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7 BEFORE THE HEARING EXAMINER
8 FOR THE CITY OF SEATTLE

9 In the Matter of the Appeal of:

10 **MICHAEL MCQUAID, et. al.,**

11 from a decision and interpretation issued by the
12 Director, Seattle Department of Construction
13 and Inspections.

**HE File: MUP 16-005 (W)
S-16-003**

**DECLARATION OF COURTNEY A.
KAYLOR**

14 I, Courtney A. Kaylor, declare:

15
16 1. I am competent to testify and make this declaration based on my personal
17 knowledge. I am one of the attorneys for the Applicant Hewitt Architects.

18 2. Attached to this declaration are true and correct copies of the following
19 documents:

20 **Exhibit A:** Code Interpretation 16-001

21 **Exhibit B:** Letter from D. Bricklin to A. McKim, April 14, 2016.

22 **Exhibit C:** *In the Matter of Neighbors Encouraging Reasonable Development*, Hearing
23 Examiner File No. S-15-003, Order on Motion to Dismiss (October 14, 2015).

24 **Exhibit D:** *In the Matter of Alterra Condominium Homeowners' Association*, Hearing
25 Examiner File No. S-10-001, Order (August 11, 2010).
26
27

28 **MCCULLOUGH HILL LEARY, P.S.**

701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct. Executed this 26th day of April, 2016.

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5 _____
6 Courtney A. Kaylor

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28 **McCULLOUGH HILL LEARY, P.S.**

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EXHIBIT A

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

MICHAEL McQUAID, ET AL.

From a decision issued by the Director, Seattle
Department of Construction and Inspections

**Hearing Examiner File:
MUP-16-005(W), S-16-003**

**SDCI Interpretation No. 16-001
(SDCI Project No. 3023843)**

Background

This interpretation was requested by attorney David Bricklin on behalf of Michael McQuaid, et al., in conjunction with an appeal of a Master Use Permit decision, Project No. 3016702, relating to a proposed 40-story mixed-use development at 1613 Second Avenue. The interpretation request raises two issues: whether the ramps within the parking garage exceed the slope allowed under Seattle Municipal Code (SMC) Section 23.54.030 without meeting the criteria for variation from the slope standard, and whether SMC 23.54.040 “preclude[s] the current building design by failing to provide adequate space, access and pickup facilities for waste and recycling receptacles in the alley.” We understand this question to relate specifically to the placement and pick-up of waste materials in the alley, and have not included a detailed analysis of how other standards in Section 23.54.040 apply to this project. That said, activities in rights-of-way, including alleys, are largely regulated by the Seattle Department of Transportation according to the Street Use Code or other SDOT standards that are beyond the scope of what may be addressed in a Land Use Code interpretation.

Findings of Fact

1. The development proposed under Project No. 3016702 is a 40-story building with 177 residential units over 2,705 square feet of retail space. Parking for 145 cars is proposed on seven levels below grade and four levels above grade. The development site consists of the half-block bounded by Pine Street on the south, Stewart Street on the north, Second Avenue on the east and an alley on the west. The southerly portion of the site is developed with a building that is to remain in place. The new development is limited to the northern portion of the lot, approximately 8,500 square feet in area, at the corner of Second Avenue and Stewart Street. The site is in a DMC 240/290-400 (Downtown Mixed Commercial) zone.
2. The alley, as platted, is 16 feet wide, and the plans indicate that an additional two-foot dedication is required and proposed. Most of the alley frontage is occupied by three large entries. The first, nearest to Stewart Street, is the entry to the underground parking. The middle entry, approximately 13 feet wide, provides access to the waste and recycling storage area and a loading dock. The third is the entry to the above-grade parking levels. The portion of the ramp to the below-grade parking, immediately within the entry, has a slope of 20 percent. The same is

true of the portion of the ramp immediately off the alley through the third entry, leading to the above-ground parking. Beyond the entry areas the slopes of the aisles in the garages is variable, with lesser slopes in most areas where cars would need to maneuver in and out of spaces, and with slopes up to 20 percent in some other areas.

3. SMC Section 23.54.030.E provides:

E. Parking aisles

1. Parking aisles shall be provided according to the requirements of Exhibit C for 23.54.030. [Exhibit C for 23.54.030: Parking Aisle Dimensions omitted.]
2. Minimum aisle widths shall be provided for the largest vehicles served by the aisle.
3. Turning and maneuvering areas shall be located on private property, except that alleys may be credited as aisle space.
4. Aisle slope shall not exceed 17 percent provided that the Director may permit a greater slope if the criteria in subsections 23.54.030.D.3.a, 23.54.030.D.3.b and 23.54.030.D.3.c are met.

4. Section 23.54.030.D.3 provides:

3. Driveway slope for all uses. No portion of a driveway, whether located on a lot or on a right-of-way, shall exceed a slope of 15 percent, except as provided in this subsection 23.54.030.D.3. The maximum 15 percent slope shall apply in relation to both the current grade of the right-of-way to which the driveway connects, and to the proposed finished grade of the right-of-way if it is different from the current grade. The ends of a driveway shall be adjusted to accommodate an appropriate crest and sag. The Director may permit a driveway slope of more than 15 percent if it is found that:
 - a. The topography or other special characteristic of the lot makes a 15 percent maximum driveway slope infeasible;
 - b. The additional amount of slope permitted is the least amount necessary to accommodate the conditions of the lot; and
 - c. The driveway is still useable as access to the lot.
5. "Driveway" is defined at SMC 23.84A.008 as "that portion of a street, alley or private lot that provides access to, but not within, an off-street parking facility from a curb cut, and may include portions of the sidewalk."
6. "Aisle" is defined at SMC 23.84A.002 as "a passageway for vehicles within a parking garage or surface parking area, other than a driveway."
7. A departure was granted, through the design review process, allowing reduced aisle widths in places. A part of the justification offered for that departure, as reflected on the plans, was the fact that the parking is to be used solely by residents who will be familiar with the garage layout.
8. In a correction sheet dated November 6, 2015, Bradley Wilburn, the DPD zoning reviewer, asked the applicant to explain why the project qualifies for aisle slope in excess of 17 percent under

the criteria of subsections 23.54.030.D.3.a through 23.54.030.D.3.c. Sean Ludviksen of the Hewitt firm responded:

