



Anne McEnery-Ogle, Mayor
Bart Hansen · Ty Stober · Linda Glover
Laurie Lebowsky · Erik Paulsen · Sarah J. Fox

October 18, 2021 - Vancouver City Council Meeting Minutes

WORKSHOPS

Workshops were conducted remotely over video conference utilizing a GoToMeeting platform. Members of the public were invited to view the meeting via the live broadcast on www.cvtv.org and CVTV cable channels 23 or HD 323, or on the City's Facebook page, www.facebook.com/VancouverUS, or listen via the GoToMeeting conference call.

Councilmember Fox was absent from workshops. Councilmember Paulsen arrived at 5:31 p.m.

4:30-5:30 p.m. Procurement Policy Discussion

Anna Vogel, Procurement Manager, 360-487-8429

Summary

Staff provided Council with an overview of proposed short- and long-term modifications to the City's Apprenticeship Program.

5:30-6:00 p.m. Heights District Plan Implementation

Rebecca Kennedy, Deputy Director of Community Development, 360-487-7896; Dave Perlick, Interim Director of Parks, Recreation and Cultural Services, 360-487-8314

Summary

Staff provided Council with an update on the implementation steps of the Heights District Plan.

REGULAR COUNCIL MEETING

This meeting was conducted remotely over video conference utilizing a GoToMeeting platform. Members of the public were invited to view the meeting via the live broadcast on www.cvtv.org and CVTV cable channels 23 or HD 323, or on the City's Facebook page, www.facebook.com/VancouverUS. Public access and testimony were also facilitated via the GoToMeeting conference call.

Call to Order and Roll Call

The consent agenda meeting of the Vancouver City Council was called to order at 6:30 p.m. by Mayor McEnery-Ogle. This meeting was conducted remotely over video conference.

Present: Councilmembers Fox, Paulsen, Lebowsky Glover, Stober, Hansen, Mayor McEnery-Ogle

Absent: None

Councilmember Hansen left at 8.29 p.m.

Approval of Minutes

Minutes - September 20, 2021

Motion by Councilmember Hansen, seconded by Councilmember Glover, and carried unanimously to approve the meeting minutes of September 20, 2021. Councilmember Fox abstained.

Minutes - September 27, 2021

Motion by Councilmember Stober, seconded by Councilmember Glover, and carried unanimously to approve the meeting minutes of September 27, 2021.

Minutes - October 4, 2021

Motion by Councilmember Glover, seconded by Councilmember Lebowsky, and carried unanimously to approve the meeting minutes of October 4, 2021.

Community Communication (Items 1-4)

Mayor McEnerny-Ogle opened Community Communication and, receiving no testimony, closed Community Communication.

Consent Agenda (Items 1-4)

Council requested Item 1 be pulled for discussion.

Councilmember Fox noted this contract had been approved for increased spending authority earlier in the year and asked why an additional increase is needed again so soon and which departments are anticipating additional staffing needs.

Dean Perez, Deputy HR Director explained the spending authority for the temporary staffing contract was previously exhausted due to staffing needs at the COVID testing and vaccination site. Since the last spending increase, staff have encumbered the need for this resource but the funds largely have not been spent; rather than pulling the funding back from staff, HR is asking for an increased spending authority. Mr. Perez stated Parks and Recreation utilizes a lot of temporary staff during the summer months. Public Works and Community Development departments also utilize the contract. He stated there have also been significant increases to wages necessary to attract candidates.

Councilmember Fox stated she gets nervous when the City uses increased temporary staffing resources, but understands the seasonal needs. She encouraged staff to look ahead and evaluate whether some of these positions should be converted to full time permanent positions.

Motion by Councilmember Paulsen, seconded by Councilmember Hansen, and carried unanimously to approve the Consent Agenda.

1. Northwest Staffing Resources Agreement C-100478, Contract Increase

Staff Report 153-21

Summary

The City of Vancouver, through the Human Resources Department, currently contracts with Northwest Staffing Resources to provide staff augmentation services on an on-call, as-needed, and occasionally on-going basis. The services required may include, but are not limited to, clerical, light industrial, technical, and professional level staffing. The contract with Northwest Staffing Resources began on November 20, 2020, and ends November 19, 2025. It is anticipated the contract not-to-exceed amount (C-100478) of \$880,000 will be exhausted by the end of October if not increased. Staff requests an increase to the authorized amount of the contract.

Request: Authorize the City Manager or designee to execute an amendment increasing the authorized not-to-exceed amount of

the contract with Northwest Staffing Resources from \$880,000 to \$1,380,000.

Dean Perez, Human Resources Deputy Director, 360-487-8406

Motion approved the request.

2. Ratify Memorandum of Understanding (MOU) Between the City of Vancouver and the Vancouver Police Command Guild (VCG) to Implement Policy 701 for a Comprehensive Police Camera Program

Staff Report 154-21

Summary

Over the last several months, the City has been engaged with the community via the Community Task Force on Policing to explore a range of policy and operational changes within the Vancouver Police Department (VPD), including establishing a police camera program. This community engagement informed the City's development of a new camera program policy for VPD, which was the foundation for bargaining contract terms with both the Vancouver Police Officer Guild and Vancouver Police Command Guild to implement this key program. The resulting policy and contract terms establish management and employee rights and responsibilities, community rights and protections, as well as compensation for officers associated with establishment and deployment of a camera program.

Based on this, the City of Vancouver and the VCG jointly wish to implement a comprehensive police camera program, to include body-worn and in-car cameras, for purposes of enhancing the safety of police officers and building transparency with the public, along with increasing the availability and protection of evidence during civil, administrative, and criminal investigations.

The camera program is anticipated to be fully implemented in the second quarter of 2022.

Request: Ratify a Memorandum of Understanding between the City of Vancouver and the Vancouver Police Command Guild regarding the police camera program.

Lisa Takach, Human Resource Director, 360-487-8611

3. Nomination for Appointment to Clark County Public Health

Advisory Council

Summary

The Clark County Public Health Advisory Council is a 20-member volunteer body that makes recommendations to Clark County Councilors who also serve as the county's Board of Health.

The advisory council helps protect the community's health by preventing disease, responding to health threats, and reducing health disparities. The advisory council's top priorities are addressing adverse childhood experiences, community health improvement planning, and support for healthy children.

After a recent set of interviews, Council Committee 1 nominated a candidate for appointment to this Public Health Advisory Council and that candidate had to step-down. Due to the close proximity of those interviews and the need to re-nominate a candidate, Council Committee 1 chose to recommend the nomination of a second, qualified candidate, Elma Blum. This nomination would then be brought before the Board of Health to be fully appointed to the Clark County Public Health Advisory Council.

Request: Nominate Elma Blum for appointment to the Clark County Public Health Advisory Council, with a term beginning as determined and expiring September 30, 2024.

Council Committee 1

Motion approved the request.

4. Approval of Claim Vouchers

Request: Approve claim vouchers for October 18, 2021.

Motion approved claim vouchers for October 18 in the amount of \$7,423,626.94.

Closed-Record Appeal Hearing (Item 5)

5. Academy Smokestack Demolition Appeal

Staff Report 155-21

On January 26, 2021, the Applicant submitted a demolition permit application for the Smokestack building located on parcel 5 of the Providence Academy property located at 400 E. Evergreen Blvd. The

property is also located in Heritage Overlay District Number One[1].

The main Academy building is the major historic asset in the area, but the outbuildings and the grounds of the Academy are also important historical and architectural features because of their relationship to the main building, and their influence on views of the main building and on the character of the immediate environs. The Providence Academy site is on the National Register of Historic Places, the highest level of recognition for historic sites and buildings in the US. According to the Vancouver Municipal Code, Providence Academy is the "...most important historic building in downtown Vancouver."[2]

Begun in 1873, the complex was built to serve as a boarding school, orphanage, convent, and headquarters for the Sisters of Charity of the House of Providence, incorporated in 1859, and one of the oldest corporations in the northwest. The main building was designed by and constructed under the direction of Mother Joseph of the Sacred Heart. It is widely regarded as one of her most outstanding architectural achievements and is one of only two buildings remaining today which bear her design imprint, though many of the institutions created under her direction remain in other buildings.

The Academy grounds have historically included numerous outbuildings, up to a total of as many as 14 at a time. The remaining historic outbuildings include the Laundry Building (c. 1884), Boiler Building and Boiler Smokestack (c.1910), and the Gymnasium (c. 1930). Today, most of the site is used for parking both paved and gravel surfaced.

