

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

In the Matter of the Appeal of

Hearing Examiner File:
MUP-21-004 (DR, W)

**FISCHER STUDIO BUILDING
CONDOMINIUM OWNERS
ASSOCIATION**

Department Reference:
3033162-LU

from a decision issued by the Director,
Seattle Department of Construction
and Inspections

Introduction

This is an appeal of a Seattle Department of Construction and Inspections (“Department” or “City” or “SDCI”) Director’s Decision (“Decision”) consisting of design review approval with one departure and a Mitigated Determination of Nonsignificance (“MDNS”) issued pursuant to the State Environmental Policy Act (“SEPA”) for a 46-story apartment building with retail (“Project” or “Proposal”). The Project is proposed for a site composed of two parcels (“Project Site”) that is located on the same block as the Fischer Studio Building. The Fischer Studio Building Condominium Association (“Appellant”), an organization representing the residents of this building, filed a timely appeal of the Decision.

The appeal hearing was held remotely via Zoom over a series of days on June 7, 8, 9, 14, and 15, before the Hearing Examiner. The Appellant was represented by Bryan Telegin, attorney-at-law; the Applicant, Jodi Patterson-O’Hare as agent for 1516 2nd Condominiums, LLC (“Applicant”), was represented by Courtney Kaylor, Ian Morrison, and David Carpman, attorneys-at-law; and the Director was represented by Daniel Mitchell, attorney-at-law. Written closing arguments were submitted by Appellant and jointly by Applicant and the Director (collectively, “Respondents”) on July 12, 2021. Both sides submitted written response arguments and proposed findings and conclusions on July 16, 2021, 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, the Hearing 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 1516 2nd Avenue, and is located in the middle of the southwest side of the block bounded by 2nd Avenue, 3rd Avenue, Pine Street, and Pike

Street. The site is currently occupied by a 4-story commercial building (“Chromer Building”) and a surface parking lot.

2. The site is zoned Downtown Mixed Commercial with a maximum height dependent on the proposed use.
3. The Fischer Studio Building is an 8-story residential condominium located to the northeast of the subject site across an alley. Other buildings on the block include a residential condominium known as the Haight Building, an office building called the Olympic Tower, and other commercial structures.

Proposal

4. The Proposal is a 46-story building with 531 apartment units, retail, and parking for 268 vehicles. The building will consist of a larger tower and a smaller tower above a podium, with its main entrance on 2nd Avenue and an additional “porte cochere” and entrance lobby on the rear alley. Existing structures are proposed to be demolished.

Design Review

5. The Downtown Design Review Board (“Board” or “DRB”) held an Early Design Guidance (“EDG”) meeting on the proposal on October 16, 2018, 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 that the proposal was not responsive to smaller buildings, did not account for transitions between zones, and required additional study of light and air. The Applicant's presentation offered three alternatives for the massing of the Proposal, including a preferred alternative combining a larger tower, smaller tower, and podium. The Board determined that the preferred massing alternative was the most compelling option and supported a design that would locate the larger tower element on the northern side of the site. The Board also directed the Applicant to study the transition between the proposal and the Fischer Studio Building.
6. The Board held an Initial Recommendation meeting on August 20, 2019. The Applicant presented a revised design and responses to the Board's request for information, along with a request for a departure to allow increased setbacks of the residential entry gasket. Additional public comments were received, communicating concern with impacts to light access, privacy impacts, and the Proposal's historic context. The Board's recommendations supported the massing improvements and other transitional elements that were incorporated by the Applicant and noted that the tower massing was successfully stepped down from the larger tower to the smaller. The Board also acknowledged public concern regarding “privacy concerns across the alley to the adjacent Fischer Studio Building” and requested “window studies and plan diagrams at levels 11, 6-10, and 2-4 that show the floor level off-sets and placement of windows.”
7. The Board held a Final Recommendation meeting on November 19, 2019. The Board took public comment at the meeting. Public comments expressed concerns with loss of light,

air, and privacy and referenced a previous proposal that would have located a higher tower to the south. After the meeting, the Board “acknowledged the exhaustive analysis provided in response to the request for more information clarifying the proposals response to immediate context across the alley” and recommended approval of the design response to these concerns, including off-set floor levels, setbacks, consideration of placing complimentary uses across the alley from the Fischer Studio Building’s residential uses, and reducing windows and increasing the use of spandrel. A majority of Board members present voted to recommend approval of the Proposal and the departure. The Board also recommended a condition requiring the Applicant to provide further information to ensure lighting from the alley entrance and inside the gap between the two towers would not create glare or spill toward the alley.

