

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

LIVABLE PHINNEY

Hearing Examiner Files:

MUP-17-009 (DR, W)

S-17-002

of a decision, interpretation, and SEPA
determination issued by the Director,
Department of Construction and Inspections

Department Reference:

3020114

Introduction

The Director (“Director”) of the Department of Construction and Inspections (“Department”) issued a State Environmental Policy Act (“SEPA”) Determination of Non-Significance (“DNS”) and design review approval for construction of a four-story structure (“Decision”), and the Appellant exercised its right to appeal the Decision and DNS. The Appellant also appealed a Land Use Code Interpretation (“Interpretation”) issued by the Director related to the proposal.

The appeal hearing was held on May 2, 3 and 4, 2017, before the Deputy Hearing Examiner (“Examiner”). The Appellant, Livable Phinney (“Appellant”), was represented by Jeffrey M. Eustis, attorney-at-law; the Applicant, Johnson Carr LLC (“Applicant”), was represented by Jessica Clawson, and Katie J. Kendall, attorneys-at-law; and the Director was represented by Michael Dorcy and David Graves, Senior Land Use Planners. The Examiner subsequently visited the site. The parties submitted written closing arguments on May 22, 2017, and the record closed on that date. On a motion by the Appellant, the record was reopened on June 29, 2017, to allow the Appellant to introduce additional evidence concerning transit service in the area of the proposal, and after comments on this new evidence were filed by the Applicant and Department on July 5, 2017, the record again closed.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated. After considering the evidence in the record and reviewing the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The subject site is addressed as 6726 Greenwood Avenue N, and is located on the southeast corner of the intersection of 6726 Greenwood Avenue N, and N 68th Street. It is approximately 8,036 square feet in size and is currently in commercial use.
2. The site is relatively flat with a slight rise from south to north, and a slope of less than three feet from the west to the east. Vehicular access is from a curb cut off N 68th Street.

3. The site is located in the Greenwood-Phinney Ridge Urban Village, and is zoned Neighborhood Commercial Two with a pedestrian overlay and a 40 foot height limit (“NC2P-40”), as are properties to the north, south and west. Two properties to the east are split zoned, with an NC2P-40 zone running in an approximate 20-foot, 7-inch strip along the proposal’s east boundary. The remainder, the majority of the two split zoned properties, is zoned Single Family 5000. *See e.g.* Exhibit 42.
4. The neighborhood is a mix of older commercial and residential buildings, with actual and proposed new development generally building to allowable heights. West of the site, across Greenwood Avenue N, is a recently constructed mixed-use building with commercial use on the ground floor and three stories of residential use above. To the north of the site is a project currently under construction that will be comparable to the proposal in height when completed. The two split-zoned lots to the east are developed with single-family homes, and include small scale garages at the property line shared with the proposal. Property to the south is developed with an older apartment building.
5. The proposal is located within 1,320 feet of transit service.

Proposal

6. The proposed project is a four-story structure containing 55 efficiency residential units, 2 live-work units, and 2,900 square feet of ground floor retail space. Twenty-three onsite bicycle stalls are proposed, but there would be no on-site parking or loading spaces.
7. The proposal includes a five-foot setback from the east property line. At the second-story the project includes a varied setback on the east side: a setback of five-feet extends south from the northeast corner of the proposal for approximately 39 feet 5 inches (approximately one-third the width of the building), at which point the setback increases to approximately 18 feet to accommodate a deck screened from property to the east by rooftop landscaping. The first-floor windows of the proposal facing the residential properties to the east would be screened by a six-foot tall wood privacy fence.
8. The roof of the proposal includes the following: a four-foot high clerestory that includes windows on all but the east side; a stairwell rising approximately ten feet above the roof height; an elevator shaft and stairwell rising approximately sixteen feet above the roof height; and deck areas to serve as common amenities.
9. An existing setback on the property to the south separates the proposal from existing apartments by approximately ten feet. The Applicant has agreed to cover the upper three stories of the south facing wall with painted fiber cement paneling, and the first floor of the same wall would be concrete masonry units painted to match the fiber cement above. The Applicant further agreed at the hearing to a condition that would require the proposal’s south wall to be shaded in a light color.

10. The only views protected by SMC 23.47A.012.A.1.c identified by the parties are views of Green Lake to the east of the proposal from residential structures on the west side of Greenwood Avenue N. The Applicant submitted a view impact analysis (Exhibit 3 Sheet G0.02B), and supplemented that analysis at the request of the Department. Exhibit 79. The view analysis showed that the proposal would not significantly block protected views.
11. The Applicant's traffic consultant prepared a transportation and parking analysis for the proposal in November of 2015. Exhibit 50. The traffic study was revised and supplemented in response to correction notices from the Department. *See* Exhibits 51 and 52 (with Exhibit 50 collectively "traffic study"). The traffic study estimated peak parking demand for the proposal and determined on-street parking utilization within 800 feet of the project site. The Department has long utilized 800 feet as the distance people are generally willing to walk from parking to their destination. The proposal will increase motor vehicle trips by 18 vehicle trips during the AM peak hour and 23 trips during the PM peak hour. The project-associated trips are expected to add little or no delay to the study area intersections during the PM peak hour. The parking analysis showed that on-street supply cannot accommodate the existing demand, parking from the proposal, and parking from future pipeline projects. The existing street supply is for 278 vehicles, and the proposal's parking demand is for 292 vehicles, for a parking utilization total of 105%.

