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BEFORE THE HEARING EXAMINER
OF THE CITY OF SEATTLE

In the matter of the Appeal by:

No. MUP-08-014(W,DR)

MAPLE LEAF COMMUNITY
COUNCIL EXECUTIVE BOARD,

APPELLANT'S CLOSING
ARGUMENT

of a Determination of Nonsignificance
by the Department of Planning and
Development.

I. INTRODUCTION

Prescott Homes wants to demolish a historic building that the Community fought for years to protect. It wants to replace a lovely urban forest, traditionally used as a neighborhood park, with towering townhomes squeezed together around a few remaining trees. Most incredibly, Prescott wants the City to say, in essence, "Sure, even though you exaggerated the future tree canopy, even though you have no plan to clean up dangerously toxic soil, even though your landscape plans are physically impossible to carry out, we trust you. Go ahead and destroy the old hospital and the Waldo Woods grove. And don't bother

1 protecting the community – you can just hose down all that toxic dust and pretend it will
2 go away.”

3 In short, Prescott’s request is radical. The Community’s request, on the other hand,
4 is reasonable. The Community wants to know the truth about the project’s impacts before
5 the project is approved. It wants an environmental impact study to be done. That is what
6 the law requires.
7

8 Unfortunately, the City has not followed the law. On May 1, 2008, the City issued
9 a Determination of Nonsignificance (DNS) on the tenuous theory that Prescott’s
10 forthcoming plans, still to be seen, would prevent significant environmental harm. The
11 City set almost no specific conditions for the project.¹ In general, the City’s DNS relied on
12 information that was either incomplete or incorrect.
13

14 The State Environmental Policy Act (SEPA) demands more. The evidence at
15 hearing established five overarching reasons why the DNS must be reversed:

- 16 1. **The City did not have sufficient information** for determining likely impacts of
17 the project on trees, public health, air and water quality, recreation, aesthetics,
18 traffic and parking. Under SMC 25.05.335, a DNS must be based on information
19 that is reasonably sufficient for evaluating impacts. Here, the information was *not*
20 sufficient because: a) key project details, such as how to demolish the former
21 Waldo Hospital building and which trees will be destroyed, were uncertain at the
22 time of the City’s decision; b) the nature of mitigation was still to be determined,
23 making it impossible to know if mitigation will prevent significant impacts; and c)
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26 ¹ The only thing certain about the toxic control plan is its title, as if it is reassuring that the
27 words “Air Quality Monitoring and Enforcement Plan” will adorn a cover page someday.

1 the City did not independently evaluate impacts on some elements of the
2 environment that were required to be considered, such as aesthetics, recreation and
3 cumulative traffic and parking.

4 2. **The City was materially misled** about tree impacts. Under SMC 25.05.340.C.1,
5 the City must withdraw a DNS if “there is significant new information indicating a
6 proposal’s probable significant adverse environmental impacts,” or if the DNS
7 “was procured by misrepresentation or lack of material disclosure.” Here, it is
8 undisputed that Prescott Homes misled the City by comparing the radius of current
9 trees to the diameter of future trees, thereby making the future canopy appear twice
10 as large, relative to the current canopy. Also, Prescott avoided showing its
11 landscape plans at scale, which would have revealed that it is physically impossible
12 to build 39 townhomes as planned while maintaining the tree canopy coverage that
13 Prescott claimed. Because the true extent of tree loss was misrepresented or not
14 disclosed, and because new information introduced at hearing indicates greater
15 environmental harm than the City was led to believe, the DNS must be withdrawn.

16 3. **The City mistakenly omitted three design-related conditions** which, according
17 to City Planner Scott Kemp’s testimony, were “supposed to be incorporated into the
18 project.” For example, Mr. Kemp said he forgot to require Prescott to put a stop
19 sign in its planned parking garage, although the Design Review Board (DRB)
20 recommended requiring the stop sign, and although public safety could be
21 significantly harmed without them. The DRB also recommended restrictions on
22 vegetation around the driveway opening, and a pavement treatment in the garage
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1 ramp to provide an audible cue when vehicles approach the sidewalk.² Mr. Kemp
2 did not have authority to simply omit the three recommended conditions from the
3 project decision. Rather, under SMC 23.41.014.F.3, once four or more DRB
4 members agreed on the recommendations, the Department of Planning and
5 Development (DPD) was required to make them conditions of project approval
6 unless the DPD Director concluded that the recommendations conflicted with laws.
7 Mr. Kemp acknowledged that the DRB's recommendations could have been
8 implemented through SEPA and testified, "We do need the stop sign" and "we
9 should probably add that." In sum, the unauthorized omissions – accidental or not –
10 require a remand.³

