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 REPLY BRIEF**

I. INTRODUCTION/OBJECTION

NERD members' introduction to the City of Seattle's DPD land use process has been something short of awesome. While enduring that process, NERD members consoled themselves with the understanding that the Hearing Examiner appeal process would be structured and fair. However, in two key respects actions by the Respondents presented as *fait accompli* to the Examiner have called NERD's expectations into question. One instance occurred when, in the midst of the hearing, and after much caginess, Respondents unveiled a different basis for the Director's Decision not to mitigate parking impacts. The result was a

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substantial additional burden on the Appellant and its members, both financially and in terms of time away from their families and jobs. However, NERD soldiered through.

Now, the Respondents (in particular the Applicant) has dropped a second shoe of system abuse by attempting to inject through "official notice" exhibits and follow-up argument yet more new bases for the Director's already tattered Decision. As explained below, NERD objects.

The Hearing Examiner Citizen Guide refers to "Closing arguments by each party (summarizing how the evidence presented supports the party's position)", confirming what every lawyer knows: closing arguments are about the evidence presented in the hearing -- not the place to present new evidence outside of the hearing.

The Hearing Examiner Rules confirm this as well. Rule 3.13(a) guarantees each party particular procedures "necessary for the full disclosure of facts and a fair hearing." Further, items to be offered into the hearing record must be supplied to all parties either before or at the hearing. Rule 3.13(d).

Applicant in its November 5 submission defies these principles and the policy behind them. Its "closing argument", citing "official notice" attaches and squarely relies on items (and arguments based on them) that could have been but were not raised in the actual hearing, despite the fact that the hearing extended over four days in a three week time frame, from September 30 through October 17. This, more than most appeals, allowed plenty of time for even a non-diligent Respondent to identify and offer on the hearing record any relevant exhibits and testimony.

Hearing Examiner Rule 2.18 does allow for "official notice", under certain conditions. Those conditions are not present here for any of the items relied

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upon by Applicant in its closing argument. The currency and accuracy of a Metro bus schedule generated online may be taken for granted by the Applicant, but that is not Applicant's decision to make.[1] A Mayoral letter does not fit the definition of items of which "official notice" can be taken. Further, the vague statements the Mayor's letter makes (even if the implications Applicant incorrectly draws from them were somehow correct) are not transcendent facts eligible for "official notice".

Even if these objections were not present, Hearing Examiner Rule 2.18(b) requires that "Before a decision or recommendation is issued, parties must be notified of the facts or material noticed and their source, and afforded an opportunity to contest or rebut them." This requirement goes unaddressed and unacknowledged by the Applicant. This is not a minor oversight. The bus schedule is not just attached as a casual matter by the Applicant to its "closing statement". It is instead the keystone of the latest new Respondent basis for denying that the Director has the authority to mitigate parking impacts. The original basis for the actual My 15, 2014 Director's Decision to this effect was that the Genesee transit stop was within the prescribed radius and provided FTS. When this was disproved in the appeal hearing, a new Director's Decision was in effect offered — that, at an entirely different transit stop, the C bus route provided FTS <u>if</u> a mechanism not hinted at in the Code -- <u>averaging</u> the C route's headway – was utilized. However, in closing argument Applicant injects yet another approach -- averaging headways between two different routes rather than just averaging headways on the C route.

[1] In contrast, Appellant offered into evidence photographs of posted bus schedules.

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This alternative basis was not offered by Respondents despite repeated questions to DPD's John Shaw both at the hearing and in his deposition (Exhibit 75). [2] No alternative basis was raised or even suggested by the Applicant, whose counsel had scripted DPD's pivot to reliance on the Yancy Street C route averaged headways. Applicant did not present its own traffic consultant at the hearing. It barely cross-examined Chuck Burkhalter in his testimony concerning the Yancy Street stop and certainly made no inquiries concerning the schedule or headways of the route now raised in Applicant's November 5 closing argument.

Respondents recognized during the hearing that their case on parking was weak. So Applicant decided to hold back its new twist (including the exhibit necessary to raise it) until closing arguments when Appellant could not address or contest it with counter-exhibits and testimony (including, e.g., cross-examination of DPD's Mr. Shaw).

The Hearing Examiner Citizen Guide offers this explanation of the importance of the playing by the rules in appeal hearings:

> The structured format of the hearings acknowledges the seriousness of the matters appealed and ensures a fair opportunity for all affected parties to participate.

Applicant's ploy defies this guiding principle. This is confirmed by a precedent set by McCullough Hill, Applicant's counsel, in In the Matter of the Appeal of Richard Gordon, et al., Hearing Examiner File: MUP-13-001, Department Reference Number: 3012582 (March

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[2] Appellant's examination of Mr. Shaw at the hearing and Appellant's objections to Respondents' then just revealed zigs and zags are documented, for example, in Appendix A, attached to this Reply. Appendix A is a transcription of Appellant's October 1 examination of Mr. Shaw and of the subsequent colloquy among the parties and the Examiner. This testimony by Mr. Shaw unmistakably relied on C route information provided in Exhibit 76, a memo from Applicant's counsel that only relied on the C route (and C route headway averaging) to find FTS:

> Yes. It just notes the distance from the subject site to the bus stop at Avalon and Yancy Street and identifies the time blocks within the schedule for the Rapid Ride C Line and the frequency of service by hour, so that provided – it provided me enough information to see that the frequent transit service was met, but I corroborated against the times in the C Line itself. So, I believe that based on the schedule of the C Line Rapid Ride Line frequent transit service is met on this project.

Exhibit 75, the transcript of Mr. Shaw's deposition, taken during the hearing hiatus, also confirms that reliance was only being placed on calculations concerning the C route.

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13 2013). In Gordon, the McCullough Hill firm, representing an Applicant, successfully objected to a far less calculated attempt (by the Gordon Appellant) to inject new matter into the record after the hearing had concluded:

> The Appellants offered additional information to rebut the Applicant's and DPD's testimony regarding the frequency of transit service at the site, and the availability of the design packet online prior to the EDG meeting. But the respondents' testimony was in response to the issues raised by the Appellants and the additional rebuttal information offered by Appellants was available to them prior to the hearing. The Appellants have not shown good cause for why the information could not with due diligence have been discovered and offered earlier at hearing. (It should be noted that similar information regarding bus schedules was submitted in comment letters that were in the DPD project file, and those comments are in the record for both this appeal and the contract rezone application).

In re Gordon, supra, at Conclusion 3 (emphasis added).

Applicant has defied the standard its counsel established through its objection in In re Gordon. Here, as in Gordon, the "additional rebuttal information offered by [Applicant] was available to them prior to the hearing. The [Applicant has] not shown good cause for why the information could not with due diligence have been discovered and offered earlier at hearing."

A quasi-judicial appeal is not meant to be iterative, allowing Respondents to reinvent that which has been appealed as the need arises. The Director's May 15, 2014 Decision -- the only one actually issued by the Director -- has long since been proven clearly erroneous. The new basis scripted by Applicant's counsel and offered by Respondents during the hearing -- without prior notice -- has already taken the matter far afield. The latest new basis introduced in closing arguments is beyond the limits of fairness and toleration. The Examiner should therefore not consider any of the new exhibits and any of the associated arguments offered by Applicant in its closing arguments.

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II. SIGNIFICANT ADVERSE UNMITIGATED PARKING IMPACTS

A. Unmitigated Parking Impacts Require an EIS

Regardless of whether SEPA mitigation is available -- a question concerning SEPA's second, substantive prong -- the unmitigated parking impact demonstrated on the record is by itself more than enough to require preparation of an EIS. This would fulfill the first, original SEPA prong, to ensure that decision makers are aware of the environmental consequences of a proposed action even if it cannot be directly regulated in the current application.[3]

Some of the Respondents' arguments on parking impacts reflect confusion about how impacts and achievement of policy goals are treated under SEPA. DPD states that "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." Here is in part what Mr. Shaw actually said:

> PJE: And when you then testified that that represents an impact that's no more than moderate, what factors did you take into account that you haven't already described to us here?
>
> JS: I'm not sure what factors I have described. What I took into consideration was that in areas with heavy parking utilization, people seeking to park on the street may simply go a block or two further to look for parking to look for parking spaces. It would broaden the area in which the parking is occurring. It is also possible that there may be a choice over time that people living in that neighborhood decide not to have a car and not to have a second car so as not to need to park a car on the street effectively reducing the utilization.

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[3] This is particularly important because the "apodment" uses contributing to cumulative impacts in the neighborhood were not contemplated in adopting the Land Use Code.

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PJE: Now, are any of those factors ones that you consider — I think the answer's going to be yes — but these are factors that you specifically believe apply in this instance? Is that correct?

JS: Yes.

PJE: So, for example, you believe that in this instance there is an opportunity for people looking for parking to, as you put it, "go a block or two further." Is that correct?

JS: Yes.

PJE: Okay. And are there any other factors? You just cited two. One was people will go a block or two further. The other people will just give up their cars and that that tells you it's not a significant impact because they'll give up their cars when they see the impact? What else? What other factor went into your statement to Mr. Hill?

JS: Those were the basic factors.

Mr. Shaw also confirmed in his deposition the City planning goal behind the conclusion of no more than a moderate impact. See Exhibit 75, Shaw Dep. Vol. II (October 15, 2014).

These explanations for how DPD arrived at the point of characterizing parking impacts of over 100% utilization as "moderate" reflect inappropriate mixing of two distinct SEPA questions. One question -- the one presented here by NERD's appeal of the DNS -- is whether there is a likelihood of more than moderate adverse impacts. The data and analyses here, including those prepared by TraffEx (the Applicant's traffic consultant) and by the Director in her Decision as well as in the more comprehensive analyses by Mr. Burkhalter all say yes. Whether the impact contributes to achieving some purportedly beneficial or positive goal is a distinct question that does not bear on whether the originating impact is significant. Here, if Mr. Shaw's testimony is credited, the goal achieved by the catastrophic parking impact on the neighborhood is to force residents to shed their cars. Whether that will be the actual result, particularly for the families in the 32nd Avenue SF neighborhood bearing the heavy brunt of parking impacts is doubtful. But even if that were the result, that does not make the impact

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forcing the change no more than moderate. The SEPA regulations make this clear in an analogous context:

> A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

WAC 197-11-330(5).