Director’s Review and Decision

8. 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.
9. Following a public comment period, the Director reviewed the environmental impacts of the Proposal and issued a determination of nonsignificance ("DNS") pursuant to SEPA. The Decision concluded with regard to the SEPA analysis:

The initial disclosure of the potential impacts from this project was made in the environmental checklist submitted by the applicant dated 12/28/2018. The Seattle Department of Construction and Inspections (SDCI) has annotated the environmental checklist submitted by the project applicant; reviewed the project plans and any additional information in the project file submitted by the applicant or agents; and any pertinent comments which may have been received regarding this proposed action have been considered. The information in the checklist, the supplemental information, and the experience of the lead agency with the review of similar projects form the basis for this analysis and decision.

The SEPA Overview Policy (SMC 25.05.665 D) clarifies the relationship between codes, policies, and environmental review. Specific policies for each element of the environment, and certain neighborhood plans and other policies explicitly referenced may serve as the basis for exercising substantive SEPA authority. The Overview Policy states in 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" subject to some limitations.

Under such limitations/circumstances, mitigation can be considered. Thus, a more detailed discussion of some of the impacts is appropriate.

10. With regard to short-term impacts, the Decision SEPA analysis states:

Construction activities could result in the following adverse impacts: construction dust and storm water runoff, erosion, emissions from construction machinery and vehicles, increased particulate levels, increased noise levels, occasional disruption of adjacent vehicular and pedestrian traffic, a small increase in traffic and parking impacts due to construction related vehicles, and increases in greenhouse gas emissions. Several construction-related impacts are mitigated by existing City codes and ordinances applicable to the project such as: the Stormwater Code (SMC 22.800-808), the Grading Code (SMC 22.170), the Street Use Ordinance (SMC Title 15), the Seattle Building Code, and the Noise Control Ordinance (SMC 25.08). Puget Sound Clean Air Agency regulations require control of fugitive dust to protect air quality. The following analyzes construction-related noise, air quality, greenhouse gas, construction traffic and parking impacts, as well as mitigation. . . .

11. With regard to historic resources, the Decision SEPA analysis stated:

The existing structure on site is more than 50 years old. The Department of Neighborhoods reviewed the proposal for compliance with the Landmarks Preservation requirements of SMC 25.12 and indicated the structure on site is unlikely to qualify for historic landmark status (Landmarks Preservation Board letter, reference number LPB 329/19). Per the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations to mitigate impacts to historic resources are presumed to be sufficient, and no further conditioning is warranted per SMC 25.05.675.H.

The site is located adjacent several designated historic landmarks including the Olympic Tower (northeast of the site), Fischer Studio Building (east of the site), J.S. Graham Store/Doyle Building (to the west), and Eitel Building (to the southwest). The Department of Neighborhoods reviewed the proposal for compliance with the Landmarks Preservation requirements of SMC 25.12 and did not recommend changes to the proposed design (Landmarks Preservation Board letter, reference number LPB 734/19). Per the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations to mitigate impacts to historic resources are presumed to be sufficient, and no further conditioning is warranted per SMC 25.05.675.H.

12. With regard to height, bulk, and scale impacts, the Decision SEPA analysis stated:

The proposal completed the design review process described in SMC 23.41. Design review considers mitigation for height, bulk and scale through modulation, articulation, landscaping, and façade treatment.

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.”

The height, bulk and scale of the proposed development and relationship to nearby context have been addressed during the Design Review process. Pursuant to the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations to mitigate height, bulk and scale impacts are adequate and additional mitigation is not warranted under SMC 25.05.675.G.

13. In the design review section of the Director’s Decision, the agency notes concern regarding nighttime light impacts from the lighting design of the gap/void between the towers, but stated that further information and analysis of the lighting design should be provided at the building permit phase. No other discussion light-related impacts is found in the Decision.
14. The Department determined that the Proposal would not have a probable significant adverse impact on the environment.