The Smokestack is appended to the Boiler Building which historically heated the main Academy Building, the 1911 St. Joseph's hospital building formerly located to the north across 12th St., and the Laundry Building. The Smokestack and Boiler Building were designed by Portland architect Robert Tegen.

In January of 2018, the City received an application for redevelopment of the Academy site. Shortly thereafter, the City met with the property owner to discuss safety concerns related to the Smokestack, Laundry and Boiler buildings. Over the course of the next year the Historic Trust enlisted the efforts of four engineering firms to determine the overall condition of the Laundry, Boiler and Smokestack buildings.

Based on the primary reports and visible concerns about the buildings, the City required the property owner to provide an action plan to address the structural condition of the buildings. The City required the property owner to submit the action plan by March 1, 2020, the date was extended to September 1, 2020, due to the COVID-19 pandemic. On September 1, 2020, the property owner provided the City with a request for an unfit

building determination, per VMC 17.32 Unfit Buildings and Premises Code, for the Smokestack. The primary purpose of the “Unfit Building and Premises Code” is to provide a just, equitable and practicable method for determining if buildings, structures and/or premises are unfit for human habitation or other uses and are inimical to health and welfare of the general public and may be required to be repaired, vacated or demolished.

The City’s Building and Fire Code Commission (BFCC) held a public hearing on October 27, 2020, to review the Building Official’s preliminary determination of the smokestack as an unfit structure. At the conclusion of the hearing, the BFCC passed a unanimous resolution supporting the Building Official’s preliminary determination that the smokestack is an unfit structure under VMC 17.32.

On December 15, 2020, the City of Vancouver Building Official declared the Smokestack unfit and ordered it to be repaired or demolished (Order to Repair or Demolish). The Building Official also required a permit application for structural rehabilitation or demolition be filed with the City of Vancouver by March 31, 2021. As stated previously, the property owner filed the demolition permit application on January 26, 2021.

Per VMC 20.510.040, demolition permits for buildings listed in the Clark County Heritage Register, State Heritage Register or National Register of Historic Places requires the approval of the HPC.

Procedures for Processing Applications for Demolitions

The standards by which the Commission must evaluate the Demolition Application at the Public Hearing are prescribed in VMC 20.510.050(A)(3) (b) and VMC 20.510.050(A)(3)(d), as outlined below. The HPC’s determination of whether to approve the Demolition Application is limited to whether the applicant can demonstrate that renovation, restoration, or reuse of the structure will impose an economic hardship on the property owner that makes any outcome other than demolition impractical. (emphasis added)

On July 7, 2021, the HPC held a public hearing regarding the Applicant’s request for approval of a demolition permit (“Demolition Application”) for the smokestack associated with the Providence Academy.

Process for Review

Per VMC 20.510.050.A.3 - A structure that is listed on the National Register of Historic Places and such structure is located within a Historic Preservation Overlay District shall not be demolished except in the

following manner:

a. Demolition of Unsafe Buildings. If the City Building Official has found the structure to be unsafe under the provisions of Chapter 17.32 VMC, Unfit Buildings and Premises Code, and has ordered that the structure be demolished.

b. Demolition of Other Buildings in a Historic Preservation Overlay District. If a proposed reuse of the site requires the demolition of a structure listed on the National Register of Historic Places and such structure is located within a Historic Preservation Overlay District. The proponent of the demolition shall submit an Application for Demolition together with a report demonstrating that preservation of the building or structure and important features thereof proposed for demolition will impose an economic hardship upon the owner, rendering it impractical to renovate, restore, or reuse the structure. (emphasis added)

As stated earlier, the Building Official deemed the Smokestack unfit on December 15, 2020, and ordered the repair or demolition of the smokestack. On January 26, 2021, the property owner filed a request for demolition of the smokestack. Because the Building Official did not outright order the smokestack demolished but rather repaired or demolished, the approval process is subject to the requirements of VMC 20.510.050.A.3.b noted above. A report detailing that the preservation of the building will demonstrate an economic hardship is required if the building is to be demolished. The report shall contain the following information:

- 1. Ownership history during the past ten years including the buyers and sellers, sales prices, dates of sales and the relationships, if any, between the present owner(s) and the most recent previous owner(s).*
- 2. The outstanding balance of the mortgage and other financing secured by the property.*
- 3. The most recent assessed value and present property taxes levied.*
- 4. All appraisals on the property performed during the past three years and an estimate of the property's present fair market value.*
- 5. A summary of listed prices, if any, for the property during the most recent three years.*
- 6. Cultural significance as described in nominations for listing in the Clark County Heritage Register, State Heritage Register or National Register of Historic Places or in any consultant report determining that the building may be an "eligible building" for future listing on the Clark County Heritage Register, State Heritage Register or National Register of Historic Places.*
- 7. Professional quality as-built drawings of the building and renderings of all exterior elevations showing the building's architectural features and black and white photographs on acid free photographic paper of*

- the building interior and exterior, its site and adjacent structures.*
- 8. Current level of economic return including annual gross income, itemized operating and maintenance expenses, capital expenditures, depreciation and debt service for the most recent three full years.*
 - 9. An analysis of reasonable economic alternatives to demolition, including:*
 - a) redevelopment of the building in its present location independent of other development of the site;*
 - b) redevelopment of the building in its present location in conjunction with new development on the balance of the site; and relocation to a different location and whether such redeveloped or relocated alternatives are capable of providing reasonable economic return upon completion of renovation / repair / relocation activities.^[3]*

The Applicant addressed each of these items in detail as part of the record from the July 7, 2021 HPC meeting (pp. 1-194).

Criteria for Approval of an Application for Demolition:

Per VMC 20.510.050.A.3.d., the following criteria for approval or denial shall be considered when reviewing an Application for Demolition:

- 1. The extent to which the demolition of the building will have a serious adverse impact on the cultural significance of the Historic Preservation Overlay District.*
- 2. The extent to which the building is so deteriorated and so lacking in historical fabric, that it would not be viable to retain the historic, cultural and architectural significance of the building through rehabilitation or renovation.*
- 3. There is no reasonable alternative to demolition that would provide the owner with a reasonable economic return.*
- 4. The extent to which the denial will deprive the owner of reasonable economic use of the underlying property.*

The Applicant addressed each of these items in detail as part of the record from the July 7, 2021 HPC meeting (pp. 195-198).

The Commission acted on the Demolition Application at the public hearing and issued a formal written decision on July 9, 2021 ("Commission Decision"). The Commission approved issuance of the applicant's demolition permit by the City of Vancouver, subject to the additional condition of approval that the effective date of the permit be delayed for 90 days to allow third parties to propose alternatives to demolition to the owner. Based on the applicant's submitted demolition application and report reviewed by the Commission at the public hearing, the Commission

determined that the record created by the applicant satisfied the requirements of VMC 20.510.050(A)(3)(b).

On July 29, 2021, an appeal of the Commission Decision ("Appeal") was submitted by Connie and Lee Kearney ("Appellant") and is properly before the Vancouver City Council in accordance with VMC 20.510.040.

Appeal of the Commission's decision is processed as a Type III land use action pursuant to VMC 20.220.030 and this appeal was timely submitted by a party with standing under VMC 20.210.130(B)(3). The hearing date for the appeal was set upon mutual agreement of the Appellant, the Applicant, and the planning official, in accordance with VMC 20.210.130(C). Under Table 20.210.130-1 of VMC 20.210.130(C)(3), the appeal hearing must be conducted on a closed record. A closed-record appeal hearing is limited to argument from the appellant, the applicant and city staff, and deliberation by the City Council. Argument and deliberation shall be limited to the record established at the original open-record hearing. The record shall consist of testimony and deliberation at the original hearing as recorded by an audio/visual tape or transcript certified as accurate and complete, any other materials submitted into the record, and the final order being appealed.

[1] VMC 20.510.020.

[2] VMC 20.510.020.A.1.

[3] VMC 20.510.050A.3.b.i-ix.

Basis of Appeal #1 – The City Council should remand the Demolition Application to the Clark County Historic Preservation Commission to require analysis of the proper underlying properties and redevelopment project.

