

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

YOSHIO AKADA, et al.

FILE NO. S-80-057

from a determination of the Director,  
Department of Construction and Land Use

#### Introduction

Appellants, Yoshio Akada, Dan W. Wong, Kirby Chin, and Howard Eng, appeal the decision of the Director of the Department of Construction and Land Use to issue a use permit subject to conditions for the Park Twelve-01 project at 1201 South Massachusetts Street.

The appellants exercised their right to appeal pursuant to Section 25.40 of the Zoning Ordinance (86300, as amended).

Parties to the proceeding were: appellants, represented by Janet E. Quimby, attorney at law; the Director, represented by Ross Radley, Assistant City Attorney; and Park 1201 Corporation, the project sponsor, represented by Brian E. Lawler, attorney at law.

This matter was heard before the Hearing Examiner on March 11 and 12, 1981.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

#### Findings of Fact

1. The Director of the Department of Construction and Land Use (Director) issued his decision to grant an application for a use permit subject to enumerated conditions for the Park Twelve-01 Condominium at 1201 South Massachusetts Street. He found that "Although the proposal in its final form does not eliminate every adverse impact ..., it is my judgment that the merits of the proposal ... outweigh the adverse environmental impacts which cannot be mitigated."

2. Appellants appeal that decision alleging that the permit should have been denied or further conditioned based on its adverse environmental impacts.

3. An environmental impact statement (EIS) was prepared for the proposal and was determined, on appeal, to be legally adequate.

4. The proposal is to construct a three story base structure garage with 61 condominium units in a tower on top of the base. Parking for a total of 76 vehicles would be provided in the garage and in an exterior parking lot.

5. The site consists of three lots at the southeast corner of the intersection of South Massachusetts Street with 12th Avenue South. The site abuts a 16 ft. wide alley which runs from South Massachusetts to South Grand.

6. Adjacent properties to the east, across the alley, include three-story apartment buildings owned by appellants. The apartment units have view orientation toward the west.

7. The EIS identified adverse impacts on the elements of the environment of noise, light and glare, land use, housing, transportation, parking, aesthetics, neighborhood goals, and scenic views.

8. The Director, in making his findings and decision on use permits, generally reviews the EIS; reviews a draft decision prepared by staff, in this case Melody McCutcheon, an environmental specialist; has read comment letters at the time received; and relies on staff to alert him to areas requiring attention.

9. In preparing the draft of the Director's findings and decision, the environmental specialist used the EIS, the Hearing Examiner's decision on the adequacy appeal and notes taken at the appeal hearing.

10. In determining the merits of the proposal the Director did not do an analysis of offsetting economic effects on adjacent apartment buildings.

11. In considering the alternatives, the Director looked at how each would deal with the adverse impacts identified and how each meets the sponsor's objectives.

12. The Director understood the objectives of the sponsor of the project to be to build multifamily housing in the form of the proposed building on the site.

13. The EIS states that the sponsor's objective is "to provide housing opportunities for middle-upper and upper income persons ...."

14. The Director concluded that the project provided adequate parking given the availability of on-street parking within walking distances, as described in the EIS and modified by evidence at the hearing on the appeal of the adequacy of the EIS. The 1.25 spaces per unit to be provided is less than the ownership pattern found in the Somerset study discussed in the EIS. The Director assumed that the income bracket of residents in both projects would be similar based on the size of units, type of building and cost of construction. No measure to mitigate the parking impact was imposed because he felt the impact would be minimal.

15. The Engineering Department commented and recommended in the EIS, and again at the hearing, that the project should provide a minimum of 92 parking spaces on-site to meet the demand based on the Somerset study. The Director accepted the conclusion that the demand would be for 92 spaces but disagreed with the Engineering Department's recommendation as to how that demand should be met. The Engineering Department expressed concern with the precedent of allowing the project's demand to be filled partially by on-street parking. The Director's policy is to allow available on-street parking to be used to satisfy some of the demand from projects until he determines it is no longer available and then will require on-site accommodation of demand for future projects.

16. The Director accepts the traffic consultant's conclusions that the available on-street parking is within reasonable walking distance of the subject site.

17. Appellants disagree with the conclusion that adequate on-street parking is available within a reasonable distance to accommodate potential overflow from this and other projects in the area.

18. Illegal parking, i.e., on planting strips, is common in the area.

19. The Director rejected the measure proposed in the EIS that transit subsidies be provided construction workers based

on the availability of on-street parking, the possibility that parking can occur on-site when the garage is built and the likelihood construction workers may have to rely more on private vehicles because of tools or change of job sites.

20. The alley, to be used for access to one level of garage parking and guest parking, is narrow, does not allow two cars to pass, and parking for other buildings is immediately adjacent to it.

21. The environmental specialist considered location of parking other than as proposed but determined that there was no alternative location without intruding on a required yard.

22. The Director viewed the separation of guest and resident parking as positive.

23. The Director rejected buffering landscaping between guest parking and the neighboring residence as a mitigating measure because the trade off would be a loss of parking. He determined that the need for parking outweighed the need for landscaping.

24. The construction noise impact was considered a short term significant adverse impact by the environmental specialist.

25. The EIS disclosed that noise level would be high during construction. The Director considered the temporary nature of the impact (12-18 months) and determined that mitigating measures could be reasonably imposed to reduce the impact to an acceptable level.

26. The construction noise impact from the construction of a low-rise project would not be significantly different from that of a high-rise project.

27. The Director determined that he had no authority to impose conditions to mitigate interference with private views.

28. The Director determined that the degree of impact of the project on the view from the scenic route was minor so imposition of mitigating measures which would require a substantial change in the proposal was not warranted. He would have considered a measure that would mitigate the impact if it meant little hindrance to the project.

29. The record does not show a significant adverse impact on the scenic view.

30. The Director's determination that low-rise alternative described in the EIS would not mitigate most view impacts was not shown to be in error. If setbacks were altered the impact on scenic view could be lessened but the Director concluded the impact was not sufficiently severe to require mitigation.

31. The environmental specialist interpreted the discussion in the EIS to mean that the project's impact on land use is significant and to the extent that the inconsistency in land use type bears on aesthetics that adverse impact is significant as well.

32. The height and bulk of the project would be out of scale with the majority of the structures in the neighborhood.

33. The Director considered the conflict of the project with the North Beacon Hill Neighborhood Improvement Plan (NIP) but concluded that this project is not expected to cause the construction of similar structures. He knew of no method for determining whether a project will actually **accelerate** the pressure for similar projects in the area.

34. Appellants showed that there has been interest in acquiring groups of lots similar to the subject site in the past but no causal relationship to the subject proposal was shown.

35. The EIS discloses that construction of the tower would minimize the possibility of down-zoning the area from its RMV 200 zoning. The NIP recommends considering a down-zone in 1982 if no significant high rise development occurs in that period.

36. The EIS also disclosed that the project could potentially contribute to an acceleration to high density land uses in the RMV 200 zone.

37. The Director saw the increase in housing stock as a benefit of the project.

38. The EIS discusses the project's relationship to the Comprehensive Plan, King Subregional Plan, Goals for Seattle 2000, Seattle's Growth Policies, Housing Assistance Plan, and the proposed Multi-family Land Use Policies. Numerous conflicts as well as consistencies are set out.

39. The Department of Construction and Land Use's policy is, as indicated in Finding No. 16, not to use the more general language of the documents in Appendix A, Ordinance 107678, for authority to condition or deny a project. The Director based this policy on his understanding of City Council intent from work sessions on the Ordinance.

40. None of the alternatives discussed in the EIS were deemed by the project sponsor to be economically feasible.

#### Conclusions

1. The sponsor and Director urge application of the "arbitrary and capricious" standard, a very narrow scope of review, in this case. The standard of review to be applied by an administrative body must be determined from the Ordinance authorizing it. Messer v. Board of Adjustment, 19 Wn.App. 780 (1978).

2. Section 25.44, Ordinance 86300, as amended, Seattle Municipal Code, 24.10.070, provides that the determination made by the Director is to be regarded as prima facie correct.

3. To overcome that presumption appellants must prove by a fair preponderance of credible evidence that the decision is incorrect. Allison v. Department of Labor and Industries, 66 Wn.2d 263 (1965).

4. Appellants contend that the decision is in error because the Director has not made formal findings on each element of the environment and on the impact of the project on that element. Section 19, Ordinance 105735, as amended, requires only a written statement of reasons for any decision to impose conditions or deny a permit. Those reasons were stated.

5. Appellants urge that the Director incorrectly interpreted his authority to condition or deny a permit in that, as described in Findings 15 and 16 of his decision, he deemed it inappropriate to look to the language of the documents listed in Appendix A for authority when specific policies had been adopted.

6. Section 1(b), Ordinance 197678, as amended, directs that the official "shall utilize SEPA, all policies, guidelines, and regulations adopted pursuant to SEPA, and shall use other environmentally related policies adopted by the City Council

in the form of resolutions, codes, ordinances, regulations or plans identified in Appendix A ...."

7. The Director's understanding that the Council did not intend that the policies in Appendix A be used is not borne out by the clear language of the provision. Legislative intent is to be ascertained from the plain language of the ordinance. Only where there is ambiguity in the language can other means of construing the language be used. Malone v. Seattle, 24 Wn.App 217 (1979).

8. The EIS discussed the documents with potentially relevant portions except for the 1980 update of the HAP and the Capital Improvement Policy Plan. Appellants cited goals and policies under each they deemed to be relevant but urged no specific measure under any which could be used to mitigate an adverse impact of the proposal.

9. Appellants bear the burden of overcoming the presumption of correctness of the Director's decision. Seattle Municipal Code, 24.10.070. The decision has been shown to have been based on an erroneous interpretation of the section granting authority to condition a permit but that showing alone does not satisfy appellants' burden. SEPA is now more than a process in that it requires a process to be followed with the intent that it may have a substantive result. Appellants must show that the Director erred in not imposing a condition or conditions to mitigate an adverse impact of the project based on appropriate authority in one of the resolutions disclosed in the EIS or otherwise applicable, e.g., an update. While appellants listed various provisions they believe are relevant and which they believe the Director should have considered, no mitigating measure is urged or becomes evident from any. Appellants' request for a remand, in the absence of a specific allegation of error in failing to impose a condition would result in a finding that no mitigating measure is appropriate under those resolutions. Such a finding is not required.

10. Appellants allege error in the failure to require more off-street parking or, in the alternative, to deny the permit. The experts disagree not as to the demand but as to the means to be used to accommodate that demand. The Director is vested with the discretion to assign weight to the potential impacts. He may accept the conclusions in the EIS that the demand can be reasonably accommodated unless that is shown clearly to be wrong. While disputed by appellants, they failed to prove clear error.

11. Appellants allege error in the failure to impose conditions to mitigate the scenic view impact. Appellants did not show that the Director's determination that the impact was minor was wrong nor that there was a mitigative measure which reasonably approximated the degree of the impact.

12. Appellants did not prove that the Director's weighing of the benefits of more landscaping against loss of parking was error.

13. Allegation as to error for failure to mitigate various other adverse impacts must fail for failure to show that measures which could be reasonably imposed exist.

14. Appellants contend that the Director failed to properly consider alternatives to the proposal. His approach of considering the alternatives only in relation to adverse impacts is required since each is deemed economically infeasible by the sponsor and the result of a decision to require one of the alternatives would be to deny the permit.

15. The significant adverse impact on land use was not mitigated by any conditions. Section 19, Ordinance 105735, as amended, allows the Director to deny a permit where a significant adverse impact cannot be prevented by reasonable conditions.


That section goes on to require the weighing of the merits of the proposal against the adverse environmental impacts. While the impact is not specifically listed in the decision section, it is apparent that the Director weighed what he regarded to be the merits against the adverse impacts which could not be prevented or mitigated, such as the impact on land use, and concluded that the benefits were greater. Appellants questioned that conclusion but did not present evidence which would prove that the Director abused the discretion he has to assign weight to the various factors. The Examiner may not substitute her judgment for that of the Director who is given that authority.

16. Appellants have shown that their properties will suffer adverse effects from the proposal. The evidence considered by the Director takes into account a broader scope of environment. Despite the impacts on appellants' properties the evidence of the record does not overcome the presumption of correctness accorded the Director's decision.

#### Decision

The Decision of the Director, Department of Construction and Land Use is AFFIRMED.

Entered this 18<sup>th</sup> day of March, 1981.

  
M. Margaret Klockars  
Deputy Hearing Examiner

#### Notice of Right to Appeal

Pursuant to Section 20A of the SEPA Ordinance (105735, as amended), a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth (15th) day after the date of the decision appealed from is filed with the SEPA Public Information Center. The appeal must be filed with the City Clerk on the 1st floor of the Municipal Building. Rules have been adopted by the City Council governing the appeal procedure and should be reviewed prior to filing an appeal.

The City Council will only review issues related to compliance with Section 19, Ordinance 105735, as amended. Section 19 related to substantive authority to condition or deny a proposal on environmental grounds.