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

In the Matter of the Appeal of

MADISON COURT PARTNERS, LLC

from a decision issued by the Director,
Department of Planning and Development

Hearing Examiner File:
MUP-11-001(DR,W)

Department Reference:
3011010

Introduction

The Director of the Department of Planning and Development issued a Determination of Non-Significance (DNS) pursuant to Chapter 25.05 of the Seattle Municipal Code (SEPA), and design review approval pursuant to Chapter 23.41 Seattle Municipal Code, for construction of a commercial office building. The Appellant exercised the right to appeal the Director's SEPA determination and design review decision.

The appeal hearing was held on March 29, and 30, 2011, before the Hearing Examiner (Examiner). The appellant, Madison Court Partners, LLC, was represented by Leslie C. Clark, attorney-at-law; the applicant, Point 32 Development Company, was represented by Melody B. McCutcheon, attorney-at-law; and the Director, Department of Planning and Development (Director or Department), was represented by Lisa Rutzick, Senior Land Use Planner. The record was held open for the Examiner's site visit, which occurred on April 4, 2011.

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 inspecting 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 1501 East Madison Street. It is 10,000 square feet in size and located on Capitol Hill at the intersection of East Madison Street, 15th Avenue East, a brick-paved alley and East Pike Street. It sits within the southeast corner of the Capitol Hill Urban Center Village where the Capitol Hill, Central Area and Pike Pine neighborhoods meet.
2. The site is zoned Neighborhood Commercial 3 with a 65-foot height limit (NC3-65), as are the areas to the north, east and west. To the south, across the alley and across East Pike Street is Lowrise 3 (L3) zoning, which also extends in an easterly direction. See Exhibit 1.

3. The site is presently vacant. It was formerly developed with a small, single-story structure used as a restaurant and bar, and an associated parking lot. The remaining structures on the block include three apartment buildings of four or five stories each, a two-story single-family residential structure to the east, and across the alley to the south in the L3 zone, a four-story condominium building. The three apartment buildings are known collectively as the Madison Court Apartments, and the western-most building abuts the subject site. Surrounding development includes a mix of single-family and multifamily residential structures, commercial structures, mixed use structures and religious and educational structures of varied vintages that range from one to 12 stories in height. The newer structures in the area are generally five to six stories high. Directly west of the site is McGilvra Place, a raised, triangular-shaped public open space owned by the City.

4. The site slopes approximately 9 feet upward from west to east resulting in approximately a 10 percent grade.

5. East Madison Street is a principal arterial, East Pike Street is a minor arterial and 15th Avenue East is a local access street. The area is well served by public transit, with four transit routes located within two blocks, some with all-day, high-frequency service. Future streetcar and light rail stops will be located approximately one-half mile away, but will not be operational for several years.

Living Building Challenge and Living Building Pilot Program

6. The Living Building Challenge is a blueprint for a new approach to building that was developed by the International Living Building Institute and the Cascadia Green Building Council. It includes seven performance areas, or "petals"- Site, Water, Energy, Health, Materials, Equity and Beauty - each of which includes certain imperatives, or prerequisites, that a proposal must meet. See Exhibit 11. A project's compliance with the Living Building Challenge is determined by the International Living Building Institute after the building has been operational for at least 12 consecutive months. Exhibit 11 at 7.

7. The City's Living Building Pilot Program (Pilot Program) was adopted in 2009 and codified in Chapter 23.40 SMC. The goal of the Pilot Program is to "encourage the development of buildings that meet the Living Building Challenge by allowing departures from code requirements that might otherwise discourage or prevent buildings from meeting this standard." SMC 23.40.060.A. The overall intent of the Pilot Program is stated in SMC 23.40.060.A as :

1. Stimulate innovative development that meets the goals of the Living Building Challenge and City of Seattle design guidelines.
2. Encourage development that will serve as a model for other projects throughout the City and the region and will stimulate development of new Living Buildings.
3. Identify barriers to Living Buildings in current codes and processes.

8. Although the Pilot Program is intended to encourage buildings that meet the goals of the Living Building Challenge, qualifying projects that are granted departures may meet just 60% of the Challenge's prerequisites and certain prescribed alternative standards relating to energy and water usage and stormwater recapture. SMC 23.40.060.E.

9. Under the Code, the Director determines whether a proposal meets the application requirements for the Pilot Program. SMC 23.40.060.B. After construction and issuance of a certificate of occupancy, the Director determines whether the proposal actually complied with all applicable standards. A determination of noncompliance subjects the owner to a penalty of between one and five percent of the project's construction value. SMC 23.40.060.E; SMC 23.90.018.B.8.

