

## FINDINGS AND DECISION

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

In the Matter of the Appeals of

WATERFORD PLACE CONDOMINIUM  
ASSOCIATION,  
RICHARD AND THERESA CORLETT, AND  
THOMAS J. WEILER

FILE NOS. MUP-88-011(W),  
MUP-88-012(W) and  
MUP-88-013(W)

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

#### Introduction

Appellants appeal the decision of the Director, Department of Construction and Land Use, on a master use permit application, for a proposed mixed use development at 920 North 34th Street.

The appellants exercised the 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 May 5, 10 and 20, 1988.

Parties to the proceedings were: appellant Waterford Condominium Association by Dick Selin and Mike Lazenby; appellant Richard and Theresa Corlett by Richard Corlett and Mike Lazenby; appellant Thomas J. Weiler, pro se; the Director, Department of Construction and Land Use, by Jay Laughlin, land use specialist, and the applicants Tom McDermott and Hannah Reisner, by their attorney, Keith W. Dearborn.

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. The applicants applied for a master use permit to demolish three single family residences and to construct two apartment buildings with eighty apartments at 920 North 34th Street. A determination of significance was issued in early 1986 by the Director, Department of Construction and Land Use ("Director"). The applicants offered a mitigated project but the Director concluded that there was not sufficient mitigation to avoid the preparation of an environmental impact statement ("EIS") so a draft and final environmental impact statements ("DEIS" and "FEIS") were prepared for the proposal.

2. The EIS identified impacts on the transportation systems, from height, bulk and scale, on land use, on housing, from shadow and on views. The DEIS presented five alternatives to the proposal including a two residential building, 60 ft. height alternative and a one commercial building, 65 ft. height alternative utilizing the maximum development standards. The FEIS, in response to public comment, offered a sixth alternative, a mixed use project with 77 units and 12,200 sq. ft. of office space.

3. The Director found the EIS to be adequate and approved the application, as modified by the applicants, with mitigating conditions. The proposal, as approved, is for two buildings,

with 77 dwelling units, the north building five stories high and the south building four stories high with basement parking, 14,000 sq. ft. of office space in the south building, a courtyard interrupting the north facade of the north building and 121 parking spaces.

4. At the hearing, the applicants offered the following additional voluntary mitigation: to indent the corner stairwells 5 ft.; to remove the top floor walkway roof; to modify the roofline creating a hip roof; and to set the building 1 ft. from the alley.

5. The EIS was authored by consultants retained by the applicants. The land use specialist supervised its preparation and approved the documents for publication.

6. Appellants raise five issues regarding the adequacy of the EIS for the proposal. The areas of alleged inadequacies were the discussion and depiction of the alley, the proposed elevation and bulk of the southern building compared to its depiction in the EIS, a cumulative traffic impact, the parking survey and the alternatives. Appellants cited error for failing to further condition the project with regard to the alley, parking and the transition between the north building and the L-3 zone to the north.

7. At the time of the publication of the EIS, the land use specialist knew of only two projects within the area where parking demand could potentially overlap with that of the proposed buildings and that could have cumulative traffic impacts. Those two projects were a 48-unit project in the 3600 block of Linden Avenue North and a 10-unit project at 3615 Whitman Avenue North. Witnesses testified to three projects within a few blocks for which permits had been applied, and in some cases, approved. One is the Whitman Avenue project, another is the project on Linden Avenue North and there is a church renovation at North 35th and Aurora. There are other pending projects more distant from the subject site. Those mentioned are at 39th and Fremont, in the 4200 block of Evanston Avenue North, on Linden Avenue North south of Allen Place and on the 4400 block of Dayton Avenue North. None were called to the attention of the DCLU in comments to the DEIS.

8. The spillover parking demand from neither of the projects considered in the EIS was expected to affect the on-street supply in the area of the subject property.

9. Appellants did not show what the volume of traffic to be generated by those projects would be or how that traffic would be distributed on area streets.