B. FTS Criteria Are not Met

The record remains unrebutted that if the Code as adopted by Council is applied neither the Genesee stop nor the Yancy stop offers a route that meets the definition of FTS. In fact, the Genesee stop would not meet even the Respondents' various iterations of FTS. See, e.g., NERD Op. Br. page 8 note 114.

The question of application of the Director's Rule comes down to whether the Code is so unclear that the gloss of a virtual rewrite by the Director is appropriate and must be credited by the Examiner. As laid out by NERD's Opening Brief, there was agreement all around in the hearing testimony that the common definition of "headway" is "the time interval between two vehicles traveling in the same direction on the same route." See Exhibit 11. This definition is confirmed in the US Department of Transportation National Transit Database ("NTD") Glossary (2013) which defines "headway" as "The time interval between vehicles moving in the same direction on a particular route."[4] Averaging is antithetical to the definition of headway. Averaging of headways between two routes compounds the conflict because headway is by definition a way to describe service on a particular route – not on an aggregate

[4] Emphasis added. NERD has stated its objections in this Reply to the "official notice" practice initiated by Applicant. If the Examiner sustains NERD's objections and does not consider the items offered by Applicant for "official notice" then she need not consider the NTD Glossary excerpt attached as an appendix to this Reply and quoted above. However, if NERD's objections are not sustained, then the Examiner should consider this NTD definition.

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of routes.[5] And again, no one on the hearing record – particularly DPD – suggested that the definition of headway was uncertain or amenable to different interpretation than the one in the dictionary.

> As a general rule, where a term is not defined in the statute, the term must be accorded its plain and ordinary meaning unless a contrary intent appears. *In re Estate of Little*, 106 Wash.2d 269, 283, 721 P.2d 950 (1986); *Island Cy. v. Dillingham Dev. Co.*, 99 Wash.2d 215, 224, 662 P.2d 32 (1983).

Dennis v. Department of Labor and Industries of State of Wash., 109 Wash.2d 467, 480, 745 P.2d 1295 (relying, inter alia, on definition from Webster's Third New Int'l Dictionary).

DPD Brief is frank that it is asserting the right to "interpret" the Code FTS definition into something more elastic because the FTS benchmark adopted by the Council in the Code is too "rigid". DPD Brief, p. 6. DPD complains that applying the Code without injecting elasticity 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."[6] DPD assumes, perhaps based on its own agency bias, that the Council could not possibly have intended to establish a firm bright line standard for FTS before a neighborhood would be deprived of the possibility of SEPA mitigation. However, it offers no basis for this assumption, for example, from cognizable legislative history (to which DPD presumably has had access all along).[7]

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[5] Averaging an aggregate of routes contravenes the definition specification for the same route and same direction. Otherwise, FTS could be met by a patchwork of trips from different routes in different directions – antithetical to providing consistent service, on a consistent route.

[6] DPD also argues that "bus schedules are subject to frequent change, and the Code should not have to be revised every time a schedule changes." However, it does not explain how a change in bus schedule would require a change in the Code.

[7] Meanwhile, in light for example of its October 17 testimony, DPD is apparently not concerned that its injection of averaging would result in outcomes inconsistent with apparent Council intent that the possibility of SEPA mitigation be foreclosed only where there is transit service meeting a clear criterion for regularity on a consistent route:

> PJE: Does that mean then that you could have a circumstance where by averaging, you would determine that frequent transit service was present even where in a 12 hour period there were intervals between busses of more than 15 minutes?

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Had the City Council wished to vary from the common understanding of "headway" to allow greater leeway to cut off SEPA mitigation otherwise available it could have done so – but it did not. If the Council wanted FTS to depend on "average" headways it was fully capable of inserting that word in the definition it adopted. But it did not. Respondents have pointed to no legislative history ("officially noticed" or otherwise) to support the interpretation they have proposed based on the Director's Rule. The Rule itself was adopted without reference to SEPA and without proper notice. It has and should have no application here.[8]

III. HEIGHT, BULK, AND SCALE

The City Council's intent that height, bulk, and scale ("HBS") impacts, particularly on abrupt zone edges, be mitigated is evident not just in the West Seattle Design Review Guidelines, but in the overarching framework the Council has established. Seattle's SEPA Code provides with regard to HBS as follows:

> Height, Bulk and Scale.
>
> 1. Policy Background.
>
> a. The purpose of the City's adopted land use regulations is to provide for smooth transition between industrial, commercial, and residential areas, to preserve the character of individual city neighborhoods and to reinforce natural topography by controlling the height, bulk and scale of development.

JS: I'm not entirely sure I follow the question, but I would agree that yes there could be instances where headways would be greater than 15 minutes but with the averaging process there would still be a determination that a route had frequent transit service.

[8] DPD argues that the DR Notice is compliant -- if it is parsed in a strained manner inconsistent with the purpose of a notice seeking public comment on a proposal. It dismisses the contrast with other very different notices issued by the Department. It offers a secondary dictionary definition of "promulgate" to support its strained approach. However, in using the term promulgate, the Code itself makes clear that it is referring to Rules that have already been adopted – not ones that have just been proposed. SMC 3.02.120.A.1, "Powers of Hearing Examiner" ("In the performance of duties prescribed by this chapter or other ordinances, Hearing Examiners may … conduct discovery procedures …pursuant to rules promulgated by the agency").

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b. However, the City's land use regulations cannot anticipate or address all substantial adverse impacts resulting from incongruous height, bulk and scale. For example, unanticipated adverse impacts may occur when a project is located on a site with unusual topographic features or on a site which is substantially larger than the prevalent platting pattern in an area. Similarly, the mapping of the City's zoning designations cannot always provide a reasonable transition in height, bulk and scale between development in adjacent zones.

2. Policies.

a. It is the City's policy that the height, bulk and scale of development projects should be reasonably compatible with the general character of development anticipated by the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan regarding Land Use Categories, the shoreline goals and policies set forth in Section D-4 of the land use element of the Seattle Comprehensive Plan, the procedures and locational criteria for shoreline environment redesignations set forth in SMC Sections 23.60.060 and 23.60.220, and the adopted land use regulations for the area in which they are located, and to provide for a reasonable transition between areas of less intensive zoning and more intensive zoning.

b. Subject to the overview policy set forth in SMC Section 25.05.665, the decision-maker may condition or deny a project to mitigate the adverse impacts of substantially incompatible height, bulk and scale. Mitigating measures may include but are not limited to:

i. Limiting the height of the development;

ii. Modifying the bulk of the development;

iii. Modifying the development's facade including but not limited to color and finish material;

iv. Reducing the number or size of accessory structures or relocating accessory structures including but not limited to towers, railings, and antennae;

v. Repositioning the development on the site; and

vi. Modifying or requiring setbacks, screening, landscaping or other techniques to offset the appearance of incompatible height, bulk and scale.

c. The Citywide design guidelines (and any Council-approved, neighborhood design guidelines) are intended to mitigate the same adverse height, bulk and scale impacts addressed in these policies. A project that is approved pursuant to the design review process is presumed to comply with

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these height, bulk and scale policies. This presumption may be rebutted only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated. Any additional mitigation imposed by the decisionmaker pursuant to these height, bulk and scale policies on projects that have undergone design review shall comply with design guidelines applicable to the project.

SMC 25.05.675.G.

Another section of Seattle's SEPA Code, SMC 25.05.675.J ("Land Use") reinforces the Council's intent and concern, adding specific reference to the overbearing effect that some uses can have on the opportunities for more fragile ones:

1. Policy Background.

a. The City has adopted land use regulations that are designed, in part, to minimize or prevent impacts resulting from incompatible land use. However, the adopted Land Use Code (Title 23) cannot identify or anticipate all possible uses and all potential land use impacts. For example, adverse cumulative land use impacts may result when a particular use or uses permitted under the Zoning Code occur in an area to such an extent that they foreclose opportunities for higher-priority, preferred uses called for in Section B of the land use element of the Comprehensive Plan and the shoreline goals and policies set forth in section D-4 of the land use element of the Comprehensive Plan.

b. Density-related impacts of development are addressed under the policies set forth in subsections G (height, bulk and scale), M (parking), R (traffic) and O (public services and facilities) of this section and are not addressed under this policy.

2. Policies.

a. It is the City's policy to ensure that proposed uses in development projects are reasonably compatible with surrounding uses and are consistent with any applicable, adopted City land use regulations, the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan regarding Land Use Categories, and the shoreline goals and policies set forth in section D-4 of the land use element of the Seattle Comprehensive Plan for the area in which the project is located.

b. Subject to the overview policy set forth in SMC Section 25.05.665, the decisionmaker may condition or deny any project to mitigate adverse land use impacts resulting from a proposed project or to achieve consistency with

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the applicable City land use regulations, the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan regarding Land Use Categories, the shoreline goals and policies set forth in Section D-4 of the land use element of the Seattle Comprehensive Plan, the procedures and locational criteria for shoreline environment redesignations set forth in SMC Sections 23.60.060 and 23.60.220, respectively, and the environmentally critical areas policies.

The Council did not stop there. It also adopted in SMC 25.05.670 a Cumulative Effects Policy for mitigation when a project, viewed in a vacuum, may not trigger the need for mitigation, but when examined in a cumulative context, as a precedent and guide for adjacent development, will create undesirable impacts:

A. Policy Background.

1. A project or action which by itself does not create undue impacts on the environment may create undue impacts when combined with the cumulative effects of prior or simultaneous developments; further, it may directly induce other developments, due to a causal relationship, which will adversely affect the environment.

2. An individual project may have an adverse impact on the environment or public facilities and services which, though acceptable in isolation, could not be sustained given the probable development of subsequent projects with similar impacts.