Design Review

12. The Northwest Design Review Board ("Board") held an Early Design Guidance ("EDG") meeting on the proposal on October 19, 2016, at which it heard the Applicant's analysis of the site and proposal as well as comments from the public. The written and oral public comments included concerns about the project's impact on parking availability, capacity for loading and unloading for the commercial uses, lack of deference to the single-family properties to the east, compatibility with the neighborhood, and other issues.
13. The Board's discussion at the EDG meeting focused on major points including: (1) the relation of the project to single family homes to the east; (2) privacy of neighbors to the south and east; (3) consideration of the neighbors to the south and east with regard to garbage storage and pickup; (4) shadow impacts; and (5) other issues related to the structure as a whole and as it related to Greenwood Avenue N.
14. The Board held a second EDG meeting on January 11, 2016. The additional public comments received reiterated comments expressed at the first EDG meeting and raised additional concerns related to the clerestory addition, lack of a setback for the building to the south, the need for a setback on the east property line, and other issues. The Board's deliberations included guidance for the Applicant concerning transitions between the proposal and properties to the east and south, and massing of the clerestory.
15. The Board held a first Recommendation meeting on August 1, 2016. The Board took public comment, which expressed similar concerns including materials proposed for the south wall, potential contaminants leeching onto property to the south, height of the

elevator shaft, and the adequacy of the east property line setback. The Board's feedback to the Applicant included increasing the setback for the east property line from three to five feet, using a light color on the south wall, and using windows on the east side that better mitigated for perceived loss of privacy for neighbors.

16. The Board's Final Recommendation, meeting took place on September 26, 2016. The Board again took public comment and reviewed the Applicant's design packet. The Board expressed satisfaction that the design had been responsive to their earlier recommendations. The Board voted 4-0 to approve the project moving forward with some identified conditions.
17. The Applicant did not request any building code departures as part of the design review process.

Director's Review and Decision

18. The Director reviewed the Board's recommendations and determined that they did not conflict with applicable regulatory requirements and law, were within the Board's authority, and were consistent with the design review guidelines. The Director therefore issued design review approval for the proposal with the Board's recommended conditions.
19. Following a public comment period, the Director reviewed the environmental impacts of the proposal and issued a determination of non-significance ("DNS") pursuant to SEPA, concluding that the proposal was not likely to have more than a moderate adverse impact on the environment.
20. Because the proposal went through design review, with numerous adjustments that addressed the transition between the proposal and adjacent properties, the Director determined that additional mitigation of height, bulk and scale impacts pursuant to SEPA was not warranted.
21. Concerning height, bulk, and scale the Director's DNS analysis states:

The proposal has gone through the design review process described in SMC 23.41. Design review considers mitigation for height, bulk and scale through modulation, articulation, landscaping, and façade treatment.

Section 25.05.675.G.2.c of the Seattle SEPA Ordinance provides the following: 'The Citywide Design Guidelines (and any Council-approved, neighborhood design guidelines) are intended to mitigate the same adverse height, bulk, and scale impacts addressed in these policies. A project that is approved pursuant to the Design Review Process shall be presumed to comply with these Height, Bulk, and Scale policies. This presumption may be rebutted only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been

adequately mitigated. Any additional mitigation imposed by the decision maker pursuant to these height, bulk, and scale policies on projects that have undergone Design Review shall comply with design guidelines applicable to the project.’

The height, bulk and scale of the proposed development and relationship to nearby context have been addressed during the Design Review process for any new project proposed on the site. Per the Overview policies in SMC 25.05.665.D, the existing City Codes and regulations to mitigate impacts to historic resources are presumed to be sufficient, and additional mitigation is not warranted under SMC 25.05.675.G.

22. In considering the impacts of the proposal on parking, the Director’s representative reviewed the traffic study and considered the opinion of the Department’s Senior Transportation Planner, and public comments concerning the project’s potential traffic and parking impacts. The Department’s Senior Transportation Planner had reviewed the traffic study, as well as traffic reports for comparable projects submitted by the Applicant, and for other projects proposed in the area.
23. The Department considered studies submitted by the Applicant concerning possible contamination of the soil on the site due to historical uses. The studies addressed “both the *potential vapor intrusion risk for the property* and the *potential threat to groundwater quality on the property*.” Exhibit 5 at 24 (emphasis in original). The Department concluded that “Compliance with [the Washington State Department of] Ecology’s requirements are expected to adequately mitigate any unlikely adverse environmental impacts from the proposed development and no further mitigation is warranted for impacts to environmental health per SMC 25.05.675.F.”

