BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of **NEIGHBORS ENCOURAGING REASONABLE DEVELOPMENT** From a Decision and Interpretation issued by the Director, Department of Planning and Development	Hearing Examiner Files: **MUP-15-022(W)** **S-15-003** (DPD Files 3014342 and 3015697 Interpretation No. 13-005) DECLARATION OF CHARLES H. BURKHALTER JR.

I, Charles H. Burkhalter Jr., under penalty of perjury under the laws of the State of Washington, declare as follows:

1. I am a member and representative of Neighbors Encouraging Reasonable Development ("NERD") and am competent to make this declaration based on my personal knowledge. Attached to this Declaration are true and correct copies of the following documents:

2. Attached as Exhibit 1 is the Seattle Department of Planning and Development Revised Notices of Applications dated June 6, 2013 relating to the applicable proposed project in this Hearing.

3. Attached as Exhibit 2 is the SEPA determination of DNS made for the project.

4. Attached as Exhibit 3 is the NERD Request for Interpretation.

5. Attached as Exhibit 4 is the Hearing Examiner Decision MUP-14-006(DR,W)/S-14-001 dated December 1, 2014.

6. DPD continued to allow the Applicant to utilize the erroneous Director's Rule application in the Applicant's submitted project application, despite repeated notifications and comments directed to the DPD Planner Seth Amrhein in the months following the Hearing Examiner's Decision. The DPD and Applicant were and are well aware and well versed in the Applicant's failure of legally following the applicable SMCs and Hearing Examiner Decision and explicitly understand both the Director's construction or application error in the applicable SMCs, and how the SMCs should be construed or applied, as evidenced by their Motions to Partially Dismiss. NERD can confirm this as based not only on the Hearing Examiner Decision, but on our direct communications with the DPD personnel, including the attached February 11, 2015 e-mail (Exhibit 5) with

Mr. Amrhein. Mr. Amrhein acknowledges receipt and asserts to have forwarded the e-mail to Christopher Ndifon, the zoning reviewer assigned to the project.

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

Respectfully,

Charles H. Burkhalter Jr.
On behalf of NERD
Dated this 1st day of October, 2015, at Seattle, Washington

Seattle Department of Planning and Development

EXHIBIT 1

D. M. Sugimura, Director

June 6, 2013

MASTER USE PERMIT

Revised Notices of Applications

Project(s) and/or notices under this heading have been revised from that previously published in this bulletin. Seattle's Department of Planning and Development is currently reviewing these applications. Your written comments are encouraged and may be submitted to:

Department of Planning and Development
700 5th Av Ste 2000
PO Box 34019
Seattle, Washington 98124-4019

For projects other than those requiring shoreline approvals, the comment period may be extended an additional fourteen (14) days. A written request to extend the comment period must be received by this Department within the initial 14-day comment period as published in this bulletin. For additional information, contact the Public Resource Center, Seattle Municipal Tower, 700 Fifth Avenue, Suite 2000, (206) 684-8467. The Public Resource Center is open 8:00 a.m. to 4:00 p.m. on Monday, Wednesday, Friday and 10:30 a.m. to 4:00 p.m. on Tuesday and Thursday. Printed material in enlarged print is available upon request. A copy fee will be charged.

Please note that "SEPA" refers to the State Environmental Policy Act. Numbers used in project descriptions are approximations. The final approved plans will control.

Note: The vicinity map feature added to the public notice of application is provided as an illustrative reference. It is not intended to replace the legal description and site plan included in the project file. In the event of omissions, errors or differences, the documents in DPD's files will control.

Revised App

Area: West Seattle **Address:** 3050 SW Avalon Way
Project: 3014342 **Zone:** ARTERIAL WITHIN 100 FT., SPECIAL GRADING REQUIREMENT, SCENIC VIEW WITHIN 500 FT., URBAN VILLAGE OVERLAY, MIDRISE, SALMON WATERSHED

Notice Date: 06/06/2013

Contact: JAY JANETTE - (206)919-2624
Planner: Seth Amrhein - (206) 386-1981

Date of Application: 03/04/2013
Date Application Deemed Complete: 03/04/2013

Land Use Application to allow a seven story (two of the seven floors contain mezzanines), 14 unit apartment building containing 102 bedrooms in an environmentally critical area. No parking proposed.

The top of this image is north.
This map is for illustrative purposes only. In the event of omissions, errors or differences, the documents in DPD's files will control.

Comments may be submitted through: 06/19/2013

The following approvals are required:

SEPA Environmental Determination (This project is subject to the Optional DNS Process (WAC 197-11-355) and Early DNS Process (SMC 25.05.355). This comment period may be the only opportunity to comment on the environmental impacts of this proposal.

Other permits that may be needed which are not included in this application:

Building Permit

3014342 – **Notice of Application Only sent 03/14/13 *Notice of Application & Checklist sent 03/14/13 drm SA Planner
Notice of Revised Application

**JAY JANETTE
JANETTE ARCHITECTURE
5215 BALLARD AVE NW STE 4
SEATTLE, WA 98107

**PAUL LABELLARTE
COLUMBIA BUILDERS
9827 51ST AVE SW
SEATTLE, WA 98136-2728

ENVIRONMENTAL REVIEW SECTION*
DEPARTMENT OF ECOLOGY
PO BOX 47703
OLYMPIA WA 98504-7703
(emailed copies to separegister@ecy.wa.gov)

MR. RAMIN PAZOOKI*
WSDOT, NORTHWEST REGION
15700 DAYTON AVE N
SEATTLE, WA 98133

MUCKLESHOOT TRIBE FISHERIES DEPT*
39015 172ND AV SE
AUBURN, WA 98092

SUQUAMISH TRIBE*
PO BOX 498
SUQUAMISH, WA 98392

UNITED INDIANS OF ALL TRIBES*
PO BOX 99100
SEATTLE, WA 98199

GARY KRIEDT*
KC METRO TRANSIT ENVIRON PLNG
201 S JACKSON ST MS KSC-TR-0431
SEATTLE, WA 98104-3856

PUBLIC REVIEW DOCUMENTS*
QUICK INFORMATION CENTER
SEATTLE PUBLIC LIBRARY
LB-03-01

DUWAMISH TRIBE*
4705 W MARGINAL WY SW
SEATTLE, WA 98106

towerview@earthlink.net
kirkprindle@comcast.net
phaury@fulcrum.net
seaweedtoasted@comcast.net

EXHIBIT 2

City of Seattle
Edward B. Murray, Mayor

Department of Planning and Development
D. M. Sugimura, Director

CITY OF SEATTLE
ANALYSIS AND DECISION OF THE DIRECTOR OF
THE DEPARTMENT OF PLANNING AND DEVELOPMENT

Application Number: 3014342

Applicant Name: Jay Jannette

Address of Proposal: 3050 SW Avalon Way

SUMMARY OF PROPOSED ACTION

Land Use Application to allow a seven story (two of the seven floors contain mezzanines), 14 unit apartment building containing 104 bedrooms in an environmentally critical area. No parking proposed.

The following approval is required:

SEPA – Environmental Determination (SMC Chapter 25.05

SEPA Determination: [ ] Exempt [X] DNS [ ] MDNS [ ] EIS

[ ] DNS with conditions

[ ] DNS involving non-exempt grading or demolition or involving another agency with jurisdiction.

BACKGROUND INFORMATION

Site Description

The site is located at 3050 Avalon Way SW on a currently vacant lot. Previously, there was a single family residence on the lot, but this was demolished in 2008. The lot is vegetated predominantly non-native blackberry and herbaceous weeds. The western portion of the lot contains eight big leaf maple trees and one common apple tree. Five of these trees fall within a

steep slope or steep slope buffer regulated by the City of Seattle's Regulations for Environmentally Critical Areas. The lot slopes up gently from Avalon Way to the west. In the eastern third of the site the slope steepens to a grade that exceeds 40 percent. Therefore, it is regulated as a steep slope environmentally critical area (ECA) under the City of Seattle's Regulations for Environmentally Critical Areas.

