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BEFORE THE HEARING EXAMINER FOR
THE CITY OF SEATTLE

In Re:

THE APPEAL OF JACK NIKFARD of
SCI # 3018686

NO. MUP 17-019

RESPONSE OF JACK NIKFARD TO
APPLICANT'S MOTION TO
DISMISS

I. INTRODUCTION

As the Applicant notes in its Motion to Dismiss (“Mot.”), this appeal involves three elements. The first is a challenge to the Director’s decision to approve a departure from SMC 23.49.058.E.2, which would otherwise limit the 179-foot wide tower to 120-feet in width along Third Avenue in downtown Seattle. *See* Letter from Jack Nikfard to Office of Hearing Examiner, re: Land Use Appeal, Project Number 3018686 at 1 (April 26, 2017) (herein, “Notice of Appeal”). This claim challenges the Director’s substantive decision to approve the departure under SMC 23.41.014.F, as part of the city’s design review process. *See* Mot., Attachment B at 18 (approving departure). Below, we refer to this claim as the “Substantive Departure Claim.”

The second element is a claim challenging lack of notice during the design review process of the departure mentioned above. As stated in the Notice of Appeal, the Applicant’s request for a departure, and its magnitude, were repeatedly hidden from the public. This lack of transparency

1 deprived the public of their ability to meaningfully comprehend and comment on this critical
2 aspect of the proposal. Indeed, by the time the public learned of the departure, city staff informed
3 them that it was too late to comment on that issue. *See* Notice of Appeal at 1–2. Below, we refer
4 to this claim as the “Procedural Departure Claim.”
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6 The third element of this appeal is a code interpretation request concerning the DCI’s
7 method of determining the width of the proposed tower under SMC 23.49.058.E.2. The Applicant
8 originally calculated the proposed tower to be 144 feet in width, which as accepted by the Design
9 Review Board. In doing so, the Applicant ignored a significant portion of the tower façade. In our
10 code interpretation request, we challenged that miscalculation, arguing the tower is, in actuality,
11 179 feet wide. *See* Notice of Appeal at 2 (“Tower dimension in the ‘general north/south axis of
12 the site’ totals 179’ as described on the fourth Meeting Report and not 144’ as presented to the
13 DRB or on the MUP documents”). Ultimately, the Director adopted our view of this issue,
14 observing in the MUP decision that “[t]he proposed façade width is approximately 180 feet,
15 which would exceed the maximum allowable width and require a departure.” *See* Mot.,
16 Attachment B at 16.
17

18 The Applicant now seeks to dismiss the Substantive Departure Claim and the Procedural
19 Departure Claim — the first because it allegedly relates to a Type I decision for which no
20 Hearing Examiner appeal is allowed, and the second because it deals with procedural issues that
21 are allegedly beyond the Hearing Examiner’s jurisdiction. *See* Mot. at 3–5. The Applicant also
22 asks the Hearing Examiner to deny our code interpretation request on the twin bases that we did
23 not initially file that request with DCI, and that the issue is now moot in light of the Director’s
24 decision that the Tower is 180 feet wide. *Id.* at 5 (arguing, *inter alia*, that “[t]here is no
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1 controversy here and nothing for the Director to interpret or for the Hearing Examiner to review
2 on appeal”).

3 As discussed below, the Applicant’s motion to dismiss the Substantive Departure Claim
4 and the Procedural Departure Claim is misguided and should be denied. In contrast, we agree that
5 our request for a code interpretation is now moot in light of the Director’s decision.
6

7 II. ARGUMENT IN RESPONSE

8 A. Our Substantive Departure Claim Challenges a Type II Decision That Is 9 Appealable to the Hearing Examiner.

10 In Section V.B of its motion to dismiss, the Applicant alleges that the Substantive
11 Departure Claim relates to a Type I decision for which no Hearing Examiner Appeal is allowed.
12 See Mot. at 3–4. The Applicant cites no authority for this proposition and, indeed, it is wrong.
13 The Director’s design review decision is a Type II decision under the plain language of the
14 Seattle Municipal Code. It is properly appealable to the Hearing Examiner.