Proposal

10. The proposal is for a six-story, 44,000 square-foot commercial office building, with approximately 36,000 square feet of office space.

11. The proposal is participating in the Living Building Pilot Program. It is designed to obtain all of its energy from alternative sources, in this case photovoltaic, and to use significantly less energy than a normal office building. It is also designed to capture all rainwater that can be used on site, and to treat gray water on site through a green roof and infiltrate it into a planting strip.

12. The arrays of photovoltaic panels would be mounted above the roof of the building in order to allow fire access to the roof. They would extend over the right-of-way on the north and west sides of the building and would run vertically down the south façade to a minimum of 26 feet above grade.¹ The vertical PV array would be sufficiently transparent for the building structure to be visible behind it. It would include an open vertical slot between the groupings of panels and a steel maintenance walk behind it and perpendicular to the building.

13. In order to improve light penetration and reduce energy usage, the floor-to-floor height for the building's upper floors would be two feet more than the typical 11 feet 6 inches.

14. The building's entries on East Madison Street and 15th Avenue East would be set back from the sidewalk, and levels three through six would be stepped back 15 feet from the property line on the north (Madison) and south (alley) sides. The northeast corner of the building would include a stairway, wrapped in glass on three sides, that would extend for most of the height of the building and three feet out over the East Madison Street right-of-way. All sidewalks would be retained at their present width.

¹ The extensions over the right-of-way are being addressed through the Seattle Department of Transportation and will be considered by the Seattle Design Commission and City Council.

15. On the east side, adjacent to the Madison Court Apartments, the proposed building would be set back five feet, resulting in a 10-foot-wide separation between the two buildings along the property line to allow for light and ventilation. This is similar to the setback conditions between buildings on the rest of the block. The east wall of the proposed building would include materials similar to the rest of the building, including non-reflective cladding, planters on levels three and four and glazing, with obscured glass being used where necessary to respect privacy. The east building wall would include some modulation, and the building height along the east property line would not exceed the allowed zoning height. However, the PV array above the roof would be set back just one foot from the shared property line.

16. Most of the condominium building across the alley to the south is aligned with the Madison Court Apartment buildings. However, the western-most part of the condominium would be aligned with the proposed structure and separated from it by a distance of approximately 16 feet. The distance between the proposed building and the property to the south across East Pike Street in the L3 zone would be approximately 66 feet.

17. The project would include alley access to a small, secured garage that would house bicycle parking, recycling areas, and a loading area large enough for delivery vans. Large delivery trucks would need to unload from the alley, or could unload from the street by obtaining a use permit.

18. No on-site parking is required in commercial zones within urban centers, and none is proposed for the project. The anticipated tenants in the building are all considered leaders in the environmental movement who are committed to reducing human impacts on the environment. Building occupants would rely primarily on public transportation and non-motorized modes of travel for their commute. For off-site travel, tenants would have access to ZipCars, currently located within three blocks of the site.

SEPA

19. The Applicant prepared a SEPA checklist that identified and evaluated environmental impacts of the proposal, Exhibit 20, and also submitted a transportation analysis prepared by a consulting transportation engineer. Exhibit 14. The engineer interviewed each of the major tenants to determine their expected mode of travel to and from the site and the programs they would implement to assure that it was used. Using a worst case scenario, the mode split showed that 25% of the employees would commute by automobile, 30% would walk or bike to work, and 45% would take transit. The transportation analysis includes the expected features of a Transportation Management Program (TMP) that might achieve this mode split.

20. The draft TMP for the proposal, Exhibits 15, includes features in addition to no on-site parking, such as substantial, secure, dry bicycle parking; on-site shower and locker facilities; a commuter information center in the building lobby; a commuter information packet for current and prospective tenants that includes information about transportation

options; a transit subsidy program of at least 50 percent for employees; subsidies for employees who bike or walk to work; a requirement that tenants participate in the TMP; and regular surveys of the TMP's effectiveness and associated reports to the Department.

21. The transportation engineer testified that large truck loading at the proposed building would be equivalent to approximately one truck every other day, including existing trucks, such as those for garbage and recycling, and that approximately three to four van-sized trucks would load or unload each day. Total deliveries would be expected to be lower than those for the restaurant and bar formerly on the site.

22. Using the rates provided in the ITE Parking Generation Manual, adjusted for an urban area and the mode split anticipated for the proposal, the transportation analysis concluded that the proposal could generate a peak parking demand of 26 vehicles on weekday afternoons. The engineer surveyed on-street parking within an 800-foot walking distance of the site, as well as nearby off-site, off-street parking. The analysis determined that no unrestricted on-street parking would be available in the vicinity to serve long-term employee parking needs. However, restricted two-hour, on-street parking was only 60% to 70% utilized during mid-day hours and would be available for short-term visitor parking associated with the proposal. All employees who drove to work would need to use pay parking lots in the vicinity, and the transportation analysis determined that there were sufficient spaces available in nearby lots, where the average utilization rate is approximately 35%.