The site is bounded by developed multi-family properties to north and south, and alley right-of-way and developed single-family properties to the west. The site is rectangular, with 60 feet of frontage along Avalon Way SW., a depth of 120 feet, and a total combined lot area of 7,198 square feet. The site is zoned Midrise (MR), as are the lots to the north and south. Lots to the west are zoned Single-Family 5000 (SF5000).

Public Comment

Notice of the proposal was provided on June 6, 2013. Numerous public comments were received.

SEPA DETERMINATION

The initial disclosure of the potential impacts from this project was made in the environmental checklist submitted by the applicant dated February 25th, 2013. A revised SEPA checklist correcting several errors was provided to DPD by the applicant on May 22nd, 2013. The information in the checklist, supplemental information provided by the applicant, project plans, and the experience of the lead agency with review of similar projects form the basis for this analysis and decision.

The project site is located in an environmentally critical area (landslide-prone area) and, therefore, the application is not exempt from SEPA review. However, SMC 25.05.908.B provides that the scope of environmental review of projects within environmentally critical areas shall be limited to: 1) Documenting whether the proposal is consistent with The City of Seattle Regulations for Environmentally Critical Areas, SMC Chapter 25.09; and 2) Evaluating potentially significant impacts on the environmentally critical area resources not adequately addressed in The City of Seattle Environmentally Critical Areas Policies or the requirements of SMC Chapter 25.09, Regulations for Environmentally Critical Areas, including any additional mitigation measures needed to protect the environmentally critical areas in order to achieve consistency with SEPA and other applicable environmental review laws.

The Department of Planning and Development has reviewed and analyzed the environmental checklist submitted by the project applicant, the accompanying project plans, and geotechnical report, and determined that this action will not result in significant adverse impacts to the environment. Codes and development regulations applicable to this proposed project will provide sufficient mitigation and no further conditioning or mitigation is warranted pursuant to the SEPA Overview Policy (SMC 25.05.665). The following summarizes anticipated short and long term impacts and identifies regulations in place that will mitigate these impacts.

Short-term Impacts

Site grading and preparation for the foundation of the proposed addition will expose soil, leading to increased potential for soil erosion during construction until the site is permanently stabilized by establishment of new vegetation and landscaping. Several adopted codes and/or ordinances provide mitigation for the identified impact. The Grading Code (SMC Chapter 22.170) requires that soil erosion control techniques be in place for the duration of the land disturbing activities. The Regulations for Environmentally Critical Areas (SMC Chapter 25.09) have a stated purpose of avoiding adverse environmental impacts and regulate all activities on sites with ECAs. The plans provided by the applicant demonstrate that the proposal complies with development restrictions for steep slopes. The applicant submitted a geotechnical engineering study prepared by Robert M. Pride, LLC, dated August 21st, 2012. The geotechnical report and construction/grading plans have been reviewed by the DPD geotechnical engineer and found to be in compliance city's standards for development on sites with geologic hazard areas provided in the City's ECA regulations. This report concluded that the proposed development on the steep slope will not result in any adverse impacts from construction. While typical temporary construction-related impacts are expected, these impacts are not considered significant because they are temporary and/or minor in scope (SMC 25.05.794). Therefore, no further conditioning pursuant to SEPA policies is warranted.

Construction activities including construction worker commutes, truck trips, the operation of construction equipment and machinery, and the manufacture of the construction materials themselves result in increases in carbon dioxide and other greenhouse gas emissions which adversely impact air quality and contribute to climate change and global warming. While these impacts are adverse, they are not expected to be significant due to the relatively minor contribution of greenhouse gas emissions from this project.

Long-term Impacts

Long-term or use-related impacts are anticipated as a result of approval of this proposal including: increased surface water runoff due to greater site coverage by impervious surfaces; increased demand for public services and utilities; loss of plant and animal habitat; and increased light and glare. Long-term impacts resulting from development of the landslide-prone area are not anticipated if construction proceeds as recommended by the applicant's consulting geotechnical engineer.

Several adopted City codes and/or ordinances provide mitigation for some of the identified impacts. Specifically these are: the Environmentally Critical Areas Regulations; the Stormwater Code, Grading Code; the City Energy Code; and the Land Use Code, which controls site coverage, setbacks, building height and use and contains other development and use regulations to assure compatible development. Compliance with these applicable codes and ordinances is adequate to achieve sufficient mitigation of long-term impacts and no further conditioning is warranted by SEPA policies.

Operational activities, primarily vehicular trips associated with the project and the projects' energy consumption, are expected to result in increases in carbon dioxide and other greenhouse gas emissions which adversely impact air quality and contribute to climate change and global

warming. While these impacts are adverse, they are not expected to be significant due to the relatively minor contribution of greenhouse gas emissions from this project.

DECISION

This decision was made after review by the responsible official on behalf of the lead agency of a completed environmental checklist and other information on file with the responsible department. This constitutes the Threshold Determination and form. The intent of this declaration is to satisfy the requirement of the State Environmental Policy Act (RCW 43.21.C), including the requirement to inform the public of agency decisions pursuant to SEPA.

[X] Determination of Non-Significance. This proposal has been determined to not have a significant adverse impact upon the environment. An EIS is not required under RCW 43.21.030(2) (c).

CONDITIONS

None required.

Signature: *Betty Galarosa for* Date: August 6 2015
Jerry Suder
Land Use Planning Supervisor
Department of Planning and Development

JS:bg

Suder/3014342 SW Avalon Wy SEPA ECA only plus Interpretation on units.docx

IMPORTANT INFORMATION FOR ISSUANCE OF YOUR MASTER USE PERMIT

Master Use Permit Expiration and Issuance

The appealable land use decision on your Master Use Permit (MUP) application has now been published. At the conclusion of the appeal period, your permit will be considered "approved for issuance". (If your decision is appealed, your permit will be considered "approved for issuance" on the fourth day following the City Hearing Examiner's decision.) Projects requiring a Council land use action shall be considered "approved for issuance" following the Council's decision.

The "approved for issuance" date marks the beginning of the **three year life** of the MUP approval, whether or not there are outstanding corrections to be made or pre-issuance conditions to be met. The permit must be issued by DPD within that three years or it will expire and be cancelled. (SMC 23-76-028) (Projects with a shoreline component have a **two year life.** Additional information regarding the effective date of shoreline permits may be found at 23.60.074.)

All outstanding corrections must be made, any pre-issuance conditions met and all outstanding fees paid before the permit is issued. You will be notified when your permit has issued.

Questions regarding the issuance and expiration of your permit may be addressed to the Public Resource Center at prc@seattle.gov or to our message line at 206-684-8467.

EXHIBIT 3

RFI 3014342

Hand Delivered to:

DPD Code Interpretation and Implementation Group
700 Fifth A venue, Suite 2000
PO Box 34019
Seattle, WA 98124-4019

Re: Request for Interpretation

Project #3014342
3050 SW Avalon Way

Dear Andrew S. McKim and the Code Interpretation Group:

On behalf of the residents who reside in the 32nd Ave SW Neighborhood (Neighbors Encouraging Reasonable Development), Paul Haury is submitting this Request for Interpretation for project 3014342/6327295, 3050 SW Avalon Way, that is currently being viewed as 14 Unit apodment structure instead of a 102 Unit Apartment in a MR zone that abuts a Single Family 5000 zone. Given existing codes and definitions, and the recent interpretation 13-002 for Project 3014912, we believe that based on the characteristics of the project as revealed by the Project Application, the SEPA Checklist and the submitted plans, that this project should be found to be a 102 Unit Apartment and be recommenced as such through full public Early Design Guidance and full SEPA Review. In short:

- The submitted application for Master Use Permit calls the structure a 14 unit Apartment Building with 102 bedrooms
- MUP application states the project as 7 levels with two levels having mezzanines
- The name for this project is as given by the developer who submitted the SEPA Checklist is appropriately named, "Avalon Apartments"
- The SEPA Checklist states the project as 14 dwelling units to occupy as a boarding house
- The SEPA Checklist states this project is intended to approximately house 102 individuals
- The SEPA Checklist states the maximum height of the structure is 70 feet
- The plans show the maximum height is
- The plans reveal that each individual will rent a small secure living areas within a secure building containing 7 levels with 2 levels having mezzanines
- The plans reveal here are 14 common kitchens
- The plans reveal that each individual bedroom will also contain 1) a food prep area with cabinets, 2) a refrigerator and 3) a sink, and 4) a bathroom that also has a separate sink; further that each room is identified by level and unit number

We too have followed the controversy surrounding the development of apodments like the entity of Harvard District Neighbors LLC, and are aware of the prevailing notion that the number of dwelling units is to be determined by the number of shared kitchen facilities located in the apodment

structure. We are aware of the practice of DPD allowing apodment developers to count only the number of full, shared kitchens as a way of minimizing the number of 'dwelling units' to thereby bring projects below the threshold for mandated SEPA and Design Review for applicable zones. In this case with project 3014342, it places the level below 20 which would have forced Design Review and SEPA Review.

