INTERPRETATION OF THE DIRECTOR
PURSUANT TO TITLE 23 OF SEATTLE MUNICIPAL CODE

In the Matter of the Use of the Property at **6726 Greenwood Ave N**	Hearing Examiner File: **MUP-17-009 (DR, W)** **LAND USE CODE INTERPRETATION No. 17-002** DPD Project No. 3027166 Related DPD Master Use Permit (MUP) Project 3020114

Introduction

On behalf of his client Livable Phinney, attorney Jeffrey M. Eustis has requested this interpretation in conjunction with an appeal of Project 3020114, an application for a Master Use Permit (MUP), including review under the State Environmental Policy Act (SEPA) and Design Review to construct a four-story structure containing 55 apartment units, 2 live-work units, and retail space. No parking is proposed due to its location in the Greenwood-Phinney Ridge Residential Urban Village and within ¼ mile of a frequent transit service corridor.

The request for interpretation raises seven interpretable[1] questions:

> 1. Whether the upper level setbacks established in the version of SMC 23.47A.014.B.3 in effect on September 3, 2015 apply to development on commercially zoned property if the development site abuts the commercially zoned portion of a lot that is zoned partly commercial and partly residential;
>
> 2. Whether rooftop features proposed for the development meet the definition of "clerestory" in SMC 23.84A.006 and may thus be constructed up to 4 feet above the otherwise applicable structure height limit pursuant to SMC 23.47A.012.C.2;

[1] Pursuant to SMC 23.88.020.A states, in part, "Procedural provisions and statements of policy are not subject to the interpretation process." As the matter concerning the correct vesting date is a "procedural provision," SDCI agrees with Livable Phinney that the vesting determination is not subject to interpretation. Therefore, this issue is not addressed in this interpretation.

3. Whether the clerestory shades property to the north, requiring a shadow diagram described in SMC 23.47A.012.C.7;

4. Whether the proposed development impermissibly provides an additional story under SMC 23.47A.012.A.1.a.2 by combining the 4 feet of additional structure height provided in SMC 23.47A.012.A.1.a with 4 feet of additional structure height for the proposed clerestories to provide space for a mezzanine level on the fourth floor;

5. Whether there was sufficient information to determine that the additional height allowed for the structure under SMC 23.47A.012.A.1 did not significantly block views per SMC 23.47A.012.A.1.c;

6. Whether a proposed elevator penthouse may extend to a height of 60 feet in the applicable NC2-40 zone by applying both the additional 4 feet of height allowed by SCM 23.47A.012.A.1.a and the 16 feet of additional height allowed under SMC 23.47A.012.C.4; and

7. Whether there is sufficient information to conclude that the "frequent transit service" definition was met at the project location.

Background

According to land use maps maintained by this department in its Geocortex, Geographic Information Service (GIS) system, the subject property is zoned NC2-40: Neighborhood Commercial 2, with a structure height limit of 40 feet. The property is also within the Greenwood-Phinney Ridge Residential Urban Village.

The zoning of the lots immediately to the east of the site is also partly NC2-40. However, portions of the lots east of the NC2-40 zone, are also zoned SF5000: Single-Family Residential, with a minimum lot size of 5000 square feet. The property north, south, and immediately west of the subject property is also zoned NC2-40.

The basic facts of the proposed development in Project 3020114 are summarized by the Seattle Department of Construction and Inspections (SDCI) land use decision in Project 3020114. Pages 1-2 of the land use decision, prior to the heading "Analysis – Design Review" are incorporated by reference into this interpretation as findings of fact.

According to records maintained by SDCI in its Electronic Data Management System (EDMS), the project application went through the Design Review process prior to publication of the MUP decision approving the project. The application for the first Early Design Guidance (EDG) meeting was submitted on September 3, 2015, according to

SDCI's Hansen project tracking system and to the receipt stamp on the face of the application.

Following publication of the decision on January 23, 2017, an appeal was filed by Livable Phinney. This interpretation was requested together with the appeal of the decision, in accordance with the Seattle Land Use Code process for request of formal Code interpretation as part of the land use decision appeal process (see Seattle Municipal Code (SMC) Section 23.88.020).

