

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BELLEVUE**

In the Matter of the Appeal by)
)
METROPOLITAN BUILDING OWNERS)
ASSOCIATION,)
)
Appellant,)
)
of File No. 16-130954-LD, a Process II, Combined)
Design Review Decision and SEPA DNS issued for)
the GIS Plaza proposal, located at 930 109th Avenue)
NE, in the City of Bellevue, Washington)
)
CITY OF BELLEVUE, DEVELOPMENT)
SERVICES DEPARTMENT,)
)
Respondent,)
)
GIS INTERNATIONAL,)
)
Respondent/Applicant)
)
_____)

AAD 17-25
**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION**

I. SUMMARY OF DECISION.

The Metropolitan Building Owner’s Association appeal is denied. The Combined Design Review Approval and SEPA Determination of Non-Significance (DNS) Decision for the GIS proposal, DSD File No. 16-130954, is affirmed.

II. PROJECT PROPOSAL.

The Proposal addressed in this appeal is identified as GIS Plaza, a mixed-use six-story building that will have residential units on four-floors, an office suite and residential units on one floor, retail space, an entry lobby and a mechanical parking system (sometimes

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1 referenced as an ‘automatic parking’ system) on the ground floor, a below grade level to
2 accommodate the parking system, and an occupied roof deck. (*Land Use Staff Report,*
3 *issuing the two determinations challenged in this appeal, dated Nov. 30, 2017, at page 1*).
4 In this Decision, the GIS Plaza proposal is also referenced as the GIS Project or just the
5 Project.

6 III. PROCEDURAL BACKGROUND.

7 This is an appeal of a Director’s Decision issued under Development Services
8 Department (DSD) File No. 16-130954-LD, a Process II, Combined Design Review
9 Decision and SEPA Determination of Non-Significance (DNS) issued for the GIS Plaza
10 proposal, located at 930 109th Avenue NE, in the City of Bellevue, Washington, issued on
11 or about November 30, 2017.

12 A SEPA DNS is a “Process II” decision, made by the City’s Environmental
13 Coordinator. LUC 20.35.015.C. The same code provision lists Design Review decisions as
14 a “Process II” decision, at LUC 20.35.015.C.3. In this matter, there is no dispute that the
15 challenged SEPA threshold determination, the DNS, was made by the City’s Environmental
16 Coordinator, Carol Helland, and that the challenged Design Review Decision was made by
17 the City’s Land Use Director, Elizabeth Stead, on delegation from the Director of the
18 Development Services Department.

19 There is no dispute that Process II matters may be appealed to the City’s Hearing
20 Examiner (LUC 20.35.250) and that, on or about December 14, 2017, the appellant
21 submitted a timely written appeal, challenging both the DNS and Design Review approval.
22 (*Appeal Notification Form, dated Dec. 14, 2017, with 10-page letter from Appellant’s*
23 *counsel as its written statement of appeal, with 8 attached exhibits, A – H*).

24 The matter was assigned to the undersigned Examiner, and an initial Pre-hearing
25 Conference occurred on January 11, 2018. The Prehearing Order issued thereafter
26 confirmed that neither respondent raised any procedural objections to prevent this appeal
from moving forward.

27 ***Parties of Record, Counsel:***

28 The parties to this appeal and their counsel of record are: Metropolitan Building
29 Condo Owners Association (the “Association” or “Metropolitan”), the appellant in this
30 matter, represented by Patrick J. Schneider and Jacqueline C. Quarre, from the Foster
31 Pepper law firm; Respondent City of Bellevue, Development Services Department,
32 represented by Assistant City Attorneys Matthew McFarland and Cheryl Zakrzewski; and

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1 Respondent / Project Applicant GIS International, represented by Courtney E. Flora and
2 Courtney A. Kaylor, from the McCullough Hill Leary law firm.

3 ***Issue Presented:***

4 Whether the challenged Design Review Decision and SEPA DNS threshold
5 determination are supported by a preponderance of the evidence?

6 ***Burden of Proof, Substantial Weight Given to Director's Decision, Standard of Review:***

7 The appellant, Metropolitan, bears the burden of proof to establish that the
8 challenged, combined Design Review Decision and SEPA threshold determination is/are
9 not supported by a preponderance of the evidence. LUC 20.35.250.F. The same provision
10 of the City's Land Use Code mandates that the Hearing Examiner "*shall accord substantial
11 weight*" to the decision challenged in this appeal. With respect to the challenged DNS,
12 Washington caselaw has long required the same type of deference specified in the city's
13 code. See *Anderson v. Pierce County*, 86 Wn. App. 290 (1997)(holding that substantial
14 weight is accorded to agency threshold determinations).

15 The preponderance of evidence standard set in the City's code is equivalent to "more
16 likely than not." *In re. Pres. Restraint of Woods*, 154 Wn.2d 400, 414, 114 P.3d 607
17 (2005). To satisfy this burden challenging the DNS, an appellant must present actual
18 evidence of probable significant adverse impacts of the Project. *Boehm v. City of
19 Vancouver*, 111 Wn.App. 711, 718-719, 47 P.3d 137 (2002). For all appeals of Process II
20 land use decisions, the Hearing Examiner reviews the matter for compliance with
21 applicable decision criteria found in the City's Code, its Land Use Code, and the
22 Comprehensive Plan. BCC 3.68.250.

