

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

CHECC, COMMUNITY RESEARCH ASSOCIATES AND
COMMITTEE FOR ALTERNATIVES AT WESTLAKE

FILE NO. W-78-024

from an environmental determination
from the Department of Community Development

The determination of the Department of Community Development
is AFFIRMED and the appeal is DENIED.

Introduction

The appellants, CHECC on Seattle City Government (CHECC), Community Research Associates (CRA) and Committee for Alternatives at Westlake (CAW), filed appeals challenging the adequacy of the environmental impact statement (EIS) prepared by the Department of Community Development (DCD), as lead agency, for the Westlake Project.

The appellants exercised their right to appeal pursuant to Section 20, Ordinance 105735.

Parties to the proceeding were: Esther Rashkov for CHECC, Eli Rashkov for CRA, Victor Steinbrueck and Folke Nyberg for CAW and Ellen D. Peterson, Assistant City Attorney for DCD.

This matter was heard before the Hearing Examiner on January 24, 25, and 26, 1979, and written summations were submitted February 5, 1979.

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

Findings of Fact

1. The Westlake Project is a proposed development action sponsored by DCD and the Department of Parks and Recreation for a downtown site comprised of the entire block between Fourth and Fifth Avenues and Pine Street and Olive Way, the block between Olive Way and Stewart Street and portions of the block south of Pine between Fourth and Fifth Avenues.

2. A series of proposals have been made for the Westlake Project. The challenged final EIS, comprised of the Draft Environmental Impact Statement December, 1976 (DEIS), Final Environmental Impact Statement February, 1977 (FEIS), Draft Supplemental Environmental Impact Statement, September, 1978 (DSEIS) and Final Supplemental Environmental Impact Statement, November, 1978 (FSEIS) was prepared to meet the requirements of SEPA for an action including the development a new Seattle Art Museum (SAM)/retail building with 3 pedestrian skybridges, underground parking garage, public park, new monorail terminal, and public plaza north of Pike Street, closure of Olive Way between Fourth and Fifth Avenues and development of a public plaza in that right-of-way, and acquisition and inclusion of the Times Square Building.

3. The DEIS and FEIS had been prepared for an earlier proposal (approved project) which included a hotel instead of the SAM portion of the building and did not include the

Times Square Building. The sponsors chose to proceed under WAC 197-10-660 and supplement the previously prepared EIS for the new proposal.

4. The appellants filed appeals on December 5, 1978, challenging the adequacy of the procedure followed, of the disclosure of environmentally significant effects, of the analysis of the alternatives and of the response to requests for disclosure of legal opinion. Prior to hearing, that portion of the challenge as to the sufficiency of disclosure of legal issues was dismissed. Pursuit of the specific challenges as to the EIS' treatment of various elements of the environment was abandoned at hearing. Those remaining are grouped below for clarity.

Procedural

5. Appellants allege that public participation was inadequate and misrepresented in the various EIS volumes, i.e. the Mayor's Westlake Evaluation Committee's involvement in the formulation of the SAM's inclusion in the DSEIS. Contrary to the suggestion at 4-26, FSEIS, the substitution of the art museum for the hotel was never discussed by the committee.

6. A public hearing was held on the EIS on or about October 19, 1978, pursuant to WAC 197-10-480. Three Council members attended. Speakers were given 5 minutes if they represented a group and 3 for individuals. A summary of selected comments and responses to those comments were included in the FSEIS. In addition a number of slide presentations were made to various groups to present the proposal. No notes of comments made at those presentations were kept by staff. Scale models of the project were displayed in various locations. Thirteen letters in response to the circulation of the DSEIS were received and included in the FSEIS. Responses to selected comments in those letters were included in the FSEIS.

7. Appellants urge that the Memorandum of Understanding entered into by the Mayor, SAM, the Westlake Development Authority, and Mondev violates the EIS process by committing the City to a particular action prior to the completion of the EIS process. That document, dated June 27, 1978, provided for terms and conditions upon which the various parties to the project outlined would operate. Appellants further contend that the EIS is premature as to the park portion of the proposal. The park was, at the time of EIS preparation, in the "predesign" stage. Its size and location had been identified.

