FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner Files:
	MUP-18-020 (DR, W) &
SAVE MADISON VALLEY	**S-18-011**
of a threshold determination, decision, and code interpretation issued by the Director, Department of Construction and Inspections	Department Reference: 3020338-LU

Introduction

The Director ("Director") of the Department of Construction and Inspections ("Department") issued a State Environmental Policy Act ("SEPA") Determination of Non-Significance ("DNS") and design review approval for construction of a six-story structure ("Decision") at 2925 E. Madison Street. Save Madison Valley, a citizens' group, ("SMV" or "Appellant") timely exercised its right to appeal the Decision and DNS. The Appellant also appealed a Land Use Code Interpretation ("Interpretation") issued by the Director related to the proposal subject to the DNS and Decision. The Code Interpretation was affirmed in a decision by the Deputy Hearing Examiner ("Examiner") in an "Order on Motion to Dismiss" dated November 19, 2018 and the appeal of that decision was dismissed.

The appeal hearing was held on December 10, 11, 12, 13, and 17, 2018 and February 5 and 6, 2019, before the Deputy Hearing Examiner ("Examiner"). The Appellant was represented by Claudia Newman and Bryan Telegin, attorneys-at-law; the Applicant, Velmeir Madison Co. LLC ("Velmeir" or "Applicant"), was represented by Patrick Mullaney and Michelle Rusk, attorneys-at-law; and the Director was represented by William Mills, Land Use Supervisor and Magda Hogness, Senior Land Use Planner. The parties submitted written closing arguments on February 20, 2019, and the record closed on that date.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. After considering the evidence in the record and reviewing the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The subject site is addressed as 2925 E. Madison Street. The site is approximately 40,422 square feet in size and is currently utilized by a single-story retail nursery with a parking lot known as City People's Garden Store.[1]

[1] Exh. 14 at 2.

2. Site grades are relatively flat on the western half of the site and steep slope on the eastern half. The site slopes down from west to east across the site, with a total change in elevation of approximately 40 feet.[2] The steep hillside is forested with trees and vegetation.

3. The site is located in the Madison Valley Neighborhood, which is characterized by commercial and retail uses along E. Madison Street, and single-family neighborhoods in the surrounding area. The Arboretum is to the north of this area, and Madison Park to the northeast. The Bush School campus is also a short distance east of the property.[3]

4. The site is zoned Neighborhood Commercial (NC2P-40 and NC2P-30). Zoning patterns surrounding the site are as follows: 1) North is Single Family (SF-7200), NC2P-40 and LRI; 2) south is single family (SF-5000); 3) west is NC2P-40, LRI; and 4) south is single family (SF-5000). [4] The site abuts a single-family residential street and the commercial district on E. Madison.

5. Directly east and at the bottom of the steep vegetated hillside on the site is a single-family neighborhood known as the "Dewey Bowl" or "Mercer Bowl." This is a small neighborhood of approximately 18 single-family homes on flat bottom land that once contained a salmon stream that flowed into Union Bay.[5] On the north side of the bowl is another steep hillside that contains public greenspace owned by the City known as the Mercer Madison Woods. On the bottom flank of that slope is the Madison Valley Pea Patch, known informally as the "Mad P-Patch." The Mad P-Patch is a plot of community gardens cultivated by neighborhood members. The garden contains 22 individual plots, providing fresh fruits and vegetables to families and friends of the plot farmers, as well as sizeable contributions to the local food bank. It has been in existence since 2001.[6]

6. Between this northerly area and the project site to the west is a triangular piece of land, also a steep hillside, owned by Seattle Department of Transportation ("SDOT"). It is covered with invasive Himalayan blackberry.[7]

7. The terrain of the hillside area of the site is not naturally occurring. East Madison Street was built on an elevated wood-frame trestle that bridged the valley (and the stream). Eventually, fill was brought in to completely bury the trestle, providing a steep slope up to E. Madison and eliminating the stream through the valley. The SDOT street grade profile shows that up to 45 feet of vertical fill was installed to replace the trestle bridge with a fill

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[2] Exh. 19, App. B at 2.
[3] Exh. 14 at 2.
[4] *Id.*
[5] Exh. 93 Velmeir/Madison Code Interpretation Response, *Seattle's Street Railway System and the Urban Form, Lessons from the Madison Street Cable Car* at 27 (C. Veka 2007).
[6] Testimony of Wallis Bolz (Dec. 12, 2018).
[7] Exh. 53 at 6.

embankment creating an earthen dam.[8] At the time this work was done it was considered legal grading.[9] As stated by a publication in the record,

> Around 1905, the Madison Street trestle over the rushing salmon stream was replaced by an earthen dam and became a permanent road. The rushing salmon stream dried up, the remaining trickle was routed through a pipe.[10]

The project site is part of this structure. The City's old permit files indicate that legal grading, including fill placement, has occurred at least three times on the site since the 1905 era.[11]

Proposal

8. The proposal is for a six-story structure containing 82 residential units, a two-story parking garage, and a retail grocery store of 25,850 square feet. The proposal would provide 140 spaces for commercial and residential parking on-site below and at-grade, as well as a loading dock for commercial deliveries to the grocery store. A pedestrian hill climb is also proposed on the adjacent SDOT property.[12]

9. The building would occupy a 32,568 square-foot footprint on the 40,422 square foot site. The site has frontage on E. Madison Street, Dewey Place East, and an unimproved portion of E. Mercer Street. East Madison Street is a designated arterial.[13] Access for E. Mercer dead-ends Dewey Avenue due to steep topography. That area is owned by SDOT and is the area of the proposed hill climb.

10. Development along East Madison Street in the area includes residential and mixed-use buildings. To the northwest and across E. Madison Street is a 3-story masonry residential building, the Madison Loft Condominiums. Adjacent to the southwest is a two-story wood frame structure, the Washington Park Art Studios. To the south and east of the project site are single family residences, as the zoning transitions to single family below the steep slope down to Dewey Avenue.[14]

11. The proposal went through extensive review. The following is a chronology of review:

- The applicant submitted for early design guidance ('EDG") in May 2016;
- Three EDG meetings followed in July 13, 2016, October 26, 2016, and January 25, 2017.

[8]Exh. 19, App. B at 4.
[9] Exh. 81, App. D.
[10] Exh. 93.
[11] Exhs. 89, 90, and 91.
[12] Exh. 14 at 2.
[13] Exh. 14 at Attachment 1 p.2.
[14] Exh. 14 at 2.

- The applicant submitted a MUP application with Design Review and SEPA components in April 2017.
- A public meeting was held on June 6, 2017 for public comment prior to the SEPA determination;
- The Design Review Board held its Recommendation meeting on September 13, 2017.[15]

12. There were some core issues that remained controversial throughout the review of the project and on which the Design Review was focused: 1) height, bulk, mass, and scale; 2) response to context and topography; 3) site features and existing tree canopy; and 4) trash, vehicle access, and loading access. [16]

Design Review Process

13. The design review process was dominated by a height, bulk and scale discussion between the Design Review Board ("Board"), the Applicant, and the public, the essence of which was to examine ways of fitting a six-story building in an area that transitions into a single family neighborhood. Given the large size of the building on the steep slope with single family homes in the bowl below, the resulting effect has been described by the residents and users of the neighborhood as a "towering presence," the scale of which is incongruent with the single family neighborhood. The Board was concerned that the massing needed to better transition to respond to the single family zone.[17]

14. Due to the irregular shape of the property, the Applicant was able to use a code-compliant alternative for allowing calculation of building height that essentially allows the site to be considered flat for purposes of calculating building height under the average grade level calculation.[18] The average height calculation allows for the full 30 or 40 foot height at the top of the slope, plus an additional bonus.[19] The Applicant is permitted to grade the steep slope to create several floors below the grade of E. Madison Street.

15. The Board held an Early Design Guidance ("EDG") meeting on the proposal on July 13, 2016, at which it heard the Applicant's analysis of the site and proposal as well as comments from the public. The written and oral public comments included concerns about the project's height bulk and scale, building frontage on Dewey, existing tree canopy, trash, vehicular access and loading location, compatibility with the neighborhood, and other issues. The Board recommended that: 1) additional setbacks should be provided to respond to topography; 2) Applicant should attempt to save some of the existing trees on site; 3) Applicant should study different alternatives on Dewey side, rather than two stories of elevated parking; and 4) Applicant should study alternatives for trash pick-up, vehicular

[15] Exh. 14 at 2.
[16] Exh. 14.
[17] Exh. 14 at 10.
[18] Exh. 61 at G002.
[19] *Id.*

access, and loading, with a view that designing pedestrian character of Madison Street is critical to address the priority of the pedestrian realm.[20]

16. The Board held a second EDG meeting on October 26, 2016, at which additional public comments were received. The Board reviewed changes to the proposal by the Applicant. While the frontage on Madison appeared to the Board to be appropriate in scale, the Dewey frontage continued to present problems, as it presented a blank wall to the neighborhood, with the potential for light and glare impacts to the residential neighborhood. The Board acknowledged that the Applicant had provided an additional setback but echoed the neighborhood concern over loss of tree canopy. The Board liked the idea of splitting the loading and vehicle access points, but asked for more information.[21]

17. The Board held a third EDG meeting on January 25, 2017. The Board again took public comment. The Board strongly supported the Applicant's rearrangement of uses, specifically the addition of townhouse units along the Dewey frontage, which it felt better reflects the residential character of the neighborhood. The Board recommended that the Applicant continue to review options for the appearance of the façade of the townhouses, noting that they appeared "shallow." The Board was supportive of the streetscape treatment along Dewey, which included terraced retaining walls, railing design and layered planting, all of which reflected a residential character. As far as access, the Board noted that the code-compliant access solely off Dewey was the least desirable in terms of pedestrian circulation conflicts and visual impacts. The Board discussed two other options: both a split access option (partially on Dewey and partially on Madison), and a single access off Madison. Regarding tree canopy, the Board deferred to the Department's arborist study recommending removal of the canopy. The Board stated a preference for the addition of evergreens to the landscape plan, to provide a year-around buffer.[22]

18. The Board's Recommendation meeting took place on September 13, 2017. The Board again took public comment and reviewed the Applicant's design packet.[23]

19. The Board identified Priority Guidelines but recognized that all guidelines remained applicable.[24] Recognized priority guidelines from the December 2013 Seattle Citywide Guidelines were:

- CS1 Natural Systems and Site Features: Use natural systems/features of the site and its surroundings as a starting point for project design.
- CS2 Urban Pattern and Form: Strengthen the most desirable forms, characteristics, and patterns of the streets, block faces, and open spaces in the surrounding area.

[20] Exh. 14 at 6-7.
[21] Exh. 14 at 10-11.
[22] Exh. 14 at 14.
[23] Exh. 14 at 14-20.
[24] Exh. 14 at 20.

- CS3 Architectural Context and Character: Contribute to the architectural character and neighborhood.
- PL1 Connectivity: Complement and contribute to the network of open spaces around the site and the connections among them.
- PL3 Street Level Interaction: Encourage human interaction and activity at the street level with clear connections to building entries and edges.
- PL4 Active Transportation: Incorporate design features that facilitate active forms of transportation such as walking, bicycling, and use of transit.
- DC 1 Project Uses and activities: Optimize the arrangement of uses and activities on site.
- DC 2 Architectural Concept: Develop an architectural concept that will result in a unified and functional design that fits well on the site and within its surroundings.
- DC 3 Open Space Concept: Integrate open space design with the building design so that they complement each other.
- DC 4 Exterior Elements and Finishes: Use appropriate and high quality elements and finishes for the building and its open spaces.[25]

20. With respect to the Dewey frontage, the Board acknowledged the public's concern with the height, bulk, and scale of the proposal and recognized the site and change of topography as challenging. The Board ultimately concluded that the Applicant had done a thoughtful job of modifying the proposal to address previous comments. The Board supported the overall design advancement and recommended changes to the upper setbacks along the Dewey frontage to better differentiate the lower and upper massing.[26]

    a. The Board acknowledged that the setback from Dewey had decreased with the addition of the townhouses on the Dewey frontage, but supported the change from the parking garage façade. The Board approved of the facial treatments and the quality of materials.[27]

    b. The Board recommended the upper level setback at the clerestory was not adequate and had too many surface treatments. The Board recommended a condition to increase the setback at the clerestory setback and to limit the variation of color to massing shifts.[28]

21. With respect to vehicular access the Board gave the following guidance:[29]

    a. The Board noted that both SDOT and the Department supported a dual access proposal, allowing for residential traffic to ingress and egress on Dewey, while grocery store traffic ingress and egress would be on Madison.

