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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

10 In the Matter of the Appeal of
11
12 **AQUARIAN FOUNDATION, INC.**
13 from the September 18, 2023 Analysis and
14 Decision of the Director of the Seattle
15 Department of Construction and Inspections

Hearing Examiner File:
MUP-23-001

Department Reference: 3038146-LU

APPLICANT’S POST-HEARING BRIEF

16
17 **I. INTRODUCTION**

18 Aquarian Foundation, Inc. (“Appellant”) appealed the Analysis and Decision of
19 the Director of the Seattle Department of Construction and Inspections (“Decision”),
20 issued September 18, 2023, providing design review approval under the Seattle
21 Municipal Code (“SMC” or “Code”) Chapter 23.41, for the application of Respondent
22 Jodi Patterson-O’Hare, acting as agent for Greystar Real Estate Partners (“Greystar”)
23 (collectively, “Applicant”), to construct a mixed-use residential and retail project
24 (“Project”) in the Capitol Hill neighborhood of the City of Seattle (“City”).
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1 As the Hearing Examiner previously confirmed when ruling on the Applicant's
2 Motion for Partial Dismissal, the only issue raised by the appeal that is properly before
3 the Examiner is the Project's consistency with the City's Citywide Design Guidelines
4 ("Citywide Guidelines") and the neighborhood-specific Capitol Hill Design Guidelines
5 ("Capitol Hill Guidelines"). Appellant fails to meet its burden to overcome the
6 substantial weight afforded the City's determination that the Project is consistent.
7 Appellant provided no affirmative testimony or other evidence to support its claim of
8 inconsistency, and its Closing Argument ("Appellant Brief" or "Brief") treats the issue as
9 a mere afterthought, failing to cite (let alone substantively discuss) any guideline by
10 name. Although Appellant's failure to provide evidence supporting its claims is a
11 sufficient reason to deny its appeal, the testimony of the Applicant and City witnesses
12 would in any case provide an ample basis for affirmance. There was no error, let alone
13 clear error, in the City's determination that the Project's design, including associated tree
14 removal, is consistent with all applicable guidelines.
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16 Instead of discussing the guidelines, Appellant has devoted the majority of its
17 hearing presentation and the entire body of its Brief to superfluous arguments that are
18 wrong on their merits, fall outside Examiner jurisdiction, have previously been decided,
19 and/or otherwise fail to provide a basis for relief. These include:
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- 21 • Appellant's invocation of City Ordinance 120754, a street vacation
22 ordinance that included conditions related to landscaped screening of
23 surface parking areas. Ordinance 120754 was not raised in the appeal or
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discussed at hearing, and even if it had been, it would not apply to the Project, which will not include surface parking;

- Appellant’s conflation of street trees in the City right of way with trees on the Applicant’s property;
- Appellant’s assertion that it does not know who the Applicant is, an assertion that is contradicted by the evidence and irrelevant to the merits of the appeal;
- Appellant’s objection to the Examiner’s denial of a subpoena for East Design Review Board (“Board”) member Joe Reilly, a decision that was entirely proper because the Board’s decision speaks for itself.
- Appellant’s continued assertion that future grading or other elements of the Project will violate its property rights, when the Examiner has already ruled those issues beyond the scope of this hearing.

For these reasons and those stated below, the Examiner should deny the appeal in its entirety.

II. FACTS

The facts in this matter were established at hearing. The background facts are provided in this section and the relevant facts are discussed below in relation to each claim.

A. The Project and Project Site

The Project proposes two 5-story apartment buildings with a combined 336 residential units, retail and parking for 373 vehicles. Dept. Ex. 1 at 1. The Project’s lead

1 designer is Austin Besse, a Senior Associate with Weber Thompson who has years of
2 experience designing multifamily projects in Capitol Hill and surrounding
3 neighborhoods. Applicant Ex. 1 at 1. A graphic rendering of the proposed Project
4 viewed from the southwest, from Applicant Ex. 24 at 10, appears below:
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16 The Project is proposed for a site (“Site” or “Project Site”) that is located at 1410
17 East John Street in the Neighborhood Commercial 2--55 (M) (“NC2-55”) and
18 Neighborhood Commercial 2 Pedestrian -55 (“NC2P-55”) zones (collectively “NC2-55
19 Zones”) in the City’s Capitol Hill neighborhood. Dept. Ex. 1 at 1. The Project Site
20 consists of a single tax parcel identified by King County Parcel Number 6003501820.
21
22 Dept. Ex. 34 at 3.

23 The Project Site is currently developed with a Safeway grocery store and a
24 surface parking lot. Primary vehicle access to the parking lot is from 14th Avenue East or
25 East John Street with secondary vehicle access and primary service access from East
26 Thomas Street to the North. Besse, Part 3 at 59:40; Applicant Ex. 24 at 1. Neighborhood
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1 stakeholders appreciate the presence of a neighborhood grocery store particularly given
2 its prominent site in the community. *Besse*, Part 4, 11:05; Applicant Ex. 5 at 17.
3 However, the current store building has numerous design failings. The current store's
4 orientation "turns its back on the neighborhood" by having its only functioning entrance
5 face west into a large surface parking lot. *Besse*, Part 3 at 64:07. Truck deliveries,
6 garbage pickups and outdoor storage all occur almost directly abutting neighboring
7 property lines. *Besse*, Part 3 at 65:00. Perhaps worst of all, the "back" of the current
8 building along 15th Ave is simply "a large wall with no active uses, no transparent glass,
9 narrow sidewalks, and a really unfriendly façade," creating an unpleasant pedestrian
10 experience as shown in the image below. *Besse*, Part 4 at 3:01; Applicant Ex. 24 at 8.
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23 The Project will include design elements that remedy these current failings, as
24 discussed below. Overall, the Project will emphasize the pedestrian and small-scale retail
25 character of the neighborhood by placing retail entrances along 15th Ave East and East
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John Street, placing parking underground, and limiting vehicle access points to two underground parking entrances on 14th Ave East and a loading entrance on East Thomas Street. The following image illustrates the proposed vehicle and service access points. Applicant Ex. 5 at 101.



Appellant owns the property in the northeast corner of the Project Site's block ("Aquarian Property"). The Aquarian Property, like the Project Site, is zoned NC2-55. Applicant Ex. 5 at 25. The Aquarian Property contains a single-family residential scale building that is used for religious functions. Appellant Ex. 5 at A14. The building is not used for residential purposes. In addition to the main building, the Aquarian Property has a garage and driveway directly adjacent to the property line shared with the Project Site. Appellant Ex. 5 at A17. The Project Site's current configuration places the grocery store's deliveries, waste services and outdoor storage directly adjacent to the property line shared with the Aquarian Property. Besse, Part 3 at 65:00; Applicant Ex. 24 at 9.

1 After the Project is constructed, the Aquarian Property will be separated and shielded
2 from these services by the northern wing of the Project, as shown in the graphic above.

3 Also on the same block as the Project Site, in the northwest corner, are two
4 residential lots developed with multifamily buildings. Dept. Ex. 1 at 1. These lots are
5 zoned LR3 (M). Properties north and south of the Site are zoned NC2P-55(M) along 15th
6 Avenue East while properties northwest and southwest of the property are primarily
7 zoned LR3(M). Dept. Ex. 1 at 1. Directly to the east of the Project Site, the 15th Avenue
8 retail corridor runs north-south. This retail corridor is characterized by a wide range of
9 building sizes and uses with an emphasis on small-scale businesses and pedestrian-
10 friendly infrastructure. Appl. Ex. 5 at 18.

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13 **B. Trees and landscaping**

14 Trees on the Project Site were inventoried in an arborist report and described in
15 testimony by Douglas Smith, founder of Seattle Tree Consulting and an ISA Certified
16 Arborist with over twenty years of experience. Appellant Ex. 3 at 1; *Smith*, Part 3 at
17 01:22.

18
19 Two groups of Leland cypress trees are currently located on the Project Site. The
20 first group, consisting of six trees and running in a row north-south, is located in the
21 northeast of the Project Site, to the west of the Aquarian Property's western boundary.
22 *Smith*, Part 3 at 6:30; Applicant Ex. 15 at 4. These trees are numbered 233 through 238
23 in the tree map prepared by Mr. Smith. *Id.* The second group, consisting of
24 approximately 30 trees forming an "L" shape with east-west and north-south legs, runs
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1 along the Project Site's boundaries with the residential properties to the northwest. *Id.*

2 These trees are numbered 201 through 231. *Id.*

3 Mr. Smith testified that Leland cypress is a hybrid species commonly used to
4 create hedges, requiring regular maintenance to ensure that they do not grow out of
5 control. *Smith*, Part 3 at 8:08; Appl. Ex. 15 at 4-6. Leland cypress is a particularly fast-
6 growing species that can quickly exceed desirable heights, creating safety hazards and
7 maintenance difficulties. *Smith*, Part 3 at 12:13. Mr. Smith testified that the rows of
8 Leland cypress along the Project Site's northern lot lines were presumably planted as
9 hedges/barriers but that necessary maintenance had not occurred for many years. *Smith*,
10 Part 3 at 12:19. After Mr. Smith's initial visit in 2021, the Applicant arranged for the
11 trees to be trimmed, which Mr. Smith testified was consistent with that needed to restore
12 the trees' hedge functionality given the many years of deferred maintenance. *Smith*, Part
13 3 at 16:48; 37:53. City regulations do not require a permit to prune trees on private
14 property. *Smith*, Part 3 at 24:50.

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17 The Project's construction will require the removal both groups of Leland cypress
18 trees. The trees closest to the Aquarian Property boundary will be replaced by a portion
19 of the Project, with a landscaped buffer area in between the building and the Aquarian
20 property line. Trees along the northwest property line will be replaced with a columnar
21 tree species that will grow to provide shielding for the adjacent residential, LR-zoned
22 properties. *Besse*, Part 5 at 23:39 and 26:19.