10. The traffic growth projection for the area was assumed, by the traffic consultant, to be .67 percent per year. This rate would not reflect all of the development reported by the witnesses.

11. The proposed development on the subject site is projected to add between one and two percent to the traffic volume on Fremont during the peak hour.

12. There is no application pending at this time for a Quadrant/Burke Industrial Park proposal so DCLU has no way to assess combined impacts.

13. The DEIS projected residential parking demand at the rate of 1.41 spaces per unit. Peak demand from the office space is projected to be for 36 spaces. The peak periods of demand for the two uses are not expected to overlap. The proposed parking space assignment of 96 spaces for residential use only, 12 spaces for office use only and 13 spaces for daytime office and evening residential use would assure that the projected peak residential demand would be met. The land use specialist concluded that

on-street supply of parking would not be affected by the residential project since the total demand would be met on-site.

14. No parking demand rate was stated specifically in the analysis and decision but the conclusion was that there would be no unacceptable spillover.

15. On-street parking was surveyed on five occasions, in April, May and August in the evenings, one daytime and on Saturday and Sunday. At the worst time, 16 on-street spaces were found to be available out of a supply of 94 spaces in the immediate area. Though the parking spaces on North 34th which are restricted during rush hours were included in the survey, at the worst time none of the 16 vacant spaces was located on that street.

16. Richard Weiler checked parking utilization in the evening within two blocks of the subject site approximately three times every two weeks for over 46 weeks. He found that the average number of spaces available in the summer was twelve and in the winter, seven. On seven occasions all spaces were filled and the most available at one time was 47 spaces.

17. North 34th is a major east-west thoroughfare between the University District and Ballard with two westbound and one eastbound lanes. The average daily traffic generated by the proposed use would be expected to add approximately three percent to the volume in the worst case. Some 70 percent of the expected 686 daily trips from the site would be expected to go westbound on North 34th. Sixty trips are expected to be generated during the PM peak with, again, 70 percent going westbound. The effect on the level of service at the intersection of North 34th with Fremont would be to lower it from C to D. Level of service D is an acceptable level of service in the City of Seattle.

18. During the peak hour approximately 22 vehicles would be expected to turn left from North 34th Street into the site. This is not enough to warrant a left-turn lane in the North 34th.

19. The alley on the north side of the subject site is only 16 ft. wide with 16.5 ft. clearance between buildings at one point. It is unpaved behind the subject site and presently carries approximately 26 cars. With the proposal there would be an additional 16 cars going in the alley and eight out during the peak hour.

20. The Engineering Department has determined that though the standard width for an alley in a commercial zone is 20 ft., a 16 ft. wide alley with 15 ft. paved is acceptable where there is not sufficient right-of-way for the full width and where the alley would serve a residential, not a commercial use, which is the case here.

21. Two cars can pass in a 16 ft. wide alley.

22. Figure 13 in the FEIS, p 2-3, shows a 45 ft. turning radius into the alley from lower Aurora Avenue North. The figure shows the alley at a right angle to the street when it is actually at an oblique angle. The figure also shows the alley on the west side of Aurora to be offset in its alignment with the alley on the east side when they are actually in line.

23. The applicants' traffic consultant, Christopher Brown, P.E., testified that neither the error in the angle nor in the configuration would have any bearing on his analysis of the alley access and safety since the offset configuration presents a "worst case" and the ten degree skew of the alley is too minor to create any problem.

24. The land use specialist was advised by the Fire Department that it would not use the alley to fight a fire on the subject site so he did not discuss the necessary radius for turning into the alley. Standpipes may be required at the time of building permit review.

25. The applicants' traffic consultant determined that the standard fire truck for emergency access design could turn into the alley in a continuous movement.

26. A fire truck used the alley to fight a fire in one of the houses on the subject site prior to its demolition.

27. Richard Weiler spoke with someone in the Fire Department's engineering division and understood that a 50 ft. radius was necessary for fire equipment to turn into the alley and that standpipes would be necessary for the Fire Department to fight fires on the site from North 34th Street. He argues that if the radius is not sufficient for equipment to turn into the alley and the building is not equipped with standpipes would constitute a hazardous condition.