Appeal

24. The Appellant filed a timely appeal of the Director’s Interpretation, Decision, and the DNS.
25. The Appellant incorporated the issues raised in its request for the Interpretation into its appeal. The Interpretation addressed the following issues:
 - a. Whether the upper level setbacks established in the version of SMC 23.47A.014.B.3 in effect on September 3, 2015 apply to the development when it abuts a split-zoned property;
 - b. Whether rooftop features proposed for the development meet the definition of “clerestory” in SMC 23.84A.006, and may thus be constructed up to 4 feet above the otherwise applicable structure height limit pursuant to SMC 23.47A.012.C.2;
 - c. Whether the clerestory feature shades property to the north, requiring a shadow diagram described in SMC 23.47A.012.C.7;
 - d. Whether the proposal impermissibly provides an additional story under SMC 23.47A.012.A.1.a.2;

- e. Whether there was sufficient information to determine that the additional height allowed for the structure under SMC 23.47A.012.A.1 did not significantly block views per SMC 23.47A.012.A.1.c;
- f. Whether a proposed elevator penthouse may extend to a height of 60 feet in the NC2-40 zone by applying both the additional 4 feet of height allowed by SMC 23.47A.012.A.1.a and the 16 feet of additional height allowed under SMC 23.47A.012.C.4; and
- g. Whether the proposal is eligible for the frequent transit service exemption from parking code requirements.

26. The appeal of the Decision addressed the following issues:

- a. Whether DCI erred in failing to give priority to design guidelines relating to height, bulk, and scale and massing and zone transition over guidelines related to architectural design;
- b. Whether the clerestory feature violates applicable design guidelines; and
- c. Whether the design review process was inadequate because a shadow study was not provided to the Board during the review process.

27. The appeal of the DNS addressed the following issues:

- a. Whether the DNS adequately considered potential proposal's adverse height, bulk, and scale impacts;
- b. Whether the DNS adequately considered potential adverse parking impacts; and
- c. Whether the DNS adequately considered potential adverse soil contamination impacts.

Applicable Law

- 28. The purpose of design review is to "[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods while allowing diversity and creativity." SMC 23.41.002.A.
- 29. The Citywide Guidelines and Council-approved neighborhood design guidelines "provide the basis for Design Review Board recommendations and City design review decisions." SMC 23.41.010.
- 30. SMC 23.41.014 describes the design review process. "Based on the concerns expressed at the early design guidance public meeting or in writing to the Design Review Board, the applicable guidelines of highest priority to the neighborhood, referred to as the 'guideline priorities,' shall be identified. The Board shall incorporate any community consensus regarding design expressed at the meeting into its guideline priorities, to the extent the consensus is consistent with the design guidelines and reasonable in light of the facts of the proposed development." SMC 23.41.014.C.1.

31. The Director must consider the Board's recommendation. If four or more members of the Board agree to a recommendation, the Director "shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval," unless the Director concludes that the recommendation inconsistently applies the design review guidelines, exceeds the Board's authority, conflicts with SEPA conditions or other applicable requirements, or conflicts with state or federal law. SMC 23.41.014.F.3.
32. SMC 23.76.022 provides that appeals of Type II MUP decisions are to be considered de novo, and that the Hearing Examiner "shall entertain issues cited in the appeal *that relate to compliance with procedures for Type II decisions as required in this Chapter 23.76*, compliance with substantive criteria," and various determinations under SEPA. Emphasis added.
33. SMC 23.84A.038 defines "Transit service, frequent" 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."
34. SMC 23.47A.012.A controls structure height limit exemptions in the context of views.
35. SMC 23.47A.012.A.1.c provides "The Director shall reduce or deny the additional structure height allowed by this subsection 23.47A.012.A.1 if the additional height would significantly block views from neighboring residential structures of any of the following: Mount Rainier, the Olympic and Cascade Mountains, the downtown skyline, Green Lake, Puget Sound, Lake Washington, Lake Union, or the Ship Canal."
36. SMC 23.47A.012.C controls rooftop features in the context of height limits.
37. SMC 23.47A.012.C.2 allows "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. Insulation material, rooftop decks and other similar features, or soil for landscaping located above the structural roof surface, may exceed the maximum height limit by up to two feet if enclosed by parapets or walls that comply with this subsection 23.47A.012.C.2."
38. SMC 23.47A.012.C.7.c provides "The rooftop features listed in this subsection 23.47A.012.C.7 shall be located at least 10 feet from the north lot line unless a shadow diagram is provided that demonstrates that locating such features within 10 feet of the north lot line would not shade property to the north on January 21st at noon more than would a structure built to maximum permitted height and FAR: . . . Clerestories"
39. 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."