[25] Exh. 14 at 20-24.
[26] Exh. 14 at 18.
[27] Exh. 14 at 18.
[28] Exh. 14 at 18.
[29] Exh. 14 at 19.

b. The Board agreed that residential trash pickup along Dewey from each townhouse was inappropriate, since it is a narrow street. Pick-up of trash will occur from one bin inside the garage entrance on Dewey Avenue.

c. The Board agreed to two garage doors on Madison Street, to allow for a truck loading area separate from ingress and egress to the parking garage by grocery store customers. With other sidewalk enhancements, the Board felt this arrangement increased pedestrian safety.

22. Concerning removal of the tree canopy, the Board recognized the public's concern with the loss of tree canopy but continued to support a replacement landscaping buffer which included evergreen trees.[30]

23. The Board recommended two departures: 1) to allow two vehicular access points-- one from Madison and one from Dewey; and 2) to allow a 40-foot curb cut on Madison rather than a 30-foot, to allow for separate loading and parking garage access doors.[31]

24. The Board expressed satisfaction that the design had been responsive to their earlier recommendations. The Board voted 4-0 to approve the project moving forward with the following conditions:[32]

(1) Along the Dewey frontage, increase the setback at the retail clerestory and residential above by two feet to match the deepest retail clerestory setback; limit the variation of color to massing shifts. (CS2-A, CS2-B, CS2-D, CS3-A-1, DC2-A-2)
(2) Relocate the bike parking between trees to another more suitable location on Madison that does not impede pedestrian circulation. (CS2-b-2, PL1, PL3-C, DC3)
(3) Ensure there is no trash pickup staging area located along Dewey. (DC1-C)
(4) Decrease the 40-foot curb cut width off Madison to the minimum necessary. (DC1-C)

Director's Review and Decision on Master Use Permit (MUP)

25. The Director reviewed the Board's recommendations and determined that they did not conflict with applicable regulatory requirements and law, were within the Board's authority, and were consistent with the design review guidelines. The Director therefore issued design review approval for the proposal with the Board's recommended conditions.[33]

[30] Exh. 14 at 18.
[31] Exh. 14 at 20.
[32] Exh. 14 at 24.
[33] Exh. 14 at 20.

26. Following a public comment period, the Director reviewed the environmental impacts of the proposal and issued a determination of non-significance ("DNS") pursuant to SEPA, concluding that the proposal was not likely to have more than a moderate adverse impact on the environment.

    a. The Director found that the height, bulk and scale impacts of the development and relationship to nearby context were addressed through the design review process.
    b. With respect to tree canopy, the Director determined that the arborist's review determined the trees are authorized for removal under the code, and that the landscape plan proposes new trees that will replace and exceed the canopy of the existing trees at maturity.
    c. The Director determined that the additional trips that will be generated by the project are expected to distribute on various roadways near the project site and would have minimal impact on levels of service at nearby intersections and overall transportation system.

27. The Director determined that the Applicant had worked with the Department to adequately respond to the conditions recommended by the Board. With respect to the Dewey frontage, the Director approved plans which increased the setback by two feet along the Dewey retail clerestory and limited the variation of color.[34]

Land Use Interpretation

28. The Appellant requested a land use interpretation from the Director related to the following:

    1) Whether the project site meets the requirements of Seattle Municipal Code (SMC) 25.09.180.B.2 for relief from prohibition on development in steep slope critical areas.
    2) Whether the proposed development, which includes removal of existing trees and other vegetation from the site, will comply with SMC 25.09.060.B., 25.09.180.D, 25.09.320.A.3.b, and 25.09.320.A.3.d, which addresses removal of vegetation from steep slope critical areas and buffers, and avoidance of adverse impacts to critical areas and buffers by restricting development to the most environmentally suitable, naturally stable, and least sensitive portions of a site.
    3) For purposes of height measurement under SMC 23.86.006.A.2, whether the average grade level of existing lot grades was properly calculated by the method of designating rectangular sections of the proposed structure at least 15 feet wide and finding average elevation of the existing lot grades at the midpoints of the two opposing exterior sides of each designated rectangular section.[35]

[34] Exh. 14 at 20.
[35] Exh. 87 at 1.

29. Regarding the first question, the Department concluded that based on its records and geotechnical reports, the steep slopes were created by previous legal grading, and therefore qualified for the relief form prohibition on development in steep slope critical areas. With respect to SMC 25.09.180.B.2, the Department determined that the areas eligible for relief are part of the most environmentally suitable and naturally stable portions of the site and eligible for development.[36]

30. Regarding the second question, the Department concluded that because the steep slope is eligible for relief from the prohibition on development in SMC 25.09.180.B.1, the restrictions on development and vegetation removal in SMC 25.09.060.B., 25.09.180.D, 25.09.320.A.3.b, and 25.09.320.A.3.d do not apply.[37]

31. Regarding the third question, the Department determined that the Applicant properly calculated the height of the structure. Due to the irregular shape of the property, the Applicant was able to use code-compliant alternative for allowing calculation of building height that essentially allows the site to be considered flat for purposes of calculating building height under the average grade level calculation.[38] Therefore, although the site is one-third to one-fourth steep slopes, the average height calculation allows for the full 30 or 40 foot height at the top of the slope, plus an additional bonus seven feet for providing a first-floor on E. Madison with retail and at least 16-foot ceilings.[39] In addition, the Applicant is permitted to grade the steep slope to create "underground" floors below the Madison Street grade.[40]

32. The Department acknowledged by using this alternative, it may seem that the Applicant was able to avoid the steep slope and build a structure that does not respond to the lot topography. However, the Department concluded that only a relatively narrow band of slope adjacent to Dewey Place and at the north end of the site is lower, and that slope is not natural but manmade. The Department stated:

> Any building built on this property best responds to site topography by measuring height from the higher elevations that predominate over most of the property and were created by the previous grading of the site. Even so, the design does respond to the lower elevations identified in the narrower 15-foot segment as depicted on plan sheet G002.[41]

[36] Exh. 87 at 12.
[37] Exh. 87 at 12-13.
[38] Exh. 61 at G002.
[39] *Id.*
[40] Exh. 87 at 13-14.

[41] Exh. 87 at 14.

33. As stated above, the challenge to the efficacy of the code interpretation was dismissed by the Examiner in ruling on the Applicant's motion to dismiss.[42] However, the Appellant preserved the right to challenge the height or the building as part of its broader appeal of aesthetic impacts under SEPA.

SEPA Decision

34. The Responsible Official determined that the proposal will not have a significant adverse environmental impact, and therefore issued a Determination of Non-Significance ('DNS"). The determination briefly reviewed the following potential short-term adverse environmental impacts: construction-related impacts, greenhouse gas emissions, earth, environmental health, noise, and mud and dust. It also reviewed potential long-term adverse environmental impacts, including drainage; historic resources; height, bulk and scale; parking; plants and animals; and transportation. The Responsible Official determined that in each instance, no further mitigation was required beyond code compliance. The Responsible Official relied on the SEPA Overview Policy, found at SMC 25.05.665.D which states in pertinent part: "where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation. . ."[43]

Evidence Introduced at Hearing

35. The Appellants introduced evidence from members of the community and a number of expert witnesses. The expert witnesses included Peter Steinbrueck, an architect who testified concerning the design review process and to the issues of height, bulk, and scale with respect to the building design; Tom Spangenberg, a civil engineer specializing in hydrology and hydraulics who testified on stormwater, drainage, and flooding issues; Ross Tilghman, a transportation planner who testified on traffic issues, Tina Cohen, a certified arborist who testified about the trees on the site, the existing tree canopy, and the Applicant's landscape plan; and Andrew Kirsh, an avid bird watcher who testified concerning birds using and occupying the property.

36. The Department presented expert evidence from Art Pedersen, a certified arborist who reviewed the project conducting a review and risk assessment regarding trees; Magda Hogness, a licensed architect and land use planner assigned to the project by the Department; Ede Courtenay, drainage review manager for the Department; Robert McIntosh, geotechnical engineer who reviewed the geotechnical studies by the Applicant on behalf of the Department; John Shaw, a senior transportation planner who reviewed traffic issues for the project; and William Mills, land use supervisor for the Department.

37. The Applicant presented expert testimony from Matthew Smith, a geotechnical engineer who conducted geotechnical studies for the project; Joe Taflin, a civil engineer who

[42] Order on Motion to Dismiss (November 19, 2018) (on file in this proceeding).
[43] Exh. 14 at 32.

conducted conceptual stormwater analysis; Sandro Kodama, a structural engineer for the project; Jim Keany, an ecologist who testified regarding wildlife habitat value of the existing site; Scott Evans, a landscape architect who testified regarding the landscape plan in the project proposal; Edward Koltonowski, traffic consultant who conducted traffic studies on behalf of the Applicant; Charles Strazzara, architect for the project; and William Mills, land use supervisor for the Department.

Design Review, Director's Decision, and SEPA Decision re: Aesthetic Impacts (Height, Bulk and Scale)

38. The Appellant presented the testimony of Peter Steinbrueck, an architect and former Seattle City Councilman. He had participated in the design review process before the Board. Mr. Steinbrueck testified to five principal conclusions: the Director erred in his conclusion that the DRB's recommendation best met the intent of the guidelines, the proposal is inconsistent with the Design Review Guidelines, the Director did not have adequate information to assess whether the proposal resulted in significant adverse environmental impacts, the proposal will have probable significant adverse impacts, and the Director did not adequately mitigate the probable significant adverse impacts using his authority under the SEPA.[44]

39. Mr. Steinbrueck testified that in his opinion, the project is inconsistent with the following design review guidelines:[45]

- C.S.1.C,[46] because the project is contextually out of scale with the single-family neighborhood in the bowl and does not step down the hillside, and therefore does not respond to the existing topography.
- C.S.1.D.1,[47] because the project does not incorporate on-site natural landscapes and habitats such as trees into the proposal; instead it simply eradicates them.
- C.S.1.D.2,[48] which requires interconnected coordinated corridors of trees, because the existing trees were not reviewed in the context of the tree canopy in the surrounding area, including the Arboretum and Lake Washington Boulevard.

[44] Testimony of Peter Steinbrueck (Dec. 10, 2018).
[45] Testimony of Peter Steinbrueck (Dec. 10, 2018).
[46] C.S.1.C states the following: "1. **Land Form**: Use the natural topography and/or other desirable land forms or features to inform the project design;" and "2. **Elevation Changes**: Use the existing site topography when locating structures and open spaces on the site. Consider "stepping up or down" hillsides to accommodate significant changes in elevation." Seattle Department of Planning Development, *Seattle Design Guidelines* p.2 (Dec. 2013).
[47] C.S.1.D.1 states: "**On-Site Features:** Incorporate on-site natural habitats and landscape elements such as existing trees, native plant species or other vegetation into project design and connect those features to existing networks of open spaces and natural habitats whenever possible. Consider relocating significant trees and vegetation if retention is not feasible." *Id.* at 3.
[48] C.S.1.D.2 states the following: "2. **Off-Site Features:** Provide opportunities through design to connect to off-site habitats such as riparian corridors or existing urban forest corridors. Promote continuous habitat, where possible, and increase interconnected corridors of urban forest and habitat where possible." *Id.* at 3.