28. The decision of the Director refers to conditions of the decision for alley improvement but none is imposed.

29. The subject site was part of a CG zone with a 60 ft. height limit between 1957 and 1986. During the Neighborhood Commercial rezoning process the Mayor's proposal was for a commercial designation with a 65 ft. height limit for the site and area. The community urged a 40 or 45 ft. height limit. The City Council designated the site for 65 ft. height.

30. The area north of the alley had been zoned RM with a 35 ft. height limit prior to the multi-family mapping process when it was changed to L-3 with a 37 ft. height limit.

31. The north elevation of northern building has a small setback after the first floor and then rises a total of 51 ft. above the alley. Another setback of approximately 15 ft. occurs for the penthouse and the building attains a total height above the alley of 58 ft. The southern building is six stories high and rises 60 to 62 ft. above North 34th Street.

32. The proposed length of the building is 240 ft. which the Director considered the most serious bulk or scale problem. The length occurred because so many parcels were assembled. Jay Laughlin testified that while the height, which is under the maximum permitted in the zone, would have been anticipated the Council would not have anticipated the assemblage of that many parcels to achieve a 240 ft. length. Therefore, the Director required a redesign to break up the horizontal massing to make the northern structure look like two smaller buildings with a 40 ft. wide recess in the middle on the northside, 22 ft. deep at the second and third levels. On the fourth and fifth floors there would be an additional 26 ft. width and 36 ft. depth. Elevated walkways recessed inside the courtyard are permitted in the area to avoid the necessity of adding a second elevator.

33. There was and is sentiment in the Fremont business community for more commercial use on the subject site. The addition of office space was made to respond to this desire. Neighboring property owners to the north would prefer the lower height which could be achieved if the office space was removed.

34. Shadow analysis in the EIS was done by a licensed architect and shows that the building's shadow would adversely affect properties north, northwest and northeast of the site placing their backyards in the shade for most of the afternoon, most of the year. The building would not shadow the lots in the morning and not in the early afternoon in the summer. No public parks or school grounds would be shaded by the building.

35. The view from at least six single family residences and 12 condominium units would be substantially blocked by the proposed development. Other views would be affected but not as greatly. No view from a designated scenic view point or route would be affected. A witness pointed out that the proposed open space policies include a policy that would require evaluation of view impact of development on property abutting a public street but that is not in effect at this time.

36. The land use specialist characterized the units as "affordable" housing in the decision. He based this characterization on the size of the units, the type of proposed construction and anticipated rental cost. Appellants strongly disagree with this characterization in that units in the expected price range would not meet the needs of immediate area or be available to low income families.

37. Alternative number 3 describes two buildings built to the 65 ft. height limit with a total of 109,000 gross sq. ft. The mitigated project would be lower and have a total of 71,750 sq. ft.

#### Conclusions

1. The Hearing Examiner has jurisdiction over these parties and this subject matter pursuant to Section 23.76.022.

2. The appellants contend that the EIS is inadequate for the proposal because it was prepared by a consultant to the applicant, it contains an erroneous depiction of the alley configuration, the parking analysis was unreliable, the EIS failed to consider cumulative traffic impacts, it did not analyze the elevation and bulk of the southern building and the alternatives were treated perfunctorily and were not ones the applicant any intention of pursuing.

3. The determination by the Director is to be given substantial weight by the Hearing Examiner on appeal. Section 23.76.022C7. The burden is upon the appellants to overcome that weight by showing that the decisions are clearly erroneous. Brown v. Tacoma, 30 Wn.App. 762, 637 P.2d 1005 (1981).

4. Section 25.05.420 allows the applicant, the applicant's agent or an outside consultant retained by the applicant to prepare the EIS but the document is the EIS of the lead agency, here, DCLU. The lead agency has the responsibility of directing the preparation and assuring that it is properly prepared. The record shows that Jay Laughlin supervised the preparation of the EIS and was satisfied that it was done appropriately.

