BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: Livable Phinney, a Washington non-profit corporation From a Department of Construction and Inspections decision.	No. MUP 17-009 (DR, W) SDCI Reference: 3020114 APPLICANT'S RESPONSE TO NEW INFORMATION IN THE RECORD

I. INTRODUCTION

Appellant Livable Phinney ("Appellant") has introduced new evidence into the record that does not assist the Hearing Examiner in making his decision.

The Hearing Examiner must determine whether it was clear error for the City to rely upon published King County Metro bus schedules instead of requiring an analysis of actual bus arrival and departure times prior to determining whether the project site meets the definition of frequent transit service. The City determined that, although buses can be late, the City should utilize published bus schedules when determining whether a project site meets the definition of frequent transit service. The evidence in the record overwhelmingly indicates that this determination is reasonable and not clearly erroneous. The new information has no bearing on this determination and does not demonstrate that the Interpretation is in error.

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Because the Appellant has not met its burden, the Applicant Johnson & Carr, Inc. ("Applicant") accordingly requests that the Hearing Examiner deny the appeal and affirm the MUP and the Interpretation.

II. FACTS

Appellant filed its appeal on February 6, 2017. The Hearing Examiner held an open record hearing from May 2-5, 2017. The record was closed on June 5, 2017. On June 29, 2017, the Hearing Examiner allowed the record to be reopened to include the addendum to Dr. Roberto Altschul's report, which purportedly analyzed data from King County Metro for the bus arrival and departure times from March 13, 2017 to April 28, 2017. The report concludes that the Project meets the definition of frequent transit if one were to use bus schedules, either before or after the inclusion of additional buses to the schedule. The report also states, utilizing data from March 13, 2017 through April 28, 2017, Route 5 buses meet or exceed 15 minute headways approximately 62.5% of the time on the southbound route and 63.2% of the time on the northbound route.[1]

The Hearing Examiner provided the City and the Applicant an opportunity to respond to the new information.

III. ARGUMENT

The information in the record, including the new information provided by Appellant from Dr. Altschul, fails to demonstrate that the City's determination to utilize published bus schedules to determine whether a project site meets the definition of frequent transit service is in clear error.

[1] Dr. Altschul's report focuses on the percentage of time when the actual bus arrival and departure times exceed 15 minutes between one another. In approximately 27% of these cases, the interval exceeded 15 minutes less than 5 minutes. The report does not distinguish between a bus that is 5 seconds late and one that is 4 minutes and 59 seconds late.

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As discussed below, the Appellant continues to fail to meet its burden to show that the conclusions in the Interpretation were erroneous. The appeal must be denied and the Interpretation must be affirmed.

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

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

Courts interpret the "substantial weight" requirement as mandating the clearly erroneous standard of review. *Indian Trail Property Owner's Ass'n. v. City of Spokane,* 76 Wn. App. 430, 431, 886 P.2d 209 (1994). Under the clearly erroneous standard, reviewing bodies do not substitute their judgment for that of the agency but may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011).

An Appellant does not meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. *See e.g.,* Findings and Decision of the Hearing Examiner for the City of Seattle, *In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et al.,* File Nos. S-96-002 and S-96-003 (July 15, 1996), p. 13.

Here, the new information provided does not help the Appellant meet its burden that the City's determination to rely upon bus schedules to determine frequent transit service is in clear error.

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B. The new information provided by Appellant has no bearing on the Hearing Examiner's determination and fails to show that the City's decision that frequent transit service is measured utilizing schedules provided by King County Metro is clear error.

The only issue raised in Appellant's request for interpretation regarding frequent transit service is that it believes that the City must use actual data from King County Metro, which varies from month to month, to determine whether a project site meets the definition of frequent transit service area. *See* Interpretation Request, p. 13. The City disagreed with the Appellant in its Interpretation and concluded that only schedules should be used in determining frequent transit, even if there are occasions where a bus does not meet its scheduled arrival or departure time. *See* Exh. 6 at 10. Additional information regarding bus arrival and departure times remains immaterial to the Hearing Examiner's determination as to whether it was clear error for the City to rely upon published King County Metro bus schedules instead of requiring an analysis of bus arrival and departure times data in determining frequent transit service.