Appeal

15. The Appellant filed a timely appeal on February 2, 2021, challenging the DNS and design review components of the MUP decision. The Appellant alleges that the Project violates design guidelines, that the Board and City have inconsistently applied the design guidelines to different projects on the same site, and that both the Board and the SDCI did not consider, analyze, or request additional information regarding light, health, and privacy impacts, as well as the potential for significant damage to adjacent buildings like the Fischer Studio Building.
16. As the result of a prehearing motion to dismiss, Notice of Appeal issues 2.c (in part), 2.d, 2.e, and 2.f were dismissed because they raised procedural issues concerning design review that are beyond the Hearing Examiner’s jurisdiction. In addition, Appellant’s Notice of Appeal SEPA issues related to privacy, trespass, and transportation impacts were dismissed.
17. Knut Ringen is a resident of the Fischer Studio Building. He testified on behalf of Appellant regarding the Fischer Studio Building’s status as a City of Seattle designated landmark and the building residents’ preservation efforts, including describing the history of the Fischer Studio Building and surrounding development. Mr. Ringen also discussed a development proposal that was submitted for the subject site and considered by the Board in 2015, indicating his concern that the Board’s review of the current Proposal was inconsistent with its approach to the previous project. Mr. Ringen also expressed concern regarding potential impacts such as wind.

18. Peter Steinbrueck is an architect and former member of the Seattle City Council. Mr. Steinbrueck testified on behalf of Appellant regarding his belief that the Proposal is inconsistent with certain Downtown Design Guidelines and that the Applicant did not respond appropriately to issues of massing, transition, light, and privacy.
19. Edward Clark is an environmental design consultant and lighting designer who specializes in providing circadian lighting design solutions, analysis, research, and simulations. Mr. Clark produced a report and testified regarding the Project's lighting impacts on the Fischer Studio Building to the east and the Haight Building to the north. Mr. Clark explained that the methodologies and modeling used in his report (including the existing Chromer building on the site as well as the gap or void of the Project). Mr. Clark's report and testimony stated the following: the Project would reduce the amount of visible sky for the western facade of the Fischer Studio Building and the southern facade of the Haight building by as much as 99%; the Project will reduce the percentage of daylight hours at 50 lux (the amount of light needed to walk around without bumping into things) by as much as 92 percent; the Project will reduce the percentage of daylight hours reaching 200 lux (the amount of light needed to read) by as much as 98 percent; that residents in several units within the Haight Building and Fischer Studio Building would never again feel the warmth of the sun in their homes. Mr. Clark also provided a Circadian Resource Availability analysis of the reduction in daylight needed to maintain a healthy sleep/wake cycle (.03 CS or "circadian stimulus"), and the impacts on human health. Mr. Clark found that the day and hours that meet the .03 CS standard will be cut by up to 100% for some units, and there will be a dramatic decrease in light levels needed to maintain health during the rainy season. The Respondents offered no evidence to counter Mr. Clark's calculations concerning light. Neither the Applicant nor Department commissioned a study quantifying the loss of light that will be caused by the Project.
20. Dr. Horacio O. de la Iglesia is a Professor of Biology and Director of the Graduate Program in Neuroscience at the University of Washington. He is the President Elect of the Society for Research on Biological Rhythms, and has spent nearly 30 years researching and publishing on the effect of environmental light on animal and human health, as well as the negative outcomes that result from disrupting light signals to the biological clock. Dr. de la Iglesia provided a report and testimony concerning loss-of-light-related human health impacts. Dr. de la Iglesia explained how the human biological clock synchronizes to the solar day and that without regular exposure to a strong light-dark cycle, the body's sleep cycle gets out of sync. He explained how a misaligned sleep cycle is associated with multiple adverse health conditions like cardiovascular disease, cancer, metabolic disorders, depression, reduced immune function, impaired cognitive performance, and mood disorders. Dr. de la Iglesia concluded that the loss of light depicted in Mr. Clark's report is likely to result in adverse physical and mental health outcomes for residents in the adjacent buildings.
21. Dr. Anirban Adhya is an Associate Professor of Architecture and Urban Design at the College of Architecture and Design, Lawrence Technological University, Southfield, Michigan. Dr. Adhya holds a doctoral degree in Architecture from the University of

Michigan and professional architecture degrees from the University at Buffalo – State University of New York and an institution in India. Dr. Adhya testified on behalf of Appellant that Fischer Studio Building residents would experience a lack of privacy due to the proximity of the Project. Dr. Adhya also testified that a study prepared by Applicant concerning sightlines between windows had improperly disregarded the potential for visual access between different floors.