This practice of understating the actual number of dwelling units has allowed developers to evade oversight and review that would balance proposed development with existing neighborhoods via Design Review and SEPA Review with specific regard to (WAC 197-11-444) (2) Built Environments. Design Review and SEPA Review are intended to promote compatible development and in turn prevent development that would otherwise harm natural and built environments.

We believe that the current approach by the DPD ignores DPD's existing published interpretation of the definition of a dwelling unit. We believe this approach leads to development that is excessive in the area of Height, Bulk and Scale in respect to their proposed environments. We believe that this approach leads to development that is incompatible from a design and fit perspective. We request that DPD confirm the existing SMCs and interpretations and apply the definition to the above mentioned application for the project at address 3050 SW Avalon Way and find it to be a structure with 102 dwelling units and not 14 units with 102 bedrooms.

The Seattle Municipal Code does not define a "kitchen." Rather, reference is made to the definition of a "food preparation area." Food preparation areas are included in the definition of a dwelling as one of a number of factors to be viewed in establishing the existence of a dwelling unit.

SMC 23.84A.008 defines a dwelling unit as follows:

> "Dwelling unit" means a room or rooms located within a structure, designed, arranged, occupied or intended to be occupied by not more than one household as living accommodations independent from any other household. The existence of a food preparation area within the room or rooms shall be evidence of the existence of a dwelling unit.
>
> (Emphasis added.)

The existence of a "food preparation area" is thus evidence of the existence of a dwelling unit but does not, by itself, determine the number of units in a structure.

SMC 23.84A.012 defines a food preparation area as follows:

> "Food preparation area" means a room or portion of a room designed, arranged, intended or used for cooking or otherwise making food ready for consumption.
>
> (Emphasis added.)

The code does not contain a definition for a housekeeping unit.

With respect to the above application, the following facts demonstrate the existence of multiple dwelling units as opposed to bedrooms:

- Each "dwelling unit" (referred to as a bedroom by the applicant) within the overall structure is intended to be occupied by one person who is unrelated to the others;
- Each "dwelling unit" (referred to as a bedroom by the applicant) is intended as a living accommodation independent of the other households. Each room is separately lockable and identifiable;
- While a larger kitchen is available for all, each individual "dwelling unit" has a (probable microwave oven,) a refrigerator, a sink and cabinets (separate from and in addition to the bathroom sink). Thus, each "dwelling unit" contains "a portion of a room ... intended for cooking or otherwise making food ready for consumption." There is no question that each unit contains its own food preparation area with refrigerator, sink and cabinets.
- The shared kitchens establish the existence of *at least* fourteen dwelling units. The existence of shared kitchens cannot obviate the existence of the food preparation areas within each of the individual units and alone are not dispositive as to the number of dwelling units in the structure.

This analysis finds support in a Official Code Interpretation 1983-7, a copy of which is included herein. This interpretation, which remains in full force and effect, defines a dwelling unit for code enforcement purposes. While some of the definitions have since be modified in insignificant ways, the interpretation remains in place.

> Interpretation 1983-7 provides:
> "Existence of one and/or several of the following elements shall be considered, evidence of the existence of more than one dwelling unit;
>
> j. Additional food preparation areas, including some combination of the following features: stove, refrigerator, kitchen cabinets, microwave oven, hotplate, sink, dishwasher.

Under the above language, the existence of any one of the factors listed shall be considered as evidence of the existence of a dwelling unit. Three separate indicia confirm the existence of a food preparation area in each room. Other indicia of separate dwelling units listed in the Interpretation include:

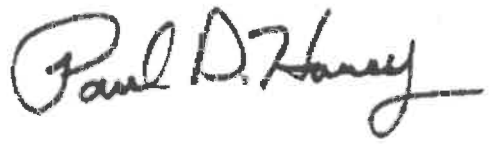
> c) Lockable interior doors that can exclude a portion of the dwelling unit from access to the entire building.
> d) Separate lockable entrance to rooms or areas which are so separated from other rooms or areas by key locks . . .
>
> e) Number of door signaling devices.
>
> f) Occupancy for the premises by more than one separate family, independent from any other family, and using any of the facilities listed herein.
>
> g) Existence of rental agreements or leases for a portion of the ... dwelling other than permitted "lodger" agreements.
>
> (Emphasis added.)

The above code language and DPD's own controlling Interpretation establish the manner in which the number of dwelling units in an apodment structure is to be determined. This interpretation should be

applied to the above application and this 102 "dwelling unit" structure should be subject to Design Review and SEPA Review.

Sincerely and submitted on July 3rd, 2013,

Paul Haury



On behalf of Neighbors Encouraging Reasonable Development
www.SeattleNERD.org
206-714-6113
4115 32nd Ave SW
Seattle WA

EXHIBIT 4

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

NEIGHBORS ENCOURAGING REASONABLE DEVELOPMENT

from a decision and interpretation of the Director, Department of Planning and Development

Hearing Examiner Files:
MUP-14-006(DR,W)/ S-14-001

Department Reference:
3013303

Introduction

The Director of the Department of Planning and Development issued a SEPA Determination of Non-Significance and design review approval for construction of a multifamily residential structure, and the Appellant exercised its right to appeal the decisions. The Appellant also requested a Land Use Code interpretation related to the proposal and appealed the Director's interpretation issued in response.

The appeal hearing was held on September 30 and October 1, 2, and 17, 2014, before the Hearing Examiner (Examiner). The Appellant, Neighbors Encouraging Reasonable Development, was represented by Peter J. Eglick and Jane Kiker, attorneys-at-law; the Applicant, Northlake Group LLC, was represented by G. Richard Hill, attorney-at-law; and the Director, Department of Planning and Development, was represented by William K. Mills, Land Use Planner Supervisor. The Examiner subsequently visited the site. The parties submitted written closing arguments on November 7, 2014, and the record closed on November 12, 2014 with the parties' submission of responses to closing arguments.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. After considering the evidence in the record and reviewing the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The subject site is addressed as 3078 SW Avalon Way and is located between SW Genesse and SW Andover/Yancy Streets, within the West Seattle Junction Hub Urban Village. It is bounded on the west by a 16-foot alley, which provides vehicular access to the property. The site is 19,196 square feet in size and is currently developed with two one-story apartment buildings on the north and a single family residence and garage on the south.

2. The site slopes down approximately 33 feet from the southwest corner to the northeast corner and includes a mapped Steep Slope Environmentally Critical Area. The Department approved the Applicant's request for a limited steep slope exemption pursuant to SMC 25.09.180.B.2.a and B.2.b.

3. The site is zoned Midrise (MR) with a base height limit of 60 feet. Property to the north, south and east is also zoned MR and is developed with two- to six-story multifamily residential buildings

and some older one- to two-story single family residences. The alley to the west sits uphill of the site. Property to the west of the alley fronts 32nd Avenue SW. It is zoned Single Family 5000 and developed with one- and two-story residential structures of mixed style and vintage. The lots slope up to the west, and most of the residences and accessory structures were constructed above the alley grade. This small pocket of single-family zoning and development is separated from adjacent single-family zoning and development to the west by the West Seattle Bridge, the only connection being a pedestrian walkway. *See* Exhibit 21.