Response #1:

In reviewing a demolition permit application under VMC 20.510.040, as the Commission properly did here, the HPC may not consider real property beyond the impacted parcel, except to the extent of evaluating the impact that demolition will have on the cultural significance of the Historic Preservation Overlay District (VMC 20.510.050(A)(3)(d(i))). The Demolition Application considered by the HPC is specific to a particular structure and that structure is located on a particular parcel of real property. Only that parcel and the ownership of that parcel is included in the report submitted to the HPC (VMC 20.510.050(A)(3)(b) itemizes the information to be included in the report, limited to the subject structure and property on which that structure is located) and the HPC would be acting ultra vires, outside of its legal power and authority, if it were to consider the economic benefit that might be achieved by other owners or other real property not the subject of the demolition application and therefore not before the HPC. The criteria for approval or denial of a demolition application that the Commission may consider is prescribed by VMC 20.510.050(A)(3)(d) and the appeal before City Council does not contest these criteria, which are expressly limited to the owner of the property in question:

Criteria for Approval of an Application for Demolition. The following criteria for approval or denial shall be considered when reviewing an Application for Demolition:

i. The extent to which the demolition of the building will have a serious adverse impact on the cultural significance of the Historic Preservation Overlay District.

ii. The extent to which the building is so deteriorated and so lacking in historical fabric, that it would not be viable to retain the historic, cultural and architectural significance of the building through rehabilitation or renovation.

iii. There is no reasonable alternative to demolition that would provide the owner with a reasonable economic return.

iv. The extent to which the denial will deprive the owner of reasonable economic use of the underlying property.

Basis of Appeal # 2 – The City Council should remand the application to the HPC to allow it to impose appropriate mitigation, if after evaluating an analysis of the proper underlying properties and redevelopment project, it concludes that demolition is warranted.

Response #2:

The prehearing guidance memo dated June 22, 2021, and provided to the Commission in advance of the public hearing (“Prehearing Guidance Memo”), includes the full language of VMC 20.510.050(A)(3)(e) regarding conditions that the HPC may impose upon its approval of a demolition permit. During the public hearing, legal counsel also advised the Commission that it could impose other requirements on The Historic Trust, as applicant, to expand or clarify the record before making a determination as to whether demolition was appropriate (at 2:29 in the Audio of the HPC July 7, 2021 public meeting). Furthermore, the plain language of VMC 20.510.050(A)(3)(e) does in fact limit the conditions the HPC may impose on the applicant because principals of statutory construction provide that illustrative examples are intended to limit the scope of a statute. Specifically, the provision “including but not limited to” is to be interpreted as allowing conditions similar to the designated list, not unfettered authority to apply any sort of condition at all.^[1] Enumerated conditions are expressly connected with the HPC’s scope of authority and process and do not allow the Commission to reach beyond.

The advice provided by legal counsel, as cited by the appeal, while perhaps abbreviated, was specifically responsive to additional conditions the Commission was inquiring about imposing that are not within the scope

of the enumerated conditions of VMC 20.510.050(A)(3)(e) and are outside the Commission's scope of authority defined in the powers and duties of VMC 20.220.050(D).

In the first instance, the appeal objects to counsel having advised the Chair that the Commission could not impose the condition of requiring the property to be listed on the Clark County Historic Register. This advice is correct. While the Commission is tasked under VMC 17.39.040(D)(2) and (3) with the power and duty to maintain the Clark County Historic Register ("CCHR") and to review nominations to the CCHR pursuant to the criteria specified in VMC 17.39.070, nomination of a structure for inclusion on the CCHR cannot be made without consent from the owner and such consent must be granted prior to consideration for CCHR designation by the Commission (VMC 17.39.070(B)(1)). Therefore, the very process of nominating, designating, and listing properties on the CCHR eliminates the possibility for the Commission to impose the CCHR designation on a property through the demolition application process to which the Smokestack was subject.

In terms of the claim that the HPC has authority under this VMC 20.510.050 review to impose additional mitigation measures preserving the historic significance of the Smokestack, the appeal appears to be conflating the authority of the Commission for structures to be demolished that are in fact designated on the Clark County Historic Register, as provided in VMC 17.39.080(C)(5)(g). That code section expressly grants authority to the Commission to impose mitigation measures that "may include, but are not limited to, photo documentation of the building or site, an identification plaque, use of an architectural element in new construction, moving the building, and/or buffering of the historic or cultural resource," but VMC 20.510.050, under which the HPC was reviewing the Demolition Application, grants no such option. Any historic mitigation measures to be imposed upon the applicant for the Smokestack demolition will be appropriately imposed under the State Environmental Policy Act, RCW Chapter 43.21C ("SEPA").

SEPA requires that the City consider the environmental impact of a proposal, such as the Demolition Application, before making decisions and expressly treats "historic and cultural preservation" as elements of the built environment to be considered when evaluating the impact of a land use project (WAC 197-11-447(2)(b)(vi)) under SEPA. Consideration must be given to preservation of historic sites and cultural resources in determining the environmental impact of the Demolition Application (WAC 197-11-330(3)(e)(i)) and incorporate, when appropriate, mitigation measures for historic and cultural resources in any Environmental Impact Statement (EIS) issued under SEPA (WAC 197-11-440(6)(d)(iv)).

Basis of Appeal #3 – THE HPC making a decision without having the final MDNS violated the State Environmental Policy Act (SEPA).

Response #3:

The HPC is not making a final decision on the issuance of the demolition permit and does not have the authority to issue the demolition permit. The City Building Official, assuming HPC approval, may only issue the demolition permit for the smokestack pursuant to the Demolition Application upon completion of the SEPA process and subject to mitigation measures imposed by SEPA.

The actual issuance of the demolition permit is made by the City Building Official, not the HPC, pursuant to the building code regulations of VMC Chapter 17.08, where issuance of a building permit for demolition is included in the scope of VMC 17.08.030. Permit issuance is subject to review by other departments and agencies to ensure compliance with applicable laws under VMC 17.08.110(A)(1). In the present case, the Building Official may not act on the Demolition Application and issue an actual demolition permit, subject to any conditions imposed by the HPC or by SEPA, until both approval by the Commission under the historic preservation, restoration, and reuse requirements of the VMC has been granted and until a determination of nonsignificance (DNS) or a mitigated determination of nonsignificance (MDNS) has been issued through the SEPA process.

Under WAC 197-11-704, the City's issuance of a demolition permit is an action subject to the authority of SEPA and subject to the authority of the HPC under the Heritage Overlay District requirements of VMC 20.510.050. While the Commission could fall within the SEPA definition of an "Agency" for purposes of WAC 197-11-714 as a "state or local governmental body, board, commission" etc., the definition of "Agency" for purposes of an agency that must have the final SEPA determination before taking action depends on the "Agency" taking a qualifying "Action" under WAC 197-11-704. Here the HPC is not an "Agency" because the qualifying "Action" is an agency decision authorizing a project through issuance of a demolition permit and the final authority for such permit issuance resides with the Building Official under VMC Chapter 17.08.

To determine whether a land use proposal will have a significant adverse impact on the quality of the environment, including the historic and cultural built environment, the City collects information pursuant to the SEPA Environmental Checklist prescribed by WAC 197-11-960. Question 13 of the Environmental Checklist addresses historic and cultural preservation as follows:

a. Are there any buildings, structures, or sites, located on or near the site that are over 45 years old listed in or eligible for listing in national, state, or local preservation registers? If so, specifically describe.

b. Are there any landmarks, features, or other evidence of Indian or historic use or occupation. This may include human burials or old cemeteries. Are there any material evidence, artifacts, or areas of cultural importance on or near the site? Please list any professional studies conducted at the site to identify such resources.

c. Describe the methods used to assess the potential impacts to cultural and historic resources on or near the project site. Examples include consultation with tribes and the department of archeology and historic preservation, archaeological surveys, historic maps, GIS data, etc.

d. Proposed measures to avoid, minimize, or compensate for loss, changes to, and disturbance to resources. Please include plans for the above and any permits that may be required.

To the extent the City, as Lead Agency, determines that additional expertise on archaeological and historic preservation environmental matters is required under a SEPA review, the Washington State Department of Archaeology and Historic Preservation, not the HPC, is the agency expressly designated by WAC 197-11-920(11) as providing this special expertise on which the City can rely.

