

**BEFORE THE HEARING EXAMINER**  
**City of Seattle**

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In the Matter of the Appeal of	)	Hearing Examiner File
	)	<b>MUP-17-009 (DR, W)</b>
<b>Livable Phinney</b>	)	
	)	Department Reference:
from an interpretation by the Director, Seattle	)	3020114
Department of Construction and Inspections	)	<b>SDCI Closing Statement</b>
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This memorandum constitutes the written closing statement of the Seattle Department of Construction and Inspections (SDCI) in the above-captioned appeal and interpretation. SDCI limits its written closing to a brief summary of the issues and a response to the oral arguments of the parties given on May 2, 2017 – May 5, 2017.

**I. INTRODUCTION**

The appellant, Livable Phinney, appealed the approval by the Director of the Department of Construction and Inspection’s (“SDCI”) of a 57-unit residential and mixed-use building at 6726 Greenwood Avenue in the Greenwood/ Phinney Ridge neighborhood in Seattle. The proposal required design review and State Environmental Policy Act (“SEPA”) review. It was also subject to a Request for Interpretation (SDCI No. 17-002), which the appellant also has appealed.

The Project received several departmental reviews, including zoning review, between the time of submittal and publication of the Master Use Permit “MUP”). It was reviewed during four separate Design Review Board (“Board”) evening meetings, occurring over the course of most of a year, the first taking place on October 19, 2015 and the final taking place on September 26, 2016. During the design review process, in

response to the Design Review Board's and Department's promptings, several changes to the proposal were made, ultimately resulting in the proposed building that is subject to the appeal hearing. In addition, the applicant thoughtfully considered the surroundings of the proposal site in its design and, in accordance with citywide and neighborhood design guidelines, and among other considerations, balanced the transition to neighboring properties with the need for a strong integrated and independent design. The proposal for the mixed-use, residential building, in scale smaller than the majority of such buildings currently seeking approval throughout Seattle, has been thoroughly reviewed and vetted. The City of Seattle Department of Construction and Inspections (SDCI) properly issued design review approval.

SDCI also thoroughly reviewed the proposal under State Environmental Policy Act (SEPA) criteria. As part of the SEPA review for the proposal, the applicant, Johnson & Carr, Inc., has commissioned several SEPA studies, including a traffic analysis, parking analyses, a geotechnical report, and Phase I and II environmental reports. These were all reviewed by SDCI as part of the department's environmental review. On January 23, 2017, SDCI issued a Master Use Permit ("MUP") decision consisting of approval of the design recommended for approval by the Design Review Board, as well as a Determination of Non-significance ("DNS"). The appellant has not met its burden to show that the MUP approving this proposal was in any way issued erroneously.

## **II. DESIGN REVIEW**

The design review process exists, in part, to "encourage better design and site planning to help ensure that new development enhances the character of the city and

sensitively fits into neighborhoods” (SMC 23.41.002). Its purpose “shall be to identify concerns about the site and the proposed project, review the design guidelines applicable to the site, determine neighborhood priorities among the design guidelines, and explore design concepts and/or options (SMC 23.41.014).

The aim of the Design Review program is not the creation of great architecture, a rare confluence of individual genius and the *genius loci*. Occasionally it will be a factor in the production of buildings of some elegance and distinction, edifices that afford a modicum of pleasantness and comfort. Despite protestations otherwise, the subject building is fine of its kind and not totally without some architectural merit. It conveys a fusion of elements of utility, firmness and delight which have been the touchstones of successful architecture over time. It will not dominate, nor will it exhaust all available light and air. Those who inhabit there will freely inhabit there. In sum, the building over time shows promise to lie peaceably with its neighbors. Without compromising what the law allows or the essential integrity the building’s need to realize its own intentionality, the Board has nudged and directed, and at time cajoled, the proposal into being a better neighbor than otherwise it might have been.

Presentation before the Design Review Board constitutes the proper forum in the City within which the design of projects is reviewed under the Code and the City’s adopted Design Review Guidelines (SMC 23.41.008.A). When (as here), four or more members of the Board are in agreement in their recommendation to SDCI, there is a presumption that the Design Review Board’s recommendation is correct and the Director is required to make compliance with the recommendation of the Design Review Board a condition of permit approval (SMC23.41.014.F.2).

