BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: Livable Phinney, a Washington non-profit corporation From a Department of Construction and Inspections decision.	No. MUP 17-009 (DR, W) SDCI Reference: 3020114 APPLICANT'S POST-HEARING BRIEF

I. INTRODUCTION

Appellant Livable Phinney ("Appellant") appealed the Director of the Department of Construction and Inspection's ("SDCI") approval of a 57-unit residential building at 6726 Greenwood Avenue North in the Phinney Ridge neighborhood in Seattle ("Project"). The Project required design review and State Environmental Policy Act ("SEPA") review, and was subject to a Request for Interpretation, Interpretation No. 17-002, which the Appellant also appeals.

The Project was reviewed during four separate Design Review Board ("Board") meetings. As a result of design review, several changes to the Project were made, ultimately resulting in a better-designed building. In addition, the Applicant thoughtfully considered the surroundings of the Project site in its design and, in accordance with citywide and neighborhood

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

design guidelines, balanced the transition to neighboring properties with the need for a strong corner street presence. In sum, the Project is one of the most well-designed and thoroughly considered residential projects in the Phinney Ridge neighborhood. The City of Seattle ("City") Department of Construction and Inspections ("SDCI") properly issued design review approval.

SDCI also thoroughly reviewed the Project under SEPA. As part of the SEPA review for the Project, the Applicant Johnson & Carr, Inc. ("Applicant") completed several SEPA studies, including a traffic analysis, parking analyses, geotechnical report and Phase I and II environmental reports, which SDCI reviewed. Ultimately, SDCI issued a Master Use Permit ("MUP") decision consisting of approval of the design recommended for approval by the Board and a Determination of Nonsignificance ("DNS").

Appellant requested a Land Use Code Interpretation regarding several items: setback requirements in SMC 23.47A.014.B.3; issues related to the definition and location of the clerestory; the shadow study conducted pursuant to SMC 23.47A.012.C.7; the view study conducted pursuant to SMC 23.47A.012.A.1; the height of certain rooftop features; and the definition of frequent transit. After thorough consideration of the issues, the City determined that the Appellant's arguments were without merit and it upheld its zoning decisions.

The Appellant has not met its burden to show that the MUP approving this Project was erroneous. The Appellant has similarly not met its burden to show that the conclusions in the Interpretation were erroneous. The appeal must be denied and the MUP and the Interpretation must be affirmed.

II. FACTS

The facts in this matter were established at hearing. The relevant facts are discussed below in relation to each claim.

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

III. ARGUMENT

The Hearing Examiner has only that authority granted to it by statute or ordinance. *Chausee v. Snohomish Ct. Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984); *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003). Accordingly, the Examiner's authority to review the Appellant's claims is expressly limited by the specific standards of review outlined in the Seattle Municipal Code ("City Code" or "SMC").

As discussed below, the Appellant has not met its burden to show that the MUP approving this Project was erroneous. The Appellant has similarly not met its burden to show that the conclusions in the Interpretation were erroneous. The appeal must be denied and the MUP and the Interpretation must be affirmed.

A. Appellant failed to meet its burden to show that SDCI's design review decision was erroneous.

1. The Hearing Examiner must give substantial weight to SDCI's design review decision and the burden of proof is on Appellant.

The design review process exists, in part, to "[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods." SMC 23.41.002. The Board is the entity charged with reviewing the design of projects under the Code and the City's adopted Design Review Guidelines. SMC 23.41.008.A. When (as here), if 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. *See* SMC 23.41.014.F.2. SMC 23.41.014.F.2 requires the Director to make compliance with the recommendation of the Design Review Board a condition of permit approval if four or more members of the Design Review Board are in agreement regarding the recommendation, with some exceptions not applicable here.

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

In recognition of this process, the City Code requires the Hearing Examiner to give substantial weight to SDCI's design review decision. RCW 43.21C.090; SMC 23.76.002.C.7; *King County v. Central Puget Sound Growth Mgm't Hrgs. Bd.,* 91 Wn. App. 1, 30, 951 P.2d 1151 (1998). The burden is on the Appellant to overcome the deference that the Director's decision.

Courts interpret the "substantial weight" requirement as mandating the clearly erroneous standard of review. *Indian Trail Property Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430, 431, 886 P.2d 209 (1994); *Brown v. Tacoma*, 30 Wn. App. 762, 764, 637 P.2d 1005 (1981). 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. *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011), *citing Norway Hill Pres. and Prot. Ass'n. v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotations omitted).

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. *See e.g.*, Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et al.*, File Nos. S-96-002 and S-96-003 (July 15, 1996), p. 13; Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeal of Andrew Kirsh and Meredith Getches*, File No. MUP-08-003 (May 23, 2008). Mere complaints, or claims without the production of affirmative evidence showing that a decision was erroneous, are insufficient to satisfy an Appellant's burden. *Boehm v. City of Vancouver, supra,* at 719-720 (2002); *see also Moss v. Bellingham,* 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Much of the Appellant's presentations were given to discussing the design review process, and the "impacts" of the Project regarding design. However, only lay testimony was submitted to the Examiner regarding design concerns of the Project. Such evidence is neither clear, nor convincing, and the Appellant failed to meet its 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 correct. The Examiner must reject Appellant's claims regarding these issues.

2. The Project is consistent with the Design Review Guidelines.

The Design Review process in Seattle is a collaborative process. The Design Review Guidelines are a framework for designing a building, and are not considered to mandate a particular project design. (Testimony of Jay Janette, Day 2, 256-260:14-1). Guidelines are intended to be viewed in total, and must accordingly be balanced among one another. *Id.*

Instead of reviewing the Project against the Guidelines in their entirety, Appellant argued that the Project did not comply with three guidelines: Citywide Guidelines CS2-D-5 and CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii. Appellant is incorrect. The evidence at hearing showed that the Project meets both the Citywide and Greenwood/Phinney Design Review Guidelines, including the specific Guidelines cited by Appellants. *See* Exhibits 63, 65-67; Testimony of Michael Dorcy, Day 3, 194-8:2-19.[1] 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 Project met both the Citywide and Greenwood/Phinney Design Review Guidelines, in the following manner:

[1] Relevant portions of the hearing transcript are cited in this brief, the excerpts of which are provided in the Declaration of Katie Kendall that accompanies this brief.

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

a. Guideline CS2-D-5: Respect for Adjacent Sites.

Appellants generally complained that the Project did not meet CS2-D-5, which recommends that a project respect adjacent sites to minimize disrupting the privacy of residents in adjacent buildings. Elizabeth Johnson Testimony, Laura Reymore Testimony. However, Appellants failed to present affirmative evidence supporting their allegations that the Project did not meet Guideline CS2-D-5. Instead, the evidence in the record shows that the Project meets 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 Project. The Board reviewed this Project in four meetings, an unusually large number. Mr. Janette testified to the design changes requested by the Board so that the Project better relates to the properties to the east and to the south. Specifically, the Project made several changes to improve the aesthetic of the Project and minimize disrupting the privacy of residents in adjacent buildings, including:

- The building maintains a 5-foot setback along the east property. (Exhs. 3 and Exh. 46, pp. 3, 6, 8)
- 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. (Exh. 46, p. 3)
- Landscape screening was added along the east property line at the upper level setback. (Exh. 46, p. 3, 16-18; Janette Testimony, Day 2, at 192-3:16-2; 216:16-23; 262-3:11-11)
- The brick façade was extended around the northeastern corner of the building to maintain a high quality and attractive look (Exh. 46, p. 3)
- The Project reduced the height of the parapet to the minimum necessary to reduce the height and appearance of bulk (Exh.46, p.3; Janette Testimony at 176:10-13, 179:6-13)
- The clerestory expression along Greenwood was set back from the southern edge of the building to transition to the existing building to the south. (Exh. 46, p. 3)

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

- The stair along the south property line was relocated further to the north, rotated, and chamfered to reduce its visual impact from the south façade (Janette Testimony, Day 2, 188:2-19).
- The south facing façade received a design treatment with patterning that is consistent with the other facades. (Exh. 46, p. 3)
- 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. (Exh. 46, p. 3)
- The south facing façade was modified so that the CMU portion of the wall at grade will be painted a lighter color to match the façade above, and provide additional reflected light into the space between the buildings. (Exh. 46, p. 6; Janette testimony, Day 2, 181:11-19 and 183-4:24-7).
- High windows of the east facing units and the punched windows in the NE brick volume were reconfigured and reduced in size in order to minimize the visual impact to and ensure the privacy of the neighboring properties to the East. (Exh. 46, p. 6; Janette testimony, Day 2, 184-5:8-14).
- The Project removed balconies on northeastern façade (Exh. 46, p. 3; Janette Testimony, Day 2, at 179:15-16)
- The Project moved roof the deck further west to ensure privacy and reduce noise for the properties east of the Project (Janette Testimony, Day 2, 186-7:17-2).
- The Project placed south-facing windows so that they are in the oblique, and do not directly face the windows in the building to the south in order to maintain privacy for the residents to the south (Janette Testimony, Day 2, 226-227:4:11).

