BEFORE SEATTLE CITY COUNCIL
CITY OF SEATTLE

| In the Matter of the Appeal of: | Notice Regarding Clerk File 311936 |
|---|---|
| 19TH Avenue Block Watch/Squire Park Neighbors | DPD Project No. 3012953, Type IV<br>New Major Institution Master Plan Application<br>Swedish Hospital Cherry Hill Campus<br>500 17th Avenue |
| Administrability Comments 2 | |

## COMMENTS

19th Avenue Block Watch/Squire Park Neighbors agree with the City Council Sub-Committee's proposed modifications below. We believe the language is clear, concise and within the Council's authority under SMC chapter 23.69. We believe the City is fully capable to administer the word and intent of the sections below.

### Conclusions

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14. It was not shown that Pursuant to the Council's authority under SMC chapter 23.69, the height, bulk and scale impacts of proposed development along the east side of 18th Avenue ~~could~~should be ~~sufficiently mitigated without a reduction in~~ reduced by lowering the maximum building height along the east side of 18th Avenue from the proposed 50 feet to 37 feet, ~~as recommended by the Director,~~ and by reducing the mass and structure width of future development as described in Condition 40 below.

15. Pursuant to the Council's authority under SMC chapter 23.69, the height, bulk and scale impacts of proposed development on the western block should be reduced by lowering the maximum building height on the western block from the proposed 160 feet to 105 feet.

1~~5~~6. It is appropriate that unmodulated façade widths along 15th Avenue be limited to 105 feet to match the existing pattern on the east side of that street.

**Rezone**

1~~6~~7. As recommended by the Director, the proposed rezone for MIO height districts on the ~~western and~~ central campus (shown in MIMP Figure C-4 on page 53), ~~together with the statement~~

~~of intent in the footnote on page 52)~~ should be approved subject to the conditions listed below. The proposed rezone for the MIO height district on the western campus should be reduced to 105 feet from the proposed 160 feet (conditioned down to 150 feet). The proposed rezone for two sections of the MIO height district on the east campus (MI0-50) should be denied.

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**Height, Bulk and Scale**

40. **Modulation Facing East Property Line**. Facades facing the east property line of the 18th Avenue half block, shall have no un-modulated facades greater than 40 feet in length~~, excluding the façade within the portion of MIO conditioned down to 15 zero feet in height~~. Required modulation on the east facade shall have a depth no less than five feet and width no less than ten feet.

**Revisions to Master Plan Text including Design Guidelines**

53. **Eastern Block Height**. Revise all references to MIO height on the half-block east of 18th Avenue to state an MIO height of 37 feet, ~~and~~except that ~~a~~the portion of this half-block ~~shall be conditioned down to zero feet for that area with 15 feet in height as~~ shown on page 53 of the Master Plan as having a height limit of 15 feet shall instead show that no above grade structure of any height is allowed at that location.

54. **Western Block Height.** Revise all references to MIO height on the block west of 16th Avenue to state an MIO height of 105 feet for the portions of the block proposed to be rezoned to an MIO height of 160 feet (conditioned down to 150 feet).

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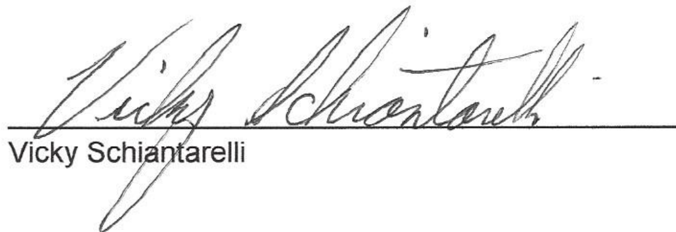
DATED this 20th day of April, 2016.



Vicky Schiantarelli


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

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| In the Matter of the Appeal of:<br><br>19TH Avenue Block Watch/Squire Park Neighbors<br><br>Administrability Comments | Notice Regarding Clerk File 311936<br><br>DPD Project No. 3012953, Type IV<br>New Major Institution Master Plan Application<br>Swedish Hospital Cherry Hill Campus<br>500 17th Avenue |
|---|---|

## CONCLUSIONS

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**MAJOR INSTITUTIONAL USES**

These conditions contain language that is closely related to a condition contained in the recent Children's' Medical Center MIMP (Conclusion 19). We believe the proposed conditions will lead to future disputes because some of the property owners' primary "business" is not major institutional in nature and some current uses do not support a tertiary and quaternary cardiovascular and neuroscience care facility, such as the sports medicine facility, the Seattle University College of Nursing Clinical Performance Laboratory, or Seattle Science Foundation.

The Land Use Code *already* requires that all uses within the Major Institution Overlay be "institutional in nature". We believe the intent of the condition in Conclusion 19 is to further refine the extent of uses that may be allowed, (just like in the Children's MIMP). However, we are concerned that the actual language does not quite achieve the intent. It is critical that OPCD informs during this proceeding whether it would have difficulty understanding the intent of the proposed limitations.

We believe the Council Committee intent to condition future uses that are similar to the condition stated in the Children's MIMP is entirely fair and appropriate. We have respectfully

propose the language below in **bolded yellow highlight** on page 3 to fit this MIMP's unique circumstances so as to be equitable.

An additional problem with administrability is limiting the provision to buildings "rented or leased". The Swedish Cherry Hill campus is different from Children's. Uses have been established on the Cherry Hill campus through sales, land swaps, and other devices. In the past, Sabey Corporation has argued successfully to DPD that the term "functionally integrated" is satisfied by locating a Sabey tenant in the same building as a Swedish medical use. "Functionally integrated" ***always*** occurs where ***any*** uses are in the same building. We believe the Council will need to spell out that it does not want that interpretation of "functionally integrated" to be adopted.
A reference to "leasing and renting" in the context of the Swedish Cherry Hill campus is ineffective. We respectfully propose the modified language in **bolded yellow highlight** on page 3.

If it is the intent that the OPCD render a decision on whether or not any proposed use is allowed by the terms of the Land Use Code and the more specific terms of the MIMP, then that must be made clear. DPD never made any decisions related to whether or not the proposed use was consistent with the Land Use Code for any past uses put in place on the Swedish Cherry Hill Campus. Sabey has been free to rent or lease to any tenant, regardless of use.

We believe another way to accomplish this condition is through height limits, which we believe would accomplish the same results while be easier for the OPCD, Sabey and Swedish, and the neighborhood to understand.


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

In order for the proposed limitation on future uses to be administrable there must be a requirement that an OPCD decision is made and the public be notified, with an opportunity to appeal.

7. The Major Institutions Code does not limit development under a MIMP to a non-profit entity. SMC 23.69.008.A, under "Permitted uses" states that "[a]ll uses that are functionally integrated with, or substantially related to, the central mission of a Major Institution, or that primarily and directly serve the users of an institution shall be defined as Major Institution uses and shall be permitted in the Major Institution Overlay (MIO) District ... Permitted Major Institution uses shall not be limited to those uses which are owned or operated by the Major Institution." **However, to ensure that uses developed under the MIMP are ~~institutional in nature~~ directly and exclusively related to the central mission of Swedish Cherry Hill Medical Center, additional conditioning is warranted.**

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**Recommended Conditions - Master Plan**

**Master Plan Review**

1. Five years after adoption of the Master Plan and every 5 years thereafter, Swedish Medical Center in cooperation with its Standing Advisory Committee ("SAC") shall hold a public meeting to review its annual report and other information intended to illustrate the status of plan implementation. The meeting shall be widely advertised to the surrounding community and involve opportunity for public comment.

**Major Institution Uses**

**2. No portion of any building on Swedish Cherry Hill's campus shall be ~~rented or leased to tenants~~ occupied except those who provide medical care that is functionally integrated with or substantively related to medical services provided by Swedish Cherry Hill, or directly related supporting uses, within the entire ~~rented or leased~~ space. Exceptions may be allowed by the Director for commercial uses that are located at the pedestrian street level, or within campus buildings where commercial/retail services that serve the broader public are warranted.**


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

~~2.~~3. The SAC will review and comment during the schematic and design stage of all proposed and potential projects intended for submission of applications to the City as follows: Any proposal for a new structure greater than 4,000 square feet or building addition greater than 4,000 square feet; and any future skybridge design location and any public benefits package associated therewith. Information provided to DPD to show compliance with SMC 23.69.008 also shall be provided to the SAC as part of schematic review. Design and schematics shall include detailed landscaping plans, building materials and future mechanical rooftop screening.

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**TMP**

The adoption of the CAC recommendations below puts the Swedish Cherry Hill TMP on par with comparable sized urban hospitals. Since 1994 until 2014, the mandatory TMP reports were not filed with the City (DPD) or were incomplete. The City had allowed Campus tenants to refuse to report at all. It was not until this MIMP process began that the TMP mandatory reports were filed and eventually all tenants required to report. The City failed to enforce the requirements. Requiring SOV rate improvements, which require the mandatory TMP reports to be filed, will help to ensure City enforcement and major institution compliance. We assume the intention by all parties is two percentage points rather than two percent (see below in **bolded yellow highlight** on page 5).

17. **According to SMC 23.69.002.K, the purpose of a major institution's TMP is to "reduce the number of vehicle trips to the major institution, minimize the adverse impacts of traffic on the streets surrounding the institution…and minimize the adverse impact of institution-related parking on nearby streets." Pursuant to that authority, the Council concludes that the CAC's recommendation to require a 32 percent SOV rate by 2034 would do more to achieve that purpose than the less aggressive SOV rate recommended by the Hearing Examiner and Director.** ~~The TMP includes the elements required by the Code. In addition, it includes some innovative elements, such as the ITB, and campus-wide access to a 100 percent transit pass subsidy. Both Swedish Cherry Hill and Sabey have demonstrated commitment to meeting the existing SOV goal and have accepted the more rigorous goal recommended by the Director. On this record, it appears that the Director's a 38 percent SOV rate within 25 years is reasonable and can be achieved. However, t~~


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

18. The continued availability of transit capacity in the areas where it is needed by Swedish Cherry Hill's employees is important to the achievement of the SOV goal. Therefore, a condition should be added to assure that the biennial survey of TMP effectiveness includes a directional capacity analysis of employees, as recommended by Washington Community Action Network's traffic consultant.

~~18~~19. Approval of the MIMP should include the CAC majority's recommended condition on mitigation to reduce cut-through traffic in the neighborhood, as amended by the Director.

~~19. The CAC majority's recommendation on requiring compliance with the SOV rate prior to issuance of a building permit would duplicate the Department's existing authority under the Code to enforce the SOV rate, and therefore is not necessary.~~

***

**Transportation, Loading and Transit**

~~3.~~4. **TMP Goal Prior to First Building Permit.** The goal for the TMP in the Master Plan will be to achieve an employee SOV rate of 50 percent prior to approval of the first building permit, including demolition, allowed under the Master Plan. **Prior to approval of subsequent building permits, Swedish Cherry Hill shall achieve an SOV rate equal to the average SOV goal for the prior three years.** ~~(Under current Land Use Code regulations, DPD reviews the progress of Major Institutions in meeting TMP goals at the time of application for development permits. SMC 23.54.016 C6. If substantial progress is not being made, as determined by DPD in consultation with SDOT, the Director may take a range of actions, including denying the permit.)~~

~~4.~~5. **Application of TMP Goal**. The TMP goal will apply to everyone who works within the Swedish-Cherry Hill MIO at least 20 hours/week and arrives for work between 6:00 AM and 9:00 AM.

~~5.~~6. **TMP Goal Reduction Over Life of Master Plan**. The TMP SOV goal of 50 percent shall be further reduced by ~~1~~ **2** percent **points** every two years to a maximum ~~38~~ **32** percent SOV goal in ~~25~~ **18** years.

~~6.~~7. **TMP Review**. As part of the Master Use Permit review process for future projects developed under this Master Plan, assess TMP performance and apply updated TMP elements.

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19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

## STORMWATER AND DRAINAGE

The sections below are to ensure that the stormwater or wastewater runoff from the Swedish Cherry Hill Campus does not contribute to flooding in the residential homes and basements surrounding the Campus. Whatever stormwater/runoff infrastructure is installed, the neighborhood expectation is that the structures will actually work and be maintained, repaired, or replaced throughout the lifecycle of the Campus buildings and structures. As an example, if the soils, topography, and geology do not support installing GSI, then traditional structures (e.g., tank) would need to be installed to keep the flows from the surrounding residential properties. If GSI structures do get installed, then the solutions need to be long term and be maintained for the life cycle of the Campus structures and buildings. Due to current conditions, liners below the installations are required to prevent shallow aquifers from flooding and replacing these liners within warranty/life expectancy to prevent future flooding, since these liners will fail within a shorter life cycle than a storage tank.

79. Use low-impact development measures such as bio-retention cells or bio-retention planters where feasible to reduce the demand on stormwater infrastructure. **Any proposal for LID facilities must include a plan for operation and maintenance of the facilities.**

80. In addition to LID measures, major development on the Swedish Cherry Hill campus would trigger the need for flow control and water quality measures as part of the storm drainage design requirements for the site. Required water quality measures would involve following the Seattle stormwater design guidelines and using the BMPs for water quality that would work effectively on the site while meeting the necessary requirements. BMPs that would likely be used include bio-filtration tree wells, stormwater filter units, or water quality vaults. There are also several other possible measures that could be used, but it will depend on site constraints and the amount of stormwater that needs to be treated. **Any proposal for LID facilities must include a plan for operation and maintenance of the facilities.**

**During Operation**

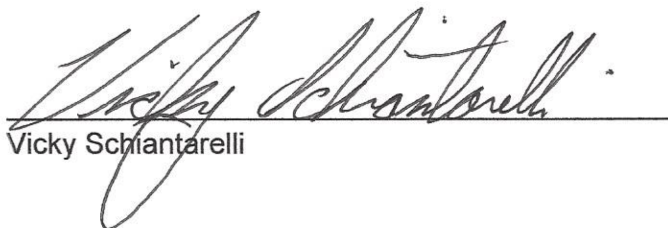
**During Operation - Greenhouse Gas Emissions**


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

Swedish should implement the following potential mitigation measures during future design and construction of buildings on campus:

81. **Natural Drainage and Green Roofs** – Where feasible, provide green roofs to provide additional open space, opportunities for urban agriculture, and decreased energy demands by reducing the cooling load for the building. As development planning occurs in conjunction with specific buildings on-campus, consider incorporation of green roofs associated with that building where feasible. Green Stormwater Infrastructure (GSI) would be developed for flow control and water quality treatment to the maximum extent feasible. **Any proposal for LID facilities must include a plan for operation and maintenance of the facilities.**

DATED this 1st day of April, 2016.



Vicky Schiantarelli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541 19th Ave, Seattle, WA 98122

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| 19TH Avenue Block Watch/Squire Park Neighbors | DPD Project No. 3012953, Type IV<br>New Major Institution Master Plan Application<br>Swedish Hospital Cherry Hill Campus |
| Reply to Applicants' TMP Comments | 500 17th Avenue |

**COMMENTS**

19th Avenue Block Watch/Squire Park Neighbors (19th Ave) has reviewed the Applicants' TMP comments submitted on April 1, 2016. The Applicants' comments are in error; the City Council Sub-Committee's proposed comments are administrable, in compliant with existing law, supported by substantial evidence in the record, does not violate RCW 82.02.020 and other constitutional protections, and does not violate the State Environmental Policy Act ("SEPA"). Each of these concerns is addressed in detail below.