In his addendum, Dr. Altschul claims he conducted the same analysis as he did for the 2016 data, but there is not enough information in the report to be able to refute or agree with this statement. Even assuming Dr. Altschul's analysis of the new data is correct,[2] it is of no moment here. The analysis shows that sometimes buses are late, often only by 0-5 minutes. It also shows that most of the time, buses are early or on time. The City has made the determination in its Interpretation that even though buses may sometimes be late, the City should utilize published

[2] In its closing brief and in the oral argument for the motion to reopen the record, Appellant notes that neither the City nor the applicant provided an expert that disputed Dr. Altschul's analysis. It is unnecessary to dispute the manner of analysis, whether it is right or wrong, because the data has no bearing on the City's determination of frequent transit. The City has reasonably determined that schedules must be utilized to determine frequent transit service—not arrival and departure times. This decision must be afforded deference and Appellant has provided no evidence demonstrating that the City's decision is in clear error. SMC 23.88.020.G.5.

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bus schedules to determine whether a project site meets frequent transit service.[3] Indeed, the City's Interpretation states:

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

Exh. 6, p. 10.

This new data accordingly has no bearing on the Hearing Examiner's decision. Moreover, even if the City should require a statistical analysis of actual data, which the Code does not require, Dr. Altschul's revised report[4] continues to provide no basis in the Code to support his subjective conclusion that a bus meeting or exceeding its schedule approximately 63 percent of the time is not meeting frequent transit service.

The Code does not require a statistical analysis of bus arrival and departure times data to determine frequent transit service. SMC 23.84A.038. This approach is reasonable. In contrast, relying on actual bus arrival and departure times is impractical and unworkable. As the City testified, an applicant would need to obtain this information from King County through a Public Records Act request. The data is only available months after the data is collected. Actual bus arrival and departure times varies day-to-day depending on many factors so that a property may meet the definition on one day, but not the next, if actual data is used. Analyzing bus arrival and departure times would create uncertainty and add significantly more complication and expense to the

[3] In its motion to reopen the record and in the oral argument in support of its motion, appellant relies upon certain statements from David Graves' testimony. It is unclear what Mr. Graves intended to convey in the cited statements and the surrounding context provides many interpretations for the statements. However, the City's official position cannot be clearer: schedules, and not bus arrival and departure times, should be used to determine frequent transit service. Exh. 6, p. 10.

[4] Dr. Altschul is a statistician, and claimed no expertise in interpreting the City's Code.

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determination of whether a project site meets frequent transit. *See generally* Testimony of David Graves. If the City Council had wanted to require an analysis of actual bus arrival and departure times, it would have adopted legislation requiring such a detailed and burdensome analysis prior to SDCI approving a parking reduction or elimination based upon a proposed project's proximity to frequent transit when the project is located in an Urban Center or Urban Village. The City Council did not do so. SDCI is the agency charged with administration of the City Code and its interpretation of the relevant provisions adopted by the City Council is entitled to deference.

The City determined that frequent transit service was met when it approved the zoning and published its decision, and reconfirmed that the definition of frequent transit service was met when King County revised its schedule to add two new buses to the route. Exh. 6, p. 10; Exh. 76. Dr. Altschul agrees with the City. Dr. Altschul admits in his addendum that the schedules met frequent transit service in both the "pre and post publish schedules," presumably referring to the schedule reviewed prior to publication in the MUP decision and the schedule reviewed as part of the interpretation due to the updated schedule.[5]

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

IV. CONCLUSION

Appellant continues to fail to meet its burden of proof with regard to any appeal issue—and the new information provided does not show that the City's Interpretation was clearly

[5] In its closing brief, Appellant raises, for the first time in this appeal, questions about whether the October 2016 bus schedule shows that the project site meets frequent transit service. The Hearing Examiner must disregard this argument, which is not only contrary to the statements in Dr. Altshcul's addendum, but was also never raised in its request for interpretation and never discussed in the hearing. Hearing Examiner Rule 3.01(d)(3).

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erroneous. The Hearing Examiner should reject the appeal and uphold the design review approval and DNS for the Project, and uphold the Interpretation.

DATED this 5th day of July, 2017.

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