B. Policies.

1. The analysis of cumulative effects shall include a reasonable assessment of:

a. The present and planned capacity of such public facilities as sewers, storm drains, solid waste disposal, parks, schools, streets, utilities, and parking areas to serve the area affected by the proposal;

b. The present and planned public services such as transit, health, police and fire protection and social services to serve the area affected by the proposal;

c. The capacity of natural systems-such as air, water, light, and land-to absorb the direct and reasonably anticipated indirect impacts of the proposal; and

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d. The demand upon facilities, services and natural systems of present, simultaneous and known future development in the area of the project or action.

2. Subject to the policies for specific elements of the environment (SMC 25.05.675), an action or project may be conditioned or denied to lessen or eliminate its cumulative effects on the environment:

a. When considered together with prior, simultaneous or induced future development; or

b. When, taking into account known future development under established zoning, it is determined that a project will use more than its share of present and planned facilities, services and natural systems.

C. Unless otherwise specified in the Policies for Specific Elements of the Environment (SMC 25.05.675), if the scope of substantive SEPA authority is limited with respect to a particular element of the environment, the authority to mitigate that impact in the context of cumulative effects is similarly limited.

The Design Guidelines adopted by the Council emphasize the concerns addressed in Title 25 and explicitly call out remedies to address them. For example, the 1999 Citywide Guidelines include the following provisions directly applicable to the circumstances here:

A-5 (Respect for Adjacent Sites)

Buildings should respect adjacent properties by being located on their sites to minimize disruption of the privacy and outdoor activites of residents in adjacent buildings.

B-1 (Height Bulk and Scale)

Height, bulk and scale mitigation may be required in two general circumstances:

1. Projects on or near the edge of a less intensive zone. A substantial incompatibility in scale may result from different development standards in the two zones and may be compounded by physical factors such as large development sites, slopes or lot orientation.

2. Projects proposed on sites with unusual physical characteristics such as

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large lot size, or unusual shape, or topography where building may appear substantially greater in height, bulk and scale that that generally anticipated for the area.

The 2013 Design Guidelines adopted by Council have been reformatted and clarified, but are to the same effect:

CS2 D (Height, Bulk and Scale);

1. Existing Development and Zoning: Review the height, bulk, and scale of neighboring buildings as well as the scale of development anticipated by zoning for the area to determine an appropriate complement and/or transition. Note that existing buildings may or may not reflect the density allowed by zoning or anticipated by applicable policies. [Cited/quoted in opening brief]

2. Existing Site Features: Use changes in topography, site shape, and vegetation or structures to help make a successful fit with adjacent properties; for example siting the greatest mass of the building on the lower part of the site or using an existing stand of trees to buffer building height from a smaller neighboring building.

3. Zone Transitions: For projects located at the edge of different zones, provide an appropriate transition or complement to the adjacent zone(s). Projects should create a step in perceived height, bulk and scale between the anticipated development potential of the adjacent zone and the proposed development. Factors to consider:

a. Distance to the edge of a less (or more) intensive zone;

b. Differences in development standards between abutting zones;

c. The type of separation from adjacent properties (e.g. separation by property line only, by an alley or street or open space, or by physical features such as grade change);

d. Adjacencies to different neighborhoods or districts; adjacencies to parks, open spaces, significant buildings or view corridors; and

e. Shading to or from neighboring properties.

4. Massing Choices: Strive for a successful transition between zones where a project abuts a less intense zone. In some areas, the best approach may be to lower the building height, break up the mass of the building, and/or match the scale of adjacent properties in building detailing. It may be appropriate in other areas to differ from the scale of adjacent buildings but

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> preserve natural systems or existing features, enable better solar exposure or site orientation, and/or make for interesting urban form.

NERD pointed out in its Opening Brief that the West Seattle Neighborhood Plan calls for protection of West Seattle single family neighborhoods calling out in particular, inter alia, the 32nd Ave neighborhood. DPD, however, rejects recognition of the 32nd Ave neighborhood as eligible for protective consideration:

> 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.

This approach is inappropriately blindered. It in effect argues that because the Comprehensive Plan does not itself specifically call out the 32nd Ave. neighborhood for protection, then 32nd Avenue is not included in the policies calling for protection of single family areas in West Seattle. Comprehensive Plan Land Use Element, "Section B", which the SEPA HBS Policy calls out as part of its consideration provides that new development is to be "consistent with the urban village strategy":

> The goals and policies in this section describe the different types of areas that the City seeks to create and enhance, in the context of existing environments and the urban village strategy.

http://seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd016650.pdf (. E.g., the introduction to Section B, "Discussion" at 2.13). The Neighborhood

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Plan cited and excerpted in the hearing record and discussed in NERD's Opening Brief is the Urban Village Neighborhood Plan for the West Seattle Junction Urban Village, and the adopted policy cited by NERD in that brief is from the West Seattle Junction Neighborhood Policies, in Element 8 of the Comprehensive Plan:http://seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd016646.pdf .

IV. SIGNIFICANT HBS IMPACTS REQUIRING MITIGATION REMAIN

NERD presented the testimony of two architects, Tom Eanes and Vlad Oustimovitch, with significant credentials and experience in working with The Code and Design Review. Both confirmed that the 39078 project as approved presents significant adverse HBS impacts that could and should have been mitigated, particularly in light of the abrupt MF/SF zone edge, the site topography (and its interaction with a change in Code height measurement), and the precedential nature of the proposal. To emphasize their importance, significant portions of each architect's testimony has been transcribed and is presented below.[9]

Tom Eanes HBS Testimony

PJE: I'm showing you what's been marked as Exhibit 21. Maybe with this is as a reference can you explain what you mean by a zone edge?

TE: Well, the land on the East side — there's an alley between SW Avalon Way and 32nd Avenue SW. The land to the East of the alley, which is shaded in blue here, is zoned MR with a 60 foot height limit, MR60. The land on the opposite side of the alley, the West side, is zoned single family 5000, which has a height limit of 30 feet.

[9] Community members did their best to describe the impacts of the proposal and explain why mitigation was authorized and necessary. These descriptions are found in Exhibits 2 and 33.

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PJE: Okay, and in your experience is a MR/SF zone edge common in Seattle?

TE: Not in my experience.

PJE: Does the existence of this edge have any implications in terms of project impacts?

TE: I believe it calls for mitigation, either through design review or through the SEPA process. In this particular case, the impact has been exacerbated by a change in the method of measuring height in this zone and many other zones in Seattle that took place partly as a result of my recommendation when I was on the Planning Commission.

PJE: And can you explain what change occurred and then we'll talk about how that exacerbates impact?

TE: Sure. So, the change occurred — when I was on the Planning Commission reviewing the proposed changes to both the commercial and the multifamily code, I and other architects on the Commission consistently recommended that the City alter its method of measuring height to simplify it. The previous method, I'll refer to that as the old method, in most zones of the City, not all but almost all, measures building height at all points on the site from the lower of existing or finished grade. There are some fine points to that but basically it followed the topography, and we all felt that that was responsible for the majority of the difficult in using the Land Use Code. So we consistently recommended that we — and in this case as I'll explain in I guess in a little bit – it has effectively allowed this building to be taller on the street than it would have been under the old method. We encountered resistance from DPD staff in recommending the change. They felt that it would result in taller buildings. I argued that that really wasn't possible because ultimately building height it based on existing topography one way or another. I did admit that it would change the granularity of height measurement in that the frequency with which buildings had to change their height on a sloped condition, the frequency would increase and so the changes in building height would become of a courser grain. The other change that I explained to people at the time, was that this would likely result in buildings on an uphill site, and by uphill site I mean one that slopes up from the street, becoming taller on the street edge, and buildings on the downhill site becoming shorter on the street edge. We did not at the time, we were not aware of and did not discuss the potential impact of this change on a site like this where there is an abrupt zone edge at the back of the site.

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. . . [discussion re admission of exhibits 21, 22 and 23. Exhibits admitted.]

PJE: I think you said that this kind of impact was not considered when the height change was being talked about and adopted.

TE: That's correct. We were not aware that there were such abrupt changes — abrupt zoning changes where the height change is so abrupt. In my experience, there were between a zone with a height of say 65 feet and another of 30 feet, there would typically be some transition height like 40 feet in place. I was accustomed to dealing with that condition.

PJE: You showed us the Avalon side of the building. Would there be a commensurate difference on the side of the building that's on the alley?

TE: So on the alley, under the new method the height limit is still up here because the height limit is a flat plane. Under the old method, the height limit would have sloped up to perhaps a higher point on the alley, but building to that height would have been contrary to the design guidelines that deal with zone transitions.

PJE: And what would the number of stories have been under the old method on the alley?

TE: Under the old method on the alley, assuming the building did not step up but had a flat upper floor such as the building to the South, there would have been four stories on the alley.

PJE: And do you know how many stories there are on the alley now?

TE: Five.

PJE: Do you have an opinion on what this means for application of the design review guidelines to this project?

TE: So, the design review guidelines for West Seattle Junction specifically recognize this abrupt zone edge as a condition that occurs in that neighborhood. The design guideline refers to abrupt edges between NC65 and 85 foot zones and multifamily zones adjacent. The Design Review Board, nonetheless, applied that design guidelines or identified it as a priority at the EDG, even though the two zones are different. The principles are the same. You have a zone of very high height limit immediately adjacent to a zone of a much lower height limit.

PJE: And in your opinion does the current project design materially

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mitigate adverse height, bulk, and scale impacts?

TE: It does not mitigate the impact of the extra story that's been allowed under the new method of height measurement.

Vlad Oustimovitch HBS Testimony

PJE: Can you give us a brief description — this term height, bulk and scale is used in the design guidelines and we all talk about it — can you give us a brief description of what that concept is from your perspective?

VO: Height, bulk and scale is kind of a popular term but it's actually a very old concept that goes back in the hundred years of planning in this country. From the New York Code when light and air became an issue in terms of the density of development in that city. Since that time, it's evolved into a number terms, but this is one that basically relates to the massing of the building and how it relates to the adjacent buildings and open spaces and streets.

PJE: When you say how it relates to the open spaces and streets, can you kind of explain that a bit, what this adjacency means with what you're describing?

VO: Could you be more specific?

PJE: Does height, bulk and scale relate to adjacent zones?

VO: The height, bulk and scale relates differently to each side of the building and the adjacencies on each side of the building. There's not height, bulk and scale that's a generalized one. It actually relates to specific sides of buildings.