The City has adopted regulations under VMC 20.790.620 giving the City substantive authority to attach express conditions on a permit or proposal approval pursuant to SEPA. Subject to 43.21C.060 RCW and 43.21C.240 RCW, the City (here the Building Official as the final issuer of the demolition permit, not the HPC) may attach conditions to the permit so long as:

1. Such conditions are necessary to mitigate specific probable adverse environmental impacts identified in environmental documents prepared pursuant to this ordinance; and

2. Such conditions are in writing; and

3. The mitigation measures included in such conditions are reasonable and capable of being accomplished; and

4. The City has considered whether other local, State or Federal mitigation measures applied to the proposal are sufficient to mitigate the identified impacts; and

5. Such conditions are based on one or more policies in Section 20.790.720 VMC and cited in the decision document.

The Commission was advised in a publicly disclosed legal memorandum dated June 14, 2021, ("SEPA Memo"), of the SEPA review process and the appropriate process available to the Commission to speak into the SEPA review process and recommend any mitigation measures. The appeal does

not contest any of the legal guidance provided to the Commission in the SEPA Memo. If the SEPA process and any mitigation provisions provided therein are deemed insufficient by the Appellant, there is a direct avenue to appeal the SEPA determination, but the adequacy and application of the SEPA determination for the demolition permit is not properly before the Council under this appeal

*[1] “[I]llustrative examples were intended to limit the scope of the statute. We apply the principle of statutory interpretation that ‘general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or “comparable to” the specific terms.’ Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (quoting John H. Sellen Constr. Co. v. Dep’t of Revenue, 87 Wn.2d 878, 883-84, 558 P.2d 1342 (1976)); see also State v. Gonzales Flores, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008) (“specific words modify and restrict the meaning of general words when they occur in a sequence” (describing the principle of ejusdem generis) (citing State v. Roadhs, 71 Wn.2d 705, 708, 430 P.2d 586 (1967))).” State v. Larson, 184 Wn.2d 843, 849, 365 P.3d 740, 743, 2015 Wash. LEXIS 1451, *7*

Request: Council is being asked to decide if the Historic Preservation Commission's decision to authorize the issuance of a demolition permit for the Academy Smokestack should be upheld or overturned.

Staff's position is that the Historic Preservation Commission appropriately applied the Vancouver Municipal Code to the record and that its decision was properly issued. The HPC followed the criteria laid out in VMC 20.510, it reviewed the documentation that was submitted into the record by the Historic Trust, and through public comment, and it properly applied the VMC criteria to the supporting documentation in reaching its decision to authorize the Building Official to issue a demolition permit.

Jason Nortz, Development Review Manager, 360-487-7844

The following is a procedural summary of this closed-record appeal. The video record, including presentations and full discussion, is available on www.cvtv.org at:

https://www.cvtv.org/vid_link/33921?startStreamAt=0&stopStreamAt=10872

At 6:42 p.m., Mayor Pro Tem Glover recused herself from the discussion and action pertaining to this item, as she sits on the board of directors for The Historic Trust.

Mayor McEnerny-Ogle stated this item is a quasi-judicial hearing, which

invokes the Appearance of Fairness Doctrine. She asked City Attorney Jonathan Young to outline the protocol for this hearing and required disclosures.

City Attorney Jonathan Young stated Council would be presiding over a closed-record appeal of the Historic Preservation Commission's (HPC) authorization of the issuance of a demolition permit for the Academy Smokestack. He stated no new testimony or evidence will be entered into the record at this appeal hearing. He stated the Council would be hearing arguments from both parties, but those arguments and the Council's decision should be based upon the record from the Historic Preservation Commission's meeting.

Mr. Young stated the Council would be asked to disclose any ex parte communication or other Appearance of Fairness issues pertaining to this matter. Mr. Young stated the City Attorney's Office conducted an email search for any emails sent or received by any member of the City Council pertaining to this application and the HPC's decision and determined there were no messages requiring disclosure.

Mr. Young then asked each member of the Council to disclose any direct or indirect financial benefit they could derive from the decision to affirm or reverse the HPC's decision; any ex parte communication they have had about this matter; and whether they are prepared to listen to all of the testimony and consider all of the evidence presented before making up their mind about the appeal.

Councilmember Fox reported nothing to disclose, but she did note she previously sat on the Historic Preservation Commission and participated in a preliminary walk-through of the site in the context of an HPC workshop, but she had not participated in any process having to do with this particular appeal.

Councilmember Paulsen reported nothing to disclose.

Councilmember Lebowsky reported nothing to disclose.

Councilmember Stober reported the appellants, Connie and Lee Kearney, contributed to his last fundraising campaign and he has made donations in the past to The Historic Trust, but he does not stand to benefit from this decision, he can be fair minded and impartial, and reported no ex parte communication to disclose.

Councilmember Hansen reported nothing to disclose.

Mayor McEnemy-Ogle reported nothing to disclose.

The hearing was opened to all members of the public present on the video conference or on the phone to provide any testimony regarding any of the Council's Appearance of Fairness disclosures. No testimony was received.

Mr. Young stated Council would first hear a background presentation from City staff, followed by up to 15 minutes of oral argument from the appellant, and then up to 15 minutes of oral argument from representatives for The Historic Trust.

Jason Nortz, Development Review Manager, presented a background presentation and an overview of the process to date. Philip Gigler, Assistant City Attorney, was also available to respond to Council questions.

Councilmember Lebowsky asked if The Historic Trust has a full 90 days to proceed with demolition if the Council upholds the HPC decision. Mr. Nortz confirmed this, stating the 90 days does not start until the demolition permit is issued.

Councilmember Stober asked if The Historic Trust is required to allow a third-party proposal to come together once the 90 days begins. Mr. Nortz stated it would be at their discretion to entertain proposals.

Mayor McEnemy-Ogle opened oral arguments at 7:15 p.m.

Appellants Connie and Lee Kearney presented their oral arguments, based on the written statement (attached) submitted in advance of the appeal hearing.

Maren Calvert then presented the oral argument on behalf of The Historic Trust.

Council asked clarifying questions of both parties regarding the parcels of the subject site, fundraising efforts, and estimates for potential stabilization efforts.

As outlined in the applicant's brief (attached) submitted in advance of the appeal hearing, Ms. Calvert presented a motion to strike four arguments presented by the appellants because they are new arguments or present new evidence not confined to the record of the HPC meeting and decision or the notice of appeal.

Council reviewed the record and considered the request to strike the following as not included in the original record:

- Council first considered the request to strike the appellants' argument that they asked the HPC to require the Trust to allow the Kearneys to conduct their own independent feasibility and cost study.

Council reviewed the documentation provided as part of HPC record. Councilmember Paulsen noted a July 23, 2021, letter to City planning staff indicates the Kearney's made request to access the site to conduct an independent analysis, and as such, he believes this argument can appropriately be considered to be part of the closed record.

Motion by Councilmember Paulsen, seconded by Councilmember Fox, and carried unanimously to deny the motion to strike the appellant argument that the appellant's asked the HPC to require the Trust to allow the Kearneys to conduct their own independent feasibility and cost study.

- Council next considered the motion to strike the appellants' argument that the repair estimates provided to the HPC were invalid or inflated.

Motion by Councilmember Paulsen, seconded by Councilmember Lebowsky, and carried 5-1 to uphold the motion to strike the appellant argument that the repair estimates provided to the HPC were invalid or inflated. Councilmember Fox voted No.

Councilmember Fox stated she recalls discussion during the HPC hearing regarding cost estimates, including other letters submitted that challenged the estimate.

- Council next considered the motion to strike the appellants' oral argument pertaining to intimidation of the Historic Preservation Commissioners during its hearing.

Ms. Calvert noted this issue was not raised in the notice of appeal. Ms. Kearney agreed they did not raise it in the notice of appeal but did raise it in the October 12 Appellant Statement to the City Council.

Councilmember Fox expressed concerns regarding how the Historic Preservation Commissioners were treated during the hearing but stated she does not see this issue has weight on the issues Council is being asked to consider under this appeal.

Motion by Councilmember Fox, seconded by Councilmember Paulsen, and carried unanimously to uphold the motion to strike the appellant argument pertaining to intimidation of Historic Preservation Commissioners.

- Council next considered the motion to strike the appellants' oral argument that Historic Preservation Commissioner Jan Bader failed to make appropriate disclosures under the Appearance of Fairness Doctrine during the HPC hearing.

