BEFORE THE CITY OF SEATTLE
OFFICE OF HEARING EXAMINER

NEIGHBORS ENCOURAGING REASONABLE DEVELOPMENT, Appellant, v. DIRECTOR, SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, and RADIM BLAZEJ, Respondents.	**Hearing Examiner File No. MUP-14-006 (DR,W)** **S-14-001** (DPD Application No. 3013303) **APPELLANT NEIGHBORS ENCOURAGING REASONABLE DEVELOPMENT'S POST-HEARING OPENING BRIEF**

I. INTRODUCTION/ STANDARD OF REVIEW

This matter presents a perfect storm of clear, consequential errors by the Department. Starting with its substantive and procedural mishandling of Design Review, extending through its MUP SEPA Decision, zigging and zagging in three successive responses to Appellant NERD's one Request for Interpretation, and then abandoning in mid-hearing its Decision basis for not mitigating adverse parking impacts (adopting instead a new approach scripted by the Applicant's attorney), the Department's approach here does not just leave the "the definite and firm conviction that a mistake has been made."[1] It also leaves the public

[1] The standard of review generally applicable in MUP cases such as this one is described In the Matter of the Appeal of Friends of Olympic Sculpture Park Alexandria Homeowners Assn., MUP-09-021(DR,W) & MUP-09-022 (W) at Conclusion 1. Per In the Matter of the Appeal of Robert Goodwin et al. MUP-10-010, MUP-10-011, MUP-10-012 at Conclusion 1 (October 25, 2010): "Appeals of interpretations are 'considered de novo, and the Examiner's decision is to be made upon the same basis as was required of the Director.' However, the Director's interpretation is to be given substantial weight, and 'the burden of establishing the contrary shall be upon the appellant.' SMC 23.88.020G.5."

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shaking its head at the many indications that the Department has not been guided by the public policy of the legislation it implements, but instead seeks to "win" application approval even in the face of meritorious public concerns and appeals. [2]

II. The Director's Decision With Regard to Parking Must Be Vacated and Reversed Because There Are Significant Adverse Unmitigated Parking Impacts

The Director's 20-page Decision devotes about a page to parking. The Decision purports to assess parking impact, but inexplicably excludes several significant parking demand generators including a 56 unit "apodment" project at 3266 SW Avalon Way on which construction was complete when the Decision was issued in mid-May.[3] Even with its unexplained exclusion of important parking demand generators, the Decision acknowledges cumulative parking demand at or above the level (85%) recognized by the Department as triggering mitigation. [4] However it nonetheless dispenses with an EIS and offers no mitigation.

SMC 25.05.675.M (2) provides that the Director may condition a project to mitigate the effects of a development on parking including through a requirement for additional on-site parking. Even before NERD presented its hearing testimony, the record demonstrated that the 3078 SW Avalon Way project would have significant adverse parking impacts on the

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[2] Another symptom of this Department approach is its processing of the developer's application when it had been notified by the property owner that the developer did not have authority to pursue it. The developer's and owner's recent rapprochement cannot retroactively legitimize prior DPD Decisions made in violation of the Code ownership requirement. The substance of this issue is laid out in Exhibits 46 through 53 and will not be repeated here.

[3] A Certificate of Occupancy, typically issued after construction is complete, finishing details are wrapped up and final inspection has occurred, was issued for this building on June 18, 2014. See Hearing Exhibit 8.

[4] The Department has established 75% as the capacity point in CAM but apparently and somewhat arbitrarily sets a higher bar in other instances. It is arguable that because the impact area at issue here is largely a single family zoned neighborhood (similar to those with which the CAM is concerned) then the CAM's lower 75% benchmark and 400 feet impact radius are more appropriately applied. If they were, percent capacity trigger and the impact on the single family neighborhood would be statistically even more dramatic. However, without conceding their applicability, the 85% at-capacity benchmark and 800 foot radius will be used for purposes of discussion.

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surrounding SF residential neighborhood. The Applicant's own consultant, TraffEx, submitted a study, accepted by DPD, that showed parking utilization in the 800-foot area of 90 % (including 3078 SW Avalon, based on 0.90 vehicles/unit). When spillover from 3050 Avalon Way was added (per the Director's Decision) the result was 99% utilization. Initial NERD testimony at the hearing was uncontradicted that when another 20 spillover cars from 3266 Avalon Way were added (accepting DPD's ratio of 0.35 vehicles/microhousing unit) the result was 109% utilization.[5] Other pending projects such as 3268 Avalon Way would similarly contribute to cumulative parking impacts.[6]

During the hearing's rebuttal stage, and in response to DPD's Mr. Shaw's testimony dismissing these already dire parking impacts as no more than "moderate", NERD painstakingly gathered and introduced an updated parking analysis performed October 14th and 15th, in keeping with the data gathering requirements in CAM/TIP 117. Exhibit 82. NERD's updated parking utilization study was based on **actual current** parking counts, incorporating 3266 SW Avalon in its built/occupied condition (rather than speculating about its cumulative impacts).

Notably, Mr. Shaw offered no critique of the updated data even after it was apparent that it directly undermined his October 1 testimony hypothesis that very little 3266 Avalon Way spillover would occur in 3078 Avalon Way's 800-foot parking study area and that over-

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[5] The neighborhood's direct experience suggests that the parking demand ratios utilized by TraffEx and the Department may be too low. For example, the Department itself in past years and in analogous circumstances has used a higher ratio. See In Re Connie Dunn, H.Ex. File No. MUP-03-024, Depart. Ref. No. 210254 at Finding 16 (June 20, 2003) (Department "used 1.4 spaces per unit as its demand figure, lower than the common 1.5, because of the number of studio units proposed"). It is noteworthy then that even accepting the lower parking ratios utilized by TraffEx and the Department, parking utilization was still far beyond the point at which mitigation is triggered.

[6] Applicant has questioned whether 3268 Avalon Way and other pending projects should be considered, but this was determination was already made by the Director's Decision analysis which itself included in its analysis some pending projects (e.g. 3050 SW Avalon Way – but inexplicably excluded others that had actually already been built.