23 Washington courts explain that a "clearly erroneous" standard applies when reviewing
24 SEPA threshold determinations made by local and state governmental entities, such as the
25 DNS challenged in this matter. *King Cty. v. Washington State Boundary Review Bd. for
26 King Cty.*, 122 Wn. 2d 648, 661, 860 P.2d 1024 (1993). A challenged DNS may be
27 reversed if, although there is evidence to support it, the reviewing authority is left with the
28 definite and firm conviction that a mistake has been committed. See *Norway Hill Pres. &
29 Prot. Ass 'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). In
30 reviewing a SEPA threshold determination, the Hearing Examiner must first determine
31 whether "environmental factors were considered in a manner sufficient to amount to prima
32 facie compliance with the procedural requirements of SEPA." *Sisley v. San Juan County*,
33 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (quoting *Juanita Bay Valley Com. v. Kirkland*, 9
34 Wn. App. 59, 73, 510 P.2d 1140 (1973)). Again, the appellant bears the burden of proof in
35 this appeal.

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2 **Hearing Dates:**

3 The appeal hearing spanned some or all of four days in the month of March,
4 beginning on March 6th, continuing on March 7, 8, and 9, 2018, at Bellevue City Hall, in
5 the Council Conference Room, where the forum was open to the public or others who sat in
6 the room as various witnesses provided their testimony under examination by counsel for
7 the parties.

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12 **IV. RECORD.**

13 A list of the complete set of the documentary evidence included as part of the
14 Record is on file in the Hearing Examiner's Office, at Bellevue City Hall. The Record
15 includes lengthy post-hearing briefing submitted by the parties in the month following the
16 public hearing, with an initial brief from the appellant, response briefs from each
17 respondent, and two reply briefs from the appellant addressing each of the respondent's
18 briefs.

19 During the appeal hearing, all witnesses testified under oath, and hearing
20 proceedings were digitally recorded. Counsel worked together to coordinate witness
21 schedules and presented well-organized exhibits and sworn testimony in support of their
22 respective positions. All of the party representatives, attorneys and their assistants working
23 on this appeal are deserving of commendation for their thorough and professional approach
24 demonstrated throughout the course of the hearing process.

25 The Examiner made several site visits to project site, just north of the downtown
26 core, including the library property across the street, the Metropolitan Building sidewalks
and parking entrance, and surrounding blocks in the area, on hearing days and in the weeks
following the hearing.

There were 15 separate witnesses called to provide sworn testimony, and several of
those were recalled to testify more than once. The witnesses, dates of their testimony, and
some notes regarding some of the information covered during their testimony is provided
below:

March 6th –

1. *Liz Stead*, Land Use Director for the City of Bellevue, provided a brief
summary of the GIS Project, and the SEPA DNS and Design Review approval that

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1 are the subject of this appeal.

2 2. *Victoria Morgan*, the appellant's principal representative at the hearing, resident of
3 the Metropolitan Building, owner of a unit (PH9) that includes a balcony facing north
4 towards the GIS project, and President of the Metropolitan Building Condominium
5 Owners Association and the Metropolitan Residential Condominium Association.
6 Ms. Morgan verified the numerous written comments and supporting documents
submitted by the Metropolitan for consideration by the city as part of the record for
reviewing the two challenged decisions. Ms. Morgan summarized the consultants
hired by her association to address various concerns about the proposed GIS building.

7 3. *Stacy Grund*, with Tatley-Grund, a 'self-performing' general contractor firm that
8 installed the stucco siding on the Metropolitan Building in or about 2004/2005 and
9 worked with Metropolitan in connection with defect litigation about the building. Mr.
10 Grund provided extensive testimony regarding maintenance work needed for a stucco
system like that his firm installed on the Metropolitan Building. Mr. Grund continued
his testimony on March 7th.

11 March 7th –

12 4. *Josh Strange*, with Amento Group, testified for the appellant, providing his
13 opinions regarding maintenance issues and options.

14 5. *Marshal Johnson*, with the CWD Group, which serves as the managing agent
15 for the Metropolitan Building association, offered his concerns about how the new
building might impact the Metropolitan.

16 6. *Lin Lin*, owner and resident of a unit in the Metropolitan Building, on the north
17 side, with a balcony that would face the GIS project. Mr. Lin offered his concerns
18 about living next to a wall just beyond his deck, and explained how he has witnessed
unsanitary activity on the now-vacant GIS lot, that he has concerns about criminal
19 activity, and that he has had a storage unit broken into.

20 7. *Elena Vasiliev*, owns commercial units A and B on the ground floor of the
21 Metropolitan Building, on the south end, where she runs her language translation
22 business. She offered her concerns about the new building, and how visitors might
compete for parking with her employees and clients who currently use on-street
parking during business hours.

23 8. *Ryan Myers*, with Harding Steel, an auto-parking system source, provided
24 testimony for the respondent/project applicant, GIS, regarding how auto-parking

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1 systems work, how they can be operated, where they are now used, and whether noise
2 and vibration have presented issues with such parking systems.

3 9. *Kyle Gaffney*, with SKB Architects for respondent/applicant GIS, served as lead
4 designer of GIS' proposed new building project.

5 10. *Mark Brennan*, Lead Planner with the City of Bellevue. Mr. Brennan's testimony
6 continued over to March 8th.

7 March 8th –

8 11. *Sean Nichols*, City of Bellevue Fire Prevention Officer, testified regarding his
9 involvement in review comments raised by the Metropolitan about fire related issues,
10 provided his determination that concerns were not well-founded, because building's
11 north emergency exit opens onto a concrete path that leads to the public right-of-way,
12 and that residents could exit safely.

13 12. *Jake Hesselgesser*, Building Supervisor for the City of Bellevue, supervises
14 building plan review and interprets building codes, testified regarding his
15 involvement to address comments raised by Metropolitan association, how building
16 codes apply and when.

17 13. *James Merriman*, with MidPac Engineering, for respondent/applicant GIS,
18 provided testimony rebutting some of Mr. Grund's testimony regarding types of tools,
19 equipment and methods available to maintain the stucco on the Metropolitan Building
20 if the GIS Building is constructed near appellant's north property line.