22. Leslie Buker testified on behalf of Appellant. Ms. Buker resides on the west side of the fifth floor of the Fischer Studio Building. Ms. Buker indicated that she expects the Project to result in a loss of light and privacy in her unit that will create stress and require her to keep her curtains drawn. She also stated that she has epilepsy that is triggered by disruptions in sleep and is concerned that the Project will affect her sleep cycle.
23. Rachel Werther testified on behalf of Appellant. Ms. Werther resides on the west side of the Fischer Studio Building. She testified that she works outside of her apartment during the day but finds the prospect of reduced sunlight during the morning and evening to be stressful. She expressed concern that this would exacerbate her depression and anxiety.
24. Darren Johnston, a structural engineer, testified on behalf of Appellant. Mr. Johnston discussed the excavation that will be required to construct the Project. He testified that the shoring planned for adjacent properties during this process would not eliminate the risk of soil movement at a level that would cause the Fischer Studio Building's foundation to settle and its facades to experience cosmetic damage. He stated that plan documents for the Fischer Building indicated that its foundations may extend deeper than the Applicant has anticipated and that its floors may be supported by "double cantilevered" beams that do not connect to one another, increasing structural vulnerability.
25. Megan Cruz is a 38-year resident of the Fischer Studio Building. She testified that residents of the Fischer Studio Building repeatedly tried to raise light and light-related health impacts to SDCI's attention during the design review and SEPA processes, but never received a response. She testified that there is a risk that if the Project goes through, residences made unhealthy by lack of light will fail to attract a new generation of tenants willing to shoulder the high costs of maintaining the Fischer Studio Building as a historic landmark. She testified that while Appellant has made a modest amount of money in the past by selling the building's development rights, the City's landmark designation has imposed high costs on the residents. She indicated that, currently, the building is in need of \$8 million in terms of repair and maintenance. Ms. Cruz testified that if the Project is approved and residences are made into unhealthy places to live, it will be difficult in the future to preserve the Fischer Studio Building as a historic landmark.
26. Julia Nagele, Principal and Director of Design at Hewitt Architects, was the lead designer for the Project and testified on behalf of the Applicant. Ms. Nagele received a Master of Architecture from the University of Maryland and has designed nine previous high-rise projects in the City. Ms. Nagele described the Project and the measures taken by the Applicant to respond to the Board's direction during the design review process, including additional study and design alterations regarding the transition between the Project and the Fischer Studio Building. Ms. Nagele discussed her interpretation of the applicable

Downtown Guidelines and the elements of the Project that demonstrate consistency with them.

27. Denise Fong testified on behalf of the Applicant. Ms. Fong is an architectural lighting designer who reviewed the Project in conjunction for the hearing. She testified that she reviewed the graphics prepared by Mr. Clark depicting levels of light in the Fischer Studio Building units and found certain accuracies. She also testified that lighting designers are capable of using methods to respond to the Board's condition regarding potential light spillage.
28. Dr. Steven Lockley testified on behalf of the Applicant. Dr. Lockley is a Neuroscientist and Director of the Circadian Physiology Program, Division of Sleep and Circadian Disorders, Department of Medicine, Brigham and Women's Hospital, Boston, USA, as well as an Associate Professor of Medicine at Harvard Medical School. He holds a Ph.D. in Biological Sciences. Like Dr. de la Iglesia, Dr. Lockley discussed the importance of light exposure in maintaining circadian entrainment, *i.e.* keeping internal circadian rhythms synchronized to the 24-hour day. Dr. Lockley stated that circadian entrainment could be achieved through low levels of light and from artificial light alone. Dr. Lockley criticized the assertions regarding health impacts made by Appellant's witnesses. He agreed that adverse health impacts could result from circadian misalignment, but he indicated that Mr. Clark and Dr. de la Iglesia had incorrectly drawn conclusions from studies involving shift workers, who experience a greater disruption in light exposure than could be caused by the Project. Dr. Lockley testified that Mr. Clark's analyses did not demonstrate that light levels would be insufficient to allow circadian entrainment and that they did not account for residents' ability to access electric light or go outside. Dr. Lockley also testified that there was no scientific basis for Dr. de la Iglesia's assertion that natural light is inherently superior to artificial light for entrainment or that morning light is more important than evening light. He stated that the use of electric light sources – especially those emitting blue light such as computers or tablets – in the evening poses a greater potential for circadian disruption than reduced light exposure in the morning.
29. Matt Smith, a geotechnical engineer with more than 25 years of experience, testified on behalf of the Applicant. Mr. Smith testified that the shoring wall planned for the location across the alley from the Fischer Studio Building will exceed the City standard of 1 inch deflection (*i.e.* lateral movement of soil) and will limit deflection to 0.5 inch. He stated that measures would be in place to stop construction of the Project if deflection exceeded this amount and that a variety of shoring methods had been used for similar projects elsewhere in the City.
30. Jacob McCann, a structural engineer with 18 years of experience, testified on behalf of the Applicant. Mr. McCann testified that he reviewed the historic plans for the Fischer Studio Building and that the gap identified by Mr. Johnston likely did not indicate a lack of connection between structural beams. He stated that double cantilevered structural systems do not pose more risk than other systems and that the approach to excavation and shoring planned for the Project had been used successfully near other historic structures.