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all parking impact would be no more than moderate. And when examined on October 17, 2014, on the basis for this dismissal (including his vague assertion that this instance was no worse than many others he had seen), he could offer no useful information. As it turned out, despite the detailed testimony and data presented, he had not even bothered to visit the Avalon site/neighborhood to observe the parking impacts first hand. And his sweeping dismissal of the 32nd Ave impact situation as comparable to many other neighborhoods turned out on inquiry to be a vague recollection of one parking utilization study for one project in an area somewhere on Capitol Hill about which he could not recall a single item of information such as the type of project involved in the study, the consultant who prepared the study – or the project/study location.[7]

The current data that the Respondents left uncontested show that the situation is even worse than the TraffEx Report and the Director's Decision projected would be the case. They also show that addition of 3078 Avalon Way parking demand will exacerbate a bad situation to an alarming degree. The current data show that the parking utilization rate is currently 89% without 3078 Avalon Way or other projects pending approval. 3078 Avalon Way's **direct** (not cumulative) impacts would take the utilization rate from 89% to 109%. Including 3050 Avalon Way spillover parking demand (as did the Director in her Decision) would increase that utilization rate to 121%. And adding 3268 Avalon Way's spillover takes the utilization

[7] This testimony by the Department also reflected a fundamental shortcoming in exercising judgment under SEPA. Per SMC 25.05.794A, which parallels SEPA WAC 197-11-794, "'significant' means more than a reasonable likelihood of more than moderate adverse impact on environmental quality." Whether an adverse impact rises to this level is not determined in a vacuum. Context is key: that which might be par for the course and unremarkable in one neighborhood can be significant in another. "Significance involves context and intensity… [I]t does not limit itself to a formula or quantifiable test." SMC 23.05.794 B.

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rate to 132% -- an over 50% increase from the 85% rate that DPD generally recognizes as the trigger point for significant adverse impacts and mitigation.[8]

The Director's Decision rationale for not addressing this impact was that SMC 25.05.675.M(2)(b)(2)[9] precluded it from doing so. For this outcome, the Director relied solely on what DPD assumed was frequent transit service ("FTS") at what has been called the "Genesee" transit stop within approximately 360 feet of the 3078 project site.

The Land Use Code (SMC 23.84A.038 "T"): defines "frequent transit service" as

> "Transit service, frequent" means transit service headways in at least one direction of 15 minutes or less for at least 12 hours per day, 6 days per week, and transit service headways of 30 minutes or less for at least 18 hours every day.

While the Land Use Code does not offer a definition of transit headway, the dictionary does:

> the time interval between two vehicles traveling in the same direction on the same route[10]

This definition, from the dictionary typically used by the Washington Supreme Court, was accepted by all parties in the hearing, including DPD.[11]

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[8] Indicative of the Department's approach in this matter, during his testimony DPD's Mr. Shaw indicated uncertainty whether 85% utilization has been the point at which the Department has consistently recognized parking is at capacity requiring mitigation. However, the 85% benchmark has been recognized repeatedly by the Department and the Hearing Examiner in decisions extending back a decade and more. See, e.g., In re Leavitt, H. Ex. File No. MUP-08-020, Depart. Ref. No. 3005396 at Finding 7 (August 25, 2008) (parking mitigation required even though utilization with project would be "less than the 85 percent rate at which DPD would typically require mitigation for parking impacts..."); In Re Connie Dunn, H.Ex. File No. MUP-03-024, Depart. Ref. No. 210254 at Finding 14 (June 20, 2003) ("the 85% that the City considers capacity for on-street parking"); In Re Seattle Committee to Save Schools, H.Ex. File MUP-02-038, Dept. Ref. No. 2202207 at Finding 14 (November 2, 2002) ("In general, on-street parking space is considered 'parked out" (i.e., at capacity) when 85% of the legal spaces are being used.")

[9] "No SEPA authority is provided for the decision maker to mitigate the impact of development on parking availability for residential uses located within: ... (c) portions of urban villages within 1,320 feet of a street with frequent transit service, measured as the walking distance from the nearest transit stop to the lot line of the lot."

[10] Exhibit 11.

[11] On September 30, 2014 DPD Representative Garry Papers, with Mr. Shaw in attendance, testified as follows:

> Eglick: Thank you. Okay, can you look at this Exhibit 11 definition of headway, and I'm asking you to look in particular at the third definition which applies to -- seems to be applied to transit as opposed to

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At the hearing, Mr. Burkhalter showed, using the posted Metro schedule (Exhibit 45), that the Genesee transit stop does not provide FTS, because it includes several headways of greater than 15 minutes during any relevant 12 hour period, six days per week. Neither DPD nor the Applicant ever seriously contested this conclusion. Instead they abandoned the Director's Decision with regard to parking and attempted to substitute a different one based on entirely different facts and an application/interpretation of the Code that had not previously been asserted.

NERD understands why, faced with this DPD course change in hearing midstream, the Examiner took the approach of trying to complete the hearing (which involved other issues as well) while allowing some time for Appellant to address as best it could DPD's new ad hoc Decision. However, Appellant NERD reserved its rights with regard to this approach and now again respectfully suggests to the Examiner that it should not be her last word on the subject.

Stepping back and looking to first principles, the proper outcome at this point must be vacation and remand of the Director's Decision – because the Director herself has in effect abandoned and withdrawn it, at least with regard to the critical issue of parking impact and mitigation. That leaves the public with no notice of the Director's actual decision with regard to parking – the decision available when the appeal period was running is not the one now before the Examiner. This deprives the public of the notice of a Director's Decision required by Code. See, e.g., SMC 23.76.020. Had others, including other stakeholders in West Seattle

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the first and second which are other contexts like headroom, and could you read that into the record please?

Papers: Part 3, the time interval between two vehicles travelling in the same direction on the same route.

Eglick: And is that the definition you used?