In recognition of this process, the City Code requires the Hearing Examiner to give substantial weight to SDCI's design review decision (SMC 23.76.002. C.7). The burden is on the appellant to overcome the deference given the Director's decision. The "substantial weight" requirement has been interpreted as mandating the *clearly erroneous* standard of review. Under the clearly erroneous standard, reviewing bodies do not substitute their judgment for that of the agency but may invalidate the decision only when left with the definite and firm conviction that a mistake has been made.

At the close of the public hearing on the appeal of Livable Phinney on Thursday, May 4, 2017, the Hearing Examiner asked Mr. Dorcy whether in his estimation the criteria listed at SMC 23.41.014.F.2 provided a fair template for anyone other than the Director considering and evaluating the performance record of the Design Review Board in reviewing a specific proposal. While acknowledging the comprehensive nature of the language in the Code in specifying the Director's obligation to evaluate the recommendations of the Board regarding overall approval of the proposed design and the granting of any related departures from development standards, Mr. Dorcy was not suggesting utilization of the criteria as anything other than an abstract exercise. The Code clearly sets forth the criteria and Director's obligations in approving or not the recommendations of the Design Review Board in any specific instance. As stated in SMC 23.41. 014.F.2, "if four or more members of the Design Review Board are in agreement in their recommendation to the Director, 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 of the Design Review Board:*

- 1. Reflects inconsistent application of the design review guidelines; or*
- 2. Exceeds the authority of the Design Review Board; or*
- 3. Conflicts with SEPA conditions or other regulatory requirements applicable to the site; or*
- 4. Conflicts with the requirements of state or federal law (italics added).*

As noted above, the “substantial weight” requirement has been interpreted as mandating the *clearly erroneous* standard of review. Under the clearly erroneous standard, *reviewing bodies do not substitute their judgment for that of the agency but may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed.* The standards set forth in SMC 23.014.F.2. are those by which the Director must conclude, is such is the case, that a given Board in a given instance had failed in its responsibilities to the Design Review purpose and process. It seems also clear that utilization of these same standards in order to assess the judgment of the Director could constitute a form of “second guessing” which would appear to be out of step with the deference obligation.

Likewise, an appellant does not meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the

decision. Mere complaints, or claims without the production of affirmative evidence showing that a decision was erroneous, are insufficient to satisfy the appellant's burden.

There was no professional testimony offered to the Examiner regarding design concerns of the proposal from the appellants. Such evidence as was offered was neither clear, nor convincing. The appellants failed to meet the burden to show, with clear and convincing evidence, that the Design Review Board's decision regarding height, bulk and scale, respect for adjacent sites, zone transitions, and other design issues, was made incorrectly or is consistent with the Design Review Guidelines.

Both Mr. Janette and Mr. Dorcy testified that the Design Review process in Seattle is a collaborative process. The Design Review Guidelines provide a framework for designing a building and are not considered to mandate a particular project design or type or architectural style. The Guidelines are intended to be viewed in their totality, and must accordingly be balanced one with the other.

Instead of reviewing the proposal against the Guidelines in their entirety, the appellant argued that the proposal did not comply with three specific guidelines: Citywide Guidelines CS2-D-5 and CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii. The applicants' evidence at hearing, however, showed that the proposal meets both the Citywide and Greenwood/Phinney Design Review Guidelines, including the specific Guidelines cited by the appellants. Appellants failed to meet their burden to demonstrate that SDCI's conclusion on design review was erroneous.

All evidence in the record shows that the proposal meets the considerations contained in both the Citywide and the Greenwood/Phinney Design Review Guidelines.

Appellants generally complained, for instance, that the proposal did not meet CS2-D-5, which recommends that a project respect adjacent sites with the intent to minimize disrupting the privacy of residents in adjacent buildings. Appellants failed, however, to present any affirmative evidence supporting their allegations that the proposal did not meet Guideline CS2-D-5. Instead, the evidence in the record shows that the proposal does meet the height, bulk and scale requirements of the Citywide and Greenwood/Phinney Guidelines, including CS2-D-5.

