BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	
NEIGHBORS ENCOURAGING REASONABLE DEVELOPMENT	Hearing Examiner Files: **MUP-14-006 (DR, W)** **S-14-001**
from a decision and interpretation by the Director, Department of Planning and Development, on a Master Use Permit	Department References: Project 3013303 Interpretation No. 14-005 Interpretation No. 14-005 Supplemental Interpretation No. 14-005 Supplemental Addendum
	DPD Closing Statement

Summary

The subject appeal is of Department of Planning and Development (DPD) Project 3013303, an application for a Master Use Permit (MUP), including review under the State Environmental Policy Act (SEPA) and Design Review to construct a seven-story structure containing 102 residential units. Parking for 59 vehicles is proposed to be provided below grade, with one level accessed from SW Avalon Way (30 spaces) and a separate level accessed from the alley to the west of the site (29 spaces), at 3078 SW Avalon Way in the West Seattle Junction neighborhood and West Seattle Junction Urban Village. The appeal by Neighbors Encouraging Reasonable Development (NERD) (hereafter referred to as "appellant") alleged: 1) that the project was noncompliant with height and floor area ratio (FAR) limits of the Seattle Land Use Code; 2) that the Design Review process was subject to procedural and substantive errors; and 3) that the SEPA review failed to mitigate significant impacts, particularly traffic, parking, and height, bulk and scale.

A formal interpretation of the Seattle Land Use Code was also requested by appellants in relation to Project 3013303, Interpretation No. 14-005 (Project 3017787), and this interpretation was also appealed. Two additional and related interpretations were filed by DPD after the initial interpretation, Interpretation No. 14-005 Supplemental and Interpretation No. 14-005 Supplemental Addendum. The interpretations analyzed the following issues related to the proposed project: 1) whether the proposed project exceeds the allowable floor area ratio (FAR) limits established by Seattle Municipal Code (SMC) Section 23.45.510 and as measured in

Section 23.86.007; and 2) whether the project exceeds the height limits established by Section 23.45.514 and as measured in Section 23.86.006. Further issues raised by the request for interpretation were as follows: 3) whether the project application is incomplete or otherwise does not comply with the requirements of Section 23.76.010.A.1 in that it includes property not owned by the applicant or, referencing Section 22.170.200, it does not address how adjacent property will be impacted; and 4-6) several issues regarding the Regulations for Environmentally Critical Areas in Seattle Municipal Code (SMC) Chapter 25.09. The interpretation states that the ownership issue is not subject to interpretation. The various ECA issues raised by the appellants were not contested at the hearing and therefore will not be further addressed in this closing statement.

The DPD position is that the evidence at hearing clearly shows that the appeal should be rejected. The DPD decision and related Code interpretations are supported by the evidence in the record and should be affirmed. Procedural errors raised by the appellant are without merit and should be disregarded.

Burden of Proof

SMC Section 23.76.022.C.7 sets forth the standard of review for administrative appeals of "Type II" Master Use Permit approvals, such as the subject design review decision and SEPA determination. Subsection C.7 provides in part as follows: "The Director's [i.e. of DPD] decisions . . . shall be given substantial weight . . . ." Thus, the appellants have the burden of proof to show that the subject DPD decision is clearly erroneous. Similarly, SMC Section 23.88.020.G.5 provides, in part: "The interpretation of the Director [of DPD] shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant." This, too, sets forth the "clearly erroneous" standard of review.

Under the clearly erroneous standard, the Hearing Examiner must be left with the definite and firm conviction that a mistake has been committed by DPD in its analysis and decisions. As is clear from a review of the facts and analysis presented by DPD at the hearing, the appellants have failed to meet this burden. The remedy sought by appellants is a remand for further review and imposition of SEPA conditions allegedly required to mitigate adverse impacts. However, the record at hearing shows clearly that the appellants have failed to offer sufficient information about either substantive issues or procedural matters to justify a remand of the DPD decisions. The record shows no errors in the application of Code to the facts, or in the decision making process, to demonstrate that the design review and SEPA approval or the Code interpretations should be reversed or remanded, as explained in detail below.

Argument

A review of the testimony and record submitted at the hearing of the subject appeal shows that the DPD project decision and the related interpretations were properly analyzed and should be affirmed by the Hearing Examiner.