Papers: That is consistent, yes.

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or across the City, known during the two week appeal period of the very controversial new basis for the Director's Decision now being asserted ad hoc five months after the Decision's issuance, they too might well have appealed and the course of this proceeding would have been significantly altered now and in terms of further appeals. See In the Matter of the Appeal of Friends of Olympic Sculpture Park Alexandria Homeowners Assn., MUP-09-021(DR,W) & MUP-09-022 (W) at Conclusion 8.

If SEPA and the appeal process are to be meaningful and fair to its citizens, then a Director's Decision cannot be a shape-shifter, taking whatever form is expedient to justify the foregone conclusion. Puyallup Tribe of Indians, et al. v. City of Algona, et al., 2004 WL 1874539, Wash.Pol.Control Bd. Nos. PCHB Nos. 03-105, 03-106, 03-107, 03-109, 03-118, at 6 (August 12, 2004) ("Allowing new arguments or evidence under a de novo standard of review does not supplant the need for Ecology, as the agency administering the Water Code, to issue a meaningful and accurate decision for the Board to review and the parties to litigate.").

This should be the end of the discussion. A vacation and reversal order should issue forthwith. However, even if the Director's new mid-hearing "decision" on the matter of parking is considered on its merits, the result must be a vacation and reversal of the project approval. As noted, NERD testimony, including particularly by Mr. Burkhalter and Mr. Haury established through statistical, documentary, photographic, video, and personal observations that parking demand in the 800 foot impact area is already in excess of the Department's acknowledged 85% trigger point and once the 3078 Avalon Way project demand comes on line parking demand would be catastrophically -- not just significantly -- in excess of 100%. Neither the applicant nor DPD contested this testimony in any significant respect, even when

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Mr. Burkhalter presented fresh statistics showing that DPD's supposition of parking demand areal dispersion from, e.g. the "apodment" project had not been borne out on the ground.[12]

Instead, following the Applicant's lead (and a freshly minted memorandum script from Applicant's counsel, as Mr. Shaw acknowledged in his October 1 testimony), the Director's response was to pivot to an entirely new basis for her parking decision. The new basis asserted was that the previously unmentioned "Yancy" transit stop provides FTS. As it turns out, however, without headway averaging the Yancy stop falls short of FTS. So, DPD and the Applicant also assert that headways on a particular Yancy stop route can be averaged to facilitate a finding of FTS.[13] Headway averaging – never before mentioned by DPD -- was said to be appropriate because Director's Rule 11-2012 allows it in the context of determining whether to grant a particular Land Use Code parking waiver not relevant in this 3078 Avalon matter.[14]

The Code definition of FTS is straightforward. It gives no hint that averaging should be employed in its application. The definition of headway, a term used in the FTS Code

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[12] Mr. Burkhalter presented updated traffic counts collected, as were his earlier counts, according to DPD's prescribed methodology. Neither DPD nor the Applicant bothered to do so nor did they question Mr. Burkhalter's data. Nor was TraffEx, the Applicant's traffic consultant, present at all during the hearing.

[13] Through exhibits (including the Metro bus schedules) and testimony, NERD demonstrated in rebuttal testimony without contradiction that the Yancy transit stop, like the Genesee stop, did not meet the Code definition of FTS which does not mention averaging headways. For its part, the Department was curiously uninterested throughout the hearing in addressing whether the Yancy stop met the Code FTS standard without application of the Director's Rule. This is illustrated in the following excerpt from Mr. Shaw's October 1, 2014 testimony (and in his subsequent hearing testimony as well):

JS: I checked the frequency of the Rapid Ride C Line at the Avalon Yancy stop and confirmed that based on current Metro schedules it does meet frequent transit service definition.

PJE: Does it meet the frequent transit service definition in the Code or does it only meet the frequent transit service definition if you apply the Director's Rule?

JS: It meets the frequent transit service definition in the Director's Rule.

PJE: Does it meet the frequent transit service definition in the Code?

JS: I don't know that off hand. I couldn't say.

[14] No headway averaging argument was made for the Genesee stop because, as Mr. Burkhalter testified without contradiction, its schedule would not support a claim of FTS even if headway averaging was applied. On Saturdays/Sundays, the average number of Genesee stop buses per hour over any given 12-hour period is less than 4. Even the Director's Rule requires this average to be at least 4 for 12 consecutive hours six days per week.

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language is also not in dispute and again, gives no basis for averaging. As DPD's John Shaw grudgingly admitted in his October 17 testimony averaging headways would result in FTS being found where FTS was in fact not present under the actual Code definition. The intent of FTS, evident from its definition, is to assure available transit with a minimum of delay and over a long period of time – not just during peak hours. Headway averaging would defeat that. For example, with averaging, one bus every 5 minutes for only four hours within an over-all twelve hour period would be FTS even if there were no buses for the remaining eight hours. As Mr. Burkhalter testified, applying the Director's Rule "interpretation" of FTS would result in mathematical computations that would expand the definition of FTS.

The key premise for the Director's new parking analysis, application of Director's Rule 11-2012, is fundamentally flawed. It depends on headway averaging, a concept that is both inconsistent with the accepted definition of headway and would by legislation through Director's Rule eviscerate the concept of FTS. No evidence was presented to support such an expansion of the explicit parameters set by the City Council in SMC 23.84A.038.

The belated assertion of a new basis for the Director's Decision with regard to a key issue, parking, is fatal both procedurally and substantively to the Director's Decision. The actual Decision appealed has been demonstrated to be erroneous beyond all doubt. The Department's attempt to salvage approval by pivoting to a new decision is improper and should not be permitted.

Even if the Director's pivot is permitted, the Examiner's review on this issue must proceed on a fundamentally altered basis. While the standard rubric is that the published Director's Decision is given substantial weight, that premise can no longer apply. The only Director's Decision with regard to parking of which notice has been given in this matter has

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effectively been withdrawn. The Department has insisted on proceeding without a new one. Instead, it relies on the last minute memorandum cobbled together by Applicant's counsel on September 30, 2014. However, that is not entitled to the substantial weight given to a Director's Decision.