**1. There Is Evidence In The Record Supporting The Proposed TMP Conditions.**

Appellants have the burden of proof to show that the Hearing Examiner's recommendation concerning the TMP should be rejected or modified. The Hearing Examiner ignored all the evidence and testimony provided by the Appellants. Ross Tilghman is not 19th Ave's transportation expert, rather he was Washington Can's transportation expert. Nicholas Richter, one of the Appellants, testified that 32% SOV could be accomplished if the Applicants adopted Children's Medical Center's TMP. The CAC, which originally advanced the idea of a 32% SOV goal, members of the public, and the experts, all provided testimony and evidence that that support a 32% SOV goal when the TMP is aggressive as other Major Institutions, including but not limited to Childrens' Medical Center and Virginia Mason.


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

The proposed 32% SOV goal and TMP conditions would not violate SEPA, as the record does supports a finding that a 32% SOV TMP goal is "reasonable and capable of being accomplished," or that the condition is necessary, i.e., "attributable to an identified adverse impact of the proposal" when a truly aggressive plan similar to Children's Medical Center is adopted by a Major Institution located in a residential neighborhood. City Council must look at the entire record not merely what the Hearing Examiner chooses to consider. A 32% SOV goal is not mere belief but is shown to be achievable when the Major Institution is not merely running on enthusiasm.

Mr. Andy Cosentino, Vice President of the Swedish Neuroscience Institute, and Ms. Szelag testified that Swedish management is committed and determined to decrease the SOV commute rate at the Cherry Hill Campus. The Hearing Examiner agreed, and nothing in the record suggests her conclusion was incorrect. However, despite all of the enthusiasm, the SOV remains at 57%. The Applicants' experts and City staff could not explain why this Major Institution could not attain the required 50% SOV since 1994. The Applicants' experts and City staff did not know and could not explain why the City had failed to enforce SMC 23.69.034(I) for almost twenty years:

> The institution shall provide an annual status report to the Director and the Advisory Committee which shall detail the progress the institution has made in achieving the goals and objectives of the master plan. The annual report shall contain the following information:
>
> 1. The status of projects which were initiated or under construction during the previous year;
> 2. The institution's land and structure acquisition, ownership and leasing activity outside of but within two thousand five hundred feet (2,500') of the MIO District boundary;
> 3. Progress made in achieving the goals and objectives contained in the transportation management program towards the reduction of single-occupant vehicle use by institution employees, staff and/or students; and
> 4. Progress made in meeting conditions of master plan approval.


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

Under SEPA, mitigating conditions must also be "reasonable and capable of being accomplished." SMC 25.05.660.A.3. There is testimony and evidence in the record, that imposing a 32% SOV goal as a mitigation measure is reasonable and capable of being accomplished, which the Hearing Examiner ignored.

**2. The Proposed Condition is Legal.**

The Council has the authority to adopt, reject, remand or modify the Hearing Examiner's determination when supported by the record. The Applicants are in error. Incorporating the SMC as conditioning is allowed.

> When an institution applies for a permit for development included in its master plan, it shall present evidence that it has made substantial progress toward the goal of its transportation management program as approved with a master plan, including the SOV goal. If substantial progress is not being made, as determined by the Director in consultation with the Seattle Department of Transportation and metropolitan King County, the Director may:
> a. Require the institution to take additional steps to comply with the transportation management program; and /or
> b. Require measures in addition to those in the transportation management program which encourage alternate means of transportation for the travel generated by the proposed new development; and/or
> c. Deny the permit if previous efforts have not resulted in sufficient progress toward meeting the SOV goals of an institution.

The Code authorizes the Council, to render a decision to add further conditioning based on the record.

**3. The Record Contains Evidence Supporting the Condition of Withholding Building Permits.**


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

Ms. Szelag, who has dealt with hundreds of TMPs in Seattle, testified that she had never seen a TMP condition that would mandate denial of a building permit. Ms. Szelag also testified she has never heard of a Major Institution that didn't meet it's' 50% SOV or that failed to submit its annual reports to the City for twenty years. Mr. Shaw testified that Swedish, like any other major institution, will be required, as part of a project application, to demonstrate that it has made substantial progress toward meeting the TMP goal in effect at the time of each permit application. However, Mr. Shaw could not explain why his department failed to enforce the TMP requirements for twenty years. The Hearing Examiner ignored these facts, concluding it "would duplicate the Department's existing authority under the Code to enforce the SOV rate, and therefore is not necessary." The Hearing Examiner's conclusion is not supported by substantial evidence. Although DCI already has the authority under SMC 23.54.016.C.6.c to require corrective action if the institution has not made sufficient progress in achieving SOV goal. *See* Shaw Testimony, it has failed to do so for twenty years with this specific Major Institution. Additional conditions enforcing the Code requirements are appropriate here.

Although the record does indicate that Swedish has not previously achieved the 1994 MIMP 50% SOV goal, it has never had as comprehensive, or aggressive, a TMP as the one included in the proposed MIMP. The Examiner found that "[b]oth Swedish Cherry Hill and Sabey have demonstrated commitment to meeting the existing SOV goal and have accepted the more rigorous goal recommended by the Director. On this record, it appears that the Director's [a] 38 percent SOV rate within 25 years is reasonable and can be achieved." COL ¶17.

**4. The Proposed TMP Conditions Do Not Violate RCW 82.02.020.**

RCW 82.02.020 prohibits the City from imposing charges (in-kind or dollars) through its impact fees. The proposed TMP condition mandating denial of building permits for failure to achieve


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c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

TMP SOV goals is in compliance with the SMC. RCW 82.02.090(3) does not define permits fees or impacts as impact fees.

Similarly, the proposed TMP conditions violate substantive due process, as the singling out of Swedish Cherry Hill as the sole institution in the City subject to a building moratorium for failure to achieve TMP goals is unduly burdensome. The record shows that the Major Institution willfully failed to meet the 50% SOV for over twenty (20) years and the City failed to perform its due diligence to enforce the SMC.

**5. The Proposed TMP Condition Supports the Institution's Mission in Spite of Itself.**

The purpose and intent of the TMP section in Major Institutions Code is to allow institutions like Swedish to work collaboratively with the ***neighborhood*** to set and achieve "goals" aimed at reducing SOV trips rather than the Institution only working with organizations like Commute Seattle and City departments to set and achieve "goals" aimed at reducing SOV trips. The draft condition requires the Institution to do what it does not wish to do.

DATED this 20th day of April, 2016.

Vicky Schiantarelli

Vicky Schiantarelli


19TH Ave Block Watch/Squire Park Neighbors
c/o Vicky Schiantarelli, vickymatsui@hotmail.com
541 19th Ave, Seattle, WA 98122

# Memorandum

To: Ketil Freeman

From: Joseph A. Brogan, Foster Pepper PLLC
Jack McCullough, McCullough Hill Leary, PS

Date: April 20, 2016

Subject: Swedish Cherry Hill Major Institution Master Plan – Comments on Proposed MIMP Conditions

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Thank you for the opportunity to comment on the latest draft conditions regarding height restrictions. On behalf of Swedish/Providence ("Swedish") and the Sabey Corporation, we write to enter our strong objection to the possibility of restricting heights below the level necessary to meet Swedish's institutional needs. Not only are the draft conditions unsupported by substantial evidence in the record, but they would irreparably harm Swedish's ability to deliver the level of medical care it plans to over the next 20-30 years. Should the Council adopt the conditions as drafted, Swedish may have no option but to appeal its own MIMP approval to Superior Court—the first time in City history a Major Institution has had to take that drastic step. Please recommend that the full Council approve the MIMP subject to the conditions recommended by the Hearing Examiner.

During the years-long process of negotiation and compromise that culminated in the Hearing Examiner's strong recommendation that the Council approve the MIMP with conditions, Swedish already reduced its proposed square footage *below* its anticipated need—need the Hearing Examiner found was credibly established through expert testimony. A further reduction in height necessarily means a reduction in floor area available to serve the medical needs of the institution, community, and the region. The draft conditions, particularly the drastic reduction in height for the west hospital tower fronting Seattle University, would further lower campus yield without any evidence in the record suggesting the institutional program could sustain such a reduction unharmed. To the contrary, the record shows that such a reduction will create significant adverse impact to hospital functions.

Under City Code, the Council's quasi-judicial decision must be "supported by substantial evidence in the record." SMC 23.76.056.A. "Substantial evidence" is a legal term of art: evidence is "substantial" when it is "of a sufficient quantum to persuade a fair-minded person of the truth of a declared premise." *See, e.g.*, *Chandler v. State, Office of Ins. Com'r*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007). The draft conditions are not supported by substantial *evidence*.

1111 Third Avenue, Suite 3000, Seattle, Washington 98101-3299 tel: 206.447.4400 fax: 206.447.9700
foster.com

No competent evidence supports a further reduction in campus heights, including those height reductions now being advanced by Councilmember Herbold. The general sentiment of public commenters that "shorter is better" is not substantial evidence. There is no evidence in the record that 105' height limits along the boundary with Seattle University would produce meaningfully fewer impacts than 150' heights. Rather, such conclusions would require expert testimony. Although project opponents called Dr. Sharron Sutton as an architecture expert before the Hearing Examiner, *she did not address this question*. Furthermore, after disavowing any expertise in hospital planning, she declined to opine on how reductions in yield would affect Swedish's ability to meet its institutional needs. No other expert testified against the MIMP development standards before the Hearing Examiner. The record is bereft of *any* support for this proposed height reduction condition.

Supporters of the draft condition will doubtless contend that issues of "height, bulk and scale" and "transition" promote its adoption. But the City Council is not entitled—indeed has no authority to—rewrite the Hearing Examiner's findings and recommendation based on mere sentiment. Each modification the Council seeks to make to the Hearing Examiner recommendation must be supported both by substantial evidence and by the decision criteria in Chapter 23.69 SMC. That cannot be the case here.

Similarly, nothing in the record factually supports the conclusion that eliminating above-ground development on portions of the MIO's east block, rather than allowing 15-foot structures, would reduce impacts on residential properties that can themselves be developed to 35'. This is especially the case given the generous setbacks along the eastern boundary of the MIO.

By contrast, the Hearing Examiner's recommendation regarding height limits is both well-reasoned and supported by substantial evidence, and the Council should adopt it. She determined that Swedish's experts credibly established the institution's need, and when deciding whether evidence is substantial, the Council cannot second-guess the Hearing Examiner's credibility determinations. *Chandler*, 141 Wn. App. at 648. As described in more detail below, given the institution's needs and the community imperative not to expand the MIO, the building heights in the MIMP necessarily follow.

Early in the MIMP process, Swedish and Sabey assented to the neighborhood's unequivocal demand that Swedish not expand its MIO boundaries. That concession necessitated that heights be increased at certain locations on the campus to meet the institution's need over the 25+ year life of the MIMP. Even so, conditioned as the Hearing Examiner recommended, campus heights are maintained at the levels established in the 1994 MIMP (or, in one case, lower) at all campus edges across from residentially-zoned areas.

Under the Hearing Examiner recommendation, height increases on the interior of campus are moved away from residentially-zoned areas, towards the center of the campus and downhill toward the adjacent MIO for Seattle University (which is on record as supporting the proposed

MIO heights). John Jex, lead architect for the MIMP, testified that the Development Program utilizes campus grades to minimize the effect of increased heights, and also implements the mitigation techniques listed in the City's SEPA policy regarding height, bulk and scale, SMC 25.05.675.G.2. Because of these planning decisions, reached after years of public comment and compromise, many of the impacts associated with increased height, bulk, and scale are avoided before the fact.

Councilmember Herbold raised the possibility that reducing heights could reduce shadow impacts on neighboring properties, but neither the EIS nor the expert testimony support such a conclusion. A detailed shadow study that assumed a worst-case scenario of maximum building envelopes[1] was undertaken for the MIMP. The unchallenged expert testimony was that the proposed MIO heights—including 150 feet on the west block and 45 feet on the east block[2]—would have very little, if any, shadow impacts on surrounding residential areas beyond those already existing. *See* MIMP Hearing Exhibit 9. Given the limited shadow impacts of building envelopes described in the MIMP, there is no evidentiary basis for concluding that lowering heights would meaningfully reduce shadow impacts.

Under City Code, "[a]n appellant bears the burden of proving that the Hearing Examiner's recommendation should be rejected or modified." SMC 23.76.056.A. These appellants have not met that burden, because the result they urge is unsupported by substantial evidence in the record. The record shows, as the Hearing Examiner concluded, that the impacts associated with increased height, bulk, and scale, are adequately mitigated or avoided. There is no reason to disturb the Hearing Examiner's thoughtful recommendation, and Swedish urges you to transmit the MIMP to the full Council with a recommendation to adopt it and the Examiner's conditions.

[1] The MIMP does not set forth specific building sizes or shapes. Rather, it establishes development standards that describe building envelopes within which eventual buildings must fit. The shadow studies examine a theoretical worst-case scenario: buildings that fill every building envelope. However, total build-out of all square footage approved under the MIMP would necessarily be smaller and less bulky than the full building envelopes, producing lower shadow impacts.

[2] The Hearing Examiner recommended reducing the proposed 45' height limit to 37', with one section at 15'. Swedish does not challenge that recommendation.

FOSTER PEPPER PLLC

# Memorandum

To: Ketil Freeman

From: Joseph A. Brogan, Foster Pepper PLLC
Jack McCullough, McCullough Hill Leary, PS

Date: April 1, 2016

Subject: Swedish Cherry Hill Major Institution Master Plan – Comments on Proposed MIMP Conditions

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Swedish Medical Center ("Swedish") and The Sabey Corporation ("Sabey") have reviewed the proposed Conclusions and Recommended Conditions transmitted by Council Central Staff, dated March 25, 2016.[1] The Recommended Conditions related to the Transportation Management Plan ("TMP") are not administrable for several reasons, not the least of which is that they are contrary to existing law, not supported by substantial evidence in the record, violate RCW 82.02.020 and other constitutional protections, and violate the State Environmental Policy Act ("SEPA"). Each of these concerns is addressed in detail below.

## 1. There Is No Evidence In The Record, Let Alone, Substantial Evidence, Supporting The Proposed TMP Conditions.

Appellants have the burden of proof to show that the Hearing Examiner's recommendation concerning the TMP should be rejected or modified, but they have not sustained that burden. The only substantial evidence in the record and expert testimony**, including the Appellants' own expert's testimony**, supports the conclusion that 38% is an aggressive and achievable TMP SOV goal.

If adopted, the proposed 32% SOV goal and TMP conditions would violate SEPA, as the record does not support a finding that a 32% SOV TMP goal is "reasonable and capable of being accomplished," or that the condition is necessary, i.e., "attributable to an identified adverse impact of the proposal." *See* SMC 25.05.660(A)(3-4).

[1] Swedish's comments on the proposed "Major Institution Use" conditions are contained in the joint memorandum prepared by McCullough Hill Leary PS.

A. <u>A 32% TMP SOV Goal is Unsupported by the Expert Testimony on Both Sides</u>.

The Council's decision must be supported by substantial evidence in the record, and no evidence supports either a 32% SOV goal or a 2%-per-every two year reduction in the SOV goal. The Council is acting as a quasi-judicial body that must apply the existing law to the facts in the record—those developed at the hearing presided over by the Hearing Examiner. SMC 23.76.056.A ("The Council's decision to approve, approve with conditions, remand, or deny the application for a Type IV Council land use decision shall be based **on applicable law** and supported by **substantial evidence in the record**" (emphasis added)). *See* Res. 31602 § VI.C.3. The mere belief that a 32% SOV goal is a tougher goal, and therefore better, will not survive scrutiny under the substantial evidence standard.