23. The geotechnical engineer for the project reviewed the building permit plans for the project related to excavation, foundation and shoring, and coordinated his work with the structural engineers and others working on the project. The geotechnical engineer would provide full-time geotechnical monitoring during construction to the lowest level and then periodic checks until the foundation work was completed.

24. Notes on the shoring plans for the proposed building require that the contractor perform a visual and photographic property condition survey of the adjacent Madison Court building to document existing conditions prior to construction. The survey would include points inside the building if the owners granted access. Other notes on the same plans, as well as a Department correction notice, require careful survey monitoring of the adjacent building for any movement during the construction process.

25. The footing along the west wall of the adjacent Madison Court building extends several feet onto the subject property. The plans for the proposed building show a structural support and shoring system that includes a soldier pile wall with tiebacks and steel haunches that extend under this footing to support the entire west wall and prevent any movement during the construction process. This system goes far beyond normal Code requirements but would require approval by the building owners. Absent that agreement, the fallback would be a more robust soldier pile wall designed with larger, deeper piles to support a higher cantilevered load. Such a system would meet all construction standards, although some building movement would be possible. The City

Building Code requires that a remedial plan be implemented if one inch or more of movement is detected.

Design Review

26. A Living Building Technical Advisory Group (TAG) was assembled to advise the Applicant and Capitol Hill Design Review Board (Board) prior to the Early Design Guidance meeting on the proposal. The TAG met with the applicant on March 4, 2010 to provide feedback on the proposal, and two members of the Board attended that meeting. The TAG confirmed that the proposed photovoltaic array was the minimum size necessary to achieve the net zero energy goal for the proposal. The TAG's comments were provided to both the Applicant and the Board.

27. The Board held an extended Early Design Guidance public meeting on the proposal on March 17, 2010, at which they heard public comment and the Applicant's analysis of the site and proposal. The Applicant also explained how the proposed development was expected to meet the goals of the Living Building Challenge and requirements of the Pilot Program.

28. After visiting the site and considering the presentation and comments from the meeting, the Board identified the guidelines in the City-wide Design Guidelines for Multifamily and Commercial Buildings, and the Capitol Hill Design Guidelines, that it determined were of highest priority for the project. Those priorities included Guidelines A-1, A-10, B-1 and C-3, among others. The Board also provided design guidance to the Applicant under each identified Guideline. (All Guidelines identified by the Board are reproduced in Exhibit 16 and in the Director's decision, Exhibit 7, at pp. 5-12.) . The Board held an extended recommendation meeting on November 17, 2010 and again took public comment.

29. Guideline A-1 "Responding to Site Characteristics" states that the "siting of buildings should respond to specific site conditions and opportunities." Capitol Hill guidance includes "Retain or increase the width of sidewalks," and "New development in commercial zones should be sensitive to neighboring residential zones".

30. The applicable section of Guideline A-10 "Corner Lots" states that "Buildings on corner lots should be oriented to the corner and public street fronts". Capitol Hill guidance includes "Incorporate residential entries and special landscaping into corner lots by setting the structure back from the property lines," and "Provide for a prominent retail corner entry."

31. The Board's early design guidance on Guidelines A-1 and A-10, stated that the building's design on each side "must respond to the unique characteristics of the context on each side," that both building corners located at intersections "should be acutely addressed as both are important, but distinct edges," and that the Board was interested in "the shadow impacts from the proposed massing on neighboring properties." Exhibit 10 at 5 and 6. At the recommendation meeting, the Board "was pleased with the interesting

building form that responds uniquely to the various edge conditions," and noted that although the proposed building would cast shadows on the Madison Court Apartments, "such shadows would be cast by any structure built to the underlying zone height. Exhibit 10 at 6.

32. Guideline B-1 "Height, Bulk, and Scale Compatibility" states that "Projects should be compatible with the scale of development anticipated by the applicable Land Use Policies for the surrounding area and should be sited and designed to provide a sensitive transition to nearby, less intensive zones," and "Projects on zone edges should be developed in a manner that creates a step in perceived height, bulk and scale between the anticipated development potential of the adjacent zones." Capitol Hill guidance includes "Break up building mass by incorporating different façade treatments to give the impression of multiple, small-scale buildings, in keeping with the established development pattern," "Consider existing views...and incorporate site and building design features that may help to preserve those views from public rights-of-way," and "Design new buildings to maximize the amount of sunshine on adjacent sidewalks throughout the year."