The site access (alley) cross slopes of approximately 7.6% at the north driveway and approximately 10% at the south driveway make 15% driveway slopes infeasible and no slopes are steeper than necessary to accommodate lot conditions. The driveway usability is achieved via crest and sag blends shown on A1.106. Aisle safety throughout is enhanced via mirror placement and high contrast painted marking locations outlined in association with DRB Departure #1.

9. The above-ground parking is proposed on Levels 3 through 6. The floor-to-floor heights on Levels 3, 4 and 5, as shown on Sheet A2.111 of the plans and elsewhere as well are 9'3", 8'8", and 8'8", respectively. The floor-to-floor height for most of the underground parking levels is 8'8".
10. The standards for solid waste and recyclable materials storage and access are in SMC 23.54.040. A copy of that section is appended to this interpretation.
11. According to the plan on Sheet T1.001, all of the trash and recyclable storage containers would be two-cubic-yard containers, with the exception of food waste containers, which would be 64-gallon or 96-gallon containers. There are approximately 231 cubic inches in a gallon, so a 96-gallon container would contain 22,176 cubic inches. There are 46,656 cubic inches in a cubic yard, so a 96-gallon container would contain about half of a cubic yard. The two-cubic-yard containers as depicted on the plans are approximately six feet wide.
12. The trash container diagram shows a total of four two-cubic-yard dumpsters for trash (three for residential uses and one for commercial uses). A total of six two-cubic-yard dumpsters are proposed for recycling (five for residential uses and one for commercial uses). Five 96-gallon food-waste containers are proposed, three for the residential units and two for the commercial uses.
13. By email dated April 8, 2016, Liz Kain of Seattle Public Utilities stated:

"I have spoken to Sean, the architect on the project and he has decided that there will be no compacted containers. The building maintenance people will bring the containers to the loading dock area. The contractor collect the containers (garbage, recycling and food waste) from that room. This will eliminate the need to put the containers in the alley. They (owners) may decide to put the food waste carts (2.5ft wide each) in the alley which would not take up the 13 foot space in the alley. This will allow them to have fewer containers, with multiple collections per week. Any question, let me know."

Conclusions

1. Passageways for cars within the building are properly regulated as aisles, rather than driveways, so they are generally subject to a slope limit of 17 percent rather than 15 percent. The allowance of a 20 percent slope in place is a modest deviation from the 17 percent standard.

The relatively small lot size and the unusual shape of the lot are both “special characteristics” of the lot that create unusual constraints for a parking garage. Providing greater slopes right off the alley helps to minimize how much of the ground level is used for parking access, freeing more area for desirable ground-level uses. Features such as mirrors are proposed, to help to ensure aisle safety.

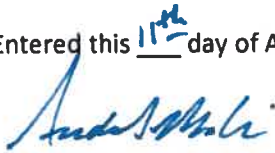
2. Because the site is tight, there is minimal circulation space on each level, and a fair amount of slope is needed in order to obtain reasonable ceiling height on each level. The floor-to-floor heights on most of the parking levels is 8’8”, which allows a modest ceiling height once floor construction is subtracted. The applicant reasonably concentrated the slope in areas that would not be used for backing out of parking spaces.
3. There is a reasonable basis for concluding that ramp slopes steeper than 17 percent in places is necessary for a garage on this site, due to the small size of the site. The additional amount of slope is modest, and appears to be the minimum necessary in order to achieve a reasonable ceiling height on each level, and minimize slope in areas where cars will be backing out of spaces. We see no basis for concluding that this modest increase in slope in limited areas would cause the garage not to be usable.
4. No more than two of the two-cubic-yard dumpsters would fit, in one row, across the 13-foot-wide area in front of the alley entrance to the trash storage area. A total of four dumpsters for trash are proposed, and another six for recycling. Even if trash and recycling pick-up were scheduled for different times, the recycling dumpsters would have to be placed three-deep in order to fit within the available 13-foot frontage. It is clear that placement of the dumpsters in the alley for pick-up would be impractical, as the appellants have suggested.
5. However, based on the communication from Seattle Public Utilities, the large dumpsters will not be stored in the alley, but rather will be staged for pick-up in the area immediately within the building, at times agreed-upon by that department and building representatives. The only waste containers that would be placed in the alley would be the five food-waste containers. These are 2.5 feet wide, so all five of them would fit across the available 13-foot entry.
6. SMC 23.54.040 includes standards governing minimum area for solid waste container storage, and access to the storage location. (It also provides that alternative measures may be approved, in consultation with Seattle Public Utilities under circumstances described in subsection 23.54.040.I.) A complete analysis of how those standards apply to the proposed trash storage room is beyond the scope of this interpretation, as the question raised was limited to the adequacy of the space, access and pick-up facilities in the alley. The provisions relating to pick-up activity in the alley are very limited. Under Section 23.54.040.F, collection locations may not be within a bus stop or within the right-of-way abutting a vehicular lane designated as a sole travel lane for a bus. A 21-foot overhead clearance is required for the collection vehicle. Under Section 23.54.040.G, direct access must be provided from the alley or street to the containers, and the pick-up location is required to minimize any blockage of pedestrian movement along the sidewalk or other right-of-way. If the pick-up location is on the planting strip, any required landscaping must be designed to accommodate the containers. The proposed pick-up location, based on the agreement between the project architect and the SPU representative, meets these standards: The collection location is within the trash storage area, immediately adjacent to and