PJE: And in this case, is height, bulk and scale for this project an important factor?

VO: It's very important. This project has, if I just quickly just go through the four sides. The street side, which is Avalon, that roadway is, because of the height of the buildings, is starting to have a somewhat canyon-like feel. So there's a lot of concern about the impact on Avalon. On the back side of the building, is a single family zone, which is highly impacted in terms of the buildings that are on the side of the area. And then there's the two adjacencies. There's multifamily on both sides of the project.

PJE: Are you aware if there are any design guidelines that address height, bulk and scale?

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VO: Almost all of them relate to height, bulk, and scaling in some shape or form. There's kind of a breakdown. I would say that the way the design review guidelines are broken down is sometimes a little bit awkward, but really all of the subcomponents do get back to that basic form and that's the tool which design review has to shape the building in terms of fitting it into its surroundings.

PJE: Was height, bulk and scale an issue raised by the surrounding community with regard to this project proposed that we're here about today?

VO: By a number of people at the hearing.

PJE: Can we mark, this is the height bulk and scale section of the design guidelines.....

HE: Exhibit 32. Which design guidelines are these?

PJE: This is the original ones....

HE: City-wide?

PJE: Yes.

HE: Okay.

PJE: And this exhibit is pages 22 through 26. Showing you what's been marked as exhibit 32, does this look familiar?

VO: Yes. This is in fact from the document that has been used by the Design Review Board since, since I was on the Design Review Board in 1999.

PJE: Okay. Can you look on the first page of exhibit 32, and if you look down a little bit below the middle of the page, there's the section, a subsection 2, do you see that?

VO: Yes I do.

PJE: Okay, and could you just read that into the record, please? And then I'm going to ask you a question about it.

VO: Projects proposed on sites with unusual physical characteristics such as a large lot size, unusual shape or topography where buildings may appear substantially greater in height bulk and scale than generally anticipated for the area.

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PJE: Okay, and is this circumstances described in number 2 in your opinion present with regard to the project we're here about today?

VO: This site, because of its slope condition, would be within this category, yes.

PJE: Okay, and could you then also read into the record the one just above, number one on that same page of exhibit 32?

VO: Projects on or near the edge of a less intensive zone, a substantial incompatibility in scale may result from different development standards in the two zones and may be compounded by physical factors such as large development site slopes or lot orientation.

PJE: All right. In your opinion, is this factor also present with regard to the 3078 project that we're here about today?

VO: It is, and this one mixes a little bit with the second one, but the one that is particular — the first sentence especially, the less intensive zone — that factors in with the single family zone next to it.

PJE: Okay. Now, you've said it's present. That's what I've asked you. Now I'm going to ask you to kind of take that one step further or not, as the case may be. How important is height, bulk and scale — Excuse me, how important are height, bulk and scale considerations in terms of design review for the project we're here about today?

VO: They're the most important characteristics for the project.

PJE: And can you explain why and I may be a little bit overlapping with what you said before, but if you could just elaborate a bit?

VO: Probably, and this is true of all projects that are directly adjacent to single family. When you have multifamily, any taller building that's close to single family, the issues surrounding that tend to dominate a lot of the discussion in Design Review Board and how to mitigate that properly in order to lessen the impact on the single family area. In this case, there's also the issue of Avalon and how it relates to the Avalon roadway which is actually very intensively used arterial that's on a slope and has a lot of heavy traffic on it.

PJE: And we've had some testimony about the zone edge here, the testimony's been that it's MRSF. Is that an edge that you have seen commonly in design review?

VO: No, it's unusual.

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PJE: And is that, in terms of impact, a good thing or a bad thing?

VO: It has some particular implications. One of them is that on the ground plane there has to be residential and not retail use.

PJE: But in terms of the level of impact, does the fact that it's an MRSF edge auger that more impact is created or less than, let's say and LRSF edge?

VO: It's higher density so it has more impact.

PJE: Did DPD give the Design Review Board any guidance for this project? I'm asking about what guidance DPD gave the Design Review Board for this project noting the importance of the abrupt zone edge next to existing low scale single family development?

VO: I was not in the meetings prior to this that occurred for the project, so I'm not privy to that discussion.

PJE: I'm asking about in the meeting you attended?

VO: In the meeting? Could you rephrase that question? I don't quite understand what the question is.

PJE: Sure. Did DPD — and that would have been, I guess Mr. Papers unless someone else was there — give any guidance about the importance of the MRSF zone edge in the meeting you attended?

VO: I wouldn't characterize anything in particular about the zoning itself but the density was something that was definitely — it appeared to me that the from the point of view of DPD that the allowable FAR was something that we should be able to figure out how to get all the maximum FAR on the site. That did seem to be an implied part of the project.

PJE: Do you recall any indication from DPD or the applicant at the meeting that you sat in the DRB for about this project that it was not compliant with the FAR limit?

VO: No, in fact during the DRB session a member of the public, or even maybe multiple members of the public, raised the issue that they thought that it was noncompliant, so it might have been me or one of the other Design Review Board members asked the planner and the architect whether it was compliant in terms of the FAR requirements and we were pointed to one of the introductory pages in the package which showed that it was several hundred feet less than the allowable FAR.

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PJE: And when you say the package you mean those color books that the

VO: Correct.

PJE: Okay. Well, and there's been a lot of testimony here you haven't been here for, but I'll characterize it this way. It's been acknowledged that actually what was in front of the DRB was not compliant. It was about 2400 square feet over the FAR limit. So, assuming that's the case, is that significant ?

VO: It's very significant, for two reasons. One, because just the 2400 square feet is several units of housing. So, it's not an insignificant number numerically. But also, in providing the incorrect information about the FAR, that's a point of departure for the Design Review Board to basically assess the project. So, basically the discussion that basically followed, and a lot of the determinations that we came up with really were with the assumption that the FAR numbers that were provided were correct.

PJE: And if the Board had known that the FAR numbers were not correct, could it have addressed any exceedance by means that would have addressed height, bulk and scale?

VO: It would have had a definite impact on how that would have done — how we would have proceeded because one of the instruments of Design Review Board is to carve portions of buildings that have the most serious impacts on adjacencies from the project and undoubtedly the project would have had that 2400 feet carved from it and the carving would have occurred in the areas where it impacts most which is along he area towards the residential area, along Avalon, and partially there's section of building that juts out into the residential area that's not part of the part that's on the street. It's an L shaped building, really.

DPD discounts the testimony of both Mr. Eanes and its own DRB member, Vlad Oustimovitch, and instead relies on the Applicant architect's (predictable) take. However, it is Mr. Blazej's testimony that should be discounted. First, he as a significant financial interest in the project because his fees have not been paid, he is in litigation with one of the developers, and the prospects for payment will no doubt be enhanced if the project is approved and becomes marketable. Even if this were not the

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case, and regardless of whether Mr. Blazej was motivated by his financial interest, his testimony in service of project approval was marked by repeated carelessness about truth and fiction. Mr. Blazej testified repeatedly in response to distinct questions from the Applicant's counsel, some of which were further clarified in response to objections and questions from Appellant's counsel, that he had been present for the DRB EDG meeting. Led by Applicant's counsel, Mr. Blazej recounted for the Examiner in more than one particular (and the record) what the DRB had said in the EDG meeting and what concerns he had heard expressed. However, Mr. Blazej later abruptly retracted his testimony (after it became apparent over a break in the hearing that his testimony would be discredited -- two NERD members and the West Seattle Blog author who had covered the EDG meeting happened to be in the hearing room to hear him testify). [10]

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[10] The following excerpts of Mr. Blazej's testimony, which he subsequently retracted as not truthful, illustrate his unreliability as a witness:

> RH: Thank you. So, at the conclusion of the Early Design Guidance meeting, did the Design Review Board provide some guidance to you folks that then Mr. Papers wrote up?
>
> RB: Yes, they did.
>
> PJE: Can I object to the form of the question? Because it seemed to morph a little bit. So I object and ask it be clarified. Is Mr. Hill asking what guidance the Board gave or what Mr. Papers wrote up?
>
> HE: Can you respond?
>
> RH: Yes, I could respond, or I'd just ask two questions.
>
> HE: All right.
>
> RH: Did the Design Review Board then give the architect guidance about what to do for the master use permit application?
>
> RB: Yes, they did.
>
> RH: Did Mr. Papers subsequently prepare a document setting forth his understanding of that guidance?
>
> RB: That is correct.
>
> RH: You were at the DRB meeting, right?
>
> RB: EDG.
>
> RH: EDG meeting. Was what Mr. Papers wrote up generally consistent with what the Board ...
>
> RB: In my recollection, yes.
>
> * * *
>
> RH: The fourth guideline down as B1 height bulk and scale compatibility. Do you see that?
>
> RB: Yes.

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RH: The first sentence reads at the early design guidance meeting the Board discussed this topic at length. Do you hear that? Do you see that?

RB: Yes.

RH: Based on your having been at the board would you agree with that sentence?

RB: Yes.

PJE: I'm sorry. Could I just ask what we're referring to — was it in

RH: It's on page 8, counsel, under EDG direction B1, first sentence.

PJE: That's what I — I've got the page. I just couldn't fine the sentence. Okay. Thank you. And the question was did he hear them do that?

RH: Unfortunately, there's not a court reporter to read back the question, but I believe the question was was that consistent with your experience at the meeting that the Board was discussing the topic at length?

PJE: Okay. Thank you. I'm sorry for the interruption.

RH: That's okay. And if I'm talking too fast, counsel, please feel free [unintelligible]

PJE: No no. I'm hearing too slow.

* * *

RH: Did the Board take an interest in the landscaping plan?

RB: Yes, they did.

RH: Do you know why they took an interest in the landscaping plan?

RB: I believe...

PJE: Objection. He can't speak for the Board.

RH: Well, I think he was at the Board meeting. He said they had an interest. I think he can state what they expressed in terms of their interest.

PJE: I don't have any problem with that question.

HE: Go ahead.

RB: What I believe at least one or two of the Board members are licensed landscape architects. So I think there was a level of professional interest, but from a Board point of view the interest was into the effectivity of those landscape plans on the alley to provide visual or further privacy buffer from the project to the single family.

