

**INTERPRETATION OF THE DIRECTOR
PURSUANT TO TITLE 23 OF SEATTLE MUNICIPAL CODE**

In the Matter of the Use of the Property at

2616 Western Avenue

Hearing Examiner File:
MUP-23-010

**LAND USE CODE
INTERPRETATION
No. 23-001**

SDCI Project No. 3041190-IR

Related SDCI Master Use Permit
(MUP) Project 3036043-LU

Introduction

On behalf of their client Belltown Livability Coalition, attorneys David Bricklin and Zachary Griefen have requested this interpretation in conjunction with an appeal of Project 3036043-LU which is an application for a Master Use Permit (MUP), including Design Review to construct a 19-story, 182-unit apartment building with parking for 130 vehicles.

The request for interpretation raises one interpretable¹ question:

1. Does SMC 23.49.156.A.1 limit the height of the subject proposal to 145 feet?

Background and Findings of Fact

According to land use maps maintained by this department in its Geocortex, Geographic Information Service (GIS) system, the subject property is zoned DMR/C 145/75: Downtown Mixed Residential/Commercial, with a structure height limit of 145 feet for

¹ SMC 23.88.020.A states, in part, “Procedural provisions and statements of policy are not subject to the interpretation process.” A second issue was raised by Mr. Bricklin and Mr. Griefen in a letter attached to, but not referenced in, the interpretation request. Further, because the second issue concerned the review process of the Living Building Pilot Project, a “procedural provision” that is not subject to the interpretation process, this issue is not addressed in this interpretation.

residential uses and 75 feet for non-residential uses. The property is also within the Downtown Urban Center.

The zoning to the north, south, and west of the subject property is also DMR/C 145/75. The zoning to the east is DMR/R 145/65. The site is bound by Western Avenue to the west, Cedar Street to the north, and by a public alley to the east.

The basic facts of the proposed development are summarized by the Seattle Department of Construction and Inspections (SDCI) land use decision for Project 3036043-LU. Pages 1-2 of the land use decision, prior to the heading “Analysis – Design Review” are incorporated by reference into this interpretation as findings of fact.

According to records maintained by SDCI, the project application went through the Design Review process prior to publication of the MUP decision approving the project. The application for the first Early Design Guidance (EDG) meeting was submitted on February 2, 2020, according to SDCI’s project tracking system, Accela. The first EDG meeting was held on March 3, 2020. On April 27, 2020, the Seattle City Council passed emergency legislation (Council Bill 119769) which allowed projects subject to full design review to opt into Administrative Design Review temporarily. As one of the projects impacted by Design Review Board meeting cancellations due to the COVID-19 pandemic, the subject project elected to make this change.

Following publication of the decision on August 14, 2023, an appeal was filed by Belltown Livability Coalition. This interpretation was requested together with the appeal of the decision, in accordance with the Seattle Land Use Code process for request of formal Code interpretation as part of the land use decision appeal process (see Seattle Municipal Code (SMC) Section 23.88.020). The interpretation request is also enclosed.

Analysis

The issue raised by the request for interpretation, as summarized in the introduction, is discussed below.

SMC 23.49.156.A does not prohibit a structure from exceeding 145 feet in height on a lot that is less than 19,000 square feet when additional height beyond 145 feet is obtained through bonus height incentives authorized elsewhere in the Code.

The code provisions relevant to this interpretation are set out below.

SMC 23.49.008.C.2 establishes the structure height limit for the subject DMR/C 145/75 zone. SMC 23.49.008.C.2 provides:

2. In DMR zones for which only two height limits are established, only those portions of structures that contain only residential uses may exceed the lower height

limit, and they may extend to the higher height limit established on the Official Land Use Map.

Since portions of the proposed structure that exceed 75 feet contain only residential uses, the maximum base height is 145 feet; however, the subject project utilizes height bonuses authorized by SMC 23.40.060.C.3, the Living Building Pilot Program, and SMC 23.49.008.F for providing 3-bedroom units 900 square feet or greater, and along with amenity area for each unit. The height achieved above the base height for 23.40.060.C.3 and 23.49.008.F is 25 feet and 10 feet, respectively, resulting in a maximum height of 180 feet.

