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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

MAPLE LEAF COMMUNITY COUNCIL  
EXECUTIVE BOARD,  
  
Petitioner,  
  
v.  
  
CITY OF SEATTLE; PRESCOTT  
DEVELOPMENT, LLC; AND CAMP  
FIRE USA PUGET SOUND  
  
Respondents.

No. 08-2-32517-2 SEA  
  
PETITIONER’S OPENING BRIEF

I. INTRODUCTION

Petitioner Maple Leaf Community Council Executive Board (“Community”) respectfully submits the following opening brief in support of its land use petition challenging the City of Seattle’s approval of the demolition and significant clearing of the historic Waldo Hospital site at 8511 15<sup>th</sup> Avenue NE, in Seattle’s Maple Leaf neighborhood. Respondent Prescott Development, LLC., (“Prescott”), proposes to demolish the historic hospital building, remove the majority of the trees and significant

1 shrubs and construct 39 clustered single family and duplex townhomes on the  
2 approximately 1.7 acre site.

3 The Community challenges three significant components of the City’s review and  
4 approval. First, while the City failed on its own initiative to require adequate lead toxicity  
5 testing of the aging hospital facility and surrounding soils, at the Community’s insistence  
6 the City finally required Prescott to adequately test the old Waldo Hospital and its  
7 surrounding soil discovering extensive lead contamination – indeed sampling in the  
8 surrounding soils produced lead levels exceeding levels requiring cleanup under  
9 Washington’s Model Toxics Contamination Act (“MTCA”).  
10

11 Despite this known significant contamination, and despite undisputed evidence that  
12 lead exposure of children at any level is deemed unsafe, the City approved a Master Use  
13 Permit (“MUP”) allowing for demolition and grading on the site limited only on a  
14 condition that the applicant develop a future plan for air quality monitoring to be reviewed  
15 and approved by unqualified City staff. The City’s review of the project, and particularly  
16 its impacts from lead contamination of the surrounding community, was clearly erroneous  
17 and in violation of the State Environmental Policy Act (“SEPA”) as it was not based on  
18 information sufficient to understand the significant environmental impacts.  
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21 Second, despite the relative dearth of significant groves of trees in Seattle’s  
22 neighborhoods, the City determined that the removal of the majority of the Waldo Woods  
23 grove was not “significant” based in large part on assertions by the applicant that the tree  
24 planting and a tree preservation plan would both replace the existing canopy and protect  
25 the existing trees from construction activities. The Community demonstrated before  
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1 Seattle's hearing examiner that both these assumptions were based on misleading drawings  
2 and calculations submitted by Prescott. Contrary to replacing the existing canopy, the  
3 project will actually result in a significant reduction in canopy coverage. More  
4 importantly, while Prescott's required tree preservation plan claims to protect the  
5 remaining large trees in the grove by protecting the root structure, that plan also is based on  
6 the same misleading drawings depicting the size of the remaining canopy (and likely root)  
7 structure. Thus, even if construction crews follow the required tree preservation plan,  
8 construction will invade the root structure of many of the required remaining trees thus  
9 likely resulting in their demise. The City's failure to re-open its review under SEPA based  
10 on the materially misleading information provided by the applicant was clearly erroneous.  
11

12  
13 Finally, projects like Prescott's, that seek to impose a significantly sized new  
14 development into an existing neighborhood, are required to undergo review by Seattle's  
15 Design Review Board ("DRB") as part of the City's Master Use Permit ("MUP") process.  
16 As explained by the city's DRB website:

17  
18 Design review is one tool the City employs to create a  
19 better city, giving the Department of Planning and  
20 Development and citizens a voice in the design of most  
21 new multifamily and commercial buildings. Good design  
22 creates pedestrian-friendly streetscapes and enhances a  
23 neighborhood's character.<sup>1</sup>

24 Of course, for design review to work, design elements agreed to by the DRB must be  
25 actually imposed on the ultimate project. City staff, in violation of city law, failed to  
26 impose several significant conditions on Prescott's project that were approved unanimously

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27 <sup>1</sup> From "The Community Guide to Design Review" available at:  
28 [http://www.seattle.gov/dpd/cms/groups/pan/@pan/@plan/@drp/documents/web\\_informational/dpdp\\_020258.pdf](http://www.seattle.gov/dpd/cms/groups/pan/@pan/@plan/@drp/documents/web_informational/dpdp_020258.pdf)

1 by the DRB in order to make this project more compatible with the surrounding  
2 neighborhood. Thus, despite providing for community input, that input was rendered  
3 meaningless. These missing conditions were linked by the DRB specifically to the  
4 approval of requested land use code departures. In keeping with the role of DRBs in the  
5 City of Seattle, the City's failure to impose all approved DRB conditions on the final  
6 project was clearly erroneous.  
7

8 The Maple Leaf Community Council seeks an order from this court reversing the  
9 City's decision approving Prescott's project and remanding the City's SEPA determination  
10 for modification requiring issuance of a determination of significance and preparation of an  
11 EIS to analyze the probable significant impacts of lead contamination during demolition  
12 and construction, along with a thorough analysis of the project's impacts on Waldo Woods.  
13 The Community seeks also an order remanding for imposition of the required design  
14 review conditions.  
15

## 16 II. BACKGROUND

17 Prescott seeks to develop a cluster of 39 single family and duplex townhomes on a  
18 1.7 acre rectangular parcel of property located at 8511 15<sup>th</sup> Ave NE in Seattle's Maple  
19 Leaf neighborhood. The proposal occupies most of the block bounded on the east by 15<sup>th</sup>  
20 Ave., NE, on the south by NE 85<sup>th</sup> Street, on the north by NE 86<sup>th</sup> Street and on the west by  
21 the Maple Leaf Reservoir. DR Tab 2 (Findings and Decision), Findings 1, 13; DR Tab 13  
22 (Director's Decision), pp 148-50; DR Tab 32 (Ex. 22).<sup>2</sup> The site contains the 20,856 sq.  
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26 <sup>2</sup> This case is brought pursuant to the Land Use Petition Act, ch.36.70C RCW ("LUPA"). The  
27 court's review is limited to the record prepared before the City and its hearing examiner. The City has  
28 produced and filed with the court its "Documentary Record" containing the Hearing Examiner's Findings and  
Decision, hearing briefs, minutes from the hearing and all exhibits submitted to the City's Hearing Examiner.

1 ft., 1920s' era Waldo Sanitarium for osteopathic medicine ("Waldo Hospital."). The  
2 property was purchased by the Camp Fire USA in 1968 for use as offices. DR Tab 2,  
3 Finding 11; DR Tabs 26 and 39 (Exs. 16 and 29 (photos of hospital)).<sup>3</sup> Prescott's proposal  
4 included demolishing the old Waldo Hospital.<sup>4</sup>

5 In addition to the old Waldo Hospital building, the site contains approximately 108  
6 trees, including a mature stand of trees, mostly native conifers, located on the eastern third  
7 of the site. The eastern stand, known locally as "Waldo Woods" contains 66, or more than  
8 half, of mature trees on the site including three of four trees classified by the City as  
9 "exceptional." DR Tab 2, Findings 2, 7-9; DR Tabs 41-45 (Exs. 31-35 (photos)). Camp  
10 Fire USA has long allowed people to walk or jog through the site for recreation. Neighbors  
11 enjoyed walking the site on their way to the nearby Maple Leaf playground or simply to  
12 enjoy the views of the woods and open space on the property. DR Tab 2, Finding 10.  
13 Prescott plans to remove all but 31 of the existing trees from the entire site, plus transplant  
14 three small trees from elsewhere on the site.