There is no evidence in the record, expert or otherwise, that suggests a 32% SOV goal is even achievable. Neither the CAC, which originally advanced the idea of a 32% SOV goal, nor any other member of the public, nor any expert, offered facts that support a 32% SOV goal. The Hearing Examiner found the testimony of Jessica Szelag, Executive Director of Commute Seattle, and the testimony of John Shaw, Senior Transportation Planner at the Seattle Department of Construction and Inspections ("DCI"), credible with regard to the comprehensive nature of the TMP and the institutions ability to reach the 38% SOV goal.

The 38% SOV goal is aggressive relative to other institutions in the City. Mr. Shaw testified that the 38% SOV goal is similarly aggressive to the one adopted by Seattle Children's Hospital. He testified that reducing the SOV goal from its current 57% to 38% represents a 33% reduction over what Swedish is achieving at the time of the MIMP application. This percentage reduction is the same as the reduction proposed by Children's in its TMP.

Even the Appellants' expert, Ross Tilghman, questioned whether the 38% SOV goal was achievable, let alone a more aggressive 32% goal. Hearing Day 3, Tape 2 of 4 at 17:00-21:20. With regard to the 38% SOV goal, Mr. Tilghman testified, "[t]he location of the campus makes it very difficult or impossible to meet that rate." In fact, throughout his testimony, Mr. Tilghman never justifies or even recommends a lower TMP SOV goal. <u>**Against the backdrop of this record and the expert testimony, the Council has no evidentiary basis whatsoever to impose a more restrictive TMP goal.**</u>

Commute Seattle has a proven track record of creating and managing successful TMPs, and both Swedish's and City's experts testified that the proposed TMP has a high likelihood of success. Ms. Szelag testified that Swedish Cherry Hill's location and the level of commitment and coordination on the campus support her belief that the 38 percent goal is realistic for this TMP. She also stated that the TMP includes the three factors that Commute Seattle has found indicative of a strong likelihood of success: 1) flexibility, in that it allows for changes as employee needs and available options and technology change; 2) strong leadership and staff commitment, noting that over the last several years, Swedish Cherry Hill and Sabey have hired five full-time and several part-time staff members with some responsibility for implementing the

TMP; and 3) parties who recognize the important role of technology in a TMP. Hearing Examiner FF. ¶89.

Mr. Andy Cosentino, Vice President of the Swedish Neuroscience Institute, and Ms. Szelag further testified that Swedish management is committed and determined to decrease the SOV commute rate at the Cherry Hill Campus. The Hearing Examiner agreed, and nothing in the record suggests her conclusion was incorrect.

In light of the substantial evidence supporting the 38% SOV goal, the Council is left with only past performance of a *different TMP* as its sole basis for imposing a 32% SOV goal. However, the record is simply devoid of any expert testimony supporting a lower TMP goal. Even the Appellants' expert testimony supports this conclusion.

The proposed 32% TMP condition is reminiscent of the condition rejected by the Washington Supreme Court in *Hayes v. City of Seattle.* In *Hayes*, the Court held that the Seattle City Council's decision to reduce the length of Hayes' building was arbitrary and capricious and amounted to nothing more than the notion that the project was simply "too big and that smaller is better." Here, the Council would be ignoring the substantial evidence in the record and simply imposing its belief that "32% is tougher, and therefore better than 38%." Without any analysis or expert testimony in the record to support that proposition, any such condition would be illegal and likely overturned on appeal.

B. <u>SEPA Does Not Support The Imposition of a 32% TMP SOV Goal</u>.

Neither the MIMP FEIS, or Appendix C to the FEIS, provide a legal basis for imposing a 32% SOV goal. SEPA requires the City to establish that the condition is "attributable to the identified adverse impacts of its proposal." SMC 25.05.660(A)(4). Mr. Mike Swenson, the applicant's transportation expert, testified that the traffic impacts disclosed in the FEIS assumed a steady-state of 50% TMP SOV performance over the life of the new MIMP. Thus, the transportation impacts disclosed in the FEIS were conservative, as the FEIS analysis was designed to ignore the incremental progress that will be achieved by Swedish's aggressive new TMP.

The FEIS does not support the conclusion additional mitigation is warranted. The FEIS contains no analysis or evidence as to whether a reduction of the SOV goal from 38% to 32% would result in improvement in intersection and corridor operations. The FEIS does contain a sensitivity analysis that addresses the impact of imposing a 38% SOV goal in the TMP. The FEIS concludes, "[t]he reduction in traffic volumes [from 50% to 38%] would result in minimal improvements to study intersection operations…." FEIS, Appendix C at C-120. As such, the Council lacks any evidentiary basis to conclude that a TMP SOV goal lower than 38% would mitigate a specific probable significant environmental impact, or result in improvements to area intersections and corridor operations.

Under SEPA, mitigating conditions must also be "reasonable and capable of being accomplished." SMC 25.05.660.A.3. **No expert testimony at the hearing even addressed the possibility of a 32% SOV rate**, so nothing in the record would meet the City's burden of establishing that a condition imposing such a rate is either reasonable or capable of being achieved. As discussed above, the experts at the hearing disagreed over whether the proposed 38% SOV rate was achievable, with Swedish's and the City's experts asserting it was and the Appellants' expert arguing it was not. City staff participated fully in the hearing, and if the City wanted to impose such a condition, it had the opportunity to offer supporting evidence. Instead, John Shaw, the City's own transportation planner, testified in *support* of the 38%/25-year goal. When combined with the additional, punitive condition that the goal be *met*—not the "substantial progress" referred to in SMC 23.54.016(C)(6), but strict compliance—prior to issuance of future permits, the draft condition is patently unreasonable. *See* 23.54.016(C)(6) ("When an institution applies for a permit for development included in its master plan, it shall present evidence that it has made *substantial progress* towards the goals of its transportation management program as approved with a master plan, including the SOV goal.").

There is no testimony or evidence in the record, let alone substantial evidence, that imposing a 32% SOV goal as a mitigation measure is reasonable and capable of being accomplished, or attributable to an identified adverse impact. *See* SMC 25.05.660(A)(3-4). The only substantial evidence in the record supports maintaining the 38% SOV goal recommended by the Hearing Examiner.

**2. The Proposed Condition is Illegal Because it is *Ultra Vires* And an Improper Legislative Text Amendment.**

**The Major Institutions Code provides that the Council's authority is limited to "increasing or decreasing" the 50% goal, and does not extend to creating conditions precedent for issuance of building permits based on the attainment of TMP goals.** Nothing in the Major Institutions Code gives the Council that authority. The Council's punitive condition requiring achievement of TMP goals prior to the issuance of any building permit amounts to an improper legislative amendment to the Major Institutions Code, Chapter 23.69 SMC, and the parking Code, Chapter 23.54 SMC.

SMC 23.54.0169(C)(1) provides that the TMP establishes "**a general goal**" of "reducing the percentage of the Major Institution's employees, staff, and/or students who commute in single occupancy vehicles (SOV) during the peak period to 50 percent or less…." SMC 23.54.016(C)(6) sets forth **the Director's** authority with regard to attainment of TMP goals.

> 6. When an institution applies for a permit for development included in its master plan, it shall present evidence that it has made substantial progress toward the goal of its transportation management program as approved with a master plan, including the SOV goal. If substantial progress is not being

> made, as determined by the Director in consultation with the Seattle Department of Transportation and metropolitan King County, **the Director may:**
> a. Require the institution to take additional steps to comply with the transportation management program; and /or
> b. Require measures in addition to those in the transportation management program which encourage alternate means of transportation for the travel generated by the proposed new development; and/or
> c. Deny the permit if previous efforts have not resulted in sufficient progress toward meeting the SOV goals of an institution.

SMC 23.54.016(C)(6).

The Code authorizes the Director, **not the Council,** to render a discretionary decision as to whether sufficient progress has been made towards attainment of TMP goals and whether any failure to achieve specified goals merits denial of a permit. The City Council's authority related to conditioning a MIMP TMP is specifically guided by SMC 23.54.016(C)(4). The Code states **only** that the Council may "increase or decrease the required 50% goal." SMC 23.54.016(C)(4). The proposed condition goes far beyond increasing or decreasing the TMP goal and would therefore amend SMC 23.54.016(C), which the Council cannot do in a quasi-judicial proceeding. Such a condition would directly contravene and supplant the Director's discretionary authority in .016 to fashion appropriate remedies if, in the Director's view, insufficient progress has been made towards meeting SOV goals. Accordingly, the proposed condition is illegal.

## 3. The Record Contains no Evidence Whatsoever Supporting the Unprecedented Condition of Withholding Building Permits.

### A. The Proposed TMP Condition is Unprecedented and Duplicates Existing Law.

Ms. Szelag, who has dealt with hundreds of TMPs in Seattle, testified that she had never seen a TMP condition that would mandate denial of a building permit. And Mr. Shaw testified that Swedish, like any other major institution, will be required, as part of a project application, to demonstrate that it has made substantial progress toward meeting the TMP goal in effect at the time of each permit application. FF ¶92. The Hearing Examiner rejected the CAC's call for such an onerous condition, concluding it "would duplicate the Department's existing authority under the Code to enforce the SOV rate, and therefore is not necessary." COL ¶19. The Hearing Examiner's conclusion is supported by substantial evidence; DCI already has the authority under SMC 23.54.016.C.6.c to require corrective action if the institution has not made sufficient progress in achieving SOV goal. *See* Shaw Testimony. No additional conditions beyond the Code requirements are appropriate here.

Although the record does indicate that Swedish has not previously achieved the 1994 MIMP 50% SOV goal, it has never had as comprehensive, or aggressive, a TMP as the one included in the proposed MIMP. The Examiner found that "[b]oth Swedish Cherry Hill and Sabey have demonstrated commitment to meeting the existing SOV goal and have accepted the more rigorous goal recommended by the Director. On this record, it appears that the Director's [a] 38 percent SOV rate within 25 years is reasonable and can be achieved." COL ¶17.

There is no evidence whatsoever in the record that imposing an SOV rate, based on a running three-year average, as a condition precedent to issuance of a building permit, is feasible and an appropriate TMP goal. Such a punitive measure is also inconsistent with the City's long-held view that it work collaboratively with City institutions and businesses to reduce SOV trips, as opposed to imposing, as the proposed condition would, a moratorium on business and institutional development.

**4. The Proposed TMP Conditions Would Violate RCW 82.02.020 And Swedish's Due Process Rights.**

RCW 82.02.020 prohibits the City from imposing charges (in-kind or dollars) through its proposed TMP conditions that are not supported by the record, and where the proposed conditions are not "reasonably necessary" to mitigate a specific, identified element of the Master Plan. *See Isle Verde Inter. Holdings, Inc., v. City of Camas*, 146 Wn.2d 740, 753, 49 P.3d 867 (2002). There is no showing that the programmatic cost to Swedish to achieve a 32% SOV goal would meaningfully mitigate any impact of development proposed under the MIMP. The statute also commands a necessary proportionality between the condition imposed and the impact of a proposed development. *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 667, 187 P.3d 786 (2008). The proposed TMP condition mandating denial of building permits for failure to achieve TMP SOV goals is **grossly disproportionate** to any incremental impact that SOV trips may have on area intersections and corridor operations. Through the proposed condition, **any development** requiring a building permit on the campus, whether it generates any SOV trips at all, would be subject to the condition mandating compliance with the three-year average TMP SOV goal at the time of permitting. The Council should refrain from imposing a condition that amounts to an unlawful charge under RCW 82.02.020.

Similarly, the proposed TMP conditions violate substantive due process, as the singling out of Swedish Cherry Hill as the sole institution in the City subject to a building moratorium for failure to achieve TMP goals is unduly burdensome. Not only does the record show that the proposed condition fails the "reasonably necessary" prong of the substantive due process inquiry, the effectiveness of less drastic measures has not been explored, the degree to which the condition solves the problem of traffic congestion is wholly unsupported in the record and the economic loss suffered by Swedish would be extraordinary. *See Presbytery of Seattle, v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990) (As to the third factor in the substantive due process analysis, we consider the (a) nature of the harm to be avoided; (b) the availability and effectiveness of less drastic measures; and (c) the economic loss suffered by the property

owner.). Accordingly, the proposed condition mandating denial of building permits for failure to achieve TMP SOV goals would violate substantive due process and is unlawful.

**5. The Proposed TMP Condition Withholding Building Permits Directly Conflicts With and Frustrates the Institution's Mission.**

There is no other TMP or Commute Trip Reduction ("CTR") provision in the City that imposes a prescriptive moratorium on all development activity based on the attainment of SOV reduction *goals*. Not only would such a punitive condition be unprecedented, it would critically undercut the hospital's ability to obtain lender financing for construction of capital improvements, such as new hospital beds, operating rooms, labs and medical technology. While lenders understand that regulating jurisdictions may impose restrictions on development, the draft condition would create a prescriptive standard and condition precedent to obtaining a building permit and Certificate of Occupancy that Swedish may or may not have the ability to meet. The condition would amount to a gross interference with Swedish/Providence's business practices and its ability to finance capital in furtherance of its mission.

The draft condition would also result in chaos as the delivery of critical patient care and the upgrading of medical technologies at Cherry Hill would be held hostage by the voluntary acts of hundreds of individuals and their personal transportation choices, even in the face of extraordinary efforts by Swedish to achieve its TMP goals. The institution simply cannot accomplish its mission with such an onerous condition in place.

The purpose and intent of the TMP section in Major Institutions Code is to allow institutions like Swedish to work collaboratively with organizations like Commute Seattle and City departments to set and achieve "goals" aimed at reducing SOV trips. The draft condition turns that concept on its head, creating a disproportionate and extraordinary burden that will directly interfere with the vital mission of healthcare institutions like Swedish Cherry Hill. It is Swedish's patients, many of whom are our neighbors, who will suffer the consequences. New facilities necessary to meet the needs of a growing population and the challenges of complex neurological and vascular diseases will be delayed, some for years, due to nothing more than the notion that "tougher TMP SOV goals are simply better," a position that is wholly unsupported by the record and will not survive scrutiny.

# McCullough Hill Leary, PS

**MEMORANDUM**

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| **TO:** | Ketil Freeman |
| **FROM:** | Jack McCullough, McCullough Hill Leary, PS<br>Joe Brogan, Foster Pepper PLLC |
| **DATE:** | April 1, 2016 |
| **RE:** | Swedish Cherry Hill Major Institution Master Plan<br>Proposed Additional Use Condition |

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Swedish Health Services ("Swedish") and the Sabey Corporation ("Sabey") submit the following comments on the proposed condition on Major Institution Uses transmitted by Council Central Staff on March 25, 2016.

Sabey owns approximately 40% of the property located within the Major Institution Overlay ("MIO") boundary at Swedish Cherry Hill. Sabey leases 75% of its holdings within the MIO boundary to Swedish. Most of the remaining space is occupied by other major institution uses supporting the Swedish's integrated healthcare services mission, including LabCorp and the Northwest Kidney Center, as required by the City's Land Use Code. There is no evidence in the record supporting a conclusion to the contrary.