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13 **4. Environmental harm, especially to trees and health, is likely to be significant.**

14 Under SMC 25.05.330, an environmental impact statement (EIS) is required when a
15 project is likely to cause significant adverse environmental impacts. Here, the
16 undeniable facts are: a) the soil on the site contains dangerously high levels of lead;
17 b) the City did not require cleanup of the toxic soil as a condition of project
18 approval; c) construction of the project will likely cause human exposure to lead;
19 and d) lead exposure, especially in children, is a significant adverse impact on
20 health. Thus, for health reasons alone, the DNS was clearly erroneous. Additional
21 reasons why an EIS is required, instead of a DNS, are discussed below.
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25 ² Please see Exhibit 5 (April 7, 2008 Design Review Board Meeting), Disc 2 at about
26 35:20.

27 ³ The appeal noted additional errors in the way the DRB decisions were described. The
28 three omissions discussed above are the most obvious of the numerous errors.

1 **5. The City applied the wrong standard concerning trees.** Mr. Kemp testified that
2 DPD decided not to protect the eastern grove of trees on the site because its loss did
3 not appear to meet the “threshold of significance.” He repeatedly stated that, in
4 determining whether to protect the grove, DPD applied the general SEPA standard
5 for making a threshold determination about a project – whether the project will
6 have a probable significant environmental impact. That is *not* the correct standard
7 for determining whether trees should be protected under SEPA. Rather, SMC
8 25.05.675.N.2 sets the standard for determining tree protection under SEPA. And
9 while Mr. Kemp testified that he relied heavily on the Rob Williams and Bill Ames
10 arborist reports in deciding not to protect the grove, neither of the arborists
11 discussed the SMC 25.05.675.N.2 standard in their reports. Thus, as a matter of
12 law, the DPD decision was clearly erroneous because the SEPA standard for trees
13 was not applied.

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16 In sum, for the reasons above and the many others presented in 3.5 days of testimony, the
17 May 1 decision of DPD must be reversed and remanded with instructions to conduct an
18 adequate SEPA review, including an EIS. A new design review also is needed to ensure
19 that DRB decisions are accurately recorded and implemented.

20
21 The main defense offered for the DNS was the optimistic notion that some day, in
22 some undetermined way, Prescott Homes would minimize the environmental damage from
23 its townhome construction project. But SEPA determinations are not to rest upon blind
24 optimism. In reality, Prescott’s plans are still a moving target, too fluid to justify the City’s
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1 leap of faith. The City's conditions of approval are so devoid of details that they add
2 nothing to the probability equation.

3 Even if the consultants' recommendations described in the hearing were likely to
4 prevent significant environmental harm, they are merely recommendations. There is no
5 requirement for Prescott to follow its own consultants' recommendations. Nor is there any
6 evidence that Prescott intends to follow those recommendations. Surprisingly, nobody
7 from Prescott took the witness stand to say whether the draft demolition plan or the arborist
8 proposals, for example, would guide its actions. Only Prescott knows what it will do, and
9 the 3.5-day hearing left sufficient uncertainty that an EIS is the only way to meet SEPA's
10 mandate to fully understand the project's impacts.

11 II. INSUFFICIENT INFORMATION

12 A. Missing details

13 Under SMC 25.05.060.C.1, a project must be defined with certainty before
14 environmental review occurs. Here, the evidence established that the City did not know
15 critical details of the Prescott project when it determined that there would be no significant
16 adverse impacts. This error was particularly problematic regarding trees and toxins.

17 At hearing, tree experts agreed that activity within the drip line of a tree can damage
18 or even kill the tree, and that the City's standard is to protect the drip line. Yet, before
19 issuing its May 1 decision, the City had no way to assess whether townhome construction,
20 utility trenching, plantings or other planned activities would encroach upon the drip lines of
21 the Waldo trees. Such an assessment was impossible because Prescott's tree plans were
22 never drawn to scale, and also because the plans kept changing. A plan to build a pump
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1 station within drip lines of supposedly retained trees, for example, was not submitted until
2 after the City issued its May 1 decision.

