SEATTLE HEARING EXAMINER

In the Matter of the Appeal by LIVABLE PHINNEY, a Washington non-profit corporation from a determination of non-significance, design review and interpretation	Hearing Examiner File MUP-17-009 (DR, W) LIVABLE PHINNEY'S CLOSING ARGUMENT

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I. INTRODUCTION

A four-day hearing showcased the myriad errors that plagued SDCI's decision to approve the controversial Phinney Flats project, 48-foot tall, 57-unit mixed use building with no on-site parking, in a portion of the uniquely shaped Greenwood/Phinney Urban Village that is only one street wide with single family homes abutting each commercial parcel.

Since the project was first unveiled in a skeletal proposal at a September 2015 Early Design Guidance meeting, hundreds of letters of opposition filled the SDCI file and identified numerous legal errors and faulty factual underpinnings of this project at every stage.[1] But despite four design review meetings that drew large crowds, multiple requests from adjacent landowners to shrink the building, and pleas from the community to add on-site parking because the streets were already over capacity during peak hours, the applicant refused to budge. Instead, the applicant slavishly adhered to keeping 57 units in the building,[2] regardless of the impacts on the immediate neighbors and the community.

In the end, the design review process failed. The final building was little changed from one presented at the first EDG meeting that the Board deemed unacceptable and

[1] Ex. 17, listing of public comments and other documents on SDCI website for the pending project.
[2] See Testimony of developer's architect, Jay Jannette.

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incompatible with applicable Design Guidelines at that time. SDCI then compounded that failure by approving the project with only minor conditions.[3] The minimal analysis of the Decision was untethered to the applicable design guidelines and Land Use Code, violated SEPA provisions relating to height, builk, and scale issues, and parking impacts, and lacked sufficient information to evaluate the proposal's environmental impacts relating to transit and parking, and environmental health. Instead it was supported by invented justifications found nowhere in the record, or no evidence at all. After the Decision was published on January 23, 2017[4] SDCI committed additional reversible errors when it rejected every aspect of Livable Phinney's Request for Interpretation that identified numerous Code violations.[5]

Throughout the four-day hearing in May 2017, the City and Applicant offered shifting and contradictory analyses, and even new, post-decision rationalizations in an attempt to conform inconvenient facts to the challenged decision. The evidence in the record and the testimony offered at the hearing support a definite and firm conviction that SDCI's Decision to approve the Phinney Flats project was in error, and a terrible mistake. For reasons elaborated upon below, the Design Review approval, the SEPA determination, and the Code Interpretation should each be reversed and remanded.

II. STANDARDS OF REVIEW

Livable Phinney's appeal encompasses three elements to the City's approvals for the Phinney Flats development: an appeal of the Code Interpretation on the

[3] Ex. 5, Analysis and Decision at 22 and 29.
[4] SDCI originally published the Decision on December 29, 2016, but that publication failed to comply with applicable notice requirements, as did SDCI's second attempt at publishing the Decision on January 9, 2017. See listing of decisions at Ex. 17. With each attempt at properly publishing the Decision, SDCI corrected additional errors from prior versions.
[5] Ex. 6 SDCI Interpretation.

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remaining issues;[6] an appeal of the SEPA Determination of Non-Significance (DNS) on issues of impacts relating to height, bulk, and scale, off-site parking, and environmental health; and the SDCI Director's acceptance of the recommendation by the Design Review Board. Each of these components is subject to a different standard of review.

The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.76.022. Appeals shall be considered *de novo* for issues that relate to "compliance with procedures for Type II decisions, compliance with substantive criteria, determinations of nonsignificance (DNSs) . . .or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts, and any requests for an interpretation included in the appeal . . . ." SMC 23.76.022.C.6. Because some of the categories of impact, such as height, bulk and scale, and impacts to off-street parking arise under more than one component to the city's approvals, the standards of review are discussed together in the following section.

A. Code Interpretation

The decision of the Hearing Examiner shall be made upon the same basis as was required of the Director of SDCI. SMC 23.88.020.G.5. Even though SDCI's Interpretation "[is to] be given substantial weight, and the burden of establishing the contrary [is] upon the appellant[,]" *Id.*, that deference is limited.

First, the Hearing Examiner's review of the City's actions is *de novo*, which means that the Hearing Examiner writes on a clean slate. When it comes to factual findings, no deference is required.

[6] On its requested code interpretation on issues relating to mezzanines and the height of the elevator shaft, Livable Phinney continues to rely upon the analysis provided in its initial request.

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Second, the "substantial weight" the hearing officer must give to the City's legal interpretation may be outweighed by other, more compelling legal arguments not embraced in the City's interpretation.

And third, the standard of review is even less deferential than the "clearly erroneous" standard applicable to the SEPA determination. As regards appellate review of questions of law, Courts caution that:

> The principle of deference does not permit the court to become a rubber stamp, automatically approving every agency interpretation of a statute. Rather, it requires a "searching and careful" inquiry into the facts of each case to determine that the agency has acted within the scope of its statutory authority.

2B N. Singer, *Statutes and Statutory Construction*, sec. 49:4, text at n. 58 (7th ed. 2012), quoting *Ohio v. Ruckelshaus*, 776 F.2d 1333 (6th Cir. 1985) and citing scores of other federal and state court decisions. McQuillin, relying in part on a Washington court's decision, put it this way:

> The rule of judicial deference does not apply when the agency's reading of the law contravenes the legislature's manifest purpose. Stated another way, the meaning of local legislation is a question of law which the court or other reviewing tribunal must decide, and the weight which should be accorded the local interpretation is instructive rather than binding. [italics added]

6 E. McQuillin, *Municipal Corporations*, sec. 20:51, text at nn. 20-21 (2007), citing *Pinecrest Homeowners Assn. v. Cloninger & Associates*, 151 Wn.2d 279, 87 P.3d 1176 (2004); *Brown v. City of Seattle*, 117 Wn.App. 781, 72 P3d. 764 (2003), as corrected (Aug. 14, 2003); and other cases. Finally, two Washington appellate court decisions establish the following guiding principles:

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> [W]here an ordinance embodies definite meaning and involves no absurdity or contradiction, literal enforcement of its terms is required, and a court will not nullify by construction [the] obvious requirements of the ordinance.

6 E. McQuillin, *Municipal Corporations*, sec. 20:49, text at n. 5 (2007), citing to *HJS Development, Inc.,v. Pierce County ex rel. Department of Planning and Land Services*, 148 Wn.2d 451, 61 P.3d 1141 (2003), *City of Pasco v. Ross*, 39 Wn.App. 480, 694 P.2d 37 (1985), and others.

As demonstrated below, SDCI's Interpretation No. 17-002 is contrary to law.

B. SEPA Review Standards

SEPA appeals are also subject to *de novo* review. SMC 25.05.680.B.3. In this case, the Director issued a DNS with no conditions on the project (other than limits on periods of construction noise). The SEPA components of the Decision, including the DNS determination, and the Director's failure to mitigate the height, bulk, and scale impacts of the design, along with the substantive and procedural issues relating to transit, parking, and environmental health, "shall be accorded substantial weight, and the burden of establishing the contrary shall be upon the appealing party. *Id.; see also* SMC 23.76.022.C.6, and SMC 23.76.022.C.7. But that deference is also limited.

First, the decision record must show that the determination was the result of "actual consideration of environmental factors." *Norway Hill Preservation and Protection Assoc. v. King County Council,* 87 Wn.2d 267, 275-76, 552 P.2d 674 (1976). The burden rests upon the governmental agency to demonstrate that it has given actual consideration to environmental factors*. City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978). Conversely, the lack of a record demonstrating actual consideration of environmental factors renders the

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agency's determination clearly erroneous. *Gardner v. Pierce County*, 27 Wn. App. 241, 246, 617 P. 2d 743 (1980).

Second, to survive judicial scrutiny consideration of environmental factors may not be superficial; it must be sufficient "to allow decisions to be based upon complete disclosure of environmental consequences." *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). *See also*, SMC 25.05.330(A)(threshold determination to be based upon review of environmental checklist, supporting documents and additional documentation); *Anderson v. Pierce County*, 86 Wn.App. 290, 299, 936 P.2d 432 (1997) ("[A]n Environmental Checklist …must provide information reasonably sufficient to evaluate the environmental impact of the proposal[,]" citing to WAC 197-11-315 to 335.). *See also*, *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002) (The DNS must be based on sufficient information to evaluate the project's impacts.).

And third, a Determination of Non-Significance should be put aside and an Environmental Impact Statement required whenever a proposed action creates the reasonable probability of causing more than moderate effects upon the quality of the environment. *Norway Hill*, supra at 277-78; SMC 25.05.360(A).

Satisfaction of these standards is reviewed under the "clearly erroneous" test, whether the Examiner is left with "a definite and firm conviction that a mistake has been made." *Moss v. Bellingham*, 109 Wn.App. 6, 13, 31 P.3 703 (2001). Under these standards, the DNS rendered on the proposed Phinney Flats project is clearly erroneous and must be vacated.

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C. Director's Acceptance of Design Review Board's Recommendation and SEPA mitigation for height, bulk, and scale.

A project subject to Design Review must meet all Codes and regulatory requirements applicable to the site. SMC 23.41.014.F. When at least four members of the Design Review Board agree in their recommendation to the Director, the Director's Decision shall require compliance with the DRB recommendation unless the Director concludes that the Board's recommendation: (a) reflects inconsistent application of the design review guidelines; or (2) exceeds the authority of the [Board]; or (c) conflicts with SEPA conditions or other regulatory requirements applicable to the site; or (d) conflicts with the requirements of state or federal law. SMC 23.41.014.F.

With regard to height, bulk and scale, the Director's acceptance of the DRB Recommendation for the Phinney Flats project should be rejected because it reflects an inconsistent application of the Design Review Guidelines and conflicts with other regulatory requirements applicable to the site, including those relating structure height, setbacks for the clerestory and setbacks abutting residential property

Moreover, because SEPA specifically provides for mitigation of height, bulk and scale impacts, SMC 25.05.675.G, and Design Review Guidelines in part are used to guide mitigation of those impacts, Indeed, SEPA specifically explains that the Citywide design guidelines and any Council-approved, neighborhood design guidelines – such as the Greenwood/Phinney Ridge Design Guidelines – are intended to mitigate the same adverse height, builk and scale impacts addressed in SEPA policies. But design review can fail. And when it does, SEPA steps in. Although a project that is approved through the design review process is presumed to comply with the height, builk and scale

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policies, "[t]his presumption may be rebutted … by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated." SMC 25.05.675.G.2.c. In this case, Livable Phinney has presented clear and convincing evidence that the height, bulk and scale impacts were not adequately mitigated.

During the procedings, the Examiner inquired of the priority to be given to various Design Review Guidelines, in response to which SDCI gave no clear answer. As Livable Phinney elaborates at part III, A, 2 below, Design Guidelines addressing height, bulk, and scale must be prioritized over guidelines that deal more generally with the architectural design. SDCI was required under SEPA to mitigate the height, bulk and scale impacts that the design review process failed to address.

III. ARGUMENT

SDCI shirked its responsibility when it approved the Phinney Flats project without additional restrictions and conditions to mitigate the outsized impacts from the height, bulk, and scale of the building, and the parking impacts on neighboring streets outside the Urban Village where parking is already at and over-capacity, even by the applicant's own analysis. The Director also violated SEPA by failing to require information sufficient to evaluate the proposal's environmental impacts relating to transit, parking, and environmental health.

Livable Phinney's appeal challenges four categories of errors in the Decision that implicate the applicable Land Use Code provisions, Design Guidelines, and SEPA: (1) height, bulk, and scale issues relating to building setbacks, view blockage, height, and clerestory shadow; (2) the meaning and application of frequent transit service and project approval without any on-site parking pursuant to the frequent transit service

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exemption in SMC 23.54.015; (3) significant impacts to on-street parking outside the Urban Village boundary, and the failure to mitigate those impacts; and (4) the failure to consider potential impacts to environmental health.

To remedy these errors, the Decision must be remanded to SDCI for the following revisions: (1) increased upper level setbacks in the northeast portion; (2) increased setbacks at the deck level at the south property line; (3) removal of the additional height that blocks the views of Green Lake, or at least remand for further view analysis; (4) removal for substantial shrinkage of the so-called clerestory structures that span almost the entire length of the west side of the building; (5) increased setback of the clerestory from the north edge of the building (if a clerestory is allowed at all); (6) the addition of on-site parking because the Route 5 fails to satisfy the definition of frequent travel service and therefore the site is not eligible for the frequent transit exemption; and (7) withdrawal of a SEPA determination to correct flawed parking and transit studies and for further consideration of potential impacts to environmental and public health.

A. <u>Height, Bulk, Scale</u>: The Phinney Flats building violates the applicable Land Use Code provisions, Design Review Guidelines, and SEPA because it is too tall, and too close to the adjacent properties.

SDCI's Decision to approve, without conditions, a 48-foot tall building on top of Phinney Ridge, constructed with three upper floors 10-feet from the single family home to the east, and a second floor deck only 1 to 1 1/2 feet back from the property line of the adjacent south property, was a mistake.

The building is too tall, too close to neighboring properties, and contains unlawful rooftop features. The Director misapplied numerous Land Use Code provisions in a clearly erroneous Code Interpretation; the design review process failed; and the

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Director failed to exercise SEPA authority to reduce the height, bulk, and scale of the building.

1. <u>Northeast section upper level setbacks</u>: The Director should have required a minimum 15-foot setback on all upper level floors in the northeast portion of the building

SDCI refused to require a 15-foot upper level setback for the second, third, and fourth floors because it concluded that the applicable Code section did not apply when a commercial parcel shared a rear boundary with a split-zoned lot. As a result of SDCI's error, the family living behind the northeast portion of the Phinney Flats building will have the upper three floors looming over 44 feet high, just 10 feet from their property line, casting longer-lasting shadows across their yard and blocking light and air for longer periods of time.[7] By contrast, the upper floors of the southern two thirds of the building are setback 25 feet.[8]

At the hearing, Elizabeth Johnson, who lives in the home behind the northeast portion of the proposed Phinney Flats building gave moving testimony about the impacts of this project on her family's home where she lives with her ailing 91-year old father who purchased the home in 1959. Their white craftsman house abuts the Phinney Flat site along the northeast portion, and their garage runs along the property line. She described the invasion of privacy they would suffer from the wall of windows looming over their yard, and the long shadows that would destroy a garden she has been cultivating. Of course, these impacts are not merely personal to her and her father, but would be visited upon any future owner of their property. Ms Johnson further described her numerous – though unsuccessful -- efforts to convince the developers

[7] Testimony of Elizabeth Johnson.
[8] Ex. 3, Plan sheet G0.02A.

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and the Board to move back the upper three floors, preferably on par with the setback along the rest of the east side upper floors.

Livable Phinney sought a Code Interpretation that a minimum 15-foot setback on the top three floors ("upper level setback") was required under the clear and unambiguous language in the upper level setback provisions of SMC 23.47A.014.B.3. SDCI disagreed. The Examiner should reverse that decision.

Even if the Examiner believed that the Code language would allow only a 10-foot upper level setback, the evidence supports a finding that the SDCI violated applicable Design guidelines and applicable SEPA provisions regarding height, bulk, and scale by failing to require at least a 15-foot setback.

a. Code Interpretation: The upper level setbacks violated the old version of SMC 23.47A.014.B.3 that required a minimum 15-foot upper level setback on all floors above 13 feet in height.