Regardless of the standard of review employed, the new approach taken by the Department and the Applicant, relying on DR 11-2012, is unsupportable. The Examiner's mandate is to follow and apply the Code, not a DR. DR 11-2012 legislates: it impermissibly loosens, varies, and is inconsistent the Code's clear approach. However, Code amendments must come from the City Council. See Edelman v. State ex rel. Pub. Disclosure Comm'n, 152 Wn.2d 584, 592 (2004) ("An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule making process. However, we accord no deference to an agency's rule where no ambiguity exists."); Batchelder v. Seattle, et al, 77 Wash.App. 154 (Div 1 1995).[15]

Here, if any ambiguity exists, it is not in the Code, but with regard to the DR itself. While the DR is now being cited as applicable to a determination under SEPA, found in SMC Title 25, it does not refer to Title 25 at all. On the DR's cover page the prominent box labeled "Code and Section Reference" calls out only "SMC 23.54.015.M and 23.54.020.F". The Notice required in publishing a proposed rule for public comment makes no reference to Title 25. And DPD's Mr. Shaw admitted in his testimony that Director's Rule 11-2012 does not

[15] "Municipal ordinances and codes are subject to the rules used for construing statutes. Spokane v. Fischer, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988). Where the meaning of an ordinance is clear on its face, that meaning controls, and it is not necessary to look further for evidence of legislative intent. City of Olympia v. Drebick, 156 Wn.2d 289, 295, 126 P.3d 802 (2006)(citation omitted). A statute or ordinance is construed as a whole, giving effect to, and harmonizing all provisions, with no portion rendered meaningless. Seto v. American Elevator, Inc., 159 Wn.2d 767, 774, 154 P.3d 189 (2007)." In the Matter of the Appeal of Robert Goodwin et al., MUP-10-010, MUP-10-011, MUP-10-012 at Conclusion 3 (October 25, 2010).

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apply at all to SEPA.[16] In fact, it was the Applicant that first made the 13th hour suggestion to DPD that the DR be brought to bear, in combination with a different transit stop, in an effort to evoke the SEPA mitigation exemption for areas served by FTS.

No deference need be accorded to the sudden, expedient resort, in the midst of appeal litigation, to a DR averaging approach. See In Re Friends of Olympic Sculpture Park Alexandria Homeowners Assn., MUP-09-021(DR,W) & MUP-09-022 (W) at Conclusion 3 (citing "Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)(agency failed to show a history of applying its interpretation of a statute as a matter of informal policy); Sleasman v. City of Lacy, 159 Wn.2d 639, 151 P.3d 990 (2007) (agency relied on past practice as a reflection of agency interpretation of code but failed to show interpretation was part of a pattern of past enforcement rather than a byproduct of current litigation").

The Examiner's mandate is to follow and apply the Code, not a DR. Even were that not the case, to even be instructive or useful to an Examiner in a quasi-judicial proceeding, a DR must have a valid provenance. The Executive can no more command the Examiner to

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[16] John Shaw acknowledged in his October 1, 2014 testimony that the Director's Rule does not address SEPA requirements but is "referring to a waiver from a Land Use Code requirement for on-site parking." He further testified as follows:

PJE: And what Land Use Code provisions does the Director's Rule say it applies to?
JS: I can speak from memory or I can check the Rule. Which would you like?
PJE: I assume you have the Rule?
JS: I do.
PJE: Okay.
JS: SMC 23.54.015.M and 23.54.020.F
PJE: Okay. Those are not — the Director's Rules don't apply to SEPA do they?
JS: This one doesn't.

Further, on its face there is no indication that DR 11-2012 has anything to do with SEPA or was adopted pursuant to SEPA rulemaking authority. It does not cite SEPA at all, nor in particular does it cite SMC 25.05.035. The DR, first cited by Respondents during the appeal hearing, on its face does not purport to implement or interpret any provision of Title 25. It refers only to a distinct Title 23 provision for parking waivers.

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apply a DR adopted in violation of Code procedural requirements than it can require the Examiner to apply a DR that impermissibly amends the Code.

The requirements for Land Use Code DR adoption are found in SMC 23.88.010 and SMC Chapter 3.02. SMC 3.02.030 ("Notice and hearing on adoption of rules"). A rule cannot be validly adopted without publication of notice, including in the Daily Journal of Commerce[17] Per SMC 3.02.030A the notice must be one that that informs the public of (a) a reference to the authority under which such rule is proposed; (b) an accurate description of the substance of the proposed rule or of the subjects and issues involved; and (c) a statement of the time and place of any public hearing, and manner in which interested persons may present data, views or argument thereon to the agency. Further, per SMC 3.02.030B, the notice must "Afford all interested persons an opportunity to present data, views, or arguments in regard to the proposed action…"

Exhibit 78 demonstrates that these requirements were not followed in major respects starting with the "notice" bold face declaration that DPD had already promulgated the DR -- certain to discourage rather than invite public comments -- and extending to a "description" of the DR that provides less than a bare minimum of information.[18]

The Director's Decision with regard to parking impacts, appealed by NERD was clearly erroneous. The ad hoc substitute "decision" pieced together by DPD (with Applicant ghostwriting) during the appeal hearing is clearly erroneous as well – assuming it is cognizable at all. Significant adverse parking impacts have been left unaddressed and unmitigated. Even if mitigation is precluded by application of the DR (which it is not), the

[17] The Daily Journal of Commerce is the City's newspaper of record for such notices.

[18] Exhibits 79-81 illustrate DR adoptions that do comply and that are markedly in contrast to the notice published for DR 11-2012.

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fact that the impacts exist cannot be ignored. If not mitigated, they must at least be addressed in an environmental impact statement.[19] The Director's Decision must therefore be reversed, vacated, and remanded.