directly accessible from the alley. It is not on a planting strip, within a bus stop or abutting a right-of-way solely designated for buses. No overhead projections are proposed in the alley, within the required 21-foot clearance. The larger dumpsters will not impede pedestrian movement along the alley, as they will not be stored in the alley. The food waste containers may be placed in the alley when pick-up is scheduled, but based on their size and number they would not impede pedestrian passage.

Conclusion

Ramps within the parking garages proposed in the building would exceed the 17 percent slope generally allowed by a modest amount in places. It is reasonably within the Department's authority to approve this minor deviation, as a Type I approval, based on the criteria of SMC 23.54.030.E and D.3. The Land Use Code, at SMC 23.54.040, provides standards for waste storage areas within a building or on a site, but it provides only minimal standards relating to how trash is to be stored within the right-of-way to await pick-up. This is within the province of Seattle Public Utilities (which manages solid waste pick-up) and the Seattle Department of Transportation (which regulates the use of rights-of-way). In this case, Seattle Public Utilities has reached an agreement with the project applicant as to how the waste pick-up for this building will be managed. Under that agreement, waste storage activity in the right-of-way would be minimized. The food-waste storage in the alley and the arrangement for pick-up of other waste, as described in SPU's email, is not inconsistent with the requirements of SMC 23.54.040.

Entered this 11th day of April, 2016.



Andrew S McKim
Land Use Planner—Supervisor
Seattle Department of Construction and Inspections

WASTE AND RECYCABLE MATERIALS:

NUMBER OF DUMPSTERS ASSUMES BI-WEEKLY PICK-UP.

ACTUAL COMMERCIAL USES TBD.

NON-RESIDENTIAL USES CAN SHARE SPACE FOR TRASH NOT RECYCLING
RETAIL SALES & RESTAURANT - (2) 64 GALLON FOOD WASTE CONTAINERS

RESIDENTIAL USES:
177 UNITS

RESIDENTIAL TRASH:
 $177 / 10 = 17.7$ CUBIC YARDS / WEEK /
4 (TRASH COMPACTION) =
4.4 CUBIC YARDS / WEEK
OR
(3) 2 CUBIC YARD DUMPSTERS

RESIDENTIAL RECYCLING:
17.7 CUBIC YARDS / WEEK =
(5) 2 CUBIC YARD DUMPSTERS

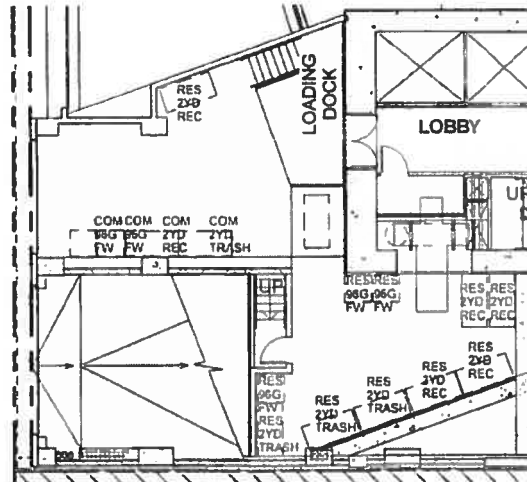
RESIDENTIAL FOOD WASTE:
20-150 UNITS = (2) 96 GALLON
FOOD WASTE CONTAINERS THEREFORE ASSUME
(3) 96 GALLON FOOD CONTAINERS