SMC 23.40.060.C.3-4 reads:

C. Additional floor area or structure height beyond otherwise applicable maximum.

3. A project qualifying for the Living Building Pilot Program may employ additional structure height, *above the otherwise applicable maximum height* as shown in Table A for 23.40.060.

Emphasis added.

4. A rooftop feature of a project qualifying for the Living Building Pilot Program may extend above the additional structure height provided in subsection 23.40.060.C.3 if the extension is consistent with the applicable standards established for that rooftop feature within the zone.

SMC 23.49.008.F reads:

F. In all Downtown zones except the IDM 75-85 and PMM-85 zones and all DH1, DH2, and PSM zones, and except for projects that receive additional height pursuant to subsection 23.49.008.G, an additional 10 feet in height is permitted *above the otherwise applicable maximum height limit* for residential uses for a structure that includes residential dwelling units that comply with all of the following conditions:

1. Unit number and size. The structure includes a minimum of ten dwelling units that each have a minimum area of 900 gross square feet and include three or more bedrooms; and

2. Amenity area. Each dwelling unit shall have access to an outdoor amenity area that is located on the same story as the dwelling unit and meets the following standards:

a. The amenity area has a minimum area of 1300 square feet and a minimum horizontal dimension of 20 feet; and

b. The amenity area must be common amenity area, except that up to 40% of the amenity area may be private provided that: the

private and common amenity area are continuous and are not separated by barriers more than 4 feet in height; and the private amenity areas are directly accessible from units meeting these requirements; and

c. The common amenity area includes children's play equipment; and

d. The common amenity area is located at or below a height of 85 feet.

Emphasis added.

SMC 23.49.008.D further allows for certain rooftop features above the applicable height:

D. Rooftop features

1. The following rooftop features are permitted with unlimited rooftop coverage up to the maximum heights indicated below:
 - a. Open railings, planters, clerestories, skylights, play equipment, parapets, and firewalls up to 4 feet above the applicable height limit;
 - b. Insulation material, rooftop decks and other similar features, or soil for landscaping located above the structural roof surface, may exceed the maximum height limit by up to 2 feet if enclosed by parapets or walls that comply with subsection 23.49.008.D.1.a;
 - c. Solar collectors up to 7 feet above the applicable height limit; and
 - d. The rooftop features listed below shall be located a minimum of 10 feet from all lot lines and may extend up to 50 feet above the roof of the structure on which they are located or 50 feet above the applicable height limit, whichever is less, except as regulated by Chapter 23.64:
 - 1) Religious symbols for religious institutions;
 - 2) Smokestacks; and
 - 3) Flagpoles.
2. The following rooftop features are permitted up to the heights indicated below, as long as the combined coverage of all rooftop features listed in this subsection 23.49.008.D.2, does not exceed 75 percent of the roof area for structures that are subject to maximum floor area limits per story pursuant to Section 23.49.058; or 50 percent of the roof area for other structures, unless a different limit is specified by other provisions.
 - a. The following rooftop features are permitted to extend up to 15 feet above the applicable height limit:

- 1) Solar collectors that exceed the height listed in subsection 23.49.008.D.1.c;
 - 2) Stair penthouses;
 - 3) Play equipment and open-mesh fencing, as long as the fencing is at least 15 feet from the roof edge;
 - 4) Covered or enclosed common recreation areas and eating and drinking establishments;
 - 5) Covered or enclosed rooftop recreational spaces within the PSM 100/100-120 zone and permitted uses within them, with coverage limits as described by subsection 23.66.140.C.4.j;
 - 6) Mechanical equipment;
 - 7) Greenhouses and solariums; and
 - 8) Wind-driven power generators.
- b. Elevator penthouses as follows:
- 1) In the PMM zone, up to 15 feet above the applicable height limit;
 - 2) Except in the PMM zone, up to 23 feet above the applicable height limit for a penthouse designed for an elevator cab up to 8 feet high;
 - 3) Except in the PMM zone, up to 25 feet above the applicable height limit for a penthouse designed for an elevator cab more than 8 feet high;
 - 4) Except in the PMM zone, if the elevator provides access to a rooftop designed to provide usable open space, an additional 10 feet above the amount permitted in subsections 23.49.008.D.2.b.2 and 23.49.008.D.2.b.3 shall be permitted.
- c. Minor communication utilities and accessory communication devices, regulated according to Section 23.57.013, shall be included within the maximum permitted rooftop coverage.
- d. Greenhouses are permitted to extend up to 15 feet above the applicable height limit, as long as the combined total coverage of all features gaining additional height listed does not exceed 60 percent of the roof area.
- e. Mechanical equipment, whether new or replacement, may be allowed up to 15 feet above the roof elevation of a structure existing prior to June 1, 1989.