21 14. *Molly Johnson*, Development Review Manager for the City of Bellevue
22 Transportation Department, testified regarding her review of the GIS proposal, and its
23 potential transportation impacts, noting that her transportation review is not limited to
24 what an applicant submits on their checklist; that she uses the City's TFP-EIS to
25 perform her review, as well as city transportation codes; referenced exhibits in the
26 record that reflect documents she reviewed, how GIS had to redesign certain aspects
of their project based on her comments, page 000039 regarding vehicle access
restrictions, right-in/right-out specific condition of approval, page 000031 re: her
SEPA analysis, and how the Environmental Coordinator has the final say on SEPA
matters. In sum, Ms. Johnson credibly demonstrated how her review resulted in
project modifications and a condition of approval that flows, in part, from the city's
reliance on prior SEPA documents, including without limitation the TFP-EIS.

1. *Elizabeth Stead*, Land Use Director, called a second time for more substantive

1 testimony regarding her review and decision to issue the Design Review approval for
2 the GIS Project, which is part of the instant appeal. Ms. Stead's testimony continued
3 on March 9th.

4 March 9th –

5 15. *Carol Helland*, Code and Policy Director for the City of Bellevue, serves as the
6 City's Environmental Coordinator (SEPA Responsible Official), testified regarding
7 her review of the project, her consideration of comments made by appellant
8 representatives and attorneys, and confirming that she stands by her threshold
9 determination, the SEPA DNS, issued for the GIS Project.

10 Mr. Grund, Mr. Merriman, and Ms. Morgan, were each recalled for testimony in an
11 effort to respond to other witness testimony.

12 V. FINDINGS OF FACT.

13 Based on the Record, the undersigned Examiner issues the following Findings of
14 Fact:

15 1. Any factual matters set forth in the foregoing or following sections are hereby
16 adopted by the Hearing Examiner as findings of fact, and incorporated into this section as
17 such.

18 2. The proposal at issue in this appeal is known as the GIS Plaza Project, a mixed-use,
19 six-story building to be located at 930 109th Avenue NE, in the southwest corner formed by
20 NE 10th Street and 110th Avenue NE, immediately north/northeast of Bellevue's downtown
21 core.

22 3. The Project site has been used as a surface parking lot for many years. Some
23 witness testimony spoke to how the site has been a bit of a problem area for the vicinity,
24 with vagrancy, suspected drug activity, and general neglect among the neighbor's concerns
25 with the site.

26 4. There is no credible dispute that the Project has been designed to comply with
applicable city development regulations, including those regarding building height, lot
coverage, floor area ratio, and setbacks. DSD 000010-11.

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1 5. The applicant/respondent GIS submitted its Administrative Design Review
2 Application on or about April 25, 2016. The application included a completed SEPA
3 checklist. The City issued its Notice of Application for the Project on or about June 2,
4 2016, inviting comments from interested parties. The applicant emphasizes that the
5 minimum public comment period is 14 days, but for this project, the Department staff
6 elected to accept comments up to the date that the Decision was issued, effectively
7 extending the comment period from two weeks to seventy-five (75) weeks. *DSD 000024;*
8 *GIS Closing Brief, at page 5.*

6 6. There is no dispute that the City required the applicant, GIS, to hold a public
7 meeting regarding the Project, on June 29, 2016, where members of the Metropolitan
8 Association and its attorney were in attendance. City staff, the applicant, and some of its
9 consultants were present to answer questions and to provide information. Because city staff
10 anticipated that there might be questions about building separation, building codes and the
11 like, the City's Building Supervisor, Jake Hesselgesser, attended the meeting to address
12 such issues. *DSD 000773; Testimony of Mr. Hesselgesser.*

10 7. The Metropolitan submitted numerous comment letters through the Department's
11 Project review process, including many that appear to use a common template, asking that
12 the City require GIS to move their building "at least 10 feet away from the Metropolitan,"
13 even though there is no dispute that applicable city codes expressly permit a zero lot-line
14 setback in the zone where the GIS Project and the Metropolitan Building are located. The
15 common-themed, "template" letters also asked the City to require GIS to cover the costs of
16 replacing the stucco stairwell façade that the Metropolitan had installed in 2005. (*See*
17 *summary of facts with references to record provided in GIS's Closing Brief, pages 5 and 6*).
18 The enclosed north stairwell is the portion of the Metropolitan Building that extends closest
19 to the building's property line shared with the GIS site.

17 8. As the Metropolitan Association's President, Ms. Morgan submitted multiple,
18 detailed letters, along with others from the Association's legal counsel, emphasizing the
19 Metropolitan's concerns that they will not be able to maintain their north façade after the
20 GIS building is constructed. The Metropolitan's detailed comment letters also specified
21 concerns about drainage, potential fire risks, rodent and/or vermin infestation, criminal
22 activity, views, light and glare impacts, utility access to meters, and alleged incompatibility
23 with the City's comprehensive Plan. (*See summary of facts with references to record in*
24 *GIS Closing Brief, at page 6*).

22 9. During the comment period, the Metropolitan also submitted a letter from Tatley-
23 Grund, Inc., which opined that a minimum 5-foot setback is required to maintain the
24 Metropolitan's northern façade, and another letter from Amento Group, which predicted

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1 that if the northern façade is not properly maintained, the stucco façade will deteriorate
2 more rapidly than it otherwise might. *Id.*

3 10. Contrary to allegations raised by the appellant, the record firmly establishes that
4 Department staff from many fields of expertise carefully and thoughtfully weighed and
5 considered Metropolitan’s detailed comments as they poured in. The Department required
6 the applicant to respond. GIS provided lengthy and substantive responses addressing
7 concerns raised by the Metropolitan. They did not ignore or disguise any concerns
8 regarding potential impacts. Instead, GIS respectfully disagreed with the Metropolitan’s
9 requests for design changes or compensation noted in their numerous written comments.
10 The applicant’s responses to comments raised by the Metropolitan included response letters
11 from the Project architects and a November 6, 2017 letter from legal counsel for GIS,
12 which addressed building maintenance issues and other public comments. GIS also
13 provided three expert consultant reports, prepared by Applied Restoration, Inc., Safway,
14 and Quality Built, LLC, which concluded that it would be possible to perform all
15 foreseeable maintenance and restoration of the north façade of the Metropolitan Building
16 after the GIS Plaza building is constructed. *Id.*, at pages 6-7; DSD 00495 – 000518.