ASSUMED COMMERCIAL USES:
1,803 SF RESTAURANT
902 SF RETAIL SALES

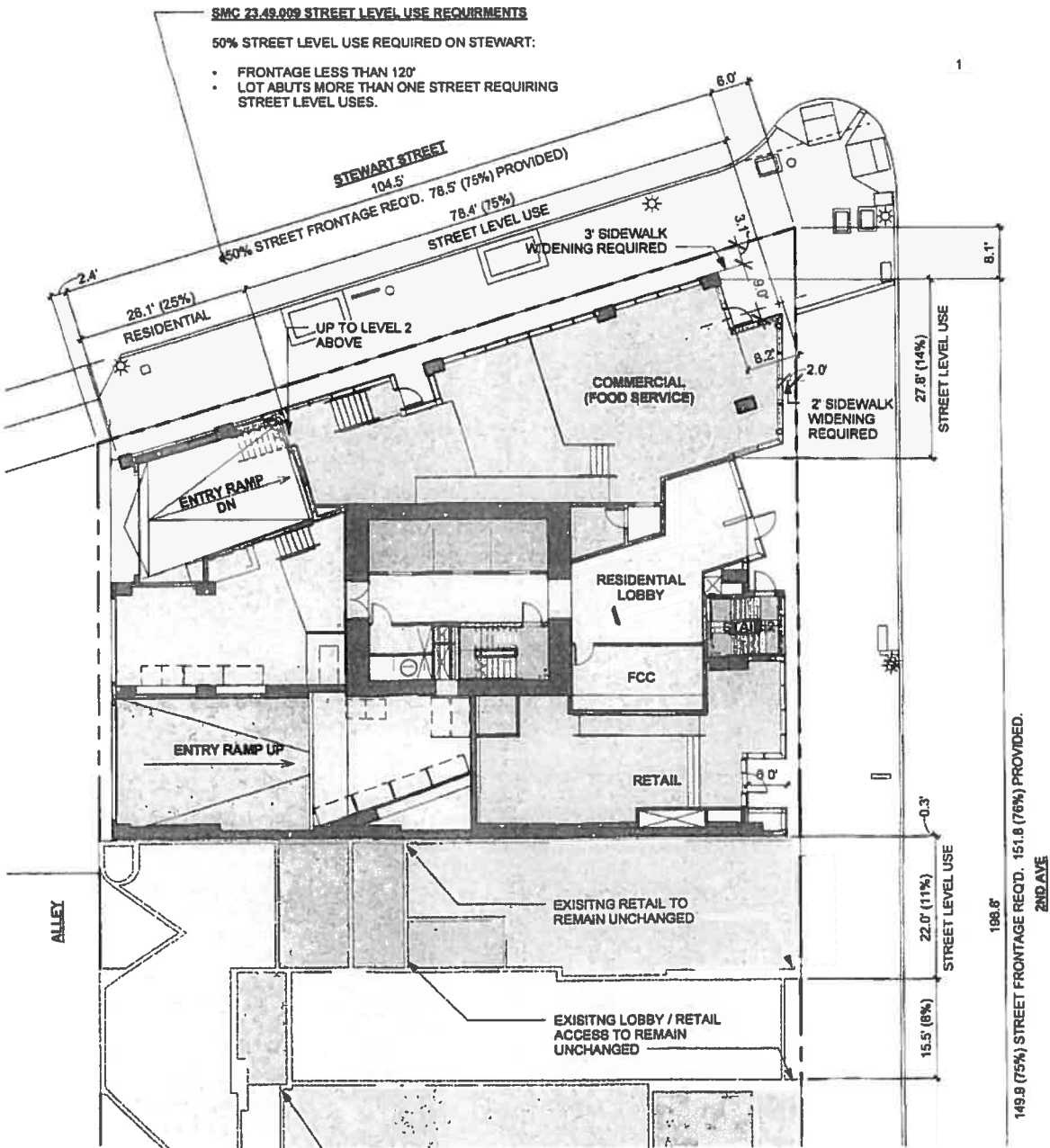
COMMERCIAL TRASH:
2 CUBIC YARD DUMPSTER
+ SHARED SPACE W/ RESIDENTIAL

COMMERCIAL RECYCLING:
RESTAURANT = 1 CUBIC YARD PER 5,000 SF (1)
 $1803 / 5000 = .36$ CUBIC YARDS
RETAIL = 1 CUBIC YARD / 8,000 SF
 $902 \text{ SF} / 8,000 = .11$ CUBIC YARDS
TOTAL = .47 OR 1 CUBIC YARD DUMPSTER

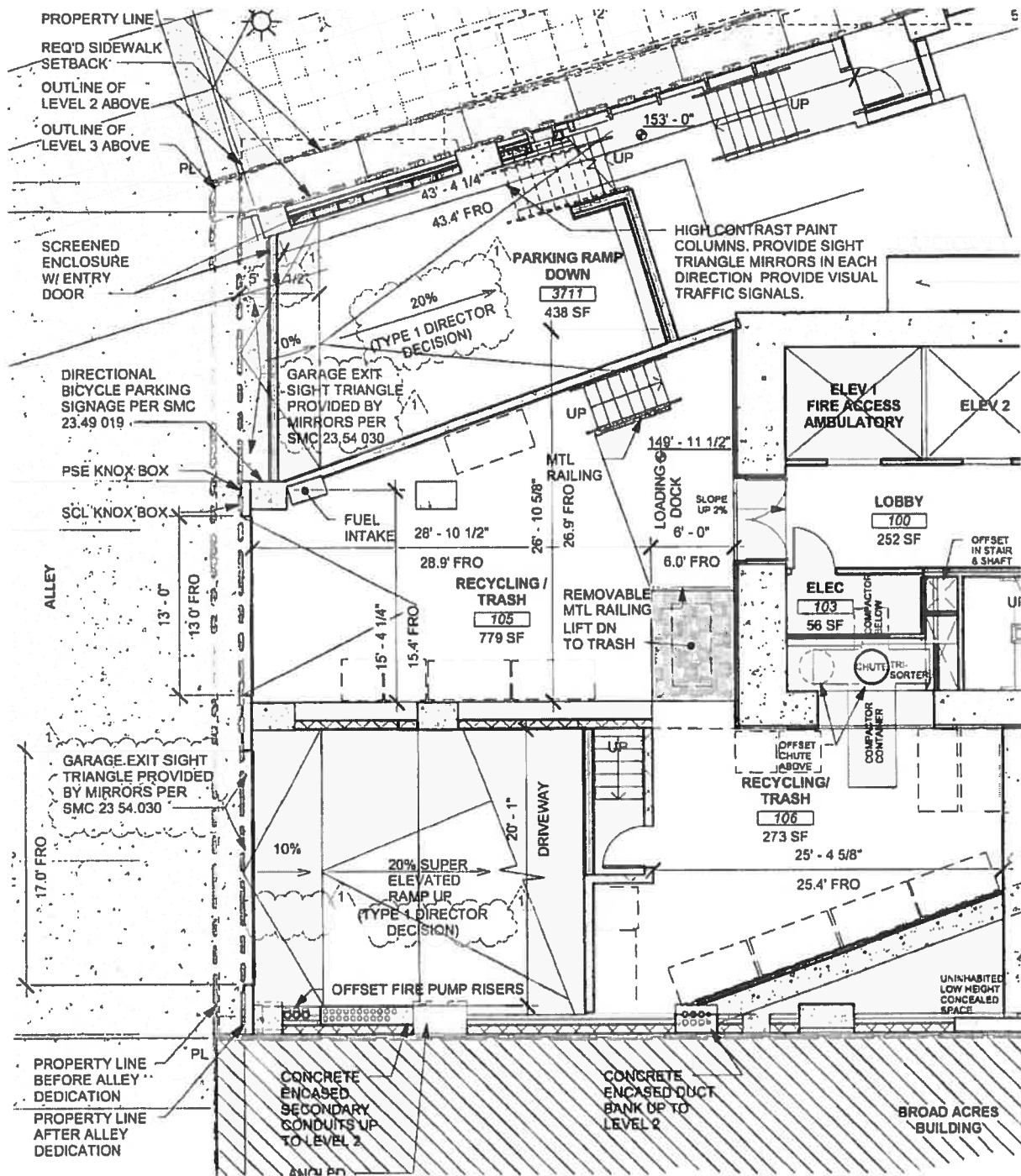
COMMERCIAL FOOD WASTE:
RETAIL SALES & RESTAURANT -
(2) 64 GALLON FOOD WASTE CONTAINERS