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25 In addition to the trees located on the Applicant's property, the Project Site is also
26 surrounded by a number of street trees along the adjacent rights of way, including East
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1 John Street to the south and East Thomas Street to the north. Applicant Ex. 15 at 4.
2 These trees are within the jurisdiction of the Seattle Department of Transportation
3 (“SDOT”). *Sachs*, Part 1 at 76:00. In 2023, the Applicant sought a permit from SDOT to
4 trim some of these street trees. Appellant Ex 15; *Sachs*, Part 1 at 76:00; *Smith*, Part 3 at
5 24:50. This right-of-way trimming procedure was separate from the pruning of the
6 Leland cypress that Applicant conducted on its own property.
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8 **C. Outreach and Design Review**

9 The Project was reviewed through the City’s Design Review process. Dept. Ex. 1
10 at 3-34. David Sachs, a Senior Land Use Planner with SDCI, served as the City’s lead
11 planner for the Project.
12

13 In preparation for the design review process, the Applicant spent significant time
14 collecting community feedback. *Besse*, Part 3 at 69:33; Applicant Ex.19. This included
15 four voluntary meetings with the Pike-Pine Urban Neighborhood Council (“PPUNC”), a
16 local group of stakeholders interested in neighborhood design issues, along with review
17 of a summary guidance document (“Workshop Summary”) that had previously been
18 prepared by a different neighborhood stakeholder meeting concerning development along
19 15th Avenue East. *Besse*, Part 4, 1:00-7:00; Applicant Ex. 18. Separately, the Applicant
20 also conducted two voluntary community information sessions, at least one of which
21 included participation by Aquarian representatives. *Besse*, Part 5 at 7:33; Applicant Ex.
22 20 at 6, 9.
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25 As documented in Applicant’s Final Design Packet, the Project responded to both
26 general neighborhood and block-specific guidance from PPUNC and the Workshop
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1 Summary. Applicant Ex. 5 at 16. General neighborhood concerns addressed by Project
2 included keeping a grocery store in the neighborhood, keeping new design looking new,
3 helping small business remain a part of the 15th Avenue community, and having
4 transparency for ground-level retail to integrate it with the streetscape. *Besse*, Part 4,
5 11:08-12:00; Appl. Ex. 5 at 17. Block-specific concerns addressed by the Project include
6 remedying the “isolating and uninviting” façade along 15th Avenue, redesigning the
7 Safeway to have housing above it, and activating the streets via retail storefronts that
8 open onto 15th Avenue, greater articulation of facades and windows, and a Safeway entry
9 that does not open onto surface parking. *Besse*, Part 4, 12:22; Appl. Ex. 5 at 17. Prior to
10 EDG, PPUNC endorsed the Project and submitted a letter in support of it. *Besse*, Part 4 at
11 5:39; Applicant Ex. 6.

14 The Board discussed the Project in two separate meetings; first in a February 9,
15 2022 Early Design Guidance (“EDG”) Meeting and then in a February 15, 2023
16 Recommendation meeting. Dept. Ex. 1 at 3, 9. Both meetings were double the length of
17 a typical Board meeting. *Besse*. The Board solicited and considered public comment at
18 both meetings. Dept. Ex. 1 at 3, 9.

20 Design considerations for the Project that were discussed during the design
21 review meetings reflects continued attention to the themes raised by the neighborhood
22 stakeholder groups. The Project’s design began by considering the Project Site in the
23 context of the Capitol Hill neighborhood with a particular emphasis on the 15th Avenue
24 corridor. For EDG, the Applicant submitted three massing options, including one
25 preferred option. *Besse*, Part 4 at 23:48; Appl. Ex. 5 at 52-53. The Applicant chose the
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1 preferred option because it “did a good job of breaking up façade elements into smaller
2 pieces”, “incorporated more outdoor space,” “aligned the residential courtyard with
3 Thomas Street” and “aligned the entry of Safeway along East John Street.” *Besse*, Part 4
4 at 24:48. The Applicant also advanced the Preferred Option because it incorporated a lot
5 of smaller scale retail and a residential entry along 15th Ave in keeping with
6 neighborhood and design guideline guidance. *Besse*, Part 4 at 24:48. Mr. Besse
7 testified that the design team paid particular attention to avoiding large walls and
8 activation of the bus stop on East John Street. *Besse*, Part 4, 2:40; Applicant Ex. 5 at 12.
9 After a lengthy discussion and consideration of community feedback, the Board voted to
10 allow the Project to proceed to recommendation. Dept. Ex 1 at 31-32.
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13 During the double-length Recommendation meeting on February 15th, 2023.
14 Board comments indicated approval of changes the Applicant had made to the design,
15 with particular praise for the Project’s façade design evolution, redesign of the residential
16 entrance, and “the small and diverse commercial spaces flanking the main entry created a
17 welcoming sense of place.” *Besse*, Part 4 at 38:52; Dept. Ex. 3 at 13. After the
18 conclusion of the Recommendation meeting, the Board recommended that the project
19 move forward to its Master Use Permit and requested that the Applicant further refine
20 certain issues, including the Project’s northern façade fronting East Thomas Street. Dept.
21 Ex. 1 at 10-12; Dept. Ex. 3 at 13. The Board’s Recommendation also supported approval
22 of all four of the Applicant’s requested development standard departures (none of which
23 are at issue in this appeal). Dept. Ex. 1 at 13-14.
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1 Following the Board's recommendation of approval, SDCI staff worked with the
2 Applicant to incorporate the Board's recommendations into the Project's design. Dept.
3 Ex. 1 at 32. Ultimately, the Department concluded that having "reviewed the decision
4 and recommendations of the Design Review Board made by the three members present at
5 the decision meeting," the Project is "consistent with the City of Seattle design review
6 guidelines." Dept. Ex. 1 at 34. Having accepted the Board's recommendations and
7 being satisfied that the Project had met them, the Director approved the Project's
8 proposed design and requested departures subject to compliance with the Board's
9 recommendations. Dept. Ex. 1 at 32. SDCI issued the Decision on September 18, 2023.
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12 **D. Appeal**

13 Appellant's Notice of Appeal raised a variety of claims, including three claims
14 that cited specific guidelines:

- 15 • A claim that the Project violates Citywide Guidelines CS3.A by failing to "fit
16 old and new together."
- 17 • Violation of Citywide Guideline PL3-B and Capitol Hill Guideline CS1-4e by
18 failing to preserve existing tree canopy.
- 19 • Violation of Citywide Guideline C2.D.5 for failing to respect adjacent
20 properties and disrupting the privacy of adjacent buildings, including that
21 belong to Appellant.
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23 In addition, Appellant raised a number of extraneous issues, including claims that its
24 property rights had been violated; that the Project would impact privacy, sunlight,
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1 airflow, traffic, and parking; and that Code provisions permitting the Project were not
2 consistent with their legislative purpose.

3 **1. Motion for Partial Dismissal and Motion to Quash Subpoenas**

4 Applicant filed a Motion for Partial Dismissal seeking to (1) dismiss design
5 claims not tied to an identified guideline; (2) limit Appellant's hearing presentation on
6 design guidelines to guidelines specifically identified in the Notice of Appeal, and (3)
7 dismiss claims that were beyond Examiner jurisdiction, irrelevant, or otherwise improper.
8 Applicant's Motion for Partial Dismissal at 4-10. The Examiner's December 4, 2023
9 ruling on the motion ("Partial Dismissal Order") dismissed Appellants' claims regarding
10 (1) design issues not based in the guidelines, such as privacy, sunlight, and airflow; (2)
11 property rights; (3) traffic and parking impacts; (4) challenges to the Code itself; (5)
12 claims alleging construction-related hazards that were not tied to design issues. Partial
13 Dismissal Order at 3. The Partial Dismissal Order declined to limit Appellant to only the
14 guidelines named in the Notice of Appeal but confirmed that the scope of hearing would
15 be limited to issues raised in the Notice of Appeal. Partial Dismissal Order at 3 and 1
16 (citing SMC 23.76.022(C)(3) and (C)(6); Hearing Examiner Rule of Practice and
17 Procedure ("HER") 5.01(d)(3)). The Examiner specifically dismissed Objections 1-3, 6,
18 8, 9, Errors 12 & 13, Request for Relief 3,4, and 5. Partial Dismissal Order at 3.

22 **2. Additional Prehearing Procedural Issues**

23 On November 2, 2023, the Examiner held a prehearing conference and, the same
24 day, issued an order ("Prehearing Order") setting the schedule. The Prehearing Order set
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1 hearing dates of February 6 and 7, 2024, and established a deadline of January 11, 2024
2 for the Appellant to file and serve its witness and exhibit list.

3 On January 23, 2024, the Appellant filed a Request for Subpoenas (“Subpoena
4 Request”) seeking to compel the testimony of six individuals: Mr. Sachs, Mr. Besse,
5 Board member Joe Reilly, permit consultant Jodi Patterson-O’Hare, public relations
6 consultant Natalie Quick, and Department environmental analyst Paul Humphries.
7 Subpoena Request at 1-2.

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9 On January 24, 2024, the Hearing Examiner issued an Order on Appellant’s
10 Request for Subpoenas (“Subpoena Order”). The Subpoena Order noted that Appellant
11 had failed to comply with HER 5.13, which requires a request to be made ten business
12 days prior to hearing plus three business days for processing, along with other issues.
13 The Subpoena Order waived the Appellant’s untimeliness with respect to Mr. Sachs,
14 noting that Mr. Sachs “presumably would have knowledge relevant to the project and
15 issues raised in the appeal” and “has been expected to attend the hearing.” Subpoena
16 Order at 1. The Subpoena Order denied Appellant’s requests with respect to the other
17 five witnesses, stating that (1) Mr. Besse, Ms. Quick, and Ms. Patterson-O’Hare could
18 not be compelled to provide expert testimony with the Appellant having completed a fee
19 arrangement; (2) in addition, Ms. Patterson-O’Hare is “not the property owner or entity
20 funding the project, but a design professional who compiled the application”; (3) Mr.
21 Humphries was not identified as having reviewed the Project or having Project-specific
22 knowledge; and (4) Mr. Reilly is a Board member, and “it would be inappropriate to call
23 a decision maker to explain a recommendation, which speaks for itself.” Subpoena Order
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1 at 2. Accordingly, the Examiner declined to waive Appellant’s untimeliness with respect
2 to these witnesses.

3 On January 24, 2024, Appellant filed a Request for Reconsideration of Subpoena
4 for Joe Reilly (“Subpoena Reconsideration Request”). The reasons provided in support
5 of the request were: “Joe Reilly is on record opposing the removal of the tree canopies on
6 the project” and “Joe Reilly’s testimony is important to Appellant.” Subpoena
7 Reconsideration Request at 1.
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9 On January 29, 2024, the Examiner issued an Order on Reconsideration Re
10 Subpoena (“Reconsideration Order”). The Reconsideration Order denied the request,
11 noting that the Appellant “did not identify any error in the order denying the subpoena
12 request as untimely” and stating further:
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14 An individual appointed to act as part of a body which issues recommendations
15 cannot testify on a project’s consistency with recommendation criteria. That
16 individual’s role is to impartially receive evidence. They cannot step from that
17 role to serve as a fact witness to advocate for a party who came before them.
Consistent with evidentiary and conduct rules, judicial privilege protects the
witness against subpoena.