40. SMC 25.05.330 directs that, in making a threshold determination under SEPA, the responsible official shall determine “if the proposal is likely to have a probable significant adverse environmental impact” “Probable” means “likely or reasonably likely to occur...” SMC 25.05.782. “Significant” means “a reasonable likelihood of *more than a moderate adverse impact* on environmental quality.” SMC 25.05.794 (emphasis added). If the Director determines that there will be no probable, significant adverse environmental impacts from a proposal, a DNS is required. SMC 25.05.340.A.
41. The SEPA policy on height, bulk and scale explains that the City’s adopted land use regulations are intended to provide “for a smooth transition between industrial, commercial, and residential areas,” and to preserve neighborhood character and reinforce natural topography by controlling development’s height, bulk and scale. The policy acknowledges that “zoning designations cannot always provide a reasonable transition in height bulk and scale between development in adjacent zones,” SMC 25.05.675.G.1, and affords limited authority for requiring mitigation of height, bulk and scale impacts. SMC 25.05.675.G.2. However, the policy concludes by stating that a project approved through the design review process is presumed to comply with the SEPA policy on height, bulk and scale, and that the presumption may be rebutted “only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated.” SMC 25.05.675.H.2.c.
42. The SEPA policy on parking impacts states that “[i]t is the City's policy to minimize or prevent adverse parking impacts associated with development projects. Subject to the overview and cumulative effects policies ... the decision maker may condition the 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. Outside this area, “parking impact mitigation for multifamily development ... may be required only when on-street parking is at capacity, as defined by the Seattle Department of Transportation or where the development itself would cause on-street parking to reach capacity as so defined.” *Id.*
43. The SEPA cumulative effects policy provides, in relevant part, that “[t]he analysis of cumulative effects shall include a reasonable assessment of ... [t]he present and planned capacity of such public facilities as ... parking areas to serve the area affected by the proposal [and the] demand upon facilities ... of present, simultaneous and known future development in the area of the project or action.” SMC 25.05.670.B.1. “Subject to the policies for specific elements of the environment ... 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" SMC 25.05.670.B.2.

Conclusions

1. The Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director's decisions. SMC 23.76.022 C.6 and C.7; SMC 23.88.020.G.5. The Appellant bears the burden of proving that the Director's Interpretation, Decision, and DNS were "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Examiner, on review of the entire record, and in light of the public policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made. *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).
2. To meet its burden of proof under SEPA, the Appellant must present actual evidence of probable significant adverse impacts from the proposal. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001). As noted above, "significance" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794. This burden is not met when an appellant only argues that they have a concern about a potential impact, and an opinion that more study or review is necessary.

Interpretation

3. The Appellant alleges that the applicable Code requires a minimum fifteen-foot setback from the property line on all upper level floors in the northeast portion of the building, rather than the proposed ten-foot setback. The application vested to the following version of SMC 23.47A.014.B.3:¹

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 or that is across an alley from a lot in a residential zone, as follows:

- a. Fifteen feet for portions of structures above 13 feet in height to a maximum of 40;
- b. For each portion of a structure above 40 feet in height, additional setback at the rate of 2 feet of setback for every 10 feet by which the height of such portion exceeds 40 feet . . .

Exhibit 72 (SMC 23.47A.014.B.3).

¹ As addressed in a prehearing motion, the proposal vested in the version of the Code in effect on September 3, 2015.

The Applicant and Department argue that, because the site does not immediately abut the single family zoned portion of the split-zoned lots that SMC 23.47A.014.B.3 does not apply in this case. The Director stated in the Interpretation:

If the code had been intended to be applied in the manner suggested by the appellant, it would have used the term “residential use” instead of “residential zone.” The subject property may abut a residential use, but it does not abut a residential zone.

Exhibit 6 at 4. However, the Code provides that the setback is required where the proposal’s rear lot line “abuts a *lot* in a residential zone.” SMC 23.47A.014.B.3 (emphasis added). Thus, the Code does not consider whether the proposal’s rear lot line abuts a residential use, or a residential zone. Instead, the setback is required where the proposal’s rear lot line abuts a lot that is within a residential zone. In this case, the majority of the two lots to the east are “in a residential zone.” The proposal should be required to comply with the setback provisions of SMC 23.47A.014.B.3.

4. The Appellant challenges the approval of the proposal’s clerestory arguing that 1) it does not meet the definition of clerestories in SMC 23.84A.006, and 2) the proposed clerestory is not the type of clerestory envisioned by SMC 23.47A.012.C.2. As noted, 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.” This definition treats a clerestory as a wall, and not as a raised structure or additional story as might appear to be implied by the spelling of the term.² Thus, under the Code a clerestory is a wall, not the entire four-sided feature. The Code further calls for such a wall to contain vertical windows to meet the definition. In the Interpretation, the Department treated the entire four foot high roof feature that protrudes from the top of the proposed structure as a clerestory, and indicated that the “feature has windows on the west, south and north sides. Nothing in the definition of ‘clerestory’ requires windows on all sides.” Thus, the proposal was allowed a four-foot high rooftop feature with windows on only three sides as a clerestory. This is a clear error, and on this point the Interpretation should be reversed. To meet the definition of clerestory the east wall must also include vertical windows.