The Board was notably focused on the transition from the Project to the neighbors to the south and the east (*see* Exhs. 5; 65; 67). Indeed, at the second Early Design Guidance meeting, the Board members agreed that the applicants' preferred option provided for the best arrangement of uses on the site and allowed for desirable transitions: 1) to the new mixed-use structure across N. 68th Street, 2) to the multi-family structure to the south, and 3) to the single-family structures to the east. Exh. 65, p. 7. However, to provide for suitable transitions, the Board also recommended that the architect doff the clerestory cap along the south portion of the top of the compositional bar facing onto Greenwood Avenue N, requested that the architect provide significant design attention to the south façade. *Id.* The Board also requested that the transition to the eastern properties receive further attention, including setting the easternmost live-work unit further back from the property line at N. 68th Street, truncate the bays above the two live-work units below the cornice line atop the side wall,

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

remove bay roofs and doff the building "caps" altogether. *Id.* These suggestions were incorporated into the approved design. Exh. 46, p. 3 and 6. Based on the extensive changes noted above, the Board was satisfied with the changes in relationship to the design guidelines.

With regard to Guideline CS2-D-5, the Board agreed that the Project responds to the concerns regarding adjacent sites and privacy of neighbors to the east, stating:

> The Board 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 privacy to the units and to their neighbors.

Exhibit 5, p. 5.

The report also reflects that:

> The Board expressed satisfaction and agreed that changes to the window composition within the clerestories and on the east façade had addressed their concerns expressed at the earlier Recommendation Meeting.

Id.

With regard to Guideline CS2-D-5, the Board requested, and the Applicant agreed, to keep the south wall a lighter color. The light color is shown in the final Design Review Submission (Exh. 46, p. 6) and in the final MUP Plans (Exh. 3, p. A3.04).

The MUP Decision requires the following:

> The building and landscape design shall be substantially consistent with the materials represented at the Final Recommendation meeting and in the materials submitted after the Final Recommendation meeting, before the MUP issuance. Any change to the proposed design, including materials or colors, shall require prior approval by the Land Use Planner (Michael Dorcy, (206) 615-1393, michael.dorcy@seattle.gov).

Exh. 5, p. 29.

To clarify that this condition also requires that the south wall be light in color, the Hearing Examiner requested that the parties propose a condition regarding the south wall.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Applicant accordingly proposes that the City revise the above condition in the MUP decision, stating the following:

> The building and landscape design shall be substantially consistent with the materials represented at the Final Recommendation meeting and in the materials submitted after the Final Recommendation meeting, before the MUP issuance. The building's south wall shall be light in color as recommended by the Board. Any change to the proposed design, including materials or colors, shall require prior approval by the Land Use Planner (Michael Dorcy, (206) 615-1393, michael.dorcy@seattle.gov).

The Appellant failed to submit any affirmative evidence overcoming the presumption that Guideline CS2-D-5 has been addressed. The Examiner must reject this issue.

b. Guideline CS2-D-3 and Guideline CS2-II-ii: Zone Transitions and Zone Edges.

Citywide Guideline CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii relate to the transitions at zone edges between different zones. Exhibit 5, pp. 6-7. The Project abuts a split zone lot which includes NC2-40 at the zone edge and single family use approximately 20 feet from the eastern property line. *Id.*, p. 2. While the Project does not directly abut a zone of lesser density, both the Applicant and the DRB took into account the single family uses to the east in consideration of the Project, resulting in a design that provides an appropriate transition to this lesser intense zone in accordance with both Citywide Guideline CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii. *See generally* Exh. 46; Exh. 5, pp. 3-22.

Guideline CS2-D-3 recommends that a project located at the edge of a different zone provide an appropriate transition or complement to adjacent zones by creating a step in perceived height, bulk and scale between the anticipated development potential of the adjacent zone and the proposed development. Exh. 5, p. 6. Greenwood/Phinney Guideline CS2-II-ii similarly requests zone transitions, and suggests that an applicant consider four different design techniques at zone edges, including (1) increasing the building setback from the zone edge at the ground

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

level; (2) reducing the bulk of the building's upper floors nearest to the less intensive zone; (3) reducing the overall height of the structure; and (4) using extensive landscaping or decorative screening. *Id.*, p. 7. The Project utilized all methods described above to reduce the actual and apparent height, bulk and scale of the building along the eastern edge of the Project, including:

- The Project reduced the height of the parapet to the minimum necessary to reduce the height and appearance of bulk. (Exh.46, p.3; Janette Testimony at 176:10-13, 179:6-13)
- The Project dissolved the mass and broke up the bulk and the scale with modulation and bays as the building moves east to provide a transition. (Janette Testimony, Day 2, 167:10-18)
- The Project removed balconies on northeastern façade (Exh. 46, p. 3)
- 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. (Exh. 46, p. 3)
- Landscape screening was added along the east property line at the upper level setback. (Exh. 46, p. 3, 16-18; Janette Testimony at 192-3:16-2; 216:16-23; 262-3:11-11)
- The Project increased setbacks beyond Code requirements to the extent feasible while maintaining a corner and street presence along 68th Street.
    - The southeastern edge is set back 5 feet at ground level and 25 feet in the upper level setbacks with significant landscaping. (Exh. 46, p. 3; Janette Testimony 192-3:16-2 and 216:16-23).
    - The northeastern edge is set back 5 feet at ground level and 10 feet in the upper level with landscaping along the upper level setback (Exh. 46, p. 3, 6; Janette Testimony, Day 2, 262-3:11-11).
- The selected scheme was determined to cast the least amount of shadow on the eastern single-family backyards than any of the other schemes presented. (Janette Testimony, Day 2, 168:1-6).

Mr. Janette also testified that the Project is 45-51 feet from the residential structures east of the Project. (*Id.*, 169:10-21). Mr. Janette testified about balancing the need for a strong architectural presence on 68th Street with the need to provide appropriate transitions and setbacks to the neighbors to the east. (*Id.*, 256-260:14-1). Indeed, the upper level southeastern façade is set back 25 feet from the property line to provide sufficient light and air to the open spaces to the east. Exh. 46, p. 3. For the northeastern façade, the upper level façade is set back 10 feet for a

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

few reasons: one, the northeastern façade is closest to a garage and not entirely open space; two, the building must maintain a strong street line on 68th Street. (Dorcy Testimony, Day 3, 217-21:17-6; Janette Testimony, Day 2, 216-19:14-9). The setbacks, coupled with the significant project changes requested by the Board, demonstrate that the Project meets Citywide Guideline CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii. Exh. 5. The Appellant failed to submit any affirmative evidence overcoming the presumption that these guidelines have been addressed. The Examiner must reject this issue.

3. Appellant failed to meet its burden to show that SDCI's design review decision was erroneous.

Much of the Appellant's presentations discussed Appellant's opinion of the southern and eastern façades of the building. However, Appellant failed to show that the design review decision was made in error.

Appellant offered no expert witnesses regarding building design, the design review process, or the application of the Design Review Guidelines. Appellant offered the testimony of several neighbors to the Project regarding their personal, lay opinion of the Project's design and its impacts. However, the personal opinions of a handful of neighbors do not overcome the substantial weight given to SDCI's design review decision.

In response, the Applicant presented the testimony of Jay Janette, a Seattle architect who has over 20 years experience designing buildings in Seattle and presenting projects to the Design Review Board. Mr. Janette testified to the significant design changes for the Project so that it best relates to the residential properties to the east and south, provides appropriate transitions, and seeks to ensure privacy of those residents. The Project design reflects those changes as well as the goal to create a coherent architectural presence and a strong street corner presence. (Janette Testimony, Day 2, 216-19:14-9, 234-36:1-16). Mr. Janette described the push and pull

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

of balancing the design guidelines, and strive 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." (*Id.*, 259:12-16). For example, Mr. Janette testified that he balanced the need for strong corners as described in Citywide Guideline CS2-C-1 with the guidelines for residential transition and privacy at Citywide Guidelines CS2-D-5 and CS2-D-3 and Greenwood/Phinney Guideline CS2-II-ii. (*Id.*, 266-67:21-17; Dorcy Testimony, Day 3, 217-20:22-6).