31. Rob McIntosh, a senior civil engineer and principal geotechnical reviewer for the City, testified on behalf of the City. Mr. McIntosh testified that the Applicant prepared a thorough geotechnical report and provided additional information at the City's request. He stated the shoring and excavation method proposed had been successfully used in other projects.
32. Crystal Torres, a Senior Land Use Planner for the City, testified on behalf of the City. Ms. Torres testified that she was the reviewer assigned to the Project throughout the design review process and had also overseen the SEPA review process. Ms. Torres stated that prior to issuing the DNS, she had received and reviewed comments from Mr. Clark discussing the loss of light in the Fischer Studio Building, consulted with her colleagues.

Applicable Law

33. SMC 23.76.022 provides that the scope of appeals of Type II MUP decisions is *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," (emphasis added) and various determinations under SEPA.
34. SEPA provides that a threshold determination shall be prepared "at the earliest possible point in the planning and decision making process, when the principal features of a proposal and its environmental impacts can be reasonably identified. SMC 25.05.055.B. "A proposal exists ... when an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated." SMC 25.05.055.B.1 (emphasis added). "The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts." SMC 25.05.055.B.1.a.
35. SMC 25.05.330.A.2 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. "If the responsible official determines that a proposal may have a probable significant adverse environmental impact, the responsible official shall prepare and issue a determination of significance (DS) substantially in the form provided in Section 25.05.980." SMC 25.05.360.A.
36. SMC 25.05.335 directs the lead agency to "make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal," and where "the agency concludes that there is insufficient information to make its threshold determination" calls for the lead agency to take additional steps that may include seeking additional information from the applicant, or making its own further study.

37. The City's SEPA Overview Policy states, in part, that:

[m]any 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.

38. 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 the 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.G.2.c.
39. The SEPA policy on "Shadows on Open Spaces" states: "Access to sunlight, especially in Seattle's climate, is an amenity of public open spaces." SMC 25.05.675.Q.1.a. "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." SMC 25.05.675.Q.2. "[Chapter 23.49](#) provides some protections against shadow impacts created by development in Downtown. However, due to the scale of development permitted in downtown, it is not practical to prevent such blockage at all public open spaces downtown." SMC 25.05.675.Q.1.c. "Title 23 attempts to protect private property from undue shadow impacts through height, bulk and setback controls, but it is impractical to protect private properties from shadows through project-specific review." SMC 25.05.675.Q.1.d.
40. 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.
41. 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.A.
42. SMC 23.41.014 describes the design review process. "The purpose of the early design guidance public meeting is to identify concerns about the site and the proposed project, receive comments from the public, review the design guidelines applicable to the site, identify guideline priorities, and explore conceptual design or siting alternatives." SMC 23.41.014.C.2. "The Board shall identify the applicable guidelines of highest priority to the Board, referred to as the "guideline priorities". The Board shall summarize and

consider any community consensus regarding design resulting from community outreach, or as expressed at the meeting or in written comments received.” SMC 23.41.014.D.1. “During a regularly scheduled evening meeting of the Design Review Board, the Board shall review the summary of public comments on the project's design, the project's consistency with the guideline priorities, and the Director's review of the project's design and consistency with the guideline priorities, and make a recommendation[.]” SMC 23.41.014.F.1.