15 Under SMC 23.41.014, the design review process culminates in a decision by the Director
16 of DCI to approve or reject the Design Review Board’s recommendation. See, e.g., SMC
17 23.41.014.F.1 (“A decision on an application for a permit subject to design review shall be made
18 by the Director. The Director may condition a proposed project to achieve compliance with
19 design guidelines and to achieve the purpose and intent of this Chapter 23.41”). Under this
20 process, the Director has final authority to approve requested departures, following a
21 recommendation by the Design Review Board. SMC 23.41.014.E.2 (“The Design Review Board
22 shall recommend to the Director whether to approve or conditionally approve the proposed
23 project based on the design guidelines, and whether to approve, condition or deny any requested
24 departures from development standards”). The Director must make this ultimate decision —
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1 including the approval of any departures — as part of the Master Use Permit (“MUP”) permit
2 process. SMC 23.41.014.F.2.

3 In turn, the Director’s design review decisions are Type II decisions under the plain
4 language of the SMC. Under the heading “The following are Type II decisions,” SMC 23.76.006
5 lists the following:
6

7 *Design review decisions, except for streamlined design review*
8 *decisions pursuant to Section 23.41.018 if no development*
9 *departures are requested . . . , and except for design review*
10 *decisions in an MPC zone pursuant to Section 23.41.020 if no*
11 *development standard departures are requested[.]*

12 SMC 23.76.006.C.2.e (emphasis added).¹ In the quote above, the term “decision” refers to the
13 Director’s design review decision under SMC 23.41.014.F (titled “Director’s decision”). The
14 only other possible interpretation — *i.e.*, that “decision” refers to an action by the Design Review
15 Board (“DRB”) — is nonsensical. The DRB can only make “recommendations.” *See* SMC
16 23.41.014.E.

17 Finally, it is clear that Type II decisions are appealable to the Hearing Examiner. *See*
18 SMC 23.76.004.B (“Type II decisions are discretionary decisions made by the Director that are
19 subject to an administrative open record appeal hearing to the Hearing Examiner”). *See also* SMC
20 23.76.006.C.2 (“The following decisions are subject to appeal to the Hearing Examiner,” and
21 listing design review decisions).

22 The authorities above could not be clearer that the Director’s design review decisions —
23 including a decision to grant or deny a departure at the end of the design review process — are
24 Type II decisions appealable to the Hearing Examiner. The Applicant is simply wrong when it

25 ¹ As quoted above, SMC 23.76.006.C.2.e provides that certain design review decisions will be treated
26 as Type I decisions when they do not involve departure requests. Those exceptions obviously do not apply
here, where the Direction granted a departure from the width limitations at SMC 23.49.058.E.2.

1 asserts, without authority, that the Director's decision is a Type I decision for which no Hearing
2 Examiner appeal is available. *See* Mot. at 3–4.

3 Similarly, the Applicant is wrong when it asserts that our Substantive Departure Claim
4 does not fall under the Hearing Examiner's scope of review in SMC 23.76.022.C.6. *See* Mot. at 3.

5 That section provides:

6
7 Scope of Review. Appeals shall be considered de novo. The
8 Hearing Examiner shall entertain issues cited in the appeal that
9 relate to compliance with the procedures for Type II decisions as
10 required in this Chapter 23.76, compliance with substantive
11 criteria, determinations of nonsignificance (DNSs), adequacy of
12 an EIS upon which the decision was made, 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 or consolidated appeal pursuant to Section
23.88.020.C.3.

13 SMC 23.76.022.C.6. Applied here, the Applicant asserts that “Appellant fails to allege that [the
14 Substantive Departure Claim] falls within any of the categories outlined in the Code.” Mot. at 3.

15 As above, this line of argument is belied by the plain language of the code. SMC
16 23.76.022.C.6 gives the Hearing Examiner authority to review Type II decisions for “compliance
17 with substantive criteria,” and there clearly are substantive criteria relating to the Director's
18 decision to grant a departure.