Michael Dorcy concurred in the Board's determination and balancing of the priority guidelines. (Dorcy Testimony, Day 3, 232-33:18-25). Mr. Dorcy also testified that, when (as here), if 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. *See* SMC 23.41.014.F.2. SMC 23.41.014.F.2 requires the Director to make compliance with the recommendation of the Design Review Board a condition of permit approval if four or more members of the Design Review Board are in agreement regarding the recommendation, unless the Director concludes the recommendation, among other things, reflects inconsistent application of the design review guidelines. SMC 23.41.014.F.2. Mr. Dorcy testified that he did not find the Board's recommendation insufficient in any way and was accordingly required to make compliance with the Board's recommendation a condition of permit approval. (Dorcy Testimony, Day 3, 197-98:23-18; 206-7:15-9).

In sum, Appellants failed to meet their burden to show the SDCI design review decision was in error, taking in to account the substantial weight allocated that decision by the Hearing Examiner.

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

B. Appellant failed to meet its burden to show that the DNS was clearly erroneous.

1. Appellant must show that the DNS was clearly erroneous.

SEPA and the City Code require the Hearing Examiner to give substantial weight to the Director's decision to issue a DNS. RCW 43.21C.090; SMC 23.76.022.C.7; *King County.*, 91 Wn. App. at 30. The burden is on the Appellants to overcome the deference that the Director's decision must be given. *Brown,* 30 Wn. App. at 764.

Substantial weight is reviewed under the clearly erroneous standard, where reviewing bodies do not substitute their judgments for those of the agency and may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain Associates v. King County,* 111 Wn.2d 742, 752, 765 P.2d 264 (1988); *Polygon Corp. v. Seattle,* 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County,* 141 Wn.2d 185, 4 P.3d 115 (2000).

It is Appellant's burden to prove, beyond a mere suggestion, that the decision to issue the DNS was clearly erroneous, and that the Project will result in significant adverse impacts and requires an EIS. *Boehm,* 111 Wn. App. at 719-720; *Moss,* 109 Wn. App. at 13. 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 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. *Boehm,* 111 Wn. App. at 719-720. 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 as a matter of law. *Id.*

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

The Appellant has not furnished affirmative evidence supporting its allegations, and it has therefore not met its burden. The Appellant's claims must be dismissed.

2. The Appellants failed to meet its burden to demonstrate that the DNS was clearly erroneous with regard to any of the alleged impacts.

In its appeal documents, Appellant alleged that the Project 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, Appellant has not furnished affirmative evidence supporting their allegations, and it has therefore not met its burden. The Appellant's claims must be rejected.

a. Appellant failed to meet its burden with regard to height, bulk and scale impacts.

Appellant failed to meet its burden of proof with regard to height, bulk and scale impacts.

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. RCW 43.21C.060; WAC 197-11-660(1); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 803, 801 P.2d 985 (1990); *Cougar Mountain Associates*, 111 Wn.2d at 752; *see also* SMC § 25.05.660.A.

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, "[m]any 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

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

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. *Id.* "Clear and convincing" evidence is not defined by the City Code. Courts have interpreted it to mean that "a highly probable standard instead of more likely than not is necessary." *In re Det. Of Brooks,* 145 Wn.2d 725, 36 P.3d 1034 (2001). The clear and convincing standard is higher than the "less stringent 'preponderance of the evidence' burden." *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 169-70, 736 P.2d 249 (1987).

Here, as discussed above, the Project underwent a lengthy and thorough design review process. Exhs. 45-46 and 62-67. The Board carefully considered the Project's height, bulk and scale and determined that it complied with the City's Design Guidelines. *See* Exhs. 63, 65, 66, 67. This determination was supported by extensive evidence in the materials presented to the Board. Exhs. 45-46 and 62, 64. The Project height is consistent with other nearby development along Greenwood Avenue. Exh.46, p. 21. The Project 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. *See* Section A.2, *supra;* Janette and Dorcy Testimony *generally*.

At hearing, Appellant failed to produce affirmative evidence demonstrating that the DNS was clearly erroneous. Instead, Appellants provided only lay testimony regarding individual

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

neighbors' opinions that the Project is too large. This evidence is not clear and convincing and does not satisfy Appellant's burden.

The Hearing Examiner must reject Appellant's claim.

b. Appellant failed to meet its burden with regard to parking impacts.

Appellant failed to meet its burden of proof with regard to parking impacts.

The testimony of Edward Koltonowski, a transportation engineer with 25 years of experience conducting traffic and parking studies in the City of Seattle, demonstrated that the parking analyses were conducted utilizing well established City of Seattle analyses methods that were reviewed and approved by John Shaw, a transportation reviewer with over 20 years of experience reviewing traffic and parking studies for the City. (Testimony of Edward Koltonowski, Day 2, 8:10-18). Both Mr. Shaw and Mr. Koltonowski testified that, while parking in the study area is constrained with and without the Project, the parking capacity constraints caused by the Project do not result in a significant adverse environmental impact. *See generally* Koltonowski Testimony; Testimony of John Shaw.

In contrast, Appellant offers only the testimony of David Crippen, a long-time employee of King County Metro who lives a block from the Project, who admitted to never conducting a parking study for a development in the City of Seattle. (Testimony of David Crippen, Day 1, 121:10-12). Mr. Crippen did not conduct a separate study and instead only sought to question the parking calculations by utilizing unsupportable assumptions. The correct process for conducting a parking study, as well as each of Mr. Crippen's incorrect assumptions, is discussed below.

Conduct of a parking study

Expert witness Ed Koltonowski and City witness John Shaw outlined the process for

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
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conducting a parking study in the City of Seattle. The only guidance with regard to SEPA is the City's SEPA Policies. The City's SEPA Policy for parking provides that "parking regulations to mitigate most parking impacts and to accommodate most of the cumulative effects of future projects on parking are implemented through the City's Land Use Code." SMC 25.05.675.M.1.a. It further states that the City has no SEPA authority to mitigate the impact of development on parking availability for residential uses located within portions of urban villages within 1,320 of a street with frequent transit service, such as this Project. *Id.*

A parking study is conducted in steps. Much of the conduct of a parking study is determined through experience conducting studies in the City of Seattle and/or seeking guidance from the City.[2] If the City determines a study requires additional information, it will ask for that information in a correction notice. Each step described below was completed by GTC on behalf of the Applicant and reviewed and approved by the City.

Mr. Crippen calls into question certain aspects of the study. To support his conclusions, Mr. Crippen relies upon unsupportable and incorrect assumptions regarding the conduct of traffic analyses in the City of Seattle. His errors are also discussed below.

1. Determine study area. Here, the study area for parking was considered to be a 800 feet radius around the site. Mr. Crippen did not dispute the Applicant's study area assumptions.

2. Determine the actual on-street parking capacity within the study area. Mr. Koltonowski testified that GTC conducted on-street parking capacity counts by counting the

[2] Even though Mr. Crippen admitted to not having experience conducting a parking study for development in the City of Seattle, he did not discuss the process of conducting a parking study with anyone at the City of Seattle in order to understand the typical means and methods for conducting a parking study. Crippen Testimony, Day 1, 121-22:14-18.

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legal parking spaces within the study area. To determine what is a legal parking space, parking restrictions such as distance from a stop sign and fire hydrants, are taken into account.[3] The conduct of parking counts is guided by Tip 117, Parking Waivers for Accessory Dwelling Units. While this is neither SEPA guidance nor a methodology for determining impacts, traffic engineers and the City typically utilize Tip 117 for the limited purpose of conducting parking counts. (Shaw Testimony, Day 4, 14-15:20-24). Mr. Shaw testified that GTC conducted the parking counts correctly, a conclusion Mr. Crippen does not dispute. (*Id.*, 27-29:24-27).