43. The Director must consider the Board’s recommendation. SMC 23.41.008.F.2.SMC 23.41.008.F.3 provides: “If four or more members of the Design Review Board agree in their recommendation to the Director, and if the Director otherwise approves a Master Use Permit application, the Director shall make compliance with the recommendation of the Design Review Board a condition of permit approval, unless the Director concludes that the recommendation of the Design Review Board: (a) Reflects inconsistent application of the design review guidelines.”

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 25.05.680.B, which also requires that the Hearing Examiner give substantial weight to the Director’s determination.
2. The party appealing the Director’s determination has the burden of proving that it is "clearly erroneous". *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Under this standard of review, the decision of the Director may be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. *Cougar Mt. Assoc. v. King County*, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).
3. Concerning light, the Appellant alleged two issues in its Notice of Appeal “The proposal will have probable significant adverse impacts related to loss of light and human health [and] . . . light and glare.” These two issues were presented in the context of testimony and evidence that concerned the loss of light only in the context of the human health impacts it might have, and as “light and glare” emanating from the Proposal. Loss of light as a distinct issue separate from human health impacts was not pleaded by the Appellant in its Notice of Appeal. The Examiner may not rule on issues not raised in an appeal. However, the Department is cautioned that the Examiner’s earlier ruling concerning light implicating an element of the environment under SMC 25.05.444 stands. SMC 25.05.444.B.2.c identifies light as an element of the environment that must be considered during SEPA review.

The Applicant and Department argued that SMC 25.05.444.B.2.c only concerns “light and glare” as a single element of the environment only concerned with the narrow issue of light and glare emanating from a proposal, and is not inclusive of any other light impact such as loss of light to adjacent properties caused by a proposal. This is an extreme and conservative reading of the Code. This stance divorces the Department from its duty to ensure adequate review of environmental impacts, is not supported by any case law, and defies the plain language of the statute.

Other elements of the environment include more than one aspect of the element joined with another, or more, by the term “and” without joining the two aspects into a single narrow element. For example:

- SMC 25.05.444.A.4 identifies “Plants and animals.”
- SMC 25.05.444.A.4.a identifies “Habitat for and numbers or diversity of species of plants, fish, or other wildlife.”
- SMC 25.05.444.A.5 identifies “Energy and natural resources.”
- SMC 25.05.444.A.5.d identifies “Conservation and renewable resources.”
- SMC 25.05.444.B.2 identifies “Land and shoreline use.”
- SMC 25.05.444.B.2.f identifies “Historic and cultural preservation.”
- SMC 25.05.444.B.3.c identifies “Waterborne, rail, and air traffic.”
- SMC 25.05.444.B.4 identifies “Public services and utilities.”

Applying the Applicant and Department’s argument to these sections of the Code - to require them to be read as single elements of the environment - produces absurd results, as it does with SMC 25.05.444.B.2.c.

The Department and Applicant’s argument that loss of light impacts are not required to be reviewed as part of SEPA analysis because they are not identified in the SEPA checklist or other portions of the Code is similarly unavailing. Where the Respondent’s argued that only the elements of the environment identified in SMC 25.05.444 must be analyzed – the converse to that is that *all* relevant elements listed in SMC 25.05.444 *must* be analyzed regardless of how the City has treated such issues in other portions of the Code.

It would be simple to include a light loss study for such a sizable project, and would be much better practice than attempting to litigate away duties required under SEPA.

4. The record demonstrates that the City considered the Project’s potential impacts relating to the loss of light and human health, and those relating to reflective light and glare from the Project, in a manner sufficient to amount to *prima facie* compliance with the requirements of SEPA and that SDCI’s Decision was based on “information sufficient to evaluate the proposal’s environmental impact” as required by SEPA. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The record demonstrates the City’s understanding that the height, bulk, and scale allowed by the zoning regulations governing the subject site will result in a reduction in the amount of sunlight reaching some adjacent properties as well as public open spaces. The City considered shadow impacts and design elements to mitigate the loss of light during the design review process and referenced these issues in the SEPA checklist. The City considered the comment submitted by Mr. Clark (which was the only substantive assertion regarding potential health impacts provided to the City prior to the threshold determination). The record demonstrates that Ms. Torres considered Mr. Clark’s comment and the assertion that the Project would result in significant adverse impacts from loss of natural light and human health.