15 The Waldo site is zoned Lowrise 2 (L2). The surrounding neighborhood is zoned  
16 Single Family 5000 (SF 5000), with the exception of a single L2 parcel containing a two-

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17 Citations to the City's "Documentary Record" are annotated as "DR Tab \_\_\_\_." The tab number  
18 corresponds to the tab in the City's record. Thus, for example, DR Tab 2 contains the Findings and Decision  
19 of the Hearing Examiner. DR Tab 13 was Exhibit 3 to the hearing and contains the Analysis and Decision of  
20 the Director. Page numbers refer to the "Bates stamp" numbers of the City's official record.

21 <sup>3</sup> Camp Fire USA is still listed as the owner of the property and is therefore at least a nominal party  
22 to this action. Camp Fire USA did not participate before the Hearing Examiner.

23 <sup>4</sup> Because the building is more than 25 years old, the site was automatically subject to the City's  
24 Landmark Preservation process. The site was unanimously nominated for landmark designation by the City's  
25 Landmark Preservation Board. City Landmark Office staff and most historical groups in the area  
26 recommended the site be designated as a historic landmark. During the landmark hearing, a majority of the  
27 Landmark Preservation Board believed the site met at least one of seven stated criteria for designation, but a  
28 majority could not agree on an individual criterion so the decision was not to designate the site as a landmark.

1 story triplex directly across NE 86<sup>th</sup> from the office building. Development to the north,  
2 south and east is primarily single family residences, including many older homes with  
3 established yards. DR Tab 2, Finding 4; DR Tab 24 (Ex. 14)(showing homes along 15<sup>th</sup>  
4 NE)). Although the site is zoned multifamily, Prescott’s proposed units are a combination  
5 of single-family attached (duplex townhouse) and single-family detached townhouse units.  
6 The individual units range in size between two and two and one half stories in height, with  
7 heights above street level ranging from 25 to over 35 feet. Most have basements. The  
8 eastern approximately one-third of the site, containing the trees which have come to be  
9 called “Waldo Woods”, contains 66 of the 108 surveyed trees and prominent shrubs on the  
10 site.  
11

12  
13 Waldo Hospital was built in 1924, with an addition completed in the 1950s. The  
14 initial toxicological studies of the building submitted to the City as part of Prescott’s  
15 application detected the presence of a heating oil tank and asbestos in floor tiles and pipe  
16 insulation. This investigation did not find lead contamination, despite the age of the  
17 building. DR Tab 128, (Ex. 118) pp 1235-36; Tab 132. (Ex. 122). Upon the insistence of  
18 the Community, the City required a more thorough investigation. DR Tab 146 (Ex. 136).  
19 This investigation uncovered concentrations of lead well in excess of Washington State  
20 Model Toxics Control Act (MTCA) allowable levels in the building interior and exterior  
21 walls and in the soil surrounding the building. See DR Tabs 108, 109, 125 (Ex. 98, 99 and  
22 115). The same Community-driven investigation discovered carcinogenic heavy metal  
23 contamination in the outbuilding that was used as an incinerator.  
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1 The project was subject to five presentations in front of Seattle’s Northeast Design  
2 Review Board. The first three meetings were Early Design Review. The final two meetings  
3 were Design Guidance meetings where the Northeast Design Review Board specified  
4 conditions on the project in exchange for building code departures requested by Prescott.  
5 These final two meetings occurred on March 3, 2008 and April 7, 2008. DR Tab 2,  
6 Findings 13-18; Tab 13, pp. 152-162.  
7

8 The City issued its MUP Decision and SEPA Determination of Non-Significance  
9 (DNS) on May 1, 2008. DR Tab 13. On May 15, 2008, Community filed a timely appeal  
10 of the decision with the Seattle Hearing Examiner. The appeal hearing took place on  
11 August 4, 5, 6, and 8. The Hearing Examiner issued a decision affirming the City’s MUP  
12 and SEPA determinations dated September 2, 2008 that was distributed to the parties via  
13 fax and US Mail on September 3, 2008. DR Tab 2. This appeal followed.  
14

### 15 III. LEGAL AUTHORITY AND ARGUMENT

#### 16 A. Standard of Review under the Land Use Petition Act

17 This is an action under the Land Use Petition Act, ch. 36.70C RCW (“LUPA”).  
18 LUPA governs review of land use decisions. *Wenatchee Sportsmen Ass'n v. Chelan*  
19 *County*, 141 Wash.2d 169, 175, 4 P.3d 123 (2000). A land use decision is “a final  
20 determination by a local jurisdiction's body ... with the highest level of authority to make  
21 the determination, including those with authority to hear appeals[ ] on ... [a]n application  
22 for a project permit.” RCW 36.70C.020(1)(a). In this case, the City of Spokane Valley  
23 Hearing Examiner, functioning as an appellate body, had the City’s highest level of  
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1 decision making authority. Accordingly, this court reviews the hearing examiner's  
2 decision.

3 Under LUPA, the court reviews the record that was developed before the City.  
4 RCW 36.70C.120. The court is authorized to invalidate the hearing examiner's decision  
5 only where the court finds that the decision is (1) an erroneous interpretation of the law;  
6 (2) not supported by substantial evidence; (3) is a clearly erroneous application of the law  
7 to the facts; or (4) violates the constitutional rights of the party seeking relief. RCW  
8 36.70C.130(1). The petitioners have the burden of proof of convincing this court that one  
9 of these standards has been violated. *Id.*; *Isla Verde Int'l v. City of Camas*, 146 Wn.2d  
10 740, 751, 49 P.3d 867 (2002).

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13 B. Review of a Threshold Determination Under the State Environmental  
14 Policy Act

15 Development proposals such as Prescott's must be reviewed by the City pursuant to  
16 SEPA. If a development proposal is likely to have "significant adverse environmental  
17 impacts," SEPA mandates that the responsible official "shall issue a determination of  
18 significance requiring that an EIS be prepared." RCW 43.21C.030(2)(c); RCW  
19 43.21C.031; WAC 197-11-360. When there is doubt whether a significant adverse effect  
20 is probable<sup>5</sup>, the SEPA threshold determination must be in favor of preparing an EIS:  
21

22 The policy of the Act, which is simply to assure via "a  
23 detailed statement" a full disclosure of environmental  
24 information, so that environmental matters can be given  
25 proper consideration during decision making, is thwarted  
whenever an incorrect "threshold determination" is made."

26 <sup>5</sup> A "probable significant adverse effect" exists whenever more than "a moderate  
27 effect on the quality of the environment is a reasonable probability." *Id.* at 278.

1 *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d  
2 267, 273, 552 P.2d 674 (1976).

3  
4 As one SEPA commentator has noted:

5 SEPA ultimately strives to avoid environmental degradation,  
6 to preserve and even enhance environmental quality by  
7 requiring the actions of state and local government agencies  
8 to be based on sufficient environmental information and to  
9 be in accord with SEPA's substantive policies.

10 Settle, Richard; *The Washington State Environmental Policy Act*, § 14.01, p. 14-2 to 14-3  
(Release 15, 2003) *citing* RCW 43.21C.010, .020, and .030.

11 While SEPA itself does not compel environmentally wise choices, its ultimate  
12 purpose, and the purpose of an EIS, is to provide decision-makers – in this case the  
13 Hearing Examiner - with all relevant information about the potential environmental  
14 consequences of their actions and to provide a basis for a reasoned judgment that balances  
15 the benefits of a proposed project against its potential adverse effects. *Citizen Alliance to*  
16 *Protect our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300.

17 Consistent with this purpose, “SEPA mandates governmental bodies consider the  
18 total environmental and ecological factors to the fullest in deciding major matters.”  
19 *Eastlake Comm'ty Coun. v. Roanoke Assocs.*, 82 Wn.2d 475, 490 (1973). These  
20 considerations must be integrated into governmental decisionmaking processes so that  
21 “presently unquantified environmental amenities and values will be given appropriate  
22 consideration in decision making along with economic and technical consideration.” RCW  
23 43.21C.030(2)(b); *Eastlake*, at 492. SEPA's ultimate quest has been described as ensuring  
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1 “environmentally enlightened government decision making. Settle, Richard; *The*  
2 *Washington State Environmental Policy Act*, § 14.01(2)(b), p. 14-48 (Release 15, 2003).