III. The Director's Decision and the Underlying DRB Recommendation Are Based on Incorrect Premises, Exceed the Board's Authority and Are Fundamentally Inconsistent with the Applicable Design Review Guidelines and SEPA

Any discussion of Design Review should start with its first principles. Prominent among these are to ensure that new development "sensitively fits into neighborhoods" (SMC 23.41.002 A) and to "provide effective mitigation of a proposed project's impact and influence on a neighborhood" (SMC 23.41.002 B). Unfortunately, in significant part through Department indifference to and misunderstanding of important Code requirements the Design Review Board in this instance was not operating within its authority. Further, the Board issued a Recommendation improperly hobbled by Department misguidance on the scope and reach of Design Review and application of the Design Review Guidelines. And, with regard to the FAR question raised by NERD's request for Interpretation, the Department ended up, improperly, usurping entirely the Board's role and authority.

A. The Design Review Board Was Not Operating Within Its Authority Because Procedural Prerequisites Were Not Met

DPD's administration of the Design Review Board and its process has devolved into one in which Code prerequisites to Board authority are not conscientiously applied. The Code takes pains to prescribe particularized, elaborate requirements for the design review process -- all deemed necessary by the Council to achieve the purposes of design review. The

[19] See, e.g. NERD Notice of Appeal Request for Relief 5.3.

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requirements range from public notice through Board composition and apportionment of member affiliations. They specify actions the Board is required to take as a prerequisite to making a recommendation. And they prescribe the bases on which a Board recommendation decision must be based. The requirements include the following:

- Regulation of Board members' affiliations to ensure balanced interest representation even when substitute Board members ae assigned. See, e.g., SMC 23.41.008 C, D.
- Assurance of balance representation on "each project" considered by the Board. SMC 23.41.008 D3 ("The five(5) Design Review Board members assigned to each project as described in subsection D1 of this section shall be known collectively as the District Design Review Board.").
- Quorum Requirement. SMC 23.41.008 D2.
- Notice. SMC 23.41.008 E, 23.41.014 D3.
- Site visits. SMC 23.41.014 (required for "Design Review Board members assigned to review a proposed project").
- Specific mandatory requirement for review of public comments that have been submitted, including specification of review place and time. SMC 23.41.014 E1c "During a regularly scheduled evening meeting of the Design Review Board, other than early design guidance public meetings, the Board shall review the record of public comments…".
- Code compliance prerequisite to design review. SMC 23.41.014 F2 ("Projects subject to design review must meet all codes and regulatory requirements applicable to the subject site, except as provided in Section 23.41.012.").

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- Preparation of mandatory Board recommendation to the Director. SMC 23.41.014 F3 (if "four or more members of the Design Review Board are in agreement in their recommendation to the Director, the Director shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval…") The only exceptions to the requirement for the Director to adopt a four Board member recommendation are if it:

    a. Reflects inconsistent application of the design review guidelines; or

    b. Exceeds the authority of the Design Review Board; or

    c. Conflicts with SEPA conditions or other regulatory requirements applicable to the site; or

    d. Conflicts with the requirements of state or federal law.

In the DRB review of the 3078 Avalon Way project, almost all of the careful prerequisites cataloged above were violated, to the neighborhood's significant detriment. For example, there was no review at the Board meetings of the record of public comments that had been submitted. As the public complained at the time and as described in NERD testimony before the Hearing Examiner, Board members seemed unaware of written public comments and proposals that had been submitted. Members of the public observed the Applicant's elaborate color books in front of the DRB members at each meeting -- but the public comment record was nowhere in evidence and was not reviewed. DPD's Mr. Papers admitted that he had not provided the record of public comments to Board members, and this was confirmed in testimony by Board member Oustimovitch. Thus an element of the process explicitly called out by the Code as key to the Board's authority to make a recommendation was absent.

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The record with regard to site visits and Board composition also demonstrates indifference to and operation outside of Code requirements. DPD staff could only speculate that one or two Board members may have made a site visit, but could confirm no more. Yet, in the absence of site visits by each Board member assigned to review the project the Board could have no authority to issuing a recommendation. Further, the composition of the Boards varied for the three sessions held, with no confirmation that any of the members variously participating had visited the site. The Board "recommendations" drafted by DPD do include a rote general statement that site visits were made. But, DPD conceded at the hearing that this was a statement from a template DPD uses for DRB decisions and was not based on any actual confirmed site visits for the 3078 application.

Further, before issuing its template recommendations, DPD neither sends a draft for review and approval by Board members -- nor does it send the recommendations once issued to individual Board members so that, even if not requested, a Board member so inclined could review it and note corrections.[20]

DPD was also unable to confirm the affiliations of the Board members who parachuted in and out of the 3078 Avalon review over three meetings, although the Council has taken great pains in the Code to prescribe a particular distribution of interests as a prerequisite to Board review. In fact on questioning DPD staff at the hearing it became apparent that DPD was indifferent to the requirement as a concern for day to day review of 3078 Avalon or any other project.

DPD similarly allowed Design Review to proceed despite the explicit Code mandate that "Projects subject to design review must meet all codes and regulatory requirements

[20] This was especially problematic in this instance because the composition of the Board was not the same for each of the three meetings on the 3078 project.

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applicable to the subject site." SMC 23.41.014 F2 (emphasis added). Mistakes can happen and DPD finally admitted in its July 17, 2014 Interpretation that one occurred with regard to 3078 Avalon in that the project was pushed through design review without regard to its exceedance of the Code FAR limit.[21] However, rather than have the project brought into compliance and return for design review, DPD has assumed that the Code's "must" actually means "do not necessarily have to meet all codes at the time of Board review." Again, the unavoidable fact is that the Board project determination adopted by the Director exceeded the Board's authority because at the time of Board review the FAR exceeded the Code limit.[22]

A Board recommendation was a prerequisite to a Director's decision. There has yet to be a Board recommendation within the Board's authority for the Director to review and adopt if supported by 4 votes.