19 For example, SMC 23.41.012.A provides that departures must “result in a development
20 that better meets the intent of the adopted design guidelines.” Relatedly, SMC 23.41.014.F.1
21 provides that the Director's decision must “achieve compliance with design guidelines and . . .
22 the purpose and intent of this Chapter 23.41.” Finally, SMC 23.41.014.F.1 provides that the
23 Director may reject the DRB's recommendation when it is inconsistent with “regulatory
24 requirements applicable to the site,” which would include the width limitations at SMC
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1 23.49.058.E.2. These substantive criteria apply to the Director's design review decision, and may
2 be implicated by granting a departure exceeding the limitations at SMC 23.49.058.E.2 by nearly
3 50 percent.

4 Finally, the Applicant asserts that a code interpretation is necessary to pursue our
5 Substantive Departure Claim. *See* Mot. at 4. This is an artifact of the Applicant's erroneous view
6 that our Substantive Departure Claim challenges a Type I decision, for which the sole avenue for
7 administrative review is the code interpretation process. In contrast, a code interpretation is not
8 necessary to pursue a Hearing Examiner appeal of a Type II decision. For Type II decisions, a
9 code interpretation may be a necessary prerequisite for *judicial* review. *See* SMC 23.88.020.A.
10 But nowhere does the code state that a code interpretation is required before pursuing an
11 administrative, Hearing Examiner appeal of a Type II decision.
12

13 Because the Substantive Departure Claim challenges a Type II decision that is appealable
14 to the Hearing Examiner; because that claim falls under the Hearing Examiner's scope of review
15 under SMC 23.76.022.C.6; and because a code interpretation is not a prerequisite to this Type II
16 Hearing Examiner appeal, the Applicant's motion to dismiss the Substantive Departure Claim
17 should be denied.
18

19 B. The Hearing Examiner Has Jurisdiction Over Our Procedural Departure Claim.

20 As stated above, our Procedural Departure Claim challenges the lack of notice during the
21 design review process of the departure from the width limitations at SMC 23.49.058.E.2. *See*
22 Notice of Appeal at 2–3. That departure was never mentioned during the Early Design Guidance
23 stage of the process, the purpose of which is to identify concerns about the proposal and to
24 explore design alternatives. *See* SMC 23.41.014.B.2. The departure was not mentioned during
25 the first design review recommendation meeting, the purpose of which was, in part, to
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1 determine whether any requested departures should be approved. *See* SMC 23.41.014.E.2.
2 Indeed, the departure was not mentioned until the second recommendation meeting — but by
3 that time, it was too late to comment on that issue. *See* Notice of Appeal at 1.

4
5 As above, the Applicant argues that these issues are beyond the Hearing Examiner’s
6 scope of review under SMC 23.76.022.C.6 because design review procedures are not within the
7 scope of issues subject to review pursuant to SMC chapter 23.76. *See* Mot. at 4–5. *See also* SMC
8 23.76.022.C.6 (“The Hearing Examiner shall entertain issues . . . that relate to compliance with
9 the procedures for Type II decisions as required in this Chapter 23.76”).

10 But the deficiencies discussed above do “relate to compliance with the procedures for
11 Type II decisions as required in [SMC] chapter 23.76,” within the meaning of SMC
12 23.76.022.C.6. In particular, SMC 23.76.011 requires DCI to provide public notice during the
13 design review process of the early design guidance meeting. *See* 23.76.011.A. In turn, “the time,
14 date, location *and purpose* of the meeting shall be included with the mailed notice.” SMC
15 23.76.011.C (emphasis added). As discussed below, omitting any reference to the departure
16 resulted is a failure to inform the public of the “purpose” of the DRB’s early design review
17 meeting, which was, in part, to consider any and all anticipated departures.

18
19 As stated at SMC 23.41.014.B.2, “[t]he purpose of the [DRB’s] early design guidance
20 public meeting shall be to identify concerns about the site and the proposed project, review the
21 design guidelines applicable to the site, determine neighborhood priorities among the design
22 guidelines, and explore design concepts and/or options.” In turn, the code specifies several
23 elements that the applicant must include in its design review packet in order to fulfill this
24 purpose. They include, *inter alia*, “[a]n initial site analysis addressing site opportunities and
25 constraints,” “[a] zoning envelope study,” and “[a] description of the proponent’s objectives
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1 with regard to site development.” SMC 23.41.014.B.a–e. Interpreting these provisions, DCI has
2 further clarified that the applicant’s early design guidance packet must identify “all anticipated”
3 departures. *See* Seattle DCI, Design Review: Early Design Guidance Proposal Packet Checklist
4 at 3 (requiring a “[d]eparture summary table for all anticipated development standard
5 departures”) (emphasis in original; Attachment A hereto). This is not accidental. Without
6 informing the public of anticipated departures, it may be impossible to “identify concerns about
7 the site and proposed project,” and to “explore design concepts and/or options,” thereby
8 hindering the very purpose of the early design guidance meeting. *See* SMC 23.41.014.B.2.