3 The court reviews a SEPA determination under a “clearly erroneous” standard of  
4 review. *Wenatchee Sportsmen Association*, 141 Wn.2d at 176. A decision is “clearly  
5 erroneous” when, although there is evidence to support it, the reviewing body is “left with  
6 the definite and firm conviction that a mistake has been committed.” *Id.*; *Moss v. City of*  
7 *Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001); *Cougar Mountain Associates v. King*  
8 *County*, 111 Wn.2d 742, 747, 755 P.2d 264 (1988).

9  
10 In reviewing a decision under the clearly erroneous standard, the court is required to  
11 “examine the entire record and all the evidence in light of the *public policy* contained in the  
12 legislation authorizing the decision.” *Cougar Mountain*, 111 Wn.2d at 747 (emphasis  
13 added). The “public policy” behind SEPA is found in the statute itself:

14  
15 SEPA recognizes the broad policy “that each person has a  
16 fundamental and inalienable right to a healthful  
17 environment . . .” RCW 43.21C.020(3). State agencies are  
18 required to use “all practicable means” to achieve the  
19 following goals:

- 20 (a) Fulfill the responsibilities of each generation as a  
21 trustee of the environment for succeeding generations;
- 22 (b) Assure for all people of Washington safe, healthful,  
23 productive, and aesthetically and culturally pleasing  
24 surroundings;
- 25 (c) Attain the widest range of beneficial uses of the  
26 environment without degradation, risk to health or safety,  
27 or other undesirable and unintended consequences.

28 RCW 43.21C.020(2)(a)-(c); *Kucera v. Department of Transportation*, 140 Wn.2d  
200, 13-14 (2000).

1 In applying SEPA policy here, this court must examine what information the City  
2 considered in issuing the DNS. “The SEPA policies of full disclosure and consideration of  
3 environmental values *require actual consideration of environmental factors* before a  
4 determination of no environmental significance can be made.” *Norway Hill*, 87 Wn.2d at  
5 275 (emphasis added). Furthermore, a DNS must be “based upon information reasonably  
6 sufficient to evaluate the environmental impact of a proposal.” *Moss*, 109 Wn. App. at 14.  
7 The record must demonstrate that the City adequately considered the relevant  
8 environmental factors “in a manner sufficient to be prima facie compliance with the  
9 procedural dictates of SEPA.” *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47  
10 P.3d 137 (2002) (citation omitted).

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13 C. The City Did Not Have Sufficient Information to Evaluate the  
14 Environmental Impacts of the Release of Toxic Lead During Demolition  
and Construction

15 1. Lead contamination is a serious issue

16 As discussed above, the City had accepted Prescott’s application on December 28,  
17 2007, based only on the Phase 1 Environmental Review. DR Tab 144 (Ex. 134), pp.  
18 2674-75 (January 13, 2008 Notice of Application). But for numerous outspoken demands  
19 from the Community that the Waldo Hospital site be tested more thoroughly for  
20 contaminants, including lead, the City would not have done so. On March 20, 2008, the  
21 City issued a Correction Notice to Prescott requiring testing of both the hospital interior  
22 and the exterior soils for lead. DR Tab 146. The Community’s concern should not have  
23 been a surprise.  
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1 The evidence before the Hearing Examiner established, without dispute, that there  
2 simply is no safe level of lead for children's exposure and that every effort should be made  
3 to reduce children's exposure because of the serious neurological effects and effects on IQ.  
4 See Testimony of Dr. Steve Gilbert (Day 3) at 9-10; Testimony of Janice Camp (Day 4) at  
5 12-14.<sup>6</sup> See also DR Tabs 105-107 (Exs. 95-97 (Gilbert Articles)). Prescott's lead  
6 consultant agreed with the Community witnesses explanation and concern for exposure to  
7 lead dust. Testimony of Elisabeth Black (Day 4) at 10. See also, 73 Fed.Reg 66963,  
8 66975-982 (November 12, 2008)(EPA Final Revised National Ambient Air Quality  
9 Regulation for Lead)(excerpts attached).  
10

11 2. There is no established "community" standard for demolition  
12 involving lead

13 Unfortunately, despite the undisputed concern for impacts of lead dust on the  
14 surrounding community and children, there is no official government standard for  
15 demolition in an urban or suburban environment. Testimony of Elisabeth Black (Day 4) at  
16 10.  
17

18 There is an Occupational Safety and Health Administration ("OSHA") based  
19 standard for workers. The occupational standard is 50 micrograms per cubic meter  
20 ( $\mu\text{g}/\text{m}^3$ ) averaged over an 8-hour period. 29 C.F.R. § 1910.1025(c)(attached). Because of  
21 the severe health effects associated with lead exposures, OSHA has set an Action Level of  
22 30  $\mu\text{g}/\text{m}^3$ , which requires initiation of activities to protect workers from exposures (29  
23 C.F.R. § 1910.1025(b)). Air concentrations above the Action Level require such safety  
24

25 \_\_\_\_\_  
26 <sup>6</sup> Certified transcripts of the testimony before the Hearing Examiner have been filed  
27 with the court. The Transcripts are broken down into four binders representing the four  
28 days of hearing. Each witnesses' testimony is in a separate, labeled, transcript.

1 provisions for workers as regular air monitoring, regular blood lead testing, special  
2 training, required personal protective equipment, showers and hand washing facilities, and  
3 worker notification of exposure levels.

4           These OSHA worker based levels are irrelevant, however, when it comes to the  
5 community outside the construction site. Testimony of Janice Camp (Day 4) at 20-21.  
6 Occupational health standards are typically much higher than community standards,  
7 acknowledging that workers on average are healthier than the general population. Babies,  
8 children, pregnant women, and geriatric people are more susceptible to the effects  
9 hazardous materials due to their size, unique behaviors or physiology, or chronic health  
10 conditions. *Id.* at 12-23.

11           Pursuant to its mandated under the Clean Air Act, 42 U.S.C. §§ 7408-7409,  
12 the Environmental Protection Agency has established National Ambient Air Quality  
13 Standards, which includes allowable air concentrations in the community for lead. In  
14 1977, EPA set the NAAQS for lead at 1.5  $\mu\text{g}/\text{m}^3$ ; quarterly average – 33 times more  
15 restrictive than the 8 hour OSHA worker standard. 40 C.F.R. §50.11. In November,  
16 2008, however, after a multi-year review, EPA reduced the NAAQS for lead by an order of  
17 magnitude to 0.15  $\mu\text{g}/\text{m}^3$  over a three month average. This revised standard, which was  
18 adopted after extensive review of the health effects of lead on children, is now over 300  
19 times more restrictive than the OSHA worker based standard. 73 Fed.Reg 66963, 66975-  
20 982 (November 12, 2008)(EPA Final Revised National Ambient Air Quality Regulation  
21 for Lead)(excerpts attached).

1 While demolition of large structures, such as the old Waldo Hospital, is not  
2 specifically covered in these standards, this is a clear indication of the level of concern for  
3 health and need to control lead dust. Testimony of Janice Camp at 22-23.