When the Applicant submitted its skeletal EDG application on September 3, 2015, SMC 23.47A.014.B.3(a) required:

> "For a structure containing a residential use, a setback is required along any side or rear lot line that abuts a lot in a residential zone . . . , as follows" [specifying 15-foot upper level setback for all floors above 13 feet in height](emphasis added).[9]

In its Request for Interpretation, Livable Phinney argued that the unambiguous Code language, which uses terms defined in the Land Use Code, requires a minimum

[9] As Livable Phinney previously detailed in its Response to Motion to Dismiss, the Applicant had a pre-submittal meeting with SDCI in August 2015, around the same time as the Land Use Omnibus legislation that revised this portion of the Land Use Code was being finalized, and the Applicant rushed in a minimal and incomplete EDG application after the legislation was passed but before it took effect. The suspicious timing of Applicant's application was further confirmed in the "Working Documents" material Livable Phinney received in one of its Public Records Requests that showed a draft of the Omnibus legislation dated August 4, 2015. Ex. 41 at 12. The Applicant's pre-submittal meeting occurred on August 5, 2015.

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15-ft upper level setback in this case because the two rear lots that "abut" the rear lot line of the Phinney Flat site, are "lots" "in" a "residential zone," regardless of whether some small portion of those lots has a commercial zoning designation.[10] The defined terms used in SMC 23.47A.014.B.3 demonstrate that the 15-foot upper level setback should have been applied here. SDCI should have applied the terms of the Code as written.[11] The applicable defined terms are:

> **"Abut** " means to border upon. SMC.23.84A.002.
>
> "**Lot**" means . . a parcel of land that qualifies for separate development or has been separately developed. A lot is the unit that the development standards of each zone are typically applied to. A lot shall abut upon and be accessible from a private or public street sufficiently improved for vehicle travel . . . .SMC 23.84A.024.
>
> "**Lot lines**" means the property lines bounding a lot. SMC 23.84A.024.
>
> "**Lot line, rear**" means a lot line that is opposite and most distant from the front lot line. SMC 23.84A.024.

The term, "**residential zone**," is defined in the code as follows:

> **"Zone, residential"** means a zone with a classification that includes any of the following: SF9600, SF7200, SF5000, RSL, LR1, LR2, LR3, MR, HR, RC, DMR, IDR and SM/R, . . ."SMC 23.84A.048.

And the the following related terms are defined:

> "**Zone, single family" or "SF zone**" means a zone with a classification that includes any of the following: SF5000, SF7200 and SF9600; [and]
>
> "**Zone, neighborhood commercial" or "Zone, NC**" means a zone with a classification that includes any of the following: Neighborhood Commercial 1 (NC1), Neighborhood Commercial 2 (NC2), ... SMC 23A.84A.048.

[10] See Request for Interpretation at 1-4, filed with Notice of Appeal.

[11] *Bravern Residential II, LLC v. Dep't of Revenue,* 183 Wn.App. 769, 777, 334 P.3d 1182 (Div. 2 2014)("As with statutory interpretation, where a regulation is clear and unambiguous we must give effect to that plain meaning.")

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Substituting the plain and unambiguous definitions for the defined terms in SMC 23.47A.014.B.3, this section requires a setback "along any rear property line that borders upon a parcel of land that qualifies for separate development in a SF 5000 (single family) zone."

It is undisputed that the two single family homes that share a boundary with the 6726 parcel are in "lots" as defined in SMC 84A.024, and that they could only be developed pursuant to the development regulations for single family zones. Notwithstanding the few feet of NC2-40 in their backyards, they are "lots in a residential zone." The 6726 Greenwood parcel "abuts" these lots. The 15-foot upper level setback in SMC 23.47A.014.B.3, accordingly, is required, and the Director erred in refusing to impose the required 15-foot upper level setback.

SDCI's Code Interpretation ignored the plain meaning of these defined terms and instead argued that since only a *portion* of the abutting lots are in a single family zone, they are not in a residential zone, but in a split zone. SDCI's interpretation of this provision has at least three flaws. First, this provision does not have separate standards for split zones, but instead distinguishes between residential and other, non-residential zones. Second, in according ordinary meaning to language, a "lot" can be "in a residential zone" without being entirely zoned for residential use. By analogy, Colorado is a state in the Rocky Mountains, even though portions of the state are not in the mountains at all, but in the Great Plains. And third, SDCI's reliance upon a subsequent enactment that modified this Code section is misplaced because the Code language SDCI applied to the Phinney Flats project is not ambiguous and legislative intent at the time of passage cannot be determined by the actions of a subsequent council.[12]

[12] *Fairley v. Department of Labor & Indus.*, 29 Wn.App. 477, 483, 627 P.2d 961, rev. denied, 95 Wn.2d 1032 (1981)(Subsequent enactment generally treated as an amendment, not a retroactive clarification of existing legislation).

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If the Examiner agrees that SMC 23.47A.014.B.3.a requires 15-foot upper level setback, then the Phinney Flats project would also require the specified additional setbacks above 40 feet pursuant to SMC 23.47A.014.B.3.b.[13]

b. Design Review: The approved design conflicts with applicable Design Guidelines

Even if the Examiner concluded that the old version of SMC 23.47A.014.B.3.a did not require a 15-foot upper level setback for commercial parcels that abut a split-zoned lot, the Examiner should nevertheless remand the Decision for failure to comply with applicable design guidelines.

(1) Design Guidelines relating to Height, Bulk, and Scale, and Massing and Zone Transitions take priority over Guidelines relating to Architectural Design.

In response to the Examiner's questioning, Michael Dorcy gave no clear answer as to the priority among various applicable design guidelines. This issue specifically arises in SDCI's refusal to require additional setbacks from the single family properties at the northeast corner of the proposed structure. At the hearing, the applicant and SDCI defended the minimal 10 foot seback for the second through fourth floors on asserted claims of architectural integrity, apparently in reliance upon the general City-wide guideline DC-2 B-1("Ensure that all facades are attractive and well-proportioned.") While this guideline would apply to any building regardless of location, other, more specific guidelines require a reduction in scale to respond to adjacent, less intensive land uses, including:

[13] SMC 23.47A.014.B.3.b requires, "[f]or each portion of a strucure above 40 feet in height, additional setback at a rate of 2 feet setback for every 10 feet by thich the height such portion sceeeds 40 feet." This additional setback would apply on the east side of the Phinney Flats project, beyond the 15-foot upper level setbacks required at up to 40 feet in height.

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> [City-wide Guideline] CS 2 D-3 ("For projects at the edge of different zones, provide an appropriate transition or complement to the adjacent zone(s). …")
>
> [City-wide Guideline] CS 2 D-4 ("Strive for a successful transition between zones where a project abuts a less intensive zone.")
>
> [Greenwood /Phinney Guideline] CS2-II-ii. **Zone Edges**: Careful siting, building design and massing are important to achieve a sensitive transition between more intensive and less intensive zones. Consider design techniques including:
>
> > a. increasing the building setback from the zone edge at the ground level;
> >
> > b. reducing the bulk of the building's upper floors nearest to the less intensive zone;
> >
> > c. reducing the overall height of the structure; and
> >
> > d. using extensive landscaping or decorative screening.

These and other policies are set forth at Exhibit 5, the Analysis and Decision at 6 and within the full City-wide Design Review Guidelines and the Greenwood/Phinney Ridge Supplemental Guidance, of which the Examiner may take official notice under HER 2.18 and ER 201.

To illustrate application of the design techniques to address zone edges, the Greenwood/Phinney Neighborhood Design Guidelines include a sketch, which is set forth below:

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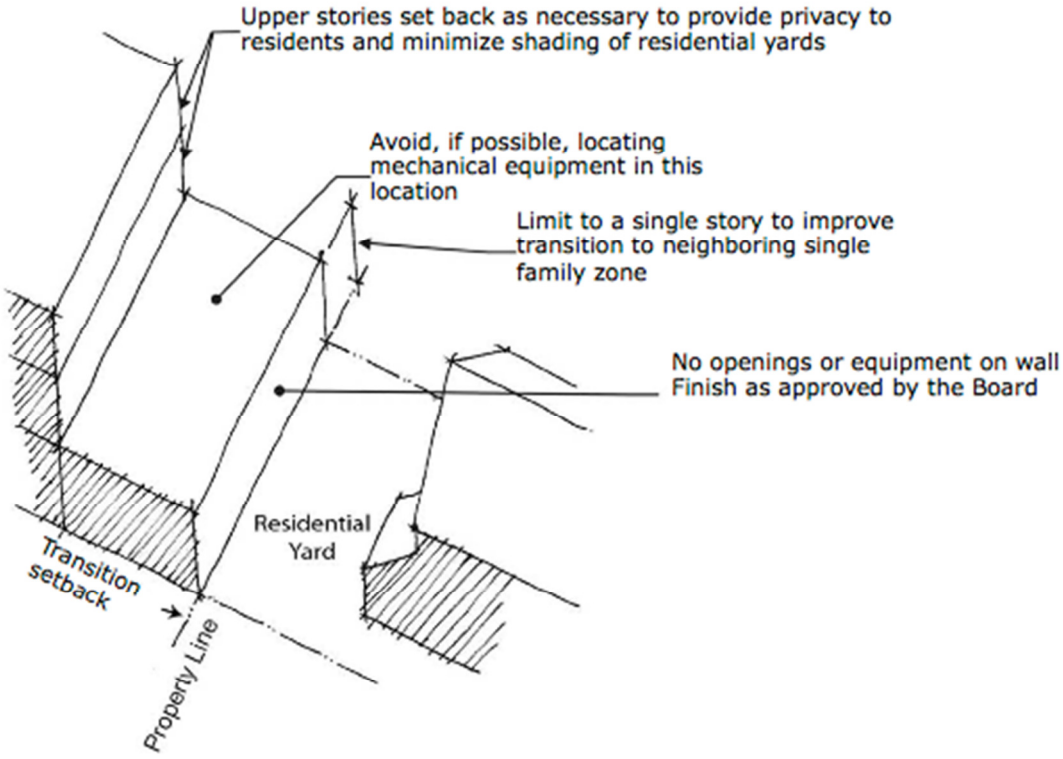

Even though the City-wide Guidelines at page v provide that "…all projects are expected to meet and address all of the guidelines, …" by their greater specificity, those guidelines addressing siting, such as the edge policies, should be weighted more heavily than guidelines addressing building proportion or appearance, which would apply without regard to location. Pursuant to the principle of statutory construction, the specific would govern over the general.[14]

Greater weight also should be given in the Design Guidelines addressing transition to zones of less intensity, compatility of design and zone edges because they in part implement the substantive height, bulk and scale policies under SEPA, while no SEPA substantive policies address such architectural design features as proportionality. *See* SMC 25.05.665.D.5 (overview policy allowing for mitigation of a project "located

[14] *Gerow v. Washington State Gambling Comm'n*, 181 Wn.App. 229, 243, 324 P.3d 800 (2014).

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near the edge of a zone, and result[ing] in substantial problems of transition in scale or use which were not specifically addressed by the applicable Dity code or zoning…") and SMC 25.05.675.G.2.c (allowing the Director to further mitigate height, bulk and scale under SEPA based upon design guidelines, even after Design Review Board recommendation).

Whether by ruling on SDCI's acceptance of the Design Review Board recommendation or by separate exercise of SEPA mitigation authority under 25.05.665.D.5 and 675.G.2.c, the Examiner should find clear error in SDCI's refusal to setback the northeast portion of Phinney Flats building a minimum of 15 feet, but more appropriately, a 25 foot distance equivalent to the southerly two-thirds of the building.[15] The applicant gave no good reason consistent with the zoning edge guidelines for refusal to continue that second level setback the full length of the building. Nor did the applicant have a good reason for refusing to provide even a minimum 15-foot upper level setback in the northeast oortion of the building. According to its architect, the applicant chose a larger frontage on North 68th Street for generalized reasons of building design, but it offered no alternative designs that would continue the upper level setback the length of the building. A building rising over 44 feet high[16] only 10 feet from a single family property does not "achieve a sensitive transition between more intensive and less intensive zones."[17] As shown in the previous section, the adjacent, single-

[15] See *e.g.*, Ex. 46 at 28 (EDG plans showing 25 foot setback from easterly property line for upper stories along the southerly 2/3 of the proposed building).
[16] As described *infra*, the extra four feet of the clerestory structures that rise from the middle of the building would be visible from the single family zone, and the entire height of the building will appear higher when viewed from the east side because the height measurements were calculated from Greenwood Avenue, which is almost ghree feet higher than the rear lot line.
[17] [Greenwood Guidance] CS2-II-ii.

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family properties are within less intensive zones, because they could only be developed in single-family uses and their narrow slices of NC2-40 could not realistically be developed in commercial uses, a point that even Mr. Graves conceded.

c. SDCI erred in refusing to exercise its SEPA substantive authority to mitigate the height, bulk and scale impacts.

Even if the Examiner were to conclude that the old setback language of SMC 23.47A.014.B did not require 15-foot upper level setbacks for commercial parcels abutting a split-zone lot, and that the minimal setbacks did not violate Design Guidelines, the Examiner should reverse and remand the Decision and instruct the Director to exercise its SEPA substantive authority to require such setbacks.

The SEPA policy on height, bulk, and scale confirms the City's policy "to provide for a reasonable transition between areas of less intensive zoning and more intensive zoning." SMC 25.05.675.G.2.a. The SEPA policies recognize that "the City's land use regulations cannot anticipate or address all substantial adverse impacts resulting from incongruous height, bulk, and scale." SMC 25.05.675.G.1.b. To address incongruous height, bulk, and scale, the SEPA policies grant decisionmakers the authority to limit height, modify bulk and facades, to reposition a structure, and to modify setbacks, screening and landscaping. SMC 25.05.675.G.2.B.i-vi. The exercise of this authority is predicated upon satisfaction of the overview policies at SMC 25.05.665 and upon a finding by clear and convincing evidence that impacts of height, bulk and scale have not been adequately mitigated through design review. SMC 25.05.675.G.2.c. These threshold tests have been satisfied.

The Design Review Board recommendation did little to address the stark incongruity between the northeast face of Phinney Flats and the adjacent single family residence to the east. As noted above, the Phinney Flats building would rise over 44 feet just 10 feet from the single family property. The Greenwood/Phinney Neighborhood

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Design Guidelines illustrate how that transition should occur, with a single story adjacent to the neighboring single-family area and an increased setback of upper stories. The Phinney Flats project arguable respects this transition for the southerly 2/3rd of the eastern elevation, but not for the portion of the building facing the Johnson property along North 68th Street. The refusal to follow the very specific Greenwood/PhinneyDesign Guidelines amounts to clear error.

The threshold overview policies are satisfied here. Under SMC 25.05.665.D.5 and D.6, mitigation beyond the requirements of adopted codes may be imposed where:

> 5. The project is located near the edge of a zone, and results in substantial problems of transition in scale or use which were not specifically addressed by the applicable City code or zoning; or
>
> 6. The project is vested to a regulation which no longer reflects the City's policy with respect to the relevant environmental impact because of the adoption of more recent policies, provided that the new policies are in effect prior to the issuance of a DNS or DEIS for the project;

Both of these overview policies apply.

The project is located near the edge of a single family zone and at least under SDCI's Interpretation, the transition problems of placing a 48 foot high structure adjacent to a one-story single-family residence is not addressed by current code. This policy applies even though a narrow portion of the single family property is zoned NC2-40, because the proposed Phinney Flats is to be located "near the edge of a zone" for far less intense single family use and the adjacent lot could not be practicably developed for a commercial use.

Overview policy D.6 also applies. Under SDCI's Interpretation as affirmed by the Examiner, the Phinney Flats project is vested to upper level setback limitations that no longer reflect city policy on account of new Code language that took effect prior to issuance of the DNS. The "old" version of SMC 23.47A.014.B.3.a in effect at the time of the Early Design Guidance application, was replaced by new Code language that

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specifically addressed the split zone issue and confirmed that a 15-foot upper level setback was required. According to SDCI, the "old" version did not require such a setback.[18] On September 21, 2015, just 18 days after the applicant had submitted its EDG application, an amendment to section SMC 23.47A.014.B.3 took effect requiring upper level setbacks for the development on lots abutting lots in a residential zone and those with split zoning.[19] That amendment took effect well before the issuance of the DNS (along with the Analysis and Decision), which first occurred on December 29, 2016, and was later reissued unchanged on January 9 and again on January 23, 2017.[20]

As far as Livable Phinney can determine, neither the Design Review Board Recommendation nor SDCI staff gave any consideration to the applicability of the overview policies D.5 and D.6 or to the specific policies for the mitigation of height, bulk and scale. For failure to even consider those policies, the SEPA determination is in error.