3 Neither Prescott nor the City presented any evidence that drip lines were measured
4 and factored into tree or building site plans. On the contrary, Prescott's arborist Rob
5 Williams testified that he proposed a tree protection zone without reference to Prescott's
6 site plans, and he was not involved in canopy or drip line calculations. Prescott's
7 consultant Brian Gilles testified that he measured only one tree's drip line. In sum, the City
8 lacked sufficient information for determining impacts on trees because, as of May 1, it did
9 not know where the drip lines were located or to what extent they would be encroached
10 upon.
11

12 The City also lacked the details needed to assess air quality and health impacts from
13 demolishing the hospital building, which is laden with asbestos and lead paint. It is
14 undisputed that, even today, there is no demolition plan. There is only a set of preliminary
15 recommendations from Prescott's consultants, which Mr. Kemp testified he has not read,
16 which are admittedly incomplete, and which Prescott has not committed to carry out. In
17 fact, the City's conditions allow Prescott to plan the demolition without reference to any
18 standards or minimum levels of protection. For example, it is up to Prescott to define its
19 own "best practices" for the demolition. Thus, the ultimate details of the plan are
20 impossible to predict. Because those details are necessary to determine the project's true
21 impacts, the DNS was premature.
22

23 Mr. Kemp, who wrote the conditions for the project, testified that controlling toxic
24 dust "is kind of a new issue" and has yet to be well regulated. He claimed that in this case,
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1 “the concern is high enough that we want to make sure that there’s a plan in place that has
2 a good possibility of working.” Yet there *was no plan* in place when Mr. Kemp concluded
3 that toxic releases from the Waldo demolition would have no significant adverse impact on
4 air, water, land or health. Nor did the City have regulations in place to ensure that the
5 demolition occurs safely.

6
7 Mr. Kemp explained his reasoning as follows:

8 If we didn’t think it could be done, we’d have to do a DS [Determination of
9 Significance]. I looked at it and said, ‘well I know you could put a circus
10 tent over it and everything could be done inside the tent’...So I know it can
11 be controlled. The question is at what level? How do you do it? So it kind
of passed the DS threshold into a DNS with that. I knew it could be
conditioned. And we’re still working that out.

12 This speculative approach violates SMC 25.05.060, which requires the City to
13 “make certain” that a project is “properly defined” before issuing a threshold
14 determination. Mr. Kemp could not have known whether a “circus tent” would be part of
15 the Prescott project. Such a tent was not mentioned in the documents available at the time
16 of the DNS issuance. Instead of properly defining the demolition part of the project, Mr.
17 Kemp simply guessed what it “could” entail. A guess cannot support a DNS.

18
19 Mr. Kemp’s approach also violates SMC 25.05.330.A.3, which says that in making
20 a threshold determination, the City must “consider mitigation measures which an agency or
21 the applicant will implement as part of the proposal.” A circus tent was not identified as a
22 mitigation measure to be implemented. Therefore, it was improper for Mr. Kemp to
23 consider it, let alone rely on it as the reason for a DNS.

24
25 If the Maple Leaf Community is to be a test case as Mr. Kemp indicated in his
26 testimony, then the City’s experimentation should only be done in conjunction with an EIS.

1 Under SEPA, only the EIS allows for the detailed study, comment, and exploration of
2 alternatives necessary to address the significant adverse environmental impacts of lead dust
3 fall due to demolition and construction activities at the Waldo Hospital site.

4 B. Uninformed decision

5 The DRB consists of architects and other design professionals who are charged
6 with applying design review standards. The DRB does not, as a rule, implement SEPA. In
7 this case, DRB members were correctly told that tree preservation is a SEPA issue rather
8 than a design review issue, and that it would be inappropriate for them to discuss details of
9 a tree preservation plan. Thus, the DRB was not equipped to decide what tree preservation
10 requirements were needed at the Waldo site. The discussion was beyond the DRB scope to
11 begin with, and was cut off.
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14 Nevertheless, the Prescott project's tree preservation conditions came *solely from*
15 *the DRB process*, not the SEPA process. The DRB conditions, outlined on pages 33 and
16 34 of the decision, include creation and implementation of a "Tree Preservation Plan" that
17 will "insure the trees to be preserved are protected and maintained." DRB conditions also
18 include creation of a fenced tree protection area, "use of minimally disruptive construction
19 techniques," and financial penalties for violating the preservation plan. Another DRB
20 condition is for an arborist to be on site during construction and to have authority to stop
21 activities that could harm trees. Thus, the City used a design review panel, rather than a
22 SEPA responsible official, to determine SEPA compliance.
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25 Mr. Kemp testified that tree preservation is a SEPA issue, and that he told the DRB
26 to stay out of it. That testimony is proof that the tree preservation conditions could not
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1 have been based on reasonably sufficient information. Rather, the conditions were decided
2 by a board which lacked SEPA authority, and which was explicitly told not to delve into
3 the details. If tree preservation is indeed a SEPA issue, it should have been determined
4 through a SEPA process with full consideration of relevant environmental factors by the
5 SEPA responsible official. Because that did not happen, the decision was clearly
6 erroneous.
7