Analysis

Each issue raised by the request for interpretation, as summarized in the introduction, is discussed below.

> **1. The upper level setbacks of former SMC 23.47A.014.B.3 do not apply to the subject project, as it is not located on a site abutting a lot in a residential zone.**

The version of SMC Section 23.47A.014.B.3 in effect at the date of vesting for the project, established upper level setbacks for lots abutting or across an alley from residential zones. It provides, in part:

> 3. For a structure containing a residential use, a setback is required along any side or rear lot line that abuts a lot in a residential zone or that is across an alley from a lot in a residential zone, as follows:
>
> > a. Fifteen feet for portions of structures above 13 feet in height to a maximum of 40 feet; and
> >
> > b. For each portion of a structure above 40 feet in height, additional setback at the rate of 2 feet of setback for every 10 feet by which the height of such portion exceeds 40 feet (Exhibit C for 23.47A.014).

SMC 23.84A.002 defines abut as "to border upon."

According to land use maps maintained by this department in our Geocortex system, the subject property abuts lots to the east that are zoned partly NC2-40 and partly SF5000. These types of properties are also known as "split-zoned" lots. While the properties neighboring the subject property are partially in an SF 5000 zone and are developed with residences, the western portions of these lots are in an NC2-40 zone. The portion of each of these lots that actually abuts the subject property is zoned NC2-40. Therefore, since the proposed development site directly abuts commercially zoned property and not property in a residential zone, it does not "abut a lot in a residential zone or that is across

an alley from a lot in a residential zone," and thus no upper level setback is required. However, the applicant, following recommendations from the Design Review Board, provided a 5-foot setback from the property line at ground level.[2] Also, the applicant has provided a 10-foot setback in the northeast portion of level two and above.

Contrary to the argument raised in the request for interpretation, the plain reading of the code section supports the conclusion that no setback is required. Treating the NC2-40 portion of the lots to the east as residentially zoned is not supported by any language in the code. There is no definition in the code for split-zoned lots or any regulations specifying that a split-zoned lot that includes residential zoning should be treated as a residentially zoned lot. Therefore, no setback was required.

The appellant's argument about the definitions of terms used in SMC 23.84A.014.B.3, on page 3 of the interpretation request, is incomplete because it does not directly address the phrase "lot in a residential zone" as used in the code. The code definitions of "lot," "zone, residential," and "zone, neighborhood commercial" do not provide specific guidance for how split-zoned lots are to be regulated. The lots to the east could contain commercial uses in the 20-foot area that is zoned NC2-40 and not be limited to development standards for single family zones as the appellant suggests on page 3 of the interpretation request. Access to commercial uses on these lots cannot be provided over the single-family portion of the lot, pursuant to SMC 23.42.030.A, but if access is provided from the commercial zone to the west, the NC2-40 portion of these lots could be used for off-site parking, for example (see SMC 23.47A.032.B.4). It is also possible, even if impractical, that a commercial use such as a barber shop or office could operate in a small structure in the rear of these lots located entirely in the NC2-40 portion and accessed from the NC zone. These lots to the east thus have more development rights than property zoned exclusively SF, as the appellant argues.

If the code had been intended to be applied in the manner suggested by the appellant, it would have used the term "residential use" instead of "residential zone." The subject property may abut a residential use, but it does not abut a residential zone. The code cannot be applied in a way that is not supported by the plain language.

Section 23.47A.014.B.3 was recently amended to require a setback in this type of situation. No code change would have been necessary if the appellant's reading of the code is correct. In the Director's Report and Recommendation for the 2015 Omnibus Ordinance in which the amendment was made, it states, "In some cases, the abutting lot is "split zoned," and includes both residentially zoned property and commercial zoning. The proposal is to clarify subsections 23.47A.014.B.2 and B.3 to provide the same setbacks for these abutting split zoned lots that would apply to a lot zoned entirely residential, provided that that the commercial zoning on the abutting lot is less than 50 percent of the width or depth of the abutting lot."