RH: Thank you. At the conclusion of this first recommendation meeting, was the Board prepared to make a recommendation.

RB: No, they were not.

RH: Okay. Did they ask the architect to do some additional work?

RB: They asked us to do some additional work, yes.

* * *

RB: Because we designed two projects on the same street. We tried to make cohesive design statement.

PJE: So would it be fair to say that whoever picks up the baton on 3062 is going to be guided by that same principle of making a design statement compatible and following the lead of 3078?

RB: I cannot speculate who is going to pick up the design or the responsibility.

PJE: Well, is that the response that you would have?

RB: I probably would have, you know, at that time. Yes.

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V. DPD IMPROPERLY CONSTRAINED DESIGN REVIEW

DPD's suggestion – and by all accounts– direction in Design Review that the DRB could not require elimination of a story and that any West Seattle policies protective of the 32nd Avenue Single Family area did not bear because the 3078 Avalon Way project was only adjacent to but not within the single family zone was misguided. If ensuring compatibility on an abrupt zone edge is not part of the mandated approach, then the policies would have little meaning.

The fact that DPD adopted this approach for itself and in its instructions to the DRB is capsulized in Rachel Padgett's October 2, 2014 testimony, based on not only her recollection but her contemporaneous notes. The following testimony excerpt, uncontroverted by Respondents, is particularly compelling in confirming how neighborhood concerns about height bulk and scale were stymied by DPD's directions in the design review process:

> PJE: And so when did your conversation with Mr. Papers over the telephone take place?
>
> RP: It took place on August 27, 2012.
>
> PJE: And in that conversation did you and Mr. Papers address the question of removing floors to address the height of the project?
>
> RP: As I recall, and it was a long time ago, I did take notes during that meeting. We expressed our major concerns as the size of the building, the parking situation — at that time it was proposed zero — the access on the alley, the ingress and egress. So, yes.
>
> PJE: And what did Mr. Papers tell you? With regard in particular to the question of height, removing stories and height?
>
> RP: He told me that that would be challenging at this meeting because the developer basically had the zoning in their favor, so they could have the height that they wanted and that we should stick to things with respect to design only, more cosmetic

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things, and that that was really a non-starter for us.

PJE: Okay, and he told you that this was a non-starter and this was August 27th before the September 13 EDG meeting, is that correct?

RP: Yes, that's correct.

PJE: Do you recall responding – did Mr. Papers tell you that on more than one occasion? Or a similar point?

RP: Definitely. I recall at the beginning of the Design Review Boards or the EDG meetings, Mr. Papers laying out some kind of guidelines for the community members as to how we should conduct ourselves, how much time we had, and you know, the kind of things we could and couldn't — the kind of things that the Design Review Board had any kind of influence over. At that those times he made it clear that it was parking we couldn't impact, the use of the alley we couldn't impact, and the number of floors on the building we couldn't impact and that we should stick to, you know, the kind of materials that would be used and the lighting and the landscaping and you know, the location of the garbage.

PJE: Did Mr. Papers ever make any other comment concerning the validity of the concerns about the proposed 3078 project?

RP: I would say that one comment that sticks in my head that was really upsetting to me and a lot of other people in the neighborhood that he said that if this were a real city, we wouldn't even be having this process, and it really kind of invalidated everything that we were trying to do as a neighborhood.

PJE: You're saying that invalidated.

RP: Invalidated. Correct.

PJE: We've talked here about this to some extent that there's a West Seattle Junction plan provision that refers to the 32nd Avenue neighborhood as being a protected single family neighborhood. Did Mr. Papers ever comment on that plan provision?

RP: He told us that those were suggestions as to how designs should be, as how development should take place, that the Design Review Board was not the place for those to be addressed. I mean, ultimately that the height of the building was kind of a done deal. There was nothing we could do about it

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None of this is inconsistent with the Respondents' argument that HBS impacts were to some extent recognized. However, recognition and actual mitigation are two different concepts. The "mitigation" cited by Respondents addressed the trimmings, but largely left the turkey intact (except for a few feet eliminated by slightly reducing ceiling heights). The record suggest that this was a direct result of DPD's insistence that the project was entitled to its full measure of FAR and height.

VI. THE PROJECT'S SIGNIFICANT HBS IMPACTS HAVE NOT BEEN SUBSTANTIALLY MITIGATED

The Applicant claims that "before even reaching its first Design Review Recommendation meeting, Northlake had already been obliged to reduce the height of its proposal by one complete floor, in order "to help ensure appropriate height, bulk and scale transitions." Ex. 1, p. 2." This claim, a reference to the Council's amendment to the Code authorization for bonus height, is specious. For one thing, as Mr. Haury testified, the public notice to which the community responded never called out eight stories in the first place. Community members addressed the seven story project called out in the notice, were outraged when it was said to actually be eight (with the bonus) and relieved when the bonus Code was revised. However, the Applicant had in any event not followed through on the Code requirements for the bonus. [11]

The statements made by Respondents in claiming that the building height/number of

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[11] DPD Correction Notice Number 3 dated October 31, 2014 shows that, just two weeks before the Council's Code revision took effect, after repeated DPD requests, the applicant had still not provided the necessary information prerequisite to the height bonus.
http://web6.seattle.gov/dpd/edms/GetDocument.aspx?src=WorkingDocs&id=133497
The bonus height was likely classic "vaporware", proposed so that Applicant could point to nonuse of the bonus as "mitigation" – just as it is doing here. See http://en.wikipedia.org/wiki/Category:Vaporware

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stories is otherwise significantly reduced from the zoning maximums are also specious.[12] Building height from alley elevation ranges from 48 to 54 feet (the range is because alley slopes down to the north). However that is still just 4' 3" below the maximum 60-ft height from average grade allowed by Code (i.e., alley elevation is higher than "average grade"). Any attempt by applicant and DPD to characterize the building as up to 12-feet below the maximum allowable height because it is only 48 – 54-ft above alley grade, is disingenuous. A building that was 60-ft above alley grade here would violate the height standards.

Prior to the Final DRB Recommendation Meeting in January, the alley side of the building was still just 1' 1" below the 60-ft maximum height from average grade. They then reduced the floor-to-floor heights to reduce overall height by 3' 2". – for a total of 4' 3" height reduction.

Further, Respondents claim the building steps down at the northeast corner but in fact it does not. There is a balcony carved out of that corner (which is on the Avalon side, anyway), which is what they must be talking about. But a huge roof/overhang above the balcony continues the plane of the top of the building, over this corner resulting in no appreciable height reduction.

Finally, the suggestion by Respondents that a letter from the Mayor concerning a legislative Code amendment somehow pre-empted SEPA mitigation for the 3078 project has no basis in law or fact. Its assertion suggests the bankruptcy of the Respondents' position under SEPA.

The fundamental shortfall here is that in many respects this site is unique. The project

[12] See, e.g., Ex. 15, p. 33 (cited by DPD) (DR Color Book).

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will inevitably also set a precedent for development on adjacent lots on Avalon.[13] Despite these factors, recognition of the project's significant impacts and requests for mitigation were hamstrung by DPD's approach, imposed on the DRB.

VII: DESIGN REVIEW CODE NON-COMPLIANCE

DPD's argument for why the changes in the project design did not need to be sent back to the DRB depend on its assumption that the changes made were "corrections of very minor errors that do not cause a substantive change in the scope or design of the project." City Op. Br. at 4.

Architect and DRB member Vlad Oustimovich's October 2 testimony is authoritative on this question:

> JSK: All right. I think I heard you touch on this the other day, and maybe more than touch on it, but per this earlier testimony, did the Board have other priority concerns that could have been considered in light of the new requirement to reduce the project's FAR by almost 2500 square feet?

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[13] PJE: Did you design both of the projects 3062 and 3078 that you referred to when you started testifying?
RB: Yes.
PJE: And in fact you confused them when you first started testifying, didn't you?
RB: That is correct.
PJE: And how come?
RB: Because they were happening in quick succession and were designed as adjacent projects.
PJE: What do you mean designed as adjacent projects?
RB: Their sides are next to each other.
PJE: And were they designed – each project designed with the other in mind?
RB: Yes, there was a correlation. '
PJE: Okay. And in fact you also synchronized their design did you?
RB: Yes.
PJE: So there was some testimony earlier that the two projects had no relation to each other. Is that in your view accurate?
RB: They have relations from – I mean, they had relations from design response. They had at one point relation of David Ebenal being involved in both projects.

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RH: I'm going to object because this was in fact addressed earlier on and it's repetitive testimony.

JSK: Well, we'd like to be able to rebut what Mr. Blazej said this morning and I mean, what I heard him say was that it was really insignificant, this 2400, 2500 square feet. I liked to hear what Mr. Oustimovitch has to say about that.

HE: Overruled.

VO: It is – there are many parts of this project that were difficult to deal with from an urban design point of view. So, the project could have used some modifications in other areas. Again, DPD seemed to have a position that the maximum density had to be achieved in the building and that we had to figure out a way to achieve that. So, there were compromises made by the design review board that would not be in this plan if the FAR calculation that we were given was given to us correctly. The modifications would have occurred in the areas closer to the roofline, and again, we discussed this a little bit two days ago. I discussed that the kind of carving of buildings that goes back 100 years to kind of New York City when they started an idea of carving to create light and air and to minimize impacts to adjacencies is a standard way to mitigate the impact of height and density, bulk and scale in an urban environment.

JSK: Thank you, and I guess I would just finish up by asking in light of — how many years of experience did you say you had on the Southwest Design Review Board between actually serving and chairing and substituting?

VO: 15 years.

JSK: In light of your 15 years' experience with design review and the Southwest Design Review Board in particular, and the fact that you actually served on this Board for this project as a substitute, in your opinion would the Board want an opportunity to address this FAR – this 2500 square foot adjustment to the building's volume or FAR?

