

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

In the Matter of the Appeal of
SEATTLE MASTER BUILDERS ASSOCIATION FILE NO. W-87-003
from an environmental determination
of Office for Long-range Planning

Introduction

Seattle Master Builders Association challenges the determination of nonsignificance issued by the Office for Long-range Planning for proposed amendments to the Neighborhood Commercial Areas Land Use Policies and Chapter 23.47, Seattle Municipal Code.

The appellant exercised the right to appeal pursuant to Section 25.05.680, Seattle Municipal Code.

Parties to the proceeding were: appellant by Terrence I. Danysh, Cairncross, Ragen & Hempelmann and the Office for Long-range Planning by the City Attorney, Michael P. Monroe, assistant.

This matter was heard before the Hearing Examiner on November 30, December 14 and 17, 1987.

All section numbers below refer to the Seattle Municipal Code unless otherwise specified.

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 Office for Long-range Planning (OLP) proposed amendments to the Land Use Policies for Neighborhood Commercial Areas and to the Land Use Code, Chapter 23.47, Seattle Municipal Code. The OLP issued a determination of nonsignificance (DNS) for the proposed action. Seattle Master Builders Association (SMBA) filed a timely appeal of the DNS.

2. The DNS provides a description of the effect of the amendments.

The proposal prohibits single purpose multi-family residential development in N1 (sic) Zones, areas with 65 ft. height limits and the core of NC2, NC3 and C1 zones with 40 or 50 ft. height limits. Bulk standards are established for single purpose residential allowed along the edges of NC2, NC3 and C1 Zones with 40 or 30 ft. height limits. Open space requirement is changed to be based on the amount of residential use (gross square footage) instead of the current lot area. For single purpose residential projects, at least 60% of the required open space must be at ground level. Setbacks for single purpose residential development on lots abutting residential lots are increased.

Exhibit 16.

3. An environmental checklist (checklist), Exhibit 1, was prepared by Elsie Crossman of OLP and reviewed by John Skelton of the Department of Construction and Land Use (DCLU) which co-spon-

sored the amendments. Ms. Crossman and other OLP staff members were involved in the preparation of the EISs for the existing multifamily and commercial policies and code.

4. William H. Staeger, manager of the northwest division of environmental services for Dames and Moore, is an expert in reviewing environmental studies and preparing checklists and testified on behalf of appellant. Mr. Staeger reviewed the checklist for appellant and concluded that he would have sent the checklist back to the preparer for more information had it been under his supervision. He testified that he would be unable to decide whether there would be significant impacts caused by the proposal based on the information in the checklist.

5. Item A.12 of the checklist requires a description of the location of the proposal. The description given is "proposal would affect all commercial zones outside of downtown, approximately 7% of City land area." Exhibit 1, p.2.

6. Ms. Crossman testified that she and staff had visited all of the areas in preparation for the Neighborhood Commercial Area zoning, visited some areas in preparing the amendments and environmental review and is familiar with all the areas involved.

7. Checklist item B.1.a. asks for a general description of the site. The response was "all Neighborhood Commercial Zones". This statement, on its face, suggests that NC1, NC2 and NC3 zones are affected by the amendment, not any C zones. Ms. Crossman and Mr. Skelton testified that they use "Neighborhood Commercial zones" and "Commercial zones" interchangeably and were aware that the C1 zone is affected by the proposed amendments. Further, the response to Item 12 which is on the same page and quoted above, refers to all commercial zones.

8. In response to checklist item B.5.d which asks what measures are proposed to preserve or enhance wildlife, the preparer responded:

Since proposal reduces development potential for housing in commercial areas, it may slow down the pace of development of certain sites, maintaining existing conditions on a short term basis.

Appellant's witness Burgor found this response unclear.

9. Under checklist item B.6.c regarding energy conservation, the response was:

The proposal requires and encourages mixed use thereby providing incentives for development of housing near places of employment and commercial services thereby providing the potential for energy savings in transportation.

Exhibit 1, p.6. Mr. Staeger disagrees with this statement. The environmental impact statement (EIS) for the existing Neighborhood Commercial Areas Policies had indicated that there would be energy savings through greater concentration of housing near jobs and since the proposed amendment limits or restricts those housing opportunities there would be potentially an increase in energy consumption from longer commutes. He acknowledged that if the housing is developed locally, the increase in energy consumption in itself would not be a significant impact.

10. In response to the question in checklist item B.8.a, "what is the current use of the site and adjacent properties?", the response was "see non proposal (sic) section". The only response in the supplemental sheet for non-project actions related to use of land is the statement that "proposal is compatible with shoreline program," Exhibit 1, p.14, so the current use of the land affected is not addressed.

11. Checklist item B.8.j asks how many people would be displaced by the project. The response was: "no displacement is expected." Both Ms. Crossman and Mr. Skelton are correct that no displacement would technically occur because no existing housing would be removed. However, with the adoption of the Neighborhood Commercial Areas Code there was to be an increase in housing opportunities. The proposed amendment would, therefore, decrease opportunities creating a type of "displacement", or loss of opportunity.