8 C. Lack of independent evaluation

9 Under SMC 25.05.330.A.1.a, a threshold determination must involve reviewing the
10 applicant's checklist of environmental impacts and "independently evaluating" the
11 applicant's responses. Here, Prescott claimed in the checklist that the project would not
12 displace any recreational uses, despite a long history of residents regularly walking,
13 jogging, bird watching, picnicking and otherwise using the site as a park. Mr. Kemp,
14 whose job was to independently evaluate that claim, admitted that he made no attempt to
15 document the nature and extent of recreational uses of the project site. That was clearly
16 erroneous.
17

18 Several community witnesses testified that walking or jogging through Waldo
19 Woods was a uniquely valuable experience because of the elevation of the site, which
20 afforded the area's best views, and because of the serene and natural setting (originally
21 designed to soothe hospital patients). The witnesses testified that they are unlikely to use
22 or enjoy the planned pedestrian path through the former Waldo Woods because they would
23 feel like intruders in a private housing development, and because the natural forest will be
24 lost. Thus, if Mr. Kemp had investigated Prescott's claim, he would have learned that it
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1 was false, and that recreation impacts will be significant. His failure to investigate violated
2 SEPA and warrants reversal, so that recreation impacts can be considered.

3 The City also failed to independently investigate aesthetic impacts, again violating
4 SMC 25.05.330. In the aesthetic section of the checklist, Prescott claimed that views
5 would not be affected, and that the new townhomes would be aesthetically consistent with
6 the character of the surrounding neighborhood. As several witnesses attested, those claims
7 were plainly *not* true. A lovely forest will be replaced by clustered housing that is
8 significantly out of character with the surrounding single-family homes. The townhomes
9 will be much taller than existing buildings on the site. And unrefuted testimony from
10 Maple Leaf Community Council President David Miller established that the development
11 would block views of downtown from at least three homes on NE 86th Street.
12

13
14 Several community witnesses – including noted architect Gerald Hansmire - agreed
15 that aesthetic impacts of the project will be significant. But the City’s decision did not
16 discuss aesthetic impacts at all. The City did not investigate Prescott’s false claims. In
17 fact, Mr. Kemp testified that he was not aware of whether aesthetic impacts must be
18 considered under SEPA, although SMC 25.05.444.B.2.d clearly says they must.
19

20 Mr. Kemp also testified that he is “not sure” what would constitute a significant
21 aesthetic impact. Nevertheless, he said, “The position that we take is that this isn’t it. I
22 can’t say what would be. But this isn’t it.” In other words, the City simply dismissed –
23 without any investigation – the issue of aesthetic impacts. In light of the undisputed
24 testimony that such impacts are significant in the eyes of the surrounding community, the
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1 failure to even consider the issue was clearly erroneous under SMC 25.05.444.B.2.d and
2 SMC 25.05.330.

3 III. MISREPRESENTATION AND NONDISCLOSURE

4 The evidence of misrepresentation by Prescott was not disputed. For example,
5 nobody denied the startling revelation at hearing that, when Prescott's plans for retaining
6 old trees and planting new trees are shown to scale, they are physically impossible to
7 achieve. Using Prescott's own measurements, the drip lines of old and new trees would be
8 right smack in the same place as the planned townhomes. Of course, if a developer must
9 choose between protecting a tree and not building a townhome, the tree will yield to
10 development. Thus, the Community's graphics illustrating tree and townhome plans at
11 scale – introduced at hearing and not refuted – prove that there will be significant adverse
12 impacts to trees which were not known during the City's review process. Prescott simply
13 cannot retain or plant as many trees as it claimed. That alone is reason to reverse the DNS.
14