Master Use Permit Decision

1. The Design Review process was correctly followed by DPD and the resulting analysis sufficiently mitigated height, bulk and scale impacts under SEPA.

The project requires Design Review pursuant to SMC Chapter 23.41. There was one Early Design Guidance (EDG) meeting before the Southwest Design Review Board (DRB) on September 13, 2012 (notice date of August 23, 2012), and two Recommendation meetings, on November 21, 2013 (notice: October 31, 2013) and January 16, 2014 (notice: December 26, 2013). At all three meetings extensive public comments were heard and considered by the DRB. At all three meetings the DRB was encouraged by DPD staff (see exhibit #64) to fully address Height, Bulk and Scale issues at the zone edge condition (the project's Midrise (MR) zoning (60 foot height maximum) meeting SF 5000 (30 foot maximum height) at the 16 foot wide alley right of way). In consideration of the importance of the zone edge, the DRB selected Citywide Design Guideline "B-1: Height, Bulk and Scale Compatibility" as a Priority Guideline, and also the Neighborhood-specific enhancement of this guideline: "More refined transitions in height, bulk and scale –in terms of relationship to surrounding context and within the proposed structure itself – must be considered [at abrupt zone edges]."

At the EDG meeting, the DRB reviewed three massing options (see EDG booklet, exhibit # 13) and largely in deference to the neighboring SF 5000 zone, endorsed the L-shaped option that pushed the majority of the building mass to the east property line along Avalon Way, away from the alley. Additionally, the DRB gave explicit guidance (see Design Review Analysis section of Decision, exhibit #1) to step back upper floors, and to reduce the north wall length, and therefore push the western most wall further from the alley. Under Priority Guideline A-5: Respect for Adjacent Sites", the DRB gave guidance to refine the courtyard and roof terrace design to buffer overlooks of adjacent backyards.

The design was changed in response to DRB guidance and presented at the Initial Recommendation meeting (see booklet, exhibit #14). The westernmost wall of the building was shifted an additional 13 feet away from the alley (23 feet total from alley property line, where a code minimum setback of 10 feet applies), and the upper two stories at this location were stepped back an additional 6 feet. The rest of the building mass is located 47 feet from the alley property line, and 100-125 feet from houses on the opposite side of the alley. In response to a code change that affected this project and site, the entire building was reduced 15 feet in height from EDG, where it showed 6 floors visible to the alley. The design now showed 5 stories to the alley, 48-54 feet height along the sloping alley, and was below the code maximum 60 foot height for the MR zone. The DRB endorsed the adjustments and reduction in bulk and height, but requested the project study further techniques to reduce height and to return for another meeting.

At the Second Recommendation meeting, in response to DRB requests, the design minimized the west parapet height and reduced floor to floor heights to typical standards, which reduced overall height to be 4 feet below the code maximum (see booklet exhibit #15, cross section on page 33). The DRB endorsed these changes, and also evaluated the studies of lowering the parking and entire building deeper into the site. The DRB concluded this would push the alley courtyard and several residential windows into depressed moats around the building, contrary to other design

guidelines, and did not endorse such a change. The design also included several material and window revisions on the alley façade to address DRB guidance to create more residential scale along the alley. The DRB did not require further height or bulk reductions, but did condition their approval on having numerous large canopy trees along the alley to buffer privacy concerns and screen the proposed building from the neighbors across the alley (see exhibit #15, page 20, lower left). The DRB approved façade facing the alley (see exhibit #15, page 12) is 45-51 feet above the sloping alley grade, 4 -5 stories, and below the 60 foot maximum height as code-measured on this sloping site.

Appellants' witnesses, particularly architect Tom Eanes, testified that there were other possible ways to design the building, but a difference of opinion as to the building design is an insufficient basis for remand of a Design Review analysis.

2. Applicability of neighborhood plans.

The Neighborhood Plan in effect and consulted by DPD is in The Seattle Comprehensive Plan (Comp Plan), Chapter B-32, "West Seattle Junction," which City Council adopted by Ordinance 119506 on July 21 1999. Within Chapter B-32, the Housing and Land Use Policy WSJ-P13 states as follows: "Maintain the character and integrity of the existing single-family areas." There is no mention of "protected neighborhoods" or zone edges in the adopted Comp Plan Neighborhood Plan. Exhibit #54 is a "West Seattle Junction Neighborhood Plan", January 1999, produced by Friends of the Junction as a precursor to the Comp Plan, and was recognized by City Council Resolution; some aspects were included in the Comp Plan by ordinance 119506, but not the map on page 40 of the precursor plan. Accordingly, the DRB properly looked to the adopted plan for guidance.