Despite the fact that there is no substantial evidence in the record to support imposing an additional condition on third party uses in the MIO area, the City Council Planning, Land Use and Zoning Committee ("Committee") has proposed adding the following condition ("Use Condition") for the Swedish Cherry Hill Major Institution Master Plan ("MIMP"):

> No portion of any building on Swedish Cherry Hill's campus shall be rented or leased to tenants except those who provide medical care that is functionally integrated with or substantively related to medical services provided by Swedish Cherry Hill, or directly related supporting uses, within the entire rented or leased space. Exceptions may be allowed by the Director for commercial uses that are located at the pedestrian street level, or within campus buildings where commercial/retail services that serve the broader public are warranted.

Sabey and Swedish Medical Center ("Swedish") have determined it is not adminsitratable for the following reasons:

1. The use condition is not administrable because it is illegal.
2. Even if it were legal (which it is not), the Use Condition is not administrable because it conflicts with SMC 23.69.008.

3. Even if it were legal (which it is not), the Use Condition is not administrable because it ignores most hospital uses conducted at Swedish Cherry Hill.
4. Even if it were legal (which it is not), the Use Condition is not administrable because it relies on undefined standards.
5. The Use Condition is not administrable because it impermissibly regulates based on the identity of the user, rather than the nature of the use.

Each of these concerns is addressed in detail below.

**1. The <u>Use Condition is not administrable because it is illegal.</u>**

SMC 23.69.008 already defines permitted uses in the MIO:

> All uses that are functionally integrated with, or substantively related to, the central mission of a Major Institution or that primarily and directly serve the users of an institution shall be defined as Major Institution uses and shall be permitted in the Major Institution Overlay (MIO) District.

Under SMC 23.69.030, a Master Plan has three components, and *only* three components: the development standards component, the development program component and the transportation management program component. "Use" is not a component of a MIMP and there is nothing in 23.69 that authorizes the Director, the Hearing Examiner or the Council, through a quasi-judicial proceeding, to re-define uses permitted within an MIO. Use is exclusively regulated by SMC 23.69.008.

Under SMC 23.76.056, the "Council's decision to approve, approve with conditions, remand, or deny the application for a Type IV Council land use decision shall be based on applicable law and supported by substantial evidence in the record." Contrary to the requirements of the MIO Code, the Committee proposes to adopt a Use Condition that is in violation of applicable law and is not supported by substantial evidence in the record. As you know, a local government's decision is not supported by substantial evidence if it is based on "vehement opposition" of residents and property owners or their "improper or unsupported concerns." *Seattle SMSA Ltd., Pshp. v. San Juan County*, 88 F. Supp. 2d 1128, 1131-1132 (1997).

The record illustrates that the present application of SMC 23.69.008 effectively regulates uses within the Cherry Hill MIO. Andy Cosentino, the Vice President of the Swedish Neuroscience Institute, Swedish physicians, and representatives of LabCorp and the NW Kidney Center all testified to the functional and necessary relationship between a broad array of parallel services to treat complex disease, many of which are provided by Sabey's tenants. For example, services such as imaging, diagnostic lab, pathology, oncology, radiation, rehabilitation, speech and physical therapy, social services may be needed to properly treat a patient. In addition, experimental protocols are often used, requiring research scientists and their equipment to be located on the immediate campus. Sabey embraces the co-location model and has a 14-year history of locating institutional uses on the Swedish Cherry Hill campus; accordingly, it only leases spaces that support the services vital to integrated care at Swedish Cherry Hill, in full compliance with SMC 23.69.008. Cosentino Testimony. No evidence contradicting this conclusion was provided at the hearing.

Moreover, state law prohibits the City Council from altering the type of land use permitted in the MIO through a project review and quasi-judicial proceeding. RCW 36.70B.030(3). The only way to legally adopt the Use Condition is as an amendment to the text of SMC 23.69.008, pursuant to the provisions of SMC 23.06.010 and Chapter 23.76 SMC. The Use Condition is in reality a text amendment to the Land Use Code. It is illegal and *ultra vires* for the Council to attempt to effect a text amendment through adoption of a MIMP.

**2. Even if it were legal (which it is not), the Use Condition is not administrable because it ignores most hospital uses conducted at Swedish Cherry Hill.**

The Use Condition provides, in part:

> No portion of any building on Swedish Cherry Hill's campus shall be rented or leased to tenants except those who provide medical care that is functionally integrated with or substantively related to *medical services* provided by Swedish Cherry Hill . . . .

"Medical services" is a defined term under the Land Use Code. It is defined as "a commercial use in which health care for humans or animals ("animal health services") is provided on an outpatient basis, including but not limited to offices for doctors, dentists, veterinarians, chiropractors, and other health care practitioners, or in which mortuary or funeral services are provided."

Swedish Cherry Hill is a hospital, which under the Land Use Code is "an institution that provides accommodations, facilities and services over a continuous period of twenty-four (24) hours or more, for observation, diagnosis and care of individuals who are suffering from illness, injury, deformity or abnormality or from any condition requiring obstetrical, medical or surgical services, or alcohol or drug detoxification."

Medical services are a subset of the array of activities that are permitted to occur at a hospital. But the Use Condition limits third-party uses to those that are related to "medical services" provided by Swedish Cherry Hill. Therefore, the Use Condition would prohibit third-party uses related to the majority of hospital uses conducted at Swedish Cherry Hill.

**3. Even if it were legal (which it is not), the Use Condition is not administrable because it relies on undefined standards.**

The Use Condition provides, in part:

> No portion of any building on Swedish Cherry Hill's campus shall be rented or leased to tenants except those who provide *medical care* that is functionally integrated with or substantively related to medical services provided by Swedish Cherry Hill . . .

The current Code provision regarding uses in the MIO Boundary, SMC 23.69.008, is clear and ensures that all uses within the MIO boundary are "functionally integrated with, or substantively related to, the central mission of a Major Institution or that primarily and directly serve the users of an institution."

Instead of relying on this Code provision, the City Council has proposed a conflicting Use Condition with a number of unclear and undefined terms. Under the Use Condition, third-party tenants are restricted to providing "medical care" that is functionally integrated with or substantively

related to medical services provided by Swedish Cherry Hill, or "directly related supporting uses." "Medical care" is not a term otherwise used or defined in the Land Use Code. "Directly related" is not a term otherwise used or defined in the Land Use Code. "Supporting uses" is not a term otherwise used or defined in the Land Use Code.

Presumably, these new terms have meanings different from similar terms otherwise used in the Land Use Code, such as "functionally integrated," "substantively related," "medical services," and "hospital."

Because the Use Condition relies on terms and standards not defined in the Land Use Code, it will create confusion and uncertainty in administering the condition, as an applicant and City staff alike will struggle to understand the Use Condition, the meaning of "medical care," "directly related," and "supporting uses," and the very clear existing Code provision regarding allowed uses in an MIO Boundary.

**4. <u>Even if it were legal (which it is not), the Use Condition is not administrable because it conflicts with SMC 23.69.008.</u>**

For the same reasons stated above, the Use Condition would require the Director of SDCI to implement two conflicting standards for permitted uses in the Cherry Hill MIO. Such implementation will result in an inconsistent and unpredictable application of the Use Condition and SMC 23.69.008. The permitted use language of SMC 23.69.008 is mandatory: such uses "*shall* be permitted in the Major Institution Overlay (MIO) District." The Code does not provide that the uses permitted in a MIO are somehow conditional, based on compliance with other MIMP conditions. Accordingly, the Director would be legally required to comply with the permitted use provisions of SMC 23.69.008, and to the extent the Use Condition conflicts with this madate, it would be unenforceable and impossible to administer.

**5. <u>The Use Condition is not administrable because it impermissibly regulates based on the identity of the user, rather than the nature of the use.</u>**

The Use Condition would create two categories of users at Swedish Cherry Hill and apply different permitted use regulations to each category. Uses undertaken by Swedish would be reviewed under SMC 23.69.008 to determine their permissibility, while uses undertaken by parties other than Swedish would be reviewed under the Use Condition to determine their permissibility. This structure violates the equal protection clause of the State and Federal Constitutions and was specifically rejected in the *Goldie London* case, attached to this memorandum for your convenience.

In the mid-1980s, the City was a defendant in a case involving a similar question —whether an independently-operated institutional use may be established within, and subject to the same zoning regulations as, a campus owned and operated by another institution. At issue in *Goldie London* were the City's "Major Institution Ordinances," which established a system of dual zoning classification for major institutional campuses. Property within the defined boundaries of a major institution that was owned by or affiliated with that institution received an "institutional" zoning designation that permitted deviation from height and other development standards in the underlying zone. Property not owned by the institution or its affiliate was subject to standard zoning requirements, regardless of whether an institutional use was established on the property. In other words, the City's Land Use Code sought to impose regulations based on the identity of the institutional user, rather than on the use itself.

The King County Superior Court found that the City had violated Ms. London's constitutional rights by regulating her boarding home use based on "ownership" rather than the services she provided. In response, the City amended its Major Institutions Code and ceased the illegal practice of regulating institutional uses based on the identity of the operator. *See* SMC 23.69.008.A ("Permitted Major Institution uses shall not be limited to those uses which are owned or operated by the Major Institution.").

The City lost this case almost 30 years ago, and the City will lose it again if it proceeds with adoption of the Use Condition.

**Conclusion**

The proposed Use Condition will be impossible to administer because it is illegal, contrary to the Major Institution Ordinance, in excess of the City Council's authority, in direct conflict with SMC 23.69.008, ignores most hospital uses undertaken by Swedish at Cherry Hill and relies on terms that are undefined and confusing. Further, imposition of the Use Condition would violate the constitutional rights of the owners, as the City is well aware from prior litigation. In view of the clear language of the Land Use Code and this prior litigation, the adoption of the Use Condition would made with knowledge of its unlawfulness and that it was in excess of lawful authority, or that should reasonably have been known to have been unlawful or in excess of lawful authority. The City Council should decline to adopt the Use Condition.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

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| GOLDIE LONDON,<br>Plaintiff-Petitioner,<br>v.<br>PROVIDENCE MEDICAL CENTER, et al.,<br>Defendants-Respondents. | Case No. 83-2-06871-1<br>FINDINGS OF FACT AND CONCLUSIONS OF LAW |

This matter came on regularly for trial before the undersigned judge on Monday, July 1, 1985. The trial was concluded on Friday, July 5, 1985. Plaintiff Mrs. Goldie London appeared and was represented by her attorney, Peter J. Eglick. Defendant Providence Medical Center appeared and was represented by its attorneys Reed, McClure, Moceri & Thonn and by attorneys Robert Johns and Christopher Marsh. Defendant City of Seattle appeared and was represented by Gordon Crandall, Senior Assistant City Attorney. The court having taken testimony and received evidence from the parties, having considered the written memoranda and oral arguments of counsel, and being otherwise fully advised, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

Plaintiff Mrs. Goldie London has, since 1959, owned a residence located at 525 17th Avenue, in the City of Seattle. Also since 1959, she has operated a home for the aged and infirm at that

COPY



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

1 address, known as the Golden Heart Boarding Home for the Aged. Mrs.
2 London's property is surrounded on all sides by land owned by
3 Providence Medical Center (PMC) and is the only property in the block
4 not owned by PMC.

5 II.

6 The block of 17th Avenue on which Mrs. London is located is
7 presently a dead end street, ending just to the north of her property
8 in the entrance to PMC. At one time, 17th Avenue was a through
9 street. When 17th Avenue was blocked off by construction by PMC, PMC
10 was required by the City to open a new east-west street, E. James,
11 which ran to the north of Mrs. London's property and placed her on a
12 corner lot. This was required as compensation for the loss of
13 through street access on 17th Street, which was closed.

14 III.

15 In 1977, as part of a planned unit development proposed by
16 PMC and approved by the City of Seattle, in Ordinance No. 106839, the
17 City of Seattle entered into a Property Use and Development Agreement
18 (PUDA) with Providence Medical Center approving the planned unit
19 development and the vacation of E. James Street. The PUD Ordinance
20 recited that the Property Use and Development Agreement restricted
21 use and development of affected PMC property "to ameliorate the
22 impact" which could otherwise occur "on private property in the
23 vicinity of said property..."

24 IV.

25 The Property Use and Development Agreement contained, inter
26 alia, the following two provisions:
27
28



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

(f) In order to compensate her for loss of corner-lot status under the Zoning Ordinance which will result from the City's granting Owners PUD Petition and street vacation petition, Owner shall convey to Goldie London (or to such persons as she shall designate) a strip of land 15 feet wide along the entire southern boundary of the existing Golden Heart Boarding Home property, and such conveyance shall be made with all due haste; and

(g) Owner shall design and provide an area for buses or other large vehicles such as large fire trucks to stop and to turn around in the area of Seventeenth Avenue which is adjacent to the Golden Heart Boarding Home property.

The City of Seattle has admitted that the above-quoted provisions of the PUDA were "intended for plaintiff's benefit."

V.

Subsequently, in May, 1983, the City of Seattle enacted ordinances 111100 and 111101 which amend the City's Land Use Code with regard to regulations for "major institutions". Ordinance 111100, Section 13 states that it is intended to supersede the provisions of any existing property use and development agreement or planned unit development and it has been so interpreted by staff of the City Department of Construction and Land Use (DCLU) in the case of the provisions of the pre-existing Property Use and Development Agreement entered into by PMC. This, in turn, has raised a substantial question about the continuation of plaintiff's rights under the PUDA and, in particular, whether Ordinance 111100 has resulted in abrogation of plaintiff's right to an area for large vehicles to stop and turn around in the area of 17th Avenue, compensation for her loss of access from the vacation of 17th Avenue and E. James Street.



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

VI.

The City of Seattle, at trial, conceded that this compensation requirement could still be effective.

Providence Medical Center took the position at trial that the required area was presently still provided, but that it was required by virtue of the Fire Code, and that Mrs. London had no separate compensatory or contractual rights to it.

VII.

The exhibits and testimony at trial demonstrate that the required area is necessary to the operation of Mrs. London's business due to the dead end nature of 17th Avenue, created by the City and PMC in 1977, and to the need for access by large vehicles to her business and property.

VIII.

The Major Institutions Ordinance establishes a system of dual zoning classification for property located within the boundaries of designated major institutions within the City of Seattle. Each property within the boundaries of a designated major institution receives two alternate zoning designations on the Official City Zoning Map. One, the institutional designation begins with the letter "I" followed by a numerical suffix. It applies to the property if it is owned or used by the designated major institution or an affiliate. The alternate designation, standard designations of the type otherwise used in the City of Seattle Land Use Code apply to property not owned by the institution or an affiliate. The Major Institution Ordinance also limits development by a designated major institution outside of its designated



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

boundaries, but within one mile of them. This limitation, which applies to property owners utilizing institutional zoning classifications, is also based on ownership of the property in question rather than the use to which it is put. The declared purpose of the Major Institution Ordinance, to restrict "horizontal" development of such institutions, is therefore heavily dependent on this one mile limitation on institution-owned or affiliated expansion.

IX.

According to the Official City Zoning Map, the PMC Campus is divided into several sections for zoning purposes under the Major Institutions Ordinance which purports to supercede the zoning designation established under the prior PUD. Plaintiff's property is located in the largest section, which is designated "I-4/L-3". All of the property in the section surrounding plaintiff is owned by PMC, is also designated I-4/L-3, and may be used by PMC as I-4 property, permitting construction up to 105 feet in height and development of a wide range of uses. Because plaintiff's property is not owned or operated in affiliation with a designated major institution, PMC, her property is governed by the L-3 zoning designation which only permits construction up to 37 feet in height and which limits uses substantially to those permitted in low-rise residential neighborhoods.

X.