The Code does not give the DRB authority to make determinations in a vacuum. The Board's authority depends on its proper constitution and process. Would a Board decision made by less than a quorum or by a Board that dispensed completely with public meetings be deemed within its authority? The prerequisites for Board exercise of authority are explicit, mandatory in wording, and clearly intended to ensure against excesses and provide fairness and well-informed decisions. There is no basis for picking and choosing among them, effectively deeming violation of some as "harmless" or inconsequential in terms of the Examiner's review authority. See generally High Sierra Hikers Association v. Blackwell, 390 F.3d 630, 640 (9th Cir.2004); Boeing v. Gelman, 102 Wn.App 862 (Div. 2 2000).

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[21] In fact, the Applicant's voluminous color books, distributed to Board members after review and approval by DPD per Mr. Papers, stated erroneously and unequivocally that the project complied with FAR and all other Code requirements See, e.g. Ex. 14 at 2.

[22] The 3078 Avalon project FAR limit cannot be waived through design departure. Nor is there any Code provision that authorizes a project whose Code noncompliance is deemed "minor" to proceed through design review. This fundamental flaw also created per se inconsistent application of the design review guidelines.

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B. Inconsistent Design Guideline Application Due to DPD's Post-Board Unilateral Alteration of the Project

The most straightforward approach to the admitted fact that the project reviewed by the DRB was not in compliance with the Land Use Code (a fact that the Applicant architect may have known all along and that DPD could readily have determined with more diligence) is to acknowledge that this violated the mandate in SMC 23.41.014 F and that the project must therefore be returned to the Board for review. The matter only becomes complicated when one tries to harmonize what DPD did in response to the belated discovery of noncompliance with the Code's prescribed design review process. Setting aside for the moment the other defects in the DRB process and recommendations addressed in this appeal, there was a DRB approval recommendation. Further, there can be no question that the recommendation was, as it had to be, based on "the proposed design submitted by the project proponent". See, e.g., SMC 23.41.014 E 2. The number of recommending Board members was, if one disregards other issues, sufficient to trigger the mandatory requirement of SMC 23.41.014 F 3 ("the Director shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval").

To vary that recommendation, the Director would have had to issue a Decision in which she relied on one of factors laid out in SMC 23.41.014F 3 a, b, c, or d. However, the only MUP Decision issued by the Director -- on May 15, 2014 -- adopts the DRB recommendation in its entirety. And, even in the absence of a new MUP Decision, the Director has not explained in any context how any of the four criteria -- a, b, c, or d – were met. Nor has the Director offered any other purported Code authority for her ad hoc approval

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of changes in "the proposed design submitted by the applicant."[23] The result is abandonment of the DRB recommendation and de facto adoption of a new one that would result in

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[23] Further, even assuming that the Director had such authority, it was not exercised here in the customary manner. Per Mr. Papers' testimony, the question of whether the Director would unilaterally approve an applicant's proposed project design alteration rather than send it back to the DRB normally would have gone for professional review to the DPD Design Review Team. That did not occur here. Instead, as can be gleaned from Mr. Mills September 30 (starting at approximately 4:30 pm) testimony, DPD staff (with Mr. Mills -- an attorney not a planner or architect, in the lead) came up with suggested plan revisions for the project, obtained advance approval for them from DPD "management" (Roberta Baker) in an ad hoc encounter and then passed the word to the Applicant. Design Review Team consultation at best consisted of a "quick hallway type conversation" between Mr. Papers and Lisa Rutzick, as Mr. Papers testified on September 30 (emphasis added below):

PJE: But can I ask you to answer my question, why Lisa Rutzick?

GP: She's the program manager and that's the protocol.

PJE: Okay, so when you have a revision to a project that's been through design review, that's the protocol. It goes to Lisa Rutzick for review, is that correct?

GP: Yes, for this initial type of email. **Once it's a formal application we take it to the entire team**.

PJE: Okay, now, you're aware that in this project we're talking about here, the FAR was found to be noncompliant in an interpretation I think he called it a supplement that Mr. Mills issued eventually. I think it was in July. Are you aware of that?

GP: I am.

PJE: Okay. And then subsequently, maybe it was August 1. We've already put in the record there was an addendum that said well we fixed that and it's not noncompliant anymore in terms of FAR. Do you recall that?

GP: I recall the document you're referring to. I wouldn't use the word fixed that.

PJE: Well, they changed the project plans in a way that Mr. Mills determined made the project compliant with the land use code FAR limit for this project. Isn't that correct?

GP: I believe there were corrected plans submitted and Mr. Mills reviewed them, yes.

PJE: Okay, now did those plans change any externalities on the proposed building?

GP: I recall that on one side of the building where it meets the ground, some finished grade elevations were adjusted and a few windows that were shown in the recommendation packet were reduced about 18 inches I believe in total height.

PJE: Well we can talk about the specific dimensions later, but when you say there were windows that were in the recommendation packet, they were also in the MUP plans for the building weren't they?

GP: Yes.

PJE: When did you talk with Lisa Rutzick about whether those changes would require a return to the Design Review Board?

GP: I believe a day or two after I reviewed those drawings with Bill I mentioned it to her.

PJE: Did she review the drawings?

GP: We glanced at them quickly. Compared them to the prior MUP drawings.

PJE: Now, you testified in your deposition that the decision was actually not presented to Lisa Rutzick, didn't you?

GP: I don't think that's of the record. I don't know what you're referring to.

PJE: What part of my question didn't you understand?

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inconsistent application of the design review guidelines and that exceeds the Board's and/or the Director's authority.

This is underscored by the testimony of a participating Board member and expert architect Vlad Oustimovitch[24], that the project design changes went directly to issues and altered parts of the building that had been specific areas of concern for the Board. Per Mr. Oustimovitch, the changes raised material issues with urban design implications that the DRB routinely addresses, but will not have addressed here for the newly revised project plans.

