sup> De Weese Declaration, Exhibit A at 8.

<sup>27</sup> This statute is implemented through WAC 197-11-330, and the City’s codification of that regulation is found at SMC 25.05.330.D.

<sup>28</sup> SMC 25.05.665.A.

<sup>29</sup> Set forth at pp. 4-5 above.

<sup>30</sup> Emphasis added.

<sup>31</sup> SMC 25.05.675.H.2.a.

<sup>32</sup> Emphasis added.

Other Impacts

The Applicant's motion for summary judgment notes the absence of any evidence in the record to support the Appellant's issues listed in paragraph 7 of the appeal.<sup>33</sup> In response, the Appellant relies on the seven declarations it filed with its response to the motions for summary judgment, arguing that they include facts that, if found to be true, show that the project will cause significant adverse impacts to the elements set forth in paragraph 7. However, a careful reading of the declarations reveals that they set forth sincerely held, but unsupported, lay opinion on subjects that are technical in nature and, in large part, are addressed by technical studies in the record. The declarations are not sufficient to raise a genuine issue of material fact for hearing. The Applicant is entitled to judgment on these issues as a matter of law.

The Appellant's motion for summary judgment is **DENIED**. The Applicant's and Department's motions for summary judgment are **GRANTED**. The appeal hearing scheduled for June 7, 2017 is **CANCELLED**.

Entered this 5th day of June, 2017.



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<sup>33</sup> As noted above, this paragraph raised claims of significant adverse impacts to traffic and parking, height, bulk and scale, light and glare, plants, animal habitat, and public views.



**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**


**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motions for Summary Judgment** to each person listed below, or on the attached mailing list, in the matter of **Protect Volunteer Park**. Hearing Examiner File: **MUP-17-015 (W)** in the manner indicated.

Party	Method of Service
Protect Volunteer Park c/o Dave Bricklin Bricklin & Newman, LLP dave@bnd-law.com  Peggy Cahill cahill@bnd-law.com  Anne Bricklin miller@bnd-law.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
SDCI c/o Daniel Mitchell Assistant City Attorney Daniel.Mitchell@seattle.gov  Bob Tobin Bob.Tobin@seattle.gov  Alicia Reise Alicia.Reise@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

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Dated: June 5, 2017

  
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Tiffany Ku  
Legal Assistant