17 11. At the appeal hearing, Department witnesses credibly explained how they
18 considered the Metropolitan’s comments, concerns and objections regarding the GIS
19 proposal. The Examiner finds that throughout the nineteen-month review process, the
20 Metropolitan’s concerns were solicited, received, heard, considered, weighed and
21 thoughtfully addressed by responsible city officials. The bottom line is that the
22 Metropolitan disagrees, and prefers a result that the law does not require or empower
23 Department staff to order.

24 12. After reviewing, discussing, and evaluating all of the comments, responses, and
25 other relevant materials included in the project file, the Department followed a “consensus”
26 review process explained by Ms. Stead and Ms. Helland to generate a 46-page Staff Report
issued on November 30, 2017, which constitutes the Department’s combined SEPA
threshold determination and Design Review approval for the GIS Project.

13. The Staff Report includes a detailed response to concerns raised by the
Metropolitan. DSD 000022-000025, as well as an explanation of how the Project complies
with applicable Land Use Code provisions and Comprehensive Plan provisions. DSD
000010-000022; DSD 000032-000037.

14. The Staff Report credibly summarizes the City’s SEPA review and the
Environmental Coordinator’s conclusion that there is “no probability of significant adverse
environmental impacts occurring as a result of the proposal.” DSD 000029. The SEPA
discussion properly notes that the City has substantive SEPA authority to impose mitigation

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1 to address significant impacts disclosed during the review process, but in this matter, all
2 anticipated impacts associated with the GIS Project can be adequately addressed or
3 mitigated using relevant provisions of the City’s Land Use Code as well as through the 34
4 project-specific Conditions of Approval contained in the Staff Report. *Staff Report, pages*
5 *28-30.*

6 15. There is no dispute that Metropolitan filed a timely appeal of both decisions issued
7 in the Department’s November 30th Staff Report. As required by city codes, Appellant, the
8 Metropolitan, raised distinct grounds for their appeal, identified in their written appeal
9 statement.¹

10 16. The Metropolitan appeal lists specific exceptions and objections to the challenged
11 decision, specifically including that “[t]he Decision fails to comply with the procedural and
12 substantive requirements of SEPA,” going on to assert that BCC 22.02.140.C gives the
13 Department substantive SEPA authority to condition or deny proposals where development
14 regulations do not exist or where unanticipated impacts occur which are not mitigated by
15 existing regulations, emphasizing that “the code specifically anticipates situations such as
16 this one where “[u]nusual circumstances related to a site or to a proposal, as well as
17 environmental impacts not easily foreseeable or quantifiable in advance” require “site-
18 specific or project-specific SEPA mitigation.” *Id.*

19 17. The written appeal alleges that the “adverse impacts caused by constructing the GIS
20 Plaza up to the property line shared with the existing Metropolitan building are not
21 anticipated by the Land Use Code and present an unusual circumstance that requires the
22 Department to reasonably exercise its substantive SEPA authority.” (*Appeal, page 3*).

23 18. In the written appeal, the primary – and only – specifically alleged *procedural*
24 defect is that “[t]he DNS is procedurally defective because it is based on a SEPA checklist
25 that disguises rather than discloses adverse impacts...” (*Appeal, page 3, last sentence on*
26 *page*).

19 19. The written appeal lists a number of reasons why it alleges that the challenged DNS
20 is *substantively* defective, including its alleged failure to mitigate or otherwise address the
21 following adverse environmental impacts of the GIS Plaza: a. Water; b. Environmental

¹ LUC 20.35.250 specifies the requirements to appeal Process II decisions, including:
A.2. Form of Appeal. A person appealing a Process II decision must file a written statement setting forth:
a. Facts demonstrating that the person is adversely affected by the decision;
b. A concise statement identifying each alleged error and the manner in which the decision fails to satisfy the applicable decision criteria
(emphasis added);
c. The specific relief requested; and
d. Any other information reasonably necessary to make a decision on the appeal.

1 Health/Noise; c. Land Use; d. Housing; e. Aesthetics; f. Light and Glare; g. Transportation;
2 h. Public Services; and i. Utilities. (*Appeal, pages 3-9*).

3 20. To support its appeal of the Design Review approval, the written appeal briefly
4 alleges that the challenged approval is not consistent with the approval criteria found in
5 BCC 20.30F.145 and is inconsistent with the Comprehensive Plan and Downtown Subarea
6 Plan, as detailed in letters submitted by the Metropolitan through the project comment and
7 review process, all of which are included in the record for this appeal. (*Appeal, pages 9
8 and 10*).

9 21. Nowhere does the written appeal at issue make any reference to any alleged
10 requirement that the city must conduct an alternatives analysis before making its threshold
11 determination. In fact, without running a computer search for the word ‘alternatives’, it
12 appears that the word is not ever used in the appellant’s written appeal statement, as a
13 specific ‘error’ or otherwise. Nevertheless, during the appeal and in closing briefs,
14 appellant’s counsel devoted considerable effort to arguing how the DNS must be reversed
15 because city staff failed to consider any alternatives to the current GIS project design. Both
16 respondents appropriately objected, noting the issue was never raised in the written appeal
17 statement. They are correct – it was not. The appellant failed to raise consideration of
18 alternatives as a basis for their appeal in their written statement.