Analysis of Impacts on Elements of the Environment

8. The DSEIS states at p. 0-9 and corrected at p. 4-33(FSEIS) that the amount of open space has been increased over the previous proposal by the addition of roof gardens improving its impact on both the elements of aesthetics and recreation. Appellants question whether open space has actually increased. They maintain that the amount of open space is misrepresented by the architectural renderings at pp. 0-17 and 0-18, DSEIS. The representations of people on those pages are not in scale with the buildings which would tend to make the open space appear to be greater than it would actually be. The section drawing at p. 1-7, FSEIS, depicts a view of the roof garden from Pine Street which probably would not be possible. Appellants also argue that in calculating the "open space" for the roof top terraces the 4/10 ratio used in the zoning ordinance to determine bonus should be used which would show a lesser amount of open space. A comparison by appellants of the amount of open space in the previous and current proposal appears at p. 3-22, DSEIS, but not reduced by the ratio as proposed by appellants.

9. Appellants point out that the effect of the sky bridges on the aesthetics of the buildings to which they are to be joined has not been analyzed. These buildings, the Bon Marche, Frederick and Nelson and Nordstrom, are considered the most impressive architectural group in the downtown area.

10. The effect on the cityscape and urban design that the project would have as it affects the diagonal of Westlake was not discussed. The DEIS acknowledges the presence of the diagonal but without discussion.

11. With regard to the Historical element the appellants point out that the DSEIS at p. 2-11 is incorrect in its statement that the Times Square Building is listed on the National Register of Historic Places which suggests that certain protections may be present. Further, there is no recognition in the EIS of the Olive Way Plaza's effect upon the Times Square Building. As now designed, the plaza would dissect the face of the building some distance above present sidewalk grade, although this fact is not apparent from the graphics presented. The historic preservation officer indicated that the design would have to be changed.

12. As to the element of air/climate appellants maintain that the discussion of shadows on the north plaza is inaccurate and insufficient. Shadows are discussed in the DSEIS and FSEIS at pp. 3-4, DSEIS, (comparing the shadow cast by the Mayflower Hotel and the new building), 3-5 (reduction of shadow impact identified in previous EIS), 2-4, FSEIS (describing times of sunlight and shadow) and 4-39 (Victor Steinbrueck comment and response). The analysis in the DEIS referred to is a one paragraph statement by the architect at p. C-8, DEIS, in which he states that "(t)he shadow cast on the Olive Way Plaza will remain as is, since it is generated primarily by the Mayflower Hotel." At p. V-66, FEIS, in response to Mr. Steinbrueck's comment, the responder refers again to C-8 but states that shadows will be longer due to the greater height of the proposed building. No graphics are provided by the EIS.

13. The DEIS at p. C-39 indicates that the new building would block views from Pine north down Westlake. The FEIS at V-65, in response to Mr. Steinbrueck's comment, again acknowledges elimination of views to the north.

14. With regard to the transportation element, only two aspects of the appeal were pursued at hearing. One was the representation that 300 parking spaces would be provided. Appellants contend that this is inaccurate and therefore misleading as insufficient space exists to meet design requirements for that number of spaces while providing space for truck services to the museum and Mayflower Hotel. p. 3-65 FEIS. Appellants also maintain that the limitations of the monorail terminal design have not been discussed. Mr. Steinbrueck cited various design problems in his comments, pointed out, in part, at p. 3-65 DEIS, which received no response.

Economics

15. Appellants, chiefly CHECC, challenged the adequacy of the EIS as to its disclosure and analysis of economic and financial factors. The analysis for the proposed project is contained chiefly at pp. 0-13, 3-24 and 3-31, DSEIS. Further disclosure and analysis occurs in the FSEIS in response to appellants' comments. Appellants questioned whether underlying assumptions would be clear to decision makers and whether they are realistic. John W. Kelly, City Treasurer, testified that the basis for certain changes were unclear to him. Bernie Dempcy, an attorney specializing in the tax and

investment area, found the information in the EIS difficult to comprehend because of lack of consistency and was concerned with invalid assumptions. Specific errors cited by appellants were, among others, the increase in the inflation factor from the "approved" project to the present proposal while bond interest remained at 5½%; the inflation factor treated as a simple factor in the DEIS and FEIS and compounded in the DSEIS; the retail sales per square foot being increased from \$150 to \$170; the failure to adjust over time for value of the dollar; no change in land values since 1976; assumption that the project will draw no retail demand from other portions of the City; assumption that no other cinerama theater will be built in the City; lack of reference to deduction of existing revenue; applying the real growth factor for 35 years to only one building where there is no room for expansion; figures not showing acquisition costs for triangular park.