- C.S.2,[49] which concerns harmony with the built environment, because the development does not consider the streetscape in the neighborhood; the townhouse features are mere "applique" façade features on Dewey.
- C.S.2.A,[50] which concerns a sense of place and architectural presence, because the proposal does not respect the existing neighborhood sense of place, and the small-scale residential neighborhood. In contrast, the proposal provides little open space, an exposed parking garage, no tree canopy, and shallow shed-roof townhouses which do not conform to the predominant gable roof form in the single-family neighborhood.
- C.S.2.B.1,[51] which concerns allowing the characteristics of the site to inform the design, because the proposal does not use any of the attributes of the existing large site that is heavily vegetated. In particular, the proposal is over-height when considered from Dewey. The prescriptive allowable height would be much more appropriate.
- C.S.2.B.3,[52] which concerns the character of open space, because the project demonstrates very little open space with only a narrow strip of landscaping.
- C.S.2.C.3,[53] which concerns full block sites, because this building exceeds a city block and brings the building to the edge of the lot. It is 290 feet long and much larger than surrounding buildings.
- C.S.2.D.1,[54] which concerns reviewing the height, bulk, and scale of existing buildings as well as the scale of development allowed by zoning in relation to the

[49] C.S.2 states the following: "C.S.2 **Urban Pattern and Form:** Strengthen the most desirable forms, characteristics, and patterns of the streets, block faces, and open spaces in the surrounding area." *Id.* at 4.

[50] C.S.2.A considers the location in the city and the neighborhood. It states: "**1. Sense of Place:** Emphasize attributes that give Seattle, the neighborhood, and/or the site its distinctive sense of place. Design the building and open spaces to entrance areas where a strong identity already exists, and create a sense of place where the physical context is less established. Examples of neighborhood and/or site features that contributed to a sense of place include patterns of streets or blocks, slopes, sites with prominent visibility, relationships to bodies of water or significant trees, natural areas, open spaces, iconic buildings or transportation junctions, and land seen as a gateway to the community. **2. Architectural Presence:** Evaluate the degree of visibility or architectural presence that is appropriate or desired given the context, and design accordingly. A site may lend itself to a 'high-profile' design with significant presence and individual identity, or may be suited to a simpler but quality design that contributes to the block as a whole. Buildings that contribute to a strong street edge, especially at the first three floors, are particularly important to the creation of a quality public realm that invites social interaction and economic activity. Encourage all building facades to incorporate design detail, articulation and quality materials." *Id.* at 4.

[51] C.S.2.B.1 states: "**Site Characteristics:** Allow characteristics of sites to inform the design, especially where the street grid and topography create unusually shaped lots that can add distinction to the building massing." *Id.* at 4.

[52] C.S.2.B.3 states: "**Character of Open Space:** Contribute to the character and proportion of surrounding open spaces. Evaluate adjacent sites, streetscapes, trees and vegetation and open spaces for how they function as the walls and floor of outdoor spaces or 'rooms' for public use. Determine how best to support those spaces through project siting and design (e.g. using mature trees to frame views of architecture or other prominent features)." *Id.* at 5.

[53] C.S.2.C.3 states: **"Full Block Sites:** Break up long facades of full-block buildings to avoid a monolithic presence. Provide detail and human scale at street-level, and include repeating elements to add variety and rhythm to the façade and overall building design. Consider providing through-block access and/or designing the project as an assemblage of buildings and spaces within the block." *Id.* at 5.

[54] C.S.2.D.1 states: "**Existing Development and Zoning:** Review the height, bulk, and scale of neighboring buildings as well as the scale of development anticipated by zoning for the area to determine an appropriate complement and/or

anticipated proposal, because the proposal does not provide an appropriate transition to the single-family neighborhood. It instead presents an abrupt edge between the Neighborhood Commercial zone and the single-family zone.

- C.S.D.2,[55] which concerns using existing site features to buffer proposal impacts, because despite the efforts to step the building on the hillside and the townhouse feature, the proposal remains a monolith with only a small strip of landscaping. There is no appropriate zone transition and gives the appearance of a six-story building in a single-family neighborhood.

40. Mr. Steinbrueck also testified to his views on environmental impacts of the project, for similar reasons as testified to with respect to inconsistency with the design review guidelines. His opinion is that the height, bulk and scale are under-addressed, and that there is a lack of transition from the single-family neighborhood, and the proposal contextually disrespects its neighbors. [56]

41. Mr. Steinbrueck testified regarding the height of proposed building. He stated that although the calculation of height met the code requirements, as interpreted by the Director's Code Interpretation decision, it does not meet the intent of the code and constitutes a significant adverse environmental impact. The impact is being caused by the failure to mitigate the transition, and limit the height of the development sufficient to achieve a reduction in scale. He also testified that although some aesthetic impacts are subjective, the height and bulk are measurable.[57]

42. Mr. Steinbrueck also testified that the loss of the tree canopy and open space will result in significant adverse environmental impacts. Finally, the sun shadow and night lighting will also cause significant adverse environmental impacts on the neighborhood.[58]

43. The Department presented extended testimony by Magda Hogness with respect to the design review process, SEPA review, and the Director's decision. Ms. Hogness recounted the various DRB meetings, as catalogued above, and the changes to the proposal that resulted through the process.[59] The Department also presented the testimony of William Mills regarding the code interpretation decision.[60]

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transition. Note that existing buildings may or may not reflect the density allowed by zoning or anticipated by applicable policies." *Id.* at 5.

[55] C.S.D.2 states: "**Existing Site Features:** Use changes in topography, site shape, and vegetation or structures to help make a successful fit with adjacent properties, for example siting the greatest mass of the building on the lower part of the site or using an existing stand of trees to buffer building height from a smaller neighboring building." *Id.* at 5.

[56] Testimony of Peter Steinbrueck (Dec. 10, 2018).

[57] Testimony of Peter Steinbrueck (Dec. 10, 2018).

[58] Testimony of Peter Steinbrueck (Dec. 10, 2018).

[59] Testimony of Magda Hogness (Dec. 13th and 17th, 2018).

[60] Testimony of William Mills (Dec. 17, 2018).

44. The Applicant presented the testimony of Charles Strazzara, the architect for the project, and Scott Evans, the landscape architect for the project. Mr. Strazzara provided a recount of the design review process from his perspective. His opinion was the building does appropriately step back along the hillside gradient. He pointed out that only 40% of the structure extends to maximum height. The setback from Dewey on the top level of the structure extends an average of 62 feet from the setback edge, the middle level extends an average of 42 feet back, and the third level is an average of 35 feet back. He provided a slideshow[61] demonstrating all aspects of the project as approved, from the street presence on Madison, the pedestrian hill climb on adjacent SDOT property, the presence on Dewey, and detailed discussion of height, bulk, and scale issues. He also stated that he thought the design review process worked very well; the Board was thoughtful, deliberative, and really listened to community voices. In addition, he stated that the Applicant had done a great deal to respond to the concerns voiced at the meetings, making numerous design changes to the project in response to the feedback.[62]

45. Mr. Scott Evans, the landscape architect, provided a detailed description of the landscape plan. Both he and Mr. Strazzara described the efforts to save part of the existing tree canopy on the property. Ultimately, however, due to the instability of the fill, they both described how their arborist was of the firm opinion that the existing trees would not survive, given the movement of the soil and the changes in hydrology that would occur in constructing the proposed building. He stated that through the public process, they adapted the plan to accommodate the community's preference for native trees. The landscape plan provides what Mr. Evans described as a three-dimensional palette, with different textures and different heights. He discussed the "green factor" score[63] for the project, which exceeded the minimum.[64]

Discuss Aesthetic Impacts of Tree Removal

46. Both in public comment during the design review process and in testimony at the public hearing, the aesthetic beauty of the forested hillside on the site was brought up repeatedly as an essential part of the Dewey Bowl neighborhood. As one comment stated during the first Early Design Guidance,

> Currently a natural buffer with a mature urban tree canopy sits between the NC2P-40 commercial zones and single-family homes. This project would remove that buffer, rather than providing a transition between more and less intense zones, as Design Guidelines CS2.D3 and CS2.D4 recommend.[65]

[61] Exh. 149.
[62] Testimony of Charles Strazzara (Feb. 6, 2019).
[63] *See* SMC 23.86.019.
[64] Testimony of Scott Evans (Feb. 6, 2019).
[65] Exh. 14 at 3.

47. Mr. Tony Hacker, a resident of the neighborhood, testified on behalf of the Appellants. He stated that one of the primary reasons his family moved to the bowl was because the entire valley is ringed with trees, and the Arboretum is across the street. He explained that the area feels unique because of the green canopy that demarcates the residential area. Since his house is directly across from the site, he spends a lot of time taking in the trees, birds and animals on site. He described how the trees provide cooling in the summer and light in the winter when they drop their leaves. He also stated that the 90-foot poplars on the site can be seen from 10-20 blocks away and are somewhat of an identifier for the neighborhood.[66]

48. The DRB recognized the concerns of the public with removal of existing trees on-site, and repeatedly gave guidance to the Applicant to examine ways of saving at least some of the existing canopy.[67] The building design was changed several times in an attempt to accommodate some of the existing trees. [68] At the third EDG meeting, however, the Board deferred to the arborist's study as reviewed and approved by the City and supported the arborist's findings recommending the removal of the canopy.[69]

Drainage and Flooding Issues

49. The Appellant presented testimony from Tom Spangenberg on stormwater, drainage, flooding, and climate change issues. Mr. Spangenberg has a master's degree in civil engineering with a specialty in water resources including hydrology and hydraulics. He has designed hydraulic plans for municipalities to plan their level of service.[70]

50. Mr. Spangenberg introduced a report completed by consultant Ch2M Hill on a flooding incident that occurred in Madison Valley in 2006.[71] The following information originates from the report. As stated above, the Madison Valley is subject to manmade site alteration. The bed of Madison Street was originally a large wooden trestle which spanned a rather large expanse of Madison Valley. The trestle than became a foundation for an earthen dam.

51. The Mercer Bowl lies at the foot of the earthen dam, presumably on the former streambed. On the other side of Madison to the north is the Arboretum, where the former stream once meandered out to Union Bay. Given the position of the Bowl, it drains a large area, approximately 790 acres.[72] The spot of lowest elevation is the intersection of East Mercer Street with Dewey Place East and 30th Avenue East, an area a very short distance from the southwest edge of the project site.[73]

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[66] Testimony of Tony Hacker (Dec. 10, 2018).
[67] Exh. 14 at 7 and 10.
[68] *See* Exh. 149.
[69] Exh. 14 at 14.
[70] Testimony of Tom Spangenberg (Dec. 11, 2018).
[71] Exh. 20.
[72] Exh. 20 at Figure 1-1.
[73] *Id.* at 2-2.

52. The drainage in this area is extremely complex. The Madison Valley is served by a combined sewer system with areas of separated storm and sanitary sewers. All the flow in these systems leaves Madison Valley through a 60-inch diameter combined sewer. In the early 1970's, combined sewers serving approximately 480 acres of the basin were separated into sanitary and storm sewers. The separation meant that wastewater from showers and toilets were conveyed in pipes separate from storm water flows. The separation project was never completed; the planned stormwater outlet to Lake Washington was not built. The separated sanitary and storm pipe systems converge back into the combined system near the intersection of East John Street and 30th Avenue East, in Madison Valley.[74]

53. If stormwater runoff does not make its way into the storm drain system via inlets, then it will remain above ground as surface flow. This flow will follow the path of least resistance and accumulate at low points. An area of Madison Street between 28th Avenue E and Lake Washington Boulevard known as "the Madison sag" is the low point for 170 acres of this basin which contributes drainage based on surface water topography. This 170-acre uphill area is served by separated storm-sewer and combined-sewer piped systems. The majority of these systems discharge into the combined-sewer-system trunk line pipe near 30th Avenue East and East John Street.[75]

54. Over the last three decades, flooding has occurred within and near the area covered by the investigation into the flooding incident, most notably at the convergence of the combined and separated sewer systems near the intersection of East John Street and 30th Avenue East. Flooding in that location has been caused by surface flow and by backups from the combined sewer. The City of Seattle developed a long-term solution for this problem, including gates that prevent stormwater from entering the combined system under peak flow conditions and an interim stormwater storage facility at the southeast corner of 30th Avenue East and John Street. Construction of this facility was nearly complete as of December 4, 2006.[76] Runoff and pipe flow that concentrates in the 30th Avenue East and East John Street area was not responsible for flooding in the Mercer Bowl, according to the study, because it would have to reach a higher elevation to flow to the north.