19 22. The record and testimony at the appeal hearing includes credible and substantial
20 evidence that demonstrates how the Department complied, as a matter of fact, with their
21 SEPA procedural requirements, including without limitation their thorough item by item
22 consideration and analysis of comments and reports submitted on behalf of the appellant
23 and its agents.

24 23. The City’s Environmental Coordinator, Ms. Helland, credibly testified that she
25 fully integrates her environmental review with a connected project permit/design review
26 application. This is entirely consistent with clear language in the Bellevue City Code and
Land Use Code that strongly encourages “integration” of SEPA processes, insofar as
possible, with any applicable process for decision-making on related land use applications,
such as the Design Review approval included in this matter. BCC 22.02.160 reads in
relevant part:

BCC 22.02.160 Integration with permit and land use decision.

A. The process under the State Environmental Policy Act (Chapter 43.21C RCW) and this
chapter shall be integrated, insofar as possible, with any applicable process for decision-
making on permit and land use applications, in accordance with the procedures in
subsection B of this section.

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1 B. For each application for a permit or land use decision which is subject to review under
2 the State Environmental Policy Act, the environmental coordinator shall determine how
3 environmental review best can be integrated with review of the permit or land use
4 application. In making this determination, the environmental coordinator shall integrate the
5 following procedures:

- 6 1. Staff review of the application under city codes and regulations and the environmental
7 review and determination thereon;
- 8 2. The staff report on the application, and the report or documentation concerning
9 environmental review;
- 10 3. Hearings and other public processes, including required public notices, required by city
11 code or regulation, and hearings and other public processes, including public notices,
12 required or conducted under the State Environmental Policy Act. This section shall include
13 appeals, except as otherwise expressly provided by this code.

14 24. Contrary to assertions made by Metropolitan, the Environmental Coordinator did
15 not limit her SEPA threshold review process to the project applicant's checklist. Instead,
16 her review included a robust collection of substantive comments from Metropolitan
17 residents, their attorneys, and consultants on virtually every subject matter that they raised
18 in this appeal. The Environmental Coordinator fully complied with her procedural and
19 substantive SEPA obligations, and the appellant failed to demonstrate how her threshold
20 determination was not supported by a preponderance of credible information in the record,
21 which failure was amplified in the public hearing for this appeal. Her determination was
22 not a mistake. It was not clearly erroneous. There are few projects that involve a lengthier
23 and more thorough review of comments submitted by opposing parties such as those
24 presented throughout this project review process. The appellant's protests were not
25 supported by a preponderance of evidence or applicable law, and were rebutted by evidence
26 reviewed and relied upon in issuing the challenged Staff Report, and testimony and exhibits
referenced by Department witnesses throughout the appeal hearing, including without
limitation the testimony of Ms. Stead and Ms. Helland.

27 25. After the project review team's thorough review of the SEPA Checklist and the
28 entire record – again, not just the checklist – the City's Environmental Coordinator
29 concluded that impacts associated with the GIS Project “will be mitigated through exercise
30 of Code authority as well as through project-specific Conditions of Approval.” DSD
31 000030. As reiterated during her testimony at the public hearing, the Environmental
Coordinator concluded that there was no basis or need to require an environmental impact
statement for aspects of the project, because the City's development regulations would
effectively mitigate impacts.

32 26. Despite Metropolitan's attempts to raise doubt, challenge Department witnesses,
33 and highlight several printing errors on the SEPA checklist or other witness remarks, they
34 amount to nothing more than putting form over substance – because the *Entire* Record for
this matter includes each and every consultant comment, report, opposition statement,

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1 suggested legal analysis, preferred design modifications, and the like, including all of the
2 voluminous materials submitted by Metropolitan and its agents. There is no credible
3 evidence in the massive record for this appeal that would serve as a basis to overturn the
Department's SEPA threshold determination or Design Review approval for the GIS
Project.

4 27. Metropolitan argues that the city cannot demonstrate prima facie compliance with
5 SEPA procedural requirements. This argument is contrary to credible and substantial
6 evidence in the record. Again, the Environmental Coordinator credibly testified and
7 confirmed that her review conducted before issuing a DNS for the GIS Project included
8 review of the SEPA checklist, as well as the *entire* Project file. *Testimony of Ms. Helland,*
9 *March 9, 2018, 2:28:36-2:28:54.* Ms. Helland explained how she was well aware of and
fully understood concerns raised by Metropolitan regarding the zero lot line issue and the
proposed location of GIS' new building about 2 feet from the Metropolitan building, and
other potential impacts alleged by Metropolitan and its agents.

10 28. Liz Stead, Sean Nichols, Jake Hesselgesser, and Molly Johnson all testified at the
11 hearing and summarized their evaluation of the Metropolitan's objections to the project.
12 The Staff Report includes a lengthy and detailed written summary of responses to various
13 objections raised by Metropolitan, at DSD 000022-000025 and 000093-000096. Based on
14 credible and substantial evidence in the Record, the Examiner finds and concludes that
there is no support for Metropolitan's argument that the SEPA checklist was inadequate or
that the Environmental Coordinator or Land Use Director failed to consider potential
environmental impacts associated with the GIS Project.

15 29. Consultants with experience in construction and maintenance work for buildings
16 like the Metropolitan were called by the appellant and the applicant. In the end, all of the
17 consultants agreed that maintenance on the north façade of the Metropolitan building will
18 be more complicated and more expensive if the GIS building is constructed up to the zero
19 lot line as proposed. But, Metropolitan witnesses verified that the stucco siding on their
20 building was a choice made years ago, and that other siding options were available at that
21 time, but they were more expensive. Different types of siding may not present the same
22 maintenance challenges as stucco. Several witnesses described some of those options,
23 including some sort of tile-like product. Although disappointing to the Metropolitan,
24 SEPA does not require their neighbor to the north of their building to cover any increased
25 maintenance costs. *W.514 v. City of Spokane*, 53 Wn.App 838, 847-848 (1989)(economic
26 loss is not a significant impact on the physical environment).