33. The Board's early design guidance on Guideline B-1 stated that the structure mass should be located along Madison Street and the massing to the south should be relieved "by shifting the bulk from the south side and opening up more of a form transition down to the Lowrise zone," that the PV overhang and vertical PV array "[raise] critical issues with regard to blank walls, bulk and massing. The extension of the PV panels into the ROW creates a far larger sense of building mass that should strive to minimize its presence over the ROW and on the eastern side." Exhibit 10 at 7.

34. At the recommendation meeting, the Board was "pleased with the adjustments made to the PV array to create a less bulky appearance. These revisions include using bi-facial panels which have greater transparency and a longitudinal gap in the vertical array that allows light through the array to the building face." Concerning the relationship to the adjacent Madison Court building, the Board "noted that both buildings are within the same zone, so the transition to a less intensive zone is less applicable. The Board also observed that any proposed non-living building could be built to the zone maximum outright and would result in a taller structure than the existing building to the east." However, the Board "recommended that the design of the east façade include a finer grained texture in the materials and ensure translucency for the fenestration to provide privacy to the residential units to the east. The Board greatly appreciates the wrapping of the building in the same material palette and notes that is both unusual and commendable to have all sides of the building treated equally with regard to materials to create a consistent, finished building on all façades. Furthermore, the materials are durable and of high quality." Exhibit 10 at 7.

35. The Board also discussed the PV array under other Guidelines. The applicant submitted pages 26 to 31 of Exhibit 19, the recommendation packet, primarily in response to those discussions. Under Guideline C-2 "Architectural Concept and Consistency," the Board's early design guidance had requested "details of how the PV

panels fit together and how they will be integrated with the rest of the building design, particularly the underside of the PV and the vertical PV array on the south side." At the recommendation meeting, the Board "reviewed renderings showing the underside of the PV array and how it would appear from the pedestrian perspective and agreed that the changes to the vertical array made the structure lighter and less imposing over the sidewalk." Exhibit 10 at 8. Under Guideline C-4 "Exterior Finish Materials," the early design guidance stated that the Board "strongly agreed that much more detail regarding the vertical PV array is necessary. What this array looks like to neighbors and pedestrians is crucial. The design of this array should be mindful of glare and blank wall effects. The Board noted concern for the portion of the array that projects over the sidewalk and agreed that this feature should feel light and elegant, not heavy and oppressive." At the recommendation meeting, the Board commented that the "PV array has been revised to be bifacial which allows clear area for light transmittance through the panels." Exhibit 10 at 10. Under Guideline D-2 "Blank Walls," the Board's early design guidance "raised concerns that the PV array that extends over the building and then downwards (the 'mud flap') along the southern vertical elevation must be eliminated or at least reduced in scale to alleviate the sense of a looming, blank wall." At the recommendation meeting, the Board "was very pleased with the revision to the vertical array to now include a vertical slot that also serves as the terminus of the maintenance catwalk. The Board felt that this update, along with the change to bifacial panels that allow greater light and views through the panels, has created an elegant solution to a necessary part of the Living Building Challenge." Exhibit 10 at 11.

36. Guideline C-3 "Human Scale," states that the "design of new buildings should incorporate architectural features, elements and details to achieve a good human scale." Capitol Hill guidance includes "Improve and support pedestrian-orientation by using components such as: non-reflective storefront windows and transoms; pedestrian-scaled awnings; architectural detailing on the first floor; and detailing at the roofline." The early design guidance stated that the "Board agreed that activation of both the Madison and 15th Avenue streetscape is desirable. The relationship of the commercial and retail spaces, as well as the entry points to the sidewalk are a critical consideration." At the recommendation meeting, the Board "discussed the façade scales and agreed that the north and south façades and upper level setbacks respond well to the neighborhood on either side [of the building]. The Board noted that the Madison Street façade successfully transitions to the human scale at ground level." Exhibit 10 at 8-9.

37. The Board determined that the proposal met the applicable Guidelines and recommended that it be approved by the Director with certain conditions relating to façade design and treatment, rain collection on the PV vertical array, and the 15th Avenue elevation and entrance. Exhibit 10 at 15.

Development Standard Departures

38. Under SMC 23.41.012.A, a departure "may be allowed if an applicant demonstrates that departures from Land Use Code requirements would result in a development that better meets the intent of the adopted design guidelines."

39. The Board unanimously² recommended four departures from development standards for the proposal. The Board agreed that the departure for the structural building overhang for the Madison Street stair met the standard departure criteria, determining that it was designed as a prominent architectural feature that enhances the Madison Street entrance, and that its design was a critical feature in the building's design and its presence along Madison Street. Exhibit 10 at 14.