4 3. The site is contaminated with lead

5 The record is clear that lead and carcinogenic heavy metals exist on the grounds.<sup>7</sup>  
6  
7 There is lead above Washington State Model Toxics Control Act (MTCA) levels in the  
8 outside of the building as well as in the soil around the building. In many cases, the lead  
9 levels are multiples of the MTCA allowable limits of 250 mg/kg. Exhibit 98 from the  
10 hearing, DR Tab 108, shows nine soil samples above allowable limits, with two over 1,000  
11 mg/kg. Exhibit 115 from the hearing, DR Tab 125, is a report from Prescott's consultant  
12 Argus who, based upon the Community's request, used a special XRF device to read lead.  
13 Readings in excess of 1 mg/cm<sup>2</sup> are considered actionably high. The results of their survey  
14 discusses, on page four, how "exterior painted concrete and stucco surfaces on the old  
15 building consistently contained lead in concentrations greater than 1 mg/cm<sup>2</sup>." Also, "High  
16 concentrations of lead were detected in ceramic tile in both the original building and  
17 addition."  
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20 It was also undisputed that lead dust travels during demolition. As Janice Camp  
21 testified, based on her review and understanding of research done by Mark Farfel and  
22 others, even with water suppression, harmful levels of lead dust from demolition of older  
23 buildings can travel at least 100 meters from the project site. DR Tab 112 (Ex. 102);  
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27 <sup>7</sup> DR Tabs 108, 109, 110, 125 (Exs 98, 99, 100, and 115).

1 Testimony of Janice Camp (Day 4) at 10-11.<sup>8</sup> Indeed, Prescott's witness agreed that, if  
2 not properly conditioned and controlled, lead dust could present a significant adverse  
3 impact. Testimony of Richard Simpson (Day 4) at 10-11.

4 4. The City lacked sufficient knowledge to review and condition the  
5 project and its impacts on public health from lead

6 The Community contended at the hearing there was not sufficient study of the  
7 potential environmental harm, particularly in the case of airborne dispersal during  
8 demolition and construction activities. Testimony of Janice Camp and Dr. Steve Gilbert.  
9 See also, DR Tabs 120 (Ex. 110 (Camp C.V.)); 121 (Ex. 112 (Farfel article)); 104 (Ex. 94  
10 (Gilbert Resume)).

12 While the Hearing Examiner recognized briefly that lead was present, DR Tab 2,  
13 finding 12), she concluded simply that the City had reviewed the studies. DR Tab 2,  
14 Conclusion 10.<sup>9</sup> The Hearing Examiner's errs in Conclusion 10, however, by concluding  
15 that:

17 DPD had reasonably sufficient information upon which to  
18 base its SEPA decision in light of other existing federal,  
19 state, and local laws that would apply to mitigate impacts  
from hazardous or toxic substances.

20 Dispersal of some hazardous substances within the site, particularly asbestos, during  
21 demolition is covered by existing law. As discussed above, **there are no federal, state,**

22 \_\_\_\_\_  
23 <sup>8</sup> While Farfel's July 7, 2003 article (DR Tab 102) identifies in its abstract that his studies have  
24 show lead dust traveling over 100 meters, the 2003 paper itself discusses dust traveling at least 10 meters. As  
25 Janice Camp explained during her testimony, however, Farfel's studies were broken into several papers and  
subsequent articles have documented travel range in excess of 100 meters. MLCC Rebuttal Witness  
Testimony (Day 4) at 16-19.

26 <sup>9</sup> The Hearing Examiner also notes that Seattle Public Utilities (SPU) performed an analysis of the  
27 potential for contamination, though it is important to note this was done solely in terms of the potential for  
contamination of drinking water in the adjacent reservoir and not for contamination of nearby homes and  
parks from airborne dust dispersal.

1 **county, or city rules governing community dispersal of lead dust from demolition.**

2 Testimony during the hearing from Community experts, the City, and Prescott’s experts  
3 confirm this. Contrary to the Examiner’s unsupported conclusion, there are no existing  
4 federal, state or local laws that would apply to mitigate the impacts from lead dust being  
5 spread during demolition and construction on this site.

6  
7 In Conclusion 11, the Hearing Examiner recognized that the Community’s qualified  
8 experts (Camp and Gilbert) presented their concerns about the project. The Examiner  
9 erred, however, by then dismissing these concerns because the Community experts did no  
10 site-specific studies or evaluations of the project’s impacts. The Examiner erred for at  
11 least two reasons. First, Community’s experts did not need to do a site-specific study to  
12 determine the presence of toxic materials. Prescott’s consultants conducted the necessary  
13 analysis and documentsed that lead above MTCA levels was present in the soils  
14 surrounding the hospital and that there was significant lead and other contaminants within  
15 the building and chimney. This was not disputed. Second, Community’s experts provided  
16 peer-reviewed scientific research that community dispersal of lead dust occurs during  
17 demolition and that any level of lead dust in the community is too much. This testimony  
18 and studies were undisputed by either the City or Prescott.

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20  
21 The Community more than met its burden of demonstrating a significant adverse  
22 environmental impact. The Community (along with Prescott’s own analysis) proved that  
23 (1) there was significant lead in the building and on the surrounding soils; (2) that lead  
24 dust travels during demolition – as much as 100 meters and well within the area where  
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1 children now live and play and where children in Prescott's proposed community will live  
2 and play; and (3) that there is no known safe level of lead dust in the community.

3 More importantly, however, the Hearing Examiner ignored completely the City's  
4 initial burden. SEPA specifically puts the burden of information gathering on the City and  
5 the applicant, in this case Prescott. SMC 25.05.335 addresses responsibilities when  
6 additional information is required:  
7

8 25.05.335 - Additional information.

9 The lead agency shall make its threshold determination  
10 based upon information reasonably sufficient to evaluate  
11 the environmental impact of a proposal (Section 25.05.055  
12 B and Section 25.05.060 C). The lead agency may take one  
13 (1) or more of the following actions if, after reviewing the  
14 checklist, the agency concludes that there is insufficient  
15 information to make its threshold determination:

16 A. Require an applicant to submit more information on  
17 subjects in the checklist;

18 B. Make its own further study, including physical  
19 investigation on a proposed site or communicating with  
20 interested parties;

21 C. Consult with other agencies, requesting information on  
22 the proposal's potential impacts which lie within the other  
23 agencies' jurisdiction or expertise (agencies shall respond in  
24 accordance with Section 25.05.550); or

25 D. Decide that all or part of the action or its impacts are not  
26 sufficiently definite to allow environmental analysis and  
27 commit to timely, subsequent environmental analysis,  
28 consistent with Sections 25.05.055 through 25.05.070.

Nowhere in this section governing additional information does it suggest an appellant is  
required to do the applicant's or the City's work for them.

1 The Hearing Examiner asserts the burden is on the Community to demonstrate a  
2 significant harm exists. The Community meets this burden. Peer-reviewed research that  
3 was questioned, but not refuted with any evidence in the record by Prescott or the City,  
4 demonstrates dust fall will happen outside the demolition area. The Community presented  
5 unrefuted information that lead dust is harmful to children and adults.<sup>10</sup> The burden to  
6 show how mitigations will solve this significant adverse environmental harm is on the City  
7 and Prescott. They fail in that burden because Prescott provides no data to base mitigation  
8 decisions on and the City fails to require those data be created.

10 5. The proposed future monitoring plan does not mitigate the  
11 significant adverse impacts

12 Rather than acknowledge and require the necessary information up front – prior to  
13 making the decision to approve the project, the City instead punts the analysis to a future  
14 un-reviewed monitoring plan. In Conclusion 12, the Hearing Examiner concludes that  
15 since the City had information about the toxics, and because it required an approvable  
16 demolition plan as a mitigating condition for the DNS, that arguments about the  
17 insufficiency of the draft plan presented after the MUP decision was made are moot. This  
18 argument is not supported by the facts. DR Tab 2, Conclusion 12.

20 The City's SEPA-responsible official for the project, Sr. Planner Scott Kemp,  
21 admitted during his testimony the city does know how to control lead dust fallout.

23 KEMP: ... You've heard lots of testimony that the main  
24 issue is dust. The first issue is identifying it. What's there  
25 and where are the pollutants and then how do you clean  
26 them up and then how to you keep them from getting  
airborne or waterborne or part of a mud cake that remains.