30. There is no dispute that the City's zero-setback / zero-lot line options have been
permitted for decades in the downtown area where the Metropolitan building and the GIS
Project are located. Designing a project that complies with longstanding setback

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1 requirements does not cause a “significant” impact under SEPA. Metropolitan’s proximity
2 to its own north property line is not some sort of force field that can or should be allowed to
3 project a “significant” impact finding onto any neighboring development project. Where
4 jurisdictions permit development projects that utilize a zero-setback/zero lot line option,
5 buildings within close proximity to one another are fully within the intent of such
6 regulations, and cannot, without more, be deemed a project-specific impact.

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11 31. Rather than focus on any potential preponderance of factual support for errors raised
12 in the appeal statement, Metropolitan’s closing brief argues that: “[t]his is not a typical
13 appeal of a Determination of Nonsignificance (DNS) where the issue is whether the adverse
14 impacts identified during SEPA review are significant. This SEPA appeal is about the
15 Department’s failure to identify and analyze adverse environmental impacts in the first
16 place: it is about the Department’s failure to comply with SEPA’s most fundamental
17 procedural requirements. Thus, the Metropolitan’s appeal does not ask the Hearing
18 Examiner to determine that any impacts are “significant” impacts requiring an
19 Environmental Impact Statement (EIS). It is premature for decision about the significance
20 of impacts to be made until the impacts are identified, analyzed, and disclosed.”
21 (*Appellant’s Reply to City’s Post-Hearing Brief, Introduction*).

12 32. For the DNS to survive judicial scrutiny, the record must demonstrate that
13 environmental factors were considered in a manner sufficient to amount to prima facie
14 compliance with the procedural requirements of SEPA and that the City’s decision to issue
15 the DNS was based on information sufficient to evaluate the proposal’s environmental
16 impacts. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123
17 (2000); *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 432 (1997).

18 33. Appellant’s alternatives argument fails as a matter of law because the appellant only
19 raised conclusory allegations that were not supported by the hearing testimony or other
20 evidence in the record and Metropolitan failed to raise the alleged error in its detailed
21 written appeal statement. The appellant’s alleged “impacts” – all flowing from the
22 Metropolitan’s decision to install and retain stucco siding instead of some other surface on
23 the north side of the building – are not the type of circumstance that constitutes evidence of
24 probable significant environmental impacts under SEPA. (*See DSD’s Response to appeal,*
25 *dated Feb. 16, 2018, at pages 20-39; Department’s Post-Hearing Brief, Sec. II.A.1-3, and*
26 *page 11, caselaw cited therein*).

27 34. In this appeal, the ultimate test is whether the appellant proved that the combined
28 Design Review approval and DNS was not/were not supported by a preponderance of the
29 evidence. Both were, so the appeal must be denied in its entirety.

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1 35. Here the record reveals that before the governmental decision was made, a wide
2 range of environmental factors were considered based upon extensive information that was
3 obtained, either directly from the appellant, its members and agents, as well as responsive
4 summaries, reports and design changes made by the applicant, based on feedback from city
5 staff. The Stipulated Record used to reach the challenged determinations, as well as the
6 extensive appeal hearing testimony and post-hearing briefs from all parties, provided the
7 Examiner with credible and substantial evidence to issue this Decision. An examination of
8 the entire record in light of SEPA and applicable city policies does not lead the Examiner to
9 the firm conviction that a mistake has been committed. The burden was on the appellant,
10 not the applicant or the city. The appellant failed to meet its burden of proof. And, the
11 entire record includes ample, credible and substantial evidence to support each of the
12 challenged decisions issued by the Department.

13 36. For example, the application and environmental information was all supplemented
14 with additional documentation that was made part of the record and addressed by
15 Department staff as part of their review, as summarized in the Staff Report. Over 30
16 conditions of approval apply to the project, and the original design was modified based on
17 staff feedback. The Examiner finds that the Staff Report includes mitigative measures to
18 lessen the impact on the surrounding area, most of which are included conditions of
19 approval. An examination of the entire record does not lead to the conclusion that a
20 mistake was committed. The DNS was not clearly erroneous.

21 37. Further, where a determination of nonsignificance is not clearly erroneous, no
22 consideration of alternative sites is required. *San Juan County v. Department of Natural
23 Resources*, 28 Wn.App. 796, 801, 626 P.2d 995 (1981).

24 38. The appellant failed to present a preponderance of evidence to support any finding
25 or conclusion that the GIS Proposal will result in significant adverse impacts or
26 unanticipated impacts that cannot be adequately addressed through application of existing
City codes, regulations, and environmental policies, all weighed and considered in the
consolidated project review process undertaken by numerous members of City staff with
subject matter expertise in a variety of relevant fields. Many of these same regulations have
been adopted, revised, updated, or maintained throughout the years when the zero-lot-line
development standards were permitted in the city's downtown area where the Metropolitan
Building was constructed and where the GIS Plaza project would be located. Downtown
Bellevue is a thriving regional center, with city codes, including its lengthy Land Use Code,
that include many provisions to address developments and uses of almost every shape and
size, including tall buildings, structures adjacent to one another, underground parking, fire
safety, aesthetics, and other topics raised in this appeal. The Design Review approval and
DNS were issued with these codes and regulations in mind, and with ample consideration
and understanding given to comments and reports submitted by the appellant.