Ms. Calvert stated this issue was not raised in the notice of appeal. Ms. Kearney agreed it was not raised, and stated she has no reason to believe Ms. Bader's comments during the HPC hearing were biased, but she raised it during her oral argument as evidence of the atmosphere of the HPC hearing that the appellants believe possibly contributed to the HPC making a hasty decision.

Motion by Councilmember Paulsen seconded by Councilmember Stober, and carried unanimously to uphold the motion to strike

the appellant argument regarding Commissioner Bader's Appearance of Fairness disclosures during the HPC hearing.

Mayor McEnemy-Ogle concluded oral arguments at 8:20 p.m.

Mr. Young reminded the Council if they affirm the HPC decision, the decision will stand subject only to further judicial appeal, and the Historic Trust will be allowed to move forward in the demolition process. If the Council overturns the decision, it will go back to the Historic Preservation Commission for a further hearing and consideration.

Councilmember Hansen left the meeting at 8:29 p.m.

Council considered each basis of appeal:

1. Failure to require information about and analyze the appropriate properties in applying VMC 20.510.050(A)(3)(d).
2. Failure to impose conditions on the demolition permit based on erroneous legal advice.
3. Failure to consider the final mitigated determination of nonsignificance (MDNS) through the SEPA process.

Motion by Councilmember Stober, seconded by Councilmember Paulsen, and carried unanimously to affirm the Historic Preservation Commission's decision to authorize the issuance of a demolition permit for the Academy Smokestack.

Councilmember Stober stated the Council was constrained in what it could consider in making this decision, but outside of the hearing, he stated he is thinking about the health of the community in general, and he encouraged the Historic Trust to use the next 90 days to build and repair relationships and to look for any potential solutions that may exist.

Councilmember Paulsen agreed, and he stated it is appropriate outside of the discussion on the HPC's decision to ask why there was reluctance to get a second estimate on the stabilization efforts.

Councilmember Glover returned at 9:08 p.m.

Councilmember Fox stated this was not an easy decision knowing the Council could not consider new evidence. She stated she really appreciates the work of appointed volunteers, and she was appalled by the way the Historic Preservation Commissioners were treated during their hearing on this. She stated she hopes in the future staff is able to help coach volunteer commissioners and provide support during such hearings.

Mayor McEnemy-Ogle closed the appeal hearing at 9:13 p.m.

Communications

A. From the Council

B. From the Mayor

a. Interstate Bridge Replacement Program - Executive Steering Group Update

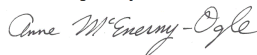
Councilmember Lebowsky disclosed she is employed by the Washington State Department of Transportation.

Katherine Kelly, Senior Transportation Policy Advisor, provided a preview of the next meeting of the Interstate Bridge Replacement Project Executive Steering Group.

C. From the City Manager

Adjournment

9:30 p.m.

DocuSigned by:

58CB15C0632F403...
Anne McEnerny-Ogle, Mayor

Attest:

DocuSigned by:

BCE6734E40E94AE
Natasha Ramras, City Clerk

Meetings of the Vancouver City Council are electronically recorded on audio and video. The audio records are kept on file in the office of the City Clerk for a period of six years.

To: Amanda Delapena
From: Connie and Lee Kearney, Appellants
Date: October 12, 2021

Re: Appeal to Vancouver City Council of the Historic Preservation Commission's July 9, 2021 decision. (PRJ-163699/LUP-80658)

Sent via email this date to Amanda.delapena@cityofvancouver.us

The record before the Council contains Appellants' appeal and attachment A. Attachment A is the written testimony Appellants provided to the Historic Preservation Commission at its July 7, 2021 hearing.

We believe the Commission's errors are clearly set out in these two documents.

We urge the Council to pay particular attention to the action by the Trust in requesting recusal of certain Commission members. (29:50 and following)

We also reference testimony by the Trust stating that \$600,000 had been pledged for smokestack stabilization. (1:49:01 and following)

Prior to the Commission's July 7 hearing we had asked the Trust many times for access to the smokestack and were refused; thus, we had no opportunity to provide testimony contradictory to that offered by the Trust as to the cost of stabilization. (Exhibit A)

We have offered to the Trust that we would fund an independent feasibility study to determine whether the smokestack can be stabilized and what the estimated cost may be. We remain willing to do so. We found a firm which specializes in the rehab of historic structures and would perform, at our expense, such study for \$37,500. We contend that the \$2.5-\$3M estimate cited by the Trust to rehabilitate the smokestack is excessive. (1:42:18 and following)

CC: Stacey Graham, Trust CEO, via email
Maren Calvert, Horenstein Law Group, via email
Jacqui Kamp, Historic Preservation Commission, via email



BUSINESS
LAND USE
REAL ESTATE
GOVERNMENT STRATEGIES

Maren L. Calvert
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(360) 597-0978 Dir. Tel. & Fax

October 12, 2021

VIA EMAIL AT: jason.nortz@cityofvancouver.us
Amanda.delapena@cityofvancouver.us

City Council
415 W. 6th Street
Vancouver, WA 98660

Re: Appeal of PRJ-163699/LUP-80658 – The Historic Trust
– Response Brief to Kearney Notice of Appeal, dated July 29, 2021

Dear City Council,

Our office represents The Historic Trust (the “Trust”) in relation to the letter of appeal filed by Connie and Lee Kearney on July 29, 2021, of the Historic Preservation Commission’s July 9, 2021, decision approving The Historic Trust’s application to demolish the Smokestack at the Providence Academy within Heritage Overlay District Number One, case number PRJ-163699/LUP-80658 (“HPC Decision”).¹

The Kearneys’ Letter of Appeal identified three alleged Errors of Fact and Law. The Kearneys claim the HPC failed to:

- (1) require information about and analyze the appropriate properties when applying VMC 20.510.050(A)(3)(d);
- (2) impose conditions on the demolition permit based on erroneous legal advice; and
- (3) consider the final MDNS prior to making a decision.

The Trust provides the following authorities and arguments in response to the Kearneys’ Letter of Appeal and respectfully requests that the City Council affirm the HPC Decision.

STANDARD OF REVIEW

Vancouver Municipal Code (VMC) chapter 20.510 governing review of demolition applications in the Heritage Overlay District explains that appeals of Clark County

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¹ The Record on Appeal (“ROA”) is available on the HPC’s website, <https://clark.wa.gov/community-planning/historic-preservation-commission>, immediately after the 7/07/21 Agenda. All references to the ROA in this brief will embed a hyperlink in the title of the document being referenced, such as “[HPC Decision](#).” Press CTRL Click on a computer or click on the blue text on a touch screen to open the ROA reference.

Historic Preservation Commission (HPC) decisions shall be appealed to the City Council.² The multitude of city code cross-references relating to appeals do not explain the standard of review the City Council is to apply.³

If subsequently appealed, the City Council's decision will be reviewed under the Land Use Petition Act ("LUPA").⁴ The standards for review under LUPA require an appellant to establish the City Council erred in one of six ways:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). "Standards (a), (b), (e), and (f) present questions of law we review de novo." *Julian v. City of Vancouver*, 161 Wn. App. 614, 623-24, 255 P.3d 763, 769 (2011) (citation omitted). Standard (c) requires a review for substantial evidence supporting the decision, which means "evidence that would persuade a fair-minded person of the truth of the statement asserted." *Id.* (Citation omitted). Under the clearly erroneous test in standard (d), the Court will determine whether it is "left with a definite and firm conviction that a mistake has been committed." *Id.* (Citations omitted). The Court is required to consider "all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." *Id.* (Citation omitted). If appealed, the City Council will be the highest forum that exercised fact-finding authority regarding the Trust's demolition application.

Alleged Error 1 – Consider Other Properties

The Kearneys contend the HPC did not properly interpret VMC 20.510.050(A)(3) and "erred by limiting its analysis to the parcel on which the Smokestack is located rather than the larger properties proposed to be redeveloped."⁵

² See [VMC 20.510.040](#).

³ ROA at [Prehearing Guidance Memo](#), p. 6-7.

⁴ See [VMC 20.210.130\(D\)\(1\)](#).

⁵ Letter of Appeal at p. 1.

Because the City Council is the legislative body that enacted VMC 20.510.050, it will be afforded substantial deference regarding the proper interpretation of VMC 20.510.050(A)(3).⁶

The Reason for the Trust's Demolition Application

The plain language of VMC 20.510.050(A)(3)(a) says it applies to buildings or structures the City Building Official has declared to be unsafe under VMC Chapter 17.32, the Unfit Buildings and Premises Code, and has ordered demolished.