2. <u>South property line</u>: The Director erred by allowing second floor decks built at the property line because that deck placement violates the applicable design guidelines and invades the privacy of residents of the adjacent property.

The Director erred in failing to require an additional setback from the south property line where the 2nd floor deck location invades the privacy of the occupants on the immediately adjacent south parcel. City-Wide Guideline CS2 D-5 aims to minimize the disruption of the privacy of adjacent uses:

> **Respect for Adjacent Sites:** Respect adjacent properties with design and site planning to minimize disrupting the privacy and outdoor activities of residents in adjacent buildings.

[18] Ex. 6, Code Interpretation at 4.
[19] See Livable Phinney's Request for Interpretation at 7, providing a side-by-side comparison of the prior and current language in SMC 23.47A.014.B.3.
[20] Ex 17, SDCI Index to project documents at 4.

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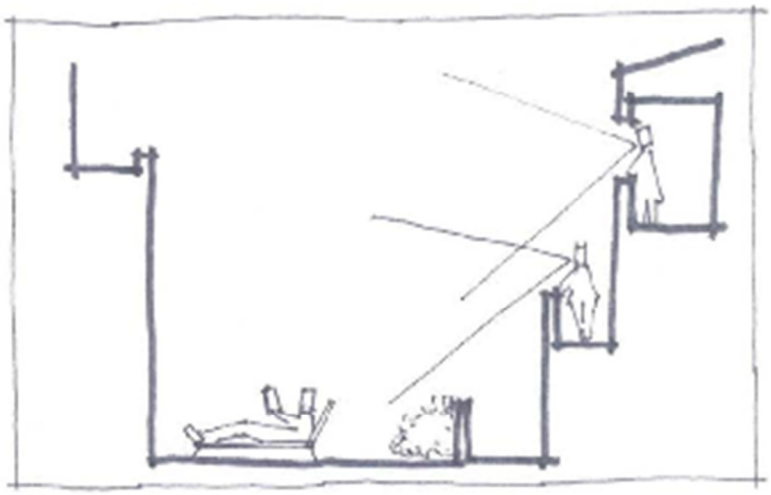
This Guidelines includes an illustration showing how the disruption of privacy can be reduced:



Inappropriate siting of large buildings can reduce the privacy of adjacent homes. Reducing windows and decks overlooking neighboring residential property or increasing side setbacks can increase privacy.

Laura Reymore, the owner of the apartment building to the south of the Phinney Flats site, testified that at the minimal, 1 to 1 1/2 foot distance away from her property,[21] Phinney Flats would disrupt the privacy of her tenants by placing a deck with a view directly into the windows of adjacent apartment units. Neither the Design Review Board Recommendations nor the SEPA determination addressed the proposal's failure to implement the above Design Guideline. To address intrusions into privacy, the Decision should be remanded for specific consideration of the above guideline, which may include increased setbacks for the Phinney Flats building and additional landscaping and screening.

[21] Ex. 3, Sheet A.100

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3. <u>View blockage</u>: The four foot height bonus under SMC 23.47A.012.A.1 should be rejected until a thorough analysis shows that views of Green Lake from facing buildings would not be blocked.

Marcel Bodsky, an architect with 30 years of experience,[22] testified as to the inaccuracy of the method used by the Applicant to establish the view of Green Lake from the Fini Condominium roof deck. The Fini Condominium ("the Fini") at 6800 Greenwood Avenue, was built in 2006, and is located right across Greenwood Avenue from the Phinney Flats site. The four story Fini building has roof decks with views to the east of Green Lake and the Cascade Mountains and of Mt. Rainier to the south.

SMC 23.47A.012.A.1.a.1.a allows a building to exceed the otherwise applicable height limit by four feet if it provides a first floor height of 13 feet or more for non-residential uses at street level. But that extra height is limited by SMC 23.47A.012.A.1.c, which provides for the protection of views from existing buildings of specified landscape features including Mt. Rainier, the Cascade Mountains, and Green Lake. This provision does not allow additional height above the base height of 40 feet in zones with 30 and 40 foot heights when the additional height of a new structure would cause the loss of a protected view from adjacent existing buildings.

[22] Ex. 24, Resume of Marcel Bodsky.

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a. Livable Phinney sought a Code Interpretation on this issue because SDCI lacked sufficient information to determine whether the additional height would unlawfully block protected views.[23] The Code Interpretation should be rejected because it offered only conclusory comments and failed to address the deficiencies in the view analysis that SDCI had relied on.

The Interpretation did not address Livable Phinney's concerns about the inadequate and incomplete view studies. It conceded that the view analysis provided by the Applicant did not provide a view analysis from all angles. But then it claimed that "an elevation analysis indicates that views previously unblocked will not be obscured by the additional 4 feet. An "elevation analysis" – whatever SDCI meant by that phrase – is not a substitute for a view study that calculates viewing angles to the protected features listed in SMC 23.47A.012.A.1.c. SDCI's shoddy and unsupported "analysis" of the view impacts from additional height does not withstand scrutiny.

SDCI further compounded its error by claiming that the applicant "will be providing a supplementary and more in-depth view analysis that further demonstrates the additional height does not block any of the protected views under SMC 23.47A.012.A.1.c. In otherwords, SDCI relied on information that had not yet been produced to support its interpretation of code. SDCI simply assumed that the non-existent information would support its desired outcome.[24] The Interpretation should be reversed.

[23] *See* Request for Interpretation at 10-11, Sec. V.

[24] The only additional analysis provided by the applicant was a purported view study from the Isola project across North 68th Street that relied on incongruous images and angles to claim that views of Mt. Rainier from the Isola building would not be blocked. The Applicant did not provide any additional information to justify its alleged view studies showing the impact on Green Lake views from the Fini building.

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b. Livable Phinney's evidence at the hearing confirmed that the additional height allowed in SMC 23.47A.012 would block views of Green Lake whereas a building without that additional height would not block those views.

The Applicant had prepared a minimal view study that purported to show the view of Green Lake was blocked at 40 feet.[25] Mr. Dorcy accepted this without question. At the hearing Mr. Bodsky testified that he reviewed the AutoCAD files provided by the Applicant's architect in order to verify the angles of view used to draw this conclusion.[26] Those viewing angles were not notated on the drawings submitted to the City. He testified that the Applicant's own CAD files actually demonstrated that a 40-foot high building at the Phinney Flats site would not block the view of the east bank of Green Lake from the Fini and that there does exist a view from the Fini rooftop decks of the far bank of Green Lake across the entire length of a 40 foot tall Phinney Flats building. The applicant, in contrast, had claimed that "views to Green Lake will be impacted with or without the additional height."[27] Of course, that conclusion – that views of Green Lake would be blocked already with a 40-foot building -- would allow the extra height pursuant to SMC 23.47A.012.A.1.A, whereas Mr. Bodsky's conclusion that the views would not be blocked at 40 feet, but would be blocked with the additional height, would prohibit the extra height.

Mr. Bodsky testified that the view angle to the far bank is .85 degrees at the narrower portion of the proposed development, and .36 degrees at the area with the dogleg. This angle of view (from .36 to .85 degrees) is a significant viewing angle

[25] Ex. 3, Sheet G.02B of Plan Set 4.
[26] *See also,* Mr. Bodsky's Exhibit 23.
[27] *See* Ex.3, MUP plan set sheet G0.02B view diagrams.

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because it provides visual context and orientation with respect to Green Lake. These aspects, in addition to aesthetics, are the reasons the Code provides for view protection.

The added clerestory structures would block the view by ¼ of 1 degree, but the clerestory rests upon the roof of a building that is already claiming a four foot height bonus for the claimed lack of blockage of views of Green Lake. It is that initial four feet of height at the first story that is at issue and should not be allowed in the absence of further proof that that it would not block views of Green Lake. It is undisputed that the additional clerestory structures would block the views from the Fini, but they should not be allowed if the building is denied the four feet of additional height due to view blockage.

To ground truth his interpretation of the applicant's own CAD files, Mr. Bodsky went to the roof of the Fini and used a simple survey application for hand held devices (an iPad in this case) that superimposed angles onto a photograph.[28] He concluded that a view of the east bank of Green Lake from the Fini across a 40 foot high structure on the Phinney Flats site would be available.

Jay Janette, the Applicant's architect, testified that he relied (in part) on the City of Seattle's GIS mapping tool to prepare his view study, but he never went to the roof of the Fini to ground-truth his calculations. Mr. Bodsky testified that he consulted with co-workers who regularly use the city's GIS maps as to their accuracy under these circumstances. Mr. Bodsky refuted Mr. Janette's testimony on ground that the GIS data

[28] See Ex. 21 and 22

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is not accurate to within a ¼ of 1 degree of angle needed to prove that the view would be blocked by a 40 foot high building.

The difference between protecting some view of Green Lake and losing it altogether requires a more sensitive analysis of the viewing angles than provided by the applicant. On this point, the Decision should be remanded to conduct an actual survey. The residents of the Fini deserve this consideration, and the residents of Seattle deserve to know that the City requires careful analysis of protected views before casually closing off views to cherished and protected destinations.

4. Clerestory structures: The alleged "clerestories," that extend the building height to 48 for feet almost the entire west side of the building on Greenwood Avenue should not have been allowed because they do not meet the code definition of "clerestory" in SMC 23.84A.006, or the applicable design guidelines, and therefore the Director should not have allowed extra height for these structures pursuant to SMC 23.47A.012.C.2.

The Decision accepted the DRB's final recommendations without considering whether the alleged clerestory structures that span almost the entire west side of the building to create a 48-foot building in a 40-foot zone, complied with the applicable Code requirements or design guidelines. "Clerestory" is a defined term in the Land Use Code, see SMC 23.84A.006. The Director granted an additional four feet of height for these alleged clerestories pursuant to SMC 23.47A.012.C.2.

Livable Phinney sought a Code Interpretation on whether the clerestories meet the applicable Code definition and whether SDCI should have granted the extra four feet of height for the clerestories pursuant to SMC 23.47A.012.C.2.[29] LP argued that the alleged clerestories did not meet the definition of clerestory in SMC 23.84A.006, and that the massive "clerestory" rooftop structures proposed for the Phinney Flats building

[29] See Livable Phinney Request for Code Interpretation at 8-9 (Sec. III).

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were not the type of rooftop feature eligible for an additional four-feet of height pursuant to SMC 23.47A.012.C.2. SDCI's Interpretation, predictably, found no error in allowing the clerestory structures.[30]

a. The alleged clerestories on the Phinney Flats building do not meet the definition of clerestories in SMC 23.84A.006.

SMC 23.84A.006 defines "clerestory" as "an outside wall of a building that rises above an adjacent roof of that building and contains vertical windows. Clerestories function so that light is able to penetrate below the roof of the structure." (emphasis added). The massive flat-topped structures that collectively span almost the entire west side of the proposed Phinney Flats building and extend more than 20 feet deep into the rooftop, rising in a windowless wall on the east side from the middle of the building, do not meet this definition.[31] SDCI's Interpretation ignored the plain meaning of this Code section.

The Interpretation noted the obvious fact that the "proposed rooftop feature contains many windows," and that the plan sets show windows on the west, south, and north sides, and then concluded that "a plain reading of the code shows that the feature qualifies as a clerestory."[32] But the Interpretation then relied on the following illogical phrase and incomplete analysis to support its conclusion: "There are no walls in front of the clerestory, so it is 'an outside wall of a building.'"[33]

That observation missed the point entirely. The front windows of this rooftop feature may rise from an outside wall, but the Interpretation overlooked entirely the undisputed fact that the east wall of the clerestory rises in a four-foot high, windowless

[30] Ex. 6, Code Interpretation at 5-6.
[31] See e.g., Ex. 3, Sheet A3.02 (east elevation).
[32] Ex, 6, Interpretation at 5.
[33] Interpretation at 5.

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wall from the middle of the building.[34] The Interpretation, therefore, truncated its analysis without considering the most important problem with these structures: the windowless east wall that rises from the interior of the roof, not an outside wall. The Interpretation allowing the clerestory contains clear error, and must be reversed.

b. Even if a clerestory could, in some circumstances, contain an interior windowless wall, the massive "clerestory" structures on the Phinney Flats building are not the type of clerestory envisioned in SMC 23.47A.012.C.2 that authorizes extra height for specified rooftop features.

The Interpretation failed to address Livable Phinney's separate argument that the alleged clerestory structures on the Phinney Flats building are not the type of "clerestory" envisioned in SMC 23.47A.012.C.2 that allows extra height for specified rooftop features.[35] Instead, the Interpretation simply concluded without analysis, that because these structures had "many windows" on three sides, and the there were "no walls in front of the clerestory," that it qualified for the four feet of extra height pursuant to SMC 23.47A.012.C.2.[36]

SMC 23.47A.012.C.2 provides that

> Open railings, planters, skylights, clerestories, greenhouses, solariums, parapets, and firewalls may extend as high as the highest ridge of a pitched roof permitted by subsection 23.47A.012.B or up to 4 feet above the otherwise applicable height limit, whichever is higher.

In this case, the approved design features two, flat-topped, four-foot high rectangular structures with windowless east walls that collectively span approximately 75 feet of the

[34] See Ex. 3, Sheet A3.02 of MUP set, October 4, 2016 (east elevation, showing the four-foot black wall rising above the roof, as viewed from the single family zone to the east); see also Sheet A3.03 (north elevation, showing the rear wall of the clerestory rising from the middle of the building, as viewed from N. 68th street and points north), and Sheet A.3.04 (south elevation, showing the rear wall of the clerestory rising from the middle of the building, as viewed from points to the south of the Phinney Flats building).
[35] See Livable Phinney Request for Interpretation at 9, III.B.
[36] See Ex. 6, Interpretation at 6.

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100-foot west façade along Greenwood Avenue, and extend more than 20 feet of the depth of the building along the western portion of the building.[37] The northern structure is approximately 25 feet long, and the southern structure is approximately 50 feet long. Together they create a 48-foot tall building in a NC2-40 zone that creates the appearance of a fifth floor.

The list of rooftop features to be granted an additional four feet of height does not embrace the massive structure in the design of the alleged "clerestories" on the Phinney Flats building. Of the eight listed rooftop features in SMC 23.47A.012.C.2, only two are separate structures: greenhouses and solariums. Each, by definition is primarily made of glass or other translucent material.[38] In contrast, the rear, windowless wall east wall of the alleged clerestories on the Phinney Flats building eliminates any notion of transparency from those structures, and makes them incongruous with the other structures granted additional height in this section. The remaining rooftop features listed in SMC 23.47A.012.C.2 features are perimeter safety protections (e.g. open railings, parapets, firewalls), or substantially smaller, insignificant features such as planters and skylights. The alleged clerestories featured on the Phinney Flats building are not the type of rooftop feature envisioned as a clerestory in SMC 23.47A.012.C.2, and therefore SDCI committed clear error by allowing them, particularly without a substantive response to LP's Request for Interpretation on this issue.

[37] See e.g., Ex. 3, Sheet A.3.01 (west elevation).

[38] See e.g., SMC 23.84A.016 ("Greenhouse" means as structure or portion of a structure, made primarily of glass or other translucent material, for which the primary purpose is the cultivation or protection of plants."); SMC 23.84A.036 ("Solarium" means a room, porch, or other area, that is designed to admit sunlight, is part of a larger structure, is enclosed substantially entirely by glass or other transparent material, and is not primarily used for the cultivation of protection of plants.")

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c. Even if the alleged clerestories meet all applicable Code definitions, SDCI should not have allowed the massive clerestory structures on the west side a wall because that design violates applicable design guidelines and SEPA height, bulk, and scale provisions.