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[2] Final Recommendation Report 2, page 3

The intent of the original provision was to provide residential zones with "a sense of openness, light, air, and other such amenities. . . ." (p. 97, Neighborhood Commercial Areas Land-Use Policies, Draft 1, December 1981). Under the language prior to the 2015 amendment, it is possible to conclude that the 20-foot deep portion of the split-zoned lot that is zoned NC2, if undeveloped, would provide space for the openness, light, and air intended by the 15-foot upper level setback requirement and that no further setback was required.

Since no upper level setback is required pursuant to SMC 23.47A.014.B.3, it is unnecessary to decide whether additional setbacks would apply to any portion of the structure over 40 feet in height.

2. The proposed rooftop features meet the definition of "clerestory" in SMC 23.84A.006 and the Director correctly allowed extra height for these features pursuant to SMC 23.47A.012.C.2.

SMC 23.84A.006, a clerestory:

> means an outside wall of a building that rises above an adjacent roof of that building and contains vertical windows. Clerestories function so that light is able to penetrate below the roof of the structure.

SMC 23.47A.012.C.2 reads:

> Open railings, planters, skylights, clerestories, greenhouses, solariums, parapets, and firewalls may extend as high as the highest ridge of a pitched roof permitted by subsection 23.47A.012.B or up to 4 feet above the otherwise applicable height limit, whichever is higher. Insulation material, rooftop decks and other similar features, or soil for landscaping located above the structural roof surface, may exceed the maximum height limit by up to two feet if enclosed by parapets or walls that comply with this subsection 23.47A.012.C.2.

As seen from elevation drawings in the plan set, the proposed rooftop feature contains many windows. The definition states that a clerestory is an outside wall of a building that rises above an adjacent roof and contains vertical windows. As depicted on plan sheets A3.01, A3.03, and A3.04 of the MUP application, the proposed rooftop feature has windows on the west, south, and north sides. Nothing in the definition of "clerestory" requires windows on all sides. Thus, a plain reading of the code shows that the feature qualifies as a clerestory.

There are no walls in front of the clerestory, so it is "an outside wall of a building." It "rises above an adjacent roof," since the main roof is immediately below and adjacent to the clerestory. It contains 30 windows "so that light is able to penetrate below the roof of the structure." As noted by the Design Review Board in Final Recommendation Report 2,

on page 3, "The clerestory fenestration has been enlarged . . . allowing more light into the related units."

The clerestory meets the definition of the code and, therefore qualify for the 4 extra feet of height pursuant to SMC 23.47A.012.C.2.

3. A shadow diagram, required by SMC 23.47A.012.C.7 concludes that no property to the north is impacted by an additional rooftop feature.

SMC 23.47A.012.C.7 states, in part (emphasis added):

> The rooftop features listed in this subsection 23.47A.012.C.7 shall be located at least 10 feet from the north edge of the roof unless a shadow diagram is provided that demonstrates that locating such features within 10 feet of the north edge of the roof would not shade property to the north on January 21st at noon more than would a structure built to maximum permitted height and FAR:
> a. Solar collectors;
> b. Planters;
> c. Clerestories.

There is no definition of "property" in the code. Webster's New Collegiate Dictionary defines "property" as:

> 2.a. Something owned or possessed; *specif*: a piece of real estate

SMC 23.84A.032 defines "right-of-way" as:

> a strip of land platted, dedicated, condemned, established by prescription or otherwise legally established for the use of pedestrians, vehicles, or utilities.

There is no property to the north that is shaded. North 68th Street is to the north of the building. The applicants supplied a shadow diagram, as shown on Sheet G0.02B, demonstrating that north of the building is a public right-of-way. The additional area shadowed by the clerestory is a small section of sidewalk north of the right-of-way. The clerestory shadow does not impact any buildings or private property.

3. The height allowance for the clerestories and the height allowance to accommodate a 13-foot ceiling height at street level under SMC 23.47A.012.A.1.a.1) applies to the project, and no additional story is added to the project through application of these Code sections.