55. On December 14, 2006, a storm yielding high-intensity rainfall hit Seattle. Seattle Public Utilities (SPU) rainfall gauge RG020 registered 1.36 inches of rain from 2:00 p.m. through 11:59 p.m., with the most intense rainfall registering 0.88 inches from 4:05 p.m. to 4:55 p.m. In terms of intensity, the rainfall gauge recorded a maximum 10-minute intensity of 0.33 inch, an hourly intensity of approximately 2 inches per hour which is equivalent to a 20-year recurrence interval or an annual probability of 4.5 percent. This intensity is

[74] *Id.* at 1.1.
[75] *Id.* at 2-5, Figure 2-3.
[76] *Id.* at 1-4 and Figure 1-2.

categorized by the National Weather Service as very heavy or intense. Residents who experienced the storm described it as "can't make out objects through the windshield."[77]

56. A summary of what happened as a result of this rainfall, which was greater than a "100-year" storm, is excerpted below from the report commissioned by SPU:

> - Runoff streamed down East Madison Street at a rate that exceeded the drainage system's capacity, ponding water in that roadway's low-lying "sag" between Lake Washington Boulevard East and 29th Avenue East.
> - The ponding water level rose above the curb in this area and passed through a hole under the fence immediately behind the sidewalk on the south side of East Madison Street, and over a curb wall in a parking lot on the opposite side of the adjacent apartment building (2921 East Madison Street).
> - This water passed through the open basement of the apartment building, through the backyards of four homes, and down an embankment and over a retaining wall (which tipped over during the event) onto Dewey Place East, sending a slug of water and soil slurry down that roadway.[78]
> - The water and slurry streamed down Dewey Place East to a low-lying "bowl" area at the intersection of East Mercer Street and 30th Avenue East.
> - The house at 538 30th Avenue East became surrounded by this water, and the owner of the home became trapped and drowned in her basement when it was filled with floodwater from the bowl.[79]

57. The CH2M Hill Report concluded that:

> Drainage into and out of the Madison "sag" (the roadway's dip, or lowest lying section) and the Mercer "bowl" area is very complex as a result of urban drainage conditions that include:
>
> - Hundreds of acres of uphill impervious roads and buildings
> - Hundreds of drainage inlets, structures, and pipes in numerous systems, including combined and separated stormwater systems, roof drains, foundation drains, and roadside drains
> - Soil saturation due to previous rainfall (November 2006 set monthly rainfall records)
> - Steep slopes, particularly on the streets immediately west and southwest of the investigation area

[77] *Id.* at 2-1.
[78] Photographs of the aftermath in the neighborhood are at Exhibit 9.
[79] *Id.* at ix.

- Clogging of inlets, pipes, and other stormwater structures by leaves, sticks, sand, coffee cups, and other debris[80]

> The characteristics of runoff flow through this area become even more complex with intense rainfall, when there are added effects of stormwater flows bypassing storm drain inlets, varying amounts of drainage system surcharging (water backing up due to the system being full or having constrictions), extensive and high-velocity roadside gutter flow that "on-ramps" and "offramps" to sidewalks and intersecting streets, and larger than normal amounts of debris clogging inlets and catch basins due to the intense rainfall and runoff during the event.[81]
>
> The most significant amount of runoff into the Madison sag came from the west and southwest, mostly down East Madison Street itself. There is no evidence that significant runoff came into the sag from the east. Similarly, there is no evidence that significant runoff flowed into the Mercer bowl from the south end of the watershed as direct runoff, and no information indicates that overflow from the interim stormwater facility recently constructed at East John Street and 30th Avenue East reached the bowl.
>
> . . .
>
> Our calculations indicate that even if all the drainage systems at the Madison Street sag were clear of obstructions and other flow restrictions (such as leaves, sand, etc.), they could not accept all the runoff coming into that area during this intense storm. This is attributable to the tremendous amount of surface runoff caused by intense rainfall.[82]

58. Mr. Spangenberg reviewed the drainage report submitted by the Applicant.[83] Mr. Spangenberg noted that the report stated that it "may fail" in another high intensity event such as the one experienced on December 14, 2006. In Mr. Spangenberg's opinion the report was insufficient because it did not provide any information that would indicate that the drainage system was adequate to handle another event similar to what occurred in 2006. Given that insufficiency, it was his opinion that there is a probable significant adverse environmental impact from the project because of drainage.[84]

59. Mr. Spangenberg also noted that the report stated that the system was "capacity constrained," although he was not clear about the nature of the constraint.[85]

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[80] Exh. 20 at 6-1.

[81] Exh. 19 at 6-1.
[82] Exh. 19 at 6-1 through 6-2.
[83] Exh. 19.
[84] Testimony of Tom Spangenberg (Dec. 11, 2018).
[85] Testimony of Tom Spangenberg (Dec. 11, 2018).

60. The Applicant's engineer, Joe Taflin, testified that the system was not capacity constrained and that improvements to the system since the 2006 event have greatly increased the capacity of the system, in that it can now hold four million gallons more than it used to.[86] Mr. Taflin further stated that the project would be using an eight-inch pipe to join the sewer system that would be exclusively dedicated to the project.[87] Mr. Taflin authored a Stormwater Drainage Report on behalf of the proposal.[88]

61. Mr. Taflin also testified that the project would route all storm water runoff to a tank at the lowest level of the garage. The water will be retained on site and released slowly into the storm sewer system so that the system will not be overwhelmed. There will also be a rainwater cistern on site to provide a watering system for the green roof.[89]

62. The Appellant brought Mr. Spangenberg forward as a rebuttal witness. He stated that he had not seen any evidence in the submittals that the eight-inch pipe would be used. He also stated that he did not believe that the Department could rule out significant adverse environmental impacts from drainage and flooding. Finally, he testified that the problem in the 2006 event was not the capacity of the system, but the blockage of the catch basins at the street level by organic detritus and garbage.[90]

Drainage Plan and Department Review

63. The Department does not conduct drainage review of any kind at the MUP stage.[91] Instead, the Department reviews drainage when they have all the information about the structure and lot at the building permit stage. In this instance, Ms. Ede Courtenay, Drainage Review Manager, entered a "Waiver of Drainage Review."[92] Ms. Magda Hogness, the MUP Reviewer for the Department in this case, stated that she relied on Ms. Courtenay's opinion in determining that the project would have no significant adverse environmental impacts.[93] She also stated that she had not read the Ch2M Hill Report. She concluded that the grading and drainage codes would adequately mitigate any significant adverse environmental impacts of the project.

64. The Applicant provided the Stormwater Drainage Report to the Department on November 17, 2017.[94] Ms. Courtenay testified that she had not read it prior to making her

[86] Testimony of Joe Taflin (Feb. 5, 2019).
[87] The Applicant's Drainage Report (Exh. 19) stated that the stormwater would be discharged into the 15-inch pipe running along Madison.
[88] Exh. 19.
[89] Testimony of Joe Taflin (Feb. 5, 2019).
[90] Testimony of Tom Spangenberg (Feb. 6, 2018).
[91] Testimony of Magda Hogness (Dec. 13, 2018).
[92] Exh. 79.
[93] Testimony of Magda Hogness (Dec. 13, 2018).
[94] Exh. 19.

determination to issue a Drainage Waiver.[95]The Report provides basic information on the existing conditions, proposed development, code requirements, and proposed conditions.

Transportation

65. The Appellant presented expert witness testimony in transportation by Ross Tilghman. Although not a traffic engineer, he is a transportation planner. According to his testimony, his specialty is anticipating transportation needs, not designing transportation systems as an engineer might do. He has been analyzing SEPA traffic review for new development for the past 35 years.[96]

66. He concluded that the proposal is 1) a large traffic generator inappropriate for the site, 2) the access on Madison doesn't work-- bad sight triangles, congested, should not be located in the middle of the block; 3) two points of access contribute more congestion to an already congested neighborhood; and 4) the excess traffic impacts the safety of the neighborhood, including that of pedestrians. Specifically, he opined that the Departure allowing the curb cut of 40 feet on Madison for the garage would lead to pedestrian safety issues. It was his opinion that the project should be redesigned for safety and should be scaled down. Mr. Tilghman also opined that there is a significant adverse environmental impact due to safety having to do with the narrow streets with both sides fully parked, especially on Republican between 29th and 32nd Avenue E.[97]

67. In a letter dated May 1, 2017, Mr. Tilghman presented the following concerns, based on his personal observations and traffic counts done: 1)The applicant needs to provide a better description of existing traffic conditions; 2) The applicant's traffic consultant has under-counted the existing use, and should re-do the counts of driveway traffic volumes, including appropriate seasonal adjustments, to verify existing site volumes; 3) Develop a realistic plan for accommodating delivery trucks safely; and 4) Acknowledge that a secondary access for residents on Dewey is out of scale for Dewey and provides little reduction in volume on Madison.[98]

68. The Department called John Shaw, a Senior Transportation Planner with the City for the past 21 years, to testify on traffic issues. Mr. Shaw indicated that he had reviewed the Applicant's traffic study and the design of the parking garages and loading areas. He indicated that the Applicant's consultant did truck counts at another PCC Market in Seattle to gauge an accurate number of trucks that would be stocking the grocery store at any one point.[99] He indicated that the Madison garage entrance will be separated into a commercial loading area and a garage entrance and exit for customers of the grocery and retail space. He testified that the traffic study showed that there were no traffic accidents at Dewey and

[95] Testimony of Ede Courtenay, Drainage Review Manager (Dec. 17, 2018).
[96] Testimony of Ross Tilghman (Dec. 11, 2018).
[97] Testimony of Ross Tilghman (Dec. 11, 2018), Exhs. 28-31.
[98] Exh. 30.
[99] Exh. 98.

Republican for the past five years and indicated the increase in traffic on Dewey would not be significant. He also indicated that the differences in the traffic counts for the existing use were not significant. Finally, he also stated that Mr. Tilghman's analysis of pedestrian conflicts at the Madison entrance were flawed, in that he overcounted the number of pedestrians, and failed to account for the sensory alerts along the sidewalk, such as textured concrete. Mr. Shaw acknowledged that there will be waits to turn out of the grocery garage, but that the City does not measure level of service ("LOS") on private properties.[100]

69. Mr. Shaw also testified regarding SEPA compliance that he believed information collected by the Department was adequate (including trip data calculations, LOS analysis of project impact in the neighborhood and at the driveway, truck turning analysis, etc.) to analyze whether significant adverse environmental impacts would occur as a result of the project. He further testified that he supported the opinion of the Department's Responsible Official that the project would have no significant adverse environmental impacts on traffic or parking.

70. The Applicant presented the testimony of Edward Koltonowski, the Applicant's traffic engineer with 25 years of experience in traffic analysis. Mr. Koltonowski testified that after analyzing various options for access, both the Department and SDOT agreed that the split access would be preferable, channeling "like for like" traffic in separate directions. In other words, commercial traffic would be directed to Madison Street, and residential traffic would be directed to Dewey.[101] He pointed to Table 10 in the traffic study showing that there would be no failing intersections under this option.[102]

71. Mr. Koltonowski also testified that the truck traffic to the PCC Market was studied at several other PCC stores in Seattle. Based on his analysis, five or six trucks may on occasion be unloading at the same time. He stated that this site could handle three trucks in the loading area at any one time, and several more on curb side loading areas in front of the store. He indicated that truck visits occur mostly in the morning when traffic is at its quietest. He further noted that the project was conditioned to require a flagger to help trucks back into the loading bays.