18 Reconsideration Order at 1.

19 **E. Hearing**

20 Appellant presented only one witness of its own: Reverend Cathryn Reid. Rev.
21 Reid focused on the Project’s public outreach efforts, the pruning of the trees on the
22 Project Site, and the SDOT-issued permit for the street trees south of the Project Site.
23 *Reid*, Part 2 35:30. Appellant’s representative, Rev. Jannifer Werner, also questioned Mr.
24 Sachs and Mr. Besse.
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1 Applicant presented two witnesses: Mr. Besse and Mr. Smith. Mr. Besse
2 described the Project's design evolution and detailed the Project's consistency with the
3 Citywide and Capitol Hill Guidelines. Mr. Smith testified regarding his evaluation of
4 trees currently on the Project Site and future landscaping plans.
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6 Mr. Sachs, an architect and Senior Land Use Planner with SDCI, testified for the
7 City. Both under questioning from Appellant's representative and later during his own
8 testimony on behalf of the City, Mr. Sachs testified that the Project is consistent with all
9 applicable guidelines and that the Applicant had actively responded to design concerns
10 raised during the Project's development.
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12 **III. ARGUMENT**

13 **A. Standard of Review**

14 The design review process exists, in part, to "[e]ncourage better design and site
15 planning to help ensure that new development enhances the character of the city and
16 sensitively fits into neighborhoods." SMC 23.41.002. The Board is the entity charged
17 with reviewing the design of projects under the Code and the City's adopted Design
18 Review Guidelines. SMC 23.41.008.A. When (as here), if four or more members of the
19 Board agree in their recommendation to SDCI, then SDCI must issue a decision
20 accepting the Board recommendation, with limited exceptions. SMC 23.41.008.F.3. In
21 recognition of this process, the Code requires the Hearing Examiner to give substantial
22 weight to SDCI's design review decision. SMC 23.76.022.C.7.
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1 **B. The Project is consistent with applicable Design Guidelines.**

2 Appellant's Notice of Appeal claimed that the Project is inconsistent with
3 Citywide Guidelines CS2.D.5 ("Respect for Adjacent Sites"), CS3.A ("Emphasizing
4 Positive Neighborhood Attributes") and PL3.B ("Residential Edges") and Capitol Hill
5 Guideline CS1.4.e (tree canopy and street trees). Neither these claims nor any other
6 design-related assertions in the appeal have merit.
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8 Most significantly, Appellant failed to offer any affirmative evidence showing
9 that the Project does not meet any of these guidelines. Because Appellant presented no
10 evidence at the hearing regarding these issues at hearing, it necessarily failed to meet its
11 burden of proof and has effectively abandoned its claims, requiring denial of this appeal.
12

13 Even if the Examiner were to consider the substance of the design-related
14 allegations in the appeal, the evidence would still compel the conclusion that there was
15 no clear error in the City's Decision. The overwhelming evidence at hearing showed the
16 Project is consistent with all applicable Guidelines.
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18 **1. Appellant's failure to provide evidence requires denial of the appeal**

19 Appellant provided no evidence that the Project is inconsistent with design
20 guidelines.
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22 Appellant's sole witness devoted her testimony to criticizing the Appellant's use
23 of a permitting specialist, the permitted trimming of trees on or near the Project Site, and
24 alleged deficiencies in the Project's public outreach effort. *Reid*, Part 2 at 35:30-70:00.
25 At no time did Rev. Reid's testimony or declaration even mention one of the guidelines
26 that form the basis for the Appeal. *See id.*; Appellant Ex.12.
27

1 Its only witness, Rev. Reid, did not discuss the guidelines; instead, Appellant
2 sought to establish inconsistency solely through Rev. Werner's questioning of Mr.
3 Sachs.¹ Mr. Sachs, however, did not provide testimony that supported Appellant; to the
4 contrary, he stated consistently that the Project is consistent with applicable guidelines.
5 *Sachs*, Part 1 at 40:00 – 50:00. Appellant's cross examination of Mr. Besse failed to
6 challenge, let alone counter, Mr. Besse's substantial testimony on direct examination
7 regarding the Project's consistency. *Besse*, Part 5 at 43:42 through Part 6 at 6:19. The
8 discussion of this issue in Appellant's Brief is confined to the Conclusion section and
9 consists of the bare assertions of Appellant's representative, citing no testimony and
10 naming no guidelines. Brief at 8-9. The only exhibits cited are a collection of Google
11 Streetview images that Appellant asserts self-evidently supports its claims. Brief at 9
12 (citing Appellant Ex. 5). However, the only testimony regarding these exhibits (or the
13 few screenshots that were individually shown) came from Mr. Sachs, who explained that
14 the images in fact *confirm* the Project's consistency with the neighborhood by
15 "address[ing] the various heights, bulks ,and scales of the neighborhood, including those
16 buildings to the [East], as well as to other buildings of various sizes around it." *Sachs*,
17 Part 1 at 50:30; Appellant Ex. 5 at A1.

21 As a result, there is no evidence in the record that supports Appellant's claim of
22 guideline inconsistency, let alone that is sufficient to overcome the substantial weight
23 afforded the City's decision. *King Cnty. v. Wash. State Boundary Review Bd.*, 122
24

26 ¹ Rev. Werner's questions are not evidence, and even if they were considered to be evidence they did not
27 contain any actual explanation of Appellant's position, only bare assertions.

1 Wn.2d 648, 670, 860 P.2d 1024 (1993) (“In order for an issue to be properly raised
2 before an administrative agency, there must be more than simply a hint or a light
3 reference to the issue in the record.”). Here, no affirmative evidence or testimony has
4 been offered. The appeal should be denied for this reason alone.

6 **2. Appellants’ approach to the Guidelines is improper**

7 Even if the Examiner considers the Project’s consistency with the guidelines that
8 were named in the Notice of Appeal or otherwise discussed at hearing, Appellant fails to
9 meet its burden. This is both because the guidelines that Appellant cites do not support
10 its claims, as explained below, and because Appellant’s overall approach to analyzing
11 consistency is incorrect. Whereas Appellant focuses on a few phrases in isolation, the
12 Guidelines as a whole are meant to be “a means of allowing flexibility in the application
13 of Land Use Code requirements.” Citywide Guidelines at 6. Accordingly, consistency is
14 evaluated holistically, and “a project is not required to meet every guideline.” Sachs
15 Testimony, Part 6 at 17:27.

17 As Mr. Besse explained, the Project serves numerous guidelines that were not
18 discussed by the Appellant – notably, Capitol Hill Guideline CS2.1.c, which is specific to
19 the 15th Avenue Corridor. Guideline CS2.1.c reads:

21 15th Avenue E is known for its lively mix of locally-owned businesses, larger
22 format grocery stores that serve multiple neighborhoods, and the Kaiser
23 Permanente campus. Despite the street’s narrow sidewalks, many businesses have
outside seating or displays that add vitality to the street.

- 24 • Encourage façade detailing at the street level that contributes to the
25 street’s existing intimate retail character and variety of pedestrian scaled
26 storefronts.

1 • Consider design approaches that visually integrate the street level façade
2 with existing buildings. Use upper level setbacks to reinforce the street-
3 scale retail character.

4 • Improve the walkability along 15th Ave while maintaining the street's
5 positive intimate pedestrian character.

6 • On half block or full block developments break up long facades to avoid
7 a monolithic presence and to add to the existing character of the corridor.

8 • Enhance visual connections and pedestrian flows to and through the
9 Kaiser Permanente campus.

10 The Project is consistent with this guideline in several ways, demonstrating
11 characteristics specifically highlighted as desirable for its location. *Besse*, Part 4 at
12 43:46. The Project's facade detailing includes multiple types of brick colors, including
13 special brick for the residential entry. This breaks up the single-story façade element to
14 promote the neighborhood's intimate retail character. The Project visually integrates the
15 street-level façade with existing building by using upper-level setbacks, while
16 maximizing ground-level setbacks along 15th Avenue. In turn, these deep ground-level
17 setbacks improve walkability while allowing for painting strips, extra-wide sidewalks and
18 space for above-ground planters. Lastly, the Project avoid creates a monolithic presence
19 by using a courtyard, upper-level setbacks, and materials differentiation to break the
20 street façade into smaller portions.

21
22 Appellants did not discuss Capitol Hill Guideline CS2.1.c or challenge Mr.
23 Besse's testimony regarding the Project's consistency with it.

1 **3. The Project is consistent with Capitol Hill Guideline CS3.1, “Fitting**
2 **old and new together.”**

3 Appellant has referenced Capitol Hill Guideline CS3.1, “Fitting old and new
4 together,” to assert generally that the Project is not consistent with the surrounding
5 neighborhood due primarily to its size. This guideline reads:

6 In areas with observable patterns of traditional materials and architectural styles,
7 design new contemporary buildings to reference the scale, proportion, fenestration
8 pattern, massing, and/or materials of character buildings. Encourage the use of
9 pedestrian scaled materials that complement and take cues from historic buildings
but do not try to mimic or copy existing structures.

10 Foster the eclectic mix of architectural design and forms on the block and
11 throughout the neighborhood. Encourage the use of new architectural concepts, as
they emerge.

12 Similar considerations are expressed by Citywide Guideline CS3.A.1:

13 Fitting Old and New Together: Create compatibility between new projects, and
14 existing architectural context, including historic and modern designs, through
15 building articulation, scale and proportion, roof forms, detailing, fenestration,
and/or the use of complementary materials.

16 Appellant’s claim that the Project is inconsistent with these guidelines consists of
17 assertions that (1) the Project, as a new building, does not fit with the Aquarian, an older
18 building, and (2) the Project is inappropriately large or “monolithic.” Neither assertion is
19 correct.
20

21 Regarding the first assertion, Guidelines CS3.1 and CS3.A.1 do not require a
22 project to mimic neighboring buildings but rather list various ways that projects are
23 encouraged to “reference” and “create compatibility” with existing architectural context.
24 Mr. Besse explained how the design of the Project considered the architectural context of
25 the neighborhood and included references to interesting brick patterns and courtyards
26
27

1 found in nearby buildings, including Anhalt buildings. Besse, Part 4 at 49:07; Applicant
2 Ex. 5 at 32-35. Mr. Besse further noted that his team studied many buildings in the
3 neighborhood, including a number of larger multifamily buildings designed in a modern
4 style, and incorporated their findings into the Project's design to "provide a variety of
5 scales and proportions." Besse, Part 4 at 49:53; Applicant Ex. 5 at 36-37, 39.

7 Regarding the second assertion, Mr. Besse explained that the Project uses
8 secondary architectural elements to reduce its perceived mass. *Besse*, Part 5 at 2:11.
9 Specific measures taken to prevent the Project from having a "monolithic" presence
10 include (a) incorporation of multiple recess and indentations within the building
11 envelope, (b) protruding out lower levels, (c) setting back portions of facades, (d) adding
12 balconies of varying sizes, (e) including porches and stoop elements along Thomas
13 Street, and (f) having a variety of canopies on all four facades. *Besse*, Part 5 at 2:11.
14 Beyond these design features, the presence of multiple buildings equal or taller in height
15 to the Project across the street, equivalent height limits for the Aquarian Property, and the
16 presence of many multi-story buildings throughout the neighborhood are all indicia of the
17 Project's consistency with neighborhood character and scale.