² Dictionary definitions of clerestory on inconsistent on this point, some even refer only to the windows themselves, but the City has adopted a definition that defines clerestory as a wall. See e.g. *Merriam-Webster Dictionary*. n.d. <https://www.merriam-webster.com/dictionary/clerestory> (July 13, 2017) (“an outside wall of a room or building that rises above an adjoining roof and contains windows”); *Collins English Dictionary*. 2017. <https://www.collinsdictionary.com/dictionary/english/clerestory> (July 13, 2017) “a row of windows in the upper part of the wall of a church that divides the nave from the aisle, set above the aisle roof 2. the part of the wall in which these windows are set;” *Oxford Learner’s Dictionaries*. 2017. <http://www.oxfordlearnersdictionaries.com/definition/english/clerestory> (July 13, 2017) (“the upper part of a wall in a large church, with a row of windows in it, above the level of the lower roofs”); Dictionary.com. 2017. <http://www.dictionary.com/browse/clerestory> (July 13, 2017) (“1. *Architecture*. a portion of an interior rising above adjacent rooftops and having windows admitting daylight to the interior. 2. a raised construction, as on the roof of a railroad car, having windows or slits for admitting light or air.)

The Appellant next argues that the proposal is not the type of clerestory envisioned by SMC 23.47A.012.C.2, because of its mass, and lack of transparency due to the absence of windows in the east wall. The Code does not identify any massing restrictions concerning the allowed rooftop features, and the Examiner has addressed the issue of transparency of the east wall above.

5. The Appellant challenges the placement of the clerestory arguing that it violates applicable Code, because of the shadow it will cast. The Appellant argues first that the Applicant's shadow study was not presented to the Board for their consideration, and therefore the Decision should be remanded. The Appellant cites no authority that would require that the shadow study be presented to the Board.³ However, even assuming the existence of such a requirement, procedural requirements under Chapter 21.41 are not within the Hearing Examiner's jurisdiction in an appeal of a design review decision. *See* SMC 23.76.022 (quoted in Finding 32).

The Appellant further argues that the Applicant's shadow study is inadequate. At the hearing, the Applicant introduced a revised shadow analysis (Exhibit 68) that was inconsistent with the Applicant's original shadow analysis (Exhibit 3) that had served as the basis for the Interpretation. Exhibit 3 shows the proposal's clerestory feature casting a shadow in the right-of-way adjacent to, but not on the building to the north at noon on December 21st. In Exhibit 68 the shadow analysis shows the clerestory casting a shadow on the building to the north at noon on December 21st, which would require the clerestory to be set back ten feet from the north property line for compliance with SMC 23.47A.012.C.7. In addition, there appear to be inconsistencies between the Applicant's shadow analysis materials submitted in Exhibits 3 and 64 (the Second EDG Packet Proposal). The Interpretation should be remanded to the Department for additional review and issuance of a revised Interpretation addressing the inconsistencies between Exhibits 3, 64 and 68.

The Applicant argues that even though the clerestory feature may cast a shadow on the building to the north at noon on December 21st, that shadow is subsumed within what would be the shadow caused by the maximum building envelope for a "structure built to the maximum permitted height and FAR," and therefore a ten-foot setback is not required. The Applicant states:

Here, mechanical, stair, or elevator penthouses are permitted as of right in this zone, and may exceed the applicable height limit by 16 feet and be located anywhere on the roof as of right. 23.47A.012.C.4.f. Penthouses are also counted towards maximum FAR. . . . Accordingly, a penthouse is permitted at the maximum FAR and height; in other words, it is the structure built to the maximum building envelope.

³ Appellant cites language for SMC 23.41.014.F.2 (Livable Phinney's Closing Argument at 34 ln. 7), but this language is not consistent with the version of the Code available to the Examiner. Even if the language quoted is accurate, it does not identify any requirement that the Board be provided a copy of the shadow analysis.

Applicant's Post-Hearing Brief at 38.

However, Applicant's interpretation of the Code would render SMC 23.47A.012.C.7 meaningless, as a clerestory feature could not exceed the height of the features identified in SMC 23.47A.012.C.4.f, and therefore its shadow could never exceed the shadow cast by a structure built to maximum permitted height and FAR. Further, under SMC 23.47A.012.C.1 "Smokestacks, chimneys, flagpoles, and religious symbols for religious institutions are exempt from height controls." Thus, under Applicant's interpretation of SMC 23.47A.012.C.7, maximum height for a project with a flag pole or smokestack would be measured from the top of such exempt and therefore unlimited in height features. As indicated in the Interpretation the maximum height for the proposed structure is 44 feet (*See e.g.* Exhibit 6 at 8). The elevator shaft, stairs, and clerestory are features added to the maximum height that do not increase the maximum permitted height of the entire structure for purposes of SMC 23.47A.012.C.7.