27 <sup>10</sup> Community Expert Dr. Steve Gilbert's testimony, including Exhibits 95-97

1 How you get rid of them. And, um, I think that's a very  
2 interesting issue because it's kind of a new issue.... So lead  
3 is the big problem. How do you keep it from getting  
4 airborne. And I don't think we're doing a very good job of  
5 that generally.

6 Testimony of Scott Kemp (Day 4) at 40.

7 Kemp continued his testimony by admitting that even in his first pass review, he  
8 knew that if the City did not know how to control the lead dust he would have to issue a  
9 SEPA determination of significance, requiring preparation of an EIS:

10 And then the question is the threshold decision. If we  
11 didn't think it could be done, We'd have to do a DS a  
12 declaration of significance.

13 *Id.* at 41. Mr. Kemp then correctly determined that he could avoid requiring an EIS only  
14 if he could control escaping dust. Thus, in Mr. Kemp's view:

15 So I looked at it and said, well I mean I know you could put  
16 a circus tent over it and everything could be done in the tent  
17 and then you wouldn't get any dust in the air. So we know  
18 it can be controlled, the question is at what level do you do  
19 it. So it kind a passed the DS threshold into a DNS with  
20 that.

21 *Id.* Of course, the City did not require a circus tent to be erected over the facility –  
22 negating completely Mr. Kemp's rationale for issuing a determination of non-significance  
23 and halting further SEPA review.

24 Instead, Mr. Kemp decided that this would be an interesting case to experiment on:

25 And it is becoming apparent that we need to and so this is  
26 an interesting case and an interesting opportunity to see  
27 what can reasonably be done. Since we're going after it  
28 with SEPA it means it has to be reasonable and capable of  
being accomplished. ...

1 I knew it could be conditions and we're still working that  
2 out as you know as the testimony has come across. I would  
3 feel really good if we were able to work out a methodology  
4 that then became a more commonly applied approach  
5 because, um, tearing down wood frame buildings with lead  
6 paint all around them is very common and is a health  
7 hazard and we do need to figure out how to deal with it. We  
8 don't have any, it isn't codified.

9 *Id.*

10 While he later denies the City is "experimenting" on members of the community, it  
11 is clear from his testimony that is exactly what is going on. Mr. Kemp notes that the way to  
12 protect the Community from environmental harm is to put a "circus tent" around the  
13 building, but chooses not to afford the community this certain protection from the  
14 significant environmental harm.

15 The City merely requires an Air Quality Monitoring Plan as a mitigation. Such a  
16 plan would only uncover contamination after it happened. The Hearing Examiner places  
17 too much faith in Prescott to come up with a plan, and with Mr. Kemp's ability to review  
18 and then approve a plan that will address these items. Indeed, as even the draft,  
19 unapproved plan offered by Prescott during the hearing demonstrated, Prescott's  
20 consultants were intent on measuring only to the OSHA workers standard – a level that is  
21 more than **300 times higher than the safe level established in the Clean Air Act for**  
22 **ambient air quality.** Since unrefuted testimony by Community Experts Janice Camp and  
23 Steve Gilbert shows even small amounts of lead can provide lifelong, untreatable learning  
24 disabilities in children, knowing that contamination existed **after** the fact is a shockingly  
25 inadequate mitigation for such a significant adverse environmental impact.

1           The Hearing Examiner failed to understand the City was missing, prior to the MUP  
2 decision and SEPA threshold determination, key information about risks associated with  
3 dust fall of lead. The City and Prescott have no idea how far from the site the dust fall  
4 might travel. They have no idea what concentrations it will travel in. They have no idea  
5 what directions it will travel. They have no idea whether dump trucks leaving the site with  
6 contaminated material will spread contamination along their route. They have no idea  
7 because such studies, necessary for making an informed SEPA determination, were never  
8 done.  
9

10           The City's decision to apply only a condition for a future air quality monitoring  
11 plan suggest the City has less interest in protecting the Community from significant  
12 adverse environmental impacts than using them to test a previously new approach to lead  
13 dust control. This is simply unacceptable outside of a full EIS process where controlled  
14 studies using non-toxic dust can be used to properly quantify the danger to the community  
15 before proceeding.  
16

17           The Community would be honored to help Seattle create demolition rules that  
18 would protect kids and adults in other neighborhoods from the significant environmental  
19 hazard of lead-bearing dust resulting from demolition of large buildings like Waldo  
20 Hospital. The creation of these rules in the context of "learning through doing" on an active  
21 demolition site surrounded by parks and single-family homes should be done only under  
22 the careful examination a full Environmental Impact Statement provides. The City's  
23 inadequate mitigation requirements miss the mark in preventing a significant adverse  
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1 environmental harm and turn what could be a potential positive into a serious, life-long  
2 harm to our neighborhood's children and adults.

3 A DNS must be "based upon information reasonably sufficient to evaluate the  
4 environmental impact of a proposal." *Moss*, 109 Wn. App. at 14. The City's decision  
5 failed to meet this basic standard of proof and must be reversed. The Court should remand  
6 the City's SEPA determination for modification and issuance of a Determination of  
7 Significance requiring preparation of an EIS to address the significant adverse  
8 environmental impacts of lead dust on the surrounding community from demolition and  
9 clearing of the old Waldo Hospital site. RCW 36.70C.140.

11 D. The City's Determination that Tree Canopy Removal Would Not Result in  
12 Significant Adverse Impacts Was Based on False and Misleading Evidence

13 1. The trees on this site are important for protection

14 As recognized by the Hearing Examiner and discussed above, there is no significant  
15 dispute that trees on the east side of the site, making up Waldo Woods, are an important  
16 community asset. While there are certainly other groves of trees within the City, many, if  
17 not most, are confined either to parks or steep slopes and therefore inaccessible.

18 Testimony of Tina Cohen (Day 2) at 7-8. The Waldo Woods grove provides significant  
19 aesthetic and recreational value to the neighborhood. DR Tab 2, Findings 2, 7-10; DR  
20 Tabs 41-45 (Exs. 31-35 (photos)).  
21

22 In addition to their aesthetic and recreational value, it is undisputed that large trees,  
23 and especially large urban conifers provide significant infrastructure value to the  
24 community. For example, large conifers filter significantly more air pollutants than  
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1 replanted smaller trees and provide significantly more shading and thus lower local  
2 temperatures. DR Tabs 63-64, 71 (Exs. 53-54, 61).

3 2. Understanding the area of the existing canopy and proposed  
4 replacement canopy was critical to the City's review

5 Understanding the size of the current tree canopy is significant for at least two  
6 critical points in the City's review of this proposal. First, it is undisputed that the existing  
7 canopy is roughly the equivalent of the "drip line" – the area containing the most  
8 significant root structure of a tree or trees. The drip line of a tree is defined in SMC  
9 25.11.020:  
10

11 "Drip line" means an area encircling the base of a tree, the  
12 minimum extent of which is delineated by a vertical line  
13 extending from the outer limit of a tree's branch tips down  
to the ground.

14 The root structure of trees of the species types located in Waldo Woods is assumed to be  
15 equivalent in area to the drip line/canopy spread.

16 As a general rule, arborists agree that construction within the drip line should be  
17 avoided. Tina Cohen, the certified arborist called by the Community to testify, confirmed  
18 her opinion that construction should stay outside the drip line plus five feet. Testimony of  
19 Tina Cohen (Day 2) at 52-53. Prescott's arborist, Robert Williams, did not disagree.  
20 Testimony of Robert Williams, (Day 3) at 52-53.  
21

22 The City recognized, at least facially, the importance of protecting the drip line by  
23 imposing a condition on the project to comply with the terms of the "Tree Protection Plan"  
24 prepared by Mr. Williams. See Tree Protection Plan, DR Tab 52 (Ex. 42); DR Tab 13  
25 (Staff Report), at p. 174. Mr. William's Tree Protection Plan, includes installation of a  
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28

1 fence at the reported drip line for protection of the remaining trees.<sup>11</sup> Under the approved  
2 Tree Protection Plan, any excavation within the drip line, must be done using an “air  
3 spade.”<sup>12</sup> DR Tab 52 (Ex. 42) at pp. 292, 305.