TRASH ROOM CONTAINER DIAGRAM



Detail from Sheet T1.005, revised December 21, 2015



Detail from Sheet A1.106

23.54.040 - Solid waste and recyclable materials storage and access

- A. Except as provided in subsection 23.54.040.I, in downtown, multifamily, master planned community, and commercial zones, storage space for solid waste and recyclable materials containers shall be provided as shown in Table A for 23.54.040 for all new structures, and for existing structures to which two or more dwelling units are added.
1. Residential uses proposed to be located on separate platted lots, for which each dwelling unit will be billed separately for utilities, shall provide one storage area per dwelling unit that has minimum dimensions of 2 feet by 6 feet.
 2. Residential development for which a home ownership association or other single entity exists or will exist as a sole source for utility billing may meet the requirement in subsection 23.54.040.A. 1, or the requirement in Table A for 23.54.040.
 3. Non-residential development shall meet the requirement in Table A for 23.54.040.

Table A for 23.54.040: Shared Storage Space for Solid Waste Containers

Residential development	Minimum area for shared storage space
2-8 dwelling units	84 square feet
9-15 dwelling units	150 square feet
16-25 dwelling units	225 square feet
26-50 dwelling units	375 square feet
51-100 dwelling units	375 square feet plus 4 square feet for each additional unit above 50
More than 100 dwelling units	575 square feet plus 4 square feet for each additional unit above 100, except as permitted in subsection 23.54.040.C
Non-residential development (Based on gross floor area of all structures on the lot)	Minimum area for shared storage space
0—5,000 square feet	82 square feet
5,001—15,000 square feet	125 square feet

For residential uses that are not readily described as a discrete number of dwelling units, such as congregate residences, the Director shall determine the amount of storage space required based on the number of sleeping rooms as a substitute for the number of dwelling units.

15,001—50,000 square feet	175 square feet
50,001—100,000 square feet	225 square feet
100,001—200,000 square feet	275 square feet
200,001 plus square feet	500 square feet

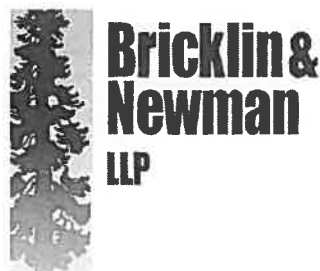
Mixed use development that contains both residential and nonresidential uses, shall meet the requirements of subsection 23.54.040.B.

- B. Mixed use development that contains both residential and non-residential uses shall meet the storage space requirements shown in Table A for 23.54.040 for residential development, plus 50 percent of the requirement for non-residential development. In mixed use developments, storage space for garbage may be shared between residential and non-residential uses, but separate spaces for recycling shall be provided.
- C. For development with more than 100 dwelling units, the required minimum area for storage space may be reduced by 15 percent, if the area provided as storage space has a minimum horizontal dimension of 20 feet.
- D. The storage space required by Table A for 23.54.040 shall meet the following requirements:
 1. For developments with eight or fewer dwelling units, the minimum horizontal dimension (width and depth) for required storage space is 7 feet. For developments with nine dwelling units or more, the minimum horizontal dimension of required storage space is 12 feet;
 2. The floor of the storage space shall be level and hard-surfaced, and the floor beneath garbage or recycling compactors shall be made of concrete; and
 3. If located outdoors, the storage space shall be screened from public view and designed to minimize light and glare impacts.
- E. The location of all storage spaces shall meet the following requirements:
 1. The storage space shall be located on the lot of the structure it serves and, if located outdoors, shall not be located between a street-facing facade of the structure and the street;
 2. The storage space shall not be located in any required driveways, parking aisles, or parking spaces;
 3. The storage space shall not block or impede any fire exits, any public rights-of-way, or any pedestrian or vehicular access;
 4. The storage space shall be located to minimize noise and odor impacts on building occupants and beyond the lot lines of the lot;
 5. The storage space shall meet the contractor safety standards promulgated by the Director of Seattle Public Utilities; and