4. The 1999 West Seattle Junction Hub Urban Village Neighborhood Plan includes a section on "Single Family Zones," which provides, in part, that

> [m]aintaining the single-family character of West Seattle's neighborhoods has been a "battle cry" during the neighborhood planning process ... There are three pockets of single-family zoning within the [Urban Village] boundaries: ... along 32nd Avenue SW.
> Goal: Protect the character and integrity of the existing Single Family Areas.
> Recommendation: Protect the character and integrity of existing Single Family Areas.

The quoted language is followed by a map that highlights several areas including the single-family-zoned property along 32nd Avenue SW. Exhibit 54 at 40.

5. The West Seattle Junction Neighborhood Plan adopted by the City Council as part of the City's Comprehensive Plan ("Adopted Neighborhood Plan") does not include the quoted language or the map from the 1999 Neighborhood Plan. Instead, under "housing & land use policies," it includes WSJ-P13, "Maintain the character and integrity of the existing single family areas."

6. SW Avalon Way is classified as a minor arterial street and is a major transit street. SW Genesee Street is classified as a planned arterial street to the west of its intersection with SW Avalon Way; east of the intersection, it is classified as a collector arterial. Thirty-second Avenue SW is classified as a residential access street and, like many residential streets in the city, has one travel lane between two lines of parked cars.

7. There are two transit stops within 1,340 feet of the subject site. One is located to the south at the intersection of SW Avalon Way and SW Genesee Street (the Genesee stop"), and the other is located to the north at the intersection of SW Avalon Way and SW Yancy Street ("the Yancy stop")[1].

Proposal

8. The proposal is for a seven-story, 102-unit multifamily structure with below-grade parking for 59 vehicles. The structure would be approximately 55 ½ feet high as measured from average grade. The west façade would be 44 to 51 feet in height above the alley grade and would show a maximum of five stories. The east façade along SW Avalon Way would show seven stories. *See* Exhibit 15 at 12 and 14. Vehicle access to parking would be via both the alley and SW Avalon Way.

[1] SW Yancy Street becomes SW Andover Street west of SW Avalon Way.

9. The Applicant's traffic consultant prepared a parking utilization and traffic study for the proposal dated February 5, 2013 ("traffic study"). Exhibit 41. The traffic study was revised and supplemented in response to several correction notices from the Department. *See* Exhibits 42, 43 and 44. The traffic study estimated peak parking demand for the proposal and determined on-street parking utilization within 800 feet of the project site. The Department has long utilized 800 feet as the distance people are generally willing to walk from parking to their destination.[2] The traffic study indicated that on-street parking utilization was at approximately 69%, and that the spillover parking of 33 vehicles generated by the proposal would lead to approximately 167 of the available 193 on-street spaces being occupied, for a parking utilization rate of 87%.

Design Review

10. The Southwest Design Review Board ("Board") held an Early Design Guidance ("EDG") public meeting on the proposal on September 13, 2012, at which they heard the Applicant's analysis of the site and proposal as well as comments from the public. The architect showed massing options that included both the proposal and a similar project proposed on adjacent property (3062 SW Avalon Street), which was going through a separate design review process. Exhibit 13. The adjacent project was subsequently cancelled. The public comments at the EDG meeting included concerns about the proposal's adjacency to a single family zone and resulting height, bulk and scale impacts, noise and visual screening of the courtyard along the alley, and other issues.

11. The Appellants, who are neighboring property owners in the adjacent single-family zone, submitted written comments in advance of, and following the Board's EDG meeting. The comments addressed the height and scale of the proposal, parking impacts, and safety in the alley. *See* Exhibits 2, 33-35, 37 and 38. The Appellants asked that the proposed structure be reduced to four stories on the west façade, at the alley, to reduce height and scale impacts.

12. The Director informed the Board about applicable language in the Adopted Neighborhood Plan, the Guidelines for Multifamily and Commercial Buildings ("Citywide Guidelines"), and the West Seattle Junction Design Guidelines ("West Seattle Guidelines"), but instructed the Board that it could not change the zoning/allowed height on the site, and that reducing the structure by one story was not an option.

13. The Board's early design guidance identified certain guidelines in the Citywide Guidelines and the West Seattle Guidelines as being of highest priority for the project. Among the Guidelines the Board called out were A-4, "Respect for Adjacent Sites," with the direction to design the courtyard and roof terraces to buffer adjacent balconies and the backyards across the alley, and D-8, "Treatment of Alleys," with direction that emphasized adequate lighting and security along the alley "through good design and 'eyes on the alley' strategies." The Board "also requested a full length, detailed and dimensioned elevation of the alley elevation showing the parking wall condition and materials, including landscaping and courtyard screen design." Exhibit 4 at 6.

14. In addition, the Board identified Guideline B-1, "Height, Bulk and Scale," as a guideline of highest priority and discussed the topic at length. Exhibit 4 at 5. They supported placing the

[2] The Department's Senior Transportation Planner testified that the 800 foot figure is based on a provision in the Land Use Code that specifies 800 feet as the maximum distance allowed for offsite parking.

courtyard on the west to reduce bulk along the alley and adjacent single-family zone. The Board stated that stepping back the upper stories on all sides was warranted, particularly the west side facing the single-family zone. They also suggested shortening the length of the north wall to reduce bulk toward the alley. *Id.* Finally, the Board reviewed and discussed several development standard departures requested by the Applicant.

15. When Board members begin their service on the Design Review Boards, they receive coaching from the Department on the need to visit the site for any application they are considering. The Department's template for minutes of the EDG meeting recites that the Board visited the site, but that is disputed by members of the Appellant group, who noted that some of the Board members' comments indicated that they were not familiar with the site. The Director does not confirm that each Board member has made a site visit. Nor is it clear from the record that all Board members received or reviewed written public comments on the application. The Director did ask the Board members to review the website for the project and to read the summary of public comments in his brief reports sent to them in advance of each meeting. *See* Exhibit 64.

16. The Applicant filed a MUP application on February 27, 2013. A change to the property's zoning, which took effect before the Board's Initial Recommendation meeting, eliminated a 15 foot bonus height allowance, requiring that the project's height be reduced to comply with the 60 foot maximum height limit for the MR zone.

17. The Board's Initial Recommendation meeting occurred on November 21, 2013. The Board took public comment, which included statements that the proposed structure exceeded the floor area ratio ("FAR") allowed by the Code. Board members then questioned the Director and the Applicant's architect about the FAR calculations and were told the structure was several hundred feet below allowable FAR.[3]

18. The Board reviewed the Applicant's design packet, exhibit 14, which showed the courtyard recessed below the alley grade, with buffers placed at the alley edge and roof deck to shield adjacent properties from view. The structure was shown as stepped back on all sides, including the top two floors in the area closest to the alley, and the building was recessed into the site. Lighting was included along the alley edge for security. The Board gave additional direction on the planted privacy screen along the alley and agreed that allowing a second vehicle access from SW Avalon would reduce impacts on the alley. However, the Board asked the Applicant to study two options to further reduce the building's height impacts: 1) "reduce the current floor-to-floor heights to lower the top parapets 3-5 ft.;" and 2) "study pushing the parking deeper into the site, lowering the entire building". Exhibit 5 at 7. The Board also asked for additional details on the alley lighting, and additional studies to reduce the height and size of the parking vent box as well as a determination on whether it could be relocated to be less visible.