The project architect, Jay Janette, testified regarding the extensive design review process conducted for the proposal. The Board reviewed this proposal in four separate evening public meetings. Mr. Janette testified to the design changes requested by the Board and met by the applicants so that the proposal would better relate to the properties to the east and to the south. Specifically, the proposal made several changes to improve the proposal while minimizing possible disruption to the privacy of residents in adjacent buildings. These included:

- The building maintains a 5-foot setback along the east property line;
- The applicants removed the level 2 amenity area in the NE corner, allowing for more privacy between the project and the adjacent single-family homes to the East;
- The building maintains a 10-ft upper level setback at the northeastern property façade and a 25-ft upper level setback at the southeastern property façade;
- Landscape screening was added along the east property line at the upper level setback;
- The brick façade was extended around the northeastern corner of the building to maintain a high quality, attractive look for properties to the east;
- The project reduced the height of the parapet to the minimum necessary to reduce the height and appearance of bulk;
- The clerestory expression along Greenwood was set back from the southern edge of the building to allow for a transition to the existing building to the south;

- The stair along the south property line was relocated further to the north, rotated, and chamfered to reduce its visual impact on the south façade;
- The south facing façade received a design treatment without fenestration but with patterning that is consistent with the proposal's other facades;
- The bays along the eastern façade were removed at the northeast corner, where the building is closest to the property line, and shortened to be below the roofline along the rest of the east façade;
- The south facing façade was modified so that the lower CMU portion of the wall will be painted a lighter color to match the façade above, and to provide additional reflected light into the space between the buildings;
- High windows of the east facing units and the punched windows in the northeast brick-faced volume were reconfigured and reduced in size in order to minimize the visual impact, and to and ensure the sense of privacy afforded the neighboring properties to the east;
- Proposed balconies on the northeastern façade were removed;
- The amenity roof deck for residents of the proposed building was moved further to the west to ensure privacy and reduce noise levels affecting properties east of the proposal;
- The few south-facing windows, located more than sixty feet from the south property line, were reduced in size and positioned so as not to directly face the windows in the building to the south in a gesture to afford a greater sense of privacy for the residents of the apartment building located to the south.

Based on the extensive modifications in design noted above, the Board was satisfied with the changes as they related to the considerations contained in the various design guidelines. With regard to Guideline CS2-D-5, the Board agreed that the project had responded to the concerns regarding adjacent sites and privacy of neighbors to the east and south. They expressed satisfaction with the 5-foot setback along the east property line and the modifications to the fenestration on the east façade. They were also satisfied with the proposed landscape plan, pointing out that establishing the plantings would require an irrigation plan, especially at the second level amenity area where it is critical to establish the landscape to ensure a sense of privacy both to the internal units and to their neighbors. The appellants failed to submit any objective evidence overcoming the presumption that Guideline CS2-D-5 has been addressed.



Citywide Guideline CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii relate to the transitions at zone edges between different zones. The project abuts two split-zone lots which include a NC2-40 designation at the property line shared with the subject lot and a Single Family 5000 designation that commences approximately 20 feet east of the eastern property line of the subject site. While the project does not directly abut a zone of lesser density, both the applicant and the Design Review Board took into account the single family uses to the east in their consideration of the proposal. This resulted in a design that provides an appropriate transition to the less intense zone that lies 20 feet from the east property line and which accords with the considerations of both Citywide Guideline CS2-D-3 and Greenwood/Phinney Guideline CS2-II-vii.