Those revisions diminished the livability and security of northeast units at ground level by raising window sills to above an average person's eye level, reducing a resident's ability to look out to the north/northeast. This was an "adjacency issue" with which the DRB had specifically been concerned. [25] Further, on the south side of the building, a window was eliminated without DRB review, again removing views/connections with and for the area between buildings. Per Mr. Oustimovitch, the DRB, on this project where height, bulk, and scale were paramount concerns, would have questioned the design in the areas that were altered for the sake of FAR compliance and would have suggested that 2500 square feet could be removed in areas closer to the roofline to good effect on the structure's height, bulk, and

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GP: What – you're asking me to remember something from the deposition and then you're asking me again. I don't …

PJE: Did you testify previously that the decision on whether or not the changes reflected in Mr. Mills' addendum required a return to the Design Review Board was not presented to Lisa Rutzick?

GP: That, I don't honestly remember that specific, but I did mention this. **It was a quick hallway type conversation** to her that the corrected plans had a minor change to finished grade that had no appreciable conflict with any Design Review Board guidance or topical concerns that the Board had brought up.

[24] Mr. Oustimovitch's credentials are nonpareil including fifteen years of Design Review Board experience. See Exhibit 31 (Oustimovitch resume). And, unlike the Respondents' planner/architect witnesses, he testified pro bono and with no financial, employment, or legal interest in the outcome of the hearing. Both DPD and the Respondent could have themselves called other Board members to testify, perhaps even pro bono. Neither did.

[25] The Applicant's Plans in elaborate color books for use by the Board and even its most current MUP plans show sills coming all the way down toward the floor (floor to ceiling windows) in the northeast units. Yet the Applicant contended at the hearing that this floor to ceiling feature never existed as if this inaccurate presentation could be used as a basis to discount the impact of the changes made to comply with the FAR limit.

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scale, which were a significant concern. This would have carried out one of the Board's key roles -- shaping buildings "to create light and air and reduce impacts to adjacencies."

Tom Eanes, another expert architect with substantial experience in design review (as well as lengthy service on the Seattle Planning Commission)[26] concurred with Board member Oustimovitch that the changes made to bring the project into FAR compliance were significant and should have been presented to the Board, particularly in light of the Board's focus on the ground floor units' fenestration (directly affected by the FAR adjustment) and the building's height, bulk and scale. He noted, with specific examples, that purely cosmetic changes with far less significance have been identified by DPD as requiring a return to the DRB if they involved concerns that had been discussed before the DRB. As Mr. Eanes testified, the approximately 2,500 sf change made was equivalent to 4-5 units in this project -- "not a modest amount" -- and certainly not too "small" to matter to the DRB in light of the design issues it had already prioritized. Per Mr. Eanes, had the DRB been presented with the proposed new design, it could have, based on the height/bulk/scale Design Guidelines, suggested (or had suggested to it by the public) that volume could have instead been removed from elsewhere such as at the top, north end of the building, where it reaches its maximum height.

Rather than let the Board have its say, the Department has sought to have its way -- in every which way. It supposedly had no basis to depart from the DRB recommendation to address community objections, but somehow was not bound to adhere to the project plans that formed the basis for the DRB recommendation when a problem inconvenient to project approval arose. There was and has always been a simple solution that comports with the Code

[26] See Hearing Exhibit 20 (Eanes resume).

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and with the implications of the change in the project plans. That is a return to the DRB for review and an updated recommendation.

C. Significant Unmitigated Height Bulk Scale Impacts

The neighborhood impacted by the 3078 Avalon proposal consistently and articulately (with reference to design guidelines, Codes, policies and the like) identified height, bulk, scale ("HBS") impacts as a key concern requiring mitigation and citing, inter alia, the Design Review Board's authority as well as the Code's SEPA provisions. Based on the record of comments made to DPD and the DRB, and confirmed in the clear and convincing evidence presented at hearing, the 3078 project was a "poster child" example of when mitigation should have been applied. The building is on an MR/SF edge, an unusually abrupt juxtaposition with implications for greater impacts. As proposed it would be taller and larger than the multi-family structures already constructed on that edge and it would set the pattern for adjacent development on that edge.[27] Further, the site topography is such that it results in a taller structure than would otherwise occur under a new Code approach to height measurement adopted after the site's zoning was put in place.

The legal framework in which 3078 was reviewed is constructed to respond to just such perfect impact storm circumstances. The circumstances fit the conditions under which SEPA mitigation authority is to be exercised. See, e.g., SMC 25.05.665 D, 25.05.670, and 25.05.675 G. However, the Code anticipates that in most cases the Director will not have to take action because height, bulk, and scale will be addressed in the Design Review process. To further that, and in keeping with key design review purposes (e.g. to "provide effective

[27] The project architect acknowledged that the 3078 Avalon had originally been designed as a pair with a design for a building he also designed for the lot next door. The two projects followed a parallel course through design review until the latter one was dropped apparently for financial reasons. However the adjacency and precedential effects on the lots next door and along the street remain.

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mitigation of a proposed project's impact and influence on a neighborhood"), the Citywide Design Guidelines used by the Board here explicitly call out a need for "Height, Bulk, and Scale Compatibility" (B-1) with a special concern for zone edges. Exhibit 32 at 22, Design Guideline ("DG") B-1. DG B-1 calls out two circumstances – projects on a zone edge and projects with unusual topography – in which HBS mitigation may be required. Id. at 22. It offers sketched examples for addressing HBS that are explicitly grounded in achieving compatibility "with the small single family house in the single family zone next door." Id. at 23; see also id. at 24 (stepping a building down to reduce impact on "smaller, nearby buildings"). DG B-1 further calls out "reductions in the actual height, bulk, and scale of the proposed structure" to achieve compatibility. Id. at 25. And it affirmatively authorizes use of such "techniques" as "reducing the bulk of the building's upper floors" and reducing the height of the structure". The Citywide Guidelines adopted in December 2013 were apparently not directly applied to the 3078 project by the DRB, although they were in effect well before the Director issued her Decision. Per DPD staff (Papers) October 17, 2014 appeal hearing testimony, "The City-wide guidelines as well as the neighborhood specific guidelines that are in effect here, because of its geographical location, have been reformatted. The content did not change significantly. They just got different headers and labelling like it went from, I believe, 1A to 1 2.2 type formatting." (Emphasis added). It is noteworthy therefore that the new Citywide Guidelines reiterate that with regard to HBS and "Existing Development and Zoning" the DRB should: "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

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appropriate complement and/or transition." December 2013 Design Review Guidelines, D-1 at 5. [28]

The concern for compatibility with existing development is also reflected in the applicable West Seattle Guidelines which include nine references to "existing" (4) or "surrounding" (5) structures. Exhibit 65, at ii, v, 7, 8, 9, 11. The West Seattle Guidelines also recognize the presence of abrupt zone edges and/or transitions as indicators that palliatives such as setbacks are not the end of the inquiry. See West Seattle Guidelines (2001), section II 2 (Height, Bulk, and Scale Compatibility at V, section III B at 7.