6. The Appellant's next challenge to the Interpretation asserts that the proposal is not eligible for exemption from Code parking requirements, because actual data demonstrates that bus service in the vicinity of the proposal does not meet the definition of frequent transit. The Department and Applicant respond that the City's reliance on published bus schedules is sufficient to determine whether or not bus service meets the frequent transit service definition, and that analysis of actual headway data is not necessary. The Code does not identify the methodology, or level of scrutiny, necessary to make this determination. In this case, the Appellant presented uncontroverted evidence, based on King County Metro data, that headways for the bus service in question did not meet the definition of frequent transit service 38.5% of the time over a period of approximately three months, and 36.8% of the time for another period of approximately one month, even after a new bus schedule was published and two new buses were added to the route. *See e.g.* Exhibits 18 and 84. This data was not contradicted by King County Metro representative Andrew Brick who testified at the hearing. While analysis of bus schedules might be sufficient in most circumstances, when presented with reliable data showing that bus service does not meet the definition of frequent transit service well over a third of the time over a period of months, the Department cannot simply ignore such information. The Interpretation should be remanded to the Director for consideration of the proposal in light of actual headway data to determine if the proposal qualifies for the frequent transit service parking exemption in SMC 23.54.015A.
7. The Appellant raised other issues in its appeal of the Interpretation that were not addressed at the hearing (*e.g.* that the clerestory creates an additional story, and that the height measurement of the elevator penthouse is did not meet Code requirements). These issues have been abandoned and should be dismissed.
8. The Appellant argues that the Applicant's view analysis is not adequate for purposes of Code compliance. The Appellant's witness concerning views, Marcel Bodsky, challenged the adequacy of the Applicant's view analysis because it lacked a survey, and offered his

own analysis performed on an iPad. There is no requirement in the Code that a survey be performed to determine view impacts, and the Appellant's did not demonstrate a clear error on the part of the Department in accepting the Applicant's analysis. Further, although Mr. Bodsky's testimony and analysis raised questions about the Applicant's analysis, it did not demonstrate any clear errors.

Decision

9. The Appellant maintains that design guidelines for applicable height, bulk, and scale, and massing and zone transitions take precedence over other design guidelines such as those that concern architectural integrity. The Appellant did not cite any authority supporting this argument. Nothing in the design guidelines or design review process suggests that any particular design guidelines take precedence over others. The Appellant has not shown that the Director's Decision accepting the recommendations of the Board was clearly erroneous in this regard.
10. The Appellant argues that the proposal's clerestory violates design guideline height, bulk, and scale provisions. No expert testimony was introduced by the Appellant on this issue. Citizen witness testimony provided by the Appellant addressed this issue only in the context of the entire structure's height, bulk, and scale, and did not demonstrate how the clerestory feature fails to fulfill the design guidelines listed in Appellant's closing argument. The Appellant has not shown that the Director's Decision accepting the recommendations of the Board was clearly erroneous.
11. The Appellant alleges that the Director erred in failing to require a setback from the south property line to minimize disruption of privacy to adjacent uses in deference to City-Wide Guideline CS2 D-5. The Appellant argues that "Neither the Design Review Board Recommendations nor the SEPA determination addressed the proposal's failure to implement" City-Wide Guideline CS2 D-5. However, the Board specifically identified City-Wide Guideline CS2 D-5 as a Priority Guideline for the proposal in its review (Exhibit 5 at 6), and the Board did not find that the proposal failed to respond to the Guideline. In addition, the Board called for a setback of the clerestory feature from the south side of the proposal. There is no clear error here.

DNS

12. The Appellant argues that the proposal's clerestory violates SEPA height, bulk, and scale provisions. The Appellant has not shown that the Director's Decision accepting the recommendations of the Board was clearly erroneous. Appellant did not present clear and convincing evidence that height, bulk and scale impacts documented through environmental review had not been adequately mitigated. In addition, the Appellant presented no evidence that significant adverse impacts would result from this rooftop feature, that impacts had not been adequately mitigated by the Design Review Process, or that evidence of any impacts was not in the record before the Director when the DNS was issued.