The appellants offered no expert witnesses regarding building design, the design review process, or the application of the Design Review Guidelines. They did offer testimony of a Mercer Island resident who owns the apartment building due south of the proposal site and a neighbor who resides due east of the site. Although each acknowledged some concessions had been granted by the applicant to their personal wishes, each voiced subjective, strongly negative opinions regarding what they characterized as an unresponsive design with unmitigated impacts affecting their properties (see Reymore and Johnson testimonies). In response, the applicants presented the testimony of Jay Janette, a Seattle architect who has over 20 years experience of designing buildings in Seattle and presenting projects to the Design Review Board. Mr. Janette testified to the significant design changes made to the project so that it would better relate to the residential uses to the east and south, provide appropriate transitions, and seek to enhance the sense of privacy afforded those residents. The project design

reflects those changes as well as the goal to create a building with a coherent and integral architectural presence, also a challenge of the design guidelines. Mr. Janette described the push and pull of balancing the design guidelines while striving to the best of his ability to “try to come to a reasonable, rational, coherent conclusion, both architecturally, functionally, programmatically, economically, environmentally in order to strike a balance.” The testimony of Michael Dorcy concurred that the Board had made a concerted effort to balance the considerations contained in the various priority guidelines. Mr. Dorcy testified that he did not find the Board’s recommendation insufficient in any way and the Director’s decision accordingly was required to make compliance with the Board’s recommendation a condition of permit approval.

In sum, the appellants failed to meet their burden to show the SDCI design review decision was in error.

### III. SEPA

The City Code require the Hearing Examiner to give substantial weight to the Director’s decision to issue a DNS (SMC 23.76.022.C.7). The burden is on the appellants to overcome the deference that the Director’s decision must be given. Substantial weight is to be reviewed under the *clearly erroneous* standard, which maintains that reviewing bodies may not substitute their judgments for those of the agency and that they may invalidate a decision only when left with the definite and firm conviction that a mistake has been made.

It is appellant's burden to prove, beyond a mere suggestion, that the decision to issue the DNS was clearly erroneous, and that the proposal will result in significant adverse impacts that requires an EIS. To prove that a decision was clearly erroneous, the appellant must produce affirmative evidence showing that such impacts will occur as a result of the project. Specifically, where an appellant makes claims of a failure to adequately identify or mitigate adverse impacts, the appellant must produce evidence that such impacts will actually exist for a decision to be overturned. Mere complaints, or claims without the production of affirmative evidence proving that the decision was clearly erroneous, are insufficient to satisfy an appellant's burden of proof. The appellants have not furnished affirmative evidence supporting their allegations.

In its appeal documents, the appellants alleged that the proposal would have significant adverse impacts to the following elements of the environment: height, bulk and scale, views, land use, neighborhood aesthetics and character, the potential release of hazardous substances, environmental health, transit, and on-street parking. With regard to each of these alleged impacts, the appellants have not furnished affirmative evidence supporting their allegations, and therefore have not met their burden. Since alleged impacts are treated elsewhere in the applicant's closing remarks, here we address only two of the impacts, *height bulk and scale* and *parking*.

#### Height, bulk and scale

SEPA states that an agency may condition a project only if the condition is based on policies identified by the agency and incorporated into regulations, plans or codes that are formally designated by the agency as possible bases for the exercise of its authority

under SEPA. The City has adopted substantive SEPA policies to form the basis of its exercise of its SEPA authority. One of these policies, the SEPA Overview Policy, provides that, “many environmental concerns have been incorporated in the City's codes and development regulations. Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation,” with limited exceptions (SMC 25.05.665.D).

The City’s SEPA policy for height, bulk and scale provides that citywide and neighborhood design guidelines are intended to fully mitigate height, bulk, and scale impacts. Any project approved through the design review process is presumed to comply with the City’s height, bulk, and scale SEPA policies (SMC 25.05.675.G.2.c). This presumption may only be rebutted with clear and convincing evidence that height, bulk, and scale impacts have not been adequately mitigated. Here, as discussed above, the proposal underwent a lengthy and thorough design review process. The Board carefully considered the proposal’s height, bulk and scale and determined that it complied with the City’s Design Guidelines. This determination was supported by extensive evidence in the materials presented to the Board. The proposal height is consistent with other nearby development along Greenwood Avenue. The proposal includes measures to reduce its actual and apparent height, bulk and scale, provide appropriate transitions to the less-intense zones, and implement project elements to ensure the privacy of adjacent neighbors. At hearing, the appellants failed to produce affirmative evidence demonstrating that the DNS was clearly erroneous. Instead, appellants provided only lay testimony regarding individual neighbors’ opinions that the proposal is “too large.” This evidence is not clear and convincing and does not satisfy the appellant’s burden.