19. The Board's Final Recommendation meeting took place on January 16, 2014. The Board again took public comment and reviewed the Applicant's design packet. Exhibit 15. The Applicant noted

[3] Before it was presented to the Board, the proposal passed zoning review, in which Department staff determines whether a project meets Land Use Code development standards, including FAR requirements. Department procedures include a subsequent zoning review prior to issuance of the MUP, which has not yet occurred.

that the tree species for the buffer along the alley had been changed to one that would maintain leaves longer and have a mature height that would better obscure the building. The Board agreed with the change and recommended a condition specifying the exact number and caliper of the trees at installation. The Applicant provided the requested parking study, and the Board agreed that it was infeasible to reduce the parking level further without creating a "moat" condition for the lower part of the building and while still maintaining two separate access points. The Board supported the Applicant's reduction in floor-to-floor height that produced a structure reduction of just over 3 feet, the use of more residential materials on the alley façade in response to guidance at the Initial Recommendation meeting, the relocation of the parking exhaust to the northwest corner of the structure, and changes in lighting along the alley. *See* Exhibit 15 at 12.

20. The Board members present at the Final Recommendation Meeting unanimously recommended that the Director grant the departures requested by the applicant that would allow access to the structure from SW Avalon Way as well as from the alley, and would increase the slope of the driveways, which allowed the building to be recessed further into the ground to reduce its height. The Board also recommended approval of the design subject to conditions related to the property line trees and revisions to a green screen wall.

Director's Review and Decision

21. The Director reviewed the Board's recommendations and determined that they did not conflict with applicable regulatory requirements and law, were within the Board's authority, and were consistent with the design review guidelines. The Director therefore issued design review approval for the proposal with the Board's recommended conditions.

22. Following a public comment period in mid- 2013, the Director reviewed the environmental impacts of the proposal and issued a determination of non-significance ("DNS") pursuant to SEPA, concluding that the proposal was not likely to have more than a moderate adverse impact on the environment. The Director's environmental analysis is found in Exhibit 1 at 13-19.

23. Because the proposal went through design review, with numerous adjustments that addressed the transition between the multifamily and single-family zones, the Director determined that additional mitigation of height, bulk and scale impacts pursuant to SEPA was not warranted.

24. In considering the impacts of the proposal on parking, the Director reviewed the traffic study and determined that although the spillover of 33 vehicles from the proposal would result in a street parking occupancy rate of 87%, "parking spaces would be available in the area but could be slightly harder to find at peak times." Exhibit 1 at 17. The Director also considered the impacts of a project 300 feet north of the subject proposal, at 3050 SW Avalon Way, that provided no off-street parking and was then under permit review. *See* Exhibit 9. The Director estimated that 3050 SW Avalon Way would generate a spillover parking demand of approximately 36 vehicles and that approximately two-thirds of them would park within the 800-foot parking study area for the proposal. This would result in a cumulative parking demand of approximately 191 vehicles, two vehicles below the identified parking capacity of 193 spaces. The Director noted that this could result in additional circulation "at peak times as drivers search for parking, as any particular block front might be at 100% capacity," and that the search for available spaces would also move beyond the 800-foot area. Exhibit 1 at 18.

25. The Director determined that the cumulative impact of these two projects within 300 feet of each other on SW Avalon Way would result in probable adverse impacts on parking. However, the Director reviewed the transit schedule for the Genesee Stop on the Metro Transit website, determined from that review that SW Avalon qualified as a frequent transit service street, and noted that the subject proposal has a walking distance of 360 feet from the Genesee Stop. Therefore, the Director found no authority under the City's SEPA policy on parking to require mitigation for parking impacts. *See* Finding 48.

26. In addressing cumulative parking impacts, the Director did not consider the impacts of two other nearby multifamily projects located, respectively, at 3266, and 3268 SW Avalon Way. *See* Exhibits 7 and 8. The boarding house (microhousing) project at 3266 SW Avalon Way was given final approval in June of 2014, after completion of the traffic study for the subject proposal, *see* exhibit 8, but the traffic study was not updated to account for the actual parking impacts of that project. Nor did the Director include an estimate on spillover parking from that project, or for the microhousing project at 3268 SW Avalon Way, in the cumulative parking impacts analysis for the subject proposal.

27. When the Appellant raised the issue of the parking impacts of 3266 and 3268 SW Avalon Way at hearing, the Director agreed that 3268 could create some spillover parking within the 800-foot "parking shed" for the subject proposal but did not give a specific spillover estimate. The Director estimated that approximately 10 of the projected spillover of 40 vehicles for 3066 would park within the proposal's parking shed. Thus, with the proposal and the projects at 3266 and 3268 SW Avalon Way, parking within 800 feet of the proposal would be at least at 104 % of capacity. The Director characterized this parking impact as "moderate," and testified that it would likely result in people going a block or two further to look for parking or, over time, would result in people living in the neighborhood deciding not to have a car, or a second car.

28. The Appellant's estimates of the likely distribution of parking associated with the proposal plus the project at 3050 SW Avalon Way, addressed in the Director's decision, and the projects at 3266 and 3268 SW Avalon Way, were higher. The Appellant's estimate utilized the same number of cars per unit used by the Director but, based on an analysis of actual neighborhood characteristics and resultant available parking, assumed a greater percentage of spillover parking into the 800-foot parking shed for the proposal than was assumed by the Director. This resulted in an estimated parking utilization of up to 120%, depending upon how many of the three nearby projects were included in the calculation.[4] *See* Exhibit 59. The Appellant's estimates were not refuted.

Appeal and Interpretations

29. The Appellant filed a timely appeal of the Director's decisions and the Director's interpretation concerning the application of several parts of the Land Use Code to the proposal.

---

[4] The Appellant also performed a parking utilization study on October 14, and 15, 2014 in accordance with the instructions included in TIP 117. It was based on current parking counts and included 3266 SW Avalon Way in its built condition. The study shows a current parking utilization rate of 89% and that the spillover parking from the proposal would increase the rate to 109%. With the spillover parking from 3050 SW Avalon Way, the rate would increase to 121%, and spillover from 3268 SW Avalon Way would increase it to 132%. Exhibit 82. Neither the parking study nor its conclusions were refuted.

30. On July 11, 2014, the Director issued Land Use Code Interpretation 14-005. The Director concluded that the FAR calculations for the proposal required some adjustment, but that the proposal complied with the Code's FAR requirements, which limited the total floor area to 3.2 times the total lot area of 19,196 square feet. Exhibit 17 at 2-8. The Director also concluded that the proposal complied with established height standards for the MR zone and met the Code criteria for a limited steep slope exemption. Exhibit 17 at 9-11 and 13. The Director declined to issue interpretations on three other issues raised by the Appellant that were procedural in nature. Exhibit 17 at 11-13.

31. After depositions were noted in this case, the Director reviewed the proposal's FAR more closely. On July 17, 2014, the Director issued a Supplemental Land Use Code Interpretation 14-005, in which the Director concluded that the proposal exceeded allowable FAR limits by 2,247 square feet, and that the FAR calculations on Plan Sheet A0.04 required revision to account for additional non-exempt floor area on Levels 1 and 2 of the proposed structure. Exhibit 18 at 3 and 9. *See also* Exhibit 73 and attachment. Under the Code, the exempt portions of floor area are "all underground stories," SMC 23.45.510.A.1, and "portions of a story that extend no more than 4 feet above existing or finished grade, whichever is lower, excluding access". SMC 23.45.510.E.

32. After several informal consultations within the Department, the Director determined that the revisions required for the proposed structure to meet the Code's FAR requirements would not change the design to an extent that additional Board review was required.

33. On July 24, 2014, the Applicant submitted revised plans that show revisions to the existing grade at the structure's north and south elevations and revised FAR calculations. Exhibit 74, sheets A0.04a, A0.04b and A0.04c. The revisions resulted in a side window being removed from a unit on the south end of the structure on level 1, and the sills on the side windows in a unit on the north end of the structure on the level 1 being raised several feet. *See* Exhibit 74, sheets A0.04c and A0.07.

34. On August 1, 2014, the Director issued an Addendum to Supplemental Land Use Code Interpretation 14-005, in which the Director concluded that the changes brought the proposal into compliance with the Code's FAR requirements.

35. Two architects agreed that the change in the FAR was a material issue that had design implications within the purview of the Board. Vlad Oustimovitch, an architect with 15 years of experience on the Design Review Board, was a member of the Board at the Initial Recommendation meeting on the proposal. In his opinion, the reduction in the proposal's FAR was significant, and the proposal should have been returned to the Board to deal with its design implications. He testified that the amount of the FAR reduction was equivalent to several units of housing, that the Board felt constrained by the Department's instructions to retain all the proposal's Code-allowed density, and that the Board would likely have used the required reduction in square footage to further reduce the height, bulk and scale of the structure instead of simply adjusting the grade at the north and south ends of it as the Applicant did. Thomas Eanes, an architect with considerable experience before design review boards, confirmed the FAR reduction's implication in terms of units, and both architects emphasized that the Board had given close attention to issues of fenestration and window size in the areas affected by the grade change made in response to the faulty FAR calculations.

Applicable Law

36. The purpose of design review is to "[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods while allowing diversity and creativity". SMC 23.41.002.A.

37. The Citywide Guidelines and Council-approved neighborhood design guidelines "provide the basis for Design Review Board recommendations and City design review decisions". SMC 23.41.010.

38. SMC 23.41.014 describes the design review process. "Based on the concerns expressed at the early design guidance public meeting or in writing to the Design Review Board the Board shall identify ... those guidelines of highest priority to the neighborhood. The Board shall incorporate any community consensus regarding design, expressed at the meeting into its guideline priorities, to the extent the consensus is consistent with the design guidelines and reasonable in light of the facts of the proposed development." SMC 23.41.014.C.1.

39. "Projects subject to design review must meet all codes and regulatory requirements applicable to the subject site, except as provided in Section 23.41.012" concerning development standard departures. SMC 23.41.014.F.2.

40. The Director must consider the Board's recommendation. If four or more members of the Board agree to a recommendation, the Director "shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval," unless the Director concludes that the recommendation inconsistently applies the design review guidelines, exceeds the Board's authority, conflicts with SEPA conditions or other applicable requirements, or conflicts with state or federal law. SMC 23.41.014.F.3.

41. Citywide Guideline B-1 on height, bulk and scale reads as follows:

> Projects should be compatible with the scale of development anticipated by the applicable Land Use Policies for the surrounding area and should be sited and designed to provide a sensitive transition to near-by less-intensive zones. Projects on zone edges should be developed in a manner *that creates a step in perceived height, bulk and scale between the anticipated development potential of the adjacent zones.*

Exhibit 32 at 22 (emphasis added). The Guideline then gives an extensive explanation on how it is to be applied:

> This guideline states the City's SEPA ... Policy on Height, Bulk and Scale. Development projects in multifamily and commercial zones may create substantial adverse impacts resulting from incongruous height, bulk and scale. For projects undergoing design review, the analysis and mitigation of height, bulk and scale impacts will be accomplished through the design review process. *Careful siting and design treatment based on the techniques described in this and other design guidelines will help to mitigate some height, bulk and scale impacts; in other cases, actual reduction in the height, bulk and scale of the project may be necessary to*

> *adequately mitigate impacts. Design review should not result in significant reductions in the project's actual height, bulk and scale unless necessary to comply with this guideline.* (Underline original)
>
> Height, bulk and scale mitigation may be required in two general circumstances:
> 1. *Projects on or near the edge of a less intensive zone.* A substantial incompatibility in scale may result from different development standards in the two zones and may be compounded by physical factors such as large development sites, slopes or block orientation.
> 2. Projects proposed on sites with unusual physical characteristics such as ... topography where buildings may appear substantially greater in height, bulk and scale than that generally anticipated for the area.

Id. (Emphasis added.) Guideline B-1also includes factors to be considered in analyzing height, bulk and scale impacts and examples of how such impacts can be mitigated. *Id* at 23-26.

42. The West Seattle Guidelines do not expressly carry forward the Adopted Neighborhood Plan's policy commitment to maintain the character and integrity of the existing single-family areas. Instead, West Seattle Guideline B-1 states that

> [c]urrent zoning in the Junction has created abrupt edges in some areas between intensive, mixed-use development potential and less-intensive, multifamily development potential. In addition, the Code-complying building envelope of NC-65 (and higher) zoning designations permitted within the commercial core ... would result in a development that exceeds the scale of existing commercial/mixed-use development. More refined transitions in height, bulk and scale - in terms of relationship to surrounding context and within the proposed structure itself- must be considered.

Exhibit 65 at 7.

43. SMC 23.76.022 provides that appeals of Type II MUP decisions are to be considered de novo, and that the Examiner "shall entertain issues cited in the appeal *that relate to compliance with procedures for Type II decisions as required in this Chapter 23.76*, compliance with substantive criteria," and various determinations under SEPA. (Emphasis added.)

44. SMC 23.76.010.A provides that MUP applications "shall be made by the property owner, lessee, contract purchaser ... or by an authorized agent thereof."

45. SMC 25.05.330 directs that, in making a threshold determination under SEPA, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact ...." "Probable" means "likely or reasonably likely to occur...." SMC 25.05.782. "Significant" means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." SMC 25.05.794. If the Director determines that there will be no probable, significant adverse environmental impacts from a proposal, a DNS is required. SMC 25.05.340 A.

46. The SEPA Overview Policy provides, in part, that "[w]here City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation subject to the limitations set forth in subparagraphs D1 through D7 below. Unless otherwise specified in the Policies for Specific Elements of the Environment (SMC Section 25.05.675), denial or mitigation of the project based on adverse environmental impacts shall be permitted only under the following circumstances: ... 5. The project is located near the edge of the zone, and results in substantial problems of transition and scale or use which were not specifically addressed by the applicable City code or zoning." SMC 25.05.665.D.

47. The SEPA policy on height bulk and scale impacts provides that, subject to the overview policy, a decision-maker "may condition or deny a project to mitigate adverse impacts of substantially incompatible height, bulk and scale." However, it also provides that the Citywide Design Guidelines and approved neighborhood design guidelines "are intended to mitigate the same adverse height, bulk and scale impacts addressed in these policies. A project that is approved pursuant to the design review process is presumed to comply with these height bulk and scale policies. This presumption may be rebutted only by clear and convincing evidence that the height, bulk and scale impacts documented through environmental review have not been adequately mitigated." SMC 25.05.675.G.

48. The SEPA policy on parking impacts states that "[i]t is the City's policy to minimize or prevent adverse parking impacts associated with development projects. Subject to the overview and cumulative effects policies ... the decision maker may condition the project to mitigate the effects of development in an area on parking; provided that ... "no SEPA authority is provided for the decision maker to mitigate the impact of development on parking availability for residential uses located within ... portions of urban villages within 1,320 feet of a street with frequent transit service, measured as the walking distance from the nearest transit stop to the lot line of the lot". SMC 25.05.675.M. Outside this area, "parking impact mitigation for multifamily development ... may be required only when on-street parking is at capacity, as defined by the Seattle Department of Transportation or where the development itself would cause on-street parking to reach capacity as so defined." *Id.*

49. There is no evidence in the record of an SDOT definition for when on-street parking is at capacity. The Department has a longstanding practice of considering 85% utilization to be the point at which parking is at capacity and mitigation should be considered..

50. "Transit service, frequent" is defined as "transit service headways in at least one direction of 15 minutes or less for at least 12 hours per day, 6 days per week, and transit service headways of 30 minutes or less for at least 18 hours every day." SMC 23.84.038. The Code does not define "headway". Webster's Third New International Dictionary defines it as "the time interval between two vehicles traveling in the same direction on the same route". The Director confirmed at hearing that this definition was consistent with that used by the Director.

51. Director's Rule 11-2012 ("DR 11-2012") addresses parking reductions based on frequent transit service. The purpose of the rule is stated as follows:

> to define the Department's requirements for demonstrating that a development site is eligible to be developed without parking (pursuant to 23.50 4.015 Table A, Row J or Table B, Row M) or qualifies for a 50 percent reduction in the amount of required

parking (pursuant to 23.54.020.F) due to the site's location within walking distance of frequent transit service (FTS).