9
10 The Washington Supreme Court has held that failure to inform the public about the nature
11 and purpose of a land use action raises serious due process concerns, prevents the public from
12 participating meaningfully in the process, and inhibits informed decision-making. *See Glaspey &*
13 *Sons, Inc. v. Conrad*, 83 Wn.2d 707, 712, 521 P.2d 1173 (1974) (“It is important that a board
14 have an opportunity to reach an ‘informed’ decision. That reason is thwarted if interested parties
15 are prevented from presenting their view because of a board’s failure to adequately disclose the
16 true ‘purpose of the hearing’”) (quoting RCW 36.70.590); *Barrie v. Kitsap County*, 84 Wn.2d
17 579, 585, 527 P.2d 1377 (agency must notify public of the “nature and character” of a proposed
18 action, so they may “intelligently prepare for the hearing”). Here, by failing to inform the public
19 of the departure — and, ergo, of the purpose of the early design guidance meeting — DCI failed
20 to comply with the procedural requirements at SMC 23.76.011.C. It also deprived the public of
21 their ability to meaningfully comment on the project. This is a serious issue that falls squarely
22 within the Hearing Examiner’s scope of review at SMC 23.76.022.C.6 (quoted above). The
23 Applicant’s motion to dismiss our Procedural Departure Claim should be denied.
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26 D. We Agree the Code Interpretation Request Is Moot.

1 Last, we disagree with the Applicant that our request for a code interpretation is deficient
2 under SMC 23.88.020.C.3.c (establishing content requirements for request), or that our failure a
3 copy of our request with DCI is a jurisdictional defect. On the latter issue, we note that SMC
4 23.76.022.C.3.c says that the Hearing Examiner “shall not accept any request for an interpretation
5 included in the appeal unless it complies with the requirements of subsection 23.88.020.C.3”
6 (which applies to the content of the request), denoting that failure to comply with the content
7 requirements of that sub-section is a jurisdictional defect. But the code nowhere says that the
8 Hearing Examiner shall similarly reject an interpretation request simply because it was not
9 simultaneously filed with DCI, as the Applicant argues. This difference in the language of the
10 Code is presumably purposeful.
11

12 Regardless, we agree that our code interpretation request is now moot. The MUP decision
13 comports with our view that, under SMC 23.49.058.E.2, the proposed tower is approximately 180
14 feet wide — not 144 feet wide as the DRB believed. Thus, we have no quarrel with the Director’s
15 application of SMC 23.49.058.E.2 in this case and there is no longer a need for a code
16 interpretation on this issue. We agree our code interpretation request may be dismissed and will
17 be prepared to address the implications of the Director’s view of this issue at the open record
18 hearing.
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20 IV. CONCLUSION

21 For the reasons above, appellant Jack Nikfard respectfully requests that the Hearing
22 Examiner deny the Applicant’s motion to dismiss the Substantive and Procedural Departure
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1 Claims. We do not oppose the Applicant's motion to dismiss the code interpretation request.

2 Dated this 9th day of June, 2017.

3 Respectfully submitted,

4 BRICKLIN & NEWMAN, LLP

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6
7 By:



8 David A. Bricklin, WSBA No. 7583
9 Bryan Telegin, , WSBA No. 46686
10 Attorney for Appellant Jack Nikfard

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ATTACHMENT A

DESIGN REVIEW: EARLY DESIGN GUIDANCE PROPOSAL PACKET CHECKLIST

The intent of the EDG packet is to demonstrate your sincere exploration of the context and site in this early phase as you are developing design options. The packet is not intended to be a marketing or branding brochure for a future building, rather it should be considered a document that communicates to the Board your analysis that has informed your design.