Unsupported Assumption #1: On-Street Parking Capacity

In contravention to the manner in which parking analyses are typically conducted in the City of Seattle, Mr. Crippen handicaps the analysis before it begins by removing 42 parking spaces from the on-street capacity. This places an inappropriate cap on measured spaces. Mr Koltonowski explained that the utilization calculation for the City is only a benchmark of utilization as actual parked cars can park closer to stop signs, other cars and driveways or be smaller than the city's theoretical car size assumed in the city's utilization calculation. (Koltonowski Testimony, Day 2, 41-42:20-17). Contrary to Mr. Crippen's testimony, parking counts are conducted in reality, and therefore must utilize the on-street capacity to determine whether the parking added by a Project will create a significant adverse impact. (Koltonowski Testimony, Day 2, 51-52:24-21). Mr. Crippen fails to provide one example of a parking study conducted in the City of Seattle or any City where the on-street utilization is artificially reduced.[4] Nor is this approach

[3] Appellant, through the testimony of Michael Richards, testifies that the Applicant should have taken into account restricted parking in developing its parking capacity. This is not true. As Mr. Richards testimony made clear, restricted parking ends at 6:00 p.m. Testimony of Michael Richards, Day 1, 221:7-10. The parking counts were conducted from 6:00 p.m. to 7:00 p.m., after parking restrictions have ended. Exh. 52.

[4] Certainly, understanding the theoretical parking capacity/utilization at 85, 90, 95, and 100 percent theoretical capacity helps inform the reader as to the percent utilization in the study area. Indeed, the Applicant's parking study

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consistent with SEPA. SEPA requires evaluation of impacts on the existing environment -- not some hypothetical environment that does not actually exist. *Chuckanut Conservancy v. Dep't of Nat. Res*., 156 Wn. App. 274, 285, 232 P.3d 1154, 1159 (2010) (SEPA requires examination of two factors: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.") (citations omitted).

To support reducing the actual street utilization calculation to an 85% theoretical street capacity, Mr. Crippen relies upon planning documents discussing planning goals. *See, e.g.,* Exhs. 35b (discussing policy recommendations for Oregon) and 35h (discussing parking planning policy recommendations for Seattle). These documents do not discuss any environmental review threshold or a threshold in which a Project would significantly impact parking. Indeed, Appellant fails to cite to any Code requirement regarding the percentage of on-street parking capacity upon which a project is determined to have a significant adverse parking impact.

Appellant also relies upon a Hearing Examiner decision in *In the matter of the Appeal of Neighbors Encouraging Reasonable Development*, S-14-001 (December 1, 2014), to support its argument that 85% is the capacity limit in the City of Seattle. Appellant misreads the holding in this matter. The Hearing Examiner does not conclude that Project created a significant impact because it exceeded 85% of the street capacity;

notes the number of cars required to reach each level of utilization on the street. Exh. 50. This is not, however, a determination of significant adverse environmental impacts.

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instead, she held that the City's analysis of parking impacts was insufficient, as it failed to consider the impacts of several nearby projects. *Id.*, Conclusions ¶¶ 10-11. Here, there is no actual evidence presented at hearing that demonstrates the parking analyses did not fully consider the effect of nearby pipeline projects. This decision accordingly has no bearing on the current matter.

John Shaw testified that the City utilizes this 85% utilization as a marker for when the City needs to look closer at a Project and study area parking utilization. (Shaw Testimony, Day 3, 260-61:2-6). The City does not, however, use this percentage as a threshold for significant adverse environmental impacts. Nor does Mr. Shaw agree that actual on-street capacity should be artificially reduced to 85% when conducting a parking analysis. *Id.*

Mr. Crippen's assumption that a reduction in capacity to 85% of the City's utilization calculation prior to even conducting the parking analysis is not supported by any convincing evidence and does not demonstrate that the City's decision is clearly erroneous.

3. Determine the Peak Hour parking demand. After determining the actual on-street theoretical parking capacity of 281 parking spaces, GTC took actual parking counts of parked cars on two separate days from midnight to 1:00 a.m., and took parking counts on two separate days from 6:00 p.m. to 7:00 p.m., as requested by the City and the community. Exh. 52. The October 2016 report focuses on the peak hour from 6:00 p.m. to 7:00 p.m., as this represents a peak parking demand resulting from the combination of existing commercial uses and residential uses. *Id.* GTC counted all cars on the street (not in driveways), whether they are legally parked (closer to stop signs or within five feet of driveway) or not so to not discount the number of cars

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parking on the street to determine demand. Koltonowski, Day 2, 114-116:22-6. Mr. Crippen did not dispute GTC's parking counts or the determination that the 6:00 p.m. to 7:00 p.m. was the appropriate peak hour in which to conduct an analysis.

Unsupported Assumption #2: Peak Demand vs. Peak Hour

Mr. Crippen argues, without providing any evidence, that the peak residential demand of the project is also 6:00-7:00 p.m. (Crippen Testimony, Day 3, 26-8:19-23). Mr. Crippen is incorrect and fundamentally misunderstands the difference between the two concepts. While peak hour for the combination of existing commercial and residential uses is 6:00-7:00 p.m., a fact to which all witnesses agree, peak residential demand or peak commercial demand is a separate concept altogether. (Koltonowski, Day 2, 25:9-19 (noting that 6:00-7:00 p.m. is neither the peak commercial demand nor peak residential demand for the project, but the "overlap of the two classes is highest at that time.")).

Mr. Koltonowski and Mr. Shaw testified to the difference between peak demand for parking ("peak hour") and the peak demand from the Project. The street peak hour is the hour in which the most cars are trying to park. The project peak demand is the time in which the combined residential parking demand from the *Project* is highest and the time in which the commercial parking demand from the *Project* is highest. Mr. Shaw testified to the difference between the two concepts:

> But I think it is good to distinguish the two concepts. One is the peak demand of the proposed development. In this case, that would be overnight because the large majority of parking generated by the development is from the residential component. There's some commercial, but the bulk is going to be from the residents. So that would occur overnight irrespective of what on-street demand shows. The existing parking supply can be measured at any time of day, and it was identified as peaking between 6:00 and 7:00, at least in the time periods that were measured. So it's not unusual for a project

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> to have one demand—one peak demand that is specifically related to the project and in the context in which the study is done in the environment in which the project is being placed, the peak time period for existing parking supply might be at a different time of day. And that's what occurred here.
>
> Shaw Testimony, Day 3, 254:6-23.

To be conservative, the October 2016 parking study in Exhibit 52 accounted for 100% of the residential parking demand from the Project from 6:00-7:00 p.m., even though this analysis over counts the residential parking demand from 6:00 to 7:00 p.m.. Exh. 52. Mr. Koltonowski testified that, in his Exhibit 56 which marks up Mr. Crippen's Exhibit 43, he accounted for the actual estimated residential parking demand, which is not at its peak from 6:00-7:00 p.m. (Koltonowski Testimony, Day 2, 25-26:5-15). Indeed, the actual residential demand is 69 percent of the full demand according to ITE, the only data source available for demand per hour. (*Id.*, 13-4:13-16). Because the October 2016 Traffic Study over counts the residential demand from 6:00-7:00 p.m., as Mr. Crippen suggests, there is no dispute here. Exh. 52.

4. Determine the Peak Demand from the Project. As documented in GTC's October 2016 parking study, GTC multiplied the 57 total residential units by a factor of .57 (per unit demand) to determine the total residential parking demand from the Project, as the Project does not provide on-site parking. Exh. 52. This .57 multiplier for residential use was determined utilizing King County's Right-Size Parking calculator. *Id.* King County provides for a factor utilizing bundled parking (where parking is provided) and unbundled parking (where a default parking fee of $275 is charged). (Koltonowski, Day 2, pp. 19-20). Based on Mr. Koltnowski's experience conducting parking analyses in the city, a project's parking demand is typically lower than the ITE demand rates due to actual parking utilization and frequent transit service. (*Id.*, 22-3:13-3). Utilizing the unbundled parking factor (.57) accordingly most accurately represents the

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residential demand for this Project, as it reflects the "cost" of finding parking. (Koltonowski, Day 2, 85-86:11-13). Here, the only parking is on the street, so there is an additional cost of paying for or finding parking. *Id.* Searching for parking equates to paying for parking, as it is not parking that is easy, accessible, and safe, such as when parking is bundled with a project as a dedicated building space. *Id.* This cost, whether monetized or not, affects who owns a car in the development. *Id.*

As there is limited data related to small efficiency dwelling units without parking, Mr. Koltonowski reviewed two surveys of recent developments that are similar in concept and were developed by the Applicant, Johnson & Carr. Exhs. 53-54. Mr. Koltonowski testified that while the data of two projects alone does not provide sufficient data points to rely upon exclusively; such data helps confirm the assumptions made for this somewhat unique residential product. (Koltonowski Testimony, Day 2, 91-92:12-22). In the two projects discussed, Mad Flats and Minnie Flats, the actual car ownership rates are .26 and .16 per unit respectively. Exhs. 53-54; Koltonowski Testimony, Day 2, 35-6:5-6. Mr. Koltonowski testified that even though the two projects are in more urban locations than the Project, both Mad and Minnie Flats and this Project have similar elements in common, such as frequent transit, size of units, and price. (Koltonowski Testimony, Day 2, 32-3:21-11). The actual rates for Mad and Minnie Flats are less than half of the parking demand rate used for the Project, further confirming that using a demand factor of .57 is appropriate for the Project. *Id.*

To determine peak commercial demand for the Project, GTC utilized a factor of 2.55 per 1000 s.f.[5] of commercial development. Exh. 52. Contrary to Mr. Crippen's misstatements at hearing, the commercial use proposed by the Project—3,298 s.f. -- is smaller than the existing

[5] Mr. Crippen does not dispute GTC's use of this multiplier.