The appellant alleges that the mezzanine of the 4th floor amounts to an additional story not allowed pursuant to SMC 23.47A.012.A.1.2). As demonstrated on Sheet A3.22 –

Building Section, of Plan Set Version 4, it is clear the mezzanine is not a separate or additional story. According to this sheet, the ground floor has a ceiling height of 13 feet, 3 inches, level 2 is 9 feet, 1 inch, level 3 is 9 feet, 1 ½ inches, and level 4 at 11 feet, 5 inches. This meets the standards of the code.

SMC 23.47A.012.A.1.a.1) states, in part:

> 1. In zones with a 30 foot or 40 foot mapped height limit:
>   a. The height of a structure may exceed the otherwise applicable limit by up to 4 feet, subject to subsection 23.47A.012.A.1.c, provided the following conditions are met:
>   1) Either:
>   a) A floor-to-floor height of 13 feet or more is provided for non-residential uses at street level
>   . . .

Pursuant to SMC 23.84A.036, "Story" is defined as follows:

> . . . that portion of a structure included between the surface of any floor and the surface of the floor next above, except that the highest story is that portion of the structure included between the highest floor surface and the ceiling or roof above.

Mezzanines are not defined in the land use code. They are defined and described in the Seattle Building Code, pursuant to Section 505.2:

> A mezzanine or mezzanines in compliance with Section 505.2 [this section] shall be considered a portion of the story below. Such mezzanines shall not contribute to either the building area or number of stories as regulated by Section 503.1.

According to this section of the building code, a mezzanine is part “of the story below” and does not contribute to the number of stories of a building. Since an additional story was not created, the extra height allowed pursuant to the 13 feet for non-residential uses at the street level is the correct application of the code.

In terms of the different floor to ceiling heights, Seattle Building Code Section 1208.2 Minimum ceiling heights, states, in part:

> Occupiable spaces, *habitable spaces* and *corridors* shall have a ceiling height of not less than 7 feet 6 inches . . . The height of *mezzanines* and spaces below *mezzanines* shall be in accordance with Section 505.

Although all 4 floors have different heights, they meet the requirements of the building code as does the mezzanine on the 4th floor.

5. The view analysis provided by the applicant demonstrates that the additional height allowed under SMC 23.47A.012.A.1 will not significantly block views from neighboring residential structures.

SMC 23.47A.012.A.1.c states:

> The Director shall reduce or deny the additional structure height allowed by this subsection 23.47A.012.A.1 if the additional height would significantly block views from neighboring residential structures of any of the following: Mount Rainier, the Olympic and Cascade Mountains, the downtown skyline, Green Lake, Puget Sound, Lake Washington, Lake Union, or the Ship Canal.

The view analysis provided by the Applicant on Sheet G0.02B does not provide a view analysis from all angles. However, an elevation analysis indicates that views previously unblocked will not be obscured by the additional 4 feet.

The applicant will be providing a supplementary and more in-depth view analysis that further demonstrates the additional height does not block any of the protected views under SMC 23.47A.012.A.1.c.

6. The Director correctly allowed the elevator penthouse at a height of 60 feet based on a structure height of 44 feet per SMC 23.47A.012.A.1.

SMC 23.47A.012.A.1.a provides, in part:

> 1. In zones with a 30 foot or 40 foot mapped height limit:
>   a. The height of a structure may exceed the otherwise applicable limit by up to 4 feet, subject to subsection 23.47A.012.A.1.c, provided the following conditions are met:
>   1) Either:
>   a) A floor-to-floor height of 13 feet or more is provided for non-residential uses at street level;
>   . . .

The additional 4 feet allowed under the Code effectively establishes a base height limit of 44 feet for the proposed structure. The term “otherwise” suggests a different height limit is applicable in cases where this standard is met. The purpose of the additional 4 feet of height is to encourage the construction of higher ceiling heights for non-residential uses on the first floor of a structure while still allowing the same number of floors above that would be allowed if the base height of 40 feet was maintained and a standard 9-foot ceiling height was provided on the first floor. If the Code provision did not change the applicable base height limit, the project would be penalized by providing the 13 feet high ceilings and forced to either construct lower ceilings in the upper floors or eliminate the fourth floor.

Therefore, the applicable height limit for the project is 44 feet.