4 Understanding the size of the existing canopy is also critical to understand whether  
5 the loss of the canopy will be mitigated by the proposed replacement plantings. Indeed, at  
6 least twice in the City’s Staff Report approving the proposed MUP, City staff confirmed  
7 that the proposed replacement plantings would result in an increase in canopy size over  
8 existing conditions. DR Tab 13, pp 171, 174. According to staffs, there would be no  
9 significant impact from canopy removal because, in part, “the applicant is planting  
10 replacement trees that will result in a larger tree canopy at maturity than exists now.” DR  
11 Tab 13, p. 174.

12  
13  
14 3. The City based its review on misleading information

15 The City’s review of the existing canopy, protected canopy and proposed new  
16 canopy was based on drawings submitted by Prescott. DR Tabs 56, 57 and 58 (Ex. 46, 47,  
17 and 48) are various versions of site plans created by Prescott. DR Tabs 56 and 57 (Exs. 46  
18 and 47) are two site plans created by Prescott showing a “Tree Protection Fence”.<sup>13</sup> As  
19 can be seen in DR Tab 56 (Ex. 46), the proposed “Tree Protection Fence” (shown by the  
20  
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22 <sup>11</sup> SMC 25.11.050 generally prohibits construction within the drip line of exceptional trees.

23 <sup>12</sup> Any excavation inside this area must be done with an air spade. The air spade is a tool that  
24 displaces dirt with compressed air. An air spade is used so excavation can be reversed with minimal damage  
25 to a tree’s root system if that root system is found to be extensive in the area planned for excavation. When  
26 the root system is not found to be extensive, then roots can be severed cleanly and treated to further minimize  
27 damage to the subject tree.

28 <sup>13</sup> It is worth noting that DR Tab 57 (Ex. 47) was not submitted to the City until after the May 1  
MUP decision was made. DR Tab 56 (Ex. 46) was the most updated copy available to the city when making  
their SEPA determination.

1 x—x—x pattern) runs immediately adjacent to, and sometime within the limits of the  
2 canopies shown on the drawing.

3 During the hearing, however, the Community demonstrated that the tree canopies  
4 depicted in DR Tab 56 (Ex. 46) (and other drawings) were purposely not drawn to scale.  
5 See DR Tab 67 (Ex. 57) (the “Satterthwaite e-mail”).<sup>14</sup> While it could be argued that the  
6 tree sketched on DR Tab 56 (Ex. 46) were schematic only, this is not the case. Prescott  
7 used a similarly misleading scale to depict the remaining tree drip lines in relation to the  
8 proposed new buildings. DR Tab 68 (Ex. 58).<sup>15</sup>

10 DR Tab 33 (Ex. 23) shows the drip lines, drawn to scale, of the trees Prescott  
11 intends to preserve. The base black lines on this exhibit are directly from Prescott’s  
12 drawings, while the larger green (or gray in the black and white version) shaded circles are  
13 the actual drip lines correctly drawn to scale. As can be readily seen, when drawn to scale,  
14 the actual tree drip lines extend far beyond the proposed Tree Protection Fence, and indeed  
15 into the proposed new units. Neither Prescott, the City, nor the Hearing Examiner  
16 disputed the accuracy of Exhibit 23. Therefore, the only conclusion from the record is that  
17 the Community’s assessment of the true drip lines is accurate. Indeed, the Hearing  
18 Examiner agreed:  
19  
20

21 The figures presented to the Board and the Director  
22 indicated that after maturity, the total canopy coverage at  
23 the site, including retained and new trees, would be 1,679  
square feet, compared with an existing canopy of 1,349

24  
25 <sup>14</sup> This e-mail specifically refers to Exhibit 46 (DR Tab 56), discussed below, but Prescott provided  
misleading drip line information in all drawings submitted to the City prior to the appeal hearing.

26  
27 <sup>15</sup> Exhibit 58 is dated after the City’s MUP decision was published, but the misleading drip line  
information was the same in versions provided to the City before the decision was published.

1 square feet. However, the figures used were not accurate,  
2 apparently due to the “existing” canopy figures being  
3 derived from tree radii, while the post project canopy  
4 figures were based on tree diameter. Exhibit 56 [DR Tab  
5 66] indicated that when comparable figures are used and re-  
calculated, the existing canopy is actually closer to 2698  
feet and the post project canopy is 2248 square feet, a net  
loss of 450 square feet.

6 DR Tab 2, Finding 18.

7 Thus, while the Hearing Examiner recognized the significant factual issue – that the  
8 drawings submitted by Prescott and relied upon by the City were inaccurate, the  
9 Examiner’s conclusions, that this was essentially irrelevant, were clearly erroneous. First,  
10 with respect to the impacts from construction within the drip line, the Examiner concluded  
11 simply:  
12

13 ...the Director here possessed reasonably sufficient  
14 information, e.g., estimates of drip lines based on crown  
15 spread, particularly given the tree protection plan's  
conservative approach to root protection.

16 DR Tab 2, Conclusion 7. This conclusion ignores, of course, that the Director did **not**  
17 have sufficient information on the drip lines. Indeed, the only evidence the Director had  
18 were inaccurate drawings showing that the tree protection fence and proposed new  
19 structures were outside of the reported dripline. The Director did not have an accurate  
20 drawing showing the construction and building would take place well within the actual  
21 dripline. DR Tab 33 (Ex. 23.) A comparison of DR Tabs 68 and 33 (Exs. 58 and 23)  
22 shows materially misleading information was provided to the City. It is not proper to  
23 conclude that material showing only one tree’s drip line is impinged by a planned unit is  
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1 “reasonably sufficient information” when the facts show that at least ten trees will have  
2 their root structures significantly impaired by planned development.

3 The impact of the Hearing Examiner not addressing the issues raised in connection  
4 with these differences is significant. The failure of Prescott to provide accurately scaled  
5 drawings of the tree drip lines is a critical issue. The Tree Protection Fence would be  
6 significantly farther west and north if Prescott had not provided misleading information to  
7 the City.  
8

9 Significant portions of the root structures of 10 of the 32 trees intended to be  
10 retained under the approved site plan will not be afforded the special protection allegedly  
11 included in Prescott’s Tree Protection Plan (i.e. air spading) or that required by SMC  
12 25.11.050 because they lie outside the specified Tree Protection Fence. The significant  
13 adverse environmental impact of root loss on these 10 trees was never addressed by the  
14 City because they were given misleading information by Prescott. The significant adverse  
15 environmental impact of root loss on these 10 trees was never addressed by the Hearing  
16 Examiner in her decision, as she never addresses Community’s appeal arguments  
17 connected with DR Tabs 33 and 68.  
18  
19

20 Second, the Hearing Examiner’s conclusion that a reduction in canopy (as opposed  
21 to the increase in canopy reported by Prescott and City Staff) would not have changed the  
22 City’s decision is without support. DR Tab 2, Conclusion 8. While the Examiner based  
23 this conclusion on a statement by Mr. Kemp during the hearing that the reduction wouldn’t  
24 have mattered, *id.*, the Examiner failed to square Mr. Kemp’s post-hoc rationalization with  
25 the actual statement in at least two places within the City’s written decision that the  
26  
27  
28

1 purported (and inaccurate) increase in canopy coverage ameliorated any environmental  
2 impacts. *Supra* at 24. The proper remedy was a remand.