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1 39. Throughout the hearing, in questions to various witnesses, and in repeated
2 restatements of issues raised in the appeal, Appellant’s counsel sought to establish that City
3 staff never considered anything other than the SEPA checklist, and never adequately
4 considered appellant’s comments regarding the project, virtually all of which form the basis
5 for this appeal. Despite best efforts, and thorough questioning of key witnesses, the Record
6 does not include a preponderance of evidence to establish that the GIS project will result in
7 any significant, adverse impacts, or that city staff failed to demonstrate prima facie
8 compliance with the procedural requirements of SEPA. Quite the opposite – the detailed
9 Staff Report that includes both the challenged DNS and Design Review approval includes
10 substantial and credible explanations of how city staff considered the numerous objections
11 raised by the appellant, its members and its agents. And, the appeal hearing record includes
12 lengthy and credible testimony from city witnesses detailing the time and attention they
13 devoted to the wide range of concerns and alleged impacts raised by the Metropolitan,
14 including that of Ms. Helland, Ms. Stead, Ms. Johnson, Mr. Hesselgesser, and Mr. Nichols.
15 Several city witnesses also acknowledged the extensive review work performed for the GIS
16 file by their former colleague, Carol Hamlin, Senior Planner, who retired from the City
17 before the final Staff Report for the GIS Plaza project was issued.

18 40. Similarly, even if there is an ongoing concern about the ability to adequately
19 maintain stucco on the north façade of the Metropolitan Building, there is no preponderance
20 of evidence in the Record to establish that the GIS Plaza project caused the problem, or will
21 cause any probable, significant, adverse impacts on the vicinity, including the Metropolitan
22 Building. Appellant could not point to or establish that there is a legal requirement or city
23 policy to require the project applicant (GIS) to maintain the Metropolitan Building or to
24 modify the GIS building design to provide Metropolitan with what amounts to an open-
25 space area on GIS’s property to use for maintenance of the Metropolitan Building.

26 41. The Examiner finds that the appellant failed to present a preponderance of evidence
to support their allegations that the Proposal will have impacts that warrant reversal of the
challenged DNS. Instead, credible and convincing testimony by City witnesses and
exhibits in the Record comprise more than a preponderance of evidence to demonstrate that
the Proposal will not have impacts that are not adequately addressed in existing City codes,
regulations, or conditions of approval noted in the combined Design Review approval and
DNS.

42. Ms. Stead reiterated that no specific mechanical parking system has been identified
for use in the new GIS Plaza project, and that any such system will be subject to careful
review at the time of building related permits for the project. If the proposed system is
found to generate noise, vibration, or other unacceptable nuisances prohibited by applicable
codes, she firmly testified that such system would not be approved. The right-in, right-out

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1 condition of approval for entering and exiting the parking area in the new building was
2 imposed as part of the combined design and environmental review for the project, relying
3 on existing transportation related environmental documents prepared by the city, and should
4 serve as a safety enhancement to mitigate potential impacts associated with the GIS
5 Proposal.

6 43. Paraphrasing the action words contained in the definition given for the word
7 “mitigation” in the state SEPA regulations, the term “mitigation” does not mean zero
8 impacts, but means “avoiding”, “minimizing”, “rectifying”, “reducing”, “compensating”, or
9 “monitoring” an impact. WAC 197-11-768.

10 44. The 34 “Conditions of Approval” detailed on pages 37 – 46 of the Staff Report are
11 precisely the sort of “mitigation” envisioned under SEPA – with reference to specific city
12 codes and policies that will apply to the project moving forward, including subsequent
13 permit reviews, construction work, and once it is constructed and operational. The
14 conditions of approval and modifications made to the project during the design review
15 process demonstrate the Department’s efforts to ensure that the Metropolitan’s concerns are
16 adequately addressed.

17 45. The situation presented in this appeal is analogous to a phased subdivision
18 development, where the initial home-buyers might take their solitude and open space for
19 granted, crossing fingers that vacant lots won’t ever be developed and unopened street stubs
20 might never be extended.

21 46. While of little solace to local residents who are/were fortunate enough to purchase
22 homes with decks, balconies, and relatively private outdoor spaces, as adjacent lots lie
23 undeveloped for several years, the fact and reality remain that the City’s development
24 regulations allow surrounding landowners to develop their properties in a manner that
25 complies with current regulations, including environmental reviews.

26 47. “First-in” or “built-first” does not entitle one to perpetually private, open, and
artificially-low contact with “neighbors” on adjoining lots, which is often experienced by
residents in neighborhoods with streets, utilities, infrastructure, and other features that were
built or planned to serve undeveloped parcels. This is especially true in an urban
environment, and even more so in a Downtown area, like the block where the proposed GIS
building and the Metropolitan Building would coexist. New buildings, new neighbors, new
and different plans come forward from individual owners and investors, as new parts of the
planning area are developed over time, provided the new proposals are all in compliance
with applicable codes and policies.

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1 48. There is no dispute that the pending proposal is for a building much shorter, and with
2 smaller mass, than could be permitted under codes and regulations that apply to the
downtown area.

3 49. Nothing the applicant did seemed to please the appellant, and in the end, it appears
4 that nothing short of redesigning the GIS Building to be located 5 or 10 feet away from
5 their shared property line would resolve this matter. Without question, the Metropolitan
6 Association pulled out all the stops to advocate their position, throughout the review
7 process and during the appeal hearing process. Their protests regarding the sufficiency of
8 SEPA review and Design Review analysis for the GIS proposal must fail, because the
9 appellant failed to satisfy its burden of proof, and the record includes credible and
10 substantial evidence that fully supports the challenged determinations issued by the
11 Department.

12 50. For reasons explained above, the appeal must be denied in its entirety, because the
13 appellant failed to meet its burden of proof, and the City presented far more than a
14 preponderance of credible and convincing evidence to support the combined DNS and
15 Design Review approval.

16 51. Upon consideration of all the evidence, information, and testimony included within
17 the Record, Appellant failed to establish that the Project is likely to have any probable,
18 significant, adverse environmental impacts. Instead, the Record establishes that a
19 preponderance of evidence supports issuance of the challenged DNS.