20 Mr. Besse also explained that these design elements further the goals of other
21 guidelines, including Capitol Hill Guideline DC2.3.b ("Fit with neighboring buildings:
22 Selectively include design elements or proportions that reflect Capitol Hill's historic
23 character such as streetscape rhythm, historic parcel widths, fenestration patterns and/or
24 material treatments.") and Citywide Guideline DC2.A.2 ("Reducing Perceived Mass: Use
25 secondary architectural elements to reduce the perceived mass of larger projects.
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1 Consider creating recesses or indentations in the building envelope; adding balconies, bay
2 windows, porches, canopies or other elements; and/or highlighting building entries.”).

3 At hearing, Rev. Werner expressly identified the two large, bulky Kaiser
4 Permanente health facility buildings located to the east across 15th Ave E from the
5 Project Site as consistent with neighborhood character, asserting in a question to Mr.
6 Sachs that the facility as “huge. It’s a massive project but it fits in with the scaling of the
7 neighborhood. And it follows the design guidelines.” *Sachs*, Part 1 at 53:02. But as Mr.
8 Besse explained, it makes no sense to say the Kaiser Permanente buildings are consistent
9 with the Guidelines but the Project is not, for reasons including the Kaiser Permanente’s
10 greater height, long unarticulated facades, and lack of street-level retail and transparency.
11 *Besse*, Part 4 at 56:10 through Part 5 at 1:29; *see* Applicant Ex. 5 at 28. The Appellant’s
12 erroneous invocation of the Kaiser Permanente buildings as examples only highlights the
13 Project’s inclusion of elements that the Guidelines have expressly identified as desirable
14 for the neighborhood.

15 Appellant fails to meet its burden to demonstrate clear error in the City’s
16 determination of consistency with Capitol Hill Guideline CS3.A or any related
17 guidelines.

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21 **4. The Project is consistent with Citywide Guidelines C2.D.5 “Respect**
22 **for Adjacent Sites,” and PL3-B.1, “Residential Edges.”**

23 The second major theme of Appellant’s claims regarding the guidelines is that the
24 Project will adversely impact the Aquarian Property and building. Appellant has invoked
25 Citywide Guideline CS2.D.5, which reads:

1 Respect adjacent properties with design and site planning to minimize disrupting
2 the privacy and outdoor activities of residents in adjacent buildings.

3 Appellant has also invoked Citywide Guideline PL3.B.1, which reads:

4 Provide security and privacy for residential buildings through the use of a buffer
5 or semi-private space between the development and the street or neighboring
6 buildings.

7 As Mr. Besse explained (and the Examiner noted in the Partial Dismissal Order), these
8 guidelines cannot support Appellant's claims because they refer only to "residential"
9 uses, and Appellant "is a church rather than a residential use." Partial Dismissal Order at
10 2-3; *see Besse*, Part 5 at 16:43. Appellant's hearing presentation and Brief essentially
11 ignore this ruling but cannot overcome the wording of the Guidelines.

12 Despite there being no guidelines to mandate consideration of the Aquarian
13 Property's privacy, Mr. Besse testified that he nevertheless carefully considered the
14 Project's effects on its neighbors, including the Aquarian Property. *Besse*, Part 5 at
15 17:07. In so doing, the design team was guided by Citywide Guideline CS2.D.1, 3, and 4.
16 Guideline CS2.D.1 directs designers to consider "the scale of development anticipated by
17 zoning," which for the Aquarian Property is permitted to be up to 55 feet high, the same
18 as the Project, without any required setback from the shared property line. *Besse*, Part 5
19 at 6:40; Applicant Ex. 9 at 42. Guidelines CS2.D.3 and 4 direct designers to provide
20 transitions to less intense zones, a consideration that applies to the LR-zoned residential
21 properties abutting the Project site to the northwest (for which the Project will provide
22 landscaped screening) but not to the non-residential, NC-55-zoned Aquarian Property.

23 Nonetheless, Mr. Besse testified that numerous elements of the Project's design
24 reflect respect for the Appellant despite these considerations not being mandatory under
25

1 the Guidelines or zoning regulations. In particular, the trash and loading areas will be
2 moved from their current location inches from the Aquarian Property boundary and will
3 instead be shielded by a residential portion of the Project, significantly buffering the
4 Appellant from the noise and visual impacts of these services. *Besse*, Part 5, 17:38;
5 Applicant Ex. 24 at 9,11. The setbacks between the Project and the Aquarian Property
6 line will be greater than currently exist along most of the shared boundary, and the
7 setback areas will incorporate landscaping to provide an additional buffer. Applicant Ex.
8 24 at 11. During the design process, the Project was modified to remove planned
9 windows from the portions of the Project that are closest to the Aquarian Property and to
10 remove balconies from the East Thomas Street façade, which will provide greater
11 privacy. *Besse*, Part 5 at 12:30-13:03. In addition, the Project's 15th Avenue East and
12 East Thomas Street frontages will provide greater-than-required setbacks, allowing more
13 sunlight to reach the Aquarian Property from those directions. *Besse*, Part 5 at 10:35-
14 11:30.

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18 Appellant fails to meet its burden to demonstrate clear error in the City's
19 determination of consistency with Citywide Guidelines C2.D.5 and PL3-B.1 or with any
20 related guidelines.

21 **C. Appellant failed to meet its burden to establish error concerning trees.**

22 In addition to its critique of the Project's overall design, Appellant raises several
23 arguments concerning trees. These too fail to meet Appellant's burden. Regarding
24 Guideline consistency – the only issue properly before the Examiner – the Project is
25 consistent with the landscaping considerations embodied in Capitol Hill Guideline
26
27

CS1.4.e and Citywide Guideline CS1.D.1. Appellant’s additional arguments concern a street vacation ordinance that is not mentioned in the Notice of Appeal and is irrelevant to the project; the pruning of trees on and off the Project Site, which is a code enforcement issue; and unspecified Code provisions that do not provide a basis for relief. These arguments fail for the reasons described below.

1. The Project is consistent with Capitol Hill Guideline CS1.4.e and Citywide Guideline CS1.D.1.

Capitol Hill Guideline CS1.4.e recommends that the Applicant “[m]aximize preservation of the area’s existing tree canopy” and “[e]ncourage the integration of any exceptional trees or heritage trees, or other mature plantings, into the project design.” Similarly, Citywide Guideline CS1.D.1 recommends that projects “[i]ncorporate on-site natural habitats and landscape elements such as: existing trees, native plant species or other vegetations into project design”

Mr. Besse explained that the Project will comply with these guidelines by including many landscaping elements, such as extensive plantings of native plant species and trees throughout the Project. *Besse*, Part 5 at 32:00. These will specifically include trees on the Project’s street frontages and in roof deck areas. *Besse*, Part 5 at 32:00. The Project will retain all existing street trees while adding additional trees throughout the Project Site. *Besse*, Part 5 at 38:37-39:43. Applicant Ex. 9 at 32, 38, 80-82.

Appellant’s critique of tree removal primarily argues that trees are required to protect Appellant’s privacy. To the extent this argument is intended to invoke a guideline, it fails for the reasons described in the previous section: no guideline requires the Project to provide privacy for the Aquarian Property. Even if such a consideration

1 were reflected in the Guidelines, it would not require the Applicant to maintain a specific
2 group of trees; the Project includes other elements demonstrating more than sufficient
3 consideration of the Aquarian Property.

4 Appellant has also suggested in previous filings that because the Project will
5 remove trees, it does not maximize the tree canopy as stated in Capitol Hill Guideline
6 CS1.4.e. This fails to establish error because Appellant misinterprets this guideline as a
7 blanket ban on tree removal. As Mr. Besse explained, the guideline encourages the
8 integration of existing plantings where possible but cannot be taken as a prohibition on
9 removal of any existing trees. *Besse*, Part 5 at 36:28. In the Project's case, integrating
10 the trees along the property line shared with the Aquarian Property was not possible
11 given the massing needs of the Project, including providing separated service vehicle
12 access from East Thomas Street. *Besse*, Part 5 at 39:56. As Mr. Besse explained,
13 although the Project involves the removal of some trees, it retains all existing street trees
14 and meets Capitol Hill Guideline CS1.4.e by including new landscaping that will
15 contribute to the area tree canopy. *Besse*, Part 5 at 38:37. Accordingly, the Board
16 explicitly voiced its support for removal of the trees. *City Ex. 3* at 14.

17 None of Appellant's allegations regarding compliance with Capitol Hill Guideline
18 CS1.4.e has merit.

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22 **2. Ordinance 120754 does not provide a basis for relief**

23 Appellant devotes much of its Brief to arguing that Ordinance 120754 prohibits
24 removal of the trees abutting its western property line. Appellant did not introduce
25 Ordinance 120754 at hearing or include a copy with its Brief. The Ordinance, along with
26
27

1 accompanying maps and other documents, is available at

2 https://clerk.seattle.gov/~archives/Ordinances/Ord_120754.pdf. A copy of this

3 compilation is attached to this brief as Exhibit A for the Examiner's convenience.

4 This argument should not be considered because it was neither included in the
5 Notice of Appeal nor discussed at hearing. Even if the Examiner considers this argument
6 on its merits, it would not justify relief.
7

8 **a. Appellant's argument regarding Ordinance 120754 is not**
9 **within the scope of the hearing**

10 Appellant's arguments regarding Ordinance 120754 should not be considered for
11 three, independently sufficient reasons.