The plain language of VMC 20.510.050(A)(3)(b) says it applies to “other buildings” in an Historic Preservation Overlay district, “[i]f a proposed reuse of the site requires” the demolition of that building. Demolition applications under subsection (A)(3)(b) must be accompanied by a report containing nine pieces of information.

The City Building Official declared the boiler, laundry, and smokestack on the Trust's property to be unsafe under the provisions of VMC Chapter 17.32.⁷ The Building Official ordered the boiler and laundry to be demolished and the smokestack to be demolished or repaired.⁸ Neither order was contingent upon, or otherwise related to, any “proposed reuse of the site.”⁹ That means, whether the Trust's property is redeveloped or not, the buildings have to be demolished – and in the case of the smokestack, demolished or repaired. If the property is not redeveloped – The Trust does not have the option of simply leaving the buildings in their current form. The Trust must act.

The plain language of VMC 20.510.050(A)(3)(b), therefore, does not apply.

As the record reflects, The Trust sought permission to demolish the boiler, laundry, and smokestack because they are unsafe buildings and seismically stabilizing them is not reasonably economically feasible.¹⁰ The Kearneys' unsubstantiated assertion that “the only reason The Historical Trust has sought a permit for demolition is to allow Aegis Phase II to be developed,”¹¹ therefore, is contrary to the substantial evidence in the record and simply not true.

Ultimately, however, the Kearneys' appeal on this point should fail either way. Whether the Trust's application should have been submitted under VMC 20.510.050(A)(3)(a) or VMC 20.510.050(A)(3)(b) is irrelevant. Either way, the

⁶ See *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011) (court deferred to city's determination of what constitutes “demonstrated need” under city code and found the City properly interpreted its own ordinance).

⁷ ROA at [Exhibit 4: A-T Economic Feasibility Report – Part 2](#), p. 24.

⁸ *Id.* at p. 32.

⁹ *Id.*

¹⁰ ROA at [Exhibit 4: A-T Economic Feasibility Report – Part 2](#) p. 24-40 and at Applicant Presentation, p. 12-14.

¹¹ Letter of Appeal at p. 1.

HPC Decision criteria were the same. The HPC Decision for all demolition applications are governed by the four criteria in VMC 20.510.050(A)(3)(d).¹²

HPC Decision Criteria

The Kearneys focus on the third and fourth criteria in VMC 20.510.050(A)(3)(d)(3) and (4).¹³

Criterion 3 requires the HPC to consider whether there is a “reasonable alternative to demolition that would provide the owner with a reasonable economic return.” The Kearneys contend the “reasonable alternative” the HPC should have considered is the redevelopment of all of the Trust’s properties.¹⁴ The Kearneys are wrong.

As explained above, the City Building Official declared the boiler and laundry unsafe and ordered them demolished.¹⁵ The Building Official’s order constitutes a determination that the building cannot be reasonably repaired or remedied. *See* VMC 17.32.060.C (“If, in the judgment of the building official, the dwelling, building, structure or premises cannot be reasonably repaired or remedied, the building official may order its demolition...”).¹⁶

Similarly, the City Building Official declared the smokestack unsafe, and ordered it to be demolished or repaired by October 31, 2021.¹⁷ HPC was required to consider whether repairing and seismically stabilizing the Smokestack – in

¹² Because the City Building Official ordered the smokestack to be demolished or repaired, the City asked the Trust to provide the report and nine data points outlined in [VMC 20.510.050\(A\)\(3\)\(b\)](#) with its application, to allow the HPC to assess whether seismically stabilizing the smokestack was reasonably feasible. ROA, [Staff Report](#), at pp. 3-4. The Trust did not agree that subsection (3)(b) applied but recognized the decision criteria were the same either way. So, the Trust reserved its rights regarding this issue and provided the requested report and information. ROA, [Exhibit 4: A-T Economic Feasibility Report-Part 1](#), at p. 2. The HPC found that the Trust’s application “satisfied the requirements of VMC 20.510.050(A)(3)(b). ROA at [HPC Decision](#), p. 1. (“Findings” section).

¹³ Letter of Appeal at p. 1.

¹⁴ *Id.*

¹⁵ ROA at [Exhibit 4: A-T Economic Feasibility Report-Part 2](#), p. 24.

¹⁶ The full text of subsection C is provided below:

If, in the judgment of the building official, the dwelling, building, structure or premises cannot be reasonably repaired or remedied, the building official may order its demolition, provided that the building official shall withdraw the order to demolish if the building owner repairs or remediates the condition within a reasonable time. The following standards shall be followed in substance in ordering repair, remediation, vacation or demolition of buildings, structures or premises:

1. If the unfit dwelling, building, structure or premises is 40 percent or more damaged or decayed or deteriorated in value, it may be ordered demolished. “Value” as used herein shall be the valuation placed upon the building or structure for purposes of general taxation.
2. If the cost of repair or remediation would exceed the value of the dwelling, building, structure or premises, it may be ordered demolished.
3. If the dangerous or unfit building, structure or premises cannot be repaired or remedied so that it will no longer exist in violation of the terms of this chapter, it may be ordered demolished.
4. If the unfit building, structure or premises is a fire hazard, it may be ordered demolished or abated.

VMC 17.32.060.C (emphasis added).

¹⁷ ROA at [Exhibit 4: A-T Economic Feasibility Report – Part 2](#), p. 32.

accordance with the City Building Official's Order – was a “reasonable alternative” to demolition that would provide the Trust with “a reasonable economic return.”¹⁸

The record is replete with evidence that it would not.¹⁹ Because the smokestack contains only 90 square feet, which would likely be filled with structural stabilizing materials – and because signs, billboards, and cell towers are prohibited uses in the Heritage Overlay District One – the repaired/stabilized Smokestack could not be used for *any* economic purpose.²⁰ It would only serve as a monument.²¹ Based on these facts, the HPC found it was impractical for the Trust to renovate, restore, or reuse the structure, pursuant to the decision criteria of Subsection (A)(3)(d).²²

Applying the fourth decision criterion to the facts of this case is straightforward. Subsection (A)(3)(d)(4) requires the HPC to consider “[t]he extent to which the denial will deprive the owner of reasonable economic use *of the underlying property*.” The Kearneys’ assertion that the HPC should consider *all* of the Trust’s real property, wherever located is directly contrary to this express code provision. City Code expressly instructs the HPC to consider the reasonable economic use of the property that is underlying – or *beneath* – the boiler, laundry, and smokestack.²³ Other outlying properties are not relevant to the analysis.

Because the HPC properly analyzed and applied the four decision criteria of VMC 20.510.050(A)(3)(d) to the facts of this case, the HPC Decision should be affirmed.

Alleged Error 2 – Conditions of Approval

The Kearneys’ second allegation of error contends that after the record was closed, the HPC received improper legal advice and, therefore, erred in failing to impose various conditions of approval.²⁴ Specifically, the Kearneys contend the HPC should have (a) required the Trust property to be “listed on the Clark County Heritage Register” and (b) imposed various unspecified “mitigation measures to

¹⁸ ROA at [Exhibit 1: Letter to the Historic Trust](#), p. 2 and [HPC Hearing Video](#) of July 7, 2021, at 1:37:52 (Building Official, Sree Thirunagari, testified that even though the smokestack is not a building, it still must meet all structural safety and stabilization requirements of the code), at 1:43:30 (Assistant City Attorney, Becky Rude, advised: “The premise before the Commission is that this structure has been deemed, um, unsafe and it either has to be demolished or repaired and so the alternative to demolition is repair and that is the economic analysis, is it economically feasible to repair the structure in such a way that will make it safe and satisfy the other city code requirements of having a stable structure...”), and at 1:44:10 (Ms. Rude: “you’re getting a structure that, um, the reason that (unintelligible) stabilization be economical is because the building can’t be left the way it is, it either has to be made safe or it has to be torn down”).

¹⁹ ROA at [Exhibit 4: A-T Economic Feasibility Report-Part 1](#), pp. 7-8, 12-13; at [Exhibit 4: A-T Economic Feasibility Report-Part 2](#), p. 186, 192, 198, 199; at [Staff Presentation](#), p. 10.

²⁰ ROA at [Exhibit 4: A-T Economic Feasibility Report-Part 1](#), p. 7.