The overwhelming weight of the evidence, including the ordinances themselves, contemporaneous City documents, and testimony of responsible City officials, demonstrated that the Major



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

1 Institutions Ordinances operate to regulate property based on
2 institutional ownership or affiliation, rather than based upon
3 impact, resulting in the limitation of Mrs. London's property to low-
4 rise residential uses, although surrounded by PMC properties
5 designated for 105 foot tall institutional use, and in the limitation
6 of expansion by owners of institutionally-zoned property.

7 XI.

8 PMC has applied to the City of Seattle for permission to
9 build a 105 foot tall professional office building (POB) to the south
10 and west of Mrs. London's property, utilizing the dual zoning
11 provisions of the Major Institutions Ordinance. The City has
12 published an official Draft Environmental Impact Statement (DEIS)
13 pursuant to the State Environmental Policy Act (SEPA), RCW Chapter
14 43.21C, which, inter alia, describes the operation of the Major
15 Institutions Ordinance with regard to the POB project and analyzes
16 its impacts.

17 XII.

18 Swedish Hospital Medical Center was apprised of the pendency
19 of this lawsuit by Gordon Crandall, the Assistant City Attorney, in
20 the Fall, of 1983. At trial, Swedish Hospital Medical Center
21 appeared and requested leave to file an amicus curiae brief in the
22 lawsuit. The court granted this request.

23 XIII.

24 The amount of time devoted by plaintiff's counsel to this
25 litigation, the amount of time devoted by plaintiff's legal intern
26 and part-time associate attorney to this litigation, and the costs
27 and expenses incurred all as set out in the Affidavits of plaintiff's
28



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

counsel were reasonable and necessary and contributed to the efficient resolution of the case.

The hourly rate for attorney's fees for plaintiff's counsel, Peter J. Eglick, $100.00 per hour, is reasonable in light of, inter alia, his experience, the quality of work in the case, the result obtained, and the prevailing rates in the community. Similarly, the hourly rate requested by plaintiff for Joan Freeman, Rule 9 Intern, and, subsequently, associate attorney, $35.00 per hour, is reasonable and contributed to the efficient resolution of this action.

Any finding of fact herein which is more properly a conclusion of law should be deemed a conclusion of law.

From the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I.

This court has jurisdiction over the parties and the claims in this action.

II.

The court applies a rational basis standard in reviewing legislative enactments under constitutional challenge. While this review here is not as stringent as the scrutiny applied when a "suspect classification" (e.g., race) is alleged, the court is not required to uphold every police power measure when it reaches beyond reasonable limits to invade fundamental rights.

III.

Plaintiff Mrs. London is a third party beneficiary of the



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

Property Use and Development Agreement entered into by the City and PMC. As a donee or creditor, non-incidental, third party beneficiary Mrs. London has a right to enforce the provisions of the Property Use and Development Agreement established for her benefit and the rights granted her may not be unilaterally abrogated without violating the Fifth Amendment of the U.S. Constitution, Article I, Section 16, Amendment 9 of the Washington Constitution and the due process clause of the federal and state constitutions.

IV.

The Major Institutions Ordinances are unconstitutional pursuant to the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Washington Constitution guaranteeing equal protection to all citizens. By establishing a zoning classification scheme in which the concept of regulation based on ownership or affiliation rather than use and impact is embedded, the Major Institutions Ordinances (Nos. 111100 and 111101) violate constitutional guarantees of equal protection under the law and plaintiff's right to same.

V.

In establishing a zoning scheme which singles out Mrs. London's property for arbitrary, disparate regulation the Major Institutions Ordinances establish an illegal "inverse" spot zone on Mrs. London's property which, apart from constitutional violations, is arbitrary and capricious and without adequate public benefit.

VI.

It is not the court's proper role to write or rewrite the Seattle Zoning Code or the Major Institutions part of it or to



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

1 determine what the zoning (I-4, L-3, or some other designation)
2 should be on plaintiff's and PMC's property. The plaintiff is
3 entitled to her requested injunctive and declaratory (pursuant to
4 RCW Chapter 7.24) relief and a judgment to that effect will be
5 entered. Correction of the defects found by this court and a
6 determination of proper zoning for plaintiff and PMC may only be
7 accomplished by the responsible legislative body, the Seattle City
8 Council.

VII.

9 Plaintiff is a prevailing party under 42 USC Section 1983 and
10 is entitled to an award of attorney's fees and expenses pursuant to
11 the Civil Rights Attorney's Fees Award Act of 1976, 42 USC Section
12 1988 in the amount of $15,718.33.
13 Any conclusion of law herein which is more properly a finding
14 of fact should be deemed a finding of fact.
15 DATED this _______ day of ____________________, 1985.
16
17
18 ______________________________
DAVID C. HUNTER
JUDGE OF THE SUPERIOR COURT
19
20
21 Presented by:
22
23 ______________________________
PETER J. EGLICK
24 Attorney for Plaintiff
25 Approved as to form:
26
27 ______________________________
GORDON CRANDALL
Asst. City Attorney

______________________________
ROBERT JOHNS
Attorney for Defendant
Providence Medical Center
28



Law Offices
Peter J. Eglick
Suite 1130
1411 Fourth Avenue Bldg.
Seattle, Washington 98101
(206) 464-1435

# City of Seattle

Edward B. Murray, Mayor

**Department of Construction and Inspections**

Nathan Torgelson, Director

April 1, 2016

Mr. Ketil Freeman
Seattle City Council Central Staff
Sent by email to Ketil.freeman@seattle.gov

RE: CF 311936, Swedish MIMP

Dear Mr. Freeman:

Thank you for the opportunity to review draft conditions. SDCI would like to specifically respond to condition two on page 2. First, it appears that Council is attempting to limit the types of institutional uses permitted outright on this campus by conditioning the tenants that can rent or lease space on the Swedish Cherry Hill Campus. SDCI suggests that the condition be more specific about what institutional uses are permitted at this site or what institutional uses are not permitted. SDCI believes that the condition as proposed is too general to limit the permitted uses any more than the current language for permitted institutional uses. For example, how will SDCI determine what medical care is functionally integrated with or substantively related to medical services provided by Swedish Cherry Hill, or directly related supporting uses, within the entire rented or leased space? With this very broad and interpretable language it is unclear that uses on site currently would look any different in the future.

Second, SDCI does not review and approve leases or have any procedural means for conducting such review. To comply with this condition as proposed the institution would need to submit for review and approval all lease agreements prior to leasing or risk an enforcement action. This seems impractical without a permit process, as well as cumbersome and unsustainable through the life of the MIMP (25 – 30 years). If the intent is to limit uses this should be part of the permit review and approval process not tied to lease agreements.

Third, the condition states that exceptions may be allowed by the Director for commercial uses that are located at the pedestrian street level, or within campus buildings where commercial/retail services that serve the broader public are warranted. What is meant by the broader public? What standards or criteria will SDCI apply to ensure the commercial/retail use is warranted? Could this be a Whole Foods? It will be difficult for SDCI to deny a permit based on this language since it contains very broad and interpretable terms.

Thank you for the opportunity to comment.

Stephanie Haines
Land Use Planner

BEFORE THE SEATTLE CITY COUNCIL

| | |
|---|---|
| In the Matter of the Application of:<br><br>SWEDISH MEDICAL CENTER<br><br>For approval of a Major Institution Master Plan | NO. CF 311936<br><br>SQUIRE PARK COMMUNITY COUNCIL'S SUPPLEMENTAL BRIEF ON PROPOSED CONDITIONS AND AMENDMENTS RELATED TO MIO HEIGHTS |

## I. INTRODUCTION

Appellant Squire Park Community Council submits this supplemental brief in response to Seattle City Council Central Staff's April 13, 2016 request for additional briefing on potential conditions related to the MIO Heights for the Swedish Cherry Hill MIMP Proposal, which are attached to this brief as Exhibit A. Squire Park Community Council supports the proposed conditions related to MIO Heights (hereinafter the "Proposed MIO Height Conditions") and requests that the Committee include those changes in its recommendation to the City Council.

As will be demonstrated below, the evidence in the record overwhelmingly supports adopting the Proposed MIO Height Conditions. The evidence, including evidence submitted by the Seattle Department of Planning and Development (DPD)[1], demonstrated repeatedly that the height, bulk and scale of the development proposed by Swedish in the Final MIMP was out of balance with the height, bulk and scale of existing and allowed uses in the surrounding neighborhood. After 36 public meetings and reviewing volumes of reports and letters on the



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

proposal, the Citizen Advisory Committee did not approve the Final MIMP. The CAC concluded that the proposed Final MIMP neither sufficiently minimizes the impacts associated with future development, nor adequately protects the livability of the neighborhood. In fact, the evidence was so clear on this point that it was impossible to reconcile the Hearing Examiner's recommendation to approve the MIO Heights proposed in the Final MIMP with the evidence in the record. Because the conditions and conclusions on MIO Heights in the Hearing Examiner's recommendation were not supported by the evidence in the record, those conditions and conclusions should be changed as outlined in the Proposed MIO Height Conditions in Exhibit A.

## II. ARGUMENT

### A. The Legal Standard for Approval of a Proposed Rezone of the Major Institution Overlay (MIO) and Major Institution Master Plan

When considering whether the recommendation of the Hearing Examiner should be changed as outlined in Exhibit A, it's best to begin with a quick summary of the legal standard for approval of the Swedish Cherry Hill proposed MIO rezone and development proposal.

Chapter 23.69 SMC limits growth within a Major Institution Overlay district. Over and over again, the regulations assert and support a policy of minimizing adverse impacts to the surrounding area associated with development and expansion and protecting the livability and vitality of adjacent neighborhoods. MIMP review requires a balancing of the needs of the major institution to develop facilities for the provision of health care against the need to minimize the impact of major institution development on surrounding neighborhoods. SMC 23.69.025. The decision must consider the extent to which the growth and change will significantly harm the livability and vitality of the surrounding neighborhood. *Id.* Before a MIMP expansion can be

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[1] At the time of the hearing in this matter, the name of the Seattle planning department had not yet



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

approved, all adverse impacts associated with the proposed development **must be** minimized and the livability and vitality of adjacent neighborhoods **must be** protected. See SMC 23.69.002; SMC 23.69.032.E.2. The code requires these conditions – failing to protect the livability and vitality of the adjacent neighborhoods is not an option. Failing to do this and/or failing to minimize adverse impacts constitutes a violation of the Seattle code.

It is essentially a balancing act - as the CAC Majority Report stated:

> To a great extent, the Major Institutions Code is intended to allow higher intensity major institutions development within close proximity to surrounding lower intensity development. Scale difference greater than those normally encountered are both allowed and expected. This is in large part to facilitate development of major public institutions that benefit the greater community.
>
> However, with the special allowances provided by the Code, comes great potential for significant impacts on the neighborhood. In most cases major institutions are built to much greater height, with less setback and generally greater bulk that [sic] in the neighborhoods that surround them; and most often the thrust of negotiations between the institution and its neighbors/CACs involves efforts to reduce height and bulk and increase setbacks.
>
> This has been the case with the Swedish Cherry Hill Plan and the major challenge for the Citizens Advisory Committee. Major scale differences necessarily have impacts on immediately adjacent properties. The height, bulk, and scale differences embedded in this proposal are significant. In addition, there are no natural boundaries between high and mi-rise institutional development and low-rise neighbors.

CAC Majority Report at 9-10.

The legal criteria for a rezone also apply here. Generally, courts apply the following rules to rezone applications:

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been changed to the Department of Construction and Inspections.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

> (1) There is no presumption of validity of favoring the action of rezoning;
>
> (2) The proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and
>
> (3) The rezone must bear a substantial relationship to the public health, safety, morals, or welfare.

*Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 874-75, 947 P.2d 1208 (1997).[2] The Seattle Code requires that the impact of more intensive zones on less intensive zones shall be minimized by the use of transitions or buffers, if possible. SMC 23.34.008.E.1. A gradual transition between zoning categories, including height limits, is preferred. *Id.* The evaluation of a proposed rezone shall consider the possible negative and positive impacts on the area proposed for rezone and its surroundings. SMC 23.34.008.

Among other things, the Code requires that the height limits be consistent with the type and scale of development intended for each zone classification and that they reinforce the natural topography of the area and its surroundings. SMC 23.34.009. The height limits established by current zoning shall be given consideration and any permitted height limits shall be compatible with the predominant height and scale of existing development. SMC 23.34.009.C. Height limits for an area shall be compatible with actual and zoned heights in surrounding areas.[3] The section

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[2] When a proposed rezone implements the policies of a Comprehensive Plan, the proponent is not required to demonstrate changed circumstances. *Bjarnson v. Kitsap County*, 78 Wn. App. 840, 845-46, 899 P.2d 1290 (1995). The Seattle Municipal Code states that "evidence of changed circumstances shall be taken into consideration in reviewing the proposed rezones, but is not required to demonstrate the appropriateness of a proposed rezone." SMC 23.34.008.G.

[3] This section excludes buildings developed under major institution height limits, but it excludes them from being considered as the "actual and zoned heights" in relationship to the requested zone heights. In other words, the compatibility assessment does not include existing MIMP heights. SMC 23.34.009.D.1.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

specifically concerning rezoning MIO districts requires that, in addition to the general rezone criteria, the comments of the Citizen Advisory Committee **shall** be considered. SMC 23.34.124.

B. The Evidence in the Record Supports Adopting the Proposed MIO Height Conditions.

The evidence in the record demonstrated overwhelmingly that the height, bulk and scale of the proposal recommended for approval by the Hearing Examiner would cause significant adverse impacts to the neighborhood, was out of scale with the neighborhood, and would threaten the livability and vitality of the neighborhood. Looking at the evidence, there could be little dispute that the Final MIMP MIO Heights recommended by the Hearing Examiner will have significant adverse impacts to the surrounding neighborhood and therefore cannot be lawfully approved under SMC 23.69.025, SMC 23.69.002, and SMC 23.69.032.E.2. As a step towards resolving this issue, the City Council should adopt the Proposed MIO Height Conditions in Exhibit A.

Swedish is requesting a rezone to allow it to build up to five times the 30 foot limit that is allowed by the underlying zoning on the project site and that is allowed by the zoning in the great majority of the surrounding neighborhoods. The uses in the areas immediately north, east, and south of the campus are primarily single family and multi-family residential. *See* Swedish Cherry Hill MIMP FEIS, Figure 3.3-4, p. 3.3-8. The height limits for SF-5000 and LR-3 are 30 feet. The height limit for LR-1 is 25 feet. The height limit for the neighboring MIO zone for Seattle University is 65 feet.

The Final Environmental Impact Statement for the Swedish Cherry Hill MIMP (FEIS), which was prepared by and submitted by Seattle DPD, concluded that the height, bulk, and scale



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

of the project would cause significant adverse impacts to the neighborhood.[4] FEIS 3.4-50. The Applicant did not appeal the conclusions in the FEIS – therefore, as a matter of law, these conclusions cannot be disputed. The FEIS concluded that the height, bulk, and scale of the proposed development is disproportionate to the surrounding lower heights and density of the residential development. The FEIS concluded that "the scale of both the existing and proposed buildings is more intense than the surrounding neighborhood character," and that aspect of the proposal is inconsistent with the "goal of promoting the integration of institutional development with the function and character of surrounding communities and the overall planning for urban centers." FEIS at 3.3-42. The FEIS also concluded that "the proposed addition of approximately 1.55 million gross SF does not appear to constitute a "limited amount of development" as called for in UVG-36 and would therefore be inconsistent with that goal.