3. The Design Review Board was given opportunity to consider all matters within its authority.

The West Design Review Board (DRB) reviewed all aspects of the proposed project at three meetings, and carefully addressed all design, code and design guidelines within its purview. The DRB did not support or approve any departures relating to bulk or height increases. The DRB has no authority to change the site zoning, reduce the code maximum height, or modify the code parking requirements. On this site, there is no minimum parking quantity requirement (SMC 23.54.015, table B for 23.54.015, line M), and the DRB has no authority to require or increase the voluntary proposed parking of 59 stalls.

4. The project is compliant with the SEPA policy addressing height, bulk and scale.

Pursuant to SEPA Policy 25.05.675.G.2.c regarding Height, Bulk and Scale, "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 [SEPA] policies. A project that is approved pursuant to the Design Review process is presumed to comply with the 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." [Emphasis added]. The project went through Design Review and numerous design adjustments, supported by adopted design guidelines, which were implemented

in consideration of the zone change at the adjacent alley. There is ample evidence the project was revised and height reduced to mitigate height, bulk and scale impacts, and additional SEPA Mitigation of height, bulk and scale is not warranted.

5. Parking impacts and cumulative effects under SEPA were sufficiently analyzed by the MUP decision

The appellant contends that there will be significant adverse impacts under SEPA due to inadequate on-street parking in the vicinity of the project site, and that various nearby projects approved or under review by DPD may have cumulative impacts under SEPA. As noted above, no parking is required for the project under the Land Use Code. The SEPA overview policy at Section 25.05.665.D generally states that City Codes addressing an issue are presumed adequate to achieve sufficient mitigation. The Land Use Code regulations concerning parking are therefore presumed sufficient to mitigate parking impacts, and the project has in any case provided parking even though it is not required. Additionally, SMC Section 25.05.675 M2 b 2) c) states, in part, "No SEPA authority is provided for the decision-maker to mitigate the impact of development on parking availability for residential uses located within 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". As further discussed in point 6 below, the site is within 1,320 feet of a street with frequent transit service; thus, no authority is provided under SEPA to mitigate the parking impacts of this residential use.

DPD acknowledges that there will be additional on-street parking as a result of development of the project and other new structures in the vicinity, but the applicants' traffic studies and assumptions regarding parking from other projects indicate that the cumulative additional parking will not have a "more than moderate impact" on parking in the neighborhood, as DPD Senior Transportation Planner John Shaw testified at the hearing. The likely effect of high levels of on-street parking utilization, as noted in the hearing, is that individuals seeking to park on neighborhood streets may park "a block or two further away" or "decide not to have a car or second car." This level of impact is reasonably characterized as moderate. Thus, while it is true that the overall neighborhood will have less available parking on the street once various new developments are in place, there is no authority to mitigate these impacts.

6. The Code language allowing parking exemptions for frequent transit service is validly interpreted by Director's Rule 11-2012, which is within DPD authority and was given proper notice of publication.

Seattle Municipal Code (SMC) Section 23.54.015 establishes parking requirements in the Land Use Code for all uses. Table B for 23.54.015, Line M, says in part that there is no minimum parking requirement for ". . . all residential uses in commercial and multifamily zones within urban villages that are not within urban center or the Station Area Overlay District, if the residential use is located within 1,320 feet of a street with frequent transit service . . . ." The proposed project is within 1,320 feet of at least two transit stops, according to DPD's Geocortex land use map and as discussed in the land use decision (Exhibit 1, page 18) and Exhibit 76 (Memo to Rich Hill from Brian Epley). These are identified as transit stops 19980 and 19930 on the Geocortex map (see also Exhibits 45 and 83, Metro bus schedules). Transit stop 19980 is at

the intersection of SW Avalon Way and SW Genesee Street, about 360 feet south of the project site, and transit stop 19930 is about 930 feet north of the site at SW Avalon Way and SW Yancy Street.