²¹ *Id.* at p. 11.

²² ROA at [HPC Decision](#) at 2 (“Findings”).

²³ See ‘underlying,’ Dictionary.com Unabridged (“lying or situated beneath, as a substratum”) available at <https://www.dictionary.com/browse/underlying>, accessed on 9/28/2021.

²⁴ Letter of Appeal at p. 2.

preserve the historic significance of the Smokestack.”²⁵ As discussed during the July 7 hearing, these conditions lie outside the HPC’s jurisdiction and it would have been inappropriate for the HPC to impose them.

The HPC did not receive inaccurate legal advice after the record closed at 2:28:10 in the video of the hearing, as the Kearneys contend. First, at 2:13:03 of the hearing, the *public comment period* closed, thus initiating the Commissioner Deliberations portion of the hearing.²⁶ The closing of the public comment period did not close the record of the proceedings.

Second, the advice the HPC received at 2:28:10 was not wrong. At 2:27:30, Commissioner Chair Gregg asked Assistant City Attorney Becky Rude if the Commission needed to make a general motion to demolish or if they could “build some recommendations into it.” At 2:28:10, Ms. Rude replied: “The guidance for the Commission’s decision, as you know, is in the Vancouver Municipal Code so the Commission’s decision is restricted to the um, the criteria that are in the code and the record before it.”²⁷ Ms. Rude then explained the first question is whether the...applicant’s report is complete. If it is, then the Commission shall consider the four criteria in VMC 20.510.050(A)(3)(d). There is nothing inaccurate about that advice.

At 2:30:00, a Commissioner asked whether the Commission could require the Trust property to be listed on the Clark County Historic Register (CCHR). Ms. Rude generally discussed the conditions of approval outlined in VMC 20.510.050(A)(3)(e), and then, at 2:32:00, replied “no.”²⁸ Ms. Rude did not explain why she said “no” – but she also did not say or suggest the Commission could only impose the conditions outlined in VMC 20.510.050(A)(3)(e). Indeed, if she had done so, Ms. Rude would have directly contradicted her previous legal advice.

Two weeks before the July 7 HPC hearing, Ms. Rude advised the HPC, in writing, that its ability to impose conditions of approval was not limited to the two conditions listed in VMC 20.510.050(A)(3)(e). Specifically, Ms. Rude advised: the conditions the HPC “may impose on issuance of a complete or partial demolition permit it has approved for a structure in the Historic Preservation (Heritage) Overlay District *include, but are not limited to*” delaying the effective date by up to 90 days and requiring additional information from the applicant.²⁹ The Kearneys’ assertion that the HPC received improper legal advice is contrary to and not supported by the substantial evidence in the record.

²⁵ *Id.*

²⁶ The video of the HPC hearing on July 7, 2021, is available on YouTube at [HPC Hearing Video](#) at 2:13:03.

²⁷ *Id.* at 2:28:10.

²⁸ [HPC Hearing Video](#) at 2:28:10.

²⁹ ROA at [Prehearing Guidance](#) Memo, p.5

Furthermore, as explained during the July 7 hearing, the conditions the Kearneys wish the HPC had imposed lie outside the HPC's jurisdiction and authority.

When asked of the Commission could require the Trust to place the smokestack on the CCHR, Ms. Rude responded that type of condition was not authorized by city code.³⁰ She was right. VMC 17.39.040.B.1 expressly provides: "[t]he owner must consent to placement of the nominated resource prior to consideration for designation" on the CCHR. Thus, the HPC is constitutionally prohibited from requiring the Trust to place the smokestack on the CCHR against its will. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-606, 133 S.Ct. 2586 (2013) (the unconstitutional conditions doctrine prevents the government from leveraging its legitimate interests by imposing "[e]xtortionate demands" as conditions of approval to "pressure a[] [land]owner into voluntarily giving up property" rights).³¹

The Kearneys' desired second condition of approval requiring the Trust to take "mitigation measures to preserve the historic significance of the Smokestack," is also outside the scope of HPC's authority.³²

State law directs municipal governments to consider mitigation measures for the loss of historic and cultural resources, through project and nonproject actions, under the State Environmental Protection Act (SEPA).³³ As explained below, HPC's decision criteria do not include SEPA analyses or historic loss mitigation measures.³⁴ Instead, City Council exercised its legislative authority when drafting city code to place these environmental considerations on the planning official.³⁵ City Council then expressly authorized HPC to weigh in and provide its opinion for

³⁰ [HPC Hearing Video](#) at 2:59:55 and 2:32:00.

³¹ *See also id. citing Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U. S. 583, 592-593, 46 S. Ct. 605, (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207, 13 S. Ct. 44 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"); *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S. W. 3d 620, 639 (Tex. 2004) ("The government cannot sidestep constitutional protections merely by rephrasing its decision from 'only if' to 'not unless'").

³² [HPC Hearing Video](#) at 2:28:10.

³³ "Actions fall within one of two categories:" a project action and a nonproject action. WAC § 197-11-704(2). A project action "involves a decision on a specific project, such as a construction or management activity located in a defined geographic area." *Id.*

³⁴ ROA at [Prehearing Guidance](#) Memo, p. 4 & pp. 8-9 (regarding HPC's public comment on the Trust's SEPA application)

³⁵ Under WAC 197-11-050, the City of Vancouver is the "lead agency" with responsibility for complying with SEPA and its procedural requirements. [VMC 20.790.130](#) explains the City planning official is responsible for supervising compliance with any SEPA threshold determination.

the planning official's consideration.³⁶ HPC may also comment on a SEPA proposal pursuant to VMC 20.790.410, VMC 20.790.430, and VMC 20.790.440.³⁷

Given these provisions of State law and city code, it would be inappropriate and outside HPC's jurisdiction and authority to impose SEPA-historic loss mitigation conditions of approval on the Trust – thereby forcing the hand and restricting the City's decision-making authority under VMC 20.790.130.³⁸

The conditions of approval proposed by the Kearneys, therefore, lie outside the HPC's jurisdiction and authority. The HPC did not receive improper legal advice and did not err in deciding not to impose conditions of approval that lay outside its jurisdiction and authority. The HPC Decision should be upheld.

Alleged Error 3 – Failed to Consider the Final MDNS

Finally, the Kearneys contend that because the City's mitigated determination of non-significance was not final and was not available to the HPC prior to issuing the HPC Decision, the HPC Decision violates SEPA. The Kearneys, again, misunderstand the law.

The Kearneys correctly cite WAC 197-11-055(2)(c), which requires "appropriate consideration of environmental information [to] be completed before an agency commits to a particular course of action." The Kearneys incorrectly conclude, however, that this (and other) regulations require the HPC to wait for and consider the MDNS before entering its decision. This is not true – for three reasons.

First, the HPC's decision criteria for all demolition applications are listed in VMC 20.510.050(A)(3)(b). None of the four decision criteria require HPC to analyze environmental concerns or SEPA regulations.

Second, under city code and the Interlocal Agreement between the City and Clark County, the City is the "lead agency" with responsibility for complying with SEPA and its procedural requirements, and City Council appointed the City's planning official – not the HPC – to supervise compliance with any SEPA threshold determination. *See* WAC 197-11-050; WAC 197-11-930; VMC 20.790.130.³⁹

³⁶ *See* [VMC 17.39.040.D.8](#) (HPC may comment on "all applications for approvals, permits environmental assessments or impact statements, and other similar documents pertaining to identified historic or cultural resources or adjacent property(ies) upon staff request").

³⁷ *See also* [VMC 20.790.440.C & D](#) (addressing timeliness of consulted agency responses to City request for comments and inability to object or challenge City decisions if consulted agency does not timely respond).

³⁸ [VMC 20.790.130.C](#) ("No City department shall prepare or require preparation of a DNS or EIS in addition to that prepared or required by the lead agency, unless required under 197-11-600 WAC.")

³⁹ *See* Interlocal Agreement by and between Clark County and the City of Vancouver, WA concerning Cultural and Historic Resources, dated July 21, 2020 (the parties agreed to continue managing historic preservation objectives as codified in County and City Code), available at: https://clark.wa.gov/sites/default/files/dept/files/council-meetings/2020/2020_3Q/SR096-20.pdf.