The proposal has rooftop features described in 23.49.008.D that are allowed above the maximum bonused height of 180 feet, up to 205 feet for an elevator penthouse. The proposal's elevator penthouse is at 198 feet, the highest point of the structure.

While SMC 23.49.156.A.1 provides:

- A. This subsection 23.49.156.A applies to DMR zones outside of South Downtown.
 - 1. The minimum lot size is 19,000 square feet for any structure over 145 feet high.

SMC 23.40.060.E provides in relevant part:

E. For a project qualifying for the Living Building Pilot Program, the provisions of the remainder of this Title 23 apply unless specifically modified by the provisions of this Section 23.40.060. *In the event of a conflict, the provisions of this Section 23.40.060 prevail.*

Emphasis added.

When construing code, the goal is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11–12, 43 P.3d 4 (2002). In construing code, one first examines the plain meaning of the statute. *Id.* In so doing, one may examine the provision at issue, other provisions of the same act, and related statutes. *Id.* If the meaning is plain on its face, one gives effect to that plain meaning. *Id.* at 11-13.

When reading SMC 23.49.156.A.1 in conjunction with SMC 23.40.060.C.3, 23.49.008.F and 23.40.060.E, it is clear that 23.49.156.A.1 would not prohibit a structure that was participating in the Living Building Pilot Project and utilizing other height allowances in the code from exceeding the standard 145 feet height limit even if the lot size was smaller than 19,000 square feet.

While the subject property is approximately 14,379.73 square feet and is not combined with other abutting lots, additional height beyond 145 feet is allowed here pursuant to SMC 23.40.060.C.3 and SMC 23.49.008.F because these provisions explicitly allow structure height beyond the zoned height, based on language in each of those provisions that expressly permits extension “above the otherwise applicable maximum height”. SMC 23.49.156.A.1 sets a minimum lot size of 19,000 square feet for any structure proposed over 145 feet in height but that does not negate allowances found elsewhere in the code to exceed height limits. If there is any confusion on how to apply SMC 23.49.156.A.1 for projects gaining additional height via the Living Building Pilot Program, SMC 23.40.060.E provides, “For a project qualifying for the Living Building Pilot Program, the provisions of the remainder of this Title 23 apply unless specifically modified by the provisions of this Section 23.40.060. In the event of a conflict, the provisions of this Section 23.40.060 [Living Building Pilot Program] prevail.”

The conflict here is the zoned height limit of 145 feet and the code provisions that allow a development to gain additional height. While SMC 23.49.156.A.1 would prohibit a structure on a lot that is less than 19,000 square feet from exceeding the 145 foot zoned height limit, SMC 23.40.060.E allows a structure on a lot that is less than the 19,000 square feet size to exceed the 145 foot zoned height limit. Likewise, SMC 23.49.008.F also permits a structure on a lot that is less than 19,000 square feet to add the bonus height “above the otherwise applicable maximum height”, which in this case was set at 145 feet.

The Living Building Pilot Program (LB Pilot) does not set a minimum lot size as a qualification to participate. *See* SMC 23.40.060.B (Minimum Standards for LB Pilot which does not include a minimum lot size to participate in the LB Pilot). Therefore, there is no requirement that this project be located on a 19,000 square feet lot in order to exceed the otherwise applicable maximum height of 145 feet.

This plain reading of the code is consistent with encouraging development to participate in the Living Building Pilot Program. The intent of the LB Pilot is to help meet the City’s Climate Action Plan goals; the LB Pilot does this, in part, by offering height incentives for projects that participate in the LB Pilot program. Similarly, minimum lot size is not a requirement to gain additional height via creation of three + bedroom units under SMC 23.49.008.F, as utilized by the subject project. Both the Living Building Pilot Project and increased number of family-size units help to reduce greenhouse gases by locating housing near job centers and transit, furthering the policies in the Climate Action Plan by creating “Complete Communities”.