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commercial uses at the Property—4,000 s.f.. Exh. 52; Koltonowski Testimony, Day 2, 15-17:19-10. Typically, a project that is replacing commercial floor area with commercial floor area does not add new parking demand and the demand is accordingly zero. *Id.* Here, the Project will also remove approximately four parking spaces used in the back of the building, so those spaces need to be accounted for in the street network. *Id.* To provide a conservative estimate, GTC assumed that the commercial demand at 6:00 p.m. to 7:00 p.m. was 5 spaces, which utilizes a commercial floor area of 3,298 s.f. and does not discount the demand based on the fact that the commercial s.f. already exists.[6] Exh. 52; Koltonowski Testimony, Day 2, 16-17:12-25. The total residential and commercial demand from the October 2016 report that was reviewed and approved by the City is 37 cars. Exh. 52.

Unsupported Assumption #3: Parking Demand from the Project

Mr. Crippen argues that the Project should have used a residential parking demand factor of .8, instead of the .57 utilized by GTC. Exh. 43. This is incorrect. In support of this assumption, Mr. Crippen relies primarily upon ITE factors, even though ITE encourages use of local data where possible. Exh. 43; Koltonowski Testimony, Day 2, 22:4-24. Here, there was plenty of local data in the King County Right-Size Parking calculator.

The data from King County is the correct data set to use, as it is a parking demand predictor based on over 240 studies, and is much more accurate than ITE data because it takes local conditions into account. Koltonowski Testimony, Day 2, 18:11-19. However,

[6] To reflect the fact that commercial demand is not at its peak at 6:00 p.m. to 7:00 p.m., the number of trips were reduced by 36% per ITE guidance. Exh. 52, p. 2.

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as discussed above, the use of the demand factor which accounts for "unbundled" parking is more appropriate to utilize for this Project.

Moreover, Mr. Crippen did not present evidence, *e.g.*, car ownership rates of tenants in comparable development projects, to directly contradict the assumptions relied upon by the Applicant. Indeed, the only evidence in the record to this effect confirms that Applicant's use of the .57 demand factor was appropriate and may in fact be conservative. Exhs. 50-52, 56; Koltonowski Testimony, Day 2, 22-25:13-1.

Even if the Applicant had used the .8 parking demand multiplier requested by Mr. Crippen—which is not required, the demand adjustment factor per unit becomes 0.55 when one accounts for the actual residential demand from the Project at 6-7 pm (at .69 percent of peak demand per ITE standards). Exh. 56; Koltonowski Testimony, Day 2, 25-6:25-15. This per unit demand factor of 0.55 is less than that used by the Applicant (0.57). Mr. Crippen's request to utilize a parking demand of .8 is accordingly immaterial.

The City did not commit a clear error by accepting the ratio for purposes of calculating project parking demand for the study time periods.

5. Determine parking demand from pipeline projects. SEPA requires a cumulative effects analysis. This analysis is conducted by adding known pipeline projects and accounting for any known and planned changes to the capacity of public facilities, such as streets. See SMC 25.05.670. Here, the cumulative effect analysis included 7 projects, two of which were added upon request by the City in a correction notice. Exh. 52, p. 1. Mr. Crippen does not note any known projects that GTC did not take into account in its cumulative effects analysis.[7]

[7] Mr. Crippen, confusingly, alleges that the Applicant did not take the development at 7009 Greenwood Avenue North into account as part of its pipeline projects analysis. Crippen Testimony, Day 4, 40:5-19. This statement is directly contradicted by the record. Exh. 52, p. A-2.

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The parking demand from the projects was calculated utilizing specific right-size parking calculations for the residential demand and utilizing the factor of 2.55 per 1,000 s.f. for the commercial demand. Exhs. 50-52. Mr. Crippen testified that the commercial demand was not included in the analysis of pipeline projects. He is incorrect. For example, for the project at 6800 Greenwood Avenue N, 32 residential units are proposed with 4,000 s.f. of retail and 28 parking spaces. Exh. 52, p. A-2. Utilizing the right size parking demand of .64 for the project, the residential demand is 20 parking spaces. *Id.* Utilizing the factor of 2.55 per 1,000 s.f. for retail, the commercial demand is 10, resulting in a total demand of 30 spaces. *Id.* As 28 spaces will be provided on site, the total parking demand is 2 parking spaces. *Id.*

Unsupported Assumption #4: Pipeline Projects

Mr. Crippen argues that the parking demand from pipeline projects is approximately 15 spaces, not the 6 spaces that GTC calculated in its Exhibit 52. Exh. 43. As noted above, Mr. Crippen ignores the fact that commercial uses were taken into account in the Applicant's study of pipeline projects. He then utilizes questionable math to arrive at his desired conclusion with regard to residential demand. Exh. 70. For example, for 6800 Greenwood Avenue North, 28 parking spaces are being provided for 32 residential units. Exh. 52, A-2. Instead of multiplying his desired and unsupported residential demand factor of .8 by the total number of units (32), which results in a residential demand of 25 spaces that is fulfilled by the provided parking, Mr. Crippen multiplies .8 by 4, the difference between the number of units and the number of provided parking spaces. Exh. 70. Mr. Crippen then states that the residential demand is 3 parking spaces, and then adds the commercial demand to this total. *Id.* His approach double counts the demand.

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Nevertheless, out of an abundance of caution, Mr. Koltonowski utilized Mr. Crippen's suggested pipeline project demand of 15 spaces in his calculation at Exhibit 56—the results continue to show there is no significant adverse impact. Appellant has failed to demonstrate otherwise.

Unsupported Assumption #5: Cycle Track

Mr. Crippen argues that a project must consider a proposed cycle track, even though it has not been programmed or designed, SEPA review has not been conducted, and there is no current plan/funding to construct it in the next five years. Exh. 55, Crippen Testimony. This argument fundamentally misunderstands how a cumulative impact analysis is conducted.

Mr. Shaw testified that, in determining pipeline projects, including development projects or the addition of a bike lane:

> We use the same sort of criteria we would use for judging whether or not a capital improvement for a transportation analysis should be included. If it's funded, if there's some level of funding commitment, if there's design details showing that the project has been fairly far advanced, it is likely appropriate to include it [as a pipeline project]. If it is a proposal that's part of a planning document but does not have funding or associated design detail associated with it, we typically would not include it.
>
> Shaw, Day 3, 259:10-19.

Mr. Crippen relies on the fact that the City updates its Implementation plan annually as a reason to include a possible cycle track that has not undergone SEPA and there is no evidence of any funding. This conclusion has no support in the law and is contrary to the City's criteria for determining pipeline projects. *See, e.g.*, SMC 25.05.670. If the City followed Mr. Crippen's methodology, it would have to guess as to the final configuration and location of the bike lane because, without a certain level of design

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certainty, the City has no way to determine the physical impact of modifying the infrastructure. Shaw Testimony, Day 4, 36:13-23. This is an untenable result that is not mandated or contemplated under SEPA. SMC 25.05.670.

Unsupported Assumption #6: Cumulative Impacts of Zoned Capacity

Mr. Crippen argues that the Project should take into account as part of its cumulative effects analysis the potential for almost every property in the area to be constructed at the same density as the Project with no parking, even though plans have not been proposed by any of the properties (other than pipeline projects accounted for in the Applicant's studies). Exh. 43. This argument is contrary to SEPA and long-standing City practices. SMC 25.05.670.B.2 (cumulative effects of the project are considered together with prior, simultaneous or induced future development or taking into account known future development under established zoning).

From a practical perspective, it is impossible to know whether a property will be redeveloped and at what density. Indeed, Mr. Shaw testified that utilizing the zoning capacity to determine pipeline projects is speculative. (Shaw Testimony, Day 4, 16:13-21 ("We don't know what those projects are going to consist of. We don't know if development capacity on any given site will be fully built out, if so by what uses, what parking supply might or might not accompany that development. It's entirely hypothetical as to what type of development might occur on any of these sites.")).