20 52. Upon consideration of all the evidence, information, and testimony included in the
21 Record, particularly including the summary of compliance with relevant Comprehensive
22 Plan provisions and applicable development regulations cited in the Staff Report, the
23 Appellant failed to establish that the Design Review approval was not supported by a
24 preponderance of evidence. Instead, the Record includes credible and substantial evidence
25 demonstrating how the proposal meets all applicable criteria for Design Review approval,
26 including without limitation the provisions of LUC 20.30F.145, as explained in the Staff
Report.

53. The Examiner finds that Department witnesses provided testimony and evidence
that was more credible and reliable than any presented by the appellant. While all of the
appellant's witnesses were obviously well-qualified, respectful, and sincere in their
testimony, their bias and motivation to please their client, or to promote their own personal
self-interests and personal preferences, tends to weigh in favor of any contradictory
testimony offered by city witnesses, who had no financial or other demonstrated bias in the
review or appeal process. In fact, the lengthy review process, combined with voluminous
requests for additional information from the project applicant, all demonstrate how

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1 Department staff took the Metropolitan’s comments and concerns seriously, and how staff
2 tried to make everyone happy. That is not always possible, but 34 conditions of approval
3 and ongoing reviews for permits and other approvals that will be needed all reflect staff’s
dedication to apply city codes and environmental policies to promote the interests of the
public they serve.

4 54. Appellant’s grievances are mostly based on their disagreement with zero-lot-line
5 setbacks permitted in their neighborhood. That is not within the jurisdiction of the
6 Examiner to overturn or rewrite. There is insufficient evidence in the record to use SEPA
7 or Design Review approval to deny the project applicant’s proposal to develop a project
utilizing a zero-setback in the downtown area.

8 55. The Staff Report and attachments thereto include detailed findings and analysis that
9 serve as support for both challenged decisions. The credibility of the Staff Report was
10 boosted by testimony provided at the appeal hearing. Except as modified in this Decision,
11 all findings, statements of fact, and analysis provided in the Staff Report are adopted by the
12 Examiner as Findings of Fact supporting this Decision, and are incorporated as such by this
13 reference.

14 VI. CONCLUSIONS OF LAW.

15 1. “SEPA does not demand a particular substantive result in government
16 decision making; rather it ensures that environmental values are given appropriate
consideration.” *Glasser v. City of Seattle*, 139 Wn. App. 728, 742 (2007).

17 2. In this appeal, the Examiner has authority to determine if Appellant has
18 shown by a preponderance of the evidence that the combined Design Review approval and
SEPA DNS was not/were not properly issued.

19 3. Case law indicates that the appellant has a high burden to show that the
20 City’s DNS was clearly erroneous. Under that standard, the Examiner and any reviewing
21 court must be firmly convinced that the Department made a mistake when it issued the
22 DNS, before the DNS can be overturned. As explained above, the Examiner finds and
concludes that the Department had sufficient available information to evaluate the GIS
Plaza’s potential environmental impacts.

23 4. In reviewing all of the evidence in the record from this appeal hearing,
24 including the City’s Staff Report explaining facts and regulations that support the

25 FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION RE: METROPOLITAN APPEAL OF
26 DESIGN REVIEW APPROVAL AND SEPA DNS
ISSUED FOR THE GIS PLAZA PROJECT –
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1 Department's combined Design Review approval and SEPA DNS for the GIS Plaza
2 proposal; the conditions of approval included in the Staff Report; the integrated and
3 consensus based SEPA/Design Review process of review undertaken by the Department;
4 and the evidence presented at the appeal hearing, particularly testimony by Appellant's
5 witnesses that essentially conceded that the north façade can be maintained, but the cost of
6 doing so may be higher than the Association might like, the Examiner is not convinced that
7 the DNS was clearly erroneous or that the appellant satisfied its burden to show that either
8 decision was not supported by a preponderance of evidence. Instead, both challenged
9 decisions were supported by credible and substantial evidence in the Record, including that
10 referenced in the Staff Report and explained by Department witnesses at the appeal hearing.

11 5. For reasons set forth in the Findings of Fact, all of the appellant's specific
12 issues on appeal must fail, because the Department successfully presented credible, reliable,
13 and substantial testimony and documentary evidence to prove that the combined Design
14 Review Approval and SEPA DNS is/are supported by a preponderance of evidence in the
15 Record. In short, based on the record established through this appeal process, whatever
16 standard applies, the Department did not make a mistake.

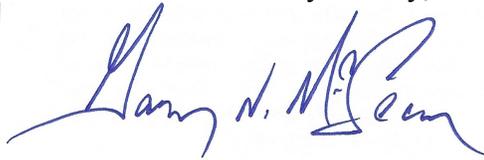
17 6. Appellant failed to meet its burden of proof.

18 7. Any finding or other statement contained in this Decision that is deemed to
19 be a Conclusion of Law is hereby adopted as such and incorporated by reference.

20 VII. DECISION.

21 The Metropolitan appeal is denied. The Department's combined Design Review
22 Approval and SEPA Determination of Non-Significance for the GIS Plaza proposal is
23 affirmed.

24 ISSUED this 30th Day of May, 2018



25 Gary N. McLean
26 Hearing Examiner

FINDINGS OF FACT, CONCLUSIONS OF LAW
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
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APPEAL TO SUPERIOR COURT

As provided in BCC 20.35.045, Process II decisions are final on the day following issuance of a final City decision on the administrative appeal. BCC 20.35.070 explains that a final City decision on a land use permit application (Processes I through III and V), except for shoreline permits, may be appealed to Superior Court by filing a land use petition meeting the requirements set forth in Chapter 36.70C RCW. BCC 3.68.270 explains that any party requesting review by the superior court or any other state or federal court shall be responsible for the cost of preparing a verbatim transcript of proceedings of the city. Parties are responsible for conferring with advisors of their own choosing to ensure they comply with any applicable codes or requirements regarding appeals, including without limitation the timing and filing requirements for same.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
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