15 Also, nobody denied the evidence at hearing that, during the City's review process,
16 Prescott grossly misrepresented the size of the future tree canopy at the site. Prescott
17 repeatedly emphasized during the design review process that, by replacing cut trees, it
18 would actually increase the tree canopy at the site. The City heralded this claimed
19 environmental benefit in explaining why it issued a DNS for the project. The City did not
20 know that, in truth, Prescott's construction plans would have reduced the canopy by 1,169
21 feet - even after planting new trees. The City's evaluation was so deficient that it did not
22 catch the fact that Prescott used radius to define the current canopy, while using diameter –
23 double the radius – to describe the future canopy.
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1 It is not credible for Mr. Kemp to say, after learning of the canopy
2 misrepresentation at hearing, that it is immaterial. The size of the future canopy would not
3 have been discussed at length in the DNS decision if the City did not consider it to be
4 important. An entire paragraph on page 24 of the decision was devoted to the false premise
5 that “the total tree canopy on the site with retained, transplanted and replacement trees will
6 be approximately 1,679 sq ft., which exceeds the total existing tree canopy of
7 approximately 1,349 sq. ft.” In addition, the overstated future canopy was mentioned again
8 in the section on page 27 that summarized reasons for approving Prescott’s tree plans.⁴ It
9 strains credulity to argue that the canopy claim, which was important enough to be touted
10 extensively in the decision and in both design guidance meetings, somehow lost
11 importance once it was revealed to be untrue.
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14 Even if Mr. Kemp’s assertion was credible, withdrawal of the DNS still is required.
15 Under SMC 25.05.340.C.1, a misrepresentation does not have to be material in order to
16 invalidate a DNS. Rather, a DNS must be withdrawn if “there is significant new
17 information indicating a proposal’s probable significant adverse environmental impacts,”
18 or if the DNS “was procured by misrepresentation or lack of material disclosure.” The
19 regulation refers to *any* misrepresentation, not just material misrepresentation. Besides,
20 even if Prescott’s misrepresentation about the canopy is disregarded, the corrected canopy
21 calculations and the drip line graphics presented for the first time at the hearing constitute
22 “significant new information” about tree impacts, warranting withdrawal of the DNS
23 pursuant to SMC 25.05.340.C.1.
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26 ⁴ That section said: “The applicant is planting replacement trees that will result in a larger
27 tree canopy at maturity than exists now.”
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IV. SIGNIFICANT IMPACTS

A. Toxic threat

Prescott's own tests show that soil around the Waldo building is highly toxic. Some of Prescott's soil samples contained three or four times as much lead content as state environmental standards allow. Nobody disputed that, if the lead is not cleaned up, it will be distributed into the environment and threaten public health.

The Community's lead exposure experts testified that even a small amount of lead can permanently damage a child's brain. It is undisputed that children will play in the area. Yet despite the threat of serious harm, the City did not require soil cleanup as a condition of the project. In the absence of a cleanup plan, or even a requirement to develop such a plan, it was clearly erroneous for the City to determine that no significant harm will occur.

The only defense offered was that Prescott can be trusted to protect the community's health. Even if there was evidence to support such a premise, it would not justify a DNS. As already noted, a DNS must be based on a properly defined project, not speculation as to what the project might entail. Also, a DNS must consider mitigation that will actually be implemented. Here, the City still does not know what Prescott will do to mitigate impacts of lead.

To the extent that the City's decision discussed health risks, it focused on the toxic dust that will be created when the Waldo building is demolished, rather than the contamination that already is in the soil. Accordingly, Prescott responded to the decision with a "draft demolition plan" that is aimed primarily at the dust problem. One Prescott consultant proposed watering as a means of dust control – in other words, wetting the dust

1 so that it will land on the ground instead of flying around. But as toxicologist Janice Camp
2 explained, watering would simply create a toxic sludge rather than removing toxins from
3 the environment. Ms. Camp, who reviewed the 300-page draft demolition plan, testified
4 that the plan does not prevent toxins from reentering the air once the sludge dries out.
5 Furthermore, Ms. Camp cited research establishing that watering does not prevent dust
6 from traveling beyond construction zones. In sum, even if the draft demolition plan had
7 been available - and final - at the time of the City's May 1 decision, it would not have
8 supported a DNS because it fails to prevent significant soil-related health effects.
9

10 In fact, the draft plan relies entirely on occupational health and safety standards,
11 which are designed to protect healthy construction workers from airborne pollution. It is
12 undisputed that those standards are *not* designed to protect children, elderly people or
13 others who are more vulnerable to toxic exposure. Thus, even if the draft plan was certain
14 to be carried out, it would leave the most vulnerable members of the community at risk.
15 For example, Alex Sobie testified that his 4-year-old son lives close enough to be at risk.
16