13. The Appellant argues that the Department erred in refusing to exercise its SEPA substantive authority to mitigate the height, bulk and scale impacts. The Department's substantive authority to mitigate the height, bulk and scale impacts is discretionary, and the record demonstrates that the Department fully considered the proposal's height, bulk and scale impacts.
14. The Appellant contends that the Director's DNS must be reversed because the record of parking impacts and cumulative parking impacts is incomplete and inaccurate. Appellant challenged the adequacy of some of the findings in the Applicant's traffic report. However, the Appellant presented no evidence regarding probable significant adverse environmental impacts or cumulative significant impacts of the project's parking impacts that were not in the record before the Director. For example, the Appellant did not provide evidence of significant adverse impacts that might result from spill-over parking into areas outside the urban village boundary. Evidence was introduced to show that there may be spill-over parking into areas outside the urban village boundary, but no evidence showed how impacts from such spill-over would rise to the level of being "significant" under SEPA. In addition, Appellant raised issues and concerns regarding parking impacts and the City's parking analysis that must be addressed in the context of policy and legislation, and not in a project level land use appeal.
15. The Appellant alleges that the DNS should be vacated, because DCI lacked adequate information regarding potential soil contamination on site that may leach to other properties. However, the record demonstrates that DCI did review environmental analysis provided by the Applicant concerning this issue. The Appellant presented no new evidence regarding probable significant adverse impacts from soil contamination that were not in the record before the Director.
16. The Appellant raised other issues in its DNS appeal that were not addressed at the hearing (*e.g.* significant adverse impacts concerning views and aesthetics). These issues have been abandoned and should be dismissed.
17. On review of the entire record, the Director's DNS and design review decisions were not shown to be clearly erroneous, and they should therefore be affirmed.
18. On review of the entire record, the Director's Interpretation was shown to be clearly erroneous in part, and it should therefore be reversed and remanded to the Director.

Decision

As noted in the Introduction, the Appellant filed a motion for leave to reply to comments filed by the Department and Applicant in response to new material (Exhibit 84) Appellant was allowed to file after the hearing was re-opened. The record was left open only for the Department and Applicant to respond to the Appellant's new evidence, and the Appellant's reply merely repeats arguments raised in its original motion to re-open the record, or at the hearing on that motion.

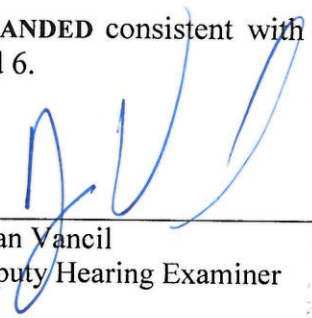
The Appellant's motion is therefore **DENIED**. The Applicant filed a document from the Department of Ecology with its closing argument after the record had closed, and without an accompanying motion to re-open the record. (*See* Kendal Declaration Exhibit E). Therefore, that document is not included in the record.

The Director's SEPA determination is **AFFIRMED**. The Director's design review decision is **AFFIRMED** subject to the conditions set forth in the Director's Decision dated December 22, 2016, and to the following condition stipulated to at the hearing:

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

The Director's Interpretation is **RESERVED** and **REMANDED** consistent with the findings and conclusion herein, in particular conclusions: 3, 4, 5 and 6.

Entered this 24th day of July, 2017.



Ryan Vancil
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

Appellant:

Livable Phinney
c/o Jeffrey M. Eustis
720 Third Ave., Ste. 2000
Seattle, WA 98104

Department Director:

Nathan Torgelson, Director, DCI
700 Fifth Avenue, Suite 1900
Seattle, WA 98104

Applicant:

Johnson Carr LLC
c/o Jessica Clawson and
Katie J. Kendall
701 Fifth Avenue, Suite 6600
Seattle, WA 98104

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Livable Phinney**. Hearing Examiner File: **MUP-17-009 (DR, W), S-17-002**, in the manner indicated.

Party	Method of Service
Livable Phinney c/o Jeff Eustis Aramburu & Eustis LLP eustis@aramburu-eustis.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Applicant c/o Katie Kendall McCullough Hill Leary, P.S. kkendall@mhseattle.com Laura Counley lcounley@mhseattle.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Michael Dorcy SDCI Michael.Dorcy@seattle.gov Patrick Downs Assistant City Attorney Patrick.Downs@seattle.gov Alicia Reise Alicia.Reise@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
SCI Routing Coordinator SCI_Routing_Coordinator@seattle.gov Sue Putnam Sue.Putnam@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

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Nathan Torgelson Nathan.Torgelson@seattle.gov	
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Roger Wynne Roger.Wynne@seattle.gov	
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Dated: July 24, 2017

TK

Tiffany Ku
Legal Assistant

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

LIVABLE PHINNEY

from a decision, interpretation, and SEPA
determination issued by the Director,
Seattle Department of Construction and Inspections

Hearing Examiner Files:
MUP-17-009 (DR, W)
S-17-002

Department Reference:
3020114

**ORDER CORRECTING
DECISION**

A clerical error was made in the decision issued in this matter. The error on page 15 reads:

The Director's Interpretation is **REVERSED** and **REMANDED** consistent with the findings and conclusions herein, in particular conclusions: 3, 4, 5, and 6.

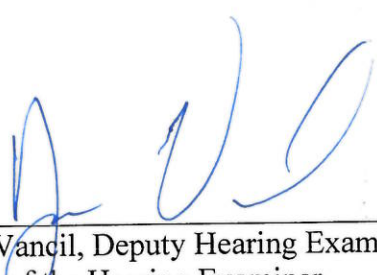
Hearing Examiner Rule 2.25 provides that clerical mistakes in decisions may be corrected by Order.