Mr. Crippen's error is further highlighted when one considers the manner in which he calculated the parking demand from these phantom development sites. Mr. Crippen confusingly calculated the density per unit of the Project as 141 s.f., even though each unit must be at a minimum 220 s.f. (SMC 23.42.048.B) and the Project's MUP

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Plans indicate that the size of the units range from 227 s.f. to 455 s.f. Exh. 3, pp. A2.11 and A2.12. Mr. Crippen then uses this factor to calculate the number of theoretical units per property in the zone. Not only is there no evidence that these properties will ever be developed, let alone in the time prior to project construction, but his mathematical errors also grossly overestimate the potential for the number of units and parking demand.

6. Compare future parking demand of the project to the remaining street capacity.

The current demand plus the pipeline projects demand, plus the project demand is then compared with the parking capacity of the study area. This resulted in a 105% parking utilization. Mr. Shaw testified that even though Applicant's traffic analyses were conservative and accordingly projected that the streets within the 800-ft radius would result in a 104% parking utilization, the City did not view the projected cumulative as a significant adverse impact.

Here, the City does not have a SEPA threshold for determining a significant impact, and has no authority to mitigate. SMC 25.05.675.M.2.b. Even if it did, however, the City has reviewed the impacts of the project and determined that the potential addition of 37 cars in a constrained parking network radius of 800 feet does not create a significant adverse impact. Exh. 5, p. 28. The City has determined "that the difficulty finding parking would likely drive down the vehicle ownership as well as result in residents and visitors parking further from the site" beyond the study area. *Id.* While the City cannot impose mitigation, it does explain that practicable mitigation is the fact that limited parking will contribute to the self-selection of potential residents at the Project. *Id.* In addition, it concludes that Transportation Demand Measures, such as providing bike parking (which the Project provides—Exh. 3, p. A2.11**)** will reduce reliance on personal vehicles. *Id.*

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There is no documentary evidence in the record that the project will result in a significant adverse parking impact. Appellant provided no authority dictating a SEPA threshold for determining significant adverse impacts requiring mitigation. Indeed the City's SEPA policies do not allow mitigation, and they control. As made clear by the testimony, the potential for impacts are fully disclosed, and Appellant has failed to present clear and convincing evidence that there will be significant adverse parking impacts.

The Hearing Examiner should reject this claim.

c. Appellant failed to meet its burden with regard to geotechnical and environmental health impacts.

Appellant failed to meet its burden of proof relating to environmental health impacts.

Federal, state and regional regulations are the primary means of mitigating risks associated with hazardous and toxic materials. SMC 25.05.675.F.1.b. If the decisionmaker makes a written finding that applicable federal, state and regional laws and regulations did not anticipate or do not adequately address the adverse impacts of a proposed project, the project may be conditioned or denied to mitigate its adverse impacts. SMC 25.05.675.F.2.c.

Appellant provided only lay testimony regarding individual neighbors' opinions that the Phase II analyses were insufficient. Appellant did not meet its burden of proof. The Examiner should reject this claim out of hand.

If the Examiner considers evidence on this issue, it supports the Applicant. The Applicant prepared Phase I and Phase II environmental site assessment reports. The Phase II Environmental Site Assessment ("Phase II ESA") evaluates the presence of hazardous substances on the Property. The Phase II ESA indicates that there is no potential for contamination on the property; indeed, the findings indicate that any evidence of contaminants fall well below the screening levels found in the Model Toxics Control Act ("MTCA") and in

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some cases were laboratory non-detections. *See* Testimony of Paul Riley, Day 2, 133:13-15. The Applicant's expert testified that the scope of the study was sufficient for conducting a Phase II ESA, and no additional study around the perimeter of the site is warranted. (*Id.*, 134-35:18-18). Indeed, EPA agreed with the conclusions of the study as well and recommended that no further action be taken. Exh. 60. Appellant provided absolutely no evidence of a potential for a significant adverse environmental health impact.

While Appellant provides no affirmative evidence of a significant adverse environmental health impact, it may attempt in its closing brief to rely upon an email from the Department of Ecology it presented as part of its cross examination of Mr. Dorcy. *See* Exh. 81. As the testimony of Mr. Riley—the only expert that testified with regard to environmental health impacts—indicates, there is no potential for a significant impact. (Riley Testimony, p. 136-37:16-5). Indeed, to the extent Ecology requested additional sampling, it was not a formal request for sampling and it was based upon community complaints and not a thorough review of the Application's Phase II. (Riley Testimony, Day 2, 140:3-11 (testifying that Ecology admitted in its phone call with the Applicant that it had not reviewed Applicant's Phase II ESA at the time that Applicant and Ecology spoke)).

To respond to the concerns raised by Ecology, Mr. Riley submitted to Ecology a summary memorandum outlining the findings of its study and its supportable methodologies. Exh. 60, Appendix B. Applicant has not heard anything substantive from Ecology since Applicant transmitted the October 2016 study. Riley testimony, Day 2, 142-43:12-5. Indeed, it appears that Ecology withheld its review of the study until the EPA issued its Preliminary Assessment. *Id.* There is no evidence in the record that indicates a concern raised by Ecology after either its review of the documents provided by the Applicant or the issuance of the EPA

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Preliminary Assessment.[8] Raising questions alone does not meet Appellant's burden of proof with regard to hazardous materials matters. *Boehm, supra.*

The City's SEPA policies require the City to defer to Ecology's requirements. SMC 25.05.675.F.1.b. After requesting the studies on environmental health, the City concluded that vapor intrusion is not considered a concern for the property based on the analysis provided, and the site does not pose a risk to groundwater quality. The City concludes that mitigation of contamination and remediation lies with Ecology, and "[c]ompliance with Ecology's requirements are expected to adequately mitigate any unlikely adverse environmental impacts from the proposed development and no further mitigation is warranted for impacts to environmental health per SMC 25.05.675.F." Exh. 5, p. 25.

Mr. Riley testified that the Applicant will fully comply with MTCA and any formal requests from Ecology (which have not occurred), and the Appellant has provided absolutely no evidence to indicate otherwise. (Riley Testimony, Day 2, 143-44:10-4). Accordingly, the City's determination that compliance with Ecology's requirements will mitigate any unlikely impacts, in light of the overwhelming evidence that there is no known contamination on the site, was not clearly erroneous.

d. Appellant failed to meet its burden with regard to transit impacts.

Appellant failed to meet its burden of proof relating to transit impacts.[9] To the extent Appellant raise a concern about the transit analysis conducted for the Project, *see* Exhibit 52, it

[8] While Applicant understands the factual record is closed, it has come to Applicant's attention that Ecology has issued a memorandum determining that no further action is necessary for 6726 Greenwood Avenue North. Kendall Declaration, Exh. E. This information was not available until the date of the filing of this post-hearing brief. As this issue was discussed at hearing, Applicant wanted to provide the document for the Hearing Examiner's information. *See* HER 2.20 and 2.21.

[9] Issues related to the City's interpretation of a frequent transit area under SMC 23.84A.038 are address in Section 2.g, *infra.*

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does so through the testimony of Jan Weldin, a lay witness who lives in the neighborhood, and Exhibit 32, which was prepared by Ms. Weldin. Without independent analysis, Ms. Weldin testifies that there is a lot of construction occurring in the Greenwood corridor and concludes, without analysis or facts, that the Route 5 bus will be crowded.[10] Ms. Weldin does not testify as to the likelihood that residents of new developments would drive or ride the bus, or if the developments have already been constructed and accordingly been accounted for in the existing transit conditions.

The transit analysis was reviewed and approved by the City and determined not to have a significant adverse impact. Exh. 52; Exh. 5. There is no documentary evidence in the record that the project will result in a significant adverse transit impact. This does not amount to clear and convincing evidence that there will be significant adverse transit impacts.

The Hearing Examiner should reject this claim.

e. The Appellant waived its claims of significant impacts in the areas of views, land use, and neighborhood aesthetics and character.