5. The EIS is not without error. The alley configuration is misrepresented in Figure 13, FEIS at 2-3. The offset depicted and the right angle, neither of which are correct, were not shown to have any effect on the conclusions regarding impacts of the project so, though incorrect, were harmless and had no significance.

6. The disclosure of parking impacts was argued to be inadequate because of the area surveyed and the small number times parking was surveyed and because the results were different from the results obtained by Mr. Weiler's surveys. While one of appellants' witnesses asserted that daytime, summer parking utilization is worse than the times chosen for the surveys by the consultant, it is noted that Mr. Weiler's surveys were done in the evening and showed that winter parking is heavier. Further, one of the consultant's surveys was conducted on a weekday and summertime was represented in the surveys. There was no showing that the number of days on which parking utilization was surveyed was too low to be reliable. Instead, the record shows that the study followed the Engineering Department guidelines for an acceptable survey. As to the area, restricted parking which the land use specialist said should not be considered was included, however, since it was full at the times of highest utilization, its inclusion would not have increased the number of spaces available for overflow. Though the traffic consultant found more available on-street spaces than Mr. Weiler, the examiner cannot conclude that the information in the EIS was erroneous for the dates, times and area surveyed nor that the surveys were unreliable. Since the dates, time and area were not shown to be unacceptable, the examiner cannot conclude that the EIS is inaccurate or misleading.

7. The EIS is not inadequate because it failed to evaluate

projects unknown to DCLU, as lead agency, where there had been no application or notice of the projects and which projects were not brought to the attention in the comment letters to the DEIS. Section 25.05.545 provides that lack of comment by members of the public within the comment period is to be construed as lack of objection to the analysis. Even if it had been possible to consider these projects, there was no showing that the combined impacts would result in a significant impact.

8. Appellants object to the EIS for failure to depict a project with a building of the height and size of the southern building. Alternative number 3 in the EIS describes two buildings, both 65 ft. high with some 30,000 sq. ft. more floor area than the mitigated proposal. The southern building, then, does not exceed the bulk considered in that alternative.

9. As to the alternatives, appellants feel that the applicants were not seriously considering any of them, they were not treated as serious alternatives and also that the public was deprived of commenting on alternative six, added to the FEIS, and on the final project. Section 25.05.440E requires the inclusion of the "no action" alternative and reasonable (as to number, range and detail) alternative courses of action which could feasibly approximate the proposal's objective at a lesser environmental cost. Though the applicants would not have pursued some of the alternatives, their inclusion provided an opportunity to compare the relative affects on the environment of different courses of action. The objective of SEPA was met in that, in response to public comment, an additional alternative was presented which attempted to respond to the desire for some commercial use and to reduce some impacts, which additional alternative resulted in the mitigated proposal. Since the mitigated proposal is in response to public input, SEPA does not require that it then be subject to new environmental disclosure and public comment, except for that occurring in the appeal process.

10. The adequacy of an EIS is to be judged by the application by the "rule of reason." Cheney v. Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976). All that is required for an adequate document is "a reasonably thorough discussion of the significant aspects of the probable environmental consequences...." Cheney at 344, 345. Appellants have not proved that the standard has not been met.

11. Appellants also challenge the failure to impose additional conditions to mitigate remaining adverse environmental impacts. They seek conditions to improve the transition between the C 1 and L-3 zones, to reduce parking impacts and to require paving and widening of the alley. View protection and reduction of shadows are also desired by appellants.

12. The Director has authority to impose conditions to mitigate adverse impacts based on policies designated in Section 25.05.902 for that purpose; which have been identified in the EIS; which are reasonable and capable of being accomplished but only to the extent attributable to the proposal. Section 25.05.660A. Again, the burden is on the appellants to prove that the Director's decision not to impose further conditions to mitigate impacts was clearly erroneous.