3 SMC 25.05.600.2 states conditions when, after a DNS or EIS is issued, preparation  
4 of a new threshold determination is required. SMC 25.05.600.2.b is the item germane here  
5 [emphasis added]:  
6

7 New information indicating a proposal's probable significant  
8 adverse environmental impacts. (**This includes discovery of  
9 misrepresentation or lack of material disclosure.**) A new  
10 threshold determination or SEIS is not required if probable  
11 significant adverse environmental impacts are covered by  
12 the range of alternatives and impacts analyzed in the existing  
13 environmental documents.

14 Because of Prescott's misrepresentation and lack of material disclosure of the drip  
15 lines, significant additional stress on the trees will occur leading to a significant  
16 environmental harm. The Hearing Examiner's decision to uphold, without remand, the  
17 City's decision, in light of a significant misrepresentation, was clearly erroneous. The  
18 record must demonstrate that the City adequately considered the relevant environmental  
19 factors "in a manner sufficient to be prima facie compliance with the procedural dictates of  
20 SEPA." *Boehm v. City of Vancouver*, 111 Wn. App. At 718. The City failed to meet the  
21 procedural requirement to remand once it discovered a significant material  
22 misrepresentation.

23 The Court should remand the MUP decision back to the City for further analysis  
24 based upon accurate information and a reconfiguration of the Tree Protection Fence to  
25 reflect accurate drip line information. Because the issue is related to the errors in canopy  
26 calculation, the Court should also require the canopy calculations be corrected. Finally, the  
27

1 Design Review Board has jurisdiction over both site planning and landscaping.<sup>16</sup> Since the  
2 Design Review Board made their decisions also based upon misleading information, the  
3 project should be returned to the design review process.

4 E. The City Failed to Included Design Review Conditions

5 1. The City must impose conditions agreed to by four or more members  
6 of the design review board

7 SMC 23.41.014.F.3 governs the conduct of Design Review Board meetings and  
8 states:

9  
10 The Director's design review decision shall be made as part  
11 of the overall Master Use Permit decision for the project.  
12 The Director's decision shall consider the recommendation  
13 of the Design Review Board, *provided that, if four (4) or*  
14 *more members of the Design Review Board are in*  
15 *agreement in their recommendation to the Director, the*  
16 *Director shall issue a decision that makes compliance with*  
17 *the recommendation of the Design Review Board a*  
18 *condition of permit approval, unless the Director concludes*  
19 *that the recommendation of the Design Review Board:*

- 20 a. Reflects inconsistent application of the design review  
21 guidelines; or  
22 b. Exceeds the authority of the Design Review Board;  
23 or  
24 c. Conflicts with SEPA conditions or other regulatory  
25 requirements applicable to the site; or  
26 d. Conflicts with the requirements of state or federal  
27 law.

28 The Hearing Examiner agreed that SMC 23.41.014.F.3 requires the Director “to  
adopt the Board's recommendation where four or more members are in agreement; unless  
specific factors are present.” DR Tab 2, Conclusion 22. The Examiner erred, however, in  
concluding that the Director had adopted the DRB recommendation. DR Tab 2,

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<sup>16</sup> A.1, and section E of Guidelines for Multifamily & Commercial Buildings

1 Conclusion 23. Several significant conditions approved by at least four members of the  
2 DRB were left out of the City's decision.<sup>17</sup>

3 2. The City failed to include conditions related to the parking garage  
4 exit

5 City code ordinarily requires a minimum 20 foot width for two-way driveways  
6 associated with parking garages for more than 30 vehicles. SMC 23.54.030.D.1.e. As part  
7 of Design Review, Prescott sought a design departure with a reduction to 16 feet. *See* DR  
8 Tab 13, at page 162. During the Design Review meetings, the Community expressed  
9 concern for pedestrian safety due to cars exiting the underground garage. In response, and  
10 in exchange for granting the requested departure for the 16-foot wide driveway, the DRB  
11 developed three significant conditions. A review of the video recording from the April 7  
12 design review meeting provides the context. DR Tab 15.<sup>18</sup> The discussion of the ramp  
13 begins around 29:35 on the second DVD. In the 30<sup>th</sup> minute, the DRB realizes that a  
14 condition they put on the driveway departure during the March 10 Design Guidance  
15 meeting was erroneously left out of the notes published for the meeting. DR Tab 98 (Ex.  
16 88). The DRB members then continue the discussion. In the 32<sup>nd</sup> minute, the DRB  
17 discusses the required conditions for the driveway departure (not a verbatim record):  
18  
19  
20

21 CRAIG PARSONS, CHAIR, NE DESIGN REVIEW  
22 BOARD: The way we usually deal with this in a lot of our  
23 other meetings is a better definition of paving in that area  
and some sort of subtle warning that you are entering a  
situation.

24  
25 <sup>17</sup> In Conclusion 25 of the Examiner's Decision, the Examiner describes only one set of missing  
26 conditions addressed in Community's appeal. As discussed below, the Community's appeal included other  
such missing or misstated conditions, but these were not specifically addressed by the Hearing Examiner in  
her decision.

27 <sup>18</sup> Tab 15, (Exhibit 5) contains 4 DVDs with video recordings of the four DRB meetings. One of  
the four CDs is the April 7 meeting.

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BRIAN RUNBERG, PRESCOTT’S ARCHITECT: Like some cobblestone that makes a noise.

PARSONS: And some sort of signage.

VINCE LYONS, DPD DIRECTOR FOR DESIGN REVIEW: Like downtown, we can put in a lot of visual materials and pavement materials.

TRICIA REISENAUER, DRB MEMBER: I would like to see conditions of pavements being enhanced.

SUE JENSEN, DRB MEMBER: You could have signage in the garage, like a stop sign.

LYONS: Coming out of our muni garage tonight there is a gate and stop sign and you have to stop and proceed very slowly.

DAVID MILLER, PRESIDENT, MAPLE LEAF COMMUNITY COUNCIL: If you are going to do some pavement treatment, do it north of the sidewalk so people with walkers and wheelchairs don’t have to go over cobblestones. So north of the sidewalk in the garage.

RUNBERG: SDOT doesn’t allow you to do that anyway. It has to be on private property.

PARSONS: And then some sort of prohibition on planting that would interrupt sight angles. With those conditions, we would like to recommend approval of the departure. Anyone opposed? No? OK.

MILLER: So that was pavement, stop sign, planting?

PARSONS: Well, we didn’t say stop sign.

JENSEN: I think stop sign is a really good idea.

KEMP: I think that is a really good idea.

Clearly, therefore, the DRB unanimously approved three conditions. The conditions include a stop sign on the property placed before exiting vehicles cross the

1 sidewalk, keeping an exiting vehicle's field of vision to the sidewalk clear of vegetation,  
2 and a pavement "treatment" on the ramp from the garage that would provide an audible  
3 warning of an exiting vehicle. Further, these were clearly three conditions for the approval  
4 of the building code departure of the driveway width. There was no record of dissent from  
5 anyone at the table – DPD, Prescott, or the DRB members themselves. DRB members  
6 noted they had done this before, as had the City Staff participants.  
7

8 As noted above, SMC 23.41.014.F.3 says the Director "shall" include in the  
9 decision conditions placed upon the project by the Design Review Board. The  
10 recommended conditions for the garage ramp width departure were made unanimously by  
11 the Design Review Board at the April 7, 2008 Design Review Board meeting. Yet, the  
12 "minutes" from the April 7, 2008 Design Review Board Meeting never mention the  
13 driveway departure at all. Indeed, the "minutes" from the March 3, 2008 Design Review  
14 Board Meeting, DR Tab 94 (Ex. 84) provide only the following about the requested  
15 departure:  
16

17 To allow a 16 foot wide driveway into the parking garage  
18 rather the [sic] the 20 required. The Board recommends this  
19 departure be granted.