The FEIS states:

> The Final MIMP's proposed greater heights and more densely developed MIO is generally inconsistent with policies that apply to areas zoned for single family and low rise residential development. The proposed height limits would be substantially higher than the 30-foot height of structures that define the neighborhood's existing character.

FEIS at 3.3-37.

The FEIS also concluded that the Swedish Cherry proposal's height, bulk and scale is inconsistent with goals and policies in the Comprehensive Plan. See FEIS at 3.3-32-33; 37-38; 40, and 42. Specifically, the FEIS concluded that the Final MIMP was inconsistent with the following policies:

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[4] The FEIS incorrectly characterizes these impacts as "unavoidable." But they are avoidable. They can be avoided by adopting the April 13, 2016 proposed conditions that the parties have been asked to respond to.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

UV-38: Permit limited amounts of development consistent with the desire to maintain the general intensity of development that presently characterizes the multi-family, commercial, and industrial areas outside of urban centers and villages and direct the greatest share of growth to the urban centers and villages. [Final MIMP inconsistent with this policy].

UVG-36: Allow limited amounts of development in areas of the city outside urban centers and villages to maintain the general intensity of development that already characterizes these areas and to promote the targeted level of growth in village and center locations. [Final MIMP inconsistent with this policy]

LU-6: In order to focus future growth, consistent with the urban village strategy, limit higher intensity zoning designations to urban centers, urban villages, and manufacturing/industrial centers. Limit zoning with height limits that are significantly higher than those found within single family areas to urban centers, urban villages, and manufacturing/industrial centers and to those areas outside of urban villages where higher height limits would be consistent with an adopted neighborhood plan, a major institution's adopted master plan, or with the existing built character of the area. [Final MIMP inconsistent with this policy]

LUG-8: Preserve and protect low density, single family neighborhoods that provide opportunities for home ownership, that are attractive to households with children and other residents, that provide residents with privacy and open spaces immediately accessible to residents, and where the amount of impervious surface can be limited. [Final MIMP Inconsistent with this policy]

LUG-9: Preserve the character of single family residential areas and discourage the demolition of single family residences and displacement of residents, in a way that encourages rehabilitation and provides housing opportunities throughout the city. The character of single family areas includes use, development, and density characteristics. [Final MIMP Inconsistent with this policy]

LU-179: Permit the establishment of zoning overlay districts, which may modify the regulations of the underlying land use zone categories to address special circumstances and issues of significant public interest in a subarea of the city, subject to the limitations on establishing greater density in single-family areas. Overlays may be established through neighborhood planning. [Final MIMP inconsistent with this policy]



Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

> LUG-35: Promote the integration of institutional development with the function and character of surrounding communities and the overall planning for urban centers. [Final MIMP inconsistent with this policy].

In spite of these multiple statements in the FEIS, the Examiner made the remarkable statement that the FEIS established that the MIMP was generally consistent with the Comprehensive Plan. *Hearing Examiner Findings and Recommendation* at 19 (Sep. 10, 2015) ("The FEIS establishes that the MIMP is generally consistent with the Comprehensive Plan and other relevant plans.").

And the FEIS was not the only evidence in the record on this point. The Citizen Advisory Committee (CAC) Decisions and testimony of CAC members also demonstrated that the height, bulk and scale of the development out of balance with the height, bulk and scale of existing and allowed uses in the surrounding neighborhood. *See Swedish Medical Center Cherry Hill Campus Major Institution Master Plan Citizens Advisory Committee Final Report and Recommendations* (May 28, 2015). (hereinafter "*CAC Majority Report*").

To underscore the weight and credibility of this evidence it is important to consider the critical role that the CAC plays in this process. SMC 23.69.032. The primary role of the CAC is to work with the major institution and the City to produce a master plan that meets the intent of Section 23.69.025. SMC 23.69.032.D.1. CAC members are recommended by the Director of the Department of Neighborhoods as individuals who are appropriate to achieve a balanced, independent and representative committee and the City Council established the final composition of the CAC. *Id.* The CAC for the Swedish Cherry Hill MIMP included representatives of Swedish Medical Center, Seattle University, design and development professionals, business and property owners, and neighborhood residents. Ultimately, the CAC must prepare a written report



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

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of its findings and recommendations on the Final MIMP. SMC 23.69.032.F.1. An application may be approved **only** when the CAC has reviewed the application and has recommended by a three fourths vote of all CAC members, with at least six affirmative votes, approval of the application. SMC 23.69.033.A.4.a.

The Swedish Cherry Hill MIMP CAC spent an extraordinary amount of time listening to, collecting and reviewing reports and information to develop its conclusions about the Final MIMP proposal. They held a total of 36 public meetings and reviewed volumes of reports and letters both from those favoring adoption of the Final MIMP and those opposed to various elements of that plan. Hundreds of people commented both during the public comment periods of the 36 Citizen Advisory Committee meetings and by e-mail or letter. *See CAC Majority Report*.

Ultimately, the CAC did not approve the Final MIMP. It concluded that the Final MIMP "neither sufficiently minimizes the impacts associated with future development nor adequately protects the livability of the neighborhood." *Id.* (*Letter from Katy Porter, CAC Chairperson to Sue Tanner and Tim Burgess* (May 20, 2015)). Relevant to the issue presented with this brief, CAC Recommendation 2 proposed amendments to the MIO heights that are identical to the heights in the Proposed MIO Height Conditions in Exhibit A to this brief. *Id.* A large CAC minority (Patrick Angus, Maja Hadlock, Dean Patton, James Shell, J. Elliott Smith, and former CAC member Nicholas Richter) issued a Minority Report that advocated even greater restrictions than the Majority for MIO Heights. *Id.*

The Central Area Land Use Review Committee, a committee composed of residents and property owners in the Central Area, concluded that reductions in height, bulk and scale of the project were necessary to adequately minimize the impacts and protect the livability of the neighborhood. *Central Area Land Use Review Committee Comments* (Jul. 13, 2015). Their



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

comments echoed those of the CAC and other members of the public. They pointed out that the Seattle code consistently refers to transitions between zoning types, requiring a gradual transition from low heights to higher heights, as well as low intensity uses to higher intensity uses. Because there is neither available land nor existing environmental buffers to create appropriate gradual transition to the surrounding residential neighborhood, they explained that the transitions must occur with, among other things, lower perimeter heights to establish the transitional zone. *Id.*

In the end, it simply cannot be disputed that the Final MIMP MIO Heights recommended by the Hearing Examiner will have significant adverse impacts to the surrounding neighborhood and cannot be lawfully approved under SMC 23.69.025, SMC 23.69.002, and SMC 23.69.032.E.2. Considering that the CAC has not recommended approval of the Final MIMP, adopting the Hearing Examiner's recommendation would also violate SMC 23.69.033.A.4.a as is explained below in Section C. The Hearing Examiner also disregarded the FEIS conclusions that demonstrated that the height, bulk and scale of the proposal would cause significant adverse impacts to the neighborhood, was out of scale with the neighborhood, and would threaten the livability and vitality of the neighborhood. The Examiner's decision has no basis in law or fact.

In contrast, the Proposed MIO Height Conditions are supported by the evidence in the record and are a proper application of the law for approving this proposal. That proposal is identical to the Majority CAC recommendations on MIO Heights.

### C. Adopting the Hearing Examiner's recommendation would violate SMC 23.69.033.A.4.a.

Considering that the CAC did not recommend approval of the Final MIMP as proposed, adopting the Hearing Examiner's recommendation (which recommended approved of the Final



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

MIMP as proposed) would violate SMC 23.69.033.A.4.a. If the City Council adopts the Proposed Conditions in Exhibit A, which reflect the CAC's Recommendation 2 in its Majority Report, that would be a step in the right direction towards ensuring consistency with that provision.

Under that provision, a MIMP application may be approved **only** when the CAC has reviewed the application and has recommended by a three fourths vote of all CAC members, with at least six affirmative votes, approval of the application. SMC 23.69.033.A.4.a. The CAC has not recommended approval of the application as proposed. The CAC has concluded that certain conditions, including height reductions set forth in Recommendation 2, must be applied before the MIMP Application can be approved. The Hearing Examiner's recommendation to approve the Final MIMP in disregard of the CAC Majority Report violated SMC 23.69.033.A.4.a.

### D. The Proposed MIO Height Conditions Are Appropriate Via the City's SEPA Substantive Mitigation Authority

Not only are the Proposed MIO Height Conditions required under the Major Institution code provisions, but the City can also require them via the City's SEPA substantive mitigation authority. With respect to a development's height, bulk and scale, the City's policy is to preserve the character of individual city neighborhoods. SMC 25.05.675.G.1.a. The code states:

> It is the City's policy that the height, bulk and scale of development projects should be reasonably compatible with the general character of development anticipated by the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan regarding Land Use Categories, the shoreline goals and policies set forth in Section D-4 of the land use element of the Seattle Comprehensive Plan, the procedures and locational criteria for shoreline environment redesignations set forth in SMC Sections 23.60.060 and 23.60.220, and the adopted land use regulations for the area in which they are located, and to provide for a reasonable transition between areas of less intensive zoning and more intensive zoning.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

The Code expressly allows the City decision maker to condition or deny a project to mitigate the adverse impacts of substantially incompatible height, bulk and scale. SMC 25.05.675.G.2.b. Mitigating measures may include but are not limited to:

> i. Limiting the height of the development;
>
> ii. Modifying the bulk of the development;
>
> ...vi. Modifying or requiring setbacks, screening, landscaping or other techniques to offset the appearance of incompatible height, bulk and scale.

*Id.*

The SEPA substantive policies on land use for the City of Seattle refer to the goals and policies set forth in Section B of the land use element of the Seattle Comprehensive Plan. The proposal is inconsistent with those policies in the Land Use Element of the Comp Plan. *See* FEIS at 3.3-37; 3.3-38; and 3.3-40. Specifically, regarding Section B.1, the FEIS concludes that the proposal is inconsistent with LUG8 and LUG9.

If there ever was a situation to apply this mitigation, this is that situation. Based on the evidence described above in detail, the height, bulk and scale of the proposal should be limited and modified as outlined in the Proposed MIO Height Conditions pursuant to the authority in the City's substantive SEPA regulations.

E. <u>The MIO Heights Should be Reduced Because the Proposal Site is Outside of Urban Centers and Villages in the area</u>

The MIO Heights should be reduced as outlined in the Proposed MIO Height Conditions in order to further the City policies associated with its urban village strategy for growth in the City. The urban village strategy was developed by the City, with the intention of concentrating growth in the urban villages. *Seattle's Comprehensive Plan, Toward a Sustainable Seattle* at 1.3.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

Areas outside of urban villages are meant to accommodate growth in less dense development patterns consisting primarily of single family neighborhoods, limited multi-family and commercial areas, and scattered industrial areas. *Id.* at 1.4. When the City establishes a fundamental goal of steering the majority of estimated growth and housing units and jobs toward urban centers and urban villages for the purpose of "preserving the character of Seattle's predominantly single-family neighborhoods," the City Council cannot and should not ignore that goal when considering how large this major institution in a single-family neighborhood should be. The Swedish Cherry Hill MIMP proposal site is outside of Urban Centers and Villages in the area.

During the hearing, the Applicant argued that inconsistencies with the urban village goals and policies are "irrelevant" to major institution planning, either as part of the MIMP or as a matter of substantive SEPA policy. They relied on the City Council decision indicating as such for the Children's Hospital proposal. We urge the Committee to revisit this issue and recognize that inconsistency with the urban village strategy is *directly relevant* to major institution planning. On a big picture scale, Chapter 23.69 SMC limits growth within a Major Institution Overlay district. The goals and policies of the City's urban village strategy are directly relevant to the question of impacts on the neighborhood. When you have a fundamental goal of steering the majority of estimated growth and housing units and jobs toward urban centers and urban villages for the purpose of "preserving the character of Seattle's predominantly single-family neighborhoods," you cannot and should not ignore that goal when considering limits on height, bulk and scale of this major institution in a single-family neighborhood. That this proposal is repeatedly inconsistent with the goal of preserving the character of the predominantly single-family neighborhoods is directly relevant to the MIMP decision. You can bet that if this site was



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

within an urban village, Swedish and Sabey would be repeatedly emphasizing that growth was appropriate because it is within an urban village. But, because it is not within the urban village, they argue, incorrectly, that the proposal's inconsistency with Seattle's 20 year vision for limited growth outside of those areas is irrelevant.

F. The Proposed MIO Height Conditions Would Address Issues Related to Need.

MIMP review requires a balancing of the needs of the major institution to develop facilities for the provision of health care against the need to minimize the impact of major institution development on surrounding neighborhoods. SMC 23.69.025. The height, bulk and scale of the proposal is directly indicated by the uses (i.e. needs) of the Institution. If you allow the Institution to go beyond limits of need on that particular site, you allow the size to expand beyond what should be allowed.

As was explained by the City Council in the Children's MIMP, (Ordinance #123262):

> Major Areas of Concern
>
> Need and Public Benefit
>
> 34. SMC 23.69.002 states that the purpose and intent of the Major Institution Code is to:
>
> A. Permit appropriate institutional growth within boundaries while minimizing the adverse impacts associated with development and geographic expansion;
>
> B. Balance the Major Institution's ability to change and the public benefit derived from change with the need to protect the livability and vitality of adjacent neighborhoods;
>
> C. Encourage the concentration of Major Institution development on existing campuses, or alternatively, the decentralization of such uses to locations more than two thousand five hundred (2,500) feet from campus boundaries;



Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

E. Discourage the expansion of established major institution boundaries;

H. Accommodate the changing needs of major institutions, provide flexibility for development and encourage a high quality environment through modifications of use restrictions and parking requirements of the underlying zoning;

I. Make the need for appropriate transition primary considerations in determining setbacks. Also setbacks may be appropriate to achieve proper scale, building modulation, or view corridor;

35. SMC 23.69.025 states that the intent of a MIMP is to "balance the needs of the Major Institutions to develop facilities for the provision of health care or educational services with the need to minimize the impact of Major Institution development on surrounding neighborhoods."

36. The Director of DPD concluded that Children's has shown a credible need for the requested expansion, and no appellants now dispute that conclusion.

...

45. Public comment uniformly supported the mission of Children's and applauded its work in the region. However some members of the public questioned the need for Children's to nearly triple the square footage of its existing facilities within the MIO.

46. Children's originally did not evaluate any alternatives that included less than 2,400,000 square feet of development area. Instead, the alternatives considered different ways to configure the same amount of development space on the existing campus and Hartmann site, and later, on an expanded campus that included both Laurelon and Hartmann sites. Now, Children's proposes to exclude the Hartmann site from the MIO and to limit the development area to 2,125,000 square feet.

47. The CAC gave considerable attention to the issue of need. Comments to the CAC were provided by individuals and groups both in support and against Children's projections concerning the rationale for a certificate of need. See Exhibits ...

48. In response to the CAC's continuing concerns about the discrepancies between Children's and LCC's need projections, Children's offered assurance that it had no intention to build beyond its actual needs.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

1
2 49. Aside from the impacts of a significantly expanded medical center, some neighbors expressed concern that facilities not be
3 constructed for general research or other uses not directly supporting Children's pediatric medical care.
4
5 50. The CAC determined to accept Children's projections of need with the understanding that the issue would be thoroughly vetted
6 during the state certificate of need process. However, the CAC recommended "in the strongest terms" that the decision on the
7 MIMP include both conditions on phasing the project in relationship to need and conditions restricting use of the
8 constructed facilities. Exhibit 8 at 17-19.