12 First, Ordinance 120754 is not mentioned in the Notice of Appeal. As the
13 Examiner ruled in the Partial Dismissal Order, issues must be included in the Notice of
14 Appeal to be considered as a basis for relief. Partial Dismissal Order at 1 (citing SMC
15 23.76.022 (C)(3)(a) and (C)(6) and HER 5.01(d)(3)).
16

17 Second, even if Ordinance 120754 had been mentioned in the Notice of Appeal, it
18 would not be properly before the Examiner because it is not included in the reasons why
19 a Type II decision can be appealed to the Examiner under SMC 23.76.022(C)(6) and was
20 not the subject of a land use interpretation under SMC Chapter 23.88.020.C.3.
21

22 Third, Ordinance 120754 was not the subject of any testimony or evidence at
23 hearing. Rev. Werner's questions to Mr. Besse, quoted at page 4 of the Brief, are not
24 testimony and would not make an affirmative case for Appellant's argument even if they
25 were, as Rev. Werner never cited Ordinance 120754 by name or explained what was
26 meant by her questions about it.
27

1 **b. Appellant’s argument regarding Ordinance 120754 fails on its**
2 **merits**

3 Even if considered on its merits, Appellant’s argument regarding Ordinance
4 120754 would fail.

5 Ordinance 120754 did not add or amend any provision in the Code; instead, it is a
6 March 25, 2002 ordinance vacating a portion of East Williams Court, which was
7 formerly an area of City right-of-way located on the east side of the Project Site facing
8 East Thomas St. Exhibit A at 3-5. Included with the ordinance is a February 8, 2002
9 recommendation from the Mayor’s Office that appears to describe an earlier vacation
10 petition approved in 1996 for another portion of East Williams Court. Exhibit A at 11-
11 12.² The recommendation states that the 1996 petition was approved subject to three
12 conditions, including Condition 3: “The petitioner shall provide the landscaping required
13 in SMC 23.47.016 to provide a buffer between the parking and the adjacent residential
14 uses. The landscaping requirements shall not be waived by DCLU.” Exhibit A at 12.

15 Appellant’s argument appears to be that Condition 3 prohibits the removal of the
16 Leland cypress trees along its western property boundary. There is no indication that this
17 condition was intended to apply to future projects on the site, rather than the current
18 Safeway building. But even leaving this aside, the wording of Condition 3 does not
19 support Appellant’s contention, because it refers to a “buffer between the parking and the
20 adjacent residential uses,” and the Code provision it cites similarly states that buffering is
21 required when “a surface parking area abuts a lot in a residential zone.” SMC
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26 ² Appellant’s Brief also refers to Ordinance 105018, a 1975 ordinance vacating a portion of East Williams
27 Court. Ordinance 105018 is available at https://clerk.seattle.gov/~archives/Ordinances/Ord_105018.pdf
and contains nothing of relevance to this matter.

23.47.016.D.1.a (2002 edition). This has no applicability here, where the Project will not contain surface parking (instead locating parking underground) and where the Aquarian Property is not a residential use or located in a residential zone. Nothing in the Ordinance refers to the privacy concerns that Appellant invokes, nor can anything in the Ordinance or accompanying documents be taken as a prohibition on removing trees.

Ordinance 120754 does not establish error in the Decision.

3. Arguments related to tree pruning are irrelevant

Appellant's Brief and prior presentations also raise two issues relating to tree pruning, neither of which provides a basis for relief.

First, Appellant has critiqued pruning of the existing trees along the northeast and northwest boundaries of the Project Site. Mr. Smith explained that the pruning occurred because the trees' extended lack of maintenance had caused them to outgrow their planting areas, thus requiring pruning for the trees' long-term maintenance. *Smith*, Part 3 at 15:50. As Mr. Smith testified, no permit is required to prune trees on private property. *Smith*, Part 3 at 24:50. Even if this pruning were improper without a permit, it would be a matter for code enforcement – it would not be relevant to this hearing, which concerns the City's approval of a future proposed project.

Second, Appellant has pointed to a permit that the Applicant sought for pruning of street trees along the right of way, within SDOT jurisdiction. Appellant Ex. 15. Appellant appears to believe that the Leland cypress are also "street trees" and therefore also required a permit to prune, but they are not – they are located on private property and are therefore subject to different rules. *Sachs*, Part 1 at 76:00; *Smith*, Part 3 at 24:50.

1 Again, even if the pruning had been improper, it would be irrelevant to the design issues
2 in this hearing.

3 **4. Additional tree-related arguments are without merit**

4 In its Brief and prior presentations, Appellant has invoked SMC Chapter 25.11
5 (the “Tree Code”) and SDCI Tip 242A. *See* Brief at 4. These arguments fail as well.
6

7 First, Appellant has repeatedly referenced the current Tree Code, which became
8 effective on July 30, 2023. Appellant Ex. 14. The Project, however, is vested to the
9 previous version of the Tree Code. *Sachs*, Part 1 at 66:06. Appellant has provided no
10 specific explanation or evidence as to why it believes the provisions of either version of
11 the Code support its case. And again, these claims are not properly before the Examiner
12 because they were not included in the Notice of the Appeal and because they raise an
13 issue of Code consistency that was not the subject of a request for interpretation under
14 SMC 23.88.020.C.3.
15

16 **D. Appellant’s remaining arguments fail.**

17 Appellant’s remaining arguments likewise fail to provide a basis for relief.
18 Appellant devotes much of its Brief to arguing that it was unaware of the identity of the
19 Applicant; that the Examiner improperly denied its subpoena requests; and that the
20 Project will interfere with its property rights. The Examiner has already correctly ruled
21 that none of these assertions establishes error in the Decision or in the hearing
22 procedures, and nothing in the Brief establishes otherwise.
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1 **1. The identity of the Applicant is known to the Appellant and irrelevant**
2 **to the relief requested**

3 Appellant makes much of the Decision’s designation of Ms. Patterson-O’Hare as
4 the Applicant for the Project, arguing that Ms. Patterson-O’Hare was not the Applicant
5 and that that party’s identity has been concealed from Appellant and the public. Brief at
6 1-4. These assertions are incorrect.

7 First, the premise of Appellant’s argument is that because Ms. Patterson-O’Hare
8 is a permit expediter, she is not “the Applicant.” This is incorrect: as is standard in land
9 use approvals, Ms. Patterson-O’Hare was listed as the Applicant on a number of City
10 documents, including the Decision, because she submitted and coordinated paperwork for
11 the Project. Dept. Ex. 1 at 1; *See* Subpoena Order at 2 (Ms. Patterson-O’Hare was a
12 “professional who compiled the application”). As Mr. Sachs testified, Greystar has been
13 clearly identified as the Applicant throughout the Project’s review. *Sachs*, Part 2 at
14 34:00. In other words, Ms. Patterson-O’Hare is the applicant as the agent for the
15 developer/property owner, Greystar.³

16 Second, Appellant’s suggestion that it was prevented from knowing the identity of
17 the developer seeking to construct the Project – Greystar – is contradicted by evidence
18 including Appellant’s own submissions. Most notably, Appellant’s witness list stated
19 that Appellant planned to call Aaron Keeler, identified as the “managing director of
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³ Appellant bases part of its argument on emails exchanged between the parties in the aftermath of
25 Appellant’s subpoena requests. The two emails from Applicant’s counsel David Carpmann, quoted at pages
26 2-3 of the Brief, reflect standard communications from an attorney on behalf of a client and witnesses
27 engaged by the client. There is no inconsistency, much less misrepresentation, in the email’s reference to
Ms. Patterson-O’Hare, along with Mr. Besse and Mr. Quick, as “members of the Applicant’s project team,”
see Brief at 2, as all three individuals were professionals engaged by Greystar for services related to the
Project.

development services for Greystar.” Appellant Witness List (Jan. 11, 2023) at 2. Rev. Reid stated in a declaration that she had previously reached out to Mr. Keeler as “Applicant’s representative.” Appellant Ex. 13 at 2. Despite this, Appellant neither requested a subpoena for Mr. Keeler nor called him at hearing. In addition, emails attached to Rev. Reid’s declaration refer repeatedly to Greystar as the entity that will own the apartments and that is requesting easements, as well as to the “Greystar/Safeway project.” Appellant Ex. 13 at 3-12; *see also* Appellant Ex. 15 at 2 (street tree permit identifying Greystar as “Applicant” and “Financially Responsible Party”). Other evidence throughout the record similarly identifies Greystar as the developer of the Project. *E.g.* Dept. Ex. 8 at 1; Dept. Ex. 12 at 1. Appellant’s assertions that it lacked knowledge of the Applicant’s identity are unconvincing, and its inappropriate suggestion that this information was deliberately concealed is all the more so. *See* Brief at 2-3.

Third, even if Appellant had been unaware of Greystar’s identity (which it was not), that would not establish any error in the Decision or the conduct of the hearing. Appellant invokes the “real party in interest” rule, but that principle (even if it applied in Hearing Examiner proceedings) requires actions to be *prosecuted* in the name of the real party in interest. It does not apply to the identity of defendants or respondents; indeed, the “function of the rule is to *protect the defendant* against a subsequent action” *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 172, 982 P.2d 1202, 1204 (1999) (emphasis added and quotations omitted). Here, this action was brought by Appellant and challenges a decision by the City. But even leaving this aside, there is no indication that the Appellant was prejudiced in any way by its alleged confusion regarding the identities

1 of Greystar and Ms. Patterson-O'Hare. Appellant was afforded a full evidentiary hearing
2 with the opportunity to ask Mr. Besse, the Project's architect, and Mr. Sachs, the
3 Department's planner, any questions it liked regarding the design issues within the scope
4 of the appeal.⁴

5
6 Appellant's assertions regarding the identity of the Applicant do not establish any
7 error by the City or Examiner.

8 **2. The Examiner properly denied the subpoena requests.**

9 The Examiner properly denied five of Appellant's six untimely subpoena requests
10 and properly denied the Subpoena Reconsideration Request for the reasons stated in the
11 Examiner's orders on those requests and on the record at the beginning of the hearing –
12 including both the nature of the testimony sought and the untimely nature of Appellant's
13 requests. In particular, the Examiner correctly concluded that Mr. Reilly's testimony as a
14 witness for Appellant would be inappropriate given his role as a member of the Board
15 that voted on approval of the Project. *See* Subpoena Order at 2; Subpoena
16 Reconsideration Order at 1-2. In closing, Appellant repeats its objection to these rulings
17 but does not provide any reasoning or explanation. There was no error in the rulings.
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20 **3. Appellant's assertions regarding property rights and grading work to**
21 **be performed under future permits are meritless.**

22 Finally, the Brief contains references to Appellant's "property rights" and
23 assertions that work that may be performed under future shoring and demolition permits
24 are "part of the design process." Brief at 2, 5. The Examiner has previously ruled that
25

26 ⁴ As indicated in Mr. Carpmann's January 29, 2024 email, Applicant informed the Appellant that it would
27 not object to cross-examination questions to Mr. Besse going beyond the scope of direct examination due to
28 Mr. Besse's inclusion on Appellant's Witness and Exhibit List. *See* Brief at 2.

1 claims based on property rights must be heard in superior court and are outside the scope
2 of administrative appeals of this nature. Partial Dismissal Order at 2.

3 Similarly, the Examiner has previously ruled that allegations of grading code
4 violations and construction-related hazards related to demolitions “do not raise land use
5 or design review issues so are not within Examiner purview.” *Id.* at 3. Appellant argues
6 that because the Applicant has begun work on other permit applications, and because
7 some of the plans that will be used in these processes have already been included in the
8 City’s record, that necessarily means they can be adjudicated as part of this case. Brief at
9 5. But as the Examiner has ruled, that does not affect the scope of this appeal, which is
10 limited to Type II design review issues. SMC 23.76.022.A.2; 23.76.022.C.6. Moreover,
11 as Mr. Sachs testified, although shoring and easement issues are not considered during
12 MUP review, they would be reviewed later during building permit review. Sachs, Part 6
13 at 20:47-21:19.