20 The City's MUP decision then compounds this omission by mentioning the  
21 requested departure twice, but still failing to identify the approved conditions. DR Tab 13  
22 at pp. 158 and 162. SMC 23.41.014.F.3 clearly states that this unanimous decision by the  
23 Design Review Board **shall** be included as a condition for this project. Yet neither the  
24 MUP decision nor the minutes of the design guidance meetings include any description of  
25 the condition.  
26

1 During the hearing in front of the Examiner, Mr. Kemp stated he did not  
2 purposefully leave out any conditions, admitted he mistakenly left out these specific  
3 conditions, and confirmed particularly that the pavement treatment and the stop sign were  
4 reasonable requests he has done for other projects: .

5 Q: Did you think you made any mistakes in writing the  
6 decision?

7 A: (KEMP): Absolutely not, no. .... I think that there are  
8 some of those factual allegations are accurate. Not sure  
9 which ones there are, but as I recall reading it. I think there  
10 were, um. I think we'd have to go through it. I think I'll just  
11 say yes it is possible.

12 \*\*\*

13 Q: ... You've indicated that it is part of your job to attend  
14 design review board meetings?

15 A: Yes.

16 Q: ... was it also your job to document the decisions of  
17 the DRB regarding this project?

18 A: Well that, that recommendations my job is to create  
19 a record ... that is reasonably accurate of what those  
20 recommendations were.

21 Testimony of Scott Kemp (Day 4) at 73-74.

22 Q: ... did you or anyone else working for city  
23 transcribe the tapes of the DRB meetings?

24 A: Nope.

25 Q: And did you before May 1<sup>st</sup> listen to the recordings?

26 A: No.

27 Q: .. and is it possible that the method used to keep  
28 track of DRB decisions could miss something?

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A: Possible.

Q: ... did you purposefully leave out of the May 1 decision any conditions recommended by ...

A: No.

Q: ... DRB members?

A: Not purposefully.

*Id.* at 76-77.

Q: ... If we showed you a video of the April 7 DRB meeting, would you be surprised if it clearly showed starting at minute 35 that four members agreed to three conditions that are not listed in the decision. Pavement treatment, stop sign for vehicles coming out of the garage, and prohibiting plants that would interfere with sight lines?

A: As I, how I recollect that is that, um. That was to be a SEPA condition instead of a design review condition and you are right it is missing from the decision. ... What I recall of it is that the discussion certainly did take place. The plantings, I think it was offered there are sight triangle requirement anyway and those plantings are not supposed to be there in an obscuring way. So that wasn't going to be a necessary condition. The stop sign wasn't a design element so that was a traffic safety element and ought to be in SEPA and I was supposed to put that in condition ... and I forgot about that. So I do need the stop sign. And the pavement treatment, though nice, is an SDOT jurisdiction so that was something the applicant said they were going to get. But it wasn't going to be a design review condition. That's my recollection of how that was resolved. If it was other than that, then I would wonder well did you capture everything or I would be surprised.

Q: ... So it sound like you do recall there was consensus on those ... matters. But your recollection is that ... the Design Review Board was talking about SEPA conditions and not design review conditions.

1 A: My recollection is that the board did not make those  
2 design review conditions, but that all three of those  
3 elements were supposed to be incorporated into the project  
4 ... And the conditions of the stop sign should be a SEPA  
5 condition and it isn't, so we should probably add that.

6 *Id.* at 77-79.

7 Thus, based on the Design Review Board's minutes and Mr. Kemp's memory of  
8 those proceedings, an error was committed – the City's decision should have required all  
9 three conditions. It does not.

10 The Hearing Examiner's decision, however, failed to impose the required  
11 conditions. Instead, the Examiner's decision contains a general statement that:

12 The decision includes a condition requiring the MUP  
13 drawings to comply with all "approved design features and  
14 elements" (Ex. 3, page 33); the applicant will need to comply  
15 with the Board's recommended conditions, and no clear error  
16 was shown to require reversal or remand of the design review  
17 decision.

18 DR Tab 2, Conclusion 25. This conclusion is in error. The generic 'approved design  
19 features and elements' language in the MUP decision does not satisfy the letter of the law  
20 in 23.41.014.F.3. Further, it is impossible for City employees to require compliance with  
21 features and elements that never appear in any document produced by the city.

22 3. The City failed to include other DRB approved conditions

23 In addition to the three parking garage related conditions, the Community raised  
24 additional Design Review conditions that were left out of the City's decision. These  
25 conditions were not specifically addressed by the Hearing Examiner's decision.

26 The proposed development will have four "entrance" walkways at each compass  
27 point. These walkways are highlighted by "arbors." At the April 7, 2008 Design Guidance

1 meeting, the issue of the oversized arbors Prescott requested was addressed. Prescott's  
2 design for the arbors is larger than the size allowed by the building code. The Design  
3 Review Board granted the departure, conditioned on there being no gates in the arbors  
4 unless there is cause such as future crime issues.<sup>19</sup> While the City's MUP decision  
5 indicates that Prescott's requested departure was approved, there is no mention of the  
6 related conditions of approval. DR Tab 13 at p. 160.  
7

8 At the March 3, 2008 Design Guidance meeting, the DRB approved departures  
9 relating to open space requirements in the building code. The "minutes" for this meeting,  
10 DR Tab 98 (Ex. 88) at p. 779, point 6, and the MUP decision, DR Tab 13 at p. 158 show  
11 the DRB approved smaller open space requirements on three units and an overall average  
12 unit open space reduction to 280 square feet.  
13

14 Of the three units, two units were allowed zero open space and one unit was  
15 allowed 185 square feet. On page 15 of the MUP decision, DR Tab 13, p. 162, however,  
16 this departure is mistakenly described as applying to seven units and an overall average  
17 unit open space reduction to 230 square feet. Of these seven units, the open space  
18 requirement for one unit is at zero and for the other six are at 100 square feet.  
19

20 Prescott has applied for permits that would make use of this requested departure.  
21 Prescott's revised plan set filed with the City after the MUP decision does not use the  
22 correct departures as noted in the March 3 minutes and on page 11 of the MUP, but the  
23

24  
25  
26 \_\_\_\_\_  
27 <sup>19</sup> Approximately minute 27:18 of Disc 2 of the April 7, 2008 Design Review Board Meeting,  
28 submitted during appeal as Exhibit 5. DR Tab 15.

1 incorrect departures listed in the table on page 15 of the MUP decision.<sup>20</sup> Therefore, there  
2 is a high likelihood that permits will be issued in violation of the DRB's unanimous  
3 condition. If the permits are allowed to be issued incorrectly, then the Community will bear  
4 a significant burden in time and cost to challenge the permits.

5 The City's decision approving the MUP without inclusion of the required approved  
6 Boundary Review Board conditions, and the Hearing Examiner's decision upholding the  
7 MUP without imposing the necessary conditions, demonstrates both that the City failed to  
8 follow the prescribed process, RCW 36.70C.130(1)(b) and that the decision was a clearly  
9 erroneous application of the law to the facts. RCW 36.70C.130(1)(d). The decision must  
10 be reversed and remanded.  
11

#### 12 IV. CONCLUSION

13 For the foregoing reasons, the City's MUP and SEPA threshold determination  
14 should be reversed and remanded for preparation of an EIS and imposition of all required  
15 design review conditions.  
16

17 Dated this \_\_\_\_ day of January, 2009.

18 Respectfully submitted,

19 GENDLER & MANN, LLP  
20

21  
22 \_\_\_\_\_  
23 David S. Mann, WSBA No. 21068  
24 Attorneys for Petitioner.  
25

26 \_\_\_\_\_  
27 <sup>20</sup> Prescott submitted the 5/12/2008 plan set as Exhibit 91 at the appeal hearing, and the departure  
28 misstatement on page 15 of the MUP is repeated on sheet T0.1 of these plans. DR Tab 101.