9 Thus, in that case, the City Council set forth certain limits on future uses that may be
10 introduced within the Children's Medical Center campus to address the "need" side of the
11 equation.
12
13 The Citizens Advisory Committee in the Swedish Cherry Hill case expressed concerns
14 similar to those of the CAC in the Children's case. However, unlike the CAC process in the
15 Children's case, the CAC in this case did not analyze and consider the alleged "need" of the
16 institution in great detail. The CAC was advised against that by City of Seattle staff.

17 The CAC Final Report and Recommendation (pages 11-12) stated:

18
19 Some members of the CAC and much of the public comment questioned the validity of projections, inclusion of some of the uses
20 at this campus, and the need for this level of density given the numerous alternate locations in the Providence system for some
21 ancillary uses. These concerns remain for some members of the CAC. However, while skepticism remains, the CAC did not take a
22 formal position on a specific level of need.

23 The Major Institutions Code further complicated this issue for the CAC. It directs that the CAC may discuss and comment on "need"
24 but that "need" is not negotiable. Ultimately the CAC concluded that Swedish Medical Center had presented sufficient justification
25 of need to justify some increased future development, but not
26 necessarily all – e.g. the hotel, Lab Corps and NW Kidney Center.



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

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Therefore, the CAC neither endorses nor rejects the level of need identified by SMC.

There is, however, consensus only that some level of increased development authority should be accommodated at the Cherry Hill Campus, particularly to accommodate the hospital bed addition and its directly associated supporting uses. If no level of increased need had been demonstrated, then a no-change or no growth alternative might have been a valid one. However, this campus is part of a larger Providence Health Care System. If the full needs of that system for development cannot be accommodated within this campus, then Providence should evaluate other options including greater decentralization.

**Guiding Principle** 1 –Some level of new development authority for the Cherry Hill Campus is necessary. A "no growth alternative" is not reasonable.

Level of Development – Bulk Height and Scale - In taking the above positon, the CAC concluded that its recommendations, while accepting that some new development was justified, would neither be bound by, nor based upon the needs calculations as presented by SMC. Instead the CAC's recommendations focus on identifying the maximum heights, bulk and scale and acceptable setbacks consistent acceptable transitions between the Cherry Hill Campus and its surrounding neighborhoods, while allowing reasonable growth at the Cherry Hill Campus. Its recommendations are not necessarily bound to accommodating the full amount of square footage originally requested by SMC. Its height bulk and scale recommendations would be independent of the overall needs calculations.

**Guiding Principle** 2 – The CAC's recommendations are not intended to necessarily achieve the square footage of development desired by SMC. To the extent that the CAC's recommended heights, bulk and scale might result in overall development at the Cherry Hill Campus falling below what SMC desires, it shall be the responsibility of SMC, and not the CAC to identify where, or if, additional opportunities are found on campus or to identify opportunities elsewhere within the Providence Health Care System.

**Guiding Principle** 3 – Overall height, bulk and scale at the Cherry Hill Campus should be reasonably compatible with its low-rise adjacent development and great care should be taken to avoid actions that would adversely affect adjacent properties or might



**Bricklin & Newman, LLP**
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

lead toward either disinvestment in those areas or conversion from low- to mid-rise development.

The Squire Park Community Council believes that a limitation associated with the MIO Height limits, as suggested by the CAC is appropriate and necessary. The CAC's recommendation in regards to limiting the impact from uses beyond those closely related to the mission of Swedish Medical Center, was to ask the City Council to approve a development envelope with slightly lower height limits in certain locations. If a smaller development envelope requires the applicants Swedish and Sabey to develop less than they desire, decisions as to which uses are most important to the mission of Swedish may, in fact be made by Swedish.

Through a combination of more precise language limiting uses on the campus and lower height limits, the necessary intention may be realized.

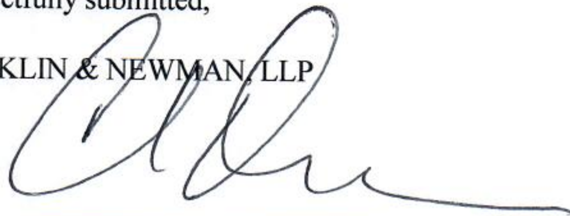
## III. RELIEF SOUGHT

Squire Park Community Council requests that the Planning, Land Use, and Zoning Committee incorporate the proposed conditions and recommendations related to MIO Heights that were distributed to the parties on April 13, 2016 into its recommendation on the Swedish Cherry Hill MIMP Proposal to the City Council.

Dated this 20th day of April, 2016.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP



By: ____________________

Claudia M. Newman, WSBA No. 24928
Attorneys for Squire Park Community Council



Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3200
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

April 1, 2016

Mr. Ketil Freeman
Seattle City Council Central Staff
Sent by e-mail to Ketil.Freeman@Seattle.gov

Re: CF 311936, Swedish MIMP

Comments regarding administrability of recommended conditions:

Dear Mr. Freeman:

Thank you for forwarding draft recommendations and for the opportunity to comment on the administrability of the proposed conditions.

These are comments submitted on behalf of the Squire Park Community Council.

I believe that the draft conditions are in two general categories.

1. Uses

In Conclusions 7 and 17 of the draft are recommendations intended to create additional conditions on the uses permitted in future MIMP development.

Under "Major Institution Uses", the draft of the Council Committee states, in paragraph 2:

*"No portion of any building on Swedish Cherry Hill's campus shall be rented or leased to tenants except those who provide medical care that is functionally integrated with or substantively related to medical services provided by Swedish Cherry Hill, or directly related supporting uses, within the entire rented or leased space. Exceptions may be allowed by the Director for commercial uses that are located at the pedestrian street level, or within campus buildings where commercial/retail services that serve the broader public are warranted."*

This condition contains language that is closely related to a condition contained in the recent Childrens' Medical Center MIMP: (In the Children's MIMP, Ordinance 123263, MIMP Condition 18: "No portion of any building on Children's extended campus shall be rented or leased to third parties except those who are providing pediatric medical care, or directly related supporting uses, within the entire rented or leased space. … .")

In the Children's Medical Center MIMP the intent and effect of the language was to proscribe some kinds of possible uses. If there was a similar intent here, which it appears there was, the language of the proposed conditions in this case create ambiguity and uncertainty.

It is stated in the final sentence of Conclusion 7 of the draft, by way of introduction to the additional condition quoted above, the following: "However, <u>to ensure that uses developed under the MIMP are institutional in nature</u>, additional conditioning is warranted." (emphasis added)

The Land Use Code *already* requires that all uses within the Major Institution Overlay be "institutional in nature". If the intent of the condition in Conclusion 19 is to further refine the extent of uses that may be allowed, (as was the apparent intent in the Children's MIMP) the final sentence in Conclusion 7 negates that. If the intent of the condition in Conclusion 19 is to state that all future uses within the Swedish MIO must be institutional uses, it is superfluous, as the Land Use Code requires that in any case

If the intent of the proposed recommendation is to put some additional limits on future uses, then it would be clearer to all parties --- the Department, the institution, the Sabey Corporation, and the public --- if that is stated. The final sentence of Conclusion 7 should be substituted with language such as: "To ensure that uses developed under the MIMIP are directly and exclusively related to the central mission of Swedish Medical Center, additional conditioning is warranted."

An additional problem with administrability is created by copying the terms used in the Children's MIMP and limiting the provision to buildings "rented or leased". As is clear from the record here, the Swedish Cherry Hill campus is different from Children's. Uses have been established on the Cherry Hill campus through sales and other devices. A reference to "leasing and renting" in the context of the Swedish Cherry Hill campus does not accomplish the apparent goal.

If the City Council intends to describe a limitation that is effectively administrable, then the condition should eliminate the reference to "leasing and renting" and, instead, state that "no portion of any building or site on Swedish Cherry Hill's campus shall be occupied except by those who provide medical care that is functionally integrated with or substantively related to medical services provided by Swedish Cherry Hill, or directly related supporting uses within the entire space."

The attempt by the Council Committee to fashion a limitation on future uses that is similar to the condition stated in the Children's MIMP is entirely fair and appropriate. However, in order for the limitation to be administrable it is necessary to use more detailed and precise language that will have a greater likelihood of having a meaning that is understood to have a common meaning by all parties.

Within the meaning of the words suggested by the current draft, in the future would the Northwest Kidney Center be included in the recommended language? The Sabey Corporation and Swedish believe that the Northwest Kidney Center is an institutional use allowed by the Land Use Code because some of the patients of the Kidney Center are also patients of Swedish physicians.

In the future would a use like the Laboratory Corporation offices be included? The Sabey Corporation and Swedish believe that the LabCorp offices are allowed because some of the services provided by LabCorp in its Cherry Hill offices benefit patients of the Cherry Hill hospital and physicians.

Within the meaning of the draft language would future uses similar to the research uses Children's Medical Center recently proposed to be located in a 13-story building in South Lake Union be permissible?

If it is the intention of the City Council to place some limits on future expansion, and if the vehicle for doing so is to limit the kinds of uses, then precise and detailed language is necessary for administrability. (This is opposed to height limits, which might accomplish the same results while being easier for the Department, the institution, and the public to understand and accept as having a common meaning.)

Finally, in regards to administrability is this issue:  There is no clear mechanism for the Department to render a decision on whether or not a future use proposed by the institution is allowed, or not, within the meaning of the MIMP.  There is no process for the public to know that such a decision has been made or is about to be made.

In the past, uses have been put in place on the Swedish Cherry Hill campus, ---Laboratory Corporation, Northwest Kidney Center, for example,  --- without any apparent decision by the Department (then DPD) related to whether or not the proposed uses were consistent with the Land Use Code.

If it is the intent of the City Council to create an enforceable decision making process by the Department of Construction and Inspection --- a process that is open and transparent, then that process must be clearly defined.  In order for the proposed limitation on future uses to be administrable, there must be a requirement that a decision be made and the public be notified, with an opportunity to appeal.

2.  Transportation Management Plan

The draft recommendations state that the SOV rate begin at 50% and "be reduced by 2 percent every two years" for the next 18 years.  Presumably the intent is that the SOV rate be reduced by "two percentage points" every two years and not 2 percent every two years.

Thank you for your consideration.

Bill Zosel

For the Squire Park Community Council

**M E M O R A N D U M**

TO: Seattle City Council

FROM: Claudia M. Newman, Bricklin & Newman, LLP
On behalf of Squire Park Community Council

DATE: April 20, 2016

RE: Swedish Cherry Hill MIMP
Additional Memorandum on Proposed TMP and Leasing Conditions

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## I. INTRODUCTION

This memorandum is being submitted on behalf of Appellant Squire Park Community Council in response to Ketil Freeman's April 13, 2016 request regarding proposed TMP conditions being considered by the City Council's Planning, Land Use and Zoning Committee (the "Committee"). In response to that request, this memo addresses issues that were raised by the Applicant in its *Memorandum from Joseph A. Brogan and Jack McCullough to Ketil Freeman* (April 1, 2016) that were outside of the scope of administrability of the proposed conditions. Specifically, Squire Park addresses herein the Applicant's contentions that the recommended conditions related to the TMP are unsupported by the record and/or violate various state and local laws. A copy of the Recommended TMP Conditions is attached to this memo as Attachment A for ease of reference.

My overall response is that the applicants' arguments on all of these issues are baseless and largely come across as scare tactics more than credible legal claims – the Seattle City Council has the discretion and legal authority to impose the proposed TMP conditions as is explained below. My rebuttal below just scratches the surface in refuting their claims – I would have gone into greater depth and detail but for the short time frame we had to prepare a response to the both the April 1, 2016 memo and the Proposed MIO Height conditions. I suspect that the City attorneys, whom I know are intimately familiar with RCW 82.02.020 and substantive due process, will have more to add on those issues.

### A. Swedish and Sabey have raised new legal issues that were not presented to the Hearing Examiner below

The arguments in Mr. Brogan and Mr. McCullough's April 1, 2016 memo are new arguments. Swedish and Sabey did not argue that SEPA does not support the imposition of a 32% SOV goal during the hearing before the Hearing Examiner. Nor did they argue that a requirement that certain SOV goals be met before building permits can be approved was *ultra vires* and would violate RCW 82.02.020 below.

This is significant because the record is now closed. Appellants are placed in the impossible position of responding to completely new legal arguments after the record has closed and, therefore, we have no opportunity to submit evidence in response to the new arguments. And the fundamental premise underlying the Applicants' arguments is that the "evidence in the record" doesn't support the City Council's proposed conditions. Obviously, Appellants would have submitted the evidence necessary to rebut these legal arguments if Swedish and Sabey had made these arguments before the Examiner in the first place.

The idea that the Council should reject potentially critical and effective mitigation of this proposal based on a contention that the evidence below didn't support it should not be the end of the conversation. The Council should allow the Appellants to supplement the record with evidence necessary to respond to these new arguments. Simply rejecting the condition outright would not only be unfair, it would violate Appellants due process rights to present the evidence necessary to support requiring those conditions.

B. The Requirement for a 32% TMP SOV Goal is Supported by the Evidence in the Record

The Applicant has created a false narrative about the testimony on the 32% SOV rate in the Proposed TMP Conditions. Swedish and Sabey's attorneys state in their memo that "there is no evidence in the record" supporting the proposed 32% TMP SOV goal. *See Memorandum from Joseph A. Brogan and Jack McCullough to Ketil Freeman* (April 1, 2016) at 1. That is simply not true.

The Citizens' Advisory Committee (CAC) Majority Report is "evidence." In fact, that "evidence" has significant weight in this MIMP review process. The CAC Report was the result of 36 public meetings and a review of volumes of reports and letters regarding the Swedish Cherry Hill MIMP Proposal. Among other things, the CAC Report concluded that the Institution's SOV goal should be 32%, within twenty-five years because "[o]ther nearby institutions are already achieving SOV rates in the 25 to 35% range. *CAC Final Report and Recommendation* at 31. According to the CAC's review, Swedish Cherry Hill is the outlier. It has consistently been out of compliance with its existing SOV goal. The CAC concluded that Swedish Cherry Hill should not benefit from its non-compliance and instead should be subject to an aggressive program to bring its SOV use rates more in line with those of similar nearby institutions. *Id.*

Based on the evidence, one could argue that the City Council would be lenient in requiring a 32% SOV rate to be achieved only after twenty five years. Virginia Mason Medical Center, for example, achieved at least six years ago, a SOV rate of 27%. Finding of Fact 62 of Virginia Mason MIMP, Seattle City Council Ordinance 124403. The SOV rate goal of that MIMP, determined by the City Council is to maintain a rate of less than 30%. That shows that this is, by no means, an unreasonable requirement.

Swedish and Sabey also mischaracterized the testimony of Ross Tilghman, a transportation expert who testified on behalf of Washington CAN at the SEPA hearing. At

the outset, it is critical to recognize that Ross Tilghman's oral testimony was limited solely to the issue of adequacy of the FEIS – he did not testify about the final MIMP, nor did he testify about substantive SEPA authority. Therefore, the Applicant's claim that he "never justifies or even recommends a lower TMP SOV goal" is misleading – the issue presented here in this memo wasn't even within the scope of his testimony.[1] We don't know for sure how Mr. Tilghman would respond directly to this new legal argument being presented by the Applicant. Mr. Tilghman did touch on the SOV rate issue, but the Applicant incorrectly leaves the impression that all he did was question whether the 38% goal was achievable. That was speculation. We don't know what he would testify if pressed on this specific issue to the extent that it's being pursued now. What they also fail to mention is that Mr. Tilghman testified that while a SOV rate reduction of a few percentage points might not have a large impact on reducing corridor congestion, it would have a much greater impact on traffic in the immediate neighborhood. The six percentage point difference will disperse as distance from the campus increases. However, immediately surrounding the campus, the entire impact of that six percentage point would be felt.