6. The storage space shall not be used for purposes other than solid waste and recyclable materials storage and access.
- F. Access for service providers to the storage space from the collection location shall meet the following requirements:
1. For containers 2 cubic yards or smaller:
 - a. Containers to be manually pulled shall be placed no more than 50 feet from a curb cut or collection location;
 - b. Collection location shall not be within a bus stop or within the right-of-way area abutting a vehicular lane designated as a sole travel lane for a bus;
 - c. Access ramps to the storage space shall not exceed a grade of 6 percent; and
 - d. Any gates or access routes for trucks shall be a minimum of 10 feet wide.
 2. For containers larger than 2 cubic yards and all compacted refuse containers:
 - a. Direct access shall be provided from the alley or street to the containers;
 - b. Any gates or access routes for trucks shall be a minimum of 10 feet wide;
 - c. Collection location shall not be within a bus stop or within the street right-of-way area abutting a vehicular lane designated as a sole travel lane for a bus;
 - d. If accessed directly by a collection vehicle, whether into a structure or otherwise, a 21 foot overhead clearance shall be provided.
- G. Access for occupants to the storage space from the collection location shall meet the following requirements:
1. Direct access shall be provided from the alley or street to the containers;
 2. A pick-up location within 50 feet of a curb cut or collection location shall be designated that minimizes any blockage of pedestrian movement along a sidewalk or other right-of-way;
 3. If a planting strip is designated as a pick-up location, any required landscaping shall be designed to accommodate the solid waste and recyclable containers within this area.
- H. The solid waste and recyclable materials storage space, access and pick-up specifications required in this Section 23.54.040, including the number and sizes of containers, shall be included on the plans submitted with the permit application for any development subject to the requirements of this Section 23.54.040.
- I. The Director, in consultation with the Director of Seattle Public Utilities, has the discretion to grant departures from the requirements of this Section 23.54.040 if the applicant proposes alternative, workable measures that meet the intent of this Section 23.54.040 and if either:
1. The applicant can demonstrate difficulty in meeting any of the requirements of this Section 23.54.040; or
 2. The applicant proposes to construct or expand a structure, and the requirements of this Section 23.54.040 conflict with opportunities to increase residential densities and/or retain ground-level retail uses.

(Ord. 124608, § 11, 2014; Ord. 123963, § 23, 2012; Ord. 123495, § 69, 2011.)

EXHIBIT B



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Reply to: Seattle Office
Please note our temporary suite number is 3200

April 14, 2016

Andrew S. McKim, Planner
Department of Construction and Inspections
P.O. Box 34019
Seattle, WA 98124-4019

Re: Interpretation 2016-001

Dear Mr. McKim:

I am in receipt of your interpretation referenced above. Unfortunately, you have misconstrued a portion of it resulting in an interpretation that misses one of its key components.

The second of my two requests sought an interpretation regarding the project's compliance with SMC 23.54.040:

Does SMC 23.54.040 preclude the current building design by failing to provide adequate space, access and pickup facilities for waste and recycling receptacles in the alley?

This request was intended to include the issue of whether the current design fails to provide (1) adequate space for waste and recycling receptacles, (2) adequate access to waste and recycling receptacles, and (3) adequate pickup facilities for waste and recycling receptacles in the alley. You have construed the request more narrowly. You applied the phrase "in the alley" to all three elements. I understand how you may have made that error, but that definitely was not the intent.

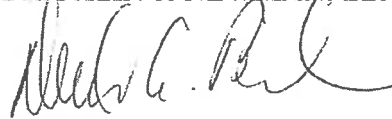
Fortunately, there is little harm done by your initial, too narrow construction. There is ample time for you to prepare an interpretation that comports with the meaning and intent of the original request before the hearing which is not scheduled until May 9, 2016. I look forward to receipt of an interpretation in line with this clarification five or more calendar days before the hearing. SMC 23.88.020.C.

Andy McKim
April 14, 2016
Page 2

Please let me know if you have any questions. Thank you for your cooperation.

Very truly yours,

BRICKLIN & NEWMAN, LLP

A handwritten signature in black ink, appearing to read "David A. Bricklin", written over the printed name below.

David A. Bricklin

DAB

cc: Clients
Hearing Examiner
Courtney Kaylor
Jack McCullough
Laura Counley
Michael Dorcy
Bill Mills

EXHIBIT C

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**ALTERRA CONDOMINIUM
HOMEOWNER ASSOCIATION**

Hearing Examiner file:
S-10-001

From an Interpretation by the Director,
Department of Planning and Development

Director's Interpretation 09-004

ORDER

The Director and the Applicant moved for dismissal of this appeal. The Appellant filed a response on August 9, 2010. The Applicant filed a reply on August 10, 2010.


On June 24, 2010, the Director issued Notice of Interpretation 09-004 and Notice of Decision for Master Use Permit 3009833, both of which relate to a mixed-use development project located at 901 Dexter Avenue North. The Appellant filed a timely appeal of Director's Interpretation but did not appeal the Master Use Permit decision for the project by the July 8, 2010 deadline. SMC 23.88.020.F.3 provides that an interpretation relating to a Type II Master Use Permit "*shall be subject to the same appeal deadline as the related project decision, and may be appealed only if that project decision is appealed.*"

Interpretation 09-004 relates to a Type II Master Use Permit. The Director and the Applicant argue that the Examiner therefore lacks jurisdiction to hear the appeal because the project decision was not appealed. The Code language is clear, and does not allow an appeal of this interpretation to the Examiner if the project decision is not also appealed.

The Appellant argues that its appeal statement includes a challenge to the project, but the appeal letter specifically identifies the interpretation as the subject of the appeal, and includes a copy of the interpretation. The Appellant also cites the failure of DPD and the Notice of the Interpretation to mention that an appeal of the project decision was required to be filed in order to appeal the interpretation. The Appellant points out that it was required to pay \$9,000.00 for this interpretation, that it was in communication with DPD staff about the timing of the interpretation, and that it did not wish to engage in unnecessary appeals of the project. But regardless of these factors, the Examiner lacks equitable authority to disregard SMC 23.88.020.F.3 or to require DPD to re-publish the decision and interpretation to re-start the appeal period.