VO: I believe that the Design Review Board would feel that this a material issue that has urban design implications and would be clearly within the mandate of the Design Review Board and that the discretionary authority that DPD exercised would have been exceeding what would be expected with the design review situation. I can tell you that there have been buildings built in West Seattle that have gone through design review board and after going through DPD and being modified into master use permits, substantially deviated from the design review board recommendations and that is always a concern. Members of the public and design review board members have been very concerned about the issue of how

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recommendations get translated into the buildings that are actually approved by DPD later on.

JSK: It sounds like that might be a paramount issue with respect to those floor plans that still indicate floor to ceiling widows there that may not be consistent with other drawings in the set?

VO: That's correct.

Testimony by DPD itself demonstrated that the changes in this project did not go through the regular DPD "design review team" process to determine whether the changes warranted return to the DRB. The decision to deem the changes "minor" was made by DPD "management", Roberta Baker, in a stand-up meeting with Mr. Mills and with no plans present for review. Consultation with the "DPD design review team", described by Mr. Papers as DPD practice in these circumstances did not occur. Instead, he had a "hallway" conversation with Lisa Rutzick. DPD, an agency that frequently cites its standard "practices" as justification for its actions, did not follow its own practices here. As Mr. Eanes testified, it is typically DPD's practice to require even the most mundane of changes to return to the DRB. And, as Mr. Oustimovitch, a DRB member participant for this project pointed out, the changes were in fact consequential in the context of the Board's concerns and considerations when reviewing the project. Short-circuiting its own process and avoiding DRB review of the changes on a project known to be sensitive is just another in a series of approaches by the Department that undermine its credibility and call into question the deference that DPD demands.

DPD misunderstands NERD's argument concerning SMC 23.41.014.F.2 as contending "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,

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that is not the point. The point is that the expectation stated in the Design Review chapter of the Code is that a project will meet Code requirements (except for ones subject to departure) before design review is done. That did not occur here. Where it is discovered that a project design that is affirmatively Code noncompliant was the basis for the DRB's recommendation, then a return to the DRB is required regardless of DPD's characterization of the change as "major or minor".

Finally, it is telling that Mr. Papers, in his September 30 testimony acknowledged that the "record of public comments" the DRB is required to review at its meetings was not provided to Board members, that he could not recall seeing Board members at the meetings with that public record, and that he could not state that the record of public comments received (as opposed to time limited oral comments) was reviewed by any Board member. See Appendix C to this Reply (Papers 9/30/14 testimony excerpt). Nor could Mr. Papers explain why DPD distributed the Applicant's color books to each Board member in advance of each DRB meeting, but did not do the same with public comments despite the requirement in the Code that the Board review them at its meetings.

The DRB process has clearly left the rails in significant respects that cannot be overlooked and that place it outside of the prescribed authority granted by the Code. Further, the absence of a DRB record available for Examiner review violates SEPA and renders the entire process extra-legal.[14] See Ellensburg Cement Products, Inc. v. Kittitas County, 179 Wn.2d 737, (2014).

[14] Respectfully, "reports" prepared by DPD staff who plug into a template without review by DRB members before or after their issuance do not provide a record meeting SEPA administrative appellate review requirements

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CONCLUSION

The project as amended should be returned to the DRB for review. The Director's Decision should be reversed, vacated, and remanded with instructions that mitigation of parking and HBS impacts must be properly considered. Preparation of an EIS should be required.

DATED this 12th day of November, 2014.

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By _____
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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 12, 2014, I caused to be delivered, a true and correct copy of the foregoing document by legal messenger 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 12, 2014 at Seattle, Washington.

Fred Schmidt

EXCERPTS OF OCTOBER 1, 2014
HEARING EXAMINER HEARING

Speakers: Hearing Examiner Sue Tanner (HE)
Peter J. Eglick (PJE)
John Shaw (JS)
G. Richard Hill (RH)
William Mills (WM)

PJE: And have you calculated frequent transit service now for the bus stop cited in the decision that you and Mr. Papers worked on?

JS: Not for that bus stop, no.

PJE: Why not?

JS: Because I, actually, I went down to the lobby to look for a schedule for the route that Mr. Burkhalter had cited and there weren't any there. I would have done it if I'd had it.

PJE: Before you go on, let me ask you a question.

JS: Sure.

PJE: Are you saying that the schedule that's been made an exhibit in this hearing was not available to you?

JS: I'm just saying I looked in the lobby of this building and I didn't see on there. I could have found it elsewhere.

PJE: Are you saying the schedule that was made an exhibit in this hearing yesterday was not available to you?

JS: No.

PJE: Okay. So you could have calculated frequent transit service for the bus stop cited in the Director's Decision, and you could have used the schedule that was put in as an exhibit yesterday to do that, but you haven't, is that correct?

JS: I have not done that. That is correct.

PJE: Okay, but you're planning on testifying here at some point about frequent transit service for a stop not cited in the Director's Decision, is that correct?

JS: I don't know what questions I might get from other folks who will call me as a witness. That's possible.

PJE: Well you've talked with someone about testifying about frequent transit service at a stop not cited in the Director's Decision, haven't you?

JS: Yes.

PJE: Who have you talked with?

JS: Mr. Hill.

PJE: Okay, and when did you have that conversation?

JS: Yesterday afternoon.

PJE: Before the conversation yesterday afternoon had you made any calculations of frequent transit service for the stop not cited in the Director's Decision?

JS: No.

PJE: You were aware of that stop, is that correct?

JS: Yes.

PJE: But you had made no calculations concerning that stop, is that correct?

JS: That is correct.

PJE: That's because that wasn't part of what went into the Director's Decision, is that correct?

JS: Yes.

PJE: Ms. Tanner, I don't know. I have to think for a minute and talk to Ms. Kiker about where we're going to take this, but I guess my first reaction is that the Department or Mr. Hill should not be permitted at this point to present what will be completely new information, not in the discovery, not alluded yesterday – calculations for another stop – and I think most importantly, not the basis on its face or by everyone's testimony for the decision that we've appealed. If the Director wishes to withdraw her decision, and issue a new one, fair enough. But the Director's Decision on pages 17 and I think it's 18, actually, is explicit. It refers to one transit stop and one only, and we prepared our entire case and did all of our work to respond to that transit stop.

RH: Ms. Tanner, with all due respect to counsel, Mr. Burkhalter testified that he tested other transit stops as well including the C Line yesterday, so this isn't a surprise to NERD or Mr. Burkhalter. The issue, as NERD knows as well as we do, isn't with respect to a particular bus stop. It is with respect to the Code provision of 1,320 feet and headway, frequent transit headway issues. This is not an issue that is a surprise to anybody. It's an issue that's been raised by counsel for NERD. We're responding to that by identifying bus stops that comply with that requirement.

PJE: But let' be clear here. We're….

RH: Let me finish. I'm not done.

PJE: Oh, I'm sorry.

HE: Just a second.

RH: Excuse me, for raising my voice.

HE: It's only the second day.

[laughter]

RH: So, I think the point is that the issue in terms of the public policy we're talking about here is whether the site is within the urban village and whether [inaudible] frequent transit service and that's the issue which I think is before the Examiner, not whether one particular bus stop meets that criteria.

HE: Mr. Mills? Do you want to get into this?

WM: Well, my only comment would be that I think that the location of bus stops or transit stops – something identified on the map – and I apologize, I did have a brief discussion with Mr. Shaw about the transit stops but that sort of went out of my head. So, I don't, as far as I know we don't have an exhibit planned or anything like that to submit on this issue.

HE: Okay. Mr. Shaw, I want to be clear. At the time, or, in advance of the Director's Decision did somebody — do you know whether you or Mr. Mills calculated frequent transit service with respect to the stop that cited in the decision?

JS: I don't know if anyone did. If any DPD employee did, it most likely would have been the zoning reviewer as this is a standard within the Land Use Code that the zoning reviewers apply.

HE: Okay.

JS: So that calculation might have been done. If so, I am not aware of it.

HE: It wasn't done with respect to the review that you did concerning transportation?

JS: That's correct.

HE: And the same goes for other stops that are not mentioned in the Director's Decision?

JS: Yeah, I – if those calculations were done, I'm not aware of it. I wasn't asked about them and didn't have any input into them.

HE: Okay, and so the first time you got into the calculation of frequent transit service was yesterday afternoon?

JS: Yes.

HE: Okay. Thank you.

PJE: Can I respond to Mr. Hill?

HE: Yes, I just wanted to get clear on what was and wasn't done. Okay, go ahead.

PJE: First of all, Mr. Burkhalter's direct testimony was not about other stops. I believe, and I know Mr. Hill fell into this trap yesterday, but I really am pretty much 100% sure that we — I and Mr. Burkhalter — did not get into on direct examination other stops. I think that was a question from Mr. Hill and so….

RH: It was. It was.

PJE: Thank you, Rich. So it's a bit irksome to then have it said that we've opened the door to this because Mr. Burkhalter answered a stray question on cross. I could just as well have objected and said well that's not part of direct, why are you asking about it? And it's a bit of a surprise to me that Mr. Burkhalter is now being asked about something he just did on the side. The second thing I want to emphasize is whether DPD did the calculations or not, and I think it should have, it clearly called out in its Decision on page 18, the SEPA Code provision 25.05.675M.2.B.2 and the criteria that supported its decision that the project was exempt from SEPA mitigation for parking. I mean, it quotes it and you can read the criteria there. It's in an urban village, within 1,320 feet of a street with frequent transit service, and what we did was we sat down and said okay, they've called out this stop and here's the criteria, there's the Code definition of frequent transit service to we will test that just as we assume DPD did. The problem is we took depositions of Mr. Papers and Mr. Mills. We got paper discovery. We were diligent in every way conceivable. And for us to now, to have to defend some stray claim that's not in the written decision, is I think inappropriate. If the Director wants to revise her decision and say well it's not that stop, which it calls out, within 360 feet... Mr. Burkhalter testified he knew just which one that was because he takes it. It's the Genesee stop. If the Director wants to change her decision, she would withdraw it and then change it and say well we didn't mean that one, we meant another one. It's really a matter of - it's a matter of equity among other things.