40. Projects participating in the Pilot Program may receive additional departures from Land Use Code requirements. To do so, the applicant must "demonstrates that the departure would result in a development that better meets the intent of the adopted design guidelines, or that the departure would result in a development that better meets the goals of the Living Building Challenge and would not conflict with adopted design guidelines." SMC 23.41.012.D.1. In making its recommendation on these departures, the Design Review Board "shall consider the extent to which the anticipated environmental performance of the building would be substantially compromised without the departures." *Id.*

41. The goal, or "intent," of the Energy Petal of the Living Building Challenge is to "signal a new age of design, wherein the built environment relies solely on renewable forms of energy and operates year-round in a pollution-free manner. In addition, it aims to prioritize reductions and optimization before technological solutions are applied to eliminate wasteful spending - of energy, resources, and dollars." Exhibit 11 at 22. The imperative under the Energy Petal is that 100% of the project's energy needs are to be supplied by on-site renewable energy on a net annual basis. Exhibit 11 at 23.

42. The "intent," of the Equity Petal is to "correlate the impacts of design and development to its ability to foster a true sense of community." Exhibit 11 at 36. The "Rights to Nature" imperative under the Equity Petal states that the "project may not block access to, nor diminish the quality of fresh air, sunlight and natural waterways for any member of society or adjacent developments." Exhibit 11 at 39 (footnotes omitted). This imperative includes a table showing the maximum amount of shading allowed on adjacent building façades and rooftops.

43. The Board determined that three departure requests met the criteria for departures specific to buildings in the Pilot Program. A height departure was sought for up to 10 feet above the 65-foot base height of the zone in order to increase floor-to-floor heights and thereby meet daylighting/energy requirements for the Living Building Challenge. The Board was "pleased with how the design of the PV vertical array was addressed in response to the EDG" and determined that both the height departure and PV array were necessary to meet Living Building Challenge standards and did not conflict with design guidelines. Exhibit 10 at 13-14.

² The Director's decision incorrectly states that three or four Board members were in attendance at the recommendation meeting. At hearing, the Department representative corrected the errors to state that all six Board members were in attendance and recommended approval of the proposal and departures.

44. A departure was sought from the development standard that requires one loading berth for office space of more than 40,000 square feet. The proposed loading area would not meet loading berth dimensional requirements. A living building requires an unusual amount of space for building systems, and the proposal would have only approximately 36,000 square feet of usable office space. Further, loading from large vehicles would be an infrequent occurrence, and a requirement for a loading berth would result in lower floor-to-floor heights. Therefore, the Board determined that the departure was necessary for the building to meet the Living Building Challenge and did not conflict with the design guidelines. However, the Board recommended that a condition be required for a loading plan to address over-height vehicles that do not fit in the garage. The loading plan was to control access and include community outreach. The Board also supported establishment of a loading zone on the street. Exhibit 10 at 14.

45. The maintenance walk under the south PV array would be an integral part of the array, and the Board was not certain that it required a departure from development standards for building overhangs. However, the Board found that if a departure was needed, the departure criteria were met: The maintenance walk was a necessary part of an essential element required to meet the Living Building Challenge and, being narrow and of simple design and grated material, it did not conflict with the design guidelines. Exhibit 10 at 14-15.

Director's Decision

46. The Director analyzed the proposal pursuant to SEPA, including its long-term parking impacts. The Director determined that the proposal would not result in significant adverse environmental impacts and issued a DNS for it.

47. The Director also concluded that the Applicant's design successfully responded to the Board's guidance. The Director reviewed the Board's determinations and recommended conditions and agreed with them. The Director therefore issued design review approval for the proposal subject to the recommended conditions. The Director inadvertently omitted the Board's condition requiring a loading plan for the proposal.

Appeal

48. The Appellants assert that that the scale of the building conflicts with Guidelines A-1, A-10, B-1 and C-3³; that the departures for structure height and for the structural building overhangs for the Madison Street stairwell and the maintenance walk conflict with Guidelines A-1, B-1 and C-3; that the proposal fails to meet the requirements under the Pilot Program for Code departures for structure height and loading berths; and that the Director failed to consider the proposed roof projections under Guidelines A-10, B-1 and

³ Additional Guidelines were cited in the appeal but were not addressed at hearing and are therefore waived.

C-3⁴. They also assert that the proposal would have significant adverse parking and soil/stability impacts that were not sufficiently mitigated.

49. Appeal issue four was withdrawn by the Appellant prior to hearing, and all references to traffic impacts in appeal issue seven were dismissed at hearing. Other issues raised in the appeal were dismissed, in whole or in part, by a prehearing order.