Mr. Tilghman also testified that, in addition to the impact of additional moving vehicle traffic, each additional percentage point for the SOV goal represents mitigation of additional impacts related to parking --- both on-street parking and structured parking. *Id.* According the MIMP (page 74) the current on-campus off-street parking supply consists of 1,510 parking spaces. The proposed campus development would, according to page 56 of the MIMP result in approximately 2,245 parking spaces --- an increase of almost fifty percent. One of the locations for which there is planned a large new parking garage is the 18th Avenue portion of the campus, immediately adjacent to the backyards of the Single Family zone on 19th Avenue. For those residents, and for many others who live in the immediate vicinity, if the parking garage were to be not as big as planned, and if the increase in the number of cars were limited by even just a few, this would be meaningful.

The *sole basis* for the 38% figure is that "38% is similar to recent years' (SOV rate) attainment of Children's Hospital." (John Shaw, DPD traffic staff, Testimony). Therefore, the support for the a SOV rate of 38% for Swedish Cherry Hill by the year 2041 is that Children's Hospital achieved that rate in 2014. It is entirely reasonable for the City Council to conclude that the rate of 32% is achievable within 25 years considering Children's achieved that rate at least two years ago, and Virginia Mason achieved 28% several years ago.

Other evidence in the record showed that Swedish Cherry Hill currently has 56%-58% of its employees commuting by single occupant vehicles. Consequently, it fails to meet Seattle's code-minimum requirement of no more than 50% SOV, and it falls far short of the performance at other major institutions, including Seattle University and Children's

[11] When another Appellant, Washington CAN, attempted to submit Ross Tilghman's written testimony on the Final MIMP issues, the Examiner excluded his written testimony on the basis that only those affected by the proposal could submit testimony on the Final MIMP. Appellants objected to this ruling on the grounds that Ross Tilghman was an expert who had been hired by Appellants and Appellants were affected by the proposal, but the Examiner prohibited his written testimony despite that argument. She also excluded the written testimony of another expert hired by Appellants, Dr. Sharon Sutton.

Hospital. To date, Swedish has been unable or unwilling to reduce its SOV goal to something less than 56%. While the Hearing Examiner required an eventual 38% SOV rate, it gives Swedish Cherry Hill 25 years to reach that level. The Proposed TMP Condition requiring that they meet certain goals before adding more square footage and increasing traffic in the area is appropriate in light of this evidence.

Swedish and Sabey argue that they should be granted a higher SOV rate than institutions such as Virginia Mason because Swedish Cherry Hill is in a residential neighborhood that is not robustly served by transit, particularly rapid transit. If the Council accepted this argument - Rather than this being a reason for the City Council to grant an unusually high SOV rate, the City Council should render a decision that would result in some reasonable limits on future development, such as by lower height limits on the so-called "western block" along 15th Avenue, as recommended by the CAC.

C. The City Has Legal Authority to Require a 32% TMP SOV Goal Via Its SEPA Substantive Authority

The applicant's contention that SEPA does not allow the City to require a 32% SOV goal as mitigation for traffic impacts is baseless. The SEPA policies and regulations authorize the City Council to condition the Swedish MIMP proposal with a Transportation Management Plan to mitigate significant traffic and transportation impacts. That TMP can include a 32% SOV goal.

The Swedish Cherry Hill MIMP FEIS concluded that the traffic and transportation generated by the Swedish Cherry Hill expansion will cause significant adverse impacts to the surrounding community. *See* FEIS 3.7-58; 3.7-59. The FEIS states:

> [The] added congestion [from the proposal] would contribute to measurably poor performance of the transportation network, in terms of increased delays along several of the corridors and at some specific intersections. The increase in traffic and pedestrian and bicycle activity due to development would result in more conflict points and increased hazards to safety. The increase in traffic volumes for Alternatives 8, 11, or 12, and the resultant impacts on traffic operations are considered significant unavoidable adverse impacts.

FEIS at 3.7-58. Several intersections in the neighborhood will be degraded to LOS F because of the traffic introduced into the area by the project. FEIS at 1-10; 1-11. The FEIS states that, although Swedish can try to implement strategies to reduce its overall traffic, the traffic volumes will still cause significant impacts. *Id*. The FEIS concludes that "the increase in Swedish Cherry Hill's traffic along the street system, even with a successful TMP, may result in an increase in traffic and related congestion that could be considered significant."

The SEPA substantive mitigation regulations state, in relevant part:

> R. Traffic and Transportation.
>
> 1. Policy Background.
>
> a. Excessive traffic can adversely affect the stability, safety and character of Seattle's communities.
>
> b. Substantial traffic volumes associated with major projects may adversely impact surrounding areas.
>
> ...
>
> d. Seattle's land use policies call for decreasing reliance on the single occupant automobile and increased use of alternative transportation modes.
>
> …
>
> 2. Policies.
>
> a. It is the City's policy to minimize or prevent adverse traffic impacts which would undermine the stability, safety and/or character of a neighborhood or surrounding areas.
>
> …
>
> c. Mitigation of traffic and transportation impacts shall be permitted whether or not the project meets the criteria of the Overview Policy set forth in SMC 25.05.665.
>
> ...
>
> i. Mitigating measures which may be applied to projects outside of downtown may include, but are not limited to:
>
> …
> (G) Transportation management plans.
>
> ii. For projects outside downtown which result in adverse impacts, the decisionmaker may reduce the size and/or scale of the project only if the decisionmaker determines that the traffic improvements outlined under subparagraph R2fi above would not be adequate to effectively mitigate the adverse impacts of the project.

SMC 25.05.675.R.

In addition to that authority, the City Council has explicit SEPA authority to condition a project to mitigate the effects of development in an area on parking via a "transportation management program" or "incentives for the use of alternatives to single-occupancy vehicles." SMC 25.05.675.M.2.d.

Therefore, the City Council has the legal authority to require that Swedish adopt a Transportation Management Plan under SEPA to address the significant impacts to traffic and transportation caused by its development. The condition requiring a Single Occupancy Vehicle (SOV) goal of 32% in 25 years is part of the Transportation Management Plan being required. The City code explicitly allows the City to require an SOV rate below 50%. SMC 23.54.016.C.1. It is, clearly, within the scope of authorized SEPA mitigation.

The Applicants take this to a molecular level and argue certain details of a TMP can be either within or outside of SEPA authority. Despite that the code explicitly allows it, they argue that the City doesn't have SEPA authority to include a Single Occupancy Vehicle (SOV) goal of 32% in the TMP because the SOV goal of 32% is not "attributable to the identified adverse impacts of its proposal." *See Sabey/Swedish memo* at 3 *citing* SMC 25.05.660.A.4. Their argument misreads and misapplies SMC 25.05.660.A.4. The question is whether the SOV 32% goal condition is *attributable* to some type of impact caused by the development. The answer is clearly yes: it is attributable to the significant, adverse traffic impacts caused by the project. The Applicants turn this single phrase into a requirement for a laser specific evidentiary basis to justify a decrease of the 38% SOV rate to a 32% SOV rate. But SMC 25.05.660.4 doesn't even say that. But even that provision did say that specific evidence was required to justify this specific aspect of the TMP, the evidence in the record clearly supported applying a 32% SOV rate to this proposal as I explained above.

Next the applicant argues that mitigating conditions must be "reasonable and capable of being accomplished." SMC 25.05.660.A.3. The evidence at the hearing showed that the 32% SOV rate is reasonable and capable of being accomplished in 25 years. The Applicant is suggesting that it would be unreasonable for the City Council to require a SOV rate that in 25 years will still be greater than what the City Council has already required of Virginia Mason. This argument makes no sense in light of the evidence.

Ultimately, if the applicant was right and the 32% SOV rate is not capable of being accomplished, then the City Council has clear legal authority to reduce in the size and/or scale of the proposal to mitigate traffic and transportation impacts. SMC 25.05.675.R.2.f.ii. Therefore, if it a 32% SOV goal will not work to mitigate the impacts, then the City Council should decrease the size and/or scale of the proposal to mitigate the traffic and transportation impacts.

D. <u>The Proposed Condition Requiring Achievement of Certain SOV Goals Prior to Issuance of Future Building Permits Is Not *Ultra Vires*, Nor Is It an Improper Legislative Text Amendment</u>

The Applicants' argument against the proposed condition that Swedish shall achieve a certain SOV rate prior to the approval of building permits does not instill much confidence in their desire to actually achieve the SOV rate goals in their TMP. This is especially concerning in light of its persistent failure to achieve better than 56%-58% SOV rates now. Considering that the evidence showed that Swedish has been unable or unwilling to reduce its SOV goal to something less than 56%, it is entirely reasonable to require that Swedish meet the new goals before it is allowed to add more square footage and more traffic impacts into the area. Their apparent foregone conclusion that they won't be able to obtain building permits because they don't expect to reach the goals in their TMP doesn't bode well for success of that Plan. Yet again, therefore, we remind the Committee that there is another option: if failure of that mitigation is so inevitable, the City should mitigate traffic and transportation impacts by reducing the size and/or scale of the proposal to per SMC 25.05.675.R.2.f.ii.

The Applicants' suggestion that this proposed condition is *ultra vires* and an improper text amendment is completely off base. The Seattle Code clearly and unambiguously gives the City Council the authority to mitigate impacts in this manner. The City Council has the authority to adopt the Proposed TMP Conditions per SEPA substantive regulations, per SMC 23.69.030.F, and per SMC 23.69.025, SMC 23.69.002; SMC 23.69.032.E.2. Frankly, the City has the authority to adopt those conditions per the code provision relied on by the Applicants, SMC 23.54.016.C.1, as well.

The Applicant's contention that the City Council's authority to adopt a certain TMP is somehow limited by SMC 23.54.016 is not a credible argument. Even if you bought their argument that only the Director has authority under that provision (which makes no sense in light of the way that the MIMP process for approval works), the MIMP regulations state that outside of and independent of SMC 23.54.016, the City Council must ensure that the TMP includes, "at a minimum, specific institutional programs to reduce traffic impacts and to encourage the use of public transit, carpools, and other alternatives to single occupant vehicles." *See* SMC 23.69.030.F. That clearly allows a program that does not allow additional square footage until and unless the institution has proven that the TMP program to reduce traffic impacts and encourage alternatives to single occupant vehicles has been proven successful. That provision gives the City Council the authority to adopt the Proposed TMP Conditions. That provision also makes it clear that SMC 23.54.016 contains the *minimum requirements* for a TMP, it doesn't in any way limit the authority of the City Council to adopt specific mitigation when it is approving a Final MIMP.

This condition is not "punitive" and it is not, by any means, an improper legislative amendment to the Major Institutions Code. This is a reasonable requirement that will require the developer to meet mitigation requirements prior to adding additional traffic impacts and additional square footage to the institution. The applicant's suggestion that this requirement somehow requires an amendment to the City of Seattle Code has no

credibility. The City Council has legal authority to mitigate this proposal with the Proposed TMP Conditions.

E. There is No Evidence to Show That the Proposed TMP Condition is Unprecedented

The Applicant contends that the proposed TMP condition is "unprecedented." There is nothing in the record to support this statement. The sole "evidence" is based on Ms. Selzig's testimony that she herself hadn't seen it before. That doesn't support a claim that it's "unprecedented." Furthermore, the fact that something hasn't been done before is hardly a reason not to do it now. If that were a viable argument, the City would be barred from applying new methods for mitigation to any projects. That approach would completely undermine any attempt at progress and improvement in mitigation strategies.

F. The Proposed TMP Conditions Do Not Violate RCW 82.02.020 or Swedish's Due Process Rights

Swedish and Sabey argue that RCW 82.02.020 prohibits the City from imposing charges (in kind or dollars) through its proposed TMP conditions that are not supported by the record and where the proposed conditions are not reasonably necessary to mitigate a specific, identified element of the Master Plan. *Isle Verde Inter. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753, 49 P.3d 867 (2002). This argument fails outright because the evidence showed (as explained above) that the Proposed TMP conditions are reasonably necessary to mitigate the traffic and parking impacts of the proposal. Furthermore, the City has explicit authority to deny a building permit if the developer has not shown that it has met the SOV goals. SMC 25.54.016.C.6.

Swedish and Sabey also argue that the Proposed TMP Conditions would violate their substantive due process rights. The general concept behind substantive due process review is reasonableness. *Robinson v. City of Seattle*, 119 Wn.2d 34, 51, 830 P.2d 318 (1992). When presented with a substantive due process claim, Washington courts ask, among other things, whether a regulation is "unduly oppressive" on the property owner. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330 (1990). *See also Robinson v. Seattle*, 119 Wn.2d at 51. The "unduly oppressive" implies a balancing of the public's interest against those of the regulated landowner. *Presbytery of Seattle v. King County*, 114 Wn.2d at 331.

It is inconceivable that a court would consider a condition requiring an SOV goal of 32% twenty-five years from now is oppressive in light of the evidence described above. *See eg. Robinson v. City of Seattle*, 119 Wn.2d at 55. This is especially true considering that the City has discretion under the MIMP regulations and under SEPA to reduce the size of the proposal overall based on the traffic, transportation and parking impacts that this enormous proposal will have in the area. And, as mentioned above, the City has explicit authority to deny a building permit if the developer has not shown that it has met the SOV goals. SMC 25.54.016.C.6. If the City approves the MIO Heights proposed by the Applicant, then the Applicant's development will, as a matter of law according to the

FEIS, have significant adverse parking and transportation impacts. Requiring mitigation in the form of an SOV rate recommended by the CAC is not unduly oppressive. As mentioned above, "[o]ther nearby institutions are already achieving SOV rates in the 25 to 35% range. *CAC Final Report and Recommendation* at 31. According to the CAC's review, Swedish Cherry Hill is the outlier. It has consistently been out of compliance with its existing SOV goal.

Swedish also claims that requiring that Swedish meet certain SOV goals before obtaining building permits is unduly oppressive because they are being "singled out" as the sole institution in the City subject to a "building moratorium" for failure to achieve TMP goals. There is no evidence whatsoever to support their claim that they are the "sole institution" in the City that has had its development subjected to this condition. Such a sweeping generalization without citation is inappropriate and should be stricken.

The evidence in the record showed that the requirement that Swedish meet a specific mitigation goal before adding more square footage is reasonably necessary to mitigate the significant adverse parking and traffic impacts of this enormous proposal. It is not unduly burdensome to require that a mitigation plan prove successful prior to allowing the developer to keep adding more traffic to the area. There is absolutely ***no evidence*** in the record to show that the "economic loss suffered by Swedish would be extraordinary" if this condition is applied.

In sum, the Proposed TMP Conditions would not violate RCW 82.02.020, nor would they violate Swedish and Sabey's substantive due process rights.

G. There is no Evidence in the Record to Support Swedish and Sabey's Argument That the Proposed TMP Condition Conflicts with or Frustrates the Institution's Mission

Section 5 of Swedish and Sabey's memo should be stricken in its entirety. Practically every sentence in that section is a factual statement that has no basis in the record. That section should not be considered by the Committee at all. That section contains speculation and factual testimony of the lawyers that has not been offered into evidence and has no basis whatsoever. It is also irrelevant to the legal issues presented to the City Council overall.