17 Prescott's consultants acknowledged that more protective federal standards exist,
18 but claimed that they apply to major industrial sites like the Asarco smelter, and not to the
19 Waldo site. If true, this argument supports the need for an EIS. If existing standards do
20 not clearly protect the community, as Prescott's consultants and Mr. Kemp suggested, it is
21 all the more important to understand the risks and to determine the best solution before
22 proceeding.⁵ A DNS is not supposed to be an experiment. The Maple Leaf community
23 should not be a guinea pig.
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27 ⁵ SMC 25.05.675.F.2.b notes:
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1 Meanwhile, the air quality monitoring proposed in the draft plan is irrelevant.
2 Monitoring does not prevent significant harm to the community. It simply documents
3 problems *after* they have occurred. Thus, even if the proposed monitoring was adequate to
4 alert community members that they have been exposed to health risks, it would not
5 eliminate the need for an EIS. In sum, the evidence overwhelmingly established that the
6 project will have probable, significant adverse impacts on air quality and public health.
7 Therefore an EIS is required.
8

9 B. Tree impacts

10 At hearing, it was undisputed that the eastern grove at the Waldo site constitutes a
11 plant habitat. Under SMC 225.05.060.B.2 and SMC 25.05.444.A.4.a, impacts to plant
12 habitat must be considered when making a threshold determination.
13

14 Arborist Tina Cohen testified, and Prescott's plans show, that at least 34 of the 59
15 living trees in the eastern grove would be removed to make way for construction. Thus,
16 even without accounting for encroachment upon drip lines, wind exposure or other threats
17 to tree survival that will result from the project, at least 42 percent of the grove will be
18 deliberately destroyed. Surely, common sense dictates that a 42 percent reduction is a
19 "significant" adverse impact on a grove. The sheer magnitude of destruction warrants an
20 EIS.
21

22
23 Federal, state, and regional regulations are the primary means of mitigating risks associated
24 with hazardous and toxic materials. However, such regulations cannot always be developed
25 and implemented to anticipate or eliminate adverse impacts from hazardous materials and
26 transmissions. Public knowledge regarding such hazardous materials and transmissions may
27 develop more quickly than the regulations.
28

1 Ms. Cohen also testified that, besides the deliberate destruction of much of the
2 grove, additional harm is likely to result from Prescott's plans for planting, trenching,
3 construction and other activities within the drip lines of retained trees. Prescott's people
4 responded that air spades used in construction and planting will "minimize" damage to tree
5 roots. However, they admitted that air spades are not an alternative to cutting roots. The
6 tools simply will expose tree roots so that when trees get in the way of Prescott's plans,
7 their roots can be cut more cleanly.

9 Moreover, there is no prohibition on activity within the drip lines of the Waldo
10 trees. In fact, Prescott's arborist testified that he intends to supervise construction activity
11 within the purported protection zone, and that construction could damage trees in the zone.
12 Such activity within drip lines is not prohibited by the City's decision even though, at
13 hearing, arborists agreed that protecting trees at the drip line is an accepted standard.⁶ Ms.
14 Cohen and the City's arborist, Mr. Ames, said the drip line plus five feet is a better
15 standard. In sum, the project will have probable, significant adverse impacts on the
16 eastern grove.
17

18 V. WRONG STANDARD

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20 Mr. Kemp testified that DPD decided not to protect the eastern grove because its
21 loss would not be "significant" under SEPA. He said the "threshold of significance" was
22 not met. Mr. Kemp must be confused.
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24
25 ⁶ SMC 25.11.020 is instructive here. It defines "tree removal" in part as "...trenching in the
26 dripline area of a tree which has the potential to cause irreversible damage to the tree."
27

1 Under SEPA, there is no such thing as a threshold determination of significance for
2 tree loss. Threshold determinations are for a project's overall significance, considering all
3 elements of the environment, not just trees. Seattle has a different standard for determining
4 whether to protect trees under SEPA.