The appellant concedes that these transit stops are within 1,320 feet of the project site but disputes the analysis that they qualify as stops with "frequent transit service." Section 23.84A.038 defines "transit service, frequent" as ". . . 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 per day."

The Code does not specifically explain how to apply the definition in Section 23.84A.038 to determine if a street has frequent transit service as described in Line M of Table B for 23.54.015. As further explanation of the Code requirements, DPD has adopted Director's Rule 11-2012, Parking Reductions Based on Frequent Transit Service, effective September 28, 2012. The rule provides a guide for calculating frequent transit service, and provides in part at the top of page 3 as follows:

"2) Identify on the plans submitted with the permit application, copies of the Metro or other agency transit schedules indicating the service headways in one direction as follows for the stop identified in step #1:

a. For a minimum of 12 hours, 6 days per week, headways of 15 minutes or less (as headways may vary in a 12 hour period, the average headways in the 12 hour period, per day, shall be interpreted to meet the standard); . . . ." [Emphasis added.]

Thus, the rule allows averaging of the headways (time intervals between two vehicles traveling in the same direction on the same route, see Exhibit 11) of the Metro buses on the schedules for the two transit stops (Exhibits 45 and 83). The Code does not specifically include an averaging test in the definition at Section 23.84A.038, but the rule provides a reasonable interpretation of how that definition should apply. DPD authority to adopt Director's Rules is set forth in Section 23.88.010 and the City's rulemaking authority in general is set forth in SMC Chapter 3.02.

Rules are commonly used by DPD to describe procedures and to interpret portions of the Land Use Code, and this is the stated purpose of DR 11-2012. The rule must be "consistent" with Title 23 per Section 23.88.010.A and, if that test is met, then the rule should be considered valid. The Code does not, and should not be required to, address every possible set of facts to which it may apply. Allowing an averaging test for headways is a perfectly reasonable interpretation of the definition. The alternative is a rigid requirement that all intervals in a bus schedule be exactly 15 minutes or less. Such an interpretation, promoted by the appellants, would prevent a transit stop from qualifying for frequent transit service merely because one or two headway intervals in a 12 hour period exceeded 15 minutes, even if many other intervals were well under 15 minutes. For example, in Exhibit 83, the morning schedule for Monday through Friday has a bus at 4:55 a.m. and the next bus at 5:14 a.m., an interval of 19 minutes. But the next bus arrives at 5:34 a.m., the one after that at 5:49 a.m., and the one after that at 6:00. The overall average is clearly well under 15 minutes. The Director's Rule thus simply provides a reasonable explanation of how Code language is to be applied to frequent transit service analysis, rather than

setting forth all the details in a definition or in Line M of Table B for 23.54.015. This is particularly true since bus schedules are subject to frequent change, and the Code should not have to be revised every time a schedule changes.

Perhaps recognizing the common sense analysis present in DR 11-2012, the appellant appears to contend that the Director's Rule was invalidly adopted, offering Exhibits 78-81 in support of that contention. In Exhibit 78, the public notice of proposed DR 11-2012 says "Notice of Adoption of Director's Rules," while other notices in Exhibits 79-81 say "Notice of Proposed Adoption of Director's Rules." However, it is very clear from the text of the notice itself in Exhibit 78 that the four rules noted are proposed. The notice says, near the top, that DPD "has promulgated the following Rulings . . ."[1] and further says, near the end of the notice that "Copies of draft rules may be obtained from the [DPD] Public Resource Center." The notice also provided for a public comment period. The failure to add the word "proposed" at the top of the notice is merely a typographical error and should not be interpreted as defective notice that would invalidate the rule, given the clear language in the rest of the notice and the opportunity for public comment that was provided. The appellants' arguments about lack of frequent transit service near the project site are without merit and should be disregarded by the Examiner. (See also Exhibit 76 for the analysis of why one of the stops meets the Code requirements for frequent transit service.) The proposal is exempt from parking requirements, although it still provides a large number of non-required parking spaces.

Interpretations

1. The analysis presented in the Code interpretations correctly interpreted the Code as applied to height and FAR, and appellants did not offer any evidence to refute the conclusions.