* * *

PJE: Well, just to clarify we're not asking for a remand as our primary request. The primary request is this testimony is out of order or ultra — whatever the correct word is — we're asking you to limit the testimony because we have the decision, we did discovery both of the Applicant and of DPD and the record is clear. This is something that is not in the decision, was not contemplated in the decision, it has been cobbled together and there's been no notice. We've had this appeal pending for months. If there was some issue here, and parking was raised in our appeal, this could have been raised a long time ago and disclosed, and it's just too late and frankly, there's a little bit of gamesmanship here because I didn't understand yesterday why Mr. Hill asked the question he did. But apparently it was to open this door.

HE: Well I think it was going to come in at another time in any event. I'm not going to limit the testimony. I'm going to allow it. Tell me how you want to deal with responding to it. Or do you want to take a break and tell me after the break?

PJE: I guess I'd like to hear the testimony first. I have no idea what the testimony is going to be.

HE: All right.

PJE: At this point, I might as well hear what Mr. Shaw has to say.

HE: All right.

PJE: And then if we could be allowed some — and more than five minutes to decide what we want to do about it, fine. But I'd like the Examiner to at least keep open the possibility – I'm asking for this – that when the ultimate decision comes out that the Examiner may say, well I heard this, I allowed it so we wouldn't lose time in case I decided it was relevant, but I hope the Examiner isn't ruling that the basis for the Director's Decision can change at this late date as a final ruling.

HE: I have that in the back of my mind as to how to deal with it, but I am assuming that given the fact that in all likelihood it will come in on Mr. Hill's direct examination or Mr. Mills' direct examination of Mr. Shaw, I think you should have the opportunity to respond to it and so that's why I'm asking you how you want to deal with that. So…

PJE: I'll ask him about it right now.

HE: Well, I know, but, do you want to go ahead with that and then rely on just what you get today? I mean, what you get right now?

PJE: Well, assuming that we are not kind of holding back — and I did have the feeling that I wasn't getting the full story which is why I asked to call Mr. Shaw — once we hear what Mr. Shaw has to say we can decide what to do.

HE: Okay. Mr. Hill, at what point in your case did you plan to call Mr. Shaw?

RH: I plan to call Mr. Shaw as my first witness.

HE: Okay, so why don't we wait until after that.

PJE: So you don't want me to….

HE: You can go ahead.

PJE: Okay.

HE: I'm just saying we're not going to make a final decision until after that.

PJE: Okay. So let me just get the baseline set here Mr. Shaw. You have, even as of now, you have not calculated whether the transit stop actually cited in the DPD decision meets the FTS definition and therefore triggers the SEPA exemption. Is that correct?

JS: That is correct.

PJE: Okay. But apparently you have made a calculation for a different transit stop?

JS: Yes.

PJE: Okay, and which transit stop have you made that calculation for?

JS: It's the transit stop at Avalon Way and Yancy Street.

PJE: How did you pick that transit stop?

JS: That was identified through material sent to me by Mr. Hill.

PJE: And when did Mr. Hill send you those materials?

JS: This morning.

PJE: And how did he send you those materials?

JS: By email.

* * *

1:08:42 p.m.

RH: Good Afternoon, Mr. Shaw.

JS: Hello.

RH: I have a few questions about frequent transit service. There was some testimony this morning about the topic of frequent transit service, if you recall that.

JS: Yes.

RH: And with respect to frequent transit service, have you received information that's pertinent to whether or not the project site complies with the frequent transit service requirement?

JS: Yes, I have.

RH: And was that the report from Brian Epley that you mentioned this morning?

JS: Yes.

RH: Earlier, have you ever received any other report pertinent to this issue?

JS: Yes, I did.

RH: And what was that?

JS: There was some information sent from your office on I believe it was Sunday that had an analysis, I believe it was by Scott Jeffries, that spoke to the question of whether or not the frequent transit service requirement was met by another bus stop near the project site.

RH: And are you relying on that report for that testimony about frequent transit service this afternoon?

JS: No, I'm not.

RH: And what's the reason for that?

JS: Excuse me. That analysis didn't utilize the averaging method that is described in the DPD Director's Rule 11-12 that I believe I mentioned this morning where the average headways over the necessary period of time are considered rather than whether each and every headway is 15 minutes or less, or 30 or less, it showed that the bulk of headways were 15 minutes or less, identified a few outliers, but didn't provide the information necessary really to determine whether or not frequent transit service was met.

RH: Now with respect to the Brian Epley report, did that appear to follow the requirements of the Director's Rule?

JS: Yes.

RH: And is that the type of report and information that you review for determining frequent transit service compliance?

JS: That's the type of information that the Director's Rule calls for and seems consistent with the Director's Rule. I don't personally frequently review these. I've seen a couple of them over the years. Often I think that review is done by the zoning staff, but it appears to me to be consistent.

RH: Based on the review that you have made, have you reached a conclusion about the projects site's compliance with the frequent transit service requirement?

JS: Yes, based on Mr. Epley's analysis and my checking of that analysis I would say that it does comply.

* * *

HE: The difficulty of — normally I could have you respond to something in writing afterward and that would be that. In this case, though, you don't have the opportunity to cross examine Mr. Shaw about it. So, Mr. Hill and Mr. Mills, suggestions?

RH: Ms. Tanner, I certainly think Mr. Eglick should have an opportunity to cross-examine the witness after he's had a full opportunity to review the information. So, I would say that the options are – I know that we have tomorrow reserved for the hearing and I'm hopeful we'll finish today. I don't know if that's enough time for Mr. Eglick, but that would be one option. The other option would be just simply to find a time on the Examiner's schedule when she's available to have that cross examination occur.

HE: That's what I was thinking of doing, but if we finish early that would be a possibility too. What…

PJE: I want to add one other thing to this. I don't know who Mr. Epley is. It's called the Epley report. I don't know who Mr. Epley is. I've never met him, have I?

RH: Not to my knowledge.

PJE: And, tell me if I'm out of line, I'm just kind of wondering who is Mr. Epley?

HE: Right. You have no opportunity to deal with that either. Mr. Shaw, can you tell us a little about this report?

JS: Yes. It just notes the distance from the subject site to the bus stop at Avalon and Yancy Street and identifies the time blocks within the schedule for the Rapid Ride C Line and the frequency of service by hour, so that provided – it provided me enough information to see that the frequent transit service was met, but I corroborated against the times in the C Line itself. So, I believe that based on the schedule of the C Line Rapid Ride Line frequent transit service is met on this project.

EXCERPTS OF OCTOBER 17, 2014
HEARING EXAMINER HEARING

9:04 a.m.

PJE: In a quick couple of questions with Mr. Hill, I think last time you were here, you stated that you thought the impact on the neighborhood would be no more than moderate. Do you recall that?

JS: I do.

PJE: Had you to talked to Mr. Hill about that before he asked you that question?

JS: I don't specifically recall doing so. I might have.

PJE: You what?

JS: I might have. I don't specifically recall doing so.

PJE: Well, had you done any comparative research on the nature of the impact in the neighborhood in question here versus other neighborhoods before you answered that question?

JS: I'm familiar with parking utilization rates in various neighborhoods of Seattle so in answering the question I took those into consideration.

PJE: Okay. Which ones did you take into consideration? Which specific neighborhoods?

JS: I have recently seen parking utilization studies in areas of Capitol Hill. I have also seen . .

PJE: Well, stop. Let's take them one at a time. Okay. So you're saying that one of your comparisons then was a neighborhood in Capitol Hill?

JS: Streets in Capitol Hill.

PJE: Okay. Which street in Capitol Hill?

JS: I don't specifically recall.

PJE: And when did you look at this street in Capital Hill for parking utilization?

JS: I think I saw a parking utilization study for areas of Capitol Hill maybe in the last years or two.

PJE: You think you saw a parking utilization study for an area of Capital Hill maybe in the last year or two.

JS: Mmhmm.

PJE: And was that in connection with a particular project?

JS: It would have been but I don't know which project.

PJE: And who had prepared the parking utilization study?

JS: It would have been a traffic consultant but I don't know which one.

PJE: And can you tell us the number of parking spaces and the number of available spaces — number of parked spaces and the number of available spaces that the study showed?

JS: I don't recall actual numbers of spaces. I recall that the study did show a utilization on several blocks at or exceeding 100%.

PJE: And what was the zoning on those blocks?

JS: Offhand I don't know.

PJE: And what was the proposed project?

JS: Again, I don't recall the specific project.

PJE: Do you recall anything about the Director's Decision on that project?

JS: Since I don't recall the particular project, not specifically no.

PJE: Okay. So we had a one on Capitol Hill, then anything else?

JS: That was the primary one. Just it was a recollection on my part that there had been parking studies in neighborhoods in Seattle showing high levels of utilization.

PJE: Okay. So I don't want to diminish your testimony. So if there's something else that you're relying on that you can cite to, now is the time. Is there anything else?

JS: No. Not specifically.

PJE: Okay. When you told Mr. Hill that the impact was no more than moderate, was that based on your site visit?

JS: No.

PJE: Was it based on anything else than your recollection of some Capitol Hill utilization?

JS: It was based on the results of the parking analysis provided for this project and the analysis provided in the Director's Decision.

PJE: When you say parking analysis provided for this project what are you referring to?

JS: The material provided by TraffEx.

PJE: Was the statement you made to Mr. Hill based on anything else?

JS: A consideration as well of the potential spill over from what we've been calling the micro-housing projects. 3068 Avalon and I think 3066.

PJE: And what do you see the percent utilization as becoming after those projects are taken into account?

JS: Roughly at 100%, possibly slightly more.

PJE: And when you say possibly slightly more, how much more?

JS: I don't have the exact numbers but I'm thinking maybe 104%, in that range. Slightly more than 100%.

PJE: And when you then testified that that represents an impact that's no more than moderate, what factors did you take into account that you haven't already described to us here?

JS: I'm not sure what factors I have described. What I took into consideration was that in areas with heavy parking utilization, people seeking to park on the street may simply go a block or two further to look for parking to look for parking spaces. It would broaden the area in which the parking is occurring. It is also possible that there may be a choice over time that people living in that neighborhood decide not to have a car and not to have a second car so as not to need to park a car on the street effectively reducing the utilization.