5 SMC 25.05.675.N.2 establishes a policy to prevent or minimize the loss of habitat
6 or vegetation which has "substantial aesthetic, educational, ecological and/or economic
7 value." SMC 25.05.675.N.2 also says that a project may be denied or conditioned if it
8 would "reduce or damage rare, uncommon, unique or exceptional plant...habitat." Thus,
9 in determining whether to protect the eastern Waldo grove under SEPA, the question is not
10 whether loss of the grove is "significant." Rather, DPD should have examined: 1) whether
11 the eastern grove has substantial aesthetic, educational, ecological or economic value; and
12 2) whether the Prescott project would reduce or damage rare, uncommon, unique or
13 exceptional plant habitat. *This required SEPA analysis was not done.*

14 Mr. Kemp testified that he relied heavily on reports by Mr. Williams, Prescott's
15 arborist, in deciding not to protect the grove. The decision itself cites the March 1, 2007,
16 and March 24, 2008 reports by Mr. Williams as the source of analysis regarding tree
17 impacts. This reliance on the Williams reports is problematic. The reports, on their face,
18 do not discuss whether the Waldo grove as a whole merits protection under the SEPA tree
19 policy, SMC 25.05.675.N. Rather, the reports deal exclusively with a separate question:
20 whether to protect individual exceptional trees pursuant to Director's Rule 6-2001. Thus,
21 if Mr. Kemp relied heavily on the Williams reports, he was not applying the correct
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1 standard for determining whether to protect the grove of trees. The correct standard is
2 SMC 25.05.675.N.

3 Mr. Kemp testified that he relied to a lesser extent on advice from the City's
4 arborist, Mr. Ames, in making the decision. Importantly, Mr. Ames admitted he was not
5 asked to evaluate the Waldo grove according to SMC 25.05.675.N, the SEPA policy.
6 Rather, he said his job is to apply Director's Rule 6-2001 to individual trees, and that he
7 examined the Waldo site with that Director's Rule in mind. Thus, both of the arborists
8 involved in the decision, Mr. Ames and Mr. Williams, applied the Director's Rule instead
9 of the SEPA policy. Accordingly, it was clearly erroneous for Mr. Kemp to rely upon their
10 analyses for his SEPA decision.
11

12 Mr. Ames testified that, in his opinion, the Waldo grove as a whole is not
13 exceptional because it lacks a diversity of plant life on the forest floor. However, he
14 acknowledged that diversity of plant life is not necessary for a grove to be exceptional
15 under SMC 25.05.675.N. He said the SEPA policy is "open to interpretation" as to what
16 constitutes substantial ecological value. As for substantial *aesthetic* value – another basis
17 for SEPA protection - Mr. Ames said, "That's subjective. I can't weight that." Thus,
18 although Mr. Ames does not personally believe the Waldo grove is exceptional, he did not
19 consider its aesthetic value in forming that opinion. Under the SEPA policy, "substantial
20 aesthetic value" makes a grove such as Waldo worthy of protection.
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1 Ms. Cohen, the Community's arborist, is the only arborist who actually analyzed
2 the eastern grove according to the factors in the SEPA policy.⁷ She determined that the
3 grove should be protected as an exceptional grove based on its overall size, aesthetics and
4 vigor. Ms. Cohen got it right. The City, by contrast, did not even consider the proper
5 factors for determining tree protection. Because the City applied the wrong standard,
6 looking for a "threshold of significance" instead of substantial ecological or aesthetic
7 value, the decision must be reversed.
8

9 VI. CONCLUSION

10 The Community's appeal is supported by 3.5 days of testimony and over one
11 hundred exhibits. This closing argument does not revisit every important point, but
12 highlights key issues bearing on the unlawfulness of the City's decision. As explained
13 above, the DNS is based on incomplete information, material misrepresentations, and
14 overly optimistic assumptions about what the project might eventually entail. The
15 evidence, viewed as a whole, compels a new SEPA review as well as a new design review.
16 Because the project will have significant adverse impacts on the environment, an EIS must
17 be required.
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22 DATED this 22nd day of August, 2008.

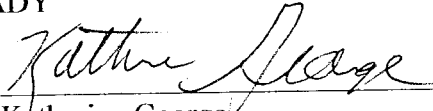
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25 ⁷ Mr. Williams testified that he looked at trees in the entire grove, and concluded the grove
26 as a whole is not exceptional. This testimony is irrelevant because it had no bearing on the City's
27 decision. Whatever Mr. Williams might have believed before the City issued the DNS on May 1,
28 the fact is that his reports to the City dealt exclusively with individual trees on the site. And the
City failed to apply the SEPA policy that protects groves instead of individual trees.

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Respectfully submitted,

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