This checklist is meant to help you prepare and assemble a meaningful packet that clearly documents and communicates your efforts to SDCI, the Board and the community. Understanding the contextual factors, as well as your assumptions, site opportunities and constraints will enable your audience to respond more effectively and efficiently. The materials should highlight key urban design features of the proposal and help to show how your analysis has informed your design.

The information in the packet should be included in the following order.

Section	Information to be included in each Section
1.0 Packet Standards	<input type="checkbox"/> 1.1: 11x17 sized design packets. Stapled or side bound. <input type="checkbox"/> 1.2: Printed double sided and in color. (No plastic covers). <input type="checkbox"/> 1.3: All pages numbered. <input type="checkbox"/> 1.4: All type fonts legible and 1/8" minimum <input type="checkbox"/> 1.5: All graphics should be oriented consistently with street names and north arrows. <input type="checkbox"/> 1.6: All drawings should fill the 11"x17" page; 1" white margins are adequate. <input type="checkbox"/> 1.7: Table of Contents for larger projects.
2.0 Cover	<input type="checkbox"/> 2.1: Project address. <input type="checkbox"/> 2.2: Project number assigned by SDCI. <input type="checkbox"/> 2.3: Meeting type (EDG, EDG2, Recommendation, etc.) and meeting date (not printing date). <input type="checkbox"/> 2.4: List of applicant team (developer, architect, landscape architect)
3.0 Development Objectives	<input type="checkbox"/> 3.1: Number of residential units (approx). <input type="checkbox"/> 3.2: Amount of total commercial (retail, office, hotel, etc.) square footage, number of live work units (approx). <input type="checkbox"/> 3.3: Number and location of parking stalls (approx). <input type="checkbox"/> 3.4: Provide concise development objectives/summary statements which describe how the project fits within and contributes to its context, as well as any sustainable ambitions of the project and/or approach to historic preservation, if applicable.
4.0 Site Plan	<input type="checkbox"/> 4.1: Structure(s) footprint. Include property lines and dimensions. <input type="checkbox"/> 4.2: Adjacent structures footprints within first 30' on all sides. Include use and height in stories. <input type="checkbox"/> 4.3: Topography of the site or other physical features. <input type="checkbox"/> 4.4: Open spaces and trees. <input type="checkbox"/> 4.5: Vehicular and pedestrian access. Include curb lines and street trees.

DESIGN REVIEW: EARLY DESIGN GUIDANCE PROPOSAL PACKET CHECKLIST

Section	Information to be included in each Section
	<ul style="list-style-type: none"> <input type="checkbox"/> 4.6: Landscaping and tree survey, identifying species (common and scientific), trees 6" or greater in diameter as measured 4.5' above the ground located on the site (see Tip 242). If Exceptional Tree(s) are present, an Arborist Report is needed and the findings should be referenced in the packet. <input type="checkbox"/> 4.7: Include all site and ROW dimensions. Include spot elevations at property corners. <input type="checkbox"/> 4.8: Legal description.
<p>5.0 Urban Design Analysis</p>	<ul style="list-style-type: none"> <input type="checkbox"/> 5.1: Aerial photograph or graphic with streets and site labeled (3 block x 3 block) vicinity map, indicating surrounding uses, structures, zoning, and overlay designations, natural features. <input type="checkbox"/> 5.2: Vicinity map and photos indicating community nodes and landmarks, and existing notable architectural and siting patterns. <input type="checkbox"/> 5.3: Axonometric or other three-dimensional drawing, photos or models of the nine block area surrounding the project site. <input type="checkbox"/> 5.4: Photo montage of the streetscape on both sides of the street identifying the site (3 strips per page max) with callouts of relevant datum lines, fenestration patterns, roof forms, etc. <input type="checkbox"/> 5.5: Maps, diagrams and/or call-out notes on all context and analysis drawings and a brief narrative stating what design cues have informed the design alternatives and concept. <input type="checkbox"/> 5.6: Map of access opportunities, constraints, pedestrian routes, bus stops, unusual traffic patterns, applicable SDOT Streetscape Concept Plan overlays and design standards, etc. <input type="checkbox"/> 5.7: Site photos.
<p>6.0 Zoning Data</p>	<ul style="list-style-type: none"> <input type="checkbox"/> 6.1: <u>Brief</u> summary of applicable development standards and how proposed development will meet these standards. (1 page max)
<p>7.0 Design Guidelines</p>	<ul style="list-style-type: none"> <input type="checkbox"/> 7.1: Identify applicant <u>priority</u> design guidelines (5-10; all remain applicable) based on information shown in the Urban Design Analysis. <input type="checkbox"/> 7.2: Brief description of how the proposal meets the intent of the applicable citywide and neighborhood design review guidelines. <input type="checkbox"/> 7.3: Conceptual response to guidelines with concept diagrams or graphics – how project intends to respond to these guidelines. (2 pages max for items 7.1 through 7.3)
<p>8.0 Architectural Massing Concept(s)</p>	<ul style="list-style-type: none"> <input type="checkbox"/> 8.1: Three <u>viable</u> alternative architectural massing concepts showing your design thinking process and how the designs respond to the context and design guidelines. Include a code complying scheme with no departures. Graphics for all options should be comparable and generally show the same development objectives. Include proposed site plan/ground floor plan in context showing the proposed structure(s)