SMC 23.47A.012.C.4 states, in part:

> 4. Except as provided below, the following rooftop features may extend up to 15 feet above the applicable height limit, as long as the combined total coverage of all features gaining additional height listed in this subsection 23.47A.012.C.4, including weather protection such as eaves or canopies extending from rooftop features, does not exceed 20 percent of the roof area, or 25 percent of the roof area if the total includes stair or elevator penthouses or screened mechanical equipment: . . .
>
> > f. Stair and elevator penthouses may extend above the applicable height limit up to 16 feet. When additional height is needed to accommodate energy-efficient elevators in zones with height limits of 125 feet or greater, elevator penthouses may extend the minimum amount necessary to accommodate energy-efficient elevators, up to 25 feet above the applicable height limit. Energy-efficient elevators shall be defined by Director's Rule. When additional height is allowed for an energy-efficient elevator, stair penthouses may be granted the same additional height if they are co-located with the elevator penthouse.

This code section allows an additional 16 feet for a stair or elevator penthouse to extend above the applicable height limit of 44 feet, resulting in a maximum height of 60 feet above average grade.

Furthermore, the additional 16 feet allowance for the elevator penthouse is to accommodate elevator access to the roof including the overrun necessary for equipment above the elevator car. The amount of height needed for this, above the roof level, would be the same whether the roof is at 40 feet or 44 feet.

7. The current bus schedule provide sufficient information to conclude that the "frequent transit service" definition is met at this location.

SMC 23.84A.038 defines "Transit service, frequent" to mean:

> 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.

The Director relied on the bus schedule produced by King Country Metro to determine if the frequent transit service is met. The Land Use Code is silent on the precise means to be used to measure transit service headways under the definition. However, the most recent bus schedule for the street adjacent to the development site is a reasonable

document to consult to determine headways, because this is the available source of information to determine the timing on which the busses run. The current bus schedule for March 11, 2017, to September 22, 2017, shows that the definition of frequent transit service is met. These schedules are available at:
http://kingcounty.gov/depts/transportation/metro/schedules-maps/005.aspx and
http://kingcounty.gov/depts/transportation/metro/schedules-maps/355.aspx.

It is unclear what alternative standard or schedule the appellant believes the applicant should use in demonstrating compliance with frequent transit service within 1,320 feet. The map, the schedule, and the analysis provided by the applicant in the plan set on Sheet A1.00 are typical of every analysis of frequent transit service received and reviewed by the Director (see, for example, Conclusions 9-11 in Findings and Decision of the Hearing Examiner for the City of Seattle, MUP-14-022(W) or Sheet A1.2 from the plan set for project #3026592 at 6002 17th Ave NW).

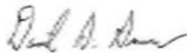
The appellant suggests that because busses do not always run on schedule, the frequent transit service definition is not met. There are occasions where a bus may not make its scheduled stop every 15 minutes or every 30 minutes as listed in the schedule. It can never be guaranteed that every bus will arrive on time. Under the appellant's test, no lot would ever qualify for the parking reduction due to frequent transit service. SDCI's reliance on scheduled arrivals is reasonable.

The applicant has demonstrated that the proposed project is within an area served by frequent transit service.

Decision

The proposed project is not required to provide an upper-level setback, is entitled to claim additional height for its clerestory, and does not violate the shading provision since the affected property is a right-of-way. The applicant may also claim additional height for meeting the 13-foot floor to ceiling height requirement on the ground floor. The mezzanine of the 4th floor does not constitute an additional floor and since the additional height is compliant, the height exception for the elevator penthouse is also compliant to a maximum height of 60 feet. The applicant will provide additional view analysis demonstrating that views are not further impacted by the additional 4 feet in height. Finally, current bus schedules affirm the continuation of frequent transit service.

Entered this 30th day of March, 2017.



David Graves, Senior Land Use Planner
Seattle Department of Construction and Inspections

DGG/17-002

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 the attached Interpretation 17-002 via email or in person, to each person listed below, in the matter of the appeal of **Livable Phinney**, Hearing Examiner File **MUP 17-009 (DR, W)**.

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Dated March 30, 2017

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