The decision is corrected to read as follows:

The Director's Interpretation is **REVERSED** and **REMANDED** consistent with the findings and conclusions herein, in particular conclusions: 3, 4, 5, and 6. The Examiner does not retain jurisdiction over this matter.

This order shall become a part of the decision, effective as of the date of the decision, and shall be attached to that decision.

Entered this 24th day of July, 2017.



Ryan Vancil, Deputy Hearing Examiner
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Seattle, WA 98124-4729
Phone: (206) 684-0521
Fax: (206) 684-0536

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order Correcting Decision** to each person listed below, or on the attached mailing list, in the matter of **Livable Phinney**, Hearing Examiner File: **MUP-17-009 (DR, W), S-17-002**, in the manner indicated.

Party	Method of Service
Livable Phinney c/o Jeff Eustis Aramburu & Eustis LLP eustis@aramburu-eustis.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Applicant c/o Katie Kendall McCullough Hill Leary, P.S. kkendall@mhseattle.com Laura Counley lcounley@mhseattle.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
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Dated: July 24, 2017

TK

Tiffany Ku
Legal Assistant

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

LIVABLE PHINNEY

from a decision, interpretation, and SEPA
determination issued by the Director,
Seattle Department of Construction and Inspections

Hearing Examiner Files:
MUP-17-009 (DR, W)
S-17-002

Department Reference:
3020114

**SECOND ORDER CORRECTING
DECISION**

A clerical error was made in the decision issued in this matter. The error on page 11 reads:

The Appellant further argues that the Applicant's shadow study is inadequate. At the hearing, the Applicant introduced a revised shadow analysis (Exhibit 68) that was inconsistent with the Applicant's original shadow analysis (Exhibit 3) that had served as the basis for the Interpretation. Exhibit 3 shows the proposal's clerestory feature casting a shadow in the right-of-way adjacent to, but not on the building to the north at noon on December 21st. In Exhibit 68 the shadow analysis shows the clerestory casting a shadow on the building to the north at noon on December 21st, which would require the clerestory to be set back ten feet from the north property line for compliance with SMC 23.47A.012.C.7. In addition, there appear to be inconsistencies between the Applicant's shadow analysis materials submitted in Exhibits 3 and 64 (the Second EDG Packet Proposal). The Interpretation should be remanded to the Department for additional review and issuance of a revised Interpretation addressing the inconsistencies between Exhibits 3, 64 and 68.

The Applicant argues that even though the clerestory feature may cast a shadow on the building to the north at noon on December 21st, that shadow is subsumed within what would be the shadow caused by the maximum building envelope for a "structure built to the maximum permitted height and FAR," and therefore a ten-foot setback is not required. The Applicant states:

Hearing Examiner Rule 2.25 provides that clerical mistakes in decisions may be corrected by Order.

The decision is corrected to read as follows:

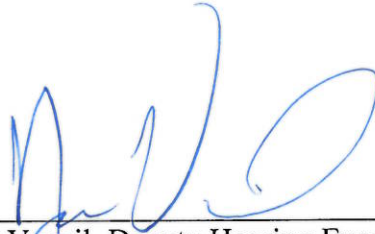
The Appellant further argues that the Applicant's shadow study is inadequate. At the hearing, the Applicant introduced a revised shadow analysis (Exhibit 68) that was inconsistent with the Applicant's original shadow analysis (Exhibit 3) that had served as the basis for the Interpretation. Exhibit 3 shows the proposal's clerestory feature casting a

shadow in the right-of-way adjacent to, but not on the building to the north at noon on January 21st. In Exhibit 68 the shadow analysis shows the clerestory casting a shadow on the building to the north at noon on January 21st, which would require the clerestory to be set back ten feet from the north property line for compliance with SMC 23.47A.012.C.7. In addition, there appear to be inconsistencies between the Applicant's shadow analysis materials submitted in Exhibits 3 and 64 (the Second EDG Packet Proposal). The Interpretation should be remanded to the Department for additional review and issuance of a revised Interpretation addressing the inconsistencies between Exhibits 3, 64 and 68.

The Applicant argues that even though the clerestory feature may cast a shadow on the building to the north at noon on January 21st, that shadow is subsumed within what would be the shadow caused by the maximum building envelope for a "structure built to the maximum permitted height and FAR," and therefore a ten-foot setback is not required. The Applicant states:

This order shall become a part of the decision, effective as of the date of the decision, and shall be attached to that decision.

Entered this 25th day of July, 2017.



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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Second Order Correcting Decision** to each person listed below, or on the attached mailing list, in the matter of **Livable Phinney**. Hearing Examiner File: **MUP-17-009 (DR, W), S-17-002**, in the manner indicated.

Party	Method of Service
Livable Phinney c/o Jeff Eustis Aramburu & Eustis LLP eustis@aramburu-eustis.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
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Dated: July 25, 2017

TK

Tiffany Ku
Legal Assistant