Even if the alleged clerestory structures satisfy all applicable Code requirements, SDCI should not have approved the DRB recommendation with this design element because a "clerestory" feature extending almost the full length of the building creates the effect of an additional story, renders this building out of scale with all other NC2-40 buildings in the area, and violates applicable design guidelines relating to Height, Bulk, and Scale, and Massing. SDCI should have rejected the DRB's recommendation allowing these massive "clerestory" structures because it reflected an inconsistent application of the design review guidelines. SMC 23.41.014.F.2.a. The massive clerestory structures also violate the SEPA height, bulk, and scale policies at SMC 25.05.675.G.

Specifically the Greenwood/Phinney Design Guideline CS2-II (Height, Bulk and Scale Compatibility) notes that "[c]areful siting, building design and massing are important to achieve a sensitive transition between more intensive and less intensive zones," and that design techniques including "reducing the overall height of the structure" should be considered. Similarly, Design Guideline DC2 (Architectural Concept), III (Mass and Scale) recommends to "[c]onsider reducing the impact or perceived mass and scale of large structures by modulating upper floors, varying roof forms and cornice lines. . . in proportions that are similar to surrounding plat patterns."

The citywide Seattle Design Guidelines also note the importance of minimizing the building height on sites located at zone transitions to a less intensive zone. See e.g., Seattle Design Guidelines, CS2.D (Urban Pattern and Form, Height, Bulk, and Scale). Specifically, Guideline CS2.D.2 recommends to:

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> Use changes in topography, site shape, and vegetation or structures to help make a successful fit with adjacent properties; for example siting the greatest mass of the building on the lower part of the site . . . "

Design Guideline CS2.D.3 (Zone Transitions) recommends that for projects located at the edge of different zones, an appropriate transition should be provided and that projects should "Create a step in perceived height, bulk, and scale between the anticipated development potential of the adjacent zone and the proposed development." And Design Guideline CS2.D.4 (Massing Choices) notes that in striving for "a successful transition between zones where a project abuts a less intensive zone," "[i]n some areas, the best approach may be to lower the building height, break up the mass of the building, and/or match the scale of adjacent properties in building detailing."

The alleged clerestories flout all of these guidelines. The massive structures add a four-foot wall to a building already at the maximum height allowed in an NC2-40 zone, to create a 48-foot tall building in a 40-foot zone. Neither the Applicant nor the City offered evidence to show that any other approved building in the Greenwood Phinney neighborhood added a massive clerestory structure along the entire street-facing façade of the building. The reason is obvious: there is no other building that attempted this stunt.

In addition, the "clerestory" structures are placed on the west side of the building site, which has the highest elevation. See e.g., MUP Plan set sheet A3.03 (north elevation), showing the eastward slope of the Phinney Flats site along North 68th Street, with all height calculations measured from the highest point at the west side on Greenwood Avenue; see also MUP Plan Sheet A3.02 (east elevation) showing the massive wall as viewed from the adjacent single family zone, which lies at a lower elevation than Greenwood Avenue. The Design Guidelines, however, recommended placing the greatest mass of the building on the lowest part of the site to minimize the perceived impact. See e.g., Seattle Guideline CS2.D.2.

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SDCI noted the eastward slope of the Phinney Flats parcel, but failed to relate the impact of that slope to the additional height it granted for this building.[39] The perceived impact of this three foot elevation change from Greenwood Avenue where the clerestories are measured, to the single family homes at the rear, means that the clerestories create a 51¬foot high structure as viewed from the adjacent single family zone, instead of the already-too-high- 48 foot high structure as viewed from Greenwood Avenue. SDCI, therefore, committed clear error in accepting the DRB recommendation allowing the massive wall of "clerestories" to extend across virtually the entire west wall of the proposed Phinney Flats building.

Although SEPA presumes that a project that is approved through the design review process complies with the SEPA height, bulk, and scale policies, this presumption may be rebutted by clear and convincing evidence that height, bulk, and scale impacts have not been adequately mitigated. For the reasons noted above, the design review process that allowed this massive clerestory structure on the uphill side of a building that transitions to a downhill single family zone failed in this case. The Examiner should remand the Decision with instructions to remove the clerestory wall and comply with the applicable design guidelines.

5. <u>Clerestory shadow</u>: The clerestory structure, if allowed at all, must be set back a minimum of ten feet from the north edge of the building to meet applicable Code requirements.

Even if the Examiner concludes that the clerestory structure is not a *per se* violation of code requirements, he must nevertheless reverse the Interpretation relating to the placement of the clerestory, and order the clerestory to be set back a minimum of

[39] See Decision at 2 ("There is a pronounced declination, west to east, as one ventures east along N. 68th Street towards Green Lake, but the site drops only slightly less than three feet from the west to the east property line.").

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ten feet from the north edge of the building because the shadow cast from the clerestory violates applicable Code requirements.[40]

SMC 23.47A.012.C.7 requires that seven specified rooftop features, including clerestories, "shall be located at least 10 feet from the north edge of the roof unless a shadow diagram is provided that demonstrates that locating such features within 10 feet of the north edge of the roof would not shade property to the north on January 21st at noon more than would a structure built to maximum permitted height and FAR." SDCI failed to require that shadow study during the design review process, and evidence presented at the hearing demonstrated that, contrary to the Applicant's alleged shadow study that SDCI accepted in its Interpretation, the proposed clerestory at the north edge of the roof would shade property to the north on January 21st at noon more than would a structure built to the maximum permitted height and FAR.

a. The design review process failed because SDCI did not require the mandatory shadow study to be produced during the Design Review process.

Despite the unambiguous requirement for a shadow diagram and the fact that the clerestory was a prominent design feature of the 6726 building from the beginning, SDCI allowed the project to proceed through the entire design review process without that mandatory shadow study. The clerestory as proposed throughout the design review process – and approved in the Decision – runs almost the entire west side of the building and extends more than twenty feet along the northern edge of the building. It is clearly within the are covered by SMC 23.47A.012.C.7.

SDCI did not even issue a correction notice on this issue until September 4, 2016, almost a year after the first EDG meeting where the clerestory was featured in the

[40] If the Examiner reverses the Interpretation and orders removal of the clerestory structure, the issues raised in this section regarding placement of the clerestory would be addressed by that decision .

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preferred option.[41] By that time, the project had already been through two EDG meetings and the first Recommendation Meeting. The second – and final -- Recommendation Meeting was a mere three weeks away at that time. There is no evidence in the record to indicate that the Design Review Board was ever informed of this requirement or of the fact that the Applicant had failed to provide the required material.[42] Nonetheless, the DRB recommended approval of the project's design at the second Recommendation Meeting on September 26, 2016.[43] Even though SMC 23.41.014.F.2 requires that a "[p]roject subject to design review must meet all codes and regulatory requirements applicable to the subject site," the DRB recommended approval without the required shadow study being submitted and, as later shown, for a structure that on January 21st would shade facing property to the north more that would a building without that clerestory. (Emphasis added).

An alleged "shadow study" was not provided until November 1, 2016, more than five weeks after the design review process ended.[44] As a result of SDCI's failure to require that shadow study during the course of design review, SDCI failed to properly consider the shadow impacts of the north edge clerestory as required by Code, and the Design Review Board was deprived of an opportunity to evaluate a design with a different clerestory placement, or perhaps no clerestory at all.

[41] Ex 17 (Project records) at 6, Correction Notice #2, Zoning, September 4, 2016 at Item 6 ("Per Section 23.57.012C7 [sic], clerestories must be set back 10' from the roofs edge on the north side unless a shadow study is provided."), of which official notice is requested under HER 2.18 and ER 201(b)(2)(judicial notice may be taken of facts not subject to reasonable dispute and which are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned[,]" as the project documents published on SDCI's website would be.)

[42] See Ex 62-67, Design Review proposals, Early Design Guidance reports and Design Review Board report and recommendation.

[43] Ex. 67, Final DRB Recommendation.

[44] Ex 17 at 4, MUP Cycle 2 Correction response, November 1, 2016

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b. The Interpretation approving the alleged shadow study should be reversed because the alleged shadow study is inaccurate and incomplete, and evidence presented at the hearing confirmed that the clerestory at the north edge violates the shadow requirements of SMC 23.47A.012.C.

Livable Phinney sought a Code Interpretation on the clerestory shadow issue because the Applicant's alleged shadow study was too inconclusive and potentially inaccurate to support the Director's Decision to allow the massive clerestory structure within 10 feet of the north edge of the building.[45] SDCI's Interpretation mirrored the Applicant's curious – and convenient -- conclusion that the clerestory shadow somehow managed to touch only a small portion of the sidewalk public right-of-way, but not any portion of the building that is directly opposite the 6726 building on the north side of N. 68th Street ("North Building"). According to SDCI, the clerestory would not shade property to the north on belief that the shadow would only reach street right of way and on the dubious distinction that street right of way is not "property," so SDCI found that the clerestory as proposed would satisfy the requirements of SMC 23.47A.012.C.7.[46]

The Interpretation, however, is nonsensical on its face, and raises questions whether SDCI actually looked at the submitted shadow diagram or simply parroted the Applicant's explanation. The image provided by the Applicant is a top-down, bird's eye view that does not show the side of the North Building where the shadow from the 6726 building is cast, and therefore it does not provide the critical view needed to answer the question posed in SMC 23.47A.012.C.7.[47] Evidently, SDCI never noticed that error. Without inquiry, SDCI simply accepted the Applicant's representation that the clerestory

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[45] Request for Interpretation at 9.

[46] *See* SDCI Interpretation No. 17-002 at 6 ("There is no property to the north that is shaded.") Livable Phinney does not take a position on SDCI's distinction between a right-of-way and "property" because it is irrelevant to the conclusion that the shadow impact from the clerestory on the building north of N. 66th Street reaches higher up the building at noon on January 21st at noon than would the shadow without the clerestory.

[47] Ex. 3, sheet G0.02B, relied upon in the Interpretation at 6.

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would only cast shadows on public right of way.[48] But that statement is contradicted by documentation in an earlier plan set showing shadows cast on the North Building at 12pm on December 21st (one month before the date required in SMC 23.47A.012.C.7).[49] T he Applicant's winter solstice shadow study does show the shadows cast on the side of the North Building.

The Applicant's later representation to the contrary (as well as SDCI's reliance on that later representation) is rather curious as it indicates either the Applicant's lack of awareness of the prior shadow study or, at worst, actual misrepresentation. In either event, evidence produced at the hearing showed that the 6726 building with the clerestory at the north edge of the building cast a shadow across the southerly façade of the North Building to an extent greater than the shadow cast from a building without that clerestory structure.

Livable Phinney provided evidence at the hearing that proved the additional shadow impact from the clerestory. LP member and mathematician Henry Brandis took a photo of the actual shadow cast from the existing 6726 building at 11:53a.m. on January 21, 2017, virtually the precise time of the required shadow study in SMC 23.47A.012.C.7.[50] From that photo showing the actual shadow cast from the current one-story building on the 6726 site, he calculated the angle of the shadow and calculated the corresponding location on the North building for a 40 foot building (zoned height with no additional height added) and a 48 foot building (zoned height plus four-foot bonus, plus four-feet for clerestory) on that site. As expected, the shadow cast from a taller building (e.g., a building with a clerestory), falls higher up on the North Building than does the shadow from a lower building. Therefore, the shadow cast from

[48] Ex. 3, sheet G0.02B, lower left-hand corner ("Shadow from rooftop feature only impact of additional shadow is within public right of way.").
[49] Ex. 64, EDG #2 at 21 (January 11, 2015) (sic, actually 2016)).
[50] Ex. 31 (Shadow impact of additional 4' plus clerestory with zero setback).

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the 6726 building with the clerestory at the north edge would shade the property to the north on January 21st at noon more than would a structure built to the 40 or 44-foot maximum height. Because the clerestory cannot meet the shadow limitations of SMC 23.47A.012.C.7, it must be set back at least 10 feet from the north edge.

Rather than addressing the Applicant's failure to provide accurate documentation of shadow impacts cast by the clerestory, earlier drafts of the Interpretation show that SDCI was casting about for an explanation that would, in the end, justify the clerestory without shadow impact documentation. Two prior drafts claim that no shadow diagram was initially provided because "[t]here is no private property to the north that could be shaded."[51]. Evidently SDCI believed that the mere presence of a street immediately north of a project site eliminated the need for the required shadow study, without any consideration of the proposed building height, street width, shadow length, or any other analysis. One draft even stated that "a shade diagram was not required" (notwithstanding requirements of city code), but that the applicants supplied one anyway "despite it being unnecessary, in an [*sic*] good faith attempt to address some of the concerns raised during the public comment period."[52] By the final version, however, SDCI had finally recognized that the North Building could be "shaded," but it then simply adopted the Applicant's implausible explanation that the clerestory would cast a shadow over the sidewalk on the west side of the North Building, but not on the North Building itself.[53]

[51] Ex. 36b (Draft Interpretation 17-002 (WKM edits) and Ex 37b (Draft Interpretation 17-002 (WKM_AMc_edits) at 6.
[52] Ex. 36b at 6.
[53] Ex. 3, sheet G0.02B, lower left-hand corner (claiming shadow would be cast on sidewalk to west of North Building but not on the face of the North Building).

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Of course, the basis for Applicant's representation of no shadow impacts and SDCI's acceptance of that representation in its Interpretation was refuted by the Applicant's own rebuttal exhibit presented at the hearing.[54]

c. The applicant's new explanation to justify the north edge clerestory placement, offered for the first time at the hearing, should be rejected because it is contrary to the accepted meaning of code language and would render the clerestory shadow section meaningless

At the hearing, the Applicant's architect conceded that the shadow cast from the proposed building with the clerestory at the north edge would run higher up the North Building than would the shadow of the building without a clerestory at the north edge, thereby contradicting his prior representations that the shadow cast by the clerestory would only reach street right of way. After having received Livable Phinney's shadow evidence,[55] the Applicant offered an entirely new and different explanation to salvage the doomed north-edge clerestory: It now claimed that the "maximum permitted height" in SMC 23.47A.012.C.7 referred not to the maximum allowable height of the building before the addition of the clerestory, but instead to the maximum height of the building with the highest of rooftop features added on top (in this case, a 16-foot elevator shaft added at the north edge of a 44-foot building to create a 60-foot building at its northern elevation). Therefore, according to the Applicant's new theory, as supported by a new diagram it submitted for the first time the day before the hearing and then attempted to explain at the hearing,[56] the clerestory was subsumed within the shadow of a 60-foot structure far taller than the 48-foot height of the building with the clerestory and therefore the clerestory did not cast additional shadow.

[54] Ex. 68 at 2 (shadow cast by proposed design) showing a shadow cast approximately half-way up the facing North Building.
[55] Ex. 31.
[56] Ex. 68 at 3.

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That argument fails on numerous levels. First, to the extent that Applicant now intends to employ an entirely new definition for "maximum permitted height," it was required to seek an interpretation on the meaning of that term pursuant to SMC 23.88.020. Raising that issue for the first time at the hearing was too late. Because the Applicant did not seek a Code Interpretation on this issue, the Applicant's newly claimed definition of "maximum permitted height" must be dismissed. But even if it is not dismissed, it fails as a matter of substance.

The Applicant's own material repeatedly refers to the 44-foot building as "max height" in every elevation drawing it provided throughout design review and the MUP application process.[57] The approved Plan Set elevations at pages A3.01-04 identify an elevation 370.1 feet as the "ht.max," which is an elevation based upon a starting elevation of 326.1 feet plus 44 feet of the zoned height. Creating a new "definition" of maximum height at the last minute for a rebuttal exhibit is simply not credible.

It is also clear from the context of SMC 23.47A.012.C.7, and the entire structure height section (SMC 23.47A.012), that "maximum permitted height" refers to the maximum height allowed in a zone before the addition of rooftop features. *See e.g.,* SMC 23.47A.012.C.2 (allowing clerestories up to four feet above the otherwise applicable height limit and insulation, decks and other similar features to exceed the "maximum height limit" by up to two feet). In this case (NC2-40 zone), the maximum permitted height would be either 40 or 44 feet, depending on whether the Applicant receives the four-foot bonus for creating a 13-foot first floor, and not 60 feet as claimed by the Applicant.