The appellant did not contest the substantive analysis of building height or FAR as presented in the Code interpretations (Exhibits 72, 73, and 17-19). As noted at the hearing, DPD acknowledges that the initial Interpretation No. 14-005 did not provide a complete analysis of the FAR limits for the project, but Interpretation No. 14-005 Supplemental did so. Appellants' witness Mr. Eanes, an architect, acknowledged in his testimony that the analysis of height using the current "average grade" method in the Code was correct and that the FAR analysis in Interpretation No. 14-005 Supplemental was also correct. He further acknowledged that changes made to the plans by the project architects and analyzed under Interpretation No. 14-005 Supplemental Addendum made the project floor area consistent with the Code. DPD witness Mr. Mills testified about both height and FAR compliance, and these subjects were also addressed by applicants' witness, architect Radim Blazej. None of this testimony was refuted by appellant, which chose instead to argue alleged procedural irregularities, discussed below. There is no basis for remanding the MUP decision or Code interpretations on the basis of these alleged procedural irregularities, and since the substantive analysis of height and FAR compliance in the

[1] The word "promulgate" is defined in part as "to make known or public the terms of (a proposed law). See Webster's New Collegiate Dictionary (1975).

Code interpretations was undisputed by the appellants' own expert witness, the interpretations should be affirmed.

2. Except for determining that the applicant filed Statements of Financial Responsibility with DPD as noted in the Code interpretations, the issue of property ownership raised by appellants is a procedural issue that is not interpretable and is beyond the scope of the Hearing Examiner's jurisdiction. In any case, the record shows that the applicant has an interest in the property as at least an authorized agent of the owner or owners, and the Examiner should determine that the MUP application can proceed on the basis of that information.

Distinct from substantive issues of the Land Use Code, the appellant has highlighted several alleged procedural issues. One of these is the argument that the project applicant has not demonstrated that it has an ownership interest in the project site. Section 23.76.010.A.1 of the Land Use Code provides as follows:

> "A.1. Applications for Master Use Permits shall be made by the property owner, lessee, contract purchaser, a City agency, or other public agency proposing a project the location of which has been approved by the City Council by ordinance or resolution, or by an authorized agent thereof. A Master Use Permit applicant shall designate a single person or entity to receive determinations and notices from the Director."

The appellant argues that Section 23.76.010 requires the applicant to prove that it is an owner or contract purchaser of the property, and contends that Exhibits 46-52 demonstrate that the applicant does not have such an ownership interest. This argument ignores the further statement in subsection A.1 that an application may also be made by an "authorized agent" of an owner. As described in Interpretation No. 14-005 Supplemental, on page 12, DPD concluded that the question of compliance with Section 23.76.010.A.1 was a procedural issue not subject to interpretation, but the interpretation did note that statements of financial responsibility were filed by the applicant indicating either an ownership interest or designating an agent for the owner. The appellant does not dispute that several statements of financial responsibility were filed with DPD by various representatives of the applicant. The inquiry into compliance with Section 23.76.010 should end with this information.

If the Hearing Examiner finds that all documents required to support a DPD application were filed, it is not clear that the Examiner has jurisdiction to attempt to resolve any further issues of ownership. Section 23.76.022.C.6 allows the Examiner to ". . . entertain issues . . . that relate to compliance with the procedures for Type II decisions . . . ." This Code language gives the Examiner authority to consider whether evidence of ownership or agent authorization was provided to DPD, and such evidence clearly was provided. Since the statement of financial responsibility was filed, Section 23.76.010.A.1 should be considered satisfied by these project applicants.

If, however, the Examiner is inclined to consider further argument on this issue, DPD asks that the following points be considered. First, why would anyone apply for a Master Use Permit, develop plans, and participate in design review, as well as pay substantial fees for project review, if they do not have an ownership or agency interest in the underlying land? They could not develop the project without some interest in the land. Second, if one gets past the incongruity of an applicant seeking approval of a project on property it does not have at least the potential to own or control, then it is necessary to try to determine if there is sufficient evidence of either a contractual relation with the property owner or evidence of agency beyond the submittal of forms to DPD. This sort of inquiry is beyond the scope of DPD's review responsibilities and beyond its expertise as an agency. DPD is not a title company, nor is it in the business of resolving real estate contract disputes. It is not in a position to investigate every person who applies for a project. Instead, DPD reasonably relies on representations made on the financial responsibility form. Even if there is a contract dispute with an underlying property owner, that owner refutes appellants' claims of procedural irregularity. (See Exhibit 53 letter from attorney Joseph Finley to DPD Director Diane Sugimura.) The argument about property ownership is without merit.