72. Mr. Koltonowski also indicated that Mr. Tilghman overcounted the number of pedestrians on Madison, doubling the number that are actually going to be using the sidewalk. He stated that he sees no concerns for pedestrian safety on Madison, given the design features that would alert the pedestrian to the loading dock and garage exit. As far as frustrated drivers trying to turn out of the garage, he stated in his opinion that there was no safety issue for pedestrians. He also testified that the visual sightlines for vehicles were met. The

[100] Testimony of John Shaw (Dec. 17, 2018).
[101] Testimony of Edward Koltonowski (Feb. 6, 2019).
[102] Exh. 95 at p. 34 (although the Madison access for grocery patrons is showing LOS F in this table, that access is not measured by the City for LOS purposes.)

sightline triangle for pedestrians is a design review issue and beyond his area of expertise and analysis in this project. [103]

73. As far as pedestrian safety on Republican and the ability for kids to walk safely to school, it was Mr. Koltonowski's opinion that conditions don't get much better than they are on Republican. There are sidewalks on both sides of the street, and they are separated from traffic by a lane of parked cars on either side of the street. Moreover, if the traffic is moving slowly on Republican, it is safer for pedestrians when going past cross streets.[104]

74. Although Mr. Tilghman had expressed concerns over increased traffic on Dewey and in the Mercer Bowl, Mr. Koltonowski pointed out that even with the additional trips, the LOS at the intersection of Dewey and Republican is still at LOS A. Mr. Koltonowski testified that overall, the project met applicable codes and did not present any significant adverse environmental impacts.[105]

Trees and Tree Canopy

75. The Appellant presented the testimony of Tina Cohen, a certified arborist. She visited the site two times, reviewed the project plans, and reviewed the Applicant's arborist's report. Her conclusions were that 1) there would be a significant adverse environmental impact to the trees on site; 2) the exceptional trees and the grove were disregarded; and 3) the landscaping proposed is not sustainable and would not live 20 years.[106]

76. She explained that under the Director's Rule 16-2008, exceptional trees are supposed to be preserved but the rule provides that there are a lot of exceptions. Under the rule, trees that meet the size threshold (the tree trunk is measured at 4.5 feet above average grade, and 30" in diameter or 75% of the largest documented tree of that species in Seattle, whichever is less.[107] A grove means a group of eight or more trees 12" in diameter or greater that form a continuous canopy.[108]

77. Ms. Cohen stated that there is one exceptional tree on the property and 13 others that form a continuous canopy or grove. She produced a map identifying each tree.[109] Ms. Cohen also stated that the project's arborist indicated that all trees are in relatively good health. Ms. Cohen disputed the project arborist's findings that three of the trees were not exceptional due to root damage or differences in measurement.[110]

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[103] Testimony of Edward Koltonowski (Feb. 6, 2019).
[104] Testimony of Edward Koltonowski (Feb. 6, 2019).
[105] Testimony of Edward Koltonowski (Feb. 6, 2019).
[106] Testimony of Tina Cohen (Dec.12, 2018).
[107] DR 16-2008 at 2.
[108] *Id.*
[109] Exh. 39.
[110] Testimony of Tina Cohen (Dec. 12, 2018).

78. Ms. Cohen further disputed the findings that if the project were built, all the trees in the grove would either become hazardous or not survive the building of the retaining wall. She generally disputed the risk assessment performed by the Applicant's arborist, which found that even if the site plan were to leave room for the canopy and the one exceptional tree, they would not survive, because of the disruptions due to the construction, with shifting fill soils and changes to hydrology. Director's Rule 16-2008 requires the Department to determine whether trees that would otherwise qualify as exceptional should be removed based on a risk assessment produced by a qualified professional. In making this determination, a qualified professional must consider crown size, structure, disease, past maintenance practice, potential damage to existing or future targets, risk mitigation options, and when development is proposed, the likelihood of survival after construction.[111]

79. Ms. Cohen also reviewed the landscape plan.[112] While Ms. Cohen admitted that the plan "meets the numbers" required by the Green Factor requirements, she stated that there will not be enough room for the roots to reach maturity, such that either they will threaten infrastructure, or the homeowners will request removal. Specifically, with respect to ten incense cedars, Ms. Cohen testified that the Applicant will plant them in an 11-foot bed. She stated that they need at least a 25-foot bed. The result of planting them very closely together, she stated, would be that they would turn into a hedge, rather than a tree. She indicated that some incense cedars had been planted on 2nd Avenue near Bell and had to be removed because they interfered with buildings.[113]

80. Ms. Cohen also questioned the use of Lawson cypress (also known as Port Orford cypress). She stated they were very susceptible to root disease and that they are forest trees, so they will not survive out in the open. If they do survive, they will become a hedge, not trees. She stated if they were grown in natural conditions, they could grow as high as 100 feet, and at least 60-70 feet in Seattle.[114]

81. Ms. Cohen also found the selection of European beech an unusual selection for a street tree. She stated that they are enormous trees in the right-of-way, typically with a height of 50-60 feet. She predicted these trees would outgrow their root boxes and split the concrete. She also discussed the Arbutus Marina, four of which are on the hill climb, and the rest of which are in the roof planters, approximately 36. She stated that these trees have been removed in the past by the City of Seattle because they are not hardy enough. They cannot withstand a cold snap of 25 degrees or less. She also stated that the Western flowering dogwood, also on the hill climb, is susceptible to dogwood disease.[115]

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[111] DR 16-2008 at 3.
[112] *See* Exh. 42.
[113] Testimony of Tina Cohen (Dec. 12, 2018).
[114] Testimony of Tina Cohen (Dec. 12, 2018).
[115] Testimony of Tina Cohen (Dec. 12, 2018).

82. The Department presented the testimony of Art Pedersen. He testified that he reviewed the Applicant's arborist report a number of times.[116] He sent the document through several correction cycles.[117] He ultimately agreed with the arborist's conclusions that the trees on the slope would not survive the construction phase and change of hydrology. He also agreed with the arborist's tree replacement numbers. He stated that he did not review the project for probable adverse environmental impacts under SEPA.[118]

83. The Applicant presented the testimony of Sean Dugan, a master arborist. He produced the arborist's report.[119] He explained his findings on why the trees would likely not survive long after the construction process, principally due to the fact that many of them are too close to the right-of-way and in all cases their root systems would be cut significantly. Moreover, due to the development the hydrology of the site would completely change, thereby further reducing their ability to survive. He stated that even if they saved all the trees, he agreed with Ms. Cohen that there would be a significant adverse environmental impact to the long-term health of the trees.[120]

84. Mr. Dugan's opinion of the new landscape plan was that it provided greater diversity and structure than what is on-site now. The Applicant also called Scott Evans, a landscape architect who submitted the landscape plan.[121] He stated that the European Beech street trees were recommended by SDOT, as other areas of Madison Street have the same trees, and SDOT seeks to create a "street tree rhythm."[122] He discussed the green factor and how the project meets the code requirement to replace trees that are 24 inches in diameter or greater. He also provided information on how the MUP and DRB process precede the SDOT process to determine street trees. He responded to Ms. Cohen's comments regarding western flowering dogwood, stating that it simply needs to be watered regularly. He indicated the reason it was chosen for the hill climb area is that it is good for sight lines and safety purposes, and it is a native plant. He also discussed the use of incense cedars and Lawson cypress to respond to the community's request for native trees. Mr. Dugan indicated he had visited 2nd and Bell after Ms. Cohen's testimony, and noted there were large healthy specimens of incense cedars at that location. He had no concerns about the size of trees and whether they would have enough room to adequately grow. He stated that the Arbutus Marina were very tolerant and would do well in the roof tray system for the landscaping. Finally, he described his design on the townhouse frontage on Dewey and the use of the Arbutus Marina because it would "contort itself to fill the space" in the front areas of the townhouses.[123]

Wildlife Habitat

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[116] *See* Exh. 41, 45.
[117] *See* Exhs. 46-50.
[118] Testimony of Art Pedersen (Dec. 12, 2018).
[119] *See* Exhs. 40-49.
[120] Testimony of Sean Dugan (Feb. 5, 2019).
[121] *See* Exh. 12 & 42.
[122] Testimony of Sean Dugan (Feb. 5, 2019).
[123] Testimony of Sean Dugan (Feb. 5, 2019)..

85. The Appellant called Andrew Kirsh, who has a degree in biology and is a serious bird watcher. He has been involved with the Mad P-Patch for over ten years and has produced a catalog of birds that he has witnessed on the project site.[124] He described three common species he has sighted on the subject property that are currently in steep decline, according to the Cornell Lab of Ornithology.[125] Those include the Wilson Warbler, the Pine Siskin, and the Brown Creeper.

86. Mr. Kirsh criticized the Applicant's Ecologist's Report[126] because the bird counts mentioned were only seen in 10 minutes of observation. He also disagreed with the ecologist's characterization of the habitat as isolated because of the proximity of the Mercer Madison Woods. Finally, he also disagreed with the ecologist's conclusion that the site has little habitat value due to limited foliage diversity. Mr. Kirsh's conclusion is that the report understates the complexity of the site since the foliage reaches into the trees.[127]

87. The Applicant called Jim Keany who has a master's degree in wildlife ecology. He produced a report for the Applicant concluding that the existing site does not provide quality habitat and is not part of a larger habitat unit. He states in the report that while the Washington Department of Fish and Wildlife has designated the Arboretum as a habitat corridor and biodiversity area, this site is separated from the Arboretum by a busy urban arterial and commercial corridor- - E. Madison Street. The parcel, according to Mr. Keany, is small, isolated, contains a high density of noxious weeds, has limited foliage diversity, and is therefore considered very low habitat value with no corridor connection. In addition, Mr. Keany stated that the site does not contain wetlands, stream/riparian habitat, and is not identified by any agency as a significant habitat feature, nor is it afforded any regulatory protection.[128]

88. Mr. Keany stated he had done three ten-minute bird counts. He said his method is consistent with National Conservation Standards and the bird counts are typically higher in the spring during breeding season. He stated that the birds he observed on site were present in most Seattle neighborhoods. He explained that this site experiences "edge effect." Edge effect is a phenomena that occurs on fragments of habitat and involves the influence of the disruption of ecological function. As such, according to Mr. Keany, if you observe the site over time you get many transitory species, but that will not give you any information on what birds actually reside and breed on the site. He stated that his bird counts were sufficient to identify the resident birds.[129]

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[124] Testimony of Andrew Kirsch (Dec. 12, 2018); bird photography at Exh. 51.
[125] Exh. 52.
[126] Exh. 53.
[127] Testimony of Andrew Kirsh (Dec. 12, 2018).
[128] Exh. 53 at 4.
[129] Testimony of Jim Keany (Feb. 5, 2019).

Construction Impacts: Traffic, Noise and Dust

89. The Appellant presented testimony from Tony Hacker, Andrew Kirsh, and Wallis Bolz regarding their concerns as residents about the potential construction impacts from the development, including noise, traffic, dust, bright lights, and air quality.[130]

90. Regarding traffic impacts, the Director's Decision stated,

> Increased trip generation is expected during the proposed demolition, grading and construction activity. The area is subject to significant traffic congestion during peak travel times on nearby arterials. Large trucks turning onto arterial streets would be expected to further exacerbate the flow of traffic. . . .
>
> Pursuant to SMC 25.05.675.B (Construction Impacts Policy), additional mitigation is warranted and a Construction Management Plan is required, which will be reviewed by Seattle Department of Transportation (SDOT). The requirements for a Construction Management Plan include a Haul Route and a Construction Parking Plan.[131]

91. The Director's Decision also addressed noise, stating:

> The project is expected to generate loud noise during demolition, grading, and construction. The Seattle Noise Ordinance (SMC 25.08.425) permits increases in permissible sound levels associated with private-development construction and equipment between the hours of 7:00 AM and 7:00 PM on weekdays and 9:00 AM and 7:00 PM on weekends and legal holidays in the Neighborhood Commercial zones.
>
> If extended construction hours are necessary due to emergency reasons or construction in the right of way, the applicant may seek approval from SDCI through a Noise Variance request. The applicant's environmental checklist does not indicate that extended hours are anticipated.
>
> A Construction Management Plan will be required prior to issuance of the first building permit, including contact information in the event of complaints about construction noise, and measures to reduce or prevent noise impacts.[132]

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[130] Testimony of Andrew Kirsh (Dec. 12, 2018), Wallis Bolz (Dec. 12, 2018), and Tony Hacker (Dec. 10, 2018).
[131] Exh. 14 at 27.
[132] Exh.14 at 27.