[57] See, e.g., Ex 45 (Design Review Drawings of August 1, 2016), page 34 and Ex 3 (approved drawings) at Sheet A3.02.

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The Applicant's new definition contradicts the Applicant's first shadow analysis[58] and its later shadow study[59] and it negates the basis for SDCI's Interpretation. As noted above both the Applicant's later shadow analysis and SDCI's interpretation rely on the representation that the clerestory shadow would fall only on the public sidewalk, not on the North Building. But the Applicant's new exhibit and new definition both show the clerestory shadow being cast across the face of the North Building.

And finally, the entire Code section SMC 23.57A.012.C.7 would be rendered meaningless if Applicant's newly claimed "maximum permitted height" explanation were accepted, because it would obviate the need for the entire Code section. All of the listed rooftop features in SMC 23.47A.012.C.7 are required to be lower than a 16-foot elevator shaft. Compare SMC 23.47A.012.C 2 and C4a-e (height limits for all rooftop features except stair and elevator penthouses) with SMC 23.47A.012.C.4.f (height limit for stair and elevator penthouses). Therefore, none of those rooftop features could ever create a shadow longer than a building built to maximum zone height plus an elevator shaft (in a NC2-40 zone, this would produce a 60 foot maximum permitted height. according to Applicant's view). Nevertheless, the Applicant's rebuttal Exhibit 68 was based upon that absurd result in its last-minute effort to justify the north-edge clerestory. Even though this new theory was not the basis for SDCI's interpretation, and would render the entire Code section meaningless, Mr. Graves indicated a willingness to embrace it anyway.

Most disappointing, at least for the members of Livable Phinney, has been SDCI's willingness to blindly accept the varying rationales advanced by the Applicant: first, that the clerestory would only cast shadows in a street right of way, when contradicted by prior shadow renditions; and second, the Applicant's theory on rebuttal

[58] Ex. 64, EDG #2 at 21 (January 11, 2015) (*sic*, actually 2016)) and Ex. 45 Design Review plans at 24 (August 1, 2016)(rendition of shadow cast at winter).
[59] Ex. 3, sheet G0.02B, lower left-hand corner.

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based upon a change to the building's maximum height. At least in principal, an Interpretation provides SDCI's objective, reasoned determination as to the meaning and application of the Land Use Code to a specific property or application,[60] as opposed to a defense of a discretionary decision already rendered, such as defense of a threshold determination. But SDCI's treatment of the shadow and other Interpretation issues indicates that it does not distinguish between those two roles. Consequently, to the tune of $3150 (and rising, given SDCI's stated intent to bill Livable Phinney $315/hour for Mr. Graves time to prepare for and to sit at the hearing) SDCI is apparently intending to bill members of Livable Phinney for its own advocacy work.

For all of these reasons, the Examiner should reverse the Interpretation on the clerestory placement and order the clerestory structure set back at least ten feet from the north edge of the building, if he does not order removal of the clerestory structures altogether

B. <u>Frequent Transit Service Exemption</u>: The Phinney Flats project is not eligible for exemption from parking code requirements because the bus service to the site does not meet the definition of frequent transit service.

SDCI concluded that "Parking is not required by the Seattle Municipal Code because the project is located within the Greenwood-Phinney Ridge Urban Village," and that "[r]egardless of the parking demand impacts, no SEPA authority is provided to mitigate impacts of parking demand from this proposal[,]" because the "site is located in an Urban Village within 1,320 feet of frequent transit service."[61]

Livable Phinney sought a Code Interpretation on frequent transit service. SDCI, predictably, concluded that the Phinney Flats site was in an area served by frequent

[60] SMC 23.88.020.A
[61] Ex 5, Analysis & Decision at 28 (December 1, 2014).

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transit service.The Hearing Examiner should reject SDCI's Interpretation, and reverse and remand the Decision to require parking mitigation in the form of on-site parking because the Number 5 bus route does not meet the definition of frequent transit service to qualify the Phinney Flats site for the frequent transit service parking exemption in SMC 23.54.015A, Table B, Item M. The Interpretation rested on a flawed analysis, and an uncontrovered statistical analysis of the actual headway data of the Number 5 bus route presented at the hearing demonstrated that the Number 5 bus route headways do not meet the definition of frequent transit service.

1. The Interpretation should be rejected because it relies exclusively on a bus schedule that was unveiled months <u>after</u> the Decision was published, it ignored a prior SDCI correction notice that required actual headway data, and it misrepresented the one Hearing Examiner decision it cited for support.

SMC 23.84A.038 ("Transit service, frequent") defines "frequent transit service," as "transit service headways in at least one direction of 15 minutes or less for at least 12 hours per day, 6 days per week, and transit service headways of 30 minutes or less for at least 18 hours every day." The term "headways" is not defined in the code. Livable Phinney's Request for Interpretation argued that SDCI lacked adequate information to conclude that the frequent transit service exception applied because it relied exclusively on a 2015 bus schedule provided by the applicant in October 2015 and it did not investigate or require additional information that actual headways were met.

In 2014, the Examiner rejected the original Director's Rule that headways may be averaged in the 12 hour period.[62] SDCI has still not published a replacement Director's Rule defining and applying frequent transit service.

[62] See Ex. 14, Findings and Decision in MUP-14-006 (DR, W)/S-14-001)(Neighbors Encouraging Reasonable Development ("NERDS") at Conclusion 15 (December 1, 2014).

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The meaning of "frequent transit service" matters because the Land Use Code imposes no minimum parking requirements "for all residential uses in commercial and multifamily zones within urban villages if the residential use is located within 1,320 feet of a street with frequent transit service . . . ." SMC 23.54.015.A, Table B, Item M.[63]

SDCI's Code Interpretation was fatally flawed for several reasons. First, it relied on a bus schedule that did not exist when the Decision was issued. It relied exclusively on "the most recent bus schedule" as "a reasonable document to consult to determine headways, because this is the available source of information to determine the timing on which the busses run." Interpretation at 9-10. And it concluded that the "current bus schedule for March 11, 2017, to September 22, 2017, shows that the definition of frequent transit service is met." *Id.* at 10. But the Decision was originally issued on December 29, 2016, months before the March 2017 schedule was released, and evidence at the hearing confirmed that Metro had added two extra morning peak bus routes in the March 2017 schedule. To the extent SDCI intended to rely exclusively on a bus schedule, it was required to base its Interpretation on the bus schedule that existed when the Decision was published.

Next, SDCI erred by relying on a bus schedule alone without investigating whether the actual headways matched that schedule or actually met the definition of frequent transit service was erroneous. SDCI ignored its own correction notice that had required actual departure times. Shortly after submittal of the application for Early Design Guidance, SDCI issued a correction notice requiring the applicant to "show actual departure times to satisfy this [the frequent transit service] requirement."[64] The Applicant never produced evidence of "actual" departure times. Instead it produced only a schedule that purported to show the departure times from several stops near the

[63] Frequent transit service is also incorporated into the SEPA parking policy, SMC 25.05.675.M, as discussed *infra*.
[64] Ex 83, Correction Notice, September 28, 2015 (emphasis supplied).

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Phinney Flats site based on the schedule in effect in October 2015 when it responded to the correction notice.[65] SDCI never required an update or verification of that 2015 data and simply accepted that same evidence republished in the MUP plans.[66]

To the extent SDCI relied on the Applicant's version of the 2015 bus schedule, it is unclear how SDCI concluded from the Applicant's information that the schedule referenced in the Applicant's material actually achieved the headways required in the frequent transit definition. The Applicant double-counted the same bus as it stopped at consecutive stops in its table showing headway data to create the illusion of 1-minute headways in its alleged headway calculations. This is evident in a close review of the alleged "schedule" the applicant submitted in its October 8, 2015 response. The Applicant included scheduled "departure" times for three separate southbound stops in the vicinity of the Phinney Flats site (Stop # 5860 at N. 70th, stop # 5875 at N. 67th, and stop # 5880 at N. 65th street). To prove that the Phinney Flats site qualified for the frequent transit service exemption, the Applicant included an image that appeared, on initial glance, to be an official Metro bus schedule showing scheduled departure times.[67] But it was no such thing. The published Metro bus schedule for the Number 5 route lists stops at N. 85th Street and at N. 46th Street. It does not list the stops around N. 67th and N. 70th streets near the Phinney Flats stops that applicant used.[68] The applicant's image depicts a "schedule" for one of its target stops at N. 70th. *Id.* That would not be a problem if the headway calculations included only the departures from that location.

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[65] *See* Ex. 17 at Permit Correction Response of October 8, 2015 (capture date of October 14, 2015) at 2, which contains the same schedule as produced in at Ex. 3 the Approved plan set at Sheet A.100, left hand side.

[66] Ex. 3 Approved plan set at Sheet A.100, left hand side.

[67] Again, *see* Permit Correction Response of October 8, 2015) at 2-3 and the schedule within the approved plan set at Sheet A.100.

[68] *See e.g.,* King County bus schedule for Number 5 bus route at http://kingcounty.gov/depts/transportation/metro/schedules-maps/005.aspx.This is the same map upon which SDCI relied in its Interpretation. Although it shows the now-current schedule for the Number 5 route, it is used here to show that the published schedule lists scheduled eparture times at N. 85th Street and N. 46th Street but not the stope in between.

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But they did not. In several instances, the applicant inserted a departure time from one of the "alternate" stops into the "schedule" for the stop at N. 70th Street, and then claimed a 1-minute headway between departure times.

This sleight-of-hand is abundantly clear by looking at the table where applicant labels its alternative stops (*e.g.,* "5875"), and then comparing those departure times to the "schedules" listed separately for each of those stops.[69] In most cases, the bus travels fast enough between those three stops that each stop has the same departure time. But in a few instances, there is a one-minute difference between those stops. Where those one minute differences between stops occurred, the applicant inserted those different times into its headway table for the stop at N. 70th, and then claimed 1-minute headways between buses. But that is a fundamental misrepresentation of the headway data. Those alleged one-minute headways do not exist between buses as required. The alleged one-minute headways in Applicant's table double-count the same bus as it stops at different stops on its route, and therefore does not represent actual scheduled headway intervals. SDCI evidently never detected that problem when it approved Applicant's material.

But even if that 2015 schedule remained the same when the Decision issued and the actual scheduled departure times met the frequent transit definition, SDCI erred by not requiring evidence that the actual headways met the stated schedule. In the NERDS case, when the Examiner invalidated the Director's Rule that had allowed averaging of headways to meet the frequent transit service definition, the Examiner specifically concluded that "in adopting the definition [of frequent transit service], the Council intended that SEPA mitigation for parking impacts be foreclosed for multifamily

[69] (*e.g.,* Oct 8, 2015 Permit Correction Response at 2; Plan set A1.00 bottom left tables).

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projects in urban villages only when nearby transit service meets the very specific criteria for consistent regularity that the Council spelled out in the definition.[70]

In a more recent decision on the meaning and application of the frequent transit service definition, the Examiner suggested that evidence showing that "actual service diverges so much and so consistently from the schedules that service headways do not occur within the specified intervals for the specified time periods" could be sufficient to override a bus schedule that otherwise met the definition of frequent transit service.[71] Although the Examiner concluded that the appellant in the Fremont Council case did not have sufficient evidence to warrant that determination, Livable Phinney, as noted below, did provide statistically significant evidence that actual service on Route 5 diverges so much and so consistently from published schedules that those schedules cannot be relied upon to establish frequent transit service.

Finally, the Interpretation misrepresented the one Hearing Examiner Decision upon which it relied. It claimed that the Hearing Examiner's conclusions in the Fremont Council case, MUP-14-022, somehow affirmed SDCI's conclusion that an applicant's provision of a map and bus schedule were sufficient.[72] But the Examiner made no such finding in the Fremont Council case. Instead, the Examiner noted that DPD had relied on the scheduled headways, that the appellant had challenged that conclusion but had not sought an Interpretation, and that the limited evidence appellants had provided was insufficient to prove that actual headways diverged from the schedule to degree sufficient to overcome SDCI's conclusion that the frequent transit definition was met. The Fremont Council case, therefore, rather than rubber-stamping SDCI's rigid

[70] Ex. 14, NERDS Decision at 15 (Conclusion #15)(emphasis added)
[71] Ex. 78 Findings and Decision in Fremont Neighborhood Council, MUP 14-022(W) at Conclusion 11 (April 15, 2015).
[72] Ex. 6, Interpretation at 10

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adherence to a bus schedule, instead opened the door to the evidence that Livable Phinney provided at the hearing to overturn SDCI's frequent transit service conclusion.

2. SDCI's application of the frequent transit exemption must be reversed because a statistically significant and unrebutted analysis of actual headway data demonstrated that the required headways are not met, regardless of what is stated on the bus schedule.

At the hearing, Livable Phinney provided unrebutted, statistically significant evidence that the actual headways of the Number 5 bus route at the stops near the Phinney Flats site diverge substantially from the stated bus schedule to a degree that proved the Phinney Flats site was not eligible for the frequent transit exemption. With expert analysis by a statistician, Livable Phinney produced the evidence that was missing in the Fremont Council case, and proved conclusively that SDCI committed clear error in granting the frequent transit exemption for the Phinney Flats site.

Andrew Brick of Metro testified that he provided actual headway data for the Route Number 5 bus for September 12 through November 30, 2016, for specified bus stops within frequent transit service area of the Phinney Flats project.[73] Data in this range included the last full month of actual headway data before the Decision was initially published in December 2016.

Dr. Roberto Altschul, a highly-experienced statistician,[74] produced a statistical analysis of that actual headway data that showed, in the 12-hour period from 7 a.m. to 7:00 p.m., the actual headways exceeded 15 minutes over 38% of the time in both the Southbound and Northbound directions.[75] Specifically, Livable Phinney produced data from Metro of actual bus headways at stops nearest to the Phinney Flats site, stops 5875 (southbound) and 6550 (northbound). That data was analyzed by Dr. Altschul who

[73] Ex. 27 (spreadsheet).
[74] Ex. 20 (Altschul resume).
[75] Ex. 18 and 19.

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concluded that headways of 15 minutes or less were not met in excess of 38% of the time in both north and south bound directions during the twelve week period from the middle of September to the end of November 2016, prior to SDCI's decision finding satisfaction of frequent transit service.[76] No evidence was submitted to contradict Dr. Altschul's findings.

At the hearing, David Graves, who wrote the Interpretation, conceded that headways that exceed 15 minutes for that time period would not meet the definition of frequent transit service.[77] But he then claimed that that didn't matter because there was a new schedule that added two morning bus trips. According to Mr. Graves, that new schedule, which was not released until two months after the Decision was issued, would meet the definition of frequent transit service,[78] even though he had made the same claim about the old schedule (that was disproved by Dr. Altschul's analysis). Mr. Brick testified that the documentation of actual headways for the new Route Number 5 schedule was not available at the time of the hearing.[79]

At the very least, the Metro data as analyzed by Dr. Altschul shows that Metro schedules cannot be relied upon for establishing actual bus headways. Yet, that's what SDCI did in its interpretation, and again at the hearing, by again lending blind faith to a published bus schedule without any evidence that actual headways would be equal or less than 15 minutes. Livable Phinney cannot be faulted for not producing data of actual headways under the new schedule, since that data was not available at either the deadline for production of exhibits or the date of the hearing (and the applicant failed to produce proof of actual headways at any point in the process). Moreover, an appellant's ability to challenge the application of the frequent transit service exemption

[76] Ex. 18 at 4 and Ex. 19 at 3.
[77] See Examiner's recording of Graves testimony on Day 3, tape 2 at 42 minutes, 37 seconds and at 46 minutes, 56 seconds.
[78] *Id.* at 38 minutes, 34 seconds.
[79] Brick testimony.

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should not turn on when its hearing occurs relative to when Metro might change a bus schedule. Livable Phinney produced actual headway data based on the bus schedule as it existed when the Decision was rendered, and that actual headway data showed that the frequent transit service definition was not met, regardless of what was stated in the schedule. No updated actual headway data was available at the time of the hearing.