## Parking

Several issues related to the applicant's parking analysis were raised by the appellants; these are addressed below:

### ***Peak on-street demand vs peak project demand:***

The time of a project's peak parking demand may be different than the time of an area's peak parking demand. Parking demand for residential projects typically occurs overnight. The on-street parking demand of a particular geographic area depends in part on prevailing nearby land uses. Heavily residential areas typically peak overnight, but mixed commercial and residential areas may have peak parking demand at other times of day, as occurs for 6726 Greenwood. The appropriate measure of the project's peak parking demand is the demand the project will generate at the time when the cumulative on-street demand (from existing counts, estimated project demand, and estimated pipeline demand) is at its highest. This was identified for 6726 Greenwood as occurring between 6-7 PM. The project's peak parking demand was estimated to occur between midnight and 1 AM; the effect of project parking demand on on-street availability also was identified for this time period.

### ***Time-of-day parking demand factors:***

The Institute of Transportation Engineers (ITE) identifies percentage of peak parking demand by time of day for various uses. For residential uses, 69% of the (overnight) peak parking demand is expected to be present between 6 and 7 PM. Gibson Traffic Consultants did not take this into account in any of their three traffic studies; as a result, these studies make a conservative estimate of project parking generation during this time period. (Similarly, they did not discount the commercial parking demand between midnight and 1 AM, resulting in a conservative parking demand estimate for this time period.) Accounting for time of day reductions is a common step in parking demand studies, and a reasonable estimate to make for this project. Gibson estimated that each unit would generate a peak parking demand for 0.57 vehicles. Even if a higher base residential parking rate were used (such as the 0.80 vehicles/unit rate proposed by Mr. Crippen), an adjustment to take account of peaking factors would result in a 6-7 PM rate of about 0.55 vehicles, very close to the rate Gibson used.

### ***Use of Right-Size Parking:***

As Mr. Crippen noted, King County's Right-Size Parking tool attempts to provide rates for developers to use to estimate how much parking would satisfy demand if their project were to provide parking. The Right-Size Parking data base includes only developments with on-site parking. It is an imperfect tool to use for estimating demand for projects with no on-site parking, as residents may self-select for parking availability. Using unadjusted parking rates from Right Size Parking for projects with no parking supply therefore may result in overestimates of parking demand. In projects with no parking, parking costs by definition would not be included in the lease; using the Right-Size Parking "unbundled parking" rate likely provides the best estimate of a per-unit rate for such projects.

***85<sup>th</sup> percentile:***

Parking utilization studies determine the percentage of parking spaces that are occupied by vehicles, relating measured or forecast parking demand to capacity. As demand approaches capacity, parking is more difficult to find. Industry best practice indicates that 85% of capacity is an appropriate benchmark to indicate when parking supplies will start to feel constrained. This percentage has been used by SDCI to determine when a project might have noticeable spillover parking impacts. However, parking spaces will still be available within a given area until the demand/capacity ratio reaches 100% (and this can be exceeded if cars park closer together or encroach on areas demarcated for driveways, clearances from corners, etc).

***Inclusion of future projects:***

The potential loss of parking from a cycle track or other planned and unprogrammed projects was not included in the forecast of future parking conditions. This is consistent with SDCI's practice of looking to SDOT's Capital Improvement Program (CIP) and similar identified commitments to determine what future changes to rights-of-way are likely.

## **IV. Code Interpretation**

### Summary

On behalf of his client Livable Phinney, attorney Jeffrey M. Eustis requested an interpretation in conjunction with the appeal of Project 3020114. The interpretation (Exhibit 6) addressed seven separate code interpretations requested<sup>1</sup>, including upper level setback requirements for the project, whether rooftop features meet the standards

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<sup>1</sup> As noted in the interpretation, SMC 23.88.020.A states, in part, "Procedural provisions and statements of policy are not subject to the interpretation process." As the issue concerning the correct vesting date is a "procedural provision," SDCI maintains that the vesting determination is not subject to interpretation. Although it was briefly discussed during oral arguments at the hearing, this issue was not addressed in the interpretation pursuant to the Land Use Code.

for clerestories, whether these features shade “property to the north” in contravention of the code, whether the project impermissibly provides an additional story in the form of a mezzanine, whether the view analysis sufficiently demonstrated that protected views are not significantly blocked, whether the elevator penthouse may extend to a height of 60 feet, and whether there is sufficient information to conclude that the “frequent transit service” definition was met at the project location.