PJE: Now, are any of those factors ones that you consider — I think the answer's going to be yes — but these are factors that you specifically believe apply in this instance? Is that correct?

JS: Yes.

PJE: So, for example, you believe that in this instance there is an opportunity for people looking for parking to, as you put it, "go a block or two further." Is that correct?

JS: Yes.

PJE: Okay. And are there any other factors? You just cited two. One was people will go a block or two further. The other people will just give up their cars and that that tells you it's not a significant impact because they'll give up their cars when they see the impact? What else? What other factor went into your statement to Mr. Hill?

JS: Those were the basic factors.

PJE: Well, I want to make sure. You said basic, so I'm going to try to pin you down here. Is there a non-basic factor that went into what you said to Mr. Hill? I want to make sure we have it all.

JS: I'm not recalling anything else, no.

PJE: Okay. So, isn't it true that DPD has as a matter of practice said that 85% utilization is the point beyond which mitigation is normally required?

JS: There have been projects that have used that as a threshold.

PJE: Isn't it more than that? Hasn't DPD said in published decisions that 85% is the utilization beyond which mitigation is normally required?

JS: If you're reading from a published decision, then yes, we have said that. I don't know that for a fact.

PJE: You have no knowledge of that.

JS: I would not be surprised if decisions had said that. I don't have a specific decision in mind that I can quote from.

PJE: Well you haven't on other things either. I'm just asking if that's something you know, that typically DPD requires mitigation when utilization exceeds 85%.

JS: Sometimes mitigation has been required. Not in every case.

PJE: And isn't that the normal policy for DPD?

RH: Asked and answered.

HE: Overruled. Go ahead.

JS: 85% is a threshold DPD uses to determine whether or not parking may be at a point where mitigation should be considered.

2013 Reporting Year

NTD

National Transit Database

Glossary

Office of Budget and Policy

September 2013

Federal Transit Administration
U.S. Department of Transportation

Head-on

A collision type where two vehicles coming from opposite directions impact each other straight on in the front; or in a T-bone or broadside collision, where the front of a vehicle (head-on) impacts the side (angle) of another vehicle. Can be found in: S&S-40

Headway

The time interval between vehicles moving in the same direction on a particular route. Can be found in: S-10

Heavy Maintenance Facilities

Facilities used for performing heavy maintenance work on revenue vehicles. Heavy maintenance includes the following:

- Unit rebuild
- Engine overhaul
- Significant body repairs
- Other major repairs.

Can be found in: A-10

Heavy Rail (HR)

A transit mode that is an electric railway with the capacity for a heavy volume of traffic. It is characterized by:

- High speed and rapid acceleration passenger rail cars operating singly or in multi-car trains on fixed rails
- Separate rights-of-way (ROW) from which all other vehicular and foot traffic are excluded
- Sophisticated signaling, and
- Raised platform loading.

Can be found in: B-10, MR-10, S&S Introduction, S&S-10, RU-10

Heavy Rail Passenger Cars (HR) (Vehicle Type)

Rail cars with:

- Motive capability
- Driven by electric power taken from overhead lines or electrified third rails
- Configured for passenger traffic
- Operated on exclusive right-of-way (ROW).

Can be found in: S&S-40

High Intensity Motorbus

A new category of guideway distinct from fixed guideway, defined by MAP-21. High Intensity Motorbus (or Bus; HIB) comprises lanes that are exclusive to transit vehicles at some, but not all, times, and lanes that are restricted to transit vehicles, HOV, and HO/T. HIB lanes do not have their own funding tier under UAFP, but do receive State of Good Repair funding once they reach seven years of age. Can be found in: Introduction, B-10, F-10, A-20, S-10, S-20, FFA-10, Declarations

EXCERPTS OF SEPTEMBER 30, 2014
HEARING EXAMINER PROCEEDINGS

Speakers: Hearing Examiner Sue Tanner (HE)
Peter J. Eglick (PJE)
Jane S. Kiker (JSK)
G. Richard Hill (RH)
William Mills (WM)

10:52 a.m.

PJE: What materials did you provide to each Design Review Board member in advance of a Design Review Board meeting, directly provide to them?

GP: In advance of the EDG meeting, they received the EDG booklet, which I don't think has been submitted as an exhibit yet.

PJE: It looks like you've got a set there, Bill had offered before. We could, if those are complete, we could put that in of you want.

GP: Yep. The EDG booklet, we call it, is also the same one that posted online for the public.

PJE: Let me just ask you to strictly confine your response to my question, was what did you directly provide to Design Review Board — each to Design Review members?

GP: Okay. Well, the EDG booklet. It's dated September 13, 2012.

PJE: Okay, and that's the color book prepared by the applicant architect, is that correct?

GP: Correct, with staff edits.

PJE: Okay. Is that the whole thing Bill? It looks skinny.

GP: The EDG is two sided. It is thinner.

PJE: Oh, okay.

WM: [unintelligible]

PJE: Well if you tell me it's complete, I'm not going to argue with you. I just, maybe I didn't realize it was double-sided I think is what it is.

HE: Do you want to have that marked?

PJE: Please.

HE: That's exhibit 13.

. . .

PJE: Okay and then maybe we should put each of the other ones in now because I assume, and Mr. Papers tell me if I'm wrong, that what you provided directly to DRB members, Design Review Board members, each, for each meeting, was the applicant architect's book, with the color photos and designs and all that. Is that right?

GP: That's correct. They get an 11 X 17 color booklet in advance of the meetings.

PJE: So Bill maybe we can just go ahead and…

. . . [Exhibit 14 marked and admitted]

GP: And if I may I should add that along with the recommendation booklet, the Board gets a copy of the EDG Report from the previous meeting which has already been submitted as exhibit 4.

PJE: And then, are you doing the third one too, Bill? Or… yeah, we might as well just do it.

. . . . [Exhibit 15 marked and admitted]

PJE: I want you to take a look for a minute at the last design review book, the one that's been marked as exhibit 15 from January 16, 2014, you got that one?

GP: I do.

PJE: Okay. So, and I forget, I think you said that at that meeting there were two board members who had not been at the previous one, is that right?

GP: Excuse me, there's a lot of names listed on this cover page. Yes, there were three at the second and final recommendation that had attended the previous one.

PJE: And two that hadn't, is that correct?

GP: Yes.

PJE: Okay, so, at the start of the meeting or any time during the meeting did anyone point out any inaccuracies in the 50 page color book that the applicant had produced and that had been provided directly to the board members?

GP: From board members?

PJE: Anyone, point out an inaccuracy in the book, exhibit 15?

GP: I believe one or two public comments asserted that the height dimensions may have been misleading or some other word that they chose.

PJE: Okay. Anything else?

GP: Not that I recall.

PJE: Okay. Can you take a look at page 5 of exhibit 15?

GP: I see it.

PJE: And look at — there's two strip pictures here, I don't know what you call them, panoramas maybe or something. Do you see what I mean?

GP: Yeah.

PJE: And then you look at the second one labeled number two SW Avalon Way looking West and is there anything wrong with this picture?

GP: Yes, the small bar that labels the site has shifted from where it should be.

PJE: It's actually on a completely different site next door isn't it?

GP: Yes, I believe the boundary shown does not overlap the true boundary of the project site.

PJE: Okay. And that wasn't noted at the meeting by anyone, is that correct, on the board?

GP: I don't recall anyone mentioning this exhibit, or this page.

PJE: Now, did you distribute, and I know, you know, that you could online and look for links and try to find them, but did you distribute to the Board members at any of the DRB meetings, directly distribute to the Board members, the public comments, any public comments, that had been submitted on the project?

GP: No, we do not send individual public comments. We instruct the Board to consult the website and to read the report which contains a summary of previous comments.

PJE: And, just kind of to characterize or identify the report that contains the public comments. For example, could you look on page 5 of exhibit 1. And you see where it says public comment summary?

GP: I do.

PJE: So, is this one two three four fix six seven eight nine ten eleven twelve thirteen fourteen or fifteen line summary what you're referring to?

GP: For that particular meeting, yes.

PJE: Well, was this summary, the public comment summary, longer or different for any of the other meetings?

GP: Well, as I mentioned there were three meetings that were rolled in. So if you look on page 3, there are about twelve bullets, fourteen bullets, because the comments at that meeting were more lengthy, and at the first recommendation meeting on page 4, there are approximately twelve bullets.

PJE: Okay, and why is it, if you can explain, that the applicant's 50 page color book is distributed directly to board members, but the public's written comments are not?

GP: I can't answer why the Department procedure is what it is.

PJE: So if you could look at exhibit 2, which we've premarked, would you agree and take a minute if you haven't already, would you agree that these comments are representative of the public comments that were submitted on the project?

GP: Sorry, which is exhibit 2?

PJE: It's the packet of public comments. Maybe Bill has it there.

GP: Oh, I have it now. Yeah. Your question again?

PJE: Can you explain — that was my last question actually, strike that. Would you agree, and if you haven't looked at them already, please do so, that the packet of public comments reflected in exhibit 2 is representative of the public comments submitted on the project? Take a minute, take two, whatever you need.

GP: Yes, these are comments that I reviewed at various stages in the process.

PJE: And are they representative of the public comments submitted to DPD on the project? These are outliers is what I'm asking.

GP: It's hard to characterize so may pages with so many different topics, but yes they have many of the same themes that were brought up in person at the meetings and just would note that they reflect the entire process starting with EDG back in September 2012.

PJE: Okay, now did you — can you identify for us any board member who at any meeting had in front of him or her a copy of any of these public comments?

RH: I'm going again to object. I don't know that there's any requirement that board members have copies of comments in front of them at meetings.

PJE: Well, I think it goes to whether the board members considered public comments.

RH: I don't think it does.

HE: Overruled.

GP: At the meetings I recall some of the Board had certainly their notes on the booklets and maybe they had in their notes made additional comments based on when the public speaks at the beginning of the meeting, I noticed them writing down things, but…

PJE: Right. But I'm asking you whether you saw that they had in from of them. We already know DPD didn't give it to them when it gave them the books, but…

GP: I sit at the end of the table. I can't see everybody's exact – what working documents are in front of them. Unlike a schoolteacher, I don't go down and check.