In addition, apart from lack of data to show that the new bus schedule for March 11 – September 22, 2017, would produce actual headways of 15 minutes or less, SDCI's assumption that it would is undercut by Metro's 2016 System Evaluation report which notes that Route 5 would need 550 additional annual hours to improve reliability and alleviate overcrowding.[80] The same report at A-50 noted that the Route 5 Express arrived 19% late, both all day and in the evening, and the non-express Route 5 arrived 21% late all day and 32% late in the evening. In response to a question by Appellant's counsel, Mr. Brick testified that 20% late meant that for 20% of the time the scheduled buses arrived at their designated stops more than 20 minutes late. Mr. Brick testified that two additional AM peak trips were added to the schedule for the Route 5 on March 11th 2017, but he was unable to confirm whether or not two trips would bring the service to the reliable 15 minute headway criteria or erase the deficiencies indicated in the most recent Service Report.[81] Given the wide distribution throughout the day of trips that failed to meet the headway criteria as demonstrated by Dr. Altschul's analysis, it is highly unlikely, that two more trips in the peak period would bring the Route 5 into compliance with the city's criteria for 15 minute headways 12 hours a day.[82]

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[80] Ex. 28, System Evaluation Report at Tables 8 and 10, pp 19 and 22.

[81] Earlier Mr. Brick testified that meeting the 15 minute headway for the Route 5 bus required averaging the trip headways over some period of time. However, as the Correction Notice # 1 Review Type Zoning dated September 28, 2015 (Exhibit 83) explains, "Averaging the departures within an hour is not acceptable."

[82] In response to a correction notice of June 8, 2016 from John Shaw to Jay Janette to provide transit capacity of the Route 5 bus to absorb the demand created by Phinney Flats, the Applicant relied on

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Despite the absence of data regarding actual headways under the new bus schedule, and unrefuted data and analysis of actual headways resulting from the schedule under which the project was approved, Mr. Dorcy and Mr. Graves continued to insist that the printed bus schedule is the only means available to judge adherence to the code-mandated 15 minute headway in order to be relieved of the obligation to meet parking demand on site. However, Livable Phinney has proven this to be in error. King County Metro has the data and the methodology available to report on actual headway performance. That is it inconvenient to take this step is not a sufficient excuse to continue to rely on a printed schedule when the evidence is clear that there are significant discrepancies in performance between the reality bus riders experience and the printed schedule. After all, the SDCI issued a correction notice requiring the project applicant to "show actual departure times to satisfy this [the frequent transit service] requirement."[83] The Examiner should reject SDCI's conclusion that the Phinney Flats site qualifies for the frequent transit service exemption, and remand the Decision with instructions for SDCI to require onsite parking commensurate with Code requirements for multifamily buildings with residential uses outside areas served by frequent transit service.

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averaging to create the illusion of capacity by counting the empty seats in the 5 and 6 am hours. Correction response of October 28, 2016. Ex. 51 at 3 and at A-56. The correction notice is listed on Exhibit 17 at 10 and available on the SDCI documents page for this project, of which the Examiner may take official notice under HER 2.18 and ER 201(b)(2). The 2016 Service Report at Table 8, page 19 however found that Route 5 still suffers from overcrowding, a factual contradiction to the Applicant's assertion that there are hundreds of empty seats in the peak hour.

[83] Ex. 83, Correction Notice #1 (September 28, 2015).

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C. Parking analysis: The parking analysis Is flawed: the DNS should be vacated for failure to give full consideration to impacts upon on-street parking.

SEPA's procedural requirements of "actual consideration of environmental factors" stand apart from its substantive authority." As the Examiner earlier held in the *Appeal of Concerned Roosevelt Neighbors*, MUP -15-009(W)(May 5, 2015) at ¶11:

> …to fulfill the procedural requirements of SEPA, the DNS must be based on the sufficient information to evaluate the project's impacts. This is true even if no mitigation would be authorized for impacts under the SEPA overview policies of SMC 25.05.675.M.

In *Concerned Roosevelt Neighors* the Examiner reversed the DNS for failure to consider the proposals impacts upon on-street parking utilization rates in light of a proposed bicycle lane on Roosevelt Avenue. *Id.* ¶12. And similarly here, for reasons covered by Dave Crippen, the DNS must also be invalidated.

1. Self-selection would not alleviate impacts under SEPA.

The discussion of parking impacts within the Analysis and Decision at 28 is premised on the unsubstantiated theory that the limited availability of on-street parking would itself reduce the project's parking impacts.[84] This theory appears to be based upon a concept that people without cars will "self-select" for the Phinney Flats development, for which the SDCI offers no evidence.

Traffic engineers utilize data from existing developments to predict parking characteristics in future developments. These characteristics are documented in the Institute of Transportation Engineer's Parking Generation Report. This published report is from the leading professional traffic engineering organization in the county. In

[84] Analysis and Decision at 28 ("The most practicable mitigation for possible off-site spillover parking demand during peak hours, if needed, would be the fact of limited parking contributing to the self-selection of potential residents for this site.")

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addition, Metro Transit has developed a program, based upon existing residential parking data in King County, to predict parking demand for future residential developments in the city. These various studies have enough data points to perform statistical analysis.

These studies were used by Livable Phinney to predict the amount of parking demand that will be created by Phinney Flats. The City's "self-selection" theory has no basis in fact from collected data which has undergone statistical analysis. Therefore, at this point, the City's theory is merely conjecture, and should not be considered.

Even if the Hearing Examiner found there to be some merit in this concept (of which there is none), it is unlikely to significantly reduce the parking demand created by Phinney Flats due to the fact that many of the residents who do not own cars would likely use car sharing services such as Car2Go. Residents who use Car2Go still end up parking that car in the neighborhood at the end of their trip.

There is a larger concern regarding the City's "self-selection" theory. If the City uses this concept to allow developers to avoid providing parking mitigation, the City could use the theory to allow developers to avoid providing mitigation for other impacts. For instance, if the City adopted a policy that certain parts of Seattle did not need sidewalks, they could eliminate the requirement and cost to developers in providing sidewalks in that part of the city, utilizing the theory that people who don't want to walk anywhere will "self-select" to that part of the city. Refusal to address the impact does not cause the impact to disappear.

2. The threshold for measuring significant impacts to on-street parking is not full capacity.

As attested to by Dave Crippen, a well established concept in traffic engineering holds that the actual parking capacity of any study area is an amount less than the

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number of legal parking spaces. Although many references identify a different percentage of legal parking spaces used to determine when a study area is at capacity, the most common percentage used is 85%. The City of Seattle Strategic Planning Office's Neighborhood Parking Study, dated August 2000, established this percentage at between 80% and 85%.[85] The City of Seattle's Tip 117, dated May 2011, a document that defines how to perform a parking study in Seattle, established this percentage at 75%.[86] Also, the City of Seattle Hearing Examiner in the *Appeal of Neighborhood Encouraging Reasonable Development*, at Finding 49 (December 2014) found that "the Department has consistently recognized an 85% utilization rate as being the point at which mitigation should be considered."[87]

The developer's consultant ignored this concept in calculating the demand to capacity ratio (or utilization rate) for the study area. This despite the fact that the developer's consultant discussed the concept and recognized it as valid in the body of their first parking study, dated November 2015.[88] However, the discussion of this concept was dropped from subsequent versions of their parking studies.[89] But at the hearing the developer's consultant and the City claimed that parking capacity should not use this well-established concept, but that capacity should be the same as the number of legal parking spaces in a study area. In other words, that parking utilization for determining capacity and mitigation should 100% of on-street capacity, and not the 85% figure previously accepted by SDOT and the Examiner. GTC, apparently with John Shaw's concurrence, claims that their opinion is based upon observations that when parking in a study area is limited, people park illegally.

[85] Ex. 35h.
[86] Ex. 12 and 35a.
[87] Ex. 14, Finding 49 and Conclusion 9.
[88] Ex. 50.
[89] Ex. 51 and 52.

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Not only does this not follow established traffic engineering concepts adopted by the City, but it raises a potential legal problem, which highlights the misinterpretation of the City's argument. If the City of Seattle acknowledges that people park on-street illegally, and if the City then bases their land use decisions on this fact, the City would acknowledge that the only way their zoning regulations will work is if people park on the street illegally. Therefore, the City of Seattle's land use policy would tacitly approve, encourage and endorse illegal on-street parking, eventually impairing the the City's ability to enforce on-street parking violations, such as: parking too close to fire hydrants, crosswalks, driveways, stop signs, and yield signs; and parking in alleys, tow away zones, no parking zones, temporary parking zones and bus zones. Where these restricted parking areas are set to assure access by fire fighting equipment, entry to driveways, and curb-side service by transit, it makes no sense for SDCI to develop land use policies that would defeat those interests.

3. The peak period is the peak period.

The peak period for parking in the Phinney Flats study area is in the evening from 6:00 p.m. to 7:00 p.m. This fact is known from parking counts the developer's consultant performed at two different times of the day, midnight to 1:00 a.m. and 6:00 p.m. to 7:00 p.m. The developer's consultant counted 204 cars parked in the study area from midnight to 1:00 a.m. and counted 249 cars parked in the study area from 6:00 p.m. to 7:00p.m. establishing that the peak period for parking in the study area is 6:00 p.m. to 7:00 p.m.

GTC (apparently again with SDOT's concurrence) has proposed to reduce the estimated parking demand created by the 57 residential units from the Phinney Flats development based on the following rationale. The ITE Parking Generation Report, shows a histogram of amalgamated parking data from many residential neighborhoods

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throughout the country. This amalgamated data represents parking characteristics in a typical residential neighborhood. The histogram indicates that in a typical residential neighborhood, the peak period for parking is between midnight and 1:00 a.m. It also indicates that parking in a typical residential neighborhood between 6:00 p.m. and 7:00 p.m. is 69% of the peak period. The developer's consultant proposes to reduce the estimated parking demand created by the 57 residential units from Phinney Flats by that percent.

Since, in a typical neighborhood, the peak period for parking is midnight to 1:00 p.m., and the peak period for the Phinney Flats study area is between 6:00 p.m. and 7:00 p.m., the study area for the Phinney Flats development is not a typical neighborhood with regard to parking characteristics. We can't be certain why this neighborhood is atypical, we can only be certain that it is not typical with regard to parking characteristics. There are several possible reasons for this. First is the proximity of the commercial developments to the residential neighborhood, which may result in commercial patrons parking on residential streets during the peak period. Another possible contributing factor may be that the residents in this neighborhood do not display the normal pattern of travel behavior during the evening. In a typical residential neighborhood, people will chose to travel by car to a restaurant or a movie during the evening, knowing when they return they will have a place to park. Many residents in this neighborhood may be reluctant to use a car to take a trip in the evening fearing that when they return their will be no place to park near their residence.

The question then is, will the future residents of Phinney Flats assume the evening travel and parking characteristics of a typical neighborhood, or will they assume the evening travel and parking characteristics of the existing Phinney neighborhood? The City and the developer's consultant have no basis to presuppose that the Phinney Flats residents will assume the travel and parking characteristics of a typical residential

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neighborhood. In fact, it is far more reasonable to presuppose that that the Phinney Flats residents will assume the travel and parking characteristics of the existing nearby residents.

Therefore, the City and the developer have no basis to reduce the estimated parking demand created by the 57 residential units, using the 69% factor. In addition, the developer's consultant did not utilize this concept in their second parking study, dated June 2016, or in their third parking study, dated October 2016.[90] In fact, it appears that this concept was developed on the evening of May 2, 2017, in the offices of Gibson Traffic Consultants without any basis in published references.

Ultimately, use of the 69% figure to artificially reduce peak hour utilization would not materially reduce the proposal's impacts on on-street parking. For illustrative purposes, the table below compares the original parking analysis presented by Dave Crippen with a parking analysis utilizing the 69% figure. It should be noted that the updated analysis includes the parking demand from the 7009 Greenwood Ave. N. development which was not included in the original analysis. You will see that the updated parking demand to capacity ratio for the analysis that does not include the City's cycle track project is reduced from 132% to 131%. In addition, the updated parking demand to capacity ratio for the analysis that does include the City's cycle track project is reduced from 153% to 151%.

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[90] *Id.*

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LIVABLE PHINNEY PARKING ANALYSIS EXHIBIT 25

	Without Cycle Track	With Cycle Track
Legal parking spaces	281	281
Actual capacity	239	206
Current demand for parking (from actual counts)	249	249
Parking demand created by pipeline projects	15	15
Parking demand created by Phinney Flats	52 Total 45 Residential 7 Commercial	52 Total 45 Residential 7 Commercial
Total demand	316	316
Demand/Capacity	132%	153%

LIVABLE PHINNEY PARKING ANALYSIS EXHIBIT 25 USING THE INVALID 60% FACTOR

	Without Cycle Track	With Cycle Track
Legal parking spaces	281	281
Actual15 capacity	239	206
Current demand for parking (from actual counts)	249	249
Parking demand created by pipeline projects	25 **	25 **
Parking demand created by Phinney Flats	38 Total 31 Residential * 7 Commercial	38 Total 31 Residential * 7 Commercial
Total demand	312	312
Demand/Capacity	131%	151%

* 57 Residential units X 0.80 X.69 =31

** Includes parking demand from development at the 7009 Greenwood Avenue North project.

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D. SEPA mitigation for parking impacts: Even if the Phinney Flats site meets the definition of frequent transit service, the Examiner should reverse and remand the Decision for failure to mitigate the significant adverse impacts from spillover parking in the area outside the Urban Village boundary.

Even if the Examiner concluded that the Phinney Flats site is within an urban village area served by frequent transit service, the Examiner should still vacate the Decision regarding parking impacts because SDCI erred when it concluded that "[r]egardless of the parking demand impacts, no SEPA authority is provided to mitigate impacts of parking demand from this proposal." Decision at 28. Although SDCI conceded that "[t]he parking analysis completed for the project showed that the estimated peak demand for the project cannot be accommodated within the on-street supply based on a combination of existing demand and future pipelines, it nevertheless concluded that

> SMC 25.05.675.M notes that there is no SEPA authority provided for mitigation of residential parking impacts in Urban Villages within 1,320 feet of frequent transit service. This site is located in an Urban Village within 1,320 feet of frequent transit service.

Decision at 28 (emphasis added).[91] The actual text of 25.05.675.M reveals that the prohibition is not as broad as SDCI applied here.

[91] As noted *infra* at Section III.B, Livable Phinney presented uncontroverted evidence at the hearing that the actual headways of the Route 5 bus, at the stops that serve the Phinney Flats site, deviate substantially from the bus schedule such that the route fails to qualify for the frequent transit service exemption. Livable Phinney also presented evidence that the parking impacts from the proposed Phinney Flats project would far exceed the 105% capacity projection that SDCI relied upon in its Decision.

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1. The SEPA parking policy in SMC 25.05.675.M.2.b.2.c does not prohibit SDCI from mitigating the impacts of development on parking availability outside the urban village

SMC 25.05.675.M indicates that "[i]t is the City's policy to minimize or prevent adverse parking impacts associated with development projects." SMC 25.05.675.M.2.a. The section then states that

> Subject to the overview and cumulative effects policies set forth in Setcions 25.05.665 and 25.05.670, the decision maker may condition a project to mitigate the effects of development in an area on parking; provided that . . . No SEPA authority is provided for the decision maker to mitigate the impact of development on parking availability for residential uses located within . . . portions of urban villages within 1,320 feet of a street with frequent transit service, measured as the walking distance from the nearest transit stop to the lot line of the lot[.]

SMC 25.05.675.M.2.b.2.c (underlining and bolding added).

The actual SEPA language refers only to the impacts of development on parking availability for residential uses located within specified portions of urban villages (and other areas listed in other parts of that section). It does not limit SDCI's ability to mitigate the impact of development on parking availability for residential uses that occurs outside the stated portions of those areas when the project creates significant adverse impacts outside the urban village. SDCI erred when it claimed its hands were tied and it could not mitigate the impacts of parking demand from this proposal.