The motions of the Director and the Applicant are granted, and the appeal is hereby dismissed.

Entered this 11th day of August, 2010.



Anne Watanabe, Deputy Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
(206) 684-0521 FAX: (206) 684-0536

EXHIBIT D

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**NEIGHBORS ENCOURAGING
REASONABLE DEVELOPMENT**

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

Hearing Examiner Files:
**MUP-15-022(DR,W)
S-15-003**

Department References:
3014342 and 3015697

**ORDER ON MOTIONS
TO DISMISS**

On September 24, 2015, the Director of the Department of Planning and Development ("Department") and the Applicant, Paul LaBellarte/Columbia Builders, each filed a motion to dismiss this appeal. The Appellant, Neighbors Encouraging Reasonable Development, filed its response to the motions on October 1, 2015. The Hearing Examiner has reviewed the file in this matter¹ as well as the motions and response and the supporting declarations.

The Department issued a SEPA Determination of Non-significance ("DNS") for a proposal for a seven-story apartment building containing 14 dwelling units and 104 bedrooms, to be constructed at 3050 SW Avalon Way. The property is zoned Midrise. Because the Department determined that the proposal did not exceed 20 dwelling units, it did not go through the design review process.² For the same reason, and because the proposal is not located within an urban village or urban center containing a Station Area Overlay District, it was not required to go through full review under SEPA.³ However, because it is located within a Steep Slope Environmentally Critical Area (ECA), the proposal was required to undergo limited review under SEPA, including documentation of whether the proposal is consistent with ECA regulations and an assessment of any significant impacts on the ECA not addressed in the ECA requirements.⁴

On July 3, 2015, the Appellant filed a request with the Department for an interpretation concerning whether the proposal contained 104 rather than 14 dwelling units.⁵ On August 6, 2015, the Department issued the DNS⁶ and also issued Interpretation No.13-005, which concluded that the proposal was properly regulated as a 14-unit apartment building.⁷ The DNS was included within a document entitled "Analysis and Decision of the Director," which identified the DNS as the only

¹ This case was originally assigned to a hearing examiner pro tem but was reassigned to the Hearing Examiner on October 6, 2015.

² See Table A for SMC 23.41.004.

³ See Table A for SMC 25.05.800.

⁴ See SMC 25.05.908.A and .B.

⁵ Exhibit 3 to Declaration of Charles H. Burkhalter, Jr. in opposition to motions to dismiss ("Burkhalter Declaration").

⁶ Burkhalter Declaration, Exhibit 2.

⁷ Exhibit 1 to Declaration of Jessica M. Clawson in support of the Applicant's motion to dismiss ("Clawson Declaration").

“approval” required for the proposal.⁸ The DNS explains that environmental review of the proposal is limited:

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.⁹

On August 20, 2015, the Appellant filed its appeal.¹⁰ Under the section entitled “Decision Being Appealed,” the appeal reads as follows:

NERD appeals the August 6, 2015 "Analysis and Decision of the Director" ("Decision") concerning Master Use Permit Application No. 3014342, the August 6, 2015 Code Interpretation (DPD Interpretation No. 13-005) concerning Project Nos. 3014342 and 6327295, and all related and subsidiary decisions, including the failure to conduct Design Review and the failure to conduct SEPA Review beyond critical area components.¹¹

The appeal lists 15 appeal issues. The first thirteen issues relate to alleged errors in the “Director’s Interpretation”. Issue 14 states that the Director erred “in determining that the project meets bicycle parking and trash storage area requirements.” Issue 15 states that the Director relied in error “on the availability of the Code-required level of transit as a basis for allowing the project to provide no parking.”¹²

The Applicant moves to dismiss appeal issues 14 and 15, and the Department moves to dismiss appeal issue 15, because issues 14 and 15 seek to appeal “Type I” decisions. “Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner.” SMC 23.76.0040.B. The determination that a proposal complies with the Code’s development standards is a “Type I” decision. SMC 23.76.006.B. Issues concerning whether a proposal meets bicycle parking, trash storage area, or certain transit level requirements address Type I decisions and can be appealed to the Hearing Examiner only through appeal of a Land Use Code interpretation. Table A for SMC 23.76.004. Code interpretations are governed by Chapter 23.88 SMC. Because this proposal was a project application requiring public notice under Chapter 23.76 SMC, Code interpretations in this instance were governed by SMC 23.88.020.C.3. Under that section, a person could request an interpretation prior to the end of the public comment period on the application, SMC

⁸ Burkhalter Declaration, Exhibit 2 at 1.

⁹ Burkhalter Declaration, Exhibit 2 at 2.

¹⁰ Clawson Declaration, Exhibit 5.

¹¹ Clawson Declaration, Exhibit 5 at 2.

¹² Clawson Declaration, Exhibit 5 at 4.

23.88.020.C.3.a, or could include a request for, and appeal of, the interpretation within the appeal of a Type II decision, such as the SEPA DNS at issue here. SMC 23.88.020.C.3.