5. The Appellant failed to establish evidence of probable, significant impacts from loss of light to human health. The Appellant's arguments focus on concerns that loss of natural light will have negative impacts on the physical and mental health of Fischer Studio Building residents and on their enjoyment of their units. However, Appellant failed to provide evidence that would quantify or demonstrate the likelihood of a more than moderate negative environmental impact. Mr. Clark's quantitative estimate of the reduction in light levels was not linked to any specific assertion regarding health impacts, and Dr. de la Iglesia's assertion that a range of adverse impacts is "likely" was similarly conclusive, and not demonstrative that this Project in particular had the probability of causing the negative human health impacts alleged.
6. Appellant argued that the Department failed to conduct a worst-case scenario analysis concerning loss of light and human health impacts pursuant to WAC 197-11-080. The provisions of WAC 197- 11-080 are only applicable in instances in which "information on significant impacts essential to a reasoned choice among alternatives is not known." This provision is not applicable in this case, where Appellant has failed to provide adequate evidence of probable negative significance, such as in the case of human health impacts, or whereas here they have demonstrated a significant impact of loss of light, but the error on the part of the City was simple failure to examine the issue. Where the Department has failed to execute an adequate SEPA analysis concerning a specific impact, it would be premature to assert that there is an "absence of vital information" to assess such impacts.
7. Appellant presented no evidence to indicate the probability of a significant adverse environmental impact related to earth or construction and thus did not establish that the City failed to adequately consider this issue. Appellant's closing argument and Mr. Johnston's testimony state only that there is a "significant risk" of settling beneath the Fischer Studio Building. Mr. Johnston indicated concerns regarding the structural elements of the Fischer Studio Building and the potential for lateral movement to exceed the planned range, but he did not suggest that impacts were probable, only that they were possible. This was not sufficient to meet Appellant's burden.
8. On review of the entire record, the Director's SEPA Decision was not shown to be clearly erroneous, and it should therefore be affirmed.
9. Appellant alleged that the Project is not consistent with Downtown Design Guidelines A1, B1, and B2. The Board specifically identified these as priority guidelines in its review, and the record reflects conformance of the Proposal with these guidelines. Ms. Nagele's testimony described design elements utilized by the Applicant to reflect the urban environment surrounding the Project and to facilitate the transition across the alley between the Project's and Fischer Studio Building's respective height limits.
10. The parties dispute whether design review of the Project was required to consider the privacy concerns raised by Appellant. The Hearing Examiner does not need to reach this question because Appellant has not established clear error in any case: the record reflects

the Board's attention to and consideration of Appellant's comments, including the requirement for the Applicant to conduct further analysis.

11. Appellant also fails to establish that the City inconsistently applied the Downtown Guidelines because its consideration of the Project differed in certain ways from its consideration of the prior 2015 proposal. The record does not support Appellant's suggestion that the Board intended to establish requirements that would govern all future development on the site. The evidence indicates that any differences in consideration are a result of the differences between the two proposals rather than an inconsistent application of the guidelines.
12. On review of the entire record, the Director's design review Decision was not shown to be clearly erroneous, and it should therefore be affirmed.

Decision

The Decision is **AFFIRMED**, and the appeal is **DENIED**.

Entered August 27, 2021.

/s/Ryan Vancil
Ryan Vancil
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.

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matters of **FISCHER STUDIO BUILDING CONDOMINIUM OWNERS ASSOCIATION**, Hearing Examiner Files: **MUP-21-004 (DR, W)** in the manner indicated.

Party	Method of Service
Appellant Fischer Studio Building Condominium Owners Association 206-696-2224 knutringen@msn.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Appellant Legal Counsel Bryan Telegin Bricklin Newman, LLP 206-264-8600 telegin@bnd-law.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Applicant Jodi Patterson-O'Hare Permit Consultants NW 425-681-4718 jodi@permitcnw.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Applicant Legal Counsel John C. McCullough McCullough Hill Leary, PS 206-812-337 jack@mhseattle.com Courtney A. Kaylor McCullough Hill Leary, PS	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

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<p>Department Crystal Torres SDCI 206-684-5887 crystal.torres@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>
<p>Department Legal Counsel Daniel Mitchell City Attorney's Office 206-684-8232 daniel.mitchell@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>
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Dated: August 27, 2021

/s/ Galen Edlund-Cho
Galen Edlund-Cho
Legal Assistant