Section 25.05.675.M.2.b specifies several discrete areas where SEPA authority is prohibited. The section, in full reads:

> Subject to the overview and cumulative effects policies set forth in Sections 25.05.665 and 25.05.670, the decionmaker may condition a project to mitigate the effects of development in an area on parking; provided that

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> 1) No SEPA authority is provided to mitigate the impact of development on parking availability in the Downtown and South Lake Union Urban Centers;
>
> 2) No SEPA Authority is provided for the decionmaker to mitigate the impact of development on parking availability for residential uses located within:
>
> a) the Capitol Hill/First Hill Urban Center, the Uptown Urban Center, and the University District Urban Center, except the portion of the Ravenna Urban Village that is not within 1,320 of a street with frequent transit service, measured as the walking distance from the nearest transit stop to the lot line of the lot;
>
> b) the station Area Overlay District, and
>
> c) portions of urban villages within 1,320 feet of a street with frequent transit service, measured as the walking distance from the nearest transit stop to the lot line of the lot.

The Code uses the preposition "for:" "No SEPA authority is provided for the decisionmaker to mitigate the impact of development on parking availability for residential uses located within [the specified areas]" SMC 25.05.675.M.2.b.2. (emphasis added). The use of "for" in SMC 25.05.675.M.2.b narrows the geographic scope of SEPA authority that is foreclosed by this section. "For," in this sentence, modifies the immediately adjacent term "parking availability; it does not modify "development.." "parking availability," in turn, is geographically constrained to the areas specified in SMC 25.05.675.M.2.b.2.

SEPA defines "Impacts" as "the effects or consequences of actions." SMC 25.05.752. In this case, the "impact" resulting from having no on-site parking for a 57-unit building is the spill-over parking that will occur in the surrounding neighborhood streets in the single family zone outside the urban village when the Phinney Flats occupants who own (or temporarily use cars such as Zip Cars, Cars-to-Go, and Reach

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Now) and try to park those cars. They will be competing for the same limited parking spaces as the residents of the adjacent single family zone who park their car on the same streets located outside the urban village. It will not be only the Phinney Flats residents and visitors who find themselves and their visitors parking further from the site, as the Decision assumes, but also the residents of the adjacent single family zone – including families with small children – who will be similarly displaced and forced to park further from their homes as a result of the unmitigated parking impact from the Phinney Flats project.

If, in contrast, SMC 25.05.675.M.2.b.2.c said "No SEPA authority is provided for the decision maker to mitigate the impact of development on parking availability from residential uses located within portions of urban villages within 1,320 feet of a street with frequent transit service," the section would prohibit SDCI from mitigating the impacts on parking availability outside the urban village as SDCI claimed in the Decision. Merriam Webster defines the preposition "from" as a function word to indicate the source or cause. Therefore, if this Code section had used "from" instead of "for," it would prohibit SDCI from mitigating the impacts of development on parking availability caused by residential uses within the urban village, regardless of where those impacts actually occurred. But the Code did not use "from." It used "for." And that choice of words in that sentence means that what happens in the urban village stays in the urban village: SDCI may not mitigate the impacts of development on parking availability for residential uses within the areas specified in SMC 25.05.05.675.M.2.b.2, but it is not prohibited from mitigating the impacts of development on parking availability that occur outside the urban village. SDCI may be accorded deference in construing SEPA

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regulations, but ultimately the meaning of the SEPA rules presents a question of law on which the Examiner may substitute his view for that of SDCI.[92] SDCI, therefore, erred when it concluded that it lacked SEPA authority to mitigate the impacts of parking demand from the 57-unit Phinney Flats project.

2. Livable Phinney presented uncontroverted evidence at the hearing that the spillover parking from Phinney Flats would extend almost entirely into the adjacent single family zone given the paucity of unrestricted parking spaces within the urban village itself

At the hearing, Livable Phinney presented evidence showing that the Greenwood/Phinney Ridge "Urban Village" in the area of the proposed Phinney Flats project is only one-street-wide along a course of more than 15 blocks, a feature unique among urban villages in the city.[93] Livable Phinney also presented evidence showing the numerous parking restrictions imposed on the single commercial arterial that comprises the urban village in the area of Phinney Flats, including limited duration parking and bus stops that consume almost entire blocks in the immediate vicinity of Phinney Flats.[94] That means that virtually all of the spillover parking generated by the Phinney Flats project will end up in the adjacent single family zone outside the urban village, displacing the cars of residents in that zone.

Moreover, the photographs of typical parking occupancy (at capacity) on streets nearby[95] as well as the Applicant's own parking study demonstrate that there is no

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[92] *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn.App. 127, 136, 356 P.3d 753 (2015)("Where a challenge requires us to construe a statute, we 'determine[ ] the meaning and purpose of a statute de novo,' but accord 'great weight' to the agency's interpretation of 'an ambiguous statute which falls within the agency's expertise,' provided that interpretation does not conflict with the statute's language or underlying intent. We show the same deference to an agency's interpretation of its own regulations…. Nonetheless, the agency's interpretation does not bind us, and 'deference to an agency is inappropriate where the agency's interpretation conflicts with a statutory mandate.'"(internal citations omitted)).

[93] See Greenwood/Phinney Ridge Design Guidelines at v (Map 2, Greenwood/Phinney Ridge Urban Village).

[94] Ex. 29 and testimony of Michael Richards.

[95] Ex. 30 and testimony of Jan Weldin.

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surplus of street parking available even before the Phinney Flats project or any of the other pipeline projects are built. The applicant's own data projects the Phinney Flats project will generate demand for on-street parking in excess of total available parking.[96] There are no commercial parking lots or garages with the urban village (or anywhere in the Phinney Ridge area) to absorb the parking demand the project will generate.

SDCI, however, failed to mitigate the significant adverse impact of this project on parking availability outside the urban village because it simply assumed that it had no SEPA authority to mitigate the impacts of parking demand. Instead, it offered the fanciful, wholly unsupported conclusion that "[t]he most practicable mitigation for possible off-site spillover parking demand during peak hours, if needed, would be the fact of limited parking contributing to the self-selection of potential residents for this site." Decision at 28. It is, however, just as likely that SDCI's anticipated "self-selection" would simply replace one frustrated car-owning occupant with another and do nothing to limit the projected spillover into the surrounding single family zone outside the urban village. The appropriate mitigation for this is not wishful thinking and voluntary action as suggested in the Director's decision. It is the provision of on-site parking commensurate with the demand created. That mitigation comports with the City's policy "to minimize or prevent adverse parking impacts associated with development projects." SMC 25.05.675.M.2.a.

[96] See Ex 69, giving results of second and third GTC traffic reports which show the project generating demand for on-street parking at 104 and 105%, respectively of total (100%) capacity of 281 spaces (as calculated by GTC), but without consideration of the 85% factor used by SDOT for determining on-street capacity. See Ex. 14, Findings & Decision in Appeal of NERDS, Finding 49 and Conclusion 9.

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3. The Legislative Memorandum that informed the 2010 Code changes relating to parking requirements for multi-family structures within urban villages confirms that the Council was concerned about spillover parking impacts and the need to consider local conditions.

The Legislative Memorandum prepared for the City Council in 2010 when the Council eliminated the minimum parking requirement for residential uses in commercial zones within urban villages (SMC 23.54.015) confirms that the Council did not intend to prohibit SDCI from mitigating the parking impacts that occur outside an urban village.[97] The Memorandum relied on two Comprehensive Plan policies for support. Policy LU49 provided general guidance about parking requirements, and suggested that "[w]hen setting new requirements for off-street parking, balance the goals of accommodating the parking demand generated by new development and avoiding on-street congestion of parked cars with the goals of lowering construction costs and discouraging single-occupant vehicles. . . ."[98] The Memorandum concluded that to support Policy LU49, "parking requirements should minimize parking spillover on the one hand and discourage under-used parking on the other."[99]

Next, the Memorandum referenced the Comprehensive Plan Policy LU50 that more specifically addressed parking requirements in urban villages. That policy opined on removing minimum parking requirements in urban villages in light of increased pedestrian, bicycle and transit accessibility in these areas, but specifically noted that "[p]arking requirements for . . . urban villages should account for local conditions and planning objectives." *Id.* at 2 (emphasis added). The local conditions in this case demonstrate that virtually all of the spillover parking impacts from the Phinney Flats project will occur outside the urban village, in the single family zone where residents are required to provide off-street parking if they add a single accessory dwelling unit on their

[97] Ex. 33 Memorandum regarding updates to multifamily zones, March 20, 2010.
[98] *Id.* at 1.
[99] *Id.* (emphasis added).

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property.[100] Given the stated concern with spillover parking from developments, and the recognition that parking requirements for urban villages should accommodate local conditions, the Council did not intent to abrogate its SEPA obligations entirely when the impacts from developments in the areas specified in SMC 25.05.675.M.s.b.2 are exported into areas outside the areas where the policy applies.

4. The SEPA Overview policies in SMC 25.05.665.D authorize SDCI to exercise substantive SEPA authority to impose parking mitigation in this case.

The Phinney Flats project meets the criteria for SDCI to exercise substantive SEPA authority to mitigate the impacts of spillover parking and require onsite parking for this project. The SEPA parking policy in SMC 25.05.675.M.2.b states that "[s]ubject to the overview and cumulative effects policies set forth in Sections 25.05.665 and 25.05.670, the decisionmaker may condition a project to mitigate the effects of development in an area on parking . . . ." The SEPA overview policy relating to City Codes states that "denial or mitigation of a project based on adverse environmental impacts shall be permitted only under the following circumstances" and then lists seven situations where SEPA substantive authority may be exercised.[101] The Phinney Flats project fits within several of the listed circumstances that allow for SEPA substantive authority.

First "[n]o City code or regulation has been adopted for the purpose of mitigating the environmental impact in question." SMC 25.05.665.D.1. In this case, the environmental impact is the spillover parking from the 57-unit Phinney Flats project, that will have an exacerbated impact on the surrounding area outside the urban village

[100] SMC 23.44.041.A.5 (at least one off-street parking space is required for an accessory dwelling unit located on a single-family lot outside of an urban center or urban village).
[101] SMC 25.05.665.D.1-7.

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because all of the spillover parking will be added to streets already at and over capacity, and there is virtually no unrestricted parking within the urban village in the immediate vicinity of Phinney Flats. The City has a policy "to minimize or prevent adverse parking impacts associated with development," SMC 25.05.675.M.2.a, but it has not memorialized that policy in a specific Land Use Code provision to address the environmental impacts of this project. To the contrary, in 2010 it eliminated the parking requirement for multi-family buildings within Urban villages where the residential use is within 1,320 feet of a street with frequent transit service. *See e.g.,* SMC 23.54.015, Table B. But since that time, there has been explosive city-wide development of micro-unit housing that was not prevalent in 2010 that has strained resources around these projects, and SDCI still does not have a Director's Rule on applying the frequent transit service parking exemption. SEPA substantive authority requiring onsite parking would lessen the significant environmental impacts caused by having no on-site parking when the impacts occur outside the urban village where parking mitigation is otherwise required.

Second, "[t]he project site presents unusual circumstances such as substantially different site size or shape, topography, or inadequate infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable City code or zoning."[102] When the City eliminated the parking requirements for multi-family buildings within urban villages near frequent transit service in 2010, it specifically assumed that regardless of zoning regulations, developers would still provide parking due to market demand. That assumption is memorialized in both the Legislative Memorandum recommending these changes[103] and the SEPA checklist that

[102] SMC 25.05.665.D.3 (emphasis added).
[103] Ex. 33 at 2.

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accompanied the legislation. Each document justified the legislation with this explanation:

> Table 1 shows that even in the densest areas of Seattle that have frequent transit service, parking is still provided due to market demand and financing requirements, at a ratio greater than half a space per unit. Therefore, eliminating the multifamily use parking requirement in urban villages is unlikely to result in structures that do not provide parking, because developers would still respond to market demand."[104]

The Phinney Flats project proved just how wrong this assumption turned out to be. The Council clearly did not anticipate a 57-micro-unit building in a one-block wide urban village that lacked capacity to accommodate the spillover parking. SDCI, therefore, should have exercised its SEPA substantive authority to require onsite parking to mitigate the spillover parking impacts associated with this project.

Further, as shown in the section below, the project creates undue impacts based on cumulative effects as provided for in SMC 25.05.670.[105]

5. SDCI also has authority to mitigate the parking impacts from Phinney Flats based on the SEPA cumulative effects policy in SMC 25.05.670.

Livable Phinney is deeply concerned about the cumulative effects of the coming wave of redevelopment along the skinny spine of our urban village. But the Decision failed to even mention the cumulative effects that could occur from failing to mitigate the parking impacts of this project, notwithstanding the SEPA policy that "[t]he analysis of cumulative effects shall include a reasonable assessment of . . . [t]he present and planned capacity of such public facilities as sewers, storm drains, solid waste disposal,

[104] Ex. 33, at 2-3 and Ex. 34, SEPA Checklist for multifamily code amendments.at 22-23 (emphasis added).
[105] Ex. 69 (showing addition demand for on-street parking created by additional pipeline not considered by GTC parking studies), as supported by the testimony of Dave Crippen.

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parks, schools, streets, utilities, and parking areas to serve the area affected by the proposal."[106] There is an obvious problem with allowing major increases in density where there is no parking infrastructure to support it, and insufficient transit capacity to keep up with the ever-growing influx of residents. SDCI erred by ignoring the SEPA cumulative effects policies especially given the undisputed evidence establishing that the Phinney Flats project will push the parking utilization over 100%.[107]

At the hearing Livable Phinney presented evidence regarding impacts to parking in the event that nearby parcels were developed in the manner of Phinney Flats. Livable Phinney's traffic expert, Dave Crippen testified to the potential for parking gridlock should other eligible parcels in the immediate vicinity of Phinney Flats be redeveloped with insufficient parking, particularly if developed in the manner of Phinney Flats with dozens of micro units and no onsite parking.[108]

In addition, the 2016 Metro Service Report provides compelling evidence by the agency itself that the Route 5 bus is not meeting today's demand, let alone being able to accommodate hundreds of new passengers. If the bus cannot reliably handle the influx of new residents, those residents may choose to commute by car instead, further exacerbating the problem (and an impact wholly overlooked by SDCI).[109]

Moreover, the cumulative significant impacts will be experienced within and beyond the Greenwood-Phinney urban village. Restricting the assessment of impacts to within 400 feet[110] or 800 feet[111] of the site turns a blind eye to this reality and leaves

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[106] SMC 25.05.670.B.1.a.The Analysis & Decision also failed to analyze the present and planned public services such as transit if parcels in the Phinney Ridge area are built out to maximum zoned potential.
[107] Ex. 69 (comparison of results from GTC studies and those prepared by Dave Crippen).
[108] Ex. 25, Crippen, Parking Utilization/Demand Comparison at lines12-14.
[109] The cumulative effects of the Phinney Flats projects will also extend beyond the Greenwood/Phinney Ridge urban village area because if the Route #5 bus becomes overcrowded in this area, it will not have room to pick the downstream passengers in Fremont or any other area en route to downtown.
[110] Ex. 35a Tip 117 at 2 (study area for parking waivers to be 400 foot walking distance from subject property).
[111] Ex. 50, GTC Report at 7 (November 2015), as well as its subsequent reports, using a radius of 800 feet.

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residents in Fremont waiting as the overcrowded Route 5 bus by-passes their stops and frustration grows over the competition for parking spaces on residential streets while illegal parking creates ever more hazardous conditions for drivers, bike riders, pedestrians and emergency vehicles.

SMC 25.05.670 provides that

> Subject to the policies for specific elements of the environments (SMC 25.05.675), an action or project may be conditioned or denied to lessen or eliminate its cumulative effects on the environment:
>
> a. When considered together with prior, simultaneous or induced future development; or
>
> b. When, taking into account known future development under established zoning, it is determined that a project will use more than its share of present and planned facilities, services and natural systems.