3. The Land Use Code procedures for Code interpretations allow DPD to analyze and submit multiple Code interpretations in response to a request for interpretation, if necessary, so long as all interpretations are provided at least five calendar days in advance of the hearing date.

The appellant may argue that DPD erred in submitting additional formal Code interpretations after its initial submittal of Interpretation No. 14-005. The initial submittal was provided on July 11, 2014, more than two and a half months prior to the hearing in this matter that commenced on September 30, 2014, in response to a Hearing Examiner order setting that date as the deadline for submittal of the interpretation. While DPD does not dispute the Examiner's authority to establish deadlines for submittal of documents in a MUP appeal process, SMC Section 23.88.020.C.3.c very clearly allows DPD to submit Code interpretations in response to a request for interpretation filed as part of a MUP appeal ". . . at least five (5) calendar days before the hearing." The final interpretation, Interpretation No. 14-005 Addendum, was submitted on August 1, 2014, two months before the hearing commenced. Thus, all Code requirements for compliance with the Code interpretation process were met and, as noted above, the appellant does not even dispute the substantive conclusions of these interpretations.

The appellant may argue that the second interpretation, Interpretation No. 14-005 Supplemental, was issued to correct an error in the initial interpretation, and that multiple interpretations correcting or clarifying prior ones are not allowed. However, there is nothing in Section 23.88.020 that prevents such a supplemental interpretation from being issued, provided it is issued at least five days before the hearing. Since Interpretation No. 14-005 Supplemental identified errors in the project plans requiring plan correction by the applicant, DPD also provided the August 1 addendum interpretation. Again, Section 23.88.020 does not preclude an addendum to an interpretation that provides further analysis. None of this process was in any way prejudicial to the appellants because all of these interpretations were subject to the ongoing

MUP appeal process. In addition, DPD provided full discovery to the appellant including depositions of its witnesses, at the appellants' request.

4. The applicant may respond to errors or omissions in its plans identified by a Code interpretation and provide corrected plans during an appeal process, and prior to the appeal hearing, provided that these corrections are identified at appeal and, as in this case, are corrections of very minor errors that do not cause a substantive change in the scope or design of the project.

An additional concern of the appellant is that the project applicant responded to the DPD Code interpretations, particularly No. 14-005 Supplemental, by proposing to submit corrected plans to address the issues with exempt floor area outlined in the interpretation. A corrected plan set was submitted to DPD and reviewed for compliance with Code standards (see Exhibit 71). For comparison with Exhibit 71, the Examiner should reference Exhibit 66, which were the plans on which original Interpretation No. 14-005 was based. The result of the DPD review of corrected plans was the issuance of Interpretation No. 14-005 Addendum, which concluded that some relatively minor changes to proposed grade for the project and to the design of windows on the north and south sides of the project would address the floor area concerns.

The DPD interpretations do not take a position on whether the changes to the project require additional public notice or additional design review process. They merely analyze the Land Use Code requirements as applied to the project and determine that the corrected plans analyzed by Interpretation No. 14-005 Addendum comply with zoning regulations. However, appellant will likely argue that changes to the project made by the applicant in response to the interpretations are major should require both further public notice and further review by the Design Review Board. This additional public process is unjustified and that argument should be rejected.

Minor corrections to MUP applications commonly occur after a MUP decision is published. If the MUP decision is appealed, the corrections can be considered and analyzed in the appeal process without further need for public notice or design review, if it is demonstrated that no significant design or environmental issues are raised by the changes. It is worth noting that DPD has a process for considering minor revisions to issued MUPs without requiring additional public notice.[2] The only difference in this case is that the corrections are being considered prior to issuance of the MUP, and in fact these corrections are subject to even greater scrutiny due to the ongoing appeal.