DR11-2012 states that "[m]ultiple routes and multiple transit stops may be identified to provide the level of transit at frequent transit service levels." It also provides that averaging may be used in measuring headways, stating that the following must be identified:

> a. For a minimum of 12 hours, six days per week, headways of 15 minutes or less (as headways may vary in a 12 hour period, *the average headways in the 12 hour period, per day, shall be interpreted to meet the standard*); and
>
> b. For a minimum of 18 hours per each day of the week, headways of 30 minutes or less (*as headways may vary in an 18 hour period, the average headways in an 18 hour period, per day, shall be interpreted to meet the standard).*

52. The SEPA cumulative effects policy provides, in relevant part, that "[t]he analysis of cumulative effects *shall include* a reasonable assessment of ... [t]he present and planned capacity of such public facilities as ... parking areas to serve the area affected by the proposal [and the] demand upon facilities ... of present, simultaneous and known future development in the area of the project or action." SMC 25.05.670.B.1 (emphasis added). "2. Subject to the policies for specific elements of the environment ... an action or project may be conditioned or denied to lessen or eliminate its cumulative effects on the environment: a. When considered together with prior, simultaneous or induced future development; or b. When, taking into account known future development under established zoning, it is determined that a project will use more than its share of present and planned facilities ...." SMC 25.05.670.B.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director's decisions and Land Use Code interpretation. SMC 23.76.022 C.6 and C.7; SMC 23.88.020.G.5. The Appellant bears the burden of proving that the Director's design review decision, DNS, and interpretation were "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Examiner, on review of the entire record, and in light of the public policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made. *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

2. The Applicant's written closing argument asked that the Examiner take official notice of several documents that related to the issues of structure height and frequent transit service, and incorporated those documents into the Applicant's argument. The Appellant asked that the Examiner not consider the new documents or associated argument because their submittal failed to comply with the Hearing Examiner Rules of Practice and Procedure, and the documents were available to the Applicant during the hearing but were not offered then. The Appellant's motion is GRANTED, and the Examiner has not considered the offered documents and related argument. The documents were available to the Applicant prior to and during the hearing, which continued over several days, and the Applicant did not show good cause for not offering them at that time.

3. The Appellant alleges that the proposal does not meet the requirements for an application under SMC 23.76.010 in that when the application was filed, the Applicant was not the "property owner, lessee, contract purchaser ... or an authorized agent thereof." The parties submitted a series of documents on this issue, exhibits 46-53. The documents demonstrate that despite a disagreement between the property owners and the Applicant over the effect and enforceability of their purchase and sale agreement, the Applicant is the authorized agent of the owners for purposes of the MUP application. *See* Exhibit 53. There is no error here.

4. The Appellant asserts that the Code's "procedural prerequisites" for the design review process set forth in Chapter 23.41 SMC were not met. Consequently, according to the Appellant, the Board acted outside its authority in making its recommendation on the proposal and thus, no recommendation within the Board's authority was made for the Director to review and adopt. The Appellant points to items such as the Board member site visit requirement, SMC 23.41.014, the mandatory Board review of written public comments, SMC 23.41.014.E.1.c, and the requirement that projects subject to design review meet all codes and regulatory requirements with some exceptions, SMC 23.41.014.F.2. However, procedural requirements under Chapter 21.41 are not within the Examiner's jurisdiction in an appeal of a Type II Director's decision. *See* SMC 23.76.022.C.6.

5. To the extent that SMC 23.41.014.F.2 could be construed to be a "substantive requirement" under SMC 23.76.022.C.6, it did not affect the validity of the Board's decision. It appears within the portion of SMC 23.41.014 that is addressed to the "Director's Decision," not within the provisions governing actions required of the Board. Further, the subsection does not state at what point in the application process a project must meet all code requirements. Design review and the MUP process run in parallel. This subsection merely states that except as allowed through the departure process, projects that are subject to design review must nonetheless meet code and regulatory requirements at some point prior to the Director's decision.

6. The Appellant challenges the design review decision as exceeding the Board's authority and being fundamentally inconsistent with the applicable design guidelines and SEPA. The Appellant is correct in that the Director's design review decision, which adopted the Board's recommendation, reflects a clearly erroneous interpretation of the Board's authority under Design Guideline B-1 on height, bulk and scale. Although the Director pointed the Board to the appropriate Citywide and West Seattle Guidelines, the Director's instruction that reducing the structure by one story was not an option went too far. The language of the Guideline does not support the Director's narrow interpretation, and the explanation accompanying Guideline B-1 makes it clear that the Guideline is far more nuanced than the Board was led to believe. It must be remembered that in most cases, the design review process is also the City's process for mitigating height, bulk and scale impacts under SEPA. It may be unlikely that the Board would determine a one-story reduction was necessary for the proposal to comply with Guideline B-1. Regardless, the Board has the authority to do so and to recommend the reduction to the Director.

7. It is clear from the record that the Board struggled with the issue of compatibility between the proposal and the adjacent single-family neighborhood, yet felt constrained by the Director's emphasis on retaining all site development potential allowed under the Code. The Applicant and Director note that the proposal's building height was reduced by 3 feet 2 inches as a result of the design review process and recite other mitigation measures imposed by the Board to reduce bulk and

scale. However, one cannot know whether the Board would have recommended additional mitigation under Guideline B-1 had they been properly instructed on it. The matter must be remanded to the Director for a return to the Board to allow them to develop a recommendation based on accurate direction concerning Board authority under Guideline B-1.

8. The matter also must be returned to the Board for further consideration in light of the design implications of the required FAR reduction. There was conflicting testimony about the Board's concerns with windows in the areas affected by the changes in grade made to reduce the proposal's FAR. Nonetheless, as noted above, the Board was clearly searching for revisions that would increase the proposal's compatibility with the adjacent single-family zone. Therefore, the required reduction in the FAR was relevant to an area of primary importance to the Board, in that the reduction in square footage would have given them the opportunity to revisit the scale of the proposed structure. The remand to the Director will provide that opportunity.

9. The Appellant contends that the Director's DNS must be reversed because no mitigation was required for what the Appellant characterizes as significant adverse parking impacts. As noted, the Director described the estimated cumulative impacts of the proposal and the development at 3050 SW Avalon Way as "moderate," although under the Director's analysis, they would together increase the on-street parking occupancy rate to nearly 100%. This despite the fact that the Department has consistently recognized an 85% utilization rate as being the point at which mitigation should be considered. The Director's characterization of the parking impact did not change even when the Director was presented at hearing with the likely parking impacts of several other nearby pipeline projects that the Director had not considered.

10. On appeal, the Director must demonstrate actual consideration of relevant environmental factors before a decision was reached to issue a DNS, and must demonstrate that environmental factors were adequately considered "in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA ... Further, the decision to issue a [DNS] must be based on information sufficient to evaluate the proposal's environmental impact." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137 (2002) (citations omitted). The evidence in the record shows that the Director's analysis of cumulative parking impacts was incomplete in that it failed to consider the impacts of several nearby projects that would likely produce spillover parking into the 800-foot parking shed for the subject proposal.

11. Both the testimony at hearing and the Director's post-hearing briefing demonstrate also that the Director's *analysis of* parking impacts was improperly truncated in light of the restrictions on *imposing mitigation for* those impacts under the City's SEPA policy on parking. This constitutes clear error under SEPA, which requires compliance with both its procedural and substantive components. SMC 25.05.330 requires that the Director fully analyze the proposal's probable significant adverse environmental impacts. This includes a review of the proposal's impacts in context, including cumulative impacts. SMC 25.05.330.C. The question of whether an adopted SEPA policy would allow mitigation of adverse environmental impacts is not relevant to the analysis of those impacts. Nor is the question of whether or not a proposal would be consistent with City policy decisions on encouraging transit over automobile use *Cf.* SMC 25.05.330.E (SEPA threshold determination shall not balance beneficial and adverse impacts of a proposal).