14 IV. CONCLUSION

15 Appellants failed to meet its burden of proof with regard to any appeal issue. The
16 Hearing Examiner should reject the appeal and affirm the Decision.

17 DATED this 5th day of March, 2024.

18 s/Jessica Clawson, WSBA #36901
19 s/David Carpman, WSBA #54753
20 s/Isaac Patterson, WSBA #60255
21 *Attorneys for Applicant*

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EXHIBIT A

Ordinance No. 120754

Council Bill No. 114118

AN ORDINANCE vacating a portion of East Williams Court on the petition of Safeway, Inc., (Clerk File 300610).

CF No. _____

Date Introduced: <u>MAR 11 2002</u>		
Date 1st Referred: <u>MAR 11 2002</u>	To: (committee) <u>TRANSPORTATION</u>	
Date Re - Referred:	To: (committee)	
Date Re - Referred:	To: (committee)	
Date of Final Passage: <u>3-25-02</u>	Full Council Vote: <u>8-0</u>	
Date Presented to Mayor: <u>3-26-02</u>	Date Approved: <u>3/28/02</u>	
Date Returned to City Clerk: <u>3/29/02</u>	Date Published: <u>KC</u>	T.O. <u>/</u> F.T. <u>/</u>
Date Vetted by Mayor:	Date Veto Published:	
Date Passed Over Veto:	Veto Sustained:	

The City of Seattle - Legislative Department
Council Bill/Ordinance sponsored by: _____

Committee Action:

3/19/02 passed unanimously
conlin / McE

3-25-02 Passed 8-0 (Excused: D)

This file is complete and ready for presentation to Full Council. Comm

Law Department

Law Dept. Review

OMP
Review

W
City Clerk
Review

Inc
The City of Seattle - Legislative Department

CONLIN

Council Bill/Ordinance sponsored by:

Richard Conlin
Councilmember

Committee Action:

3/19/82 passed unanimously 2-0
conlin / mcfar

3-25-02 Passed 8-0 (Excused: Dr. Castro)

This file is complete and ready for presentation to Full Council.

Committee:

RC 3/19/02
(Initial/Date)

Law Department

Law Dept. Review

OMP
Review

[Signature]
City Clerk
Review

[Signature]
Electronic
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NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
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ORDINANCE 120754

1 AN ORDINANCE vacating a portion of East Williams Court on the petition of Safeway, Inc.,
2 (Clerk File 300610).

3 WHEREAS, there has been filed with the City Council the petition of Safeway, Inc., (Clerk
4 File 300610) for the vacation of a portion of East Williams Court, as therein fully
5 described; and

6 WHEREAS, following a public hearing on said petition, which commenced on May 7, 1996,
7 said petition was granted; and

8 WHEREAS, pursuant to Section 35.79.030, RCW and Seattle Municipal Code Chapter 15.62,
9 the petitioner has paid \$31,850 to the City, which amount is one-half the appraised
10 value of the property approved for vacation, according to an appraisal obtained by the
11 Director of Seattle Transportation; Now, Therefore;

12 BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

13 Section 1. That

14 Beginning at the southeast corner of Lot 6, Block 4, Williams Addition, as
15 recorded in Volume 1 of Plats, page 161, Records of King County, Washington;
16 thence north 88°40'37" west along the south line of said lot, 1.65 feet to a point on
17 a curve, the center of which bears north 79°54'20" west; thence southerly and
18 southwesterly along said curve to the right, having a radius of 150 feet, a
19 distance of 64.84 feet to the north line of Block 3, said addition; thence south
20 88°40'37" east along said north line, 24.59 feet to the west line of 15th Avenue
21 East; thence north 1°35'12" east along said west line, 60 feet to the beginning.

22 be and the same is hereby vacated; RESERVING to the City of Seattle the right to make all
23 necessary slopes for cuts or fills upon the above-described property in the reasonable
24 original grading of any rights-of-way abutting upon said property after said vacation.

Section 2. This ordinance shall take effect and be in force thirty (30) days from and
after its approval by the Mayor, but if not approved and returned by the Mayor within ten
(10) days after presentation, it shall take effect as provided by Municipal Code Section
1.04.020.



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PASSED by the City Council of the City of Seattle this 25th day of
March, 2002, and signed by me in open session in authentication of its passage
this 25th day of March, 2002.

Peter Stemberger
President _____ of the City Council

Approved by me this 28 day of March, 2002.

G. M. [Signature]
Mayor

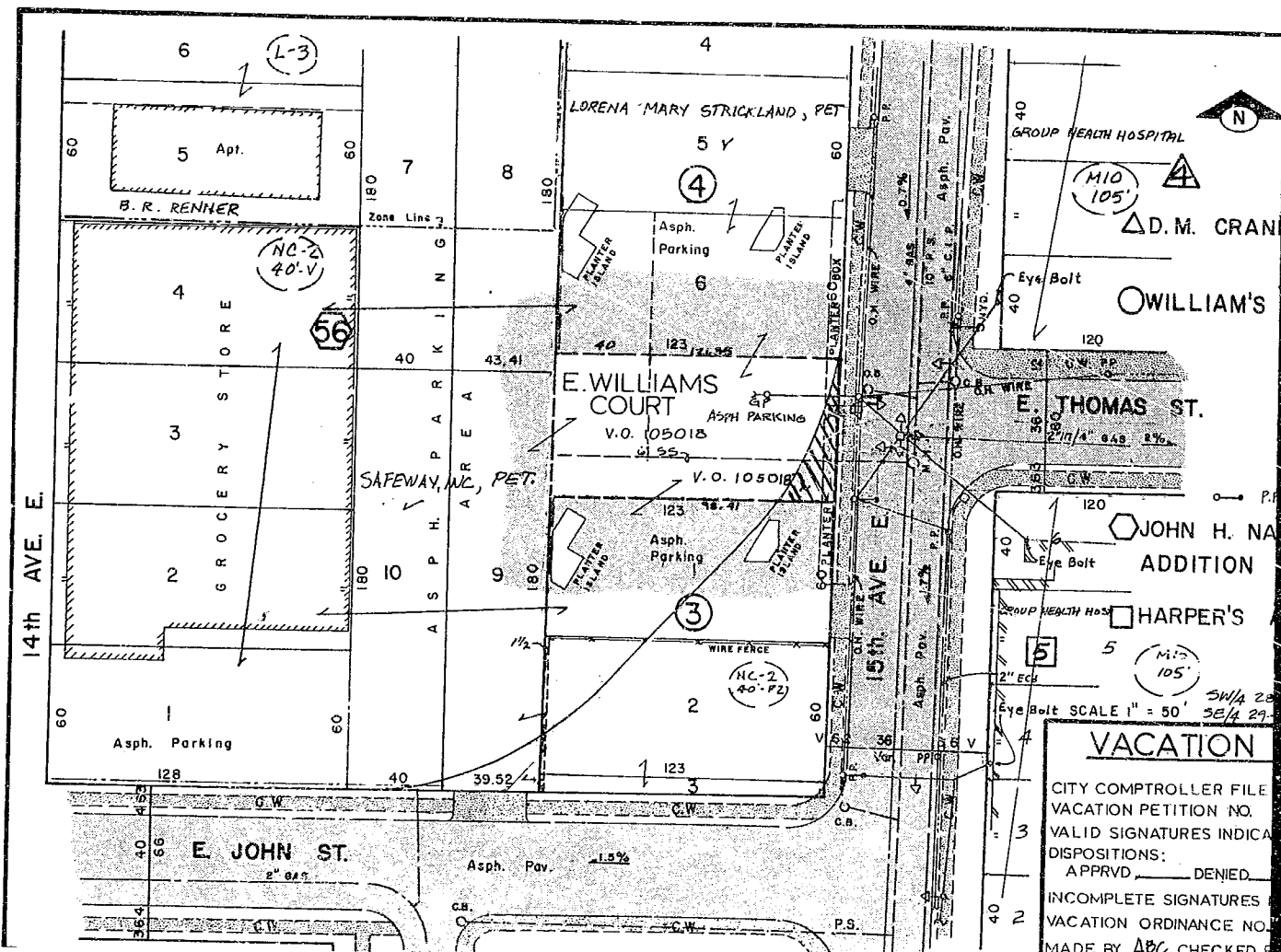
Filed by me this 27th day of March, 2002.