92. With respect to mud and dust, the Director's decision stated:

> Approximately 27,000 cubic yards of material will be excavated and removed from the site. Transported soil is susceptible to being dropped, spilled, or leaked onto City streets. The City's Traffic Code (SMC 11.74.150 and .160) provides that material hauled in trucks [is] not to be spilled during transport. The City requires that loads be either 1) secured/covered; or 2) a minimum of six inches of "freeboard" (area from level of material to the top of the truck container). The regulation is intended to minimize the amount of spilled material and dust from the truck bed en route to or from a site.[133]

93. Seattle has numerous regulatory controls for grading and stormwater control, which are found in the building and construction codes, SMC Title 22, including SMC 22.170.220 (erosion control); SMC 22.805.020 et seq. (stormwater controls for all projects, including Best Management Practices ("BMPs") to prevent dust and dirt from leaving the site and to prevent degradation of water quality.

Shadow Impacts

94. The Applicant presented testimony from Wallis Bolz, a nearby resident who is very active in the Mad P-Patch. She explained in detail the growing seasons at the patch. She testified that the growing season gets started as early as February and all plantings must be in the ground by May. The first harvest occurs in April or May, and the last harvest occurs in August/September. Then cover crops must be planted by October 31st. Given this rotation, Ms. Bolz stated that shadow impact is a big concern, because the amount of light in the garden greatly affects the growth of the crops; shade depresses production.[134]

95. Reviewing the Applicant's shadow studies in the record,[135] Ms. Bolz indicated that part of the patch (below the shed) would suffer increased shade. She further stated that the studies show only specific dates, such as spring and fall equinoxes which occur annually during March and September at 4:00 in the afternoon. Therefore, the impacts that may occur on other days of the year is unknown, and in her opinion, further study is required to have adequate information on potential significant adverse environmental impacts due to shading of the patch.[136]

96. Ms. Hogness, the Department's planner assigned to the project, testified that she did not believe she had authority to condition the project for shadow impacts to the Mad P-Patch

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[133] Exh. 14 at 27-28.
[134] Testimony of Wallis Bolz (Dec. 12, 2018).
[135] *See* Exh. 58; Exh. 75 at 113.
[136] Testimony of Wallis Bolz (Dec. 12, 2018).

because she did not consider the Mad P-Patch to be the type of property that is granted protection under the City's SEPA policy for shadow impacts.[137]

Applicable Law

97. The purpose of design review is to "[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods while allowing diversity and creativity." SMC 23.41.002.A.

98. The Citywide Guidelines and Council-approved neighborhood design guidelines "provide the basis for Design Review Board recommendations and City design review decisions." SMC 23.41.010.

99. SMC 23.41.014 describes the design review process. "Based on the concerns expressed at the early design guidance public meeting or in writing to the Design Review Board, the applicable guidelines of highest priority to the neighborhood, referred to as the 'guideline priorities,' shall be identified. The Board shall incorporate any community consensus regarding design expressed at the meeting into its guideline priorities, to the extent the consensus is consistent with the design guidelines and reasonable in light of the facts of the proposed development." SMC 23.41.014.C.1.

100. The Director must consider the Board's recommendation. If four or more members of the Board agree to a recommendation, the Director "shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval," unless the Director concludes that the recommendation inconsistently applies the design review guidelines, exceeds the Board's authority, conflicts with SEPA conditions or other applicable requirements, or conflicts with state or federal law. SMC 23.41.014.F.3.

101. SMC 23.76.022 provides that appeals of Type II MUP decisions are to be considered de novo, and that the Hearing Examiner "shall entertain issues cited in the appeal that relate to compliance with procedures for Type II decisions as required in this Chapter 23.76, compliance with substantive criteria," and various determinations under SEPA.

102. SMC 25.05.330 directs that, in making a threshold determination under SEPA, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact …." "Probable" means "likely or reasonably likely to occur…." SMC 25.05.782. "Significant" means "a reasonable likelihood of *more than a moderate adverse impact* on environmental quality." SMC 25.05.794 (emphasis added). If the Director determines that there will be no probable, significant adverse environmental impacts from a proposal, a DNS is required. SMC 25.05.340.A.

103. SMC 25.05.660 governs the application of substantive authority and mitigation:

[137] Testimony of Magda Hogness (Dec. 13, 2018).

A. Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations:

1. Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated in Sections 25.05.665, 25.05.670 and 25.05.675 as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued. (Compare Section 25.05.350 C).
2. Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decisionmaker. The decisionmaker shall cite the City's SEPA policy that is the basis of any condition or denial under this chapter (for proposals of applicants). After its decision, each agency shall make available to the public a document that states the decision. The document shall state the mitigation measures, if any, that will be implemented as part of the decision, including any monitoring of environmental impacts. Such a document may be the license itself, or may be combined with other agency documents, or may reference relevant portions of environmental documents.
3. Mitigation measures shall be reasonable and capable of being accomplished.
4. Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal. Voluntary additional mitigation may occur.
5. Before requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.
6. To deny a proposal under SEPA, an agency must find that:

   a. The proposal would be likely to result in significant adverse environmental impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and

   b. Reasonable mitigation measures are insufficient to mitigate the identified impact.
7. If, during project review, the City as lead agency determines that the requirements for environmental analysis, protection, and mitigation measures in the City's development regulations, or in other applicable local, state or federal laws or rules, provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action under RCW 43.21C.240, the City as lead agency shall not impose additional mitigation under this chapter.

B. Decisionmakers should judge whether possible mitigation measures are likely to protect or enhance environmental quality. EISs should briefly indicate the intended environmental benefits of mitigation measures for significant impacts (Section 25.05.440 E). EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

1. Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and

2. Will not be analyzed in a subsequent environmental document prior to their implementation.

104. SMC 25.05.665 provides an overview of the SEPA policies. It states:

A. Purpose of the SEPA Policies.

1. It is the City's policy to protect the environment and provide for reasonable property development while enhancing the predictability of land use regulation. In order to provide predictability, it is the City's intent to incorporate environmental concerns into its codes and development regulations to the maximum extent possible. However, comprehensive land use controls and other regulations cannot always anticipate or effectively mitigate all adverse environmental impacts.

2. The policies set forth in this part of the SEPA Rules shall serve as the basis for exercising substantive SEPA authority pursuant to SMC Section 25.05.660. Based on these policies, a decisionmaker may condition a proposal to reduce or eliminate its environmental impacts. The decisionmaker may deny a proposed project if an environmental impact statement has been prepared and if reasonable mitigating measures are insufficient to mitigate significant, adverse impacts identified in the environmental impact statement. Conditioning or denial of project proposals will occur pursuant to RCW 43.21C.060, WAC 197-11-660 and SMC Section 25.05.660.

. . .

D. Relationship to City Codes. Many environmental concerns have been incorporated in the City's codes and development regulations. Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation subject to the limitations set forth in subparagraphs D1 through D7 below. Unless otherwise specified in the Policies for Specific Elements of the Environment

(SMC Section 25.05.675), denial or mitigation of a project based on adverse environmental impacts shall be permitted only under the following circumstances:

1. No City code or regulation has been adopted for the purpose of mitigating the environmental impact in question; or

2. The applicable City code or regulation has been judicially invalidated; or

3. The project site presents unusual circumstances such as substantially different site size or shape, topography, or inadequate infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable City code or zoning; or

4. The development proposal presents unusual features, such as unforeseen design, new technology, or a use not identified in the applicable City code, which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable City code or zoning; or

5. The project is located near the edge of a zone, and results in substantial problems of transition in scale or use which were not specifically addressed by the applicable City code or zoning; or

6. The project is vested to a regulation which no longer reflects the City's policy with respect to the relevant environmental impact because of the adoption of more recent policies, provided that the new policies are in effect prior to the issuance of a DNS or DEIS for the project; or

7. The project creates undue impacts based on cumulative effects as provided for in SMC Section 25.05.670.

105. The SEPA policy on height, bulk and scale explains that the City's adopted land use regulations are intended to provide "for a smooth transition between industrial, commercial, and residential areas," and to preserve neighborhood character and reinforce natural topography by controlling development's height, bulk and scale. The policy acknowledges that "zoning designations cannot always provide a reasonable transition in height bulk and scale between development in adjacent zones," SMC 25.05.675.G.1, and affords limited authority for requiring mitigation of height, bulk and scale impacts. SMC 25.05.675.G.2. However, the policy concludes by stating that a project approved through the design review process is presumed to comply with the SEPA policy on height, bulk and scale, and that the presumption may be rebutted "only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated." SMC 25.05.675.H.2.c.

106. Section 25.05.675.G.2.c of the Seattle SEPA Ordinance provides the following:

The Citywide Design Guidelines (and any Council-approved, neighborhood design guidelines) are intended to mitigate the same adverse height, bulk, and scale impacts addressed in these policies. A project that is approved pursuant to the Design Review Process shall be presumed to comply with these Height, Bulk, and Scale policies. This presumption may be rebutted only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated. Any additional mitigation imposed by the decision maker pursuant to these height, bulk, and scale policies on projects that have undergone Design Review shall comply with design guidelines applicable to the project.

107. SMC 25.05.675.C.2 provides SEPA policies with respect to drainage impacts. It states:

. . .

b. The decisionmaker may condition or deny projects to mitigate their adverse drainage impacts consistent with the Overview Policy set forth in SMC Section 25.05.665; provided, that in addition to projects which meet one or more of the threshold criteria set forth in the Overview Policy, the following may be conditioned or denied:

. . .

2) Projects located in areas where downstream drainage facilities are known to be inadequate . . . .

c. To mitigate adverse drainage impacts associated with the projects identified in the policy set forth above in subsection 25.05.675.C.2, projects may be required to provide drainage control measures designed to a higher standard than the design storm specified in the Stormwater Code (Chapters 22.800 through 22.808) and the Environmentally Critical Areas Ordinance. Mitigating measures may include, but are not limited to:

1) Reducing the size or scope of the project;

2) Requiring landscaping and/or retention of existing vegetation;

3) Requiring additional drainage control or drainage improvements either on or off site; and

4) Soil stabilization measures.

108. SMC 25.05.675.J provides SEPA policies with respect to loss of wildlife habitat or other vegetation which have substantial aesthetic, educational, ecological, and/or economic value. It states:

a. . . . A high priority shall be given to the preservation and protection of special habitat types. Special habitat types include, but are not limited to,

wetlands and associated areas (such as upland nesting areas), and spawning, feeding, or nesting sites. A high priority shall also be given to meeting the needs of state and federal threatened, endangered, and sensitive species of both plants and animals.

b. For projects which are proposed within an identified plant or wildlife habitat or travelway, the decisionmaker shall assess the extent of adverse impacts and the need for mitigation.

c. When the decisionmaker finds that a proposed project would reduce or damage rare, uncommon, unique or exceptional plant or wildlife habitat, wildlife travelways, or habitat diversity for species (plants or animals) of substantial aesthetic, educational, ecological or economic value, the decisionmaker may condition or deny the project to mitigate its adverse impacts. Such conditioning or denial is permitted whether or not the project meets the criteria of the Overview Policy set forth in SMC Section 25.05.665.