12. The Appellant challenges the Director's conclusion that regardless of the proposal's parking impacts, the City's SEPA policy on parking prohibits the Director from requiring parking mitigation because the proposal is located within an urban village and is within 1,320 feet of a street with frequent transit service. The Appellant demonstrated at hearing that, contrary to the Director's assumption, the Genesee stop did not qualify as providing frequent transit service as that term is defined in SMC 23.84.038. The Director then related that in determining whether mitigation of identified parking impacts is prohibited under the SEPA parking policy, because of the availability of frequent transit service, the Director averages a transit route's headways, as allowed by DR11-2012. When the Appellant showed that the Genesee stop did not qualify as frequent transit service even if headways were averaged, the Director testified that the Yancy stop did. The Appellant objected to the change in the basis for the Director's determination on the availability of frequent transit service and was allowed time to prepare a response to the new information, including taking the deposition of the Department's Senior Transportation Planner. The Appellant renews the objection in its closing memorandum and urges the Examiner to summarily remand the matter for preparation and notice of a new Director's decision. However, the Director's actual decision, that frequent transit service was available, did not change, although the basis for the decision changed from one transit stop to another located a block away. In this instance, the Appellant has not shown that it was prejudiced by the change, and it does not require a remand of the decision.

13. The Appellant argues that, contrary to DR11-2012, the definition of frequent transit service in SMC 23.84A.038 "T" does not allow for averaging of a transit route's headways. Municipal ordinances and codes are subject to the rules used for construing statutes. *Spokane v. Fisher,* 110 Wn. 2d 541, 542, 754 P.2d 1241 (1988). A statute or ordinance is construed to give effect to legislative intent. *Blueshield v. State Office of Ins. Com'r.* 131 Wn.App. 639, 646-647, 128 P.3d 640 (2006). Where statutory language is plain and unambiguous, a reviewing body will not construe the statute but will determine the legislative intent from the words of the statute itself. A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable." *Agrilink Foods, Inc. v. Dep't. of Revenue,* 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (citations omitted). A reviewing body "'cannot add words or clauses to an unambiguous statute' but must apply the statute as written." *Blueshield v. State Office of Ins. Com'r. supra* at 647 (citations omitted).

14. As noted above, the Examiner gives substantial weight to the interpretation of the Director as the official charged with implementing the Land Use Code. However, a reviewing body does not defer to an agency interpretation that conflicts with the statute or ordinance itself. *Waste Management, Inc. v. Utilities and Transp. Com'n.*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 815, 828 P.2d 549 (1992). "Agencies do not have the authority to make rules which amend or change legislative enactments." *Washington Federation of State Employees v. State Personnel Bd.*, 54 Wn. App. 305, 308, 773 P.2d 421 (1989).

15. The definition of "Transit service, frequent" adopted by the City Council is meticulous and straightforward. It requires "transit service headways" [the time interval between two vehicles traveling in the same direction on the same route] "in at least one direction" "of 15 minutes or less" "for at least 12 hours per day," "six days per week," and "transit service headways" "of 30 minutes or less" "for at least 18 hours every day." SMC 23.84.038. The definition is not ambiguous. The Applicant argues that the definition is ambiguous because interpreting it as written could lead to a situation in which there would not be frequent transit service if a route had headways of 15 minute or

less during most of a 12 hour period but also had some headways of 16 minutes or more during the same period. This situation, according to the Applicant, would lead to absurd results because it would frustrate the City Council's intent to reduce reliance on the automobile and increase use of transit. However, it is just as likely that, in adopting the definition, the Council intended that SEPA mitigation for parking impacts be foreclosed for multifamily projects in urban villages only when nearby transit service meets the very specific criteria for consistent regularity that the Council spelled out in the definition. Had the Council intended that headways be averaged, it could have inserted the word "average" in two places within the definition to indicate that intent. It did not do so, and neither the Director nor the Examiner has the authority via statutory construction to add the word "average" to the term "headway" in the definition of frequent transit service. Doing so would change the clearly stated meaning and the impact of the definition. This can be accomplished only through legislation.

16. The Director's SEPA determination has been shown to be clearly erroneous, and it must therefore be reversed.

17. The Appellants challenge the validity of DR11-2012 due to what the Appellants cite as defects in the notice of the proposed rule as published in the *Daily Journal of Commerce*. However, this issue is moot in light of the above conclusions.

18. The appeal claimed that the Director's decision failed to address or mitigate probable significant adverse geotechnical impacts, but the Appellants withdrew this issue at hearing, and it is dismissed. The appeal also challenged the Director's interpretation that the proposal complied with the height standards for the MR zone, but the Appellant presented no evidence in support of this issue, and it is therefore dismissed.

Decision

The Director's design review decision is REVERSED, and the matter is REMANDED to the Director to return to the Board for the Board to review their recommendation, as discussed above, in light of: 1) accurate direction concerning the Board's authority under Design Guideline B-1; and 2) the requirement that the proposal's FAR be reduced by 2,247 square feet.

The Director's DNS is REVERSED, and the matter is REMANDED to the Director for a complete analysis of proposal's parking impacts, including cumulative impacts, and a revised SEPA determination if warranted. As discussed above, in determining whether SEPA mitigation is warranted for parking impacts, the Director shall apply the Code's definition of frequent transit service as it is written rather than averaging transit route headways.

Entered this 1st day of December, 2014.

Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

Appellant:
Neighbors Encouraging
Reasonable Development
c/o Peter J. Eglick or
Jane Kiker
1000 Second Avenue, Suite 3130
Seattle, WA 98104

Department Director:
Diane Sugimura, Director, DPD
700 Fifth Avenue, Suite 1900
Seattle, WA 98104

Applicant:
Northlake Group, LLC
c/o G. Richard Hill
701 Fifth Avenue, Suite 6600
Seattle, WA 98104

Subject: RE: Frequent Transit Service for Project 3014342 / 6327295 / 6129355 / 3006861

From: Amrhein, Seth (Seth.Amrhein@seattle.gov)

To: cburkhalterjr@yahoo.com;

Date: Thursday, February 12, 2015 9:49 AM

Thank you for the information. This aspect of the project will be reviewed by Christopher Ndifon, the zoning reviewer assigned to this project. I have forwarded your email to him.

Best Regards,

Seth Amrhein

206-386-1981

From: Charles Burkhalter Jr [mailto:cburkhalterjr@yahoo.com]
Sent: Wednesday, February 11, 2015 8:00 PM
To: Amrhein, Seth
Subject: Frequent Transit Service for Project 3014342 / 6327295 / 6129355 / 3006861

Seth:

I believe you are the DPD Planner for Project 3014342 / 6327295 / 6129355 / 3006861 - the proposed microhouse at 3050 SW Avalon Way.

Have you reviewed the applicant's analysis for meeting the requirements of frequent transit service, for purposes of the reduced parking exception?

When you do, you will notice that the analysis is incorrect - the bus stop at Yancy/Avalon fails the definition of frequent transit service on several occasions, as follows:

C Line (weekday) - 9:53am - 10:09am; 10:24am - 10:40am; 12:25pm - 12:41pm; 1:56pm - 2:12pm;

10:40am - 11:11pm. Five failures within the 12 hour window from 5:14am - 5:14pm.

21 (weekday) - 12:32pm - 12:48pm; 5:00pm - 5:17pm; 5:32pm - 5:49pm; Three failures within the 12 hour window from 6:09am - 6:09pm.

You will notice that the applicant is combining Route 21 and the C Line in the analysis, as meeting the "headway" requirement. This is contrary to the DPD application of "headways", defined by the DPD for this purpose as "the time interval between two vehicles traveling in the same direction on the same route." If you look at the route maps for both Route 21 and the C Line, you will notice that they do not travel on the same route.

This specific bus stop was ruled as failing the requirements of frequent transit service on December 1, 2014 in the recent Hearing Examiner Decision MUP-14-006(DR,W)/S-14-001. I have attached the decision for your convenience.

I will follow up with a call to discuss, but would expect the DPD to abide by the Hearing Examiner's ruling, and determine that this development does not qualify for the reduced parking exemption, as it currently fails the requirements for frequent transit service.

Sincerely,

Chuck Burkhalter Jr.