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November 13, 2014

Via Email (Hearing.Examiner@seattle.gov)

Sue Tanner
Hearing Examiner
City of Seattle
700 Fifth Avenue, Suite 4000
Seattle, WA 98104

RE: Corrections to Appellant Neighbors Encouraging Reasonable Development's Post-Hearing Reply Brief
Hearing Examiner File No. MUP 14-006

Dear Hearing Examiner Tanner:

This letter is to serve as an errata to Appellant's Post-Hearing Reply Brief submitted yesterday, November 12, 2014, in this matter. Corrections to the brief are shown as tracked changes in the attached pages, and listed below:

Page	Line	Change
9	9	Change "DPD" to "DPD's"
17	12	Change "3978" to "3078"
24	22	Change "as" to "has"
25	7	Delete "(and the record)"
25	12	Insert "Examiner" between "the" and "hearing"
30	2	Insert "the" between "because" and "alley"

Thank you for your attention to this matter.

Respectfully,

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cc: G. Richard Hill
William D. Mills
Garry Papers
Client

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's 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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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 3~~9~~078 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: 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 has 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 Examiner 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.
>
> * * *

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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 the 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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