109. SMC 25.05.675.Q.2 provides SEPA policies with respect to shadows on open spaces. It states: "It is the City's policy to minimize or prevent light blockage and the creation of shadows on open spaces most used by the public. . . Areas outside of downtown to be protected . . . [include] [p]ublicly owned parks; . . ."

110. SMC 25.05.675.R.2 provides SEPA policies with respect to traffic and transportation. It states in pertinent part:

a. It is the City's policy to minimize or prevent adverse traffic impacts which would undermine the stability, safety and/or character of a neighborhood or surrounding areas.

b. In determining the necessary traffic and transportation impact mitigation, the decisionmaker shall examine the expected peak traffic and circulation pattern of the proposed project weighed against such factors as the availability of public transit; existing vehicular and pedestrian traffic conditions; accident history; the trend in local area development; parking characteristics of the immediate area; the use of the street as determined by the Seattle Department of Transportation's Seattle Comprehensive Transportation Plan; and the availability of goods, services and recreation within reasonable walking distance.

Traffic mitigation measures for projects outside of downtown may include changes in access and changes in the location, number and size of curb cuts and driveways, among other things. SMC 25.05.675.R.2.f.

Conclusions

1. The Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director's decisions. SMC 23.76.022 C.6 and C.7; SMC 23.88.020.G.5. The Appellant bears the burden of proving that the Director's Interpretation, Decision, and DNS were "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Examiner, on review of the entire record, and in light of the public policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made. *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

2. To meet its burden of proof under SEPA, the Appellant must meet the high burden of demonstrating the reasonable probability of the significant impacts they allege and present actual evidence of probable significant adverse impacts from the proposal. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001). As noted above, "significance" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197–11–794. This burden is not met when an appellant only argues that they have a concern about a potential impact, or an opinion that more study or review is necessary.

3. The Appellant filed a timely appeal of the Director's Decision, the DNS, and the Interpretation, including the following:

    a. Whether the proposal's height, bulk, and scale violate provisions of the Code, design review guidelines, and SEPA.
    b. Whether the Director collected adequate information on which to make a determination whether the project would generate significant adverse environmental impacts, including but not limited to impacts related to steep slopes, surface water, groundwater, sewer and waste water, flooding, trees, wildlife habitat, land use, aesthetics (including height, bulk and scale), public safety, traffic and transportation, construction, and public infrastructure/utilities).
    c. Whether the project will have significant adverse environmental impacts to the environmental elements listed in (b), above. In addition, the Appeal alleged the Director erred in its determination that no further mitigation was required and in the exercise of its substantive authority under SEPA with respect to these impacts.
    d. Whether the Land Use Code Interpretation was in error;
    e. Whether the proposal is inconsistent with the tree removal restrictions set forth in SMC Chapter 25.11, including whether the Applicant adequately identified the trees, whether the Applicant adequately justified removal, whether the Applicant met the canopy replacement requirements of the code, and whether the Applicant met the replacement and restoration requirements of the code.

4. The appeal attempts to blanket its challenge of compliance with code provisions with a SEPA appeal of all of the same issues. SEPA recognizes that certain analyses formerly performed solely under SEPA are now the subject of other regulatory schemes.[138] The legislative intent behind RCW 43.21C.240 was to narrow SEPA review to "gaps" that may exist in applicable law.[139] The role of local government is to determine whether adverse impacts will be adequately analyzed and brought below a level of significance as a result of either changes to the proposal, conditioning of the proposal, and/or regulatory requirements imposed pursuant to local laws.[140]

5. The Code follows the state mandate to avoid duplicative review. SMC 25.05.665.D states that

> Many environmental concerns have been incorporated in the City's codes and development regulations. Where City regulations have been adopted to address an environmental impact it shall be presumed that such regulations are adequate to achieve sufficient mitigation . . ..

The Code provides seven circumstances under which denial or mitigation of a project based on adverse environmental impacts is permitted.[141] It is up to the Appellant to demonstrate that one or more of these exceptions is applicable in this case.

Height, Bulk, Scale, and Aesthetic Impacts (Compliance with the Code and SEPA)

6. The Appellant asserts that the approved project design conflicts with applicable design review guidelines related to height, bulk, and scale, and massing and zone transitions. Mr. Steinbrueck, a licensed architect with deep experience with the design review process, testified to his views that the proposed building is "grossly incompatible" with the site. He specifically cited a number of design review guidelines that he opined were not met by the project.[142]

7. As stated in the Findings of Fact, there were a total of four Design Review meetings. Two is more typical for a project, as testified by Magda Hogness, Senior Land Use Planner. The Board thoroughly considered issues of height, bulk, and scale due to the zone edge condition.[143] The Board requested numerous modifications of the project, with which the Applicant complied.[144] The Applicant made substantial changes to the façade facing Dewey in an effort to comply with the Board's guidance, including step backs to different floors of the building, a new street façade with townhouses to blend better with the character of the residential community adjacent to the project, landscaping, and multiple

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[138] *See* RCW 43.21C.240; WAC 197-11-330(1)(c).
[139] 1995 WA HB 1724 § 201(a)
[140] R. SETTLE, *Washington State Environmental Policy Act: A Legal and Policy Analysis* § 13.01[5] (2018).
[141] *See* SMC 25.05.665.D, quoted at Finding of Fact #104.
[142] *See Exh.* 15. A number of the guidelines outlined in Exhibit 15 were not appealed by the Appellant, and therefore will not be considered as part of the appeal.
[143] SDCI Closing Statement at 4 (Feb. 4, 2019).
[144] *See* Exhs. 61, 63, 67, 71, and 75.

design and material changes to respond to comments by the community. The design analysis was quite thorough during each of the four iterations of the project.

8. While Mr. Steinbrueck is certainly qualified to express an expert opinion on the adequacy of the design of the project, one opinion differing with the unanimous decision of the Board (which is in part comprised of design professionals), the decision of the Director, and the expert opinions of two other witnesses (Magda Hogness and Charles Strazzara) is not enough to reverse the decision, given the deferential standard of review. Mr. Steinbrueck is correct that height and bulk are measurable, but the opinion about whether the building is out of scale with the neighborhood in the bowl is still a matter of professional opinion.

9. After reviewing the entire record and in light of the public policy expressed in the underlying law, the Examiner is not left with the definite and firm conviction that a mistake has been made. The appeal should be **DENIED** with respect to the challenge to the Director's decision affirming the Design Review Board's recommendation.

10. With respect to the SEPA challenge regarding height, bulk, and scale, SMC 25.05.675.G.2.c states:

> The Citywide design guidelines (and any Council-approved neighborhood design guidelines) are intended to mitigate the same adverse height, bulk, and scale impacts addressed in these policies. A project that is approved pursuant to the design review process is presumed to comply with these height, bulk, and scale policies. <u>This presumption may be rebutted only by clear and convincing evidence that height, bulk, and scale impacts documented through environmental review have not been adequately mitigated.</u> Any additional mitigation imposed by the decisionmaker pursuant to these height, bulk, and scale policies on projects that have undergone design review shall comply with design guidelines applicable to the project.

11. Just as the Appellant has failed to meet its burden to show that the Director's decision affirming the Design Review Board's recommendation should be overturned, it has failed to present clear and convincing evidence that the height, bulk, and scale impacts have not been adequately mitigated. The Appellant has not rebutted the presumption in the code that the design review process did not provide proper consideration of the impacts of the proposal.

12. On the issue of aesthetic impacts due to the loss of the mature tree canopy onsite, there can be no denying that the loss of the tree canopy will bring aesthetic changes to the neighborhood. However, the Applicant demonstrated through its arborist report and the testimony of a number of experts, including Sean Dugan, John Shaw, Magda Hogness, Scott Evans, and Charles Strazzara that reasonable attempts were made to save some portion of the tree canopy. The building was even redesigned to allow a portion of the grove and the exceptional tree to remain. It was, however, the arborist's firm conclusion

that these trees would not survive the trauma of the building construction process and the changes to hydrology related to the construction. This is due in no small part to the fact that this slope was artificially created, and the hillside is constructed of fill.

13. The appeal should be **DENIED** with respect to the SEPA challenges regarding height, bulk, scale, and aesthetic impacts.

Did the Department adequately analyze and mitigate each challenged element of the environment?

14. Steep Slopes. The Appellant presented no evidence challenging the Applicant's geotechnical studies and numerous expert witnesses who testified regarding the slope and the engineering involved in siting the building.[145] The Appellant has therefore abandoned its appeal on this issue, and the SEPA appeal with respect to this issue should be **DISMISSED.**

15. Surface Water, Groundwater, Sewer and Waste Water, and Flooding.

The Appellant presented the testimony of Tony Hacker, a local resident in the Mercer Bowl, and Tom Spangenberg to challenge the conclusion in the Director's decision that "[t]he City's stormwater Ordinance provides authority and regulations intended to mitigate potential drainage impacts; no further mitigation is warranted pursuant to SMC 25.05.675.C or SMC 25.05.665." The Appellant also introduced a report commissioned by Seattle Public Utilities with respect to the catastrophic storm on December 14, 2006 that tragically claimed the life of one of the residents of the Bowl neighborhood and a report by the University of Washington on climate change in the Puget Sound.[146]

16. SMC 25.05.665 allows use of substantive SEPA authority in cases when there is inadequate infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable City code or zoning." SMC 25.05.675.C.2.b.2 similarly allows a decisionmaker to condition or deny projects to mitigate adverse drainage impacts when the project is "located in areas where downstream drainage facilities are known to be inadequate."

17. In this case, the Applicant has submitted a conceptual drainage report that appears to be outdated.[147] The report indicates that the applicant's drainage system will discharge to the 15-inch pipe under Madison Street, while Mr. Taflin's testimony indicates that the drainage will discharge into a newly-located eight-inch pipe.[148] The evidence in the record is conflicting regarding the details of the system, but the testimony is uncontroverted that the system will be brought into code compliance in the next stages of permit review.[149]

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[145] *See* Exhibits 80, 81, and 82.
[146] *See* Exhs. 20 & 21.
[147] *See* Exh. 19.
[148] Testimony of Joe Taflin (Feb. 5, 2019).
[149] Testimony of Ede Courtenay (Dec, 17, 2018).

18. Beyond the drainage system onsite, the Appellant points to the location of this project in the "Madison sag" and the massive surface water flooding that occurred during the December 14, 2006 storm. The Applicant has provided testimony that the improvements to the system since the 2006 event have greatly increased the capacity of the system, in that it can now hold four million gallons more than it used to.

19. The Ch2M Hill Report provides relevant conclusions in reviewing this issue. Among the conclusions, it states:

> Drainage in and uphill of the Madison sag and Mercer bowl is very complex as a result of urban drainage conditions that include:
>
> - Acres of impervious roads and buildings
> - Hundreds of drainage inlets, structures, and pipes in numerous systems (combined and separated stormwater systems, roof drains, foundation drains, roadside drains)
> - Soil saturation due to previous rainfall (November 2006 set monthly rainfall records)
> - Steep slopes, particularly the streets immediately west and north of the investigation area
> - Clogging of inlets, pipes, and structures by leaves, sticks, sand, coffee cups, and other debris
>
> The characteristics of runoff flowing through Madison Valley became more complex with intense rainfall, when there are added effects of inlet grate bypassing, varying amounts of drainage system surcharging (i.e., water backing up), roadside gutter flow that "on-ramps" and "off-ramps" to sidewalks and intersecting streets, and larger than normal amounts of debris clogging inlets and catch basins.
>
> Rainfall across Madison Valley during the late afternoon of December 14, 2006, was so intense that the City's drainage and combined sewer systems could not collect and convey all the runoff generated by the storm. . . .
>
> Flooding occurred in the low-lying roadway sag at East Madison Street and the low-lying bowl area at the intersection of 30th Avenue East and Mercer Street because inflow in these areas exceeded the outflow, enough so that water built up . . .to the elevations. . . The sources were direct surface runoff . . . .
>
> The majority and most significant amount of runoff into the Madison sag came from the west, mostly down East Madison Street itself.