Third, the HPC Decision is not a final action or final decision on the Trust's demolition permit application. The Trust's demolition permit applications are, arguably, a "project action" under SEPA.⁴⁰ State law requires lead agencies to consider environmental information "before an agency commits to a particular course of action" on project actions.⁴¹

Under city code, HPC does not make the final decision on or "commit to a particular course of action" on demolition permits. The City Building Official does.⁴²

The HPC is authorized to review and render its decision on a demolition permit application related to structures in Heritage Overlay District One. VMC 17.08.110.A.1 (demolition permit applications "may be reviewed by other departments and agencies to verify compliance [with] any applicable laws in this jurisdiction"); VMC 20.510.050 (requiring HPC review and decision on demolition permit applications within a Historic Preservation Overlay District).⁴³ The HPC's decision is then forwarded to the City Building Official – along with other required materials – for his review and decision.⁴⁴

The HPC Decision, therefore, is not a final agency action on a specific project under WAC 197-11-055(2)(c). It is merely one datapoint the City Building Official will consider when deciding to approve or deny the Trust's the demolition application.⁴⁵

The Kearneys may contend there is a "snowballing effect" from the HPC Decision that renders the ultimate approval of the demolition a fait-accompli. But this argument overstates reality.

Because SEPA is substantially similar to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347, courts routinely look to federal case law for guidance on interpreting SEPA requirements. *See Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 525-26, 309 P.3d 654, 661 (2013). "Under NEPA, agencies must complete environmental review prior to the

⁴⁰ See footnote 33, above.

⁴¹ WAC 197-11-055(2)(c)

⁴² See [VMC 17.08.030](#) (the provisions of this chapter regulate construction and demolition of every building or structure in the City); VMC 17.08.170.A ("It shall be unlawful for any person, firm, or corporation to ...demolish or occupy any building, structure or equipment regulated by this code ...in conflict with or in violation of any provision of this code"); VMC 17.08.080 ("The building official shall issue permits pursuant to this code."); VMC 17.08.105.C (building official or his/her designee approves application); VMC 17.08.110.A.2 & C (building official issues permits); VMC 17.08.170.B ("Violations of this code are subject to enforcement by the Building Official").

⁴³ See also [VMC 20.510.030.C](#) and [20.510.040](#) (requiring approval of the HPC to demolish buildings on the "State Heritage Register or National Register of Historic Register [sic]," subject to appeal to the City Council)' VMC 17.39.040.D.5 (empowering HPC to "[p]rovide advisory review of structures located in the city's heritage overlay districts per Chapter 20.510 VMC").

⁴⁴ See e.g., [VMC 17.08.100.C & G](#) (listing requirements for "projects involving plan review by the Fire Department").

⁴⁵ See [VMC 17.08.100](#) (listing required items for building construction and demolition permit applications); VMC 17.08.100A.4 (requiring plans and "other data as required elsewhere in this code or technical codes") & A.11 (other data and information required by the building official).

‘go-no go’ stage of the project, which is to say before any “irreversible and irretrievable commitment of resources.’” *Id.* (Citations omitted).

“Preliminary steps that retain an agency's authority to “change course or to alter the plan it was considering implementing” are not “actions” requiring NEPA environmental review.” *Id.* Where an agency retains “absolute authority to decide” how to proceed, the project has not reached the ‘go-no-go’ stage. *See id.*

Here, the HPC Decision does not represent an irreversible and irretrievable commitment of resources. The City Building Official retains absolute authority to decide whether to approve the Trust’s demolition applications, or not. The HPC Decision is merely one municipal agency’s input the Building Official must consider.

Moreover, State SEPA regulations expressly provide that where – as here, one agency reviews or comments on the actions of another agency – the commenting agency (here HPC) is exempt from conducting a SEPA review. *See* WAC 197-11-800(22) (“Any activity where one agency reviews or comments upon the actions of another agency or another department within an agency shall be exempt.”)⁴⁶

In short, because the HPC Decision is not a “final” government decision and the City Building Official still retains absolute authority to approve or deny the Trust’s demolition permit applications, HPC was exempt from and was not required to conduct an environmental analysis or to consider City staff’s MDNS before entering the HPC Decision.

The Kearneys’ appeal based on alleged error 3 should be denied.

Preservation Opportunities

Although not identified as an error on appeal, the Kearneys attempt to raise new arguments in the Letter of Appeal, under the heading “preservation opportunities.” Specifically, the Kearneys assert the Trust’s seismic stabilization repair estimates were inflated and urge the City Council to require the Trust to allow the Kearneys on Trust property to conduct an independent cost analysis.⁴⁷ The Kearneys supplement this argument with their letter submitted to City Council on October 12, 2021. The Trust objects to these arguments because they were not raised during the proceedings below and these appeal proceedings are required to be conducted upon a closed record.

⁴⁶ *See also* [HPC Hearing Video](#) at 2:29:31 – 2:29:50 Assistant City Attorney, Becky Rude, expressly advised which four criteria were before the Commission for decision or consideration and that the ‘outcome of the demolition in terms of the environmental mitigation or other mitigating factors are not part of the equation for that consideration.’”

⁴⁷ Letter of Appeal at pp. 2-3.

Closed Record Appeal

Prior to the HPC hearing on July 7, 2021, Assistant City Attorney Becky Rude explained the appeals process for the HPC Decision. In that analysis, Ms. Rude explained: “City Council hears land use appeals pursuant to VMC 20.220.030(A)(5), which prescribes the form and manner of such appeals as being in accordance with those set forth in VMC 20.210 regarding land use decision making procedures.”⁴⁸ “The form of appeal submittal is provided in VMC 20.210.130(A),” and the appeal fee is \$1,969 for “all other” appeals.⁴⁹ Ms. Rude’s opinion continued, explaining:

Although the appeals process described here requires classification as a Type I, II, III, or IV land use decision for purposes of determining who has standing to appeal (VMC 20.210.130(B)), **only the form of Type III appeal (VMC 20.210.130(B)(3)) fits with the appeal process for this situation** (VMC Table 20.210.130-1, to City Council with further appeal to Superior Court...⁵⁰

The Kearneys’ appeal acknowledges that it was filed pursuant to VMC 20.210.130.B.3.⁵¹ Table 20.210.130-1 provides that Type III applications are appealed to City Council as closed record hearings.⁵²

A closed-record appeal hearing before the City Council shall be limited to argument from the appellant, the applicant and city staff, and deliberation by the City Council. **Argument and deliberation shall be limited to the record established at the original open-record hearing.** The record shall consist of testimony and deliberation at the original hearing as recorded by an audio/visual tape or transcript certified as accurate and complete, any other materials submitted into the record, and the final order being appealed.

VMC 20.210.130.C.3.b (emphasis added).

The Kearneys appeal of the HPC to the City Council, therefore, is a closed record appeal, confined to the facts and record presented to the HPC.

The Kearneys had the opportunity to submit written and oral comments to the HPC for its consideration during the July 7 hearing, and they did so.⁵³ The Kearneys, however, did not argue during the proceedings below that the Trust’s repair and

⁴⁸ ROA at [Prehearing Guidance](#) Memo, p. 7

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Letter of Appeal at p. 1.

⁵² [VMC 20.210.130](#),

⁵³ Letter of Appeal at p. 1, referring to ROA at [Public Comments](#), pp. 5-7.

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seismic stabilization costs estimates were inflated. Nor did they ask the HPC to require the Trust to allow the Kearneys to conduct their own independent feasibility and cost study.⁵⁴

City Council should reject the Kearneys' attempt to raise new issues on appeal because doing so violates city code. *See* VMC 20.210.120(a)(4) (appellants must provide a "statement demonstrating that the specific issues raised on appeal were raised during the period in which the record was open"). *Accord Wells v. Whatcom Cnty. Water Dist.*, 105 Wn. App. 143, 154, 19 P.3d 453, 458 (2001) (striking evidence offered during the land use appeal that was not presented to the hearing examiner and thus, was not in record on appeal; granting sanctions and costs associated with motion to strike to objecting party).

In the event the City Council is inclined to consider the Kearneys' new arguments, the Trust requests leave to supplement this brief and its oral argument to refute the Kearneys' late-proffered information and arguments.

For all of the reasons stated above and to be discussed during a hearing on this appeal, The Historic Trust respectfully requests that the HPC Decision be affirmed in all respects. Thank you.

Sincerely,



MAREN L. CALVERT

⁵⁴ *See id.* *See also* Kearneys' October 12, 2021, letter to City Council attempting to raise these arguments.