The applicant's own parking impacts analysis confirmed that the parking utilization would exceed 100% after the Phinney Flats project opened,[112] which SDCI's Decision acknowledged.[113] Dave Crippen presented evidence proving that the actual parking space shortage would be substantially higher.[114] Livable Phinney also presented evidence showing that SDCI had failed to consider the actual number of developments in the pipeline upstream on the Number 5 bus route, and in the immediate area of the Phinney Flats project.[115] Although most of those projects provided at least some onsite parking, all would add spillover parking onto the surrounding streets. The Phinney Flats project, with 57 units and no parking, would use

[112] Ex. 69, showing summary of GTC reports.
[113] Analysis & Decision at 28 ("With the [Phinney Flats] project, street demand would be parking space for 292 vehicles, with street supply being 278, for a parking utilization figure of 105%").
[114] *See* Ex. 25 and 69.
[115] Ex. 32, Proposed and recently completed projects in the Greenwood-Phinney corridor, supported by the testimony of Jan Weldin and Ex 25 and 69, supported by the testimony of Dave Crippen.

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more than its share of on-street parking facilities. SDCI, therefore, should have imposed parking mitigation based on the cumulative effects policy.[116] The Decision should be remanded with instructions for SDCI to conduct a complete and thorough cumulative impacts analysis, and mitigate as appropriate.

For all of the above reasons, SDCI conclusion that it lacked SEPA authority to mitigate the parking impacts of the proposed Phinney Flats project is in error and should be vacated and reversed with instructions to require on-site parking.

E. SEPA Environmental Health Policy: The DNS should be vacated because SDCI failed to obtain adequate information from which to make an informed decision regarding potential soil contamination on the site.

SDCI not only failed to comply with applicable code requirements regarding the height, bulk, and scale of the proposal and the impacts on parking and transit, but it failed to obtain sufficient information from which to make an informed decision about the environmental health impacts arising from excavating and disposing of potentially contaminated soils on the site. *See* SMC 25.05.675.F (SEPA policy on Environmental Health) A dry-cleaning facility and other users of hazardous had previously occupied the property. SDCI knew the Phinney Flats site housed a dry cleaner in the mid 20th century when carcinogenic dry cleaning chemicals were prevalent. And SDCI knew that approximately 450 cubic yards of soil were going to be excavated from the site in order to construct the proposed mixed use structure, and that soil removal would be necessary.[117]

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[116] Although SMC 25.05.670.C notes that "if the scope of substantive SEPA authority is limited with respect to a particular element of the environment, the authority to mitigate that impact in the context of cumulative effects is similarly limited," that section would not apply here because, as noted *infra*, the SEPA parking policy in SMC 25.05.675.M does not prohibit SDCI from imposing parking mitigation in this case.

[117] *See* Analysis & Decision at 25 (Earth and Grading); *see also* Decision at 26 (Traffic and Parking: "The soil removed will not be reused on the site and will need to be disposed off-site.").

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SDCI also knew that all of the immediate neighbors as well as numerous other people in the community were concerned about potential soil contamination and had specifically asked for comprehensive soil testing before any excavation or demolition.[118] And SDCI knew about the remarkably contaminated soils at another former dry cleaner site less than 10 blocks away at 6010 Phinney Avenue North where SDCI had required comprehensive soil sampling several years ago.[119] Yet, for the Phinney Flats project SDCI simply accepted at face value the minimal and incomplete environmental assessments provided by the Applicant's consultant, The Riley Group.[120] The Riley Group, however, did not undertake a comprehensive soil sampling investigation, and SDCI failed to require such analysis despite repeated requests to do so. Because the vast majority of the site was never sampled, SDCI lacked sufficient information about the current condition of soils that will be disturbed – and disposed of – during the construction of Phinney Flats. The Decision, therefore, was clearly erroneous and must be remanded with instructions that SDCI require comprehensive soil sampling on the site and evidence of a clean-up plan if the soils exceed threshold levels for known hazardous materials.

SDCI also erred in accepting, without evidence, the Riley Group's representation that its "client is prepared to have a contingency plan prepared to address the handling and disposal of any contaminated soil and/or groundwater encountered during the planned redevelopment of the property."[121] There is no evidence in the record that such a contingency plan has ever been prepared or what it would consist of.

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[118] *See,* Ex. 44, (comment by neighbor Elizabeth Johnson dated July 29, 2016) and Ex. 81, Ecology Early Report Tracking System ("ERTS") at 4 (complaint by Elizabeth Johnson to Ecology, September 21, 2016).

[119] *See,* Ex. 82 (Wall comment letter of March 30,2016) and Ex. 15, Geotech Phase II environmental Site Assessment for Phinney Ridge Dry Cleaners at 6010 Phinney Avenue North.

[120] Analysis & Decision at 24.

[121] Analysis & Decision at 24-25.

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1. SEPA requires a comprehensive analysis of potential environmental consequences but SDCI failed to require such analysis for this project.

SEPA aims "to promote the policy of fully informed decionmaking by government bodies" to ensure that environmental issues are properly and carefully considered. *Moss v. Bellingham* 109 Wn. App. 6, 14, 31 P.3d 703 (2001). "[O]ne of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King County v. Washington State Boundary Review Bd.,* 122 Wn.2d 648, 663-64, 860 P.2d 1024 (1993).

With regards to environmental health issues, "[i]t is the City's policy to minimize or prevent adverse impacts resulting from toxic or hazardous materials. . . ." SMC 25.05.675.H.2.a. "For all proposed projects involving the . . transport . . [or] disposal . . of toxic or hazardous . . . wastes . . . the decisionmaker, shall in consultation with appropriate agencies with expertise, assess the extent of potential adverse impacts and the need for mitigation, where permitted by federal and state law." SMC 25.05.675.F.2.b (emphasis added). There is no evidence in the record that SDCI ever consulted with the Department of Ecology on this project. SDCI simply jumped straight to its conclusion that no further mitigation is warranted on the asserted ground that "[c]ompliance with Ecology's requirements are [sic] expected to adequately mitigate any unlikely adverse environmental impacts from the proposed development."[122] But without knowing whether the soils were contaminated in the first place, SDCI had no basis from which to determine whether adverse environmental impacts were "unlikely," or for how the public would be protected if the Applicant disturbed soils that later proved to be contaminated.

[122]Analysis & Decision at 25.

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If SDCI had consulted with Ecology before issuing its Decision, it would have discovered that Ecology had begun its own investigation in the summer of 2016 in response to numerous citizen requests to the agency.[123] The Applicant was informed of this investigation but evidently never informed SDCI.[124]

Ecology, however, put its investigation on hold in November 2016 after it received information from the Environmental Protection Agency ("EPA") that EPA would be acting on a Citizen's Petition for Preliminary Assessment, conducting its own investigation, and issuing its own report.[125] The EPA report, which was produced on April 21, 2017, months after the Decision was published, ultimately added nothing to the information already available.[126] It simply recited the history of the site and types of soils and summarized the Riley reports, but it did not even acknowledge that the site would be redeveloped, with hundreds of cubic yards of soil excavated and removed for disposal, an activity that could be problematic if contaminated soils were disturbed.[127] The report, however, did point out that only one of the three soil sample holes was dug to the depth of the side sewer, which confirms that even the limited soil samples were not tested to the depths required for excavation.[128]

Ecology presumably has resumed its investigation although Livable Phinney is not aware of the status. SDCI should be required, pursuant to SMC 25.05.675.F.2.b, to

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[123] *See* Ex. 81, ERTS report at 17 (request by Ecology that applicant take additional samples during demolition).
[124] Ex. 81, ERTS at 17 (email from Ecology to Paul Riley: "Ecology received a citizen inquiry regarding the subject property. The inquiry will be processed as an initial investigation . . .") and Ecology's cover email to Michael Dorcy of May 2, 2017 attaching ERTS and emphasizing Ecology's expectation that additional samples would be taken at the site).
[125] *See* ERTS at 20.
[126] Ex. 60.
[127] *See e.g.,* EPA Report at 3-4, 3-5 ("Given the presence of the building and paved surfaces, surface soils are not exposed at the site, representing an incomplete exposure pathway. As such, further evaluation of the soil exposure pathway is not included.")(emphasis added).
[128] *Id.* at 4-2.

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consult with Ecology before rendering any revised decision regarding the Phinney Flats proposal.

2. The Riley Reports upon which the Decision relied failed to provide comprehensive soil sampling and failed to disclose Ecology's request for additional samples.

SDCI's conclusions regarding potential environmental health impacts caused by excavation and removal of potentially contaminated soils rested entirely on two Riley Group investigatory reports that claimed there to be no contamination, as well as a memorandum from the Riley Group to Ecology responding to citizen complaints.[129] Although SDCI had noted the potential for soil contamination in a correction notice, it evidently never reviewed the thoroughness of the reports that were ultimately provided.[130]

The Riley Group Phase I Report recommended further investigation because of the historic presence of dry-cleaning operation onsite, but the Phase II investigations tested an insignificant number of samples (2 shallow soil vapor tests and 3 shallow soil samples from only a small portion of the property), and from those limited samples concluded that the soils on site were not contaminated.[131] The insufficiency of the Riley Group analysis is particularly striking given the far more comprehensive 2009 investigation at a virtually identical site less than 8 blocks away at 6010 Phinney Avenue.[132] The 10,000 square foot parcel at 6010 Phinney is nearly identical in size and layout to the 8,000 square foot parcel for the proposed Phinney Flats project. Both house a one-story 1920s-era building in the front half of the property, and have an

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[129] Analysis & Decision at 24.
[130] *See* Ex. 17, listing of project documents at 11 (Correction Notice dated April 5, 2016, requesting a site assessment and noting that "[i]t is the City's experience that the occupations listed [in the Appendix A report] may be responsible for enduring below-grade contaminants."); *see also* Exh. 81, ERTS at 1-3 (complaint letter to Ecology summarizing the inadequate sampling at the Phinney Flats site).
[131] Ex. 58, Riley Phase II Report at 6.
[132] Ex. 15.

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asphalt parking lot in the rear half, and both housed drycleaners in the mid twentieth century.

At the 6010 Phinney site, the consultant chose its soil boring locations "based upon site conditions, access to sewer lines, and likely areas where improper disposal could occur."[133] Based on that scope, it drilled 11 boring holes and obtained 28 boring samples mostly located in the perimeter area of the site.[134] The concentrations of Tetrachloroethene ("PERC" or "PCE", the carcinogen associated with dry-cleaning operations) were substantially above the current cleanup levels in all 28 samples, and in many cases, orders of magnitude above the cleanup level.[135] One perimeter sample (B8E) tested at 320,000 where the cleanup level is 50.[136] Nine of the 28 samples were contaminated with TCE.

In contrast, The Riley Group employed a far narrower scope for its investigation, guessing where the dry cleaning machines may have been located inside the building and digging only shallow test holes to test soil vapors, and 3 minimal soil samples near the building itself.[137] It never tested anywhere in the perimeter area, and never bothered to check portions of the interior or storage sheds on the property. SDCI never required a perimeter investigation even though the adjacent property owners had expressed concerns about potentially contaminated soils at the Phinney Flats site.[138]

Borings at the 6010 Greenwood site were drilled to a maximum depth of 22 feet, but the Riley vapor samples were taken at depths of only 2.5-3 feet, and the soil

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[133] Ex. 15 Geotech Report at 2 (Methodology: Drilling and Sampling) (emphasis added).
[134] Ex. 15, Geotech Report, "Site Exploration Map" (located two pages after the reference list on page 9 of the report); *see also* Geotech Report at 3-4 (describing the borings in the "Subsurface" section) and individual boring logs on pages following the Site Exploration Map).
[135] Geotech Report at 5-6 (Table 1: Laboratory Results"), and at 4-6 (Results of Laboratory Analysis: Soil – Volatile Organic Compounds) .
[136] *Id.* at 5.
[137] Ex. 58, Riley Phase II Report at 3, 5.
[138] Ex. 44 (comments by Elizabeth Johnson) and Ex. 48 (comments by Laura Reymore to Michael Dorcy of July 24, 2016, September 26, 2016 and January 12, 2017 regarding impacts of exaction of contaminated soils).

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samples not much deeper.[139] The 6010 investigation produced 28 soil samples; the Riley Group produced only three.[140]

Neither the Applicant nor the Riley Group revealed to SDCI that Ecology had requested additional samples from the site. As noted above, SDCI's Analysis and Decision at 24 relied in part upon a memorandum by The Riley Group that purported to summarize a conference call with Ecology that occurred on September 30, 2016.[141] But the Riley Group failed to disclose in that report that Ecology had requested additional soil sampling at the site.[142] Although the Riley memorandum of October 26, 2016 claims it "provides clarification regarding our findings that respond to any Ecology/citizen issues raised,"[143] it did nothing of the sort. It simply regurgitated its earlier conclusions while omitting the most critical detail of the Ecology call: that Ecology had requested additional samples. SDCI relied on the Riley Memorandum's conclusions in its Decision without being informed of Ecology's specific request for additional soil test samples, and the Applicant's agreement to provide such samples.[144]

On Tuesday May 2, 2017, during the Hearing in this case, Donna Musa, the investigator at Ecology, forwarded the ERTS report to SDCI planner Michael Dorcy and specifically noted that (1) "Ecology requested the property owner(s)/developer(s) conduct additional sampling at the property prior to development," and that (2) "[d]uring a telephone conference on September 30, 2016, Ecology was given the impression that further testing would be conducted," but that the technical memorandum they later

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[139] Compare, Ex. 15 Geotech Report for 6010 site at 3 to Ex. 58 Riley Phase II Report at 3.
[140] Ex. 58, Riley Phase II Report at 3, 5.
[141] The Riley Group Memorandum of October 26, 2016 referenced in the Analysis & Decision at 24 is contained within SDCI's documents for this application under an capture date of November 1, 2016, as listed on page 4 of Exhibit 17. Pursuant to HER 2.18 and ER 201, Livable Phinney requests official notice of this document.
[142] Ex.81 , ERTS at 17 (email from Donna Musa to Kelten at Johnson Carr, the owner of the 6726 site, and email to citizen confirming Ecology's request for additional samples)
[143] Riley Memorandum of October 26, 2016 at 1,
[144] *See* Analysis & Decision at 24-25.

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received "indicated no additional testing was planned."[145] SDCI's Analysis and Decision fails to acknowledge, consider or disclose the Applicant's refusal to provide additional testing.

The record demonstrates that SDCI's conclusions regarding the potential environmental health impacts of the project were not based on information sufficient to evaluate the potential impacts. SDCI failed to consult with Ecology as required, it failed to require a comprehensive soil sampling investigation given the historic presence of a drycleaner on site, and it was misled by the Applicant who failed to reveal that Ecology had requested additional sampling on the site. On this issue, the DNS was rendered without actual consideration of environmental factors therefore is clearly erroneous and must be reversed with instructions that SDCI order comprehensive soil sampling before any excavation or demolition occurs, and consult with Ecology as appropriate.

IV. CONCLUSION

A review of the entire record confirms that, even giving substantial weight to SDCI's Interpretation and DNS, a mistake was made when SDCI approved the Phinney Flats project without additional restrictions and conditions to mitigate the outsized impacts from the height, bulk, and scale of the building, and the parking impacts on neighboring streets where parking is already over-capacity even by the applicant's own analysis, and when it issued a DNS without obtaining adequate, accurate information from which to evaluate the potential impacts to transit, parking, and environmental health. To remedy these errors, Livable Phinney requests that the Examiner reverse the Interpretation, vacate the Decision and DNS, and remand the proposal to require SDCI to properly exercise its authority to mitigate parking impacts and to require

[145] *See* Ex. 81, email of Donna Musa to Michael Dorcy of May 2, 2017.

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comprehensive soil sampling, including perimeter areas, to at least the depth that will be excavated for this project.

Dated this 5th day of June, 2017.

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By _____
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DECLARATION OF SERVICE

I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document upon parties of record, addressed as follows:

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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, 2017.

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