The Appellant failed to present any evidence regarding significant impacts in the areas of views,[11] land use, and neighborhood aesthetics and character,[12] which were issues raise in the appeal.[13] These issues should be considered waived. *Boehm v. City of Vancouver*, *supra*, 111

[10] Ms. Weldin appears to claim that the projects in the Greenwood corridor would also create parking impacts in the study area, even though a number of projects she listed in Exhibit 32 are more than 60 blocks away from the Project.
[11] While a view analysis was reviewed under SMC 23.47A.012.A.1.c, Appellant did not raise a SEPA concern with regard to view studies. Indeed, Appellant did not allege that there are any public viewpoints in the area that could potentially be impacted by the Project. *See* SMC 25.05.675.P.2.a.i (noting that a view analysis is conducted only from designated public viewpoints).
[12] To the extent that Appellant assert impacts to neighborhood aesthetic and character even though it provided no evidence regarding this element of the environment at hearing, that claim is addressed in the discussion of height, bulk and scale. Appellant provided no affirmative evidence specifically related to "neighborhood aesthetic and character," nor did any witness define this term in the context of the Greenwood/Phinney neighborhood. Further the City has not adopted a SEPA policy regarding impacts to neighborhood aesthetics and character. Accordingly, the City lacks authority to deny or condition the Project based on such impacts.
[13] The testimony of Laura Reymore raised a traffic safety concern. Not only was traffic safety not an issue in this appeal, but Ms. Reymore was complaining about the loading and traffic safety concerns under the existing

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Wn. App. at 722; *see also King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) ("In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a light reference to the issue in the record."); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d (1997). No evidence was presented at the hearing regarding these issues and, therefore, they are waived.

C. Appellants failed to meet their burden to show that SDCI's Code Interpretation was erroneous.

1. The Hearing Examiner must give great weight to SDCI's Code Interpretation and the burden of proof is on Appellant.

Under SMC 23.88.020.G.5, appeals of Code Interpretations are "considered de novo, and the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director. The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant."

As discussed *supra,* courts interpret the "substantial weight" requirement as mandating the clearly erroneous standard of review. *Indian Trail Property Owner's Ass'n, supra*. 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. *Whatcom County Fire District No. 21, supra.*

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. *See e.g.*, Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeals of CUCAC and Friends of UW Open Space, supra.*

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conditions—and not as a result of the Project. This claim must be denied. In addition, testimony at hearing indicated that the Project will have a loading zone in front of the building on Greenwood, and will not use the center lane. (Janette Testimony, Day 2, 185-6:23-16).

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

2. Appellant has failed to meet its burden that the City's Interpretation was clearly erroneous

The substantial evidence submitted at hearing shows that the City's interpretation was reasonable. The Appellant failed to demonstrate that the City's interpretation was clearly erroneous. Each item subject to the City's Interpretation is discussed below.

a. The applicable SMC 23.47A.014.B.3 does not apply to the Project

The Court must apply the Code according to its plain language. *Post v. City of Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). The applicable version of SMC 23.47A.014.B.3 to which the Project is vested[14] provides for upper level setbacks "[f]or 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 . . ." Under the plain language of SMC 23.47A.014.B.3, upper level setbacks are not required for a lot in a split zone.

Appellant argues that the lot is in a residential zone because the majority of the lot is zoned SF5000. Its argument cannot be squared with the plain language of SMC 23.47A.014.B.3. A lot in a residential zone is distinct from a lot in a split zone. *See* Exh. 6, pp. 3-4. Had the City Council intended Appellant's suggested result under the former SMC 23.47A.014.B.3, it would have used the term "lot in residential use" and not a "lot in a residential zone." *Id.* Moreover, if Appellant's interpretation is correct, the City Council would not have felt it necessary to amend the provision to account for a lot in a split zone. *Id.* at p. 4. Under Appellant's interpretation, this amendment would have been unnecessary.

Mr. Graves testified that the City has long interpreted SMC 23.47A.014.B.3 to exclude split zones, as they are considered a lot in a split zone, not a lot in a residential zone. Testimony

[14] The Hearing Examiner determined in his order dated April 26, 2017, that the Project vested to the development standards in the Code in effect on September 3, 2015.

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

of David Graves, Day 3, 104:14-19. Indeed, if one so chooses, a commercial use can be included in the 20-ft of the NC2-40 zone. This is especially true here where the lot abuts a street so that the commercial portion of the lot would have direct street access. Exh. 46, p.8.

Appellant provided no evidence or testimony that demonstrates that the City's interpretation is clearly erroneous. This claim must fail.

b. The Project's clerestory meets the definition of a clerestory

The approved MUP plans show that the clerestory has windows on the west, south, and north sides. See sheets A3.01, A3.03, and A3.04 of Exh. 3. The City's interpretation concluded that "[n]othing 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."

Appellant provided no evidence or testimony on the clerestory at all. The only evidence in the record is that this clerestory is typical of many clerestories; Mr. Janette designed it as a clerestory and the City approved it as such. Janette Testimony, Day 2, 206:5-22. The City's interpretation of a clerestory is accordingly not erroneous.

Appellant also argues that the clerestory does not constitute an outside wall. See Request for Interpretation, p.8. This is incorrect. The clerestory is the wall above the roof that is considered an outside wall. *See* Exh. 3, p. A3.01. Any other interpretation directly contradicts the Code. The Code requires a clerestory to be set back 10 feet from the north lot line unless it meets certain criteria. SMC 23.47A.012.C.7. Certainly, the drafters understood that a clerestory set back 10 feet from the edge of the building would still create an outside wall. Appellant's arguments accordingly fail and they have not presented any evidence demonstrating that the City's interpretation is clearly erroneous.

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701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
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c. The shadow study conducted pursuant to SMC 23.47A.012.C.7 demonstrates that the location of the clerestory within 10 feet of the building does not create additional shadow on adjacent properties

A clerestory is permitted as of right. The question raised in the Interpretation is whether the clerestory can be located within 10 feet of the northern property line. SMC 23.47A.012.C.7 provides that a clerestory "shall be located at least 10 feet from the north lot line unless a shadow diagram is provided that demonstrates that locating such features within 10 feet of the north lot line would not shade property to the north on January 21st at noon more than would a structure built to maximum permitted height and FAR."

The shadow study presented by the Applicant and reviewed by the City compares the project shadows with and without a clerestory element, and the City determined that the shadow diagram was properly developed. Graves Testimony, Day 3, 76:14-24. This comparison, however, is conservative because it does not compare the shadow of a structure built to maximum permitted height and FAR with the Project with a clerestory, as required by SMC 23.47A.012.C.7. The City, in its review of the shadow study in Exhibit 3, found it to be typical of the type of shadow study reviewed by the City and determined that the incremental shadow caused by the clerestory (in comparison to the project without the clerestory) falls within the right of way. Accordingly, it was reasonable for the City to determine that the location of the clerestory does not create additional shadow on property to the north.

Appellant misreads the Code when it developed its Exhibit 31, showing what they perceive as the shadows on the Isola building, now called the Hendon. The exhibit was developed with Powerpoint by Mr. Brandis, who is not an architect, and there was no testimony as to its accuracy. Assuming it is accurate, however, it provides no useful information to the Examiner. One, the diagram measures the difference in shadows between a 40-ft building and a 48-ft building. That is not the standard. *See* SMC 23.47A.012.C.7. Two, the plain language of SMC 23.47A.012.C.7

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

requires one to compare the proposed building with the "structure built to maximum permitted height and FAR". Here, mechanical, stair, or elevator penthouses are permitted as of right in this zone, and may exceed the applicable height limit by 16 feet and be located anywhere on the roof as of right. 23.47A.012.C.4.f. Penthouses are also counted towards maximum FAR. *See* 23.47A.013.D (showing penthouses, stairs, elevators, and mechanical equipment are not exempt from FAR requirements). Accordingly, a penthouse is permitted at the maximum FAR and height; in other words, it is the structure built to the maximum building envelope. Exhibit 68, p. 3, shows the comparison between the maximum building envelope and the Project with clerestories. The maximum building envelope casts a larger shadow, and accordingly, the clerestories are permitted to be located within 10 feet of the northern property line. *Id.* There was accordingly no evidence that supports Appellant's arguments.

d. The clerestory does not create an additional story

Appellant provided no evidence at hearing that the clerestory creates an additional story. Indeed, the only evidence in the record is from the Interpretation and the testimony of Mr. Graves.

The question at issue in this Interpretation is whether a mezzanine creates an additional story. While story is defined at SMC 23.84A.036, mezzanines are not defined in the Code. The primary principle of statutory interpretation is that "[w]here statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982); *HomeStreet, Inc. v. Dep't. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

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Because the City Code does not separately define "mezzanine," the City's Building Code definition applies. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). Mezzanine is defined as:

> 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.

Seattle Building Code, Section 505.2.

The plain language of the definition of mezzanine unequivocally states that a mezzanine does not contribute to building area or number of stories.