16. The inflation factor was increased by 1% from the analysis in the DEIS to that in the DSEIS. That can be discerned by carefully reading each.

17. The interest rate for the bond issue was assumed to be 5½%. The staff member verified the validity of this assumption for the DSEIS by contacting City personnel dealing in bond issues.

18. DCD did not dispute the allegation that the method used to compute inflation's effect changed between the DEIS and DSEIS.

19. The DSEIS shows that the retail sales average of \$170 square foot was used. The DEIS at p. C-41 shows use of the \$150 average. The staff person adjusted this figure based on new information.

20. The flow charts at pp. 3-26 and 27 state clearly that tax revenue is stated in current dollars.

21. The DSEIS at p. 3-25 states clearly that revenue figures shown are net of existing revenue.

Alternatives

22. Appellants challenge the adequacy of the section on alternatives to the proposal. The DSEIS refers to the "approved project" assessed in the DEIS and FEIS and "museum alternatives" which excerpts SAM's study of alternative sites and discusses reduction of SAM's use of the Times Square Building. Five pages in the DSEIS are devoted to "alternatives" all of which, except for one paragraph, are related to "museum alternatives". The FSEIS, in response to Victor Steinbrueck's comment, refers to the DEIS, Sections G and N and the FEIS, pp. III-38-40; V-34 and V-40. Section G is a 25 page section detailing the "no action" alternative in two pages, an alternative location alternative in 1.5 pages, a reduction in scale alternative in 2.5 pages, expansion in scale alternative in 3 pages and the remaining 12.5 pages devoted to discussion of various components or related issues such as the Mayflower Hotel, Pine Street, skybridges, elevated park space, parking garage, Olive Way, public costs.

23. The "no action" alternative assumed no changes in existing private development in the short term and major new development in the long term to be high rise, thus having greater adverse effects than the "approved project" and resulting in economic decline. This was not updated in the DSEIS. Evidence adduced at hearing showed the likelihood of immediate private redevelopment if the City decided upon the "no action" alternative with consideration of other than high rise development.

24. The "reduction in scale" alternative analysis did not address a specific proposal but gave two persons' specific

suggestions and a general statement of the proposal favored by opponents to the "approved project." The impacts were discussed in general terms. Some economic data and additional detail was given at pp. III-38-40 in response to a Council member's questions. A response at V-34 explained why the "no action" alternative was rejected and that DCD believed, at that time (2/77) that the City Council and public already had sufficient information on which to base a decision among the alternatives. A response at p. V-40 also refers to the "reduced scale alternative" and reasons for rejecting it.

Conclusions

1. In assessing the adequacy of the final EIS the "rule of reason" is to govern. Washington's Supreme Court adopted the approach used by the federal courts in Cheney v. Mountlake Terrace, 87 Wn.2d 338 (1976) requiring a "reasonably thorough discussion of the significant aspects of the probable environmental consequences".

2. Under the "rule of reason" an EIS

"need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice among alternatives."

County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), Monroe County Conservation Council v. Adams, 566 F.2d 419, 422 (2d Cir. 1977).

3. The Examiner, in reviewing the EIS on appeal must use the "rule of reason standard" which the courts would apply but must also accord substantial weight to DCD's determination of adequacy.

4. As to the allegations of procedural defects, it must be concluded that the minimum requirements of SEPA have been met by the lead agency in its circulation of the drafts and in its holding of the public hearing. Implications in the EIS of more public participation than actually occurred, while regrettable and perhaps reason for some anger from certain members of the public, are not of a degree to seriously mislead decision-makers in weighing the proposal.