The revisions at issue are proposals to adjust proposed grade for the project, so that portions of the first and second levels shown as more than four feet above grade will either be below grade or less than four feet above grade in compliance with the exemptions from floor area standards in the Code. These proposed adjustments to grade will require minor adjustments to the height of windows proposed on the north side of the project and elimination of a small window on the south side of the project, with a very limited effect on the overall appearance of the building that was approved in the Design Review process for the project. The changes are shown on the

[2] See DPD Tip No. 224B, Master Use Permit (MUP) Revisions.

applicant's plan sheet A0.04c in Exhibit 71. It should be noted that precise location of grade is a typical refinement item as projects progress through MUP review and transition into building permit submittals.

In the hearing, the appellant pointed out the requirement of Section 23.41.014.F.2, which reads as follows:

> "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."

The appellants' argument seems to be that since the project is subject to Design Review, any small change made during project review to demonstrate Code compliance must be reviewed by the DRB. However, subsection 23.41.014.F.2 merely states a plain requirement for purposes of clarity. Of course, prior to issuance of a MUP, project subject to Design Review must meet all codes and requirements. The exception in Section 23.41.012 is for Code requirements from which design departures have been granted, and Section 23.41.012 summarizes the Code sections from which departures may be granted. No MUP has yet been issued. Height and floor area ratio standards are not subject to departure, so the project must comply with these standards before a permit is issued. Nothing in Section 23.41.012 prevents an applicant from correcting plans to fix minor errors and omissions discovered in plan review, even during an appeal or due to review in a formal Code interpretation instead of a zoning review correction sheet process. The changes proposed by the applicant are simply too minor to justify additional review by the DRB or additional public notice process.

To counter the argument that the changes are minor, appellant provided the testimony of architect Vlad Oustimovitch. Mr. Oustimovitch testified in part that the proposed revisions would "alter the ground plane" of the building, and the reductions in size or elimination of windows would reduce two dwelling units and a fitness room to "basement like" conditions. Mr. Oustimovitch further testified that the plans originally showed floor to ceiling windows on the north side, and the change would not allow are resident to look out of the smaller windows. He felt the change to the window design would have been a "material issue" to the DRB.

Applicants' architect Mr. Blazej testified, however, that removal of the one window on the south side would result in a corner unit having windows facing only on SW Avalon Way, but this condition was no different than other "interior units" in the proposed structure that have frontage only on the street, as well. With respect to the north windows, it is clear that they are still of substantial size, allowing light into the corner units on that side. Mr. Blazej testified that these windows were never designed as floor to ceiling windows or to allow a view to the north, due to an existing slope and issues of privacy with the adjoining property. Further, a kitchen area is shown adjacent to these windows and it is unlikely that a floor to ceiling view would be possible even if the windows were larger. On cross examination, Mr. Oustimovitch sidestepped the question of whether the windows were essentially consistent with design drawing review by the DRB. He also admitted that he is the head of a neighborhood organization, which points to potential bias in his testimony.

Regardless of which witness is more credible on this issue, the changes to grade and windows proposed for the project, as documented in Exhibit 71, are too minor to justify further review by

the DRB, which did not specifically consider these issues, according to the written reports of the DRB meetings prepared by DPD Senior Land Use Planner Garry Papers. The applicant's corrections to the plans to achieve compliance with the Code interpretations do not justify a remand of this project for further review.

Conclusion

In his opening statement, appellants' counsel stated the evidence would show that there were flaws in the Design Review process and in the approval of a large project in an "edge" zone, that DPD allowed "consequential" changes to the project without further public review, and that the application was processed without "clear participation" by the property owner. None of these statements have been demonstrated by the facts provided at the hearing, as described above. Further, with respect to the specific points of the appeal statement, appellant NERD has failed to show that the project is noncompliant with height and floor area ratio (FAR) limits of the Seattle Land Use Code, based on the applicants' corrected plans. The appellants have also failed to demonstrate that the Design Review process was subject to any procedural or substantive errors or that the SEPA review failed to mitigate significant impacts, particularly traffic, parking, and height, bulk and scale. The DPD project decision and related interpretations were correctly analyzed by DPD. As there is nothing in the record to refute the conclusions of the DPD decisions or suggest that they are clearly erroneous, the DPD decisions should be affirmed.

Entered this 5th day of November, 2014.

William K. Mills

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cc. Peter J. Eglick, for appellant NERD
G. Richard Hill, for applicant Northlake Group LLC