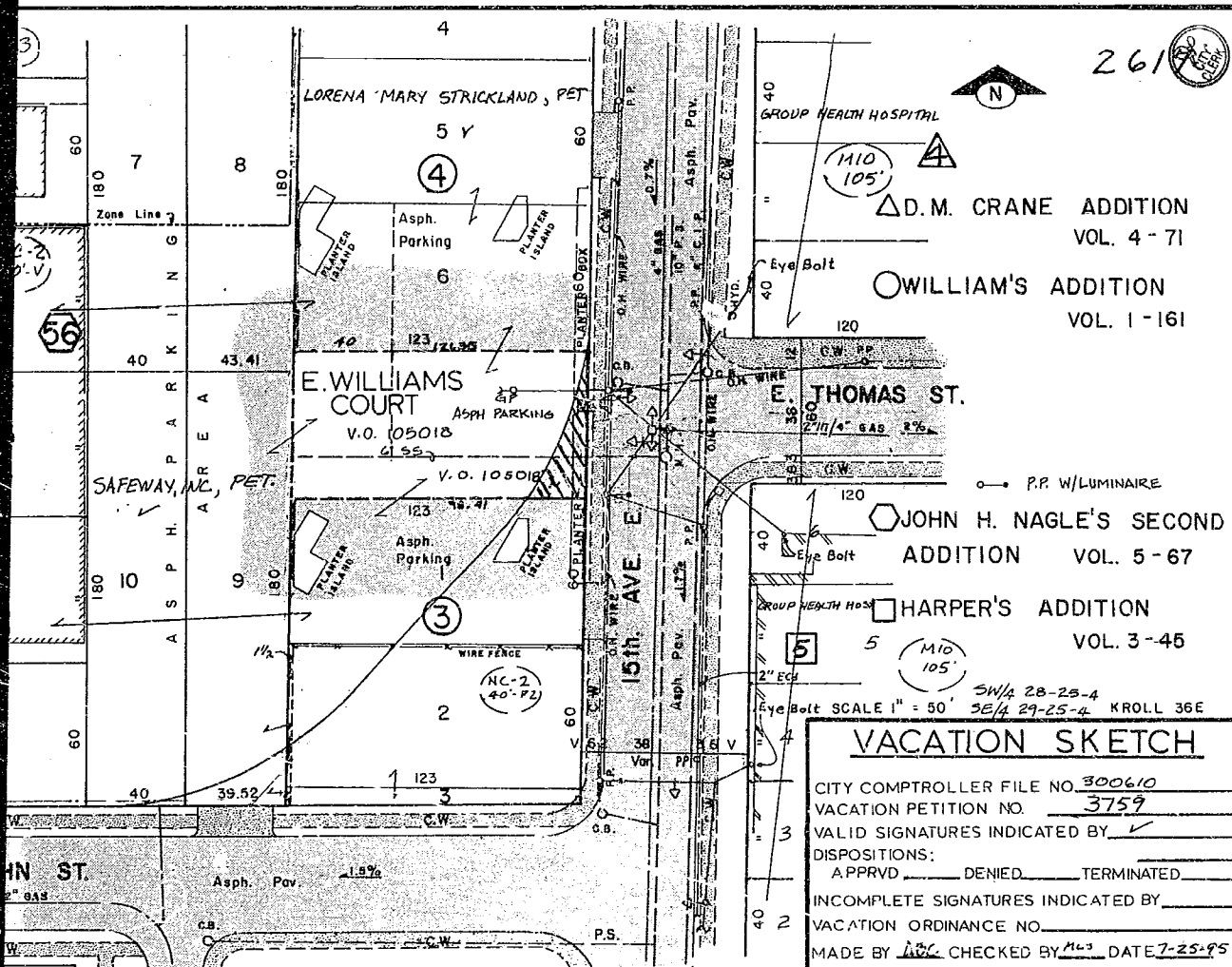
Judith E. Phipps
City Clerk

(Seal)

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Seattle City Clerk's Office
600 4th Avenue, Room 104
Seattle, WA 98104



20020403001984

SEATTLE CITY L. CORD
PAGE 001 OF 004
04/03/2002 12:14
KING COUNTY, WA

12.00

CITY CLERK

2002 JUL 31 PM 3:12

FILED
CITY OF SEATTLE

Please print or type information WASHINGTON STATE RECORDER'S Cover Sheet (RCW 65.04)

Document Title(s) (or transaction contained therein): (all areas applicable to your document <u>must</u> be filled in.)	
1. ORDINANCE #120754	
Re - _____ of document. AN ORDINANCE vacating a portion of East Williams Court on the petition of Safeway, Inc.. (Clerk File No. 300610)	
Grantor(s) (Last name first, then first name and initials) 1. City of Seattle <input type="checkbox"/> Additional names on page----- of document.	
Grantee(s) (Last name first, then first name and initials) 1. N/A 2.	
Legal description (abbreviated: i.e. lot, block, plat or section, township, range) <input type="checkbox"/> Additional reference #s on page ----- of document N/A	
Assessor's Property Tax Parcel/Account Number/ N/A <input type="checkbox"/> Assessor Tax # not yet assigned.	

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2002 040 3001984

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ewillford.dot
01/08/02
Ver. 1/mjg

ORDINANCE 120754

1 AN ORDINANCE vacating a portion of East Williams Court on the petition of Safeway, Inc.,
2 (Clerk File 300610).

3 WHEREAS, there has been filed with the City Council the petition of Safeway, Inc., (Clerk
4 File 300610) for the vacation of a portion of East Williams Court, as therein fully
5 described; and

6 WHEREAS, following a public hearing on said petition, which commenced on May 7, 1996,
7 said petition was granted; and

8 WHEREAS, pursuant to Section 35.79.030, RCW and Seattle Municipal Code Chapter 15.62,
9 the petitioner has paid \$31,850 to the City, which amount is one-half of the appraised
10 value of the property approved for vacation, according to an appraisal obtained by the
11 Director of Seattle Transportation; Now, Therefore;

12 BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

13 Section 1. That

14 Beginning at the southeast corner of Lot 6, Block 4, Williams Addition, as
15 recorded in Volume 1 of Plats, page 161, Records of King County, Washington;
16 thence north 88°40'37" west along the south line of said lot, 1.65 feet to a point on
17 a curve, the center of which bears north 79°54'20" west; thence southerly and
18 southwesterly along said curve to the right, having a radius of 150 feet, a
19 distance of 64.84 feet to the north line of Block 3, said addition; thence south
20 88°40'37" east along said north line, 24.59 feet to the west line of 15th Avenue
21 East; thence north 1°35'12" east along said west line, 60 feet to the beginning.

22 be and the same is hereby vacated; RESERVING to the City of Seattle the right to make all
23 necessary slopes for cuts or fills upon the above-described property in the reasonable
24 original grading of any rights-of-way abutting upon said property after said vacation.

Section 2. This ordinance shall take effect and be in force thirty (30) days from and
after its approval by the Mayor, but if not approved and returned by the Mayor within ten
(10) days after presentation, it shall take effect as provided by Municipal Code Section
1.04.020.



NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
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1 PASSED by the City Council of the City of Seattle this 25th day of
2 March, 2002, and signed by me in open session in authentication of its passage
3 this 25th day of March, 2002.

4 Peter Stemberger
President _____ of the City Council

5 Approved by me this 28 day of March, 2002.

6 [Signature]
Mayor

7 Filed by me this 29th day of March, 2002.

8 Judith E. Pippin
City Clerk

9
10 (Seal)

11 STATE OF WASHINGTON
12 COUNTY OF KING
13 CITY OF SEATTLE

14 } ss

15 I, JUDITH E. PIPPIN, CITY CLERK OF THE CITY OF SEATTLE, DO HEREBY
16 CERTIFY THAT THE WITHIN AND FOREGOING IS A TRUE AND CORRECT
17 COPY OF Ordinance 120754

18 AS THE SAME APPEARS ON FILE, AND OF RECORD IN THIS DEPARTMENT.

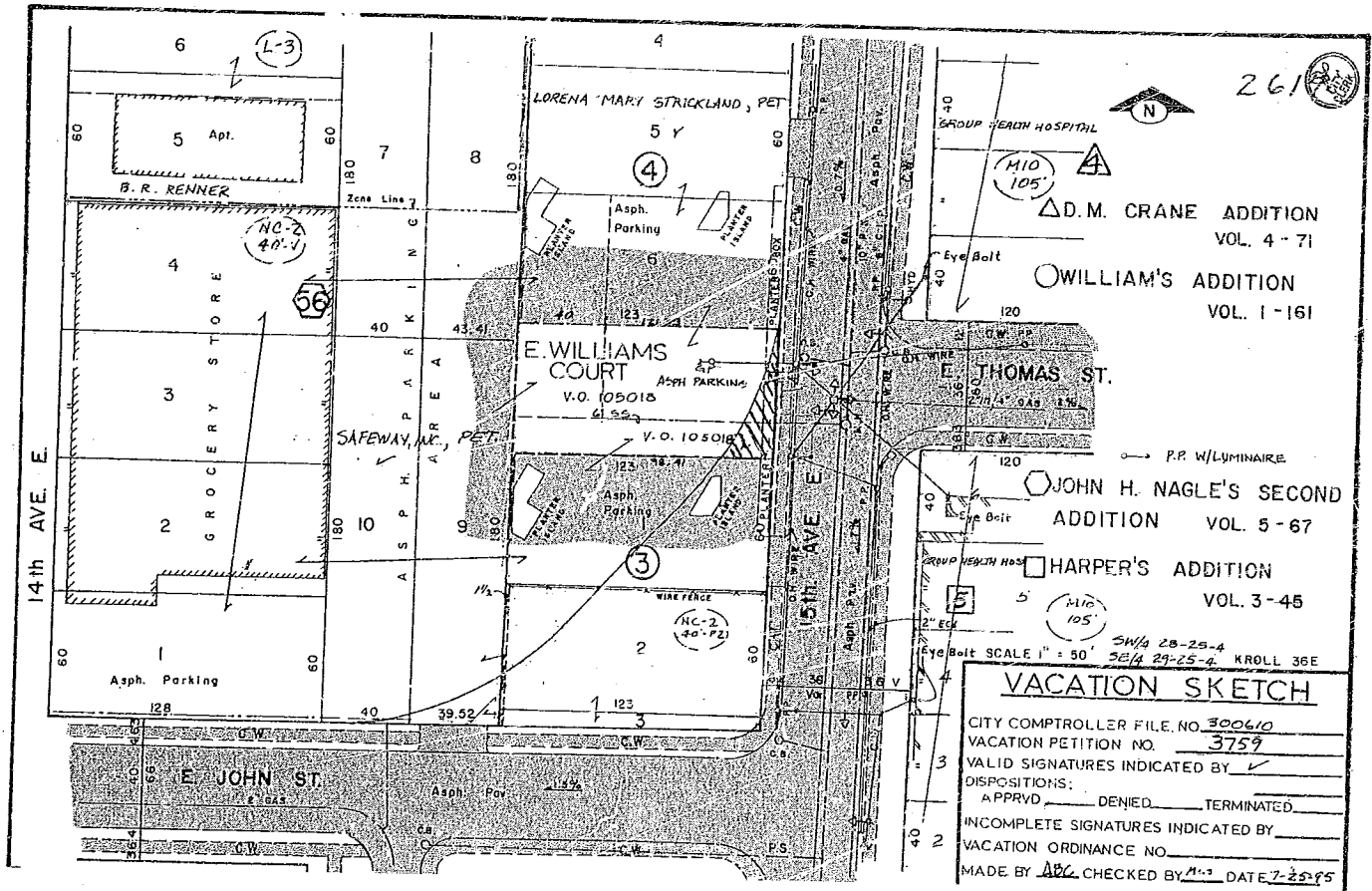
19 IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED
20 THE SEAL TO THE CITY OF SEATTLE, THIS 3rd day of April, 2002
21 JUDITH E. PIPPIN
22 CITY CLERK

23 BY: Margaret Carter

24 CITY CLERK



2002 040 3001984





City of Seattle

Gregory J. Nickels, Mayor

Office of the Mayor

CONCURRENCE PRIOR TO SIGNATURE		
ROUTING	DATE	INITIAL
10/2/01	10/2/01	GC
3/12/02	3/12/02	GC
MC	3/12/02	MC
10/2/01	10/2/01	GC

February 8, 2002

Honorable Peter Steinbrueck
President, Seattle City Council
1100 Municipal Building
600 - 4th Avenue
Seattle, Washington 98104

Via: City Budget Office

Dear Councilmember Steinbrueck:

Subject: Vacation of a Portion of East Williams Court, Clerk File 300610

Enclosed is the legislation to vacate a portion of East Williams Court, west of 15th Avenue East (Clerk File 300610). The petition was filed by Safeway, Inc. for the renovation and expansion of the existing store at the site. The City Council granted approval of the vacation in 1996.