5. Section 5(2), Ordinance 105735, as amended, follows WAC 197-10-055 closely, providing that the EIS should be completed at the earliest point in the process at which the principal features and impacts can be reliably identified. Both state that the ideal is to do the EIS at the beginning of the process prior to making any decisions or taking any action. The Council has made the timing requirement more explicit than the Guidelines by providing that, at a minimum, it should be completed prior to the first major action or making any irreversible commitment to the proposal. While the Memorandum of Understanding and other ordinances and resolutions have been signed or adopted, none is an irreversible commitment to the project. Financial costs may be incurred under the Memorandum of Understanding however they are proportionately small and are not the type of commitment to the project that would preclude the possibility of revision or rejection because of adverse environmental impacts.

6. While design of the park would have provided additional information to the public, the problems raised by holding back of the EIS to await that design could have outweighed the advantages. The SEPA guidelines at WAC 197-10-495 have built in a protection for projects or components subject to change. That provision would require an amended or new EIS should the park component be changed substantially, new information regarding impacts come to light or if further input and review is deemed necessary.

7. With regard to the adequacy of the document itself, it is appropriate to consider that it will be used by Council members who must make the major decisions involved since City agencies are sponsoring the project. It is also appropriate to note that the EIS is not the sole source of information in that both the public and staff can give additional input and the Council members can request further information.

8. Despite a number of inaccuracies and deficiencies in the disclosure and evaluation of the impacts of the proposal on the elements of the environment which appellants have cited, that section provides reasonably sufficient information to the decision-makers to balance risks against benefits.

9. The problems with scale in the sketches, pointed out by Mr. Steinbrueck, have offsetting results. The open space is made to appear larger than would actually exist however the building also appears more massive. The lesser desirability of roof top terraces is clearly declared in the DEIS.

10. The impacts of the skybridges and importance of the diagonal of Westlake on the Cityscape did receive short shrift. Some disclosure is provided by public comments, however, and the disclosure is concluded to be reasonable.

11. The lack of acknowledgement of the plaza's effect upon the Times Square Building is of more serious consequence. The EIS was prepared at the schematic stage of design, however, and it may have been reasonable to have overlooked certain design problems. No proof was offered that this was anything but oversight that would be corrected and, in fact, appellant's witness testified that it would be corrected.

12. The absence of diagrams of shadow patterns is puzzling given the City's policy to consider blockage of sunlight from publicly owned parks. Some discussion of shadows is included, as set out in finding no. 12, however evidence at hearing showed it to be largely incorrect. While graphic representations of shadows are commonly included in EIS's, a decision-maker, by looking at the schematic drawings and photographs of the model, should be aware of potential shadow patterns and problems.

13. Appellants' evidence raised question as to the design's ability to provide the amount of parking stated and showed that the proposed design for the monorail terminal platforms may be less desirable than the existing terminal or the Seattle Center terminal. As to the parking garage, on appeal, without proof based upon specific measurements and plans, the Examiner cannot accept Mr. Steinbrueck's opinion over that given by the project's architect through the proposal description. As to the monorail platform, while such information might be of interest to the Council, it is not clear from the record where the platforms were described and more importantly it cannot be concluded that this information must be present to have a reasonably thorough analysis.

14. Disclosure of economic factors, including but not limited to employment, public investment and taxation, is included and is an additional element of the environment to be analyzed. Section 15, Ordinance 105735, as amended. WAC 197-10-440(14) and 446 allow the City to add this element but (14) directs that the "Other Issues" section be limited to a brief identification of such problems or issues. Section 15 of the ordinance states that the level of detail is to be proportionate to the impacts the proposal is likely to have. The Guidelines establish an upper limit on these non-environmental considerations. The Council's provision for level of detail must be operative within the established limit. While economic factors appear to be of major importance at the decision making level from the number of economics-related questions from Council members, a clear identification of the issues is all that may be required.

15. Appellants have not proved the underlying assumptions used by DCD to be invalid. The lack of consistency in methodology between the DEIS and DSEIS may cause some confusion in comparison but at least in the case of the 1% increase in the inflation, may provide a more realistic figure. The challenge as to the accuracy of the figures used must fail for lack of proof.

16. The economic analysis of the impacts of the proposal can be legitimately criticized for "putting the best foot forward" where the "worse case" analysis and disclosure is considered safer, at least in privately sponsored project's EIS. Given the "brief identification" of problems and issues standard, it is concluded that the EIS is adequate as to economic factors.