The Director’s position is that the evidence at hearing clearly shows that the appeal should be rejected. The Director’s decision and related Code interpretations are supported by the evidence in the record and should be affirmed.

### Burden of Proof

SMC 23.76.022.C.7 sets forth the standard of review for administrative appeals of “Type II” Master Use Permit approvals, such as the subject design review decision and SEPA determination. Subsection C.7 provides in part as follows: “The Director’s decisions . . . shall be given substantial weight . . .” Thus, the appellants have the burden of proof to show that the Director’s decision is clearly erroneous. Similarly, SMC 23.88.020.G.5 provides, in part: “The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant.” This, too, sets forth the “clearly erroneous” standard of review.

Under the clearly erroneous standard, the Hearing Examiner must be left with the definite and firm conviction that a mistake has been committed by DPD in its analysis and decisions. As is clear from a review of the facts and analysis presented by SDCI at the hearing, the appellants have failed to meet this burden. The remedy sought by appellants is a remand for further review, imposition of SEPA conditions allegedly required to mitigate adverse impacts, and vacation of the Analysis and Decision based upon “its erroneous interpretation.” However, the record at hearing shows clearly that the appellants have failed to offer sufficient information about either substantive issues or procedural matters to justify a remand of the Director’s decisions. The record shows no errors in the application of Code to the facts, or in the decision-making process, to demonstrate that the Code interpretation should be reversed or remanded, as explained in detail below.

### Argument

- 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 (Exhibit 72), established upper level setbacks for lots abutting or across an alley from residential zones.

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 a SF 5000 zone and are developed with residences, the western portions of these lots are in a 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 (Exhibit 4), provided a 5-foot setback from the property line at ground level. Also, the applicant has provided a 10-foot setback in the northeast portion of level two and above.

No persuasive testimony was provided at the hearing to explain why the SDCI analysis was in error. Rather, the appellant simply focused on the residential use of the split zoned lot, while ignoring its partly commercial zoning.

**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.**

As seen from elevation drawings in the plan set, the proposed rooftop feature contains many windows. The definition of clerestory 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 (Exhibit 17), 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 (Exhibit 4), “The clerestory fenestration has been enlarged . . . allowing more light into the related units.”

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

Again, the appellant offered no persuasive testimony or exhibits at the hearing to demonstrate an error in SDCI’s analysis.



**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.**

According to the shadow diagram provided in the plan set (Exhibit 17), there is no property to the north that is shaded. North 68<sup>th</sup> Street is to the north of the building. 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. This shadow diagram is typical of shadow diagrams provided in plan sets and routinely approved and accepted by the Director.

However, during the hearing, Exhibit 31 provided an alternative shadow diagram. This diagram, provided by the appellant, appeared to disagree with the results provided by the shadow diagram in the plan set. The applicants also provided an alternative shadow diagram (Exhibit 68) and Jay Janette offered an alternative understanding of SMC 23.47A.012. Their reading of that code section is reasonable - that only shadows which extend beyond the shadows produced by a building that has used the maximum permitted height and FAR should be considered, as opposed to considering shadows from the current configuration of the building. Under that reading of the code, the alternative shadow diagram offered by the appellant does not appear to show that the clerestories would shade property to the north. Regardless, it also remains SDCI's position that shading of street right-of-way only does not constitute shading or "property" as regulated by SMC 23.47A.012.C.7.

Therefore, based on the typically approved shadow diagram in the original plan set or the alternative way of reading the code, the building meets the requirements of SMC 23.47A.012.C.7.

**4. 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 contended that the mezzanine of the 4<sup>th</sup> floor (Exhibit 17) constitutes an additional story which is not allowed by the Code. Mezzanines are not defined in the land Use Code. They are defined and described in the Seattle Building Code, pursuant to Section 505.2. 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.