Confirming the concern for transitions, the West Seattle Junction Hub Urban Village Neighborhood Plan also calls out "three pockets of single family zoning within the village boundaries: between SW Edmunds Street and SW Dawson Street along 40th, 41st, and 42nd Avenues SW; between SW Dakota Street and SW Oregon Street generally from 37th and 41st Avenues SW; and along 32nd Avenue SW" with a goal of protecting their "character and integrity". West Seattle Junction Hub Urban Village Neighborhood Plan at 40. (Emphasis added) [29]

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[28] Per SMC 23.76.026 the project is not vested to the "old" design guidelines because the "new" ones were adopted and in effect before the Director's decision was issued. However, because DPD acknowledged in testimony that the Guidelines were reworded and clarified but not substantively changed, all should be applied to ensure the most informed interpretation.

[29] The Council adopted the following concerning the West Seattle Junction in the "Neighborhood Planning Element" of the Comprehensive Plan:

> WSJ-P13 Maintain the character and integrity of the existing single family areas.

This is clearly based on the West Seattle Neighborhood Plan goal which NERD cited repeatedly to DPD staff, to the DRB, and at the recently concluded appeal hearing. See Exhibits 2, 54.

SMC 23.84A.026 "N" defines "Neighborhood plan" as:

> The goals and policies adopted by the Council into the Comprehensive Plan's Neighborhood Planning Element, that are developed to guide the growth and development of a specific neighborhood and deal with other neighborhood related issues such as housing, institutions, transportation, economic development and other community development activities.

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The guidance is unmistakable, including its explicit inclusion of elimination of structure floors and substantial height reduction as tools to achieve HBS compatibility with existing development and particularly on abrupt zone edges. The presence of such a circumstance here and the need for mitigation was confirmed not only by submissions to the DRB and DPD but by the transcendent expert testimony of two architects with unparalleled experience in crafting and applying the City's Codes in zoning and design review contexts – Vlad Oustimovitch and Tom Eanes. The exacerbating factor of the effects of a Land Use Code change in height measurement methodology, allowing through unusual confluence of circumstances even greater height on the "uphill" 3078 site than the zoning would normally anticipate, was essentially uncontroverted.

And, in fact, if the recommendation drafted by DPD staff is to be credited, the DRB while incorrectly advised that the project FAR complied with the Code, was of the view that HBS was an issue, although the Board clearly did not appreciate the Code height measurement amendment circumstances that made this abrupt zone edge all the more disruptive to the single family neighborhood.

It is at this point that the system for mitigation of a confluence of such adverse circumstances and impacts broke down. The evidence, including hearing testimony, is clear, consistent, and convincing on why that occurred. Per sworn testimony by multiple persons who had attended and consistently participated in the Board proceedings, the neighborhood repeatedly asked the Board to consider mitigation along the lines authorized by the design guidelines including significant reductions in bulk and height. And just as repeatedly, DPD staff gave the Board "jury instructions" that such remedies were not within its authority, a position which the Board then reiterated to the public participants at its meetings. Board

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member Oustimovitch's testimony was unequivocal and emphatic that the Board was instructed by DPD staff that regardless of the impacts the Board could not entertain as mitigation significant height reductions.

At the end of the day, even DPD staff, after dancing around the question, acknowledged that, in response to public comments respecting a one or two floor height reduction, he instructed that such a "significant downzone is a Council-only action."[30] The upshot of this constrained approach was that review by the DRB – and by the Director—was placed in an inappropriate box of the Department's own making. Alternatives that could have been considered were not[31], and mitigation that should have occurred was taken off the table.

In other circumstances, Examiner decisions have required a remand where a project was improperly noticed so that potential public comments were curtailed, pointing out that fatal flaw in what occurred was that the substance of public comments that would have been given had proper notice occurred might otherwise never be known. The facts here are analogous – and even more egregious. It is clear on the record here that there are significant adverse HBS impacts that have not been mitigated and that will diminish the integrity of the single family neighborhood both directly and cumulatively as 3078 shows the way for other redevelopable lots on the street. That is reason enough to reverse and remand. But, an equally compelling basis for reversal and remand is that what the Board might have done with this project will never be known if the current DRB recommendation and Director's Decision – based on false limitations – are allowed to stand.

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[30] The testimony from others was that Mr. Papers was far more expansive in the DRB setting than he acknowledged before the Examiner, discounting the community's concerns as not worthy of a "real city" and repeatedly telling the Board that the Applicant was entitled to develop to the zoning height with only minor variation.

[31] Architect Tom Eanes' described one such alternative: placing lower townhome units at the rear of the project site, toward the alley and SF residences and significantly lowering the building's bulk/mass by eliminating all or portions of its top level.

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CONCLUSION

For all of the reasons discussed above, the Director's Decision should be vacated, reversed, and remanded.

DATED this 5th day of November, 2014.

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CERTIFICATE OF SERVICE

I, Fred Schmidt, an employee of Eglick Kiker Whited PLLC, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On November 5, 2014, I caused to be delivered, a true and correct copy of the foregoing document by email to the following individuals:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 5, 2014 at Seattle, Washington.

Fred Schmidt