The Appellant contends that the following language in its July 3, 2015 interpretation request constituted a request for an interpretation of the applicability of Code requirements concerning bicycle parking, trash storage areas, and transit-levels as they relate to an exemption from certain vehicle parking requirements:

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 permit development that would otherwise harm natural and built environment.¹³

The Appellant notes that transportation and parking are included in the list of elements of the built environment within the WAC, and that it expected the Department to address these concerns in Interpretation No. 13-005. The Appellant asserts that if the Department did not understand what the Appellant was seeking, it should have asked for clarification. However, the entire interpretation request related to the correct number of dwelling units included in the proposal and the Department's alleged practice of allowing developers to minimize the number of dwelling units to "bring projects below the threshold for mandated SEPA and Design Review for applicable zones."¹⁴ A reasonable person would not read the paragraph quoted above as requesting an interpretation of the applicability of the Code's specific requirements concerning bicycle parking, trash storage areas, and transit-levels as they relate to an exemption from certain vehicle parking requirements. Further, there is no evidence that the Appellant took any action immediately after the interpretation was issued to inform the Director that the Appellant considered the interpretation incomplete. Appeal issues 14 and 15 are not before the Examiner as part of an appeal of a Land Use Code Interpretation. Consequently, the Examiner has no jurisdiction over them, and they are **DISMISSED**.

The Applicant asserts that the appeal should be dismissed because the Appellant failed to appeal the underlying decision, the DNS. Raising a similar issue, the Department asserts that "the appeal fails to state any basis, within the scope of the ECA SEPA review, for reversing the ... DNS".¹⁵ To appeal a Type II decision, such as the DNS, the "appeal shall ... clearly identify each component of the Type II Master Use Permit being appealed." SMC 23.76.022.C.3.a. Rule 3.01(d) of the Hearing Examiner Rules of Practice and Procedure requires that an appeal include a "brief statement of the appellant's issues on appeal, *noting appellant's specific objections to the decision or action being appealed.*" Emphasis added. The Appellant contends that it did appeal the DNS and cites the language in section 1 of its appeal, quoted above. That language does state that the "Analysis and Decision of the Director" is being appealed, as is the Code interpretation. The "Analysis and Decision" includes only the DNS, so the language may be sufficient to meet the requirements of SMC 23.76.022.C.3.a. However, it does not meet the requirements of Rule 3.01 for a statement of "specific objections to the decision or action being appealed." One would normally look to the appeal issues, or "Appeal Grounds" in this case, for that specificity. But that section of the appeal does not include any issue

¹³ Burkhalter Declaration, Exhibit 3 at 2.

¹⁴ *Id.*

¹⁵ DPD's Motion to Dismiss at 2.

related to the DNS. Further, this concern was apparently a subject of discussion at the prehearing conference held in this case on September 16, 2015. The Prehearing Order recites the following:

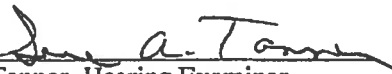
3. The following statement is intended as clarification of the issue regarding the SEPA component of the MUP decision appeal. Appellant shall file any correction to this statement no later than September 22.

Appellant does not claim that the determination of non-significance as to probable adverse impacts of the project on the environmentally critical area involved is erroneous but claims that the determination should not have been limited to those impacts because the interpretation on which the count of dwelling units was based is in error.

Nothing in the record indicates that the Appellant filed a correction to the clarification of the appeal concerning the DNS. The appeal does not include any issues related to the DNS, the only Type II decision that could have been appealed. Consequently, the DNS was not appealed.

SMC 23.88.020.F.3 states that "[a]n interpretation relating to a Type II Master Use Permit shall be subject to the same appeal deadline as the related project decision, *and may be appealed only if that project decision is appealed.*" The Appellant argues that it did appeal the project decision, the DNS, at the same time it appealed the Code Interpretation, and that a "negative ruling." by the Examiner on the DNS appeal does not automatically require dismissal of the associated appeal of the interpretation. But the appeal itself merely states that the "Analysis and Decision of the Director" is appealed. As noted, nothing else in the appeal relates in any way to the DNS, and, as recited in the Prehearing Order, the Appellant agreed that they did not claim that the DNS was erroneous as to probable adverse impacts on the ECA. Because the DNS was not appealed, the appeal of the interpretation is not properly before the Examiner under SMC 23.88.020, and the Examiner therefore lacks jurisdiction to consider it. The motions to dismiss are **GRANTED**. The appeal is **DISMISSED**, and the appeal hearing scheduled for November 5, 2015 is **CANCELLED**.

Entered this 14th day of October, 2015.


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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

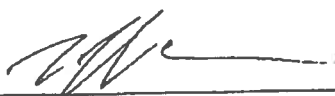
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached Order of Dismissal to each person listed below, or on the attached mailing list, in the matter of Neighbors Encouraging Reasonable Development, Hearing Examiner Files: MUP-15-022 (W), S-15-003, in the manner indicated.

Party	Method of Service
Paul LaBellarte/Columbia Builders c/o Jessica M. Clawson 701 Fifth Ave, Suite 6600 Seattle, WA 98104 jessica@mhseattle.com Laura Counley lcounley@mhseattle.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
N.E.R.D. c/o Paul Haury 4115 32 nd Ave SW Seattle, WA 98126 phaury@fulcrum.net Chuck Burkhalter 4031 32 nd Ave SW Seattle, WA 98126 cburkhalterjr@yahoo.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Andy McKim DPD Andy.McKim@seattle.gov Jerry Suder Jerry.Suder@seattle.gov Betty Galarosa Betty.Galarosa@seattle.gov Reta Cunnetubby-Gonzales Reta.Gonzales@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Denise Minnerly Denise.Minnerly@seattle.gov Sue Putnam Sue.Putnam@seattle.gov PRC PRC@seattle.gov	
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Dated: October 14, 2015



Tiffany Ku
Legal Assistant