Other Applicable Law

50. The City-wide Design Guidelines “and neighborhood design guidelines approved by the City Council ... provide the basis for Design Review Board recommendations and City design review decisions”. “Neighborhood design guidelines ... augment and make more specific” the City-wide Guidelines. SMC 23.41.010.

51. “The Director may condition a proposed project to achieve compliance with design guidelines and to achieve the purpose and intent of [Chapter 23.41 SMC]. For applications accepted into the Living Building Pilot Program ... the Director may also condition a proposed project to achieve the purpose and intent of the Living Building Pilot Program.” SMC 23.41.014 F.1. However, the Director must consider the Board’s recommendation. SMC 23.41.014 F.3.

52. “Probable” is defined under SEPA as “likely or reasonably likely to occur....” SMC 25.05.782. “Significant is defined as “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” SMC 25.05.794.

53. SMC 25.05.330 directs that, in making a threshold determination, the responsible official shall determine “if the proposal is likely to have a probable significant adverse environmental impact”. If the responsible official reasonably believes that a proposal may have such an impact, an environmental impact statement is normally required. *Id.* If the responsible official determines that there will be no probable significant adverse environmental impact, a determination of nonsignificance is to be issued. SMC 25.05.340.

54. The City’s SEPA Overview Policy states, in part, that “[m]any environmental concerns have been incorporated in the City’s codes and development regulations. Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation,” subject to certain exceptions not applicable here.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC. The Examiner must give substantial weight to the Director’s decisions, SMC

⁴ Additional Guidelines were cited in the appeal but were not addressed at hearing and are therefore waived.

23.76.022 C.7, and the Appellant bears the burden of proving that the Director's design review decision and DNS are "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 764, 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, 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. The Appellant argued at hearing that the Director failed to independently review the proposal and granted inappropriate deference to the Board. This claim was not included in the appeal and is therefore waived. Moreover, although the Director inadvertently included boilerplate language on deference to the Board, the decision shows that the Director performed her own independent analysis before agreeing with the Board's conclusion that the proposal conformed to the Guidelines and the departures met all Code requirements.

3. The Appellant claims that the scale of the proposed building conflicts with Guidelines A-1 on site characteristics, A-10 on corner lots, B-1 on height, bulk and scale compatibility, and C-3 on human scale. In this regard, the Appellant's architect testified that the proposal did not meet A-1 because sidewalk widths were retained rather than being increased. Yet Guideline A-1 expressly provides that sidewalk widths may be retained. The architect testified that the proposal did not meet A-10 because the building was not set back from the corner. However, the Capitol Hill guidance to "Incorporate residential entries and special landscaping into corner lots by setting the structure back from the property lines" applies to residential structures, while the guidance to "Provide for a prominent retail corner entry" applies to commercial structures like the proposal. This is reinforced by the photographic examples for Guideline A-10, which show a residential structure set back from a landscaped corner, and a commercial structure built to the corner but with a prominent, recessed entry. *See Capitol Hill Neighborhood Design Guidelines*, effective September 21, 2005. The Board's early design guidance appropriately recognized this distinction and focused on how the proposal's building corners were addressed.

4. The Appellant's architect testified that the proposal did not meet Guideline B-1 because it was not compatible with development in the L3 zone to the south or with the park to the west. He stated that the lack of compatibility was magnified by the proposal's projections over the right-of-way and the 10-foot structure height departure. Concerning Guideline C-3, he focused on the pedestrian viewpoint and the increase in the "apparent" height, bulk and scale from the combined effects of the height departure and the PV array.

5. The proposed building is definitely taller than the Madison Court Apartments, but it is consistent with the scale of development anticipated by the underlying commercial zoning, as required by Guideline B-1. As recognized by the Board, a 65-foot structure that would be allowed outright on the site could be built to the property line and would also block the entire western side of the adjacent Madison Court building. Further, the Department's representative and the Applicant's architect both testified that with allowed

height bonuses for rooftop features and sloped lots, a mixed use proposal on the site, or anywhere on the block along East Madison Street, could achieve a height just one to three feet below the height of the proposal with the 10-foot structure height departure.

6. The Appellant's architect's concern with the proposal's compatibility with its surroundings, including with the adjacent L3 zone, failed to consider the measures taken by the Applicant in response to the Board's early design guidance on height, bulk and scale (B-1) and on achieving a good human scale (C-3). These included stepping the upper levels of the building back 15 feet, incorporating high levels of transparency into the design, changing the vertical PV array to more transparent panels and creating an opening between the panel groupings, incorporating the maintenance walk, choosing materials and colors that lighten the bulk of the building, and using the same quality of materials on all sides. The architect also failed to consider the effects of existing street trees on a pedestrian's perception of the building, particularly the mature trees in the park, and the effect of separations provided by the rights-of-way between the proposal and the L3 zone. The Board and the Director appropriately considered all of these measures in determining that the proposal responded well to the neighborhood on all sides and transitioned to a human scale at ground level, as required by Guidelines B-1 and C-3.

7. The Appellant also claims that the Director failed to consider the proposed roof projections under Guidelines A-10, B-1 and C-3, but this claim is contradicted by the extensive record of the Board's consideration of all aspects of the PV arrays in conjunction with the height, bulk and scale of the proposal. The Director's testimony and decision show that she agreed with the Board's initial concerns about both arrays, and with the Board's ultimate conclusion that those concerns were addressed satisfactorily by the revisions to the project. The evidence also shows that the arrays that project over the rights-of-way will receive additional scrutiny before other City review bodies.

8. The Appellant asserts that the 10-foot structure height departure does not result in a development that better meets the goals of the Living Building Challenge, as required by SMC 23.41.012.D.1. The evidence shows that this departure is required to allow increased daylighting to the upper floors of the proposed building in order for it to meet the net zero energy imperative of the Living Building Challenge. The Appellant does not dispute this. Instead, the Appellant focuses on the fact that the PV arrays on the building extend over the rights-of-way, and thus, all energy would not be produced "on-site" as required by the LBC energy imperative. The Appellant also observes that the proposal would cast shadows over the Madison Court properties even if they were built to the allowed 65-foot height limit. The Appellant reasons that this shading would not be consistent with the Rights to Nature imperative of the Living Building Challenge, and that the structure height departure that permitted the shading would therefore not result in a development that better meets the goals of the Living Building Challenge.

9. Even if the Examiner had jurisdiction to determine whether a proposal meets the imperatives of the Living Building Challenge, the Appellant did not show that the proposal exceeds the specific amount of shading allowed under the Rights to Nature

imperative of the Living Building Challenge. More important, under the Living Building Challenge, only the International Living Building Institute has authority to decide whether the imperatives have been met, and this is done approximately a year after a building achieves occupancy. For buildings in the City's Pilot Program to receive a departure under SMC 23.41.012.D.1, it must be shown only that a development would better meet the goals of the Living Building Challenge with the departure than it would without the departure, and in reaching that decision, the Board and Director are to consider "the extent to which the anticipated environmental performance of the building would be substantially compromised without the departures".

10. As discussed above, the goals of the various petals of the Living Building Challenge are not stated as equivalent to its imperatives. But even if they were, the City's departure criteria must be read together with SMC 23.40.060.E.1, which states that "qualifying projects [in the Pilot Program] that are granted departures" must meet just 60 percent of the "prerequisites of the Living Building Challenge". The Appellants did not demonstrate that the proposal fails the 60 percent threshold. The evidence clearly shows that the proposal would better meet the net zero energy imperative of the Living Building Challenge with the structure height departure than without it. Without the departure, the environmental performance of the proposal would be substantially compromised, and it would meet neither part of that imperative.

11. The Appellant alleged that the loading berth departure does not result in a development that better meets the goals of the Living Building Challenge, but provided no evidence in support of that appeal issue, and it should be dismissed.

12. The Appellant also alleged that the departures for the structural building overhangs for the Madison Street stairwell and the maintenance walk conflict with Guidelines A-1, B-1 and C-3, but provided no evidence in support of that appeal issue, and it should be dismissed. The Appellant argued that the departure for the stairwell should be overturned because the Appellant contends that the Director's decision fails to document in detail how it meets the Code's departure criteria. However, this would turn the burden of proof in this case on its head. The Examiner is required to give substantial weight to the Director's design review decision, and the burden is on the Appellant to affirmatively demonstrate that it is clearly erroneous.

13. The Appellant failed to meet its burden of demonstrating that the Director's design review decision is clearly erroneous, and it should be affirmed.

14. The Appellant alleges that the proposal would have significant unmitigated adverse impacts on the structural stability of the abutting Madison Court property, and presented expert testimony in support of the allegation. However, unlike the Applicant's geotechnical engineer, the Appellant's expert had not reviewed the building permit plans or the notes on the shoring plans for the proposal. Those notes include a requirement for an existing conditions survey and for settlement monitoring of the adjacent building. These are two of the three elements that the Appellant's expert advocated. The Appellant states that although these requirements are included in the plans, only one is also required

by the Building Code. However, the referenced plans constitute “the project” for which the DNS was issued. The Appellant's allegation that the Director's decision was deficient in failing to mention the Building Code's requirement for settlement monitoring is also unpersuasive. The Building Code is one of the “City regulations” referred to in the SEPA overview policy, and that policy is expressly included within the Director's decision.