> Our calculations indicate that even if all drainage systems at the Madison sag were clear of obstructions and other flow restrictions (such as leaves, sand, and coffee cups), they would not accept all the runoff coming into the area during this storm. This is due to the size of the pipes carrying flow from the surface to the combined sewer. In addition, leaves and other debris, both prior accumulation and what was carried by runoff during this event, likely prevented some stormwater from getting into roadway inlets and through structures and pipes, further reducing the drainage system's capacity.
>
> The [15]-inch-diameter combined sewer mainline along East Madison Street had numerous obstructions to flow. Of these, roots growing into the pipe between 25th and 26th Avenues East and between 27th and 28th Avenues almost certainly restricted flow through and into this pipe, enough to have increased runoff flowing tot the sag during this storm.[150]

Mr. Spangenberg's testimony that the improvements made since 2006 would not alleviate the conditions in this area may well be correct. At this point, it is unclear that the public infrastructure has been fixed to assure an event like what happened in 2006 will not happen again. The Department should have, but did not, provide an analysis of this issue.

20. In determining the proposal's specific impacts to this problem, the Responsible Official should have, but did not assess the ways in which this development might either contribute to or alleviate the problem (if it still exists). As the Court of Appeals has stated in *Moss v. Bellingham*, "[M]ore than mere consistency with the comprehensive plan and development regulations is required to avoid EIS preparation. WAC 197-11-158 and WAC 197-11-350 also require that the specific adverse environmental impacts of the project be adequately mitigated."[151]

21. Ms. Hogness indicated in her testimony that she had not reviewed the Ch2M Hill report and seemed to be generally unaware of the 2006 event. She admitted that she completely deferred the SEPA analysis of drainage to the drainage review manager, Ede Courtenay. Ms. Courtenay testified she had not yet reviewed the project, but only filed a "Preliminary Assessment Report" indicating there is adequate capacity in the system to accommodate the project (assuming a 25-year storm post-development discharge rate).

22. Blind reliance on compliance with development regulations to meet SEPA requirements is inappropriate, especially in this case where this is concrete evidence of significant adverse environmental impact in the 2006 storm due to inadequate drainage systems. While it is not the easier prescriptive path, there are some instances in which such review is necessary under SEPA.

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[150] Exh. 20 at 6-1 through 6-2.
[151] *Moss v. Bellingham*, 109 Wn .App. 6, 23-24, 31 P.3d 703 (2001).

23. On the other hand, it is not up to this developer to fix this problem for the entire 170-acre area of uplands above the Madison sag. Under SMC 25.05.660, "[r]esponsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal." The appropriate analysis is whether there are specific impacts resulting from this development that could exacerbate the problems faced in 2006, if in fact the specific causes for the catastrophic failure of the drainage system have not been fixed, as indicated by Mr. Spangenberg. For example, would the choice of European Beech trees contribute to the problem of clogged catch basins and drainage inlets because of their big leaves? Are their roots likely to grow into pipes in Madison Street?

24. Another area of investigation is whether the code prescriptive post-development discharge rates are adequate for this development. The drainage report submitted by the Applicant stated,

> The stormwater conveyance system for this project has been designed to address storm events in accordance with City of Seattle practices. In the event of a larger storm, the system may fail. In this case, the runoff from larger events will overflow to the west into East Madison Street.[152]

While Mr. Taflin attempted to walk back that language in testimony, the report bears his engineer's stamp.[153]

25. The code requires designing for a 25-year storm event. The storm that occurred in December 2006 was over a 100-year storm event.[154] According to the University of Washington, one of the projected changes due to climate change is that winter precipitation extremes are will increase. Specifically, the heaviest 24-hour rain events in western Oregon and Washington are projected to *intensify* by 22% on average and occur more frequently- up to 8 days per year from a historical average of 2 days per year.[155]

26. Given these facts as documented in the record, there is no choice but to find the threshold determination invalid with respect to drainage. Reviewing all the facts in the record, the DNS was clearly erroneous, and there is clear and convincing evidence that a mistake has been made. The Responsible Official should look to the guidance of SMC 25.05.675.C in reviewing this matter on remand.

27. The threshold determination decision with respect to drainage should be **REVERSED**, and the matter **REMANDED** to the Department for further actions in compliance with this decision.

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[152] Exh. 19 at 13.
[153] Exh. 19 at cover page.
[154] Exh. 20 at 6-2.
[155] Exh. 21 at 2-7.

28. Plants and Animals. The Appellants challenged the Director's decision allowing the removal of the trees on site both as a matter of code compliance and SEPA compliance. The Applicant supplied studies of the trees and vegetation on site, and a Risk Assessment assessing the likelihood of survival of the trees once the site is developed. Sean Dugan, Arborist, testified regarding the studies on behalf of the Applicant. Art Pedersen, City Arborist, testified on behalf of the Department. Both concurred with the conclusion of the Risk Assessment, recommending removal of all the trees on site due to damage to their root systems during construction and changes in hydrology as a result of the development.

29. The Appellants presented the testimony of Tina Cohen, arborist. While she provided criticisms of the Applicant's studies and Risk Assessment, she did not provide any compelling testimony on how the removal of trees constituted a significant adverse environmental impact. She did state there would be a significant adverse impact to the trees, which Mr. Dugan agreed with. However, that is not the question the Department is required to address as a part of the SEPA analysis.

30. The Department's and the Applicant's analysis of the requirements to meet the requirements of DR 16-2008 is sound. The objections from Ms. Cohen are based on small differences in measurements or the amount of damage to a particular tree, which are matters of differences of professional opinion. Appellant also has not shown that the replacement canopy is not adequate under the code. The DNS with respect to trees and tree canopy is not clearly erroneous.

31. With respect to wildlife habitat, the Applicant provided a professional report completed by ecologist Jim Keany opining that the habitat provided by the site was isolated and of low value. Mr. Keany was a credible expert witness. Although Mr. Kirsh provided detailed information on the bird population on site, he did not have the same expertise as Mr. Kirsh in evaluating the value of the habitat.

32. There is no basis in the SEPA policies for plants and animals[156] for overturning the DNS with respect to wildlife habitat. There is no sensitive habitat within the area, such as a wetland or stream, the isolated habitat on the site is not part of a habitat corridor, and there are no uncommon or exceptional species using the site. Mr. Keany testified that the birds found on site are found in most Seattle neighborhoods, and that existing bird populations would relocate to the nearby Arboretum or the Mercer Madison Woods. He further testified that many of the bird species would return to the site once the landscaping is installed and established.

33. The Appellant has failed to meet its burden to prove with actual evidence that the DNS was clearly erroneous with respect to wildlife habitat impacts. The appeal should be **DENIED** with respect to the SEPA challenges regarding trees, tree canopy, and wildlife habitat.

[156] SMC 25.05.675.N.

34. Traffic. The Appellant makes numerous claims regarding the impacts of the traffic from the proposed development. Mr. Tilghman, the Appellant's expert witness on traffic, stated a number of disagreements with the project, opining that it generated too much traffic in the area, the dual access (driveways on Dewey and Madison) were objectionable, and the loading access on Madison was unsafe for pedestrians and presented too many challenges to traffic due to the location of the grocery store mid-block.

35. The Department presented testimony from John Shaw, a traffic expert on staff who concurred with the Applicant's traffic analysis and access configuration. The Applicant presented testimony from Edward Koltonowski, the engineer who conducted the traffic studies. Mr. Koltonowski presented an extensive study of baseline, three access options, LOS counts for intersections based on traffic projections, parking analysis, and collision history. He also provided testimony on the loading access, site distance for cars, truck counts that his firm completed at other similar grocery stores, and pedestrian safety in several locations. Through this testimony, the Applicant more than adequately rebutted Mr. Tilghman's criticisms of the project, and provided sufficient detail to indicate both compliance with the code and that the project would present no significant adverse environmental impacts.

36. With respect to traffic and transportation, the Applicant has failed to meet its burden to show that the Director's Decision, including the SEPA analysis, was clearly erroneous. The appeal should be **DENIED** with respect to the SEPA challenges with respect to traffic and transportation.

37. Construction Impacts: Noise and Dust. The Appellant presented the testimony of three concerned citizens re: the impact of construction on the neighborhood. While these concerns are understandable, the City has a robust set of regulations and policies to mitigate the impacts of construction in the City, including dust control, noise control, and rigorous stormwater controls. The Applicant is required to complete a Construction Management Plan in accordance with SDOT requirements to mitigate traffic impacts.

38. With respect to short-term construction impacts, the Applicant has failed to meet its burden to show that the Director's Decision, including the SEPA analysis, was clearly erroneous. The appeal should be **DENIED** with respect to the SEPA challenges with respect to short-term construction impacts.

39. Shadow Impacts. The Appellant argues that the Department erred in failing to exercise SEPA authority to mitigate shadow impacts. SMC 25.05.675.Q.2 provides SEPA policies with respect to shadows on open spaces. It states: "It is the City's policy to minimize or prevent light blockage and the creation of shadows on open spaces most used by the public. . . Areas outside of downtown to be protected . . . [include] [p]ublicly owned parks; . . ." Here the question is whether or not the Mad P-Patch, which is part of the Mercer Madison Woods that is designated open space owned by the City of Seattle, qualifies as a "park" under the meaning of the code.

40. "Park" is not defined in the Environmental Protection Code. It is defined in the Land Use Code, Title 23, as the following:

> "Parks and open space" means a use in which an area is permanently dedicated to recreational, aesthetic, educational or cultural use and generally is characterized by its natural and landscape features. A parks and open space use may be used for both passive and active forms of recreation.[157]

41. Given the interrelationship between the Land Use and the Environmental Protection Code, it is appropriate to adopt this definition for purposes of determining whether or not the Mad P-Patch is protected from shadow impacts. Applying the definition, the Mad P-Patch is permanently dedicated to an aesthetic, educational, and culture use. Although it consists of cultivated beds, it is generally characterized by natural features. The Mad P-Patch is protected by the SEPA policies that require the minimization or prevention of light blockage and shadows on open spaces.

42. Since the SEPA Responsible Official did not apply this SMC 25.05.675.Q.2 to the project, the decision must be reversed and remanded to allow study and consideration of this issue by the Department. The Examiner encourages the Department to work with representatives of the Mad P-Patch to ensure that the analysis focuses on the appropriate times of the year when light is critical to garden's operation.

43. The SEPA threshold determination decision with respect to shadow impacts should be **REVERSED**, and the matter **REMANDED** to the Department for further actions in compliance with this decision.

44. The Appellant raised other issues in its appeal that were not addressed at the hearing or in its closing statement, and these issues have been abandoned.

Decision

The appeal with respect to the Director's design review decision is **DENIED**, and the Director's design review decision is **AFFIRMED** subject to the following conditions set forth in the Director's Decision dated July 23, 2018:

For the Life of the Project

1. The building and landscape design shall be substantially consistent with the materials represented at the Recommendation meeting and in the materials submitted after the Recommendation meeting, before MUP issuance. Any change to the proposed design, including materials or colors, shall require prior

[157] SMC 23.84A.030.

approval by the Land Use Planner (Magda Hogness 206-727-8736 and Magda.Hogness@seattle.gov).

Prior to Issuance of Demolition, Excavation/Shoring, or Construction Permit

2. Provide a Construction Management Plan that has been approved by SDOT. The submittal information and review process for Construction Management Plans are described on the SDOT website at http://www.seattle.gov/transportation/cmp.htm.

Prior to Issuance of a Construction Permit

3. Provide a commitment letter recorded with King County, signed by the property owner and the applicant, stating that the property owner and applicant will provide flaggers to facilitate reversing down the arterial and backing into the loading dock for the life of the project.

The Determination of Non-Significance is **RERVESED** and **REMANDED** consistent with Conclusions 15-27 and 39-43. The Appellant's other challenges to SEPA compliance are **DENIED** consistent with this opinion.

Entered this 26th day of February, 2019.

Barbara Dykes Ehrlichman
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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