BACKGROUND

The vacation area for this portion of East Williams Court is small, only 637 square feet. It abuts 15th Avenue East between East Thomas Street and East John Street. Although the majority of East Williams Court at this location was vacated in 1975, the portion in this petition was purposely left out. At that time there were plans to use the area as part of an intersection re-alignment at the northwest corner of 15th Avenue East and East John Street, that plan did not prove feasible. Safeway submitted the current petition as part of their plans to enlarge and improve their existing store. The existing store was situated on the west side of the block with parking fronting on 15th Avenue East. Safeway proposed to move the new store adjacent to 15th Avenue East and place the parking area behind it, along 14th Avenue East.

The new store increased square footage from 27,000 to 45,000 with about 125 parking spaces. Although no pedestrian amenities were required through the vacation process, amenities were required by the project's Master Use Permit (MUP). Safeway has just recently finished these requirements. One of the MUP conditions has not been met in the way originally envisioned by DCLU. The MUP required an active pedestrian entrance located mid-block on the west side of 15th Avenue East at East Thomas Street. While Safeway has provided the door structurally, it remains as an emergency exit only, unavailable for regular daily pedestrian use.

Safeway has indicated it is not feasible to use the door as an entrance or exit, citing their experience of theft. There are no checkout, office or staff functions located near the door.

600 Fourth Avenue, 12th Floor, Seattle, WA 98104-1873

Tel: (206) 684-4000, TDD: (206) 684-8811 Fax: (206) 684-5360, E-mail: mayors.office@ci.seattle.wa.us
An equal employment opportunity, affirmative action employer. Accommodations for people with disabilities provided upon request.



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Honorable Peter Steinbrueck
February 8, 2002
Page 2

The lack of the door and the overall street design had raised questions about the pedestrian character of the project. City staff from DCLU, SeaTran and Councilmember McIver's office have been working with Safeway over the past several months to address questions about pedestrian character particularly because the entry door on 15th Avenue East was not provided as required by the MUP.

Safeway proposed to provide additional pedestrian amenities to address this concern and to substitute for the original MUP condition requiring an active entry on 15th Avenue East.

Based on the meetings between Safeway and the City, City staff identified specific improvements that could help to accomplish the original MUP and street vacation objectives. Safeway completed these improvements in the late summer. City staff reviewed the new design components and amenities and is satisfied that these elements improve the pedestrian environment at the store.

Safeway has leveled the cement at the main entrance at 15th Avenue East and East John Street and provided tables and chairs. The tables will include chessboards with the goal of creating a neighborhood gathering space and encourage pedestrians to linger in the area.

Safeway has also upgraded the displays in the four large windows along 15th Avenue East to showcase artwork from the Marvin Foundation, a non-profit organization that promotes interracial harmony, and the Cornish Institute of the Arts. These windows will be changed on a monthly basis. Safeway has also enhanced the window displays on East John Street and 15th Avenue East with a variety of items: a movie-themed window with posters and lights, a window with glass art, a window with vintage items such as cookbooks, kitchen appliances, lava lamps, and treatments such as neon and artist-made mobiles.

Safeway asks that these pedestrian enhancements substitute for the MUP requirement that there be an entry door on 15th Avenue East, and further requests that while reviewing the vacation ordinance the Council indicate its support of the revision to the existing MUP.

CONDITIONS

The City Council granted the petition subject to the following conditions:

1. The petitioner shall provide City Light with an easement or make other provisions to protect the City Light facilities in the area.
2. The petitioner shall work with City Light, SED (now SeaTran) and Metro to protect the existing guy wires, as necessary.
3. The petitioner shall provide the landscaping required in SMC 23.47.016 to provide a buffer between the parking and the adjacent residential uses. The landscaping requirements shall not be waived by DCLU.

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Honorable Peter Steinbrueck
February 8, 2002
Page 3

SATISFACTION OF CONDITIONS

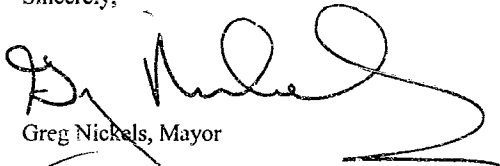
Safeway, Inc, has satisfied the vacation conditions related to their store project. Their activities to meet the conditions are outlined below:

1. The petitioners have executed and recorded an easement protecting City Light facilities.
2. The guy wires have been removed under City Light approval.
3. The landscaping buffer has been provided between the parking and the adjacent residential uses.

RECOMMENDATION

The petitioner has satisfied all the conditions and has paid all fees, including the street vacation fee of \$31,850.00, which is one-half the appraised value of the property, according to an appraisal obtained by Seattle Transportation. I recommend approval of the Council Bill. If there are additional questions or more information is required, please contact Moira Gray, Street Vacation Specialist, at 684-8272.

Sincerely,



Greg Nickels, Mayor

MJG:mjg

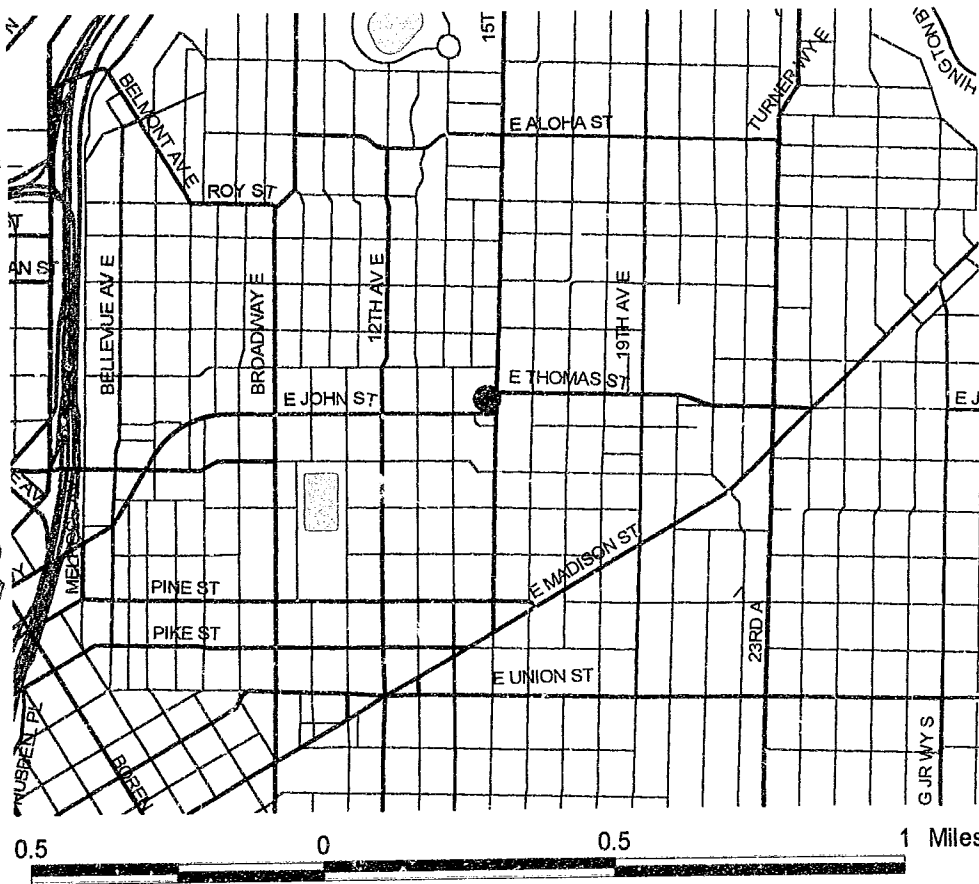
Enclosure

cc Vince Lyons, DCLU

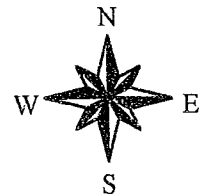
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East Williams Court Vacation Clerk File 300610



- SND Floating Bridges
- State Highway
- Interstate Freeway
- Streets
- Residential
- Arterials
- State Highway
- Interstate Freeway
- Text Displays at 1:24,000 and large Arterial Names
- Arterials & Local Streets - large scale
- Residential
- Principal Arterial
- Minor Arterial
- Collector Arterial
- State Route/Freeway



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STATE OF WASHINGTON - KING COUNTY

--SS.

143220
City of Seattle, Clerk's Office

No. ORDINANCE IN FULL

Affidavit of Publication

The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

CT:120754

was published on

4/4/2002

G. Stedman
Subscribed and sworn to before me on

4/4/2002

Heather M. Pasqua
Notary public for the State of Washington,
residing in Seattle

Affidavit of Publication



State of Washington, King County

City of Seattle

ORDINANCE 120754

AN ORDINANCE vacating a portion of East Williams Court on the petition of Safeway, Inc., (Clerk File 300610).

WHEREAS, there has been filed with the City Council the petition of Safeway, Inc., (Clerk File 300610) for the vacation of a portion of East Williams Court, as therein fully described; and

WHEREAS, following a public hearing on said petition, which commenced on May 7, 1996, said petition was granted; and

WHEREAS, pursuant to Section 35.79.030, RCW and Seattle Municipal Code Chapter 15.62, the petitioner has paid \$31,850 to the City, which amount is one-half the appraised value of the property approved for vacation, according to an appraisal obtained by the Director of the Seattle Transportation; Now, Therefore;

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. That

Beginning at the southeast corner of Lot 6, Block 4, Williams Addition, as recorded in Volume 1 of Plats, page 161, Records of King County, Washington; thence north 88°40'37" west along the south line of said lot, 1.65 feet to a point on a curve, the center of which bears north 79°54'20" west; thence southerly and southwesterly along said curve to the right, having a radius of 160 feet, a distance of 64.84 feet to the north line of Block 3, said addition; thence south 88°40'37" east along said north line, 24.59 feet to the west line of 15th Avenue East; thence north 1°35'12" east along said west line, 60 feet to the beginning

be and the same is hereby vacated; RESERVING to the City of Seattle the right to make all necessary slopes for cuts or fills upon the above-described property in the reasonable original grading of any rights-of-way abutting upon said property after said vacation.

Section 2. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

PASSED by the City Council of the City of Seattle this 25th day of March, 2002, and signed by me in open session in authentication of its passage this 25th day of March, 2002.

PETER STEINBRUECK,
President of the City Council.

Approved by me this 28th day of March, 2002.

GREGORY L. NICKELS,
Mayor.

Filed by me this 29th day of March, 2002.

(Seal) JUDITH E. PIPPIN,
City Clerk.

Publication ordered by JUDITH PIPPIN, City Clerk.

Date of official publication in Daily Journal of Commerce, Seattle, April 4, 2002. 4/4(143220CD)

Page 2 of affidavit