The appellant offered no persuasive testimony or exhibits at the hearing to demonstrate an error in SDCI's analysis.

**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.**

The original view analysis provided by the Applicant on Sheet G0.02B of Exhibit 17 was appropriate and typical of the view analyses accepted by the Director. However, it did not provide a view analysis from all angles. The supplementary and more in-depth view analysis (Exhibit 79) demonstrated that the additional height does not significantly block any of the protected views under SMC 23.47A.012.A.1.c.

The view analyses provided by the Appellant (Exhibits 21, 22, and 23) that used an application on an iPad is not a form or type of analysis that has been accepted by the Director for any other project. The Code does not spell out the level of analysis required, but while the Director does not require an applicant to employ a surveyor to aid in completion of the view analysis, the use of a drone and methods specifically designed for view analyses are more credible than a hand-held iPad application.

The code does not require that views be unchanged, but only that they not be “significantly” blocked. Thus, for example, both banks of Green Lake may not be visible after the project is constructed, but most of the lake remains visible from neighboring residential structures, and thus there is insufficient basis to conclude from the view analyses provided that the view of the lake or other views referenced in the Code will be significantly blocked. The view analyses provided by the applicant demonstrates that none of the protected views are significantly blocked by the additional height.

**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.**

The additional 4 feet allowed under SMC 23.47A.012.A.1.a effectively establishes a base height limit of 44 feet for the proposed structure. The term “otherwise” in the code sections 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.

Pursuant to SMC 23.47A.012.C.4 an additional 16 feet for a stair or elevator penthouse to extend above the applicable height limit of 44 feet is allowed, resulting in a maximum height of 60 feet above average grade.

Again, the appellant offered no persuasive testimony or exhibits at the hearing to demonstrate an error in SDCI's analysis.

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

The applicant correctly relied on bus schedules produced by King Country Metro to determine if the location of the project provides frequent transit service. 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 schedules (Exhibit 76) for the streets adjacent to the development site is a reasonable document to consult to determine headways, because this is the most readily available source of information to determine the timing on which the busses run. The Director consistently relies on bus schedules and the type of analysis provided by the applicant to determine whether frequent transit services is met, as shown as an example in Exhibit 77.

The applicant's witness Mr. Brick and appellant's witness Dr. Altschul provided testimony about bus timing from September, October, and November of 2016. The analysis by Dr. Altschul (Exhibit 18) determined that the busses did not run on schedule a little less than half the time. However, this analysis was completed based on now outdated schedules and bus services. Mr. Brick explained that service on this route has been increased and improved since this study took place. With constantly changing schedules and improved service, the outdated study (Exhibit 19) is no longer accurate. Similar to the decision in MUP-14-022 (W) (Exhibit 78), the evidence presented at hearing fails to prove that the new and expanded transit service at the project location does not meet the frequent transit service requirements. Furthermore, it is impractical to require applicants to perform detailed statistical analyses each time they attempt to demonstrate frequent transit service is located nearby. By the time such studies are completed, it is likely the schedule and service has changed significantly. It is also unclear how many days, weeks, or months the busses would need to meet their scheduled stops to be sufficient to meet the standard.

Conclusion

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 based on either the shadow diagram in the plan set or using the alternative reading of the code that addresses the shadow diagrams provided during the hearing. 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 view analysis in the plan set and provided at the hearing demonstrate that views are not further impacted by the additional

4 feet in height. Finally, current bus schedules are appropriate for concluding whether frequent transit service is met as the most practical way of making this determination.

Entered this 5th day of June 2017.



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Michael Dorcy, Senior Land Use Planner  
Seattle Department of Construction and Inspections



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

cc. Jeff Eustis, attorney for appellant  
Jessica Clawson, attorney for applicant  
Katie Kendall, attorney for applicant

DECLARATION OF SERVICE

I am a Land Use Planner employed by the City of Seattle, Department of Construction and Inspections, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document via email upon parties of record, addressed as follows:

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Department of Construction and Inspections

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Dated: June 5<sup>th</sup>, 2017

  
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Michael M. Dorcy  
Department of Construction and Inspections