Appellant provided no evidence that the City's interpretation is erroneous in light of the Building Code definition of mezzanine.

e. The view analysis conducted pursuant to SMC 23.47A.012.A.1.c demonstrates that the additional 4 feet of the building permitted under SMC 23.47A.012.A.1 will not significantly impact the view of Green Lake, the Cascades, or Mt. Rainier from adjacent residential properties

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.

Applicant provided a view study that utilized an on-site survey, GIS mapping, including topographical and elevation information, and the as-built drawings for the Fini Condos to determine the appropriate view angle from the Fini. (Janette Testimony, Day 2, 241-43:5-5). This information was inputted into AutoCAD, which is extraordinarily accurate. *Id.* The view study shows that the view of the Cascades from the Fini remains completed unhindered by the additional 4 feet. Exh. 3, p.G0.02B. The view study also shows that some of the views of Green Lake from the Fini Condos would be blocked by the building with or without the additional 4

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feet allowed under SMC 23.47A.012.A.1.c. Exh. 3, p.G0.02B; Janette Testimony, Day 2, 201-02:9-22; Graves Testimony. Importantly, the view of Green Lake remains completely unimpeded from the Fini if one looks to the left of the building and the view is accordingly not significantly blocked. This is clearly shown in Exhibits 21 and 22, where Mr. Bodsky had the luck of finding a clear day.

Appellants rely upon the testimony of Marcel Bodsky, an architect by training. Mr. Brodsky did not conduct a view analysis for this appeal. Bodsky Testimony, Day 1, 178:7-11. Instead, he relied upon an iPad application to determine the viewing angles. *Id.* Mr. Bodsky noted that he does not know the accuracy of the iPad app. *Id.*, 172:19 ("Now, I'm not representing any accuracy on here."). Indeed, throughout his testimony, he spoke in qualifying terms that he was not only unsure of the accuracy of the iPad app, but also concludes that the study provided by the Applicant could be accurate. *Id.*, 177:1 ("If their data is correct, then the view is blocked."); 181:8-11 (". . . if this diagram is correct and the view is indeed blocked, then the applicant is allowed to raise the building an additional 4 feet and totally block the view. . ."). His main concern appears to be that if the angle was not correctly measured, then the far bank of the lake would be visible. He provided no evidence that the angle was not correctly measured.

Appellant appears to be requesting that any view study be conducted by a surveyor. There is no mandate as to methodology in the Code, and Appellant provided no evidence that Applicant's analysis is incorrect. Appellant only brings questions, but no answers. *See Boehm, supra*, at 719-720 (mere complaints without the production of affirmative evidence showing that a decision was erroneous, are insufficient to satisfy an appellant's burden). The only affirmative evidence presented is the testimony of Mr. Janette and the corresponding exhibits regarding the view study, and the City concurring in the conclusions of the analysis.

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The City reviewed the view study and found that, under SMC 23.47A.012.A.1.c, the additional 4 feet would not significantly block the view from the Fini. The City testified it found the view study in the MUP plans to be sufficient and accurate, but wanted the view angle from the Isola (now named Hendon). (Graves Testimony, Day 3, 109-110:9-18); Exh. 6. In the MUP Plans in Exhibit 3, the Applicant provided a drawing of the view of Mt. Rainier from the Hendon. Exh. 3, p.G0.02B. The Applicant concluded that there is no potential for the additional 4 feet to block the view of Mt. Rainier from the Hendon. *Id.* The Applicant has since conducted a view study of the view from the Hendon, which confirmed its original finding. Exh. 79; Graves Testimony, Day 3, 109-110:9-18. The City's determination of the view study is accurate and Appellant failed to demonstrate the City's determination was in clear error.

f. The elevator penthouse was properly measured from the otherwise applicable height limit of 44 feet.

Appellant questions whether the elevator penthouse is measured from 44 ft., as determined by the City. Appellant provided no evidence at the hearing to support its claim. Indeed, the City determined that the base height limit is 44 ft. under SMC 23.47A.012.A.1. This provision provides, in part, that:

> 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;
> . . .

SMC 23.47A.012.A.1.

The plain language of the provision provides that the *otherwise applicable limit* may be exceeded by 4 feet. *Post*, 167 Wn.2d at 310. This implies that the base height limit can be

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701 Fifth Avenue, Suite 6600
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increased by 4 feet if the Project meets certain criteria. As discussed above, this Project meets the criteria under SMC 23.47A.012.A.1, and the base height limit is accordingly 44 ft.

Elevator penthouses are permitted to extend 16 feet above the *applicable height limit.* SMC 23.47A.012.C.4. Here, that limit is 44 feet. The City's interpretation is not clearly erroneous and Appellant provided no evidence at hearing to indicate otherwise.

g. The City properly determined that frequent transit service is measured utilizing schedules provided by King County Metro

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 Land Use Code is silent on the precise means to be used to measure transit service headways under the definition, and there is no active Director's Rule that provides guidance. The Director relied on the bus schedule produced by King Country Metro to determine if the frequent transit service is met. Utilizing the bus schedule for the analysis provided by the Applicant in the plan set on Sheet A1.00 of Exhibit 3 is typical of analyses of frequent transit service received and reviewed by the Director. Graves Testimony, Day 3, 82-85:4-10; Exh. 6; Exh. 77. The City determined that frequent transit service was met when it approved the zoning and published its decision, and reconfirmed that the definition of frequent transit service was met and exceed when King County revised its schedule to add two new buses to the route. Exh. 6, p. 10; Exh. 76.

Appellant's only issue in its request for interpretation is that it believes that the definition of frequent transit service demands that the City use actual data from King County Metro, which varies from month to month, for each determination of a frequent transit area.[15] This reading of

[15] Appellant appears to suggest in its testimony that the average headways were used to calculate frequent transit service. This is not true. Graves Testimony, Day 3, 173:13-23.

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

the Code is untenable and misreads the definition of frequent transit service. To support their reading of the Code, Appellant relies upon the testimony of Dr. Altschul, a statistician who conducted an analysis of the data from September 12 to November 30, 2016. Exh. 18. Dr. Altshcul testified that the bus exceeds 15 minute headways approximately 38.5 percent of the time, meaning that it meets or exceeds 15 minute headways approximately 61.5 percent of the time. Altschul Testimony. Dr. Altshchul did not testify as to whether he knew if this was a typical month or whether there were extenuating circumstances that resulted in buses being late.

Even if the City should require a statistical analysis of actual data, which the Code does not require, Dr. Altschul provided no basis in the Code to support his subjective conclusion that a bus meeting or exceeding its scheduling almost 62 percent of the time is not meeting frequent transit. Indeed, Andrew Brick, of King County Metro, who utilized the same data in his analysis, came to the opposite conclusion. Mr. Brick testified that the corridor in which the Route 5 bus and Route 5 Express operate is considered a very frequent route, which means it has better than 15-minute headways during peak periods, and meet or exceed the 15 minute headways on average. Testimony of Andrew Brick, Day 1, 34-5:17-15.

Dr. Altschul also did not run the analysis after the addition of the two buses in the morning commute, as the data was not available at the time of analysis. He also did not review data from months prior to establish any pattern. The variability of the bus routes on a monthly basis, due to extenuating circumstances or increases in service, and the delay in obtaining recent data, underscores the arbitrariness of relying upon a statistical analysis of actual arrival times of the bus—whether one reviews one month of data or four. One can envision a scenario where one project is deemed to be located in an area with frequent transit service, while another project across the street analyzes data in a month where the buses were later than normal, and is

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701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
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determined not be located in a frequent transit service area. Such an analysis would not only place a significant burden on an applicant to determine whether it was in a frequent transit area, but it also allows for inconsistent subjective determinations by the City as to what constitutes frequent transit. Graves Testimony, Day 3, 172-73:2-23. Depending on the arbitrary standard upon which Appellant would apply, it is possible no lot would ever qualify for frequent transit service due to one bus being late. Exh. 6, p. 10.

The reliance upon schedules by the City is reasonable, and Appellant has not demonstrated that reliance upon the King County bus schedule is clearly erroneous. This claim should be denied.

IV. RELIEF REQUESTED

Appellants failed to meet their burden of proof with regard to any appeal issue. The Hearing Examiner should reject the appeal and uphold the design review approval and DNS for the Project.

DATED this 5th day of June, 2017.

MCCULLOUGH HILL LEARY, P.S.

By: _____

Jessica M. Clawson, WSBA #36901
Katie Kendall, WSBA #48164
Attorneys for Applicant

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax