

**APPELLANT INFORMATION**

**1. Appellant:**

Name: Livable Phinney, a Washington non-profit corporation

**2. Authorized Representative:**

Name: Jeffrey Eustis, Aramburu & Eustis, LLP

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City, State & Zip: Seattle, WA 98104

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**DECISION BEING APPEALED**

1. **Decision appealed:** Supplement to Interpretation No. 17-002 (copy attached).

2. **Property Address:** 6726 Greenwood Ave N, Seattle, WA

**3. Elements of decision being appealed.**

- Adequacy of conditions
- Variance
- Design Review and Departure
- Adequacy of EIS
- Conditional Use
- Interpretation (See SMC 23.88.020)
- EIS not required
- Short Plat
- Major Institution Master Plan
- Rezone
- Other (Specify:)

**APPEAL INFORMATION**

**1. What is your interest in this decision? How are you affected by it?**

- a. Livable Phinney is a Washington non-profit corporation organized to protect the interests of residents in the Phinney Ridge neighborhood. Livable Phinney appealed the Master Use Permit for the Phinney Flats project and concurrently

appealed SCDI's Interpretation of the land use code concerning parking reductions for projects in proximity to frequent transit. HE File Number MUP-17-009. The Examiner remanded the Department's interpretation on frequent transit and other issues. (excerpt below from Decision, July 25, 2017)

*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.*

- b. Livable Phinney has been waiting for this revised interpretation and we now find that the revision (now titled a Supplement to Interpretation No. 17-002) is incorrect and continues to misapprehend the significance of actual transit on-time performance to a person's decision to use transit on a regular basis so as not to require on-site parking in new developments.
- c. Residents in Phinney Ridge who currently live near the proposed Phinney Flats site and neighborhood businesses that depend on street parking for their patrons, will be adversely impacted by the spillover parking that will inevitably be generated by the project. Evidence presented at the hearing in May, 2017 showed that the available legal street parking within the vicinity of the proposed Phinney Flats development is fully utilized with no excess capacity and no available commercial parking to absorb the estimated parking demand that will be generated.

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2. What are your objections to the decision being appealed?

- a. The interpretation, produced six months after the Hearing Examiner's remand, does not provide sufficient evidence or analysis to support the conclusion that the King County Metro Bus Route #5 meets the code definition of frequent transit service (FTS) such that the Phinney Flats proposal can be permitted without providing any on-site parking.
- b. In the Findings of Fact, there are references to two older SDOT planning documents, (a draft document from 2004 and a transit monitoring report from 2007). These documents form the basis of a convoluted argument about the presumed definition of transit headways at the time the City Council passed Ordinance No 123495 (2010) and Ordinance 123939 (2012). These do not constitute appropriate legislative history and they do not indicate Council intent because there is no evidence they were considered by the Council at the time the two cited ordinances were passed several years later.
- c. As the Hearing Examiner has noted in a prior relevant decision [MUP-14-006 (DR, W)/S-14-001] where legislative intent was invoked to justify a now withdrawn Director's Rule concerning averaging to achieve a 15 minute headway – *“However, it is just as likely that in adopting the definition, the Council intended that SEPA mitigation for parking impacts be foreclosed for multifamily projects in urban villages only when nearby transit service meets the very specific criteria for consistent regularity that the Council spelled out in the definition.”* Conclusions Paragraph 14. (emphasis added)
- d. The decision misuses the King County Metro 2017 System Evaluation report to retroactively impose a new definition of “on time” to the SMC definition of frequent transit 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.” SMC 23.84A.038 (Emphasis added). Metro's definition of a 15-minute headway stretches to 20.5 minutes. The developer and SDCI seize upon an analysis technique that has not been used by SDCI in prior decisions or Director's Rules and does not demonstrate the equivalency of Metro's “weekday” “PM peak hour” or “weekend” to the code requirements for compliance over 12 and 18 hours per day. The applicant and SDCI intentionally presents data from only one southbound #5 stop because ‘on-time’ performance is substantially worse northbound. Also, the peak time for south-bound (toward downtown) ridership on the #5 bus is not 3-6 PM.
- e. The interpretation acknowledges that King County 2017 System Evaluation Report finds that the Route #5 is still not meeting all of Metro's performance standards but mysteriously concludes that this is somehow consistent with the definition of frequent transit service. There is a reference to added service hours but no documentation is provided about the added service or the impact on bus on-time performance.
- f. The findings disregard the importance of reliability on decisions to use transit. Basing the definition of frequent transit on actual arrival times is important because patrons catch buses at actual times and need to be at their destinations at predictable times. The linkage between frequent transit and vehicle parking requirements is weak at best but more so when the definition of frequency is disconnected from reality. The interpretation cherry picks the Metro 2017 System Evaluation Report to conclude that

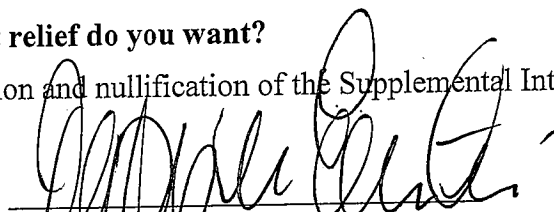
the #5 bus is “close enough” to Metro’s definition of on-time performance but does not acknowledge other of Metro’s criteria including crowding and service growth. If there’s no room on the bus today, there is no frequent transit. If there is no guarantee of additional service for the expected future riders in the FTS zone, there is no frequent transit.<sup>1</sup>

- g. The interpretation erroneously concludes that using actual arrival times is not feasible and developers would not be able to take advantage of frequent transit parking reductions. This is wrong because the data exists to demonstrate actual performance over very recent time intervals. What is lacking is a willingness to use this data and to make simple policy decisions about that appropriate time interval to use for permitting purposes. Relying on a printed schedule is arbitrary in comparison.
- h. The department asks for deference to its decision, again relying on the argument that their past practices and assumptions about the Council’s intent in defining frequent transit is good enough. Their preference to rely on printed bus schedules because they have always done it that way is not a justifiable standard for deference. Simply because in 2010 (or since), the Director did not request bus performance data from Metro, or even if that data was not available then, does not excuse SDCI from using available data today.
- i. To the extent it relies upon the GTC report referenced at Finding of Fact 8, the interpretation lacks support by substantial evidence of the actual performance of Route #5.

**3. What relief do you want?**

Rejection and nullification of the Supplemental Interpretation.

Signature:



Jeffrey M. Eustis, WSBA No. 9262  
Attorney for Livable Phinney

Date: February 28, 2018

**Appeal and appeal fee e-filed with:**

Mailing Address: City of Seattle  
Office of Hearing Examiner  
P. O. Box 94729  
Seattle, WA 98124-4729

Physical Address: Seattle Municipal Tower  
700 5<sup>th</sup> Avenue, Suite 4000  
Seattle, WA 98104  
Phone: (206) 684-0521

<sup>1</sup> There are currently over 1,000 units of housing permitted for construction along the Route 5 bus corridor from N 132<sup>nd</sup> to N 65<sup>th</sup> Street. This does not include units in the remainder of Phinney Ridge and Fremont served by the #5 bus.



Feb 15, 2018

Seattle Department of Construction and Inspections

## Land Use Information Bulletin

A Twice-Weekly Bulletin Announcing Land Use Applications, Decisions, Hearings, and Appeals  
[www.seattle.gov/dpd](http://www.seattle.gov/dpd)

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### NOTICE OF INTERPRETATION

**Area:** North/Northwest **Address:** 6726 GREENWOOD AVE N  
**Project:** 3027166 **Zone:** ARTERIAL WITHIN 100 FT., URBAN VILLAGE OVERLAY,  
NEIGHBORHOOD COMMERCIAL 2-40'  
**Notice Date:** 02/15/2018

**Contact:** J RICHARD ARAMBARU - (206)625-9515 x  
**Planner:** Andy McKim - (206) 684-8737

### Supplement to Interpretation No. 17-002

SDCI's Interpretation No. 17-002 relating to a mixed use development proposed under Project No. 3020114, was requested by attorney Richard Aramburu on behalf of project neighbors. Upon appeal to the Seattle Hearing Examiner, two of the determinations in the interpretation, relating to clerestory design and an upper-level setback, were reversed, and two other determinations, relating to shadow impacts and qualification for a parking reduction based on frequency of nearby transit, were remanded for further analysis. The proposed development has been modified to address the first three of these issues. The supplemental interpretation addresses the remaining issue, which is whether the project site is served by frequent transit within the meaning of the code.

The proposed development includes no off-street parking, relying on a code provision requiring no parking for development on lots close to bus lines with service meeting frequent transit parameters. The scheduled bus arrivals at a nearby stop meet the frequent transit parameters, but it was shown at the hearing that due to late arrivals, buses on the route often fail to meet those parameters based on actual arrival times. The decision was remanded to SDCI for further review based on this fact.

Based on further consideration, the Department has concluded that qualification for parking reductions based on frequent transit service must be determined based on scheduled bus arrivals rather than actual arrival times. No bus line runs perfectly on schedule, and it would not be possible to guarantee that any line would not have gaps in actual service, at times, that are inconsistent with the intervals stated in the frequent transit definition. The code provides no basis for evaluating whether actual arrival times meet the frequent transit parameters often enough for a bus line to be considered good enough to qualify. Evaluating whether the service on a route qualifies as frequent transit based on scheduled rather than actual arrival times is consistent with the definitions in the code and the City's transportation planning practices. Based on the bus schedule, the project site has frequent transit service.

### HOW TO APPEAL THE INTERPRETATION

Appeal of the Interpretation may be submitted through 5:00 p.m. **March 1, 2018** and must be accompanied by a \$85.00 filing fee in a check payable to the City of Seattle. The appeal must state specifically why the appellant believes the Interpretation is incorrect. The appeal must be sent to:

**City of Seattle  
Hearing Examiner  
700 5<sup>th</sup> Avenue, Suite 4000  
P.O. Box 94729  
Seattle, WA 98124-4729**

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**INTERPRETATION OF THE DIRECTOR  
UNDER SEATTLE MUNICIPAL CODE TITLE 23**

In the Matter of the Use of Property at  
**6726 Greenwood Avenue North**

**Supplement to  
Interpretation No. 17-002**

**Background**

SDCI is issuing this supplemental interpretation in response to a remand by the Hearing Examiner, in the Matter of the Appeal of Livable Phinney, Hearing Examiner File No. MUP-17-009(DR,W), S-17-002. The Hearing Examiner affirmed the Department's SEPA and design review decision, but reversed and remanded SDCI's Land Use Code Interpretation No. 17-002 on four bases:

**Reversed:**

- The neighboring split-zoned lot was held to be a lot in a residential zone for purposes of the upper-level setback requirements in SMC 23.47A.014.B.3, so the required setback is greater than what was proposed.
- Proposed features that took advantage of a structure height limit exception for clerestories were held not to qualify, as they had windows on only three of four sides.

**Remanded:**

- Inconsistencies between shadow analysis materials was noted, and the interpretation was remanded for further review of that issue. If clerestories are to be permitted above the height limit and within 10 feet of the north property line, it must be documented that they would not shade properties to the north on January 21 at noon more than a building otherwise built to the maximum height and FAR would.
- The project relied on an exemption from parking requirements due to frequent transit service in the area, determined based on bus schedules, but it was documented that the intervals between actual arrival of buses often exceeded the allowance under the definition of frequent transit service. The interpretation was remanded for consideration whether the proposal qualifies for the parking exemption considering the actual arrival times of the buses.

Revised plans have been submitted addressing the first three of these issues. The building as revised provides the necessary upper-level setback abutting the split-zoned lot. The clerestory that was within 10 feet of the north property line has been eliminated, and no features remain that

require a shadow analysis under the code. The remaining clerestory has been modified so that it has windows on all sides.

This interpretation addresses the remaining issue, regarding frequent transit service analysis.

### Findings of Fact

1. "Transit service, frequent" is defined at SMC 23.84A.038 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."
  2. "Headway" is not defined in the Land Use Code. Webster's Third International Dictionary provides this definition: "The time interval between two vehicles traveling in the same direction on the same route."
  3. "Frequent transit service" was first defined in the code, and parking requirements were reduced or eliminated in areas with frequent transit service, under Ordinance No. 123495, which was adopted in 2010. Frequent transit provisions were expanded by Ordinance No. 123939 in 2012. The parameters for frequent transit service were drawn directly from the Seattle Department of Transportation's definition of frequent transit service, according to a Legislative Department Memorandum.
  4. The Seattle Department of Transportation's "Seattle Transit Network Development Plan, Final Draft, September 2004" ("TNDP") describes five performance criteria: frequency, span of service, speed, reliability, and loading. Span of service relates to the hours each day when bus service is provided, and loading relates to the number of passengers. Notably, frequency and reliability are distinct criteria. Buses that arrive late would affect the reliability score rather than the frequency criterion.
  5. The "UVTN [Urban Village Transit Network] Monitoring Project Final Report, February 2007," at page iii also reflects this distinction, and reflects that scheduled arrivals were considered in determining frequency:
    1. Frequency is described by the duration of the **maximum scheduled gap** between consecutive buses on the route. When all service is on schedule, this gap, called the "headway," is the maximum waiting time a customer will experience.
    2. Span of service describes the number of hours in the day that a service runs at UVTN frequencies (every 15 minutes or better).
    3. Reliability describes the degree to which the schedule is achieved.
- (Emphasis added.)
6. The UVTN Monitoring Report, at page 9, again says: "Frequency is described by the duration of the maximum scheduled gap between consecutive buses on the route." The monitoring methodology described in the report provides further support:



All performance indicators are based on King County Metro's data sources...Schedule database "TED" (Transit Enterprise Database.) This data describes the design of the service (routes and schedules) as opposed to its operation...This data is used for frequency and span of service. (page 11)

Frequency. The Frequency indicator is derived from the current schedule database (TED). The value is determined by finding the number of scheduled midday trips on a road segment (in either direction) on the weekday schedule.... (page 12)

There are daily variations in the schedule between peak and off-peak periods where the service frequency can be more or less frequent than indicated. It also represents all **scheduled** service, so it should not be interpreted as the wait time for a specific destination. This indicator is best used as a first look for comparing density of service compared to other corridors, and the availability for mobility within a corridor. (page 12, emphasis added.)

Span of service. The span of service indicator is derived from the current schedule database (TED). (page 14.)

7. King County Metro's metrics for their service, and the performance record for different bus lines, are reflected in Metro's 2017 System Evaluation, ("System Evaluation"), <http://kingcounty.gov/~media/depts/transportation/metro/accountability/pdf/2017/system-evaluation.pdf>. The metrics reflect a recognition that some variation in arrival times is natural and inevitable. A bus is "on time" if it arrives during the window between 1.5 minutes before the scheduled arrival time and 5.5 minutes after the scheduled arrival time. (System Evaluation, at pages 7 and 24.) Metro's county-wide goal is an 80 percent performance rate over-all (buses arrive no more than 1.5 minutes early and no more than 5.5 minutes late 80 percent of the time, and a 65 percent performance rate during weekday PM peak periods). Routes that fail to achieve these goals are targeted for investment. By Metro's measurements, as reflected on page 42 of the report, buses on the #5 route were late 23 percent of the time in general, 21 percent of the time on Saturdays and 32 percent of the time for PM trips, which we assume to mean PM peak trips. The PM record is within the target for PM performance, which would tolerate lateness 35 percent of the time, and the overall and Saturday performance just misses meeting the 80 percent goal. The #5 route was identified for service improvements in March and September of 2017. (System Evaluation, pages 51 and 56.) The report was published on September 18, 2017, so the data do not reflect improvements made in September or later.
8. The project applicants commissioned a consultant, Gibson Traffic Consultants, to evaluate a year's worth of data, from August 2016 through July 2017 for Stop #5875 at Greenwood Avenue North and North 67<sup>th</sup> Street, near the project site. The consultant found that arrivals were within the "on-time" window 82 percent of the time on

weekdays, 80 percent of the time on weekdays during the evening peak hour, and 81 percent of the time on weekends.

9. The revised plans include documentation of scheduled bus arrivals at a nearby bus stop, demonstrating that the scheduled arrivals meet Land Use Code standards for frequent transit.

## Conclusions

1. As with any mode of transportation, buses do not run like clockwork. Bus service is affected by weather, traffic, roadwork, and events such as parades. It would be impossible to guarantee that the transit on any bus line would meet the definition of frequent transit service, based on actual arrival times, 100 percent of the time.
2. Conclusion 6 of the Hearing Examiner decision states in part: "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." However, the code does not provide a basis for the Department to exercise judgment as to how much of the time actual arrival time of buses may exceed the specified interval before the transit service is deemed not to be frequent. Absent a specific standard, the Department could not determine that bus service that hits its target 90 percent or even 99 percent of the time is good enough to qualify for an exemption.<sup>1</sup> It is likely that no bus line satisfies the headway requirements 100 percent of the time based on actual arrival time of buses, so if actual arrival time is to be taken into consideration, under current code no area would qualify for the exemptions or parking reductions provided for areas with frequent transit service.
3. Neither the code definition of "frequent transit service" nor the dictionary definition of "headway" specifies whether the time intervals between buses should be determined based on actual or scheduled arrivals. It is reasonable, and consistent with the definitions, to consider headways based on scheduled arrivals when deciding whether an area qualifies as having frequent transit service.
4. We have not found legislative history reflecting that the City Council specifically considered the question whether qualification should be based on scheduled or actual bus arrival times when Ordinance No. 123495 was adopted. However, documents produced and relied on by the City's Department of Transportation at the time reflect that the

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<sup>1</sup> In response to an appeal by Michelle Acquavella from a Land Use Code interpretation, Hearing Examiner File No. S-08-003, the Hearing Examiner addressed the Department's practice of distinguishing between lodging and residential uses based on whether occupancy exceeded a period of 30 days. The Hearing Examiner held the 30-day period would be a reasonable way to draw the distinction, but that this test cannot be applied unless it is specified in an adopted standard.

frequency of bus service have been routinely evaluated based on scheduled arrivals by people in the transportation planning field in Seattle.

5. Even if we were to conclude that actual rather than scheduled arrival times should be taken into consideration, the buses serving the neighborhood are operating at or close to Metro's goals for reliability. As reflected in Metro's 2017 System Evaluation, Metro's practice is to identify routes where performance goals are not being met, and to target them for improvement. That recently occurred on the #5 route.

## Decision

As instructed in the remand, SDCI has reconsidered its interpretation considering actual arrival times of buses near the project site. Based on additional research, the Department concludes that the determination whether a location qualifies as having frequent transit service within the meaning of the Land Use Code must be made based on scheduled rather than actual arrival times. This approach is consistent with the City's transportation planning practices when the provision was added to the code. Based on prior City transportation planning policy and SDCI consistent prior implementation of this policy, this interpretation should be given deference with applying frequent transit service to development proposals.<sup>2</sup>

The alternative of using actual arrival times is not feasible. There can be no assurances that every bus will arrive on time, and no basis for deciding under the code how often the bus must be on time for the area to qualify. A potential project applicant would not be able to confidently design a development that would take advantage of frequent transit parking reductions, as there is no reliable way to know that buses will always be on time. However, in this case, even if the actual performance record of the buses is taken into consideration, the applicants documented that the actual arrival times meet Metro's metrics for reliable service, so the project also qualifies on that basis.

Entered this 15<sup>th</sup> day of February, 2018.



Andrew S. McKim  
Land Use Planner—Supervisor

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<sup>2</sup> *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990, 994 (2007), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). In *Sleasman*, the court determined that the City of Lacey's construction of a tree preservation ordinance was not entitled to deference, as it could not be shown that that construction was a matter of preexisting policy. Conversely, in this case, the Department's routine practice of determining whether an area has frequent transit service based on scheduled arrivals is consistent with the City's documented transportation planning practices at the time the frequent transit service provisions were added to the Land Use Code. See also SMC 23.88.020.G.5, which provides in part: "The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant."