

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

In the Matter of the Appeal of

CDJ PROPERTIES

FILE NO. MUP-84-054(W)
APPLICATION NO. 81279-0380

from a decision of the Director of
the Department of Construction and
Land Use on a master use permit
application

Introduction

Appellant, CDJ Properties, appeals the decision of the Director, Department of Construction and Land Use, to deny its application for a master use permit to construct the Portage Bay Condominium at 4014-30 8th Avenue N.E.

The appellant exercised its right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on March 19, 1985.

Parties to the proceedings were: appellant, represented by Donn Etherington, partner, and the Director represented by Cliff Portman, senior land use specialist.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

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

Findings of Fact

1. Appellant applied for a master use permit to demolish existing structures and construct a ten-story, 40 unit condominium building on property at 4014-30 8th Avenue N.E. The Director, utilizing his authority pursuant to SEPA, denied the application. Appellant appeals.

2. A draft environmental impact statement (EIS), prepared by the Department of Construction and Land Use (DCLU), was issued in April, 1982. A public hearing on the draft EIS was held in May, 1982 and the final EIS was issued July, 1983.

3. The decision on the application was delayed by the Director until June 28, 1984, while he awaited resolution of the appeals of his decision on the application of the Victoria Tower Partnership.

4. The subject site is currently zoned Lowrise 3. The applicant has a vested right, recognized by the Director, to develop the site in conformance with the RMV 200 zoning which applied to the site at the time of the application. The previous zoning would allow a ten story building. The current development standards have a 37 ft. height limit.

5. The Director based his determination on his conclusion that there would be a significant adverse impact from the

building's height, bulk and scale on the surrounding neighborhood and an inconsistency with the Multi-family Policies which impacts could not be mitigated.

6. The summary of impacts in the draft EIS at p. 9, under Aesthetics, shows the unavoidable adverse, long-term impact of "increase in bulk and lot coverage on the site", and that language is repeated in the final EIS on p. 9.

7. In the discussion of the proposed, (at the time of the draft EIS) Multi-family Policies in the draft EIS at p. 18, the statement is made that:

The proposed project would be inconsistent with item 4, of the general objectives listed above. The project would be of considerably greater height than the immediately surrounding structures. It would also be inconsistent with the lowrise designation of the site. The project would be neither consistent nor inconsistent with objectives 1 through 3. It would be consistent with objectives 6 and 7 (by locating a large number of dwelling units within walking distance of a major activity center and in proximity to an extensive transit system).

8. Regional, City and Neighborhood Goals, Objectives and Policies, is listed as an element of the human environment in the List of Elements of the Environment on p. 20 of the draft EIS.

9. The discussion of aesthetics at p. 46, draft EIS, recognizes that the urban design theme of the University area is a mixture of highrise, office and residential buildings, mid-rise apartment and single family residences. The unavoidable adverse impact on this element recognized is potential view blockage.

10. The discussion under the Regional, City and Neighborhood Goals, Objectives and Policies element at p. 47 of the draft EIS is limited to a reference to the discussion under Relationship to Regional, City and Neighborhood Goals, Objectives and Policies (p. 14-19) and the discussion under Population and Housing (p. 32).

11. Comments on the adverse impact of the building's height, bulk and scale or its consistency with the Multi-family Policies are found in the final EIS as follows:

In a letter from I. Dean Mosier, p. 20,

We would suggest that the land use impacts be recognized as a change from three, lowrise multiple buildings to a single, highrise multiple dwelling.

At p. 21, this comment is acknowledged. In a letter from Harold P. Hemke, p. 45,

F. Multi-Family Policies - The proposed building would not be compatible in bulk and height with the existing neighborhood character and would be inconsistent with the lowrise designation of this site. p. 18.

In a letter from L. Bartley Dobb, p. 51,

They continue by stating another alternative -- "Developed at a Reduced Density", consisting of a "six story, twenty unit condominium". This, however, "Does not meet the objectives of the

adopted but not yet implemented Multi-Family Land Use Policies". If, then, 6 stories and 20 units do not meet City objectives, how much worse would be the proposed 10 stories and 40 units.

At p. 53. The response is: "This comment is acknowledged". In a letter from Jed Marshall, p. 54,

Probably the most striking feature of the proposal is its apparent violation of the recently passed Seattle Multi-Family Land Use Policies. In particular, this policy would limit the height of buildings in the area to 37 feet. In a discussion with Cliff Portman of your office, I learned the developers had vested a right several years ago to the RMV 200 designation and are therefore assured of the right to construct a high-rise tower. This fact is not mentioned in the impact statement. Instead, the developer simply admits to be in violation of the rezone policy.

The response to the letter at p. 56 is,

The proposed construction and design is currently in conformance with the zoning designation, RMV 200, which was applicable at the time of application. The discussion in the DEIS relates to violation of the then Proposed Multi-Family Land Use Policies which were adopted just prior to the publishing of the DEIS. Subsequently, the area has a new zone designation, Low rise 3, that is administered through the Multi-Family Land Use Code.

In a letter from Lisa and Stuart Bryzell at p. 60,

This 109' structure would be totally incompatible in bulk and height with the existing neighborhood character and we urge that you deny this proposed application.

In a letter from Doris Baxter Burns, p. 62,

In May, 1981, CUCAC recommended that the Southwest Quadrant of the University District be zoned Low-rise 3. The new multifamily zoning code which becomes effective in June allows only Lowrise 3 in this area. Clearly the proposed development will be in violation of the code.

The response at p. 63 is: "The applicable zoning code designation for the proposed project is RMV 200."

In a letter from Marvin O. Rogneby at p. 70,

I feel it has been shown repeatedly in recent surveys of the area of the proposed construction that the site is not suitable for a 10 story condominium.

In a letter from Stanley Hoy and Pamela Baugher at p. 72,

II. The entire neighborhood on 8th Avenue N.E. is low-rise rather than highrise. And it is our understanding the City wishes to preserve this quality under new zoning taking effect August 198_ (illegible).

In a letter from Ernst and Rosalia Wolff, p. 87,

If you will inspect that area you will understand that a high building like that will disturb the sight of this area and be a real disfigurement of the area, still showing a distinctive "green and small houses" appearance.

In a letter from June E. Connor, p. 89

...and is inconsistent with the City's proposed proposed ('Multi-Family') Policies limiting height height to 37 feet in the southwest quadrant of the U-district.

12. One alternative discussed in the draft EIS at p. 51 is to "develop at a reduced density". The alternative discussion explains that there is an existing demolition and use permit for the site allowing a development of a six story, 20 unit condominium. It states that impacts on the elements of the environment would diminish relative to the size of the project, that the proponents may elect to exercise their right to develop under this permit at some future date but that the alternative "does not meet the objectives of the adopted but not yet implemented Multi-Family Land Use Policies".

13. Appellant was notified in August, 1984, that the use permit issued for the six story proposal had expired.

14. The "footprint" of the proposed building would cover approximately 8,000 sq. ft. The unrefuted testimony of Donn Etherington was that a larger "footprint" would be allowed by the Multi-family Policies.

15. The eastern boundary of the area the Director considers in judging the compatibility of scale is at 9th Avenue N.E. Appellant believes it should be further east. Buildings nearby are generally lowrise with newer buildings three and four stories high. East of Roosevelt are university dormitories of nine and eleven stories, Condon Hall and Applied Physics at seven stories. On 7th and 8th Avenues N.E., north of the subject site but within the same zone, are proposed and existing buildings four to five, and more, stories high.

Conclusions

1. Appellant offers at least six grounds for reversing the Director's decision. The alleged errors may be described as:

a) Where policies in Appendix A conflict, the most specific policy must be applied and in this case it is the zoning under which the proposal is vested.

b) Section 25.05.902 requires that the policies relied upon for conditioning or denial must be in effect when the draft EIS was issued. The Multi-family Policies used by the Director were not.

c) The proposed structure would not be out of scale with development in the area.

d) Height, bulk and scale are not elements of the environment as defined in SEPA.

e) The height, bulk and scale of the proposed building has not be identified in the EIS as an unavoidable, unmitigated, adverse impact.

f) The project's "bulk" could be greater under the Multi-family Policies so it is error to use those policies to deny because of height, bulk and scale.

2. The City Council recently clarified its intent as to the use of the policies included in Appendix A to Chapter 25.05. In its Findings and Conclusions of the City Council on DCLU's Request for Interlocutory Review in the Appeals of Queen Anne Community Council, et al., the Victoria Apartments case, the Council concluded that not only did it not intend that the more specific provisions of zoning should override the policies but that policies adopted subsequent to any vesting may be considered in the exercise of substantive authority to condition or deny permits.

3. Section 25.05.660(1)(a) of the new SEPA ordinance is inapplicable to the Director's decision as it was not effective on the date of the decision. The predecessor provision, Section 25.04.190 did not limit the policies available for conditioning and denying to those in effect when the draft EIS was issued.

4. The only factual controversy raised by appellant involves a disagreement about the area to be considered in judging the proposal's scale or relationship to the size of other structures in the area. The Director has taken a more restrictive view of the area of impact utilizing zone lines as demarcations. Appellant's witness proposes a wider area. Where there is a difference of opinion but no actual error shown, the substantial weight which must be given the Director's decision, Section 23.76.36B(7), requires the examiner to conclude that the proposed structure would be out of scale with development in the area.

5. Appellant is correct that WAC 197-10-444, which lists the elements of the environment for preparation of an EIS, and Section 25.04.150 which adds to those elements economic factors and regional, city and neighborhood goals, objectives and policies, does not include an element of "height, bulk and scale". The City Council has concluded, however, in the Victoria Apartments case, supra, that the policies in Appendix A may be used to mitigate specific adverse impacts relating to height, bulk and scale. It appears that height, bulk and scale is treated as an impact which may affect other elements.

6. Section 25.04.190, which was in force at the time of the decision under review, provides:

- C. Any proposal may be denied where significant adverse impacts have been identified in the environmental documents prepared pursuant to SEPA which cannot be substantially mitigated or prevented by the imposition of reasonable conditions; provided that a proposal may not be denied solely on the basis of environmental impacts on the additional elements of the environment defined in 25.04.150. The merits of the proposal shall be weighed against the adverse environmental impacts.

7. The Director's representative acknowledges that the impacts of "height, bulk and scale" and resultant incompatibility with the Multi-family Policies have not been listed specifically as significant impacts but that a reading of the entire document, including comment letters and responses, clearly shows that significant impacts exist.

8. The findings of fact list all references which the examiner could find in the EIS to "height, bulk and scale", other than "causing shadows or view interference, and lack of conformance to the Multi-family Policies. The project's bulk and lot coverage

are listed as an impact under Aesthetics. The conflict of the proposed height with Multi-family Policies was mentioned in the discussion of the policies under Relationship to Regional, City, and Neighborhood Goals, Objectives and Policies. The remaining references to the impacts, chiefly comments from departments and others, show the writers' belief that the impact would be significant.

9. Even assuming the impact to be adequately identified as a significant adverse impact, the decision to deny must be based on SEPA policy. Section 25.04D. The Director's decision finds the inconsistency with the Multi-family Policies to be an impact and that the Multi-family Policies are the policy basis for the decision. The proviso of Section 25.04.190C prohibits denial solely on the basis of the conflict or incompatibility with city goals, objectives and policies. The other element impacted, by bulk and lot coverage, according to the EIS, would be "aesthetics". The Multi-family Policies, Policy 5, addresses Bulk Requirements, and provides a definition of "bulk": "Bulk is the mass of a building as determined by a combination of its width and depth". Policy 5 provides:

Bulk limits are established to conform with the prevailing pattern of development in the surrounding area, to prevent the development of wide buildings which block views, and to encourage infill development. In order to minimize the appearance of bulk, modulation techniques shall be used which allow buildings to be wider than their neighbors while appearing to be compatible in horizontal scale. In each classification except Highrise, there are established two sets of width and depth limits; more restrictive limitations for unmodulated buildings and less restrictive limits for buildings which minimize the appearance of bulk through modulation.

10. The testimony of Mr. Etherington that the Multi-family Policies allow an even larger building footprint which would be both "bulk" and "lot coverage", the impact under "Aesthetics", was not refuted by the Director's representative. Therefore, the Multi-family Policies cannot provide the basis for a denial when they actually provide for greater mass.

11. The greater height than other structures in the area, which is a factor of scale, was mentioned by commenters in the EIS. The height is in clear conflict with Policy 4 of the Multi-family Policies which establishes the 37 ft. height limit to be implemented by the new code. The disclosure of the impact of the relative height, or scale, is tied to a specific element of the environment only by the discussion of the Multi-family Policies under the element of "regional, city and neighborhood goals, objectives and policies". Again, that is an additional element of the environment which alone may not support denial of a permit according to Section 25.04.190C. Therefore, even if the impact of increased "height, bulk and scale" is sufficiently identified in the EIS, the Director has no authority to deny the permit based on the conflict with city policy so the decision is erroneous.

12. Section 25.04.190B would allow the Director to reasonably condition the proposal to mitigate that impact. The Director concluded that a 3-4 story structure would be compatible but that would not be "possible within the parameters of the present proposal". The alternative of six stories was included in the EIS as an option available to the proponent because of the outstanding use permit with recognition that both the impacts to elements of the environment and the "architectural amenities that the pro-

ponents feel this site warrants" would be diminished. It does not appear that the Director considered approving the permit on the condition the building be limited to six stories. This condition seems reasonable, as evidenced by appellant's earlier application and permit, and would lessen the impact of incompatibility of the height, bulk and scale.

13. Since the Director is without authority pursuant to Section 25.04.190 to deny the permit because any impacts disclosed in the EIS are on the additional element of the environment, the matter should be remanded for him to consider imposition of a condition reducing the scale of the building to lessen these impacts to the extent possible.

Decision

The matter is remanded to the Director to approve the master use permit with reasonable conditions reducing the scale of the building.

Entered this 2nd of April, 1985.


M. Margaret Klockars
Deputy Hearing Examiner