Based on the plain language of the Code, it is logical to conclude that a development project in the Downtown Mixed Residential zone need not have at least 19,000 square feet minimum lot size to take advantage of the height bonuses to allow it to exceed the 145 feet zoned height limit.

Applying SMC 23.49.156.A.1 as the requesting party suggests, would prohibit similarly positioned DMR zoned properties from achieving additional height above what is authorized by basic zoning regulations and across many zones, resulting in an oddly balanced application of the SMC. It would also be inconsistent with encouraging development to utilize the Living Building Pilot program. It would appear that the DMR/C 145/75 and DMR/R 145/65 zones would be the only DMR zones to not be able to take advantage of bonuses or other allowances. To illustrate the imbalance: If interpreted as the requesting party suggests, a lot in the DMR/C 95/75 that is less than 19,000 square feet would be able to fully utilize the Living Building Pilot Program and incentives for 3+ bedroom units, going from 95 feet in height to 130 feet (This, in a less intensive DMR zone than the subject property). However, a structure of such height would surely require elevators. According to the requesting party’s argument, the building would not be able to have elevator penthouses, which are allowed 25 feet above the height limit pursuant to SMC 23.49.008.B.2.b, unless the building were dropped to 120 feet so that the absolute height would not exceed 145 feet. In this scenario, the site would still qualify for other features allowed under SMC 23.49.008.D.1-D.2.a, features 15

feet or less, which would still fit within an absolute height of 145 feet (95 feet limit + 35 feet bonus + 15 feet allowances in 23.49.008.D.1-D.2.a = 145 feet).

Provisions to allow for elevator penthouses above the height limit are a common theme throughout the SMC and across many zones. If the requesting party is asserting that elevator penthouses should not be allowed above the height, the result is an anomaly in the SMC where buildings in the DMR/C 145/75 and DMR/R 145/65 zones that are built without utilizing any incentives could not have elevator penthouses or any other features customarily allowed above the height. If the City Council had intended to limit elevator penthouses to an elevation of 145 feet in these zones, they would have established the zone height limit at 120 to allow for an absolute structure height of 145 feet; they did not. Clearly, bonuses or features allowed above the stated height are to be permitted, as a bright line of 145 feet with no bonuses or other allowances permitted ends in absurd results where properties in the DMR/C 145/75 and DMR/R 145/65 zones cannot qualify for any incentives afforded to others, and that are not allowed to have necessary features such as elevator penthouses, customarily allowed in the SMC and across many zones.

Decision

The proposed project is allowed to utilize the Living Building Pilot Program incentives, along with other allowances in code, to extend the building height above 145 feet even though the lot size is less than 19,000 square feet.

Entered this 17th day of November, 2023.

Travis Saunders

Travis Saunders, Land Use Policy and Technical Planner
Seattle Department of Construction and Inspections

cc. David Bricklin and Zachary Griefen, for appellant Belltown Livability Coalition
Ian Morrison, David Carpman, and Issac Patterson for applicant Cedars LLC



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

August 28, 2023

VIA E-MAIL TO Nathan.Torgelson@seattle.gov

Nathan Torgelson
Director
Seattle Department of Construction & Inspections
Code Interpretation and Implementation Section
P.O. Box 34019
Seattle, WA 98124-4019

Re: Project No. 3036043-LU (2616 Western Avenue)

Dear Mr. Torgelson:

I am writing to request that you issue a Land Use Code Interpretation relating to the above-referenced project. I am combining this request with an appeal of your interpretation to the Hearing Examiner pursuant to SMC 23.88.020. Said appeal will be consolidated with our appeal of the land use application for this project. Also, please find enclosed a Statement of Financial Responsibility/Agent Authorization. We are paying the \$4,300 filing fee by credit card.

This request is filed on behalf of Belltown Livability Coalition. I am requesting a code interpretation regarding the applicability of SMC 23.49.156.A.1. As discussed in more detail in our April 29, 2021 letter to Joseph Hurley (attached hereto), the lot is too small for a building of this height. The zoning code provides that in this zone the “minimum lot size is 19,000 square feet for any structure over 145 feet high.” SMC 23.49.156.A.1. The structure is proposed to be approximately 175 feet high, so it is allowed only on lots larger than 19,000 square feet. But this lot is approximately 14,400 square feet. Because the lot is smaller than the minimum required by the Code for a building of this height, the MUP must be denied. Please review the attached letter to Mr. Hurley for more detail.

We look forward to a code interpretation that confirms the views expressed herein.

Nathan Torgelson
August 28, 2023
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If you have any questions regarding this request, please feel free to contact me. Thank you for your attention to this matter.

Very truly yours,

BRICKLIN & NEWMAN, LLP

A handwritten signature in blue ink that reads "David A. Bricklin". The signature is fluid and cursive, with a long horizontal flourish at the end.

David A. Bricklin

cc: Client

ATTACHMENT



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

April 29, 2021

VIA E-MAIL TO joseph.hurley@seattle.gov

Joseph Hurley
Seattle Department of Construction and Inspections
700 Fifth Ave, Ste 2000
P.O. Box 34019
Seattle, WA 98124-4019

Re: Project No. 3036043-LU

Dear Mr. Hurley:

We are submitting this comment on behalf of our client, the Belltown Livability Coalition to discuss two issues. One, the lot size limit in SMC 23.49.156.A.1 precludes approval of the proposed building. Two, we are concerned about the opaqueness of the Living Building bonus height program and urge staff to take steps to make sure that, as applied to this project, the program is more open to public review and input.

I. DESCRIPTION OF THE PROJECT AND APPLICABLE CODE

The tower is in the DMR/C 145/75 zoning district. The “145/75” suffix means the allowed height is 145 feet for residential uses and 75 feet for commercial uses. *See* SMC 23.49.008.C.2. The code refers to 145/75 as the “maximum” height, but this is misleading. The nominal 145 height limit can be extended upwards through the applications of various allowances (exceptions) and bonuses. The applicant has referenced height bonuses and allowances that amount to a total of 75 feet of potential additional height.¹

The applicant seeks to utilize all of the available bonuses and allowances listed in the note. As a result, the main tower is proposed to be approximately 180 feet tall, with a maximum rooftop

¹

- SMC 23.49.008.F provides a 10-foot height bonus if the tower complies with conditions regarding (1) unit number and size, and (2) amenity areas. The proposed tower can only qualify for this bonus if applicant’s Zoning Departure No. 5 is granted.
- SMC 23.40.060 provides a 25-foot height bonus under the Living Building Pilot Program.
- SMC 23.49.008.B.2 allows certain screen walls to extend the building’s height by 15 feet.
- SMC 23.49.008.B.2.b allows elevator penthouses to extend the building’s height by 25 feet.

feature height at approximately 195 feet and a maximum building penthouse height at approximately 205 feet. *See* Site Plan Sheet G-025 (October 16, 2020 revision).

Separate from code provisions limiting height, the code includes a section on lot size. SMC 23.49.156.A.1 states that in the DMR zones (outside of South Downtown), the “minimum lot size is 19,000 square feet for any structure over 145 feet high.” The lot in question is less than 15,000 square feet, substantially smaller than 19,000 square feet minimum allowed by the code.

II. THE TOWER IS TALLER THAN ALLOWED ON A LOT THIS SMALL

Proposing a building taller than 145 feet on a lot smaller than 19,000 square feet in a DMR zone (outside of South Downtown) is a clear code violation. The applicant could apply for a variance, but has not done so.

The applicant discussed this issue in an August 9, 2019 memorandum to SDCI. The applicant acknowledged that the project’s lot is too small, but argued that the code’s lot size limit should not apply. Memo from Jen Lien (GGLO) to SDCI (Aug. 9, 2019).

SDCI has identified the lot size as a continuing issue:

Downtown Mixed Residential, Minimum Lot Size. (SMC 23.49.156.A.1) The minimum lot size is 19,000 sq. ft. for any structure over 145 feet high . . . The combined development site is approximately 14,379.73 sq. ft., please explain how this project exceeds 145 feet.

SDCI Correction Letter 130247 (Oct. 4, 2020).

The applicant did not respond to SDCI’s October 4, 2020 letter with any new information. Instead, it referred SDCI back to GGLO’s August 9, 2019 submittal. To our knowledge, the city has not addressed this issue further.

The applicant’s justifications in its August 9, 2019 memo for ignoring the lot size limit do not withstand scrutiny. The applicant first argues that the code provisions that allow height bonuses should “supersede” the code section that requires a minimum lot size for buildings taller than 145 feet:

[B]oth the LBPP and 3-bedroom height provisions are for ‘additional’ height that supersedes the general DMR/C height standards. . . . These more specific bonuses that allow for height beyond the otherwise applicable limits and supersede SMC 23.49.156.A.1 [the lot size limitation].

This argument ignores that the code has separate sections addressing height and lot size in the DMR zones. The bonus provisions apply to the former, not the latter. Both sections can apply without one undermining the other.

Simply put, buildings greater than 145 feet are allowed in the DMR zones if the lot is larger than 19,000 square feet, but not otherwise. Buildings in the DMR zones can be taller than 145 feet either because greater height is allowed outright (as in the DMR/C 280/125 zone) or through bonuses. But either way, if a building taller than 145 feet is proposed, it must be on a lot larger than 19,000 square feet. SMC 23.49.156.A.1.

That plain reading of the code does not negate the city code's bonus height provisions. It just means that they cannot be used on lots smaller than 19,000 square if the bonus will result in a building taller than 145 feet. In all other situations, the bonus provisions remain available.

Further, even if a lot is smaller than 19,000 square feet, the code allows the developer to aggregate area from an adjacent lot to meet the 19,000 square foot threshold, if certain conditions are met. SMC 23.49.156.A.2. Thus, even some lots smaller than 19,000 can use bonuses to exceed 145 feet.

If the City Council intended the minimum lot size to apply only to buildings in zones where heights greater than 145 feet are allowed outright (and not where the limit of 145 feet is exceeded due to a bonus), it could have said so, but did not. The Council's decision to apply the minimum lot size to all buildings taller than 145 feet, whether due to a bonus or otherwise, is a decision that must be adhered to by staff and respected by the applicant. If the applicant believes the Council should revise the lot limit so that it does not apply in the DMR/C 145/75 zone, it must take that argument to the Council. But as currently written, the lot size limit applies to all DMR zones, including the DMR/C 145/75 zone.

Words matter. Unambiguous statutes are not subject to "construction" to arrive at a meaning different than the clear import of the words used. "We are not authorized to read into it those things which we conceive the legislature may have left out unintentionally. We must assume the legislature meant what it said." *Jepson v. Dep't of Lab. & Indus.*, 89 Wn.2d 394, 403 (1977) (internal citations omitted). *See also Jenkins v. Bellingham Mun. Ct.*, 95 Wn.2d 574, 579 (1981) ("This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission"). SMC 23.49.156.A.1 could not be clearer: The "minimum lot size is 19,000 square feet for any structure over 145 feet high." Staff is not at liberty to read into that clear statement words which are not there.

The applicant's second argument is that it "defies logic that the minimum lot size requirement for a 'structure over 145 feet high' would apply in a zone in which the maximum structure height does not exceed 145 feet (e.g., DMR/C 145/75)." The applicant does not explain the logic which is "defied" by applying the lot size limit in this situation. None is apparent.

The logic of the lot size limitation section is very clear. While buildings taller than 145 feet are allowed in the DMR zones (outright or via bonuses, depending on which DMR zone applies), the

Council did not want buildings that tall on lots smaller than 19,000 square feet in any DMR zone. As the applicant and SDCI know so well, the 145-foot height limit in this zone is subject to many exceptions. While nominally the limit is 145 feet, the real limit is much greater, if various exceptions and bonuses are applied. A developer can seek to exceed the nominal 145-foot height limit, but if so, it needs to find a lot larger than 19,000 square feet. If the lot is smaller than 19,000 square feet and cannot be aggregated with other adjacent lots, the proposal cannot exceed a height of 145 feet through bonuses or other allowances. There is nothing illogical about that.

The applicant's third argument is that "project lot size should not be the reason for a project to not pursue city incentivized programs. To read the Code otherwise would prevent the use of these bonuses for this Property." This is really an invitation to the City Council to amend the code (to allow use of the bonuses on lots smaller than 19,000 square feet), not an argument that the code currently allows that. As written, the incentive program cannot be used to authorize a building in excess of 145 feet on a lot smaller than 19,000 square feet that cannot be aggregated with an adjacent lot. If the applicant believes the city's incentive system should be expanded to allow taller buildings on lots smaller than 19,000 square feet that cannot be aggregated, it needs to persuade the City Council to amend the code, not try to persuade staff to ignore the code.

In sum, staff was correct in its October 4, 2020 letter to identify the lot size as a potential fatal flaw in this proposal. The applicant has not provided any reason for staff to waver from that view. Given the amount of resources being devoted by the applicant and city staff to an obviously illegal project, staff should consider making this issue a priority and halt further processing of the application until a code-compliant building is proposed.

III. STAFF SHOULD TAKE STEPS TO ASSURE THAT THE LIVING BUILDING REVIEW PROCESS IS TRANSPARENT AND AMENABLE TO PUBLIC REVIEW AND INPUT

The code offers a 25-foot height bonus if the building meets the criteria of the Living Building Pilot Program, a program to promote energy conservation, water conservation, and other public goods. While we strongly support the goals of the program, implementation of the program is an ongoing subject of great concern. The program is being implemented in a manner that precludes effective public participation.

City staff is not directly involved in the program's primary implementation. Instead, the program primarily is being implemented by a private non-profit called the International Living Future Institute (IFLI). IFLI's evaluation process is hidden from public view. Under these circumstances, staff should proceed cautiously in accepting IFLI's conclusions regarding the project's compliance with the program's requirements.

A project may qualify for the Living Building Pilot Program by achieving either (A) all of the imperatives of the International Living Future Institute's (ILFI) Living Building ChallengeSM 3.1 or 4.0 certification, or (B) all of the following:

1. The project meets ILFI Living Building ChallengeSM Petal certification;
2. Total annual building energy use that is 25 percent less than a baseline defined as the Energy Use Intensity (EUI) targets in the Target Performance Path of Seattle Energy Code Section C401.3;
3. None of the space heating and water heating in the project shall be provided using on-site combustion of fossil fuel; and
4. The project uses only nonpotable water to meet the demand for toilet and urinal flushing, irrigation, hose bib, cooling tower (make up water only), and water features, except to the extent other applicable local, state, or federal law requires the use of potable water.

SMC 23.40.060.B.

The applicant states that the Western & Cedar Tower is registered in the Living Building Pilot Program under LBC 3.1 as IFLI Registration No. PT-2649867753. Site Plan Sheet G-032 (Oct. 16, 2020 revision). It appears that the applicant does not intend pursue Option A. The applicant does not claim to meet all, or even most, of the imperatives of the International Living Future Institute's (ILFI) Living Building ChallengeSM 3.1 certification. Instead, the applicant is pursuing Option B, the so-called “petal” certification (as described in option B.1-4, above).

IFLI is not implementing the program in a manner that allows the public to have a meaningful opportunity to review and comment on the project’s claimed adherence to the Living Building “Petal” certification. Land use permit applications are supposed to be subject to public review and comment. In this case, the question of whether the proposed tower qualifies for a 25’ height bonus depends on whether IFLI certifies/approves the Western & Cedar Tower under LBC 3.1. But IFLI’s process and timing for doing that is a “black box.” According to Richard Garrett of IFLI, IFLI has marked this Western & Cedar Tower project as confidential. Even without that designation, the IFLI process is opaque. The confidential designation makes it even harder to assess whether the project meets the requirements for the 25’ height bonus.

The City should not be granting height bonuses based on an evaluation and determination conducted outside of the public’s view. There must be an opportunity for the public to review and comment on the determination. Staff should require IFLI to open up its process and assure that the public has a fair opportunity to review and comment on the project’s asserted compliance with the program’s criteria.

IV. REQUEST TO BE MADE A PARTY OF RECORD

We request that you make our firm, Bricklin & Newman, LLP, and our client, Belltown Livability Coalition, parties of record in this proceeding. We may be contacted at:

Joseph Hurley
April 29, 2021
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Belltown Livability Coalition, *care of*:
David A. Bricklin
Zachary K. Griefen
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
bricklin@bnd-law.com
griefen@bnd-law.com
cahill@bnd-law.com

Thank you for your consideration of these matters.

Very truly yours,

BRICKLIN & NEWMAN, LLP

A handwritten signature in blue ink that reads "David A. Bricklin". The signature is fluid and cursive, with a long horizontal stroke at the end.

David A. Bricklin
Zachary K. Griefen
On behalf of Belltown Livability Coalition

DAB/ZKG:psc

cc: Public Resource Center - Via email to: prc@seattle.gov
Belltown Livability Coalition