DESIGN REVIEW: EARLY DESIGN GUIDANCE PROPOSAL PACKET CHECKLIST

Section	Information to be included in each Section
	<p>footprint. Composite ground floor plan desired. Include property lines and dimensions. Indicate preferred massing.</p> <ul style="list-style-type: none"> <input type="checkbox"/> 8.2: If Exceptional Tree(s) is on-site, at least one option must show retention of all those trees and any related departures. If Exceptional Tree(s) are confirmed to be on-site <u>after</u> an EDG meeting, a second EDG is may be required so that massing alternatives preserving the trees may be considered with the other massing options. <input type="checkbox"/> 8.3: Include one sheet that compares these options side by side. For each concept, list opportunities and constraints of each option. Express how the urban design analysis has informed these concepts. <input type="checkbox"/> 8.4: Include conceptual floor plans, using color to differentiate uses in context with property lines and abutting properties. <input type="checkbox"/> 8.5: Show siting, massing, open space, façade treatments, and access. <input type="checkbox"/> 8.6: One or more color renderings adequate to depict the overall massing of structures and the design concept. Street level perspectives preferred. <input type="checkbox"/> 8.7: Three dimensional studies and sketches (including those at the street level), are optional to better assist the planner and Board in evaluating the design proposal. <input type="checkbox"/> 8.8: Include precedent images from the neighborhood or beyond that will inform the design development of the proposed development. Clearly caption each and note the specific relevance of the image to the proposed development. <input type="checkbox"/> 8.9: Basic sun/shadow graphical analysis at following times*: March/Sept 21 (combined); June 21; Dec 21; at 9am; noon; 3pm; equinox should be bigger; shadow cast by proposal should be differentiated from existing ones, by darker tone or color. *Show/label any impacts on public parks, plazas or similar; more detailed analysis may be required.
<p>9.0 Departures</p>	<ul style="list-style-type: none"> <input type="checkbox"/> 9.1: Departure summary table for <u>all anticipated</u> development standard departures, including the following: <ul style="list-style-type: none"> <input type="checkbox"/> Code citation; <input type="checkbox"/> Code requirement; <input type="checkbox"/> Proposed design departure; <input type="checkbox"/> Rationale explaining how the departure results in a project which better meets the intent of specific design guidelines; <input type="checkbox"/> 9.2: Graphics, as needed, to clearly explain the departure(s) showing code compliant dimension/area and the requested departure with dimensions/ sq. ft./% of difference.

Tips to Consider:

- Avoid information overload, by limiting the packet size. Consolidation of information onto clear, readable graphics is encouraged.
- Set the massing option in context; avoid images where the proposed building stands alone.

DESIGN REVIEW: EARLY DESIGN GUIDANCE PROPOSAL PACKET CHECKLIST

- Include pedestrian perspectives for massing options, rather than the aerial/birds-eye perspectives.

Updated February 2017