17. The adequacy of the alternatives section presents the most serious challenge. Numerous federal cases have dealt with NEPA's requirements for analysis of alternatives. It is clear that the rule of reason governs both which alternatives must be reviewed and the extent to which they are to be discussed. The requirement of the first part was described as a reasonably comprehensive selection of alternatives made in good faith by the court in Monroe County Conservation Council v. Adams, 11 ERC 1037 (2d Cir. 1977). That court went on to cite many previous cases for the principle that the EIS does not have to consider in detail each and every conceivable variation of the alternatives "but that it need only set forth those alternatives 'sufficient(ly) to permit a reasoned choice.'" Adams, supra, at p. 1040. A "detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives" is required, however, N.R.D.C. v. Morton, 458 F 2d 827, 834 (DC Cir. 1972) and has been characterized as "the linchpin of the entire impact statement" Monroe County Conservation Council, Inc. v. Volpe, 4 ERC 1886 (2d Cir. 1972).

18. The lead agency is to be given some reasonable discretion to decide what the reasonable alternatives are. In choosing those alternatives to discuss in detail in the EIS, DCD selected those alternatives in which the Council had expressed interest in 1975. The Dempcy proposal, which was suggested as a specific alternative which should have been reviewed could be categorized under the no action or the reduction in scale alternatives, as suggested by DCD. Neither suggests the possibility of that type of project, however.

19. The level of detail of the "approved project" as an alternative was not challenged in this appeal nor was it challenged in the previous EIS. The difficulty in evaluation and comparison of it in terms of its economic impacts with the proposed project was noted by appellants because of the changed inflation rate and average retail sales used.

20. The analysis of the other alternatives occurs chiefly in the DEIS since alternative siting of the SAM does

not relate to the goals of the Westlake Project. If the challenge could legally extend to the content of the section on alternatives in the DEIS, the analysis would be concluded to be inadequate for the detailed and careful analysis of the alternatives "must go beyond mere assertions and expos(e) the reasoning and data of the agency." Natural Resources Defense Council v. Callaway, 524 F.2d 79, 93, 94, 8 ERC 1273 (1975). The portion on the Reduction in Scale alternative, for one, fails in this regard. No clear approach is taken as to possible areas of reduction with resulting impacts. The discussion itself acknowledges its subjectivity and cannot be considered "careful" or "objective" analysis, yet it stands as one of the chief alternatives.

21. Appellants argue that DCD should be required to use a process structured for the comparative evaluation of alternatives which is established practice in the field of urban design. Various examples of the state of the art were supplied. The Examiner agrees that the process used, or lack of, resulted in a product which will not be easily used by the decision-makers as each will have to resort to some evaluation tool (i.e. matrix) of his or her own to weigh costs and benefits. The methodology to be used, however, is the sole province of the lead agency and the Examiner is not permitted to substitute her judgment. Only the product may be judged on review and while the analysis is, at best, disordered, no remedy exists for the reasons following.

22. The order on the Motion for Summary Judgment which ruled that the final EIS for the proposed project included the DEIS and FEIS took into account the language of the Guidelines and those documents' function as a part of the total EIS for the project. That function is apparent in the area of the alternatives to the proposal requirement. Without the alternatives discussed in the DEIS, the DSEIS and FSEIS would not be adequate as the range would include only alternative sites for the museum and the "approved project" without any description. The Guidelines require, at the very least, a discussion of the "no action" alternative. Therefore, the range of alternatives is adequate only with the inclusion of those discussed in the DEIS and FEIS. The new proposal did not change possible alternatives, however, except to substitute itself for the "approved project." DCD did rely on those alternatives previously discussed with the addition of the SAM siting alternatives. No one challenged the adequacy of the content of the Alternative Section of the previous EIS so it is adequate, as a matter of law for that project. Since no change occurred requiring supplementing of the alternative section, the content or level of detail of a section included in the earlier EIS cannot now be challenged. So, while the range of alternatives to the present project can and has been assessed to determine if any additional alternatives must be considered, the discussion of those previously analyzed are beyond attack in this forum.

Decision

Based on the foregoing conclusions,

The appeal is DENIED and the determination of the Department of community development is AFFIRMED.

Entered this 15th day of February 1979.

M. Margaret Klockars
M. Margaret Klockars
Deputy Hearing Examiner

Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination and any further appeal must be made to the courts.