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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)
APPELLANT’S REPLY TO RESPONSES
BY SDCI AND APPLICANT

I. Introduction

Livable Phinney replies below to the responses by SDCI and the Applicant to the June 19, 2017 Addendum prepared by Dr. Roberto Altschul.

II. Reply to SDCI

SDCI essentially offers an *ipse dixit* defense to its code interpretation on frequent transit service: it interprets the frequency of transit service to be established by published schedules based on the assertion that it has always interpreted the code that way. For support of this claimed consistent practice, SDCI offers the Declaration of David Graves, within which he makes the same assertion, but without any evidence to support the claimed consistent practice. If in rendering a code interpretation, SDCI seeks to rely on prior consistent interpretations, it “must show it adopted its interpretation as a ‘matter of agency policy’[;]... it cannot merely ‘bootstrap a legal argument into the place of agency interpretation,’ but must prove an established practice of enforcement.” *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007), citing to *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). But that’s what SDCI is doing, by attempting to support its

1 interpretation in this proceeding upon a claimed consistent practice for which it provides
2 no evidence. This is a classic case of bootstrapping. What would be the point of
3 requesting a code interpretation, if SDCI could simply reply that it had always done it
4 that way?

5 In further support of its position, SDCI argues that there is no indication the City
6 Council intended that actual data of arrival and departure times be used to determine
7 frequent transit service and that such a determination should not turn on one bus being
8 late. SDCI misreads its code and seeks to diminish the extent to which Route #5 falls
9 short of providing frequent transit service.

10 SDCI (*sub nom*, DPD) had a Director's Rule on the determination of frequent
11 transit service, DR 11-2012, but it was rescinded following the Examiner's Decision in
12 MUP-14-006 (DR, W)/S-14-001)(Neighbors Encouraging Reasonable Development
13 ("NERD") (December 1, 2014), rejecting the portion of the rule allowing for the
14 averaging of headways. *Id.*, Conclusion 15.

15 Without a rule to fall back on, the unambiguous language of the code must be
16 the source of reference. It defines "frequent transit service," as "transit service
17 headways ..." SMC 23.84A.038. While the code does not separately define "headway,"
18 in this context it means "the time interval between two vehicles traveling in the same
19 direction on the same route." NERD Decision at Conclusion 15. As the NERD Decision
20 goes on to hold, headways are not averaged. *Id.* If not averaged, headways must then
21 be the *actual* intervals between vehicles, or buses in this case.

22 SDCI points to nothing indicating that theoretical intervals, not actual intervals be
23 used to determine the frequency of headways. Following the Examiner's reasoning in
24

1 Conclusion 15 of the NERD Decision, the use of actual headway data would better
2 implement the Council's intent in that it would better assure that proposed multi-family
3 development would actually be served by service meeting 15 minute headways.

4 By no means does the lack of frequent transit service on Route #5 turn on one
5 bus a month being late, as SDCI avers in an attempt to diminish the problem. In prior
6 testimony, Mr. Graves conceded that the prior service failed to achieve frequent transit
7 service.¹ But as concluded by Dr. Altschul, Metro's data shows that the new schedule
8 falls as short of providing 15 minute headways as did the former schedule. By his
9 concession that the prior schedule did not meet frequent transit service, he must also
10 concede that the current schedule does not either.

12 III. Reply to Applicant

13 After reviewing the procedural background and standard of review,² the Applicant
14 asserts that Dr. Altschul's Addendum is immaterial and then reiterates what it claims the
15 City's "official position" to be: "schedules, not bus arrival and departure times, should be
16 used to determine frequent transit service." Applicant's Response at 5, fn 4. But that
17 claim simply begs the question presented by the Fremont Neighbors Decision: at what
18 point does "actual service diverge[]" so much and so consistently from the schedules
19
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22 ¹ Graves Direct Testimony, Tape 2 of 4 on Day 3 at 42:37:

23 76 is the bus schedule. And then my one Exhibit labeled 16 is actually from Exhibit 3
24 sheet A1.00. This shows the analysis done by the Applicant. This is the kind of analysis
25 that we routinely look at to determine frequent transit. It sounds like under the current uh
former bus schedule it may not have met frequent transit service but I believe under the
new schedule with the improved it does meet the requirements but that...

² Covered in Livable Phinney's Closing Argument at 3-5, so not repeated here.

1 that service headways do not occur within the specified intervals for the specified time
2 periods[?]³

3 While the Examiner found that the evidence in the Fremont Neighbors appeal fell
4 short of proving such a divergence, here it clearly does, nearly 40% of the time. Dr.
5 Altschul's Addendum is both relevant to and probative of the failure of Route #5 to
6 provide frequent transit service.⁴ To conclude otherwise, and to accept a schedule over
7 actual data, would amount to the acceptance of the theoretical in the place of fact.
8

9 Dated this 6th day of July, 2017.

10 ARAMBURU & EUSTIS, LLP

11
12 /s/ _____
13 Jeffrey M. Eustis, WSBA #9262
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24 ³ Ex. 78, Findings and Decision in MUP 14-022(W) at Conclusion 11 (April 15, 2015).

25 ⁴ The Applicant's Response at 5 incorrectly states that Dr. Altschul rendered a "subjective conclusion" that frequent transit service was not met. First, Dr. Altschul analyzed data of actual headways; he did not draw the legal conclusion as to whether those headways met frequent transit service. Second, as the analysis of data by a statistician, his work would hardly be considered subjective.

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: July 6, 2017.

/s/ _____
Jeffrey M. Eustis