15. The Applicant notes that the Director's decision fails to require the structural support and shoring system that includes a soldier pile wall with tiebacks and steel haunches to support the adjacent building. Again, this system goes well beyond Code requirements and also requires the adjacent owner's approval. The evidence shows that, absent that approval, a more robust soldier pile wall would be sufficient to meet construction standards, making it unnecessary to require the failsafe system.

16. The Appellant alleges that the proposal would have significant unmitigated adverse parking impacts. Both the Appellant's and the Applicant's evidence showed that the proposal will cause some spillover parking at times. The higher spillover estimate by the Appellant's expert's was not convincing, however, because it was based on assumptions for which no basis was shown, such as the assumptions that every employee would be on the site every day, and that all employees would be on the site at the same time.

17. The Appellant contends that a requirement for covenant parking is necessary to sufficiently mitigate the impacts of spillover parking from the proposal, but the evidence does not support such a requirement. The record shows that there would be ample short-term parking for visitors to the building, and ample long-term, paid parking in the area for employees who chose to commute by car. Covenant parking, paid by the building owner, would also contradict the aggressive TMP that the Appellant advocates for the proposal. The concern that available parking lots will disappear over time is offset by the fact that public transit opportunities are scheduled to increase over the same time period. The concern also ignores the undisputed evidence that as convenient, available parking decreases, commuting behavior tends to change. There is no clear error here.

18. The Appellant's request for a more aggressive TMP is reasonable, and most of the Appellant's suggested additions were agreed to by the Applicant. In fact, the evidence shows that the TMP is still in draft form. In light of the Applicant's ambitious SOV goal, additional elements will be required for the TMP, including a guaranteed ride home for employees, a provision on flexible work hours for employees and a telecommuting program for employees.

19. The need for a restricted parking zone was included in the appeal, but the Appellant presented no evidence on it. Nonetheless, the Applicant agreed to support a request to the City for an RPZ in the vicinity of the site, and that will be added as a condition.

20. The condition requiring a loading plan, which was requested by the Board, will also be included.

21. The Applicant agreed to the Appellant's requested condition of a sign in the alley informing truck drivers to turn off their engines and compressors while loading or unloading, and it will be included.
22. The Appellant did not meet its burden of demonstrating that the Director's DNS was clearly erroneous, and it should be affirmed with some modifications to the conditions.

Decision

Appeal issue 5 is **DISMISSED**, and appeal issue 2 is **DISMISSED** as to the loading berth departure.

The Director's design review decision is **AFFIRMED**. The Director's DNS is **MODIFIED** as follows:

RECOMMENDED CONDITIONS-SEPA

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Prior to Issuance of a Building Permit

2. A Transportation Management Program (TMP) shall be prepared and submitted to DPD. It shall be consistent with Director's Rule 19-2008. The goal for this TMP will be a maximum SOV rate of 25 percent for all site employees. The elements of the October 1, 2010 draft TMP will be included in the final TMP developed for the project; ~~proposed elements may be modified~~ The TMP shall also include the following elements: A guaranteed ride home program; a provision for flexible work hours for employees; a telecommuting program for employees; and a commitment that the building owner will support a request by the neighborhood for a RPZ in the vicinity of the site, or for expansion of an existing RPZ. Additional elements may be added following review by City of Seattle staff. Such additions or modifications might include, but are not limited to, a greater subsidization of ORCA passes and a restriction on employees of certain building tenants driving a car to work.
3. The Applicant shall submit to the Director, in a form satisfactory to the Director, a loading plan to address over-height (over 9 feet) vehicles that do not fit in the garage. The plan shall also include a community outreach component. The plan shall control access and shall include a requirement that the building owner maintain a sign in the alley directing truck drivers to turn off their engines and compressors while loading or unloading.

During Construction

34. The hours of construction activity shall be limited to nonholiday weekdays between the hours of 7:00 a.m. and 6:00 p.m. and between the hours of 9:00 a.m. and 6:00 p.m. on Saturdays (except that grading, delivery and pouring of cement and similar noisy activities shall be prohibited on Saturdays). This condition may be modified by DPD to allow work of an emergency nature. This condition may also be modified to permit low noise exterior work (e.g., installation of landscaping) after approval from DPD.


45. For the duration of the construction activity, the applicant/responsible party shall cause construction truck trips to cease during the hours between 4:00 p.m. and 6:00 p.m. on weekdays.

For the Life of the Project

56. Maintain TMP goal of 25 percent maximum SOV rate for all site employees.

As modified, the Director 's DNS is **AFFIRMED**.

Entered this 11th day of April 2011.


Sue A. Tanner
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.