13. The increased use of the alley is an adverse impact because of the alley's condition. That impact was identified in the EIS and the SEPA policy on parking and traffic, Section 25.05.902D, provides authority for conditions to improve access and flow. While the Engineering Department will require improvement to the alley, appellants have shown that a condition requiring the improvement would be reasonable and can be tailored to reflect the extent of the impact from the project so a SEPA condition is appropriate to assure that the impacts are mitigated. Therefore, a condition should be added requiring that the alley be paved, according to Engineering Department standards, for minimum width of 15 ft. in front of the property and that the surface of the alley to at least one of streets be gravelled, at

a minimum.

14. As to parking impacts, while the EIS identified a potential overflow of parking onto the streets, the record shows that the mitigated proposal will have no overflow. Since there is no adverse impact from parking remaining which can be mitigated, the Director's decision is not erroneous.

15. Appellants urge that the height of the northern building at the alley is too great and requires mitigation to provide a transition in scale between the proposed building and the structures permitted in the adjacent L-3 zone. They contend that a difference of 15 ft., from 52 ft. proposed at the alley down to 37 ft. in the L-3 zone, from one side of the alley to the other, is an abrupt discontinuity, not the "transition" described in Goal B 9 of the Neighborhood Commercial Area Land Use Policies. The City Council has had opportunity to interpret and apply the Land Use Policies on transition in a number of cases since the adoption of the policies. The Council explained in In re Oden, C.F. 293557 (1985), that the height and bulk standards of the Land Use Code control unless the site is on the edge of a zone where the problems of transition are not fully accommodated by the zoning or the project presents unusual circumstances which the City Council would not have contemplated at the time of the zoning.

16. Here, the record shows that the Council was fully cognizant of the juxtaposition of the L-3 with the C1 65 ft. zones and intentionally rejected the suggested lower heights. It would be anomalous for the Council to have rejected the lower height limit for the specific properties but now require that the structures be limited to the earlier proposed height to provide transition. The other indication of intent is that the multi-family policies and Council decisions have treated the L-3 zone as a "transitional zone" which should be located between more intensive commercial and residential zones and less intensive residential zones so that the zone, itself, with its development standards, is to provide that transition. Therefore, the Director was correct that while there is authority to deal with the unanticipated length of the building, which she has done, the policies do not provide authority for mitigating the height or scale of the building based only on its proximity to an L-3 zone.

17. Various other impacts were identified in the EIS and by appellants, chiefly those of shadow and view impairment. The Director has no substantive authority pursuant to Section 25.05.660 to mitigate these impacts because there is no policy basis for protection of private views and shadows on private properties. Further, SEPA does not address economic impacts to properties due to view, solar access or privacy loss.

18. The examiner must conclude that, except for specifying alley improvements, the appellants have not proved that the Director failed to utilize all authority she has available to mitigate remaining identified adverse impacts of the proposal.

#### Decision

The decision of the Director is affirmed with the following additional condition: The alley abutting the subject property shall be paved, according to Engineering Department standards, for a minimum width of 15 ft. and improved with at least a gravel surface from the property to one of the street accesses. This is to be regarded as a minimum improvement pursuant to SEPA recognizing that the Engineering Department may require further improvements.

Entered this 6th day of June, 1988.

M. Margaret Klockars  
M. Margaret Klockars  
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 25.05.680(C), a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The decision is filed with the SEPA Public Information Center the same day that the decision is signed by the Examiner. The SEPA Public Information Center telephone number is 684-8322. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to Section 25.05.680(C), the time for filing a request for judicial review of the underlying governmental action and/or other SEPA issues is stayed until the City Council renders a final decision on this Section 25.05.680(C) appeal.

If no appeal is taken pursuant to Section 25.05.680(C), the decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review of the decision on the underlying governmental action must be filed in King County Superior Court within fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.22(C)(12)(c). Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington 98104, within fifteen days of the date of this decision. Section 25.05.680(D)(4).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost of preparing a verbatim written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available for the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review.