12. Checklist item B.8.k asks for any proposed measures to avoid or reduce displacement impacts. The response was:

Housing is permitted outright as mixed use. Also, single purpose housing is allowed along the edges when character of the area is more compatible for single single (sic) purpose housing development.

Exhibit 1, p.8. As pointed out by appellant, this response does not describe a mitigation measure but explains that not all housing will be prohibited and it assumes that such housing will be built despite mixed use requirements and more restrictive bulk, setback and open space conditions.

13. Checklist item B.8.l asks for a listing of any proposed measures to assure that the proposal is compatible with existing and project(ed) land uses and plans. The response was:

By reducing bulk by establishing width and depth of structure for single purpose housing. By limiting the amount of land where single purpose housing may be allowed thereby ensuring commercial activity will be maintained or established in the future.

Exhibit 1, p.8. This response does not describe measures to improve the compatibility between the amendments and existing uses. In fact, the City's witnesses indicated there is no incompatibility to be mitigated. The existing policies and code showed intent to address compatibility and this is an amendment to those policies and that code. The measures described are the rationale for the amendments and how they would improve the existing code rather than measures to make the amendments more compatible. Since the proposed action is to amend the policies as well as the code, compatibility between future land uses and plans is assured.

14. Mr. Staeger was unable to tell from the checklist responses whether the proposal would be in compliance with the Neighborhood Commercial Areas Land Use Policies for which an environmental impact statement accompanying the policies listed six objectives. A moderate increase in development potential, additional capacity and wider range of housing types were all cited as desired outcomes of the Neighborhood Commercial Area Policies in that EIS. Mr. Staeger noted that the checklist states both that the proposed action will be consistent with the land use plan but also acknowledges a loss of capacity. Mr. Staeger found this inconsistency within the checklist to be unexplained. Again, however, changes to the policies assure compatibility.

15. The responses to housing questions in the checklist, items B.9.a and B.9.b do not attempt to quantify the housing capacity impact. B.9.a asks how many units would be provided and for an indication of whether the housing would be high, middle, or low income. The response was:

Some housing capacity will be diminished due to the limitations imposed on single purpose housing which is presently allowed to develop to generous commercial standards.

Item B.9.b asks how many units would be eliminated and whether

they would be high, middle or low income. The response was:

Some reduction may occur because the proposal reduces the lot coverage and locations for single purpose housing development.

Exhibit 1, p.9. The use of the term "some" gives no understanding even in broad terms as to what the impact on housing opportunities would be and gives no indication as to what income levels would be most affected, if any. Mr. Staeger testified that "some" reduction does not give enough information to make a judgment as to whether the impact would be significant. He believes the impact may be greater on low and middle income housing than on high income.

16. Pat Williams, a low income housing consultant, sees the greatest impact on low income housing because when the property available for single purpose residential is reduced and the density permitted is reduced by bulk and open space changes, the price of land and, hence, that of housing, will be driven up. If any federal regulations are involved there is a percentage limitation on land costs. HUD subsidies do not allow for mixed use so the only possible development for special needs population is single purpose. Given the prohibition on low income subsidized housing in some areas of Seattle and dispersion criteria for some special needs populations, she sees the additional restriction as potentially eliminating new low income housing from the city of Seattle.

17. Commercial areas are ideal for elderly and other special needs housing since the housing would be proximate to arterials for transportation, shopping and other services and the topography of commercial areas is generally flat.

18. Ms. Crossman testified that the needs of special populations and for low income housing cannot be addressed in the environmental review because, in her opinion, there is no relationship between zoning and low income housing. It is her understanding that housing for low income elderly needs to be within one half to one mile of services. There are lowrise zones near many commercial areas meeting that requirement. Single purpose residential development would still be permitted along edges adjacent to residential zoned areas.

19. The response to checklist item B.9.c, "proposed measures to reduce or control housing impacts, if any" was:

Proposal will reduce the impacts of single purpose housing on the edges of commercial zones where they abut residential zones by imposing bulk limitations which are consistent with the scale of development permitted in abutting residential zones. Single purpose housing will be prohibited in NC1 zones which are often surrounded by single-family zones. Single purpose housing will also be prohibited in zones with height limits of 65 ft. or more and in the core of commercial areas where competition with commercial uses is possible.

Exhibit 1, p.9. This response does not propose any measures to mitigate impacts of the proposed amendments on housing but treats the amendment as a mitigation measure to the earlier adopted Neighborhood Commercial Area Code.

20. In Mr. Staeger's opinion, the potential change in housing opportunities is not clear from the checklist nor is it analyzed sufficiently in the checklist to allow an understanding of what the impact would be.

21. To demonstrate the potential loss in density from the amendments, Thomas Harader an architect with extensive experience in designing housing in the city of Seattle, presented examples of possible development on an NC3 40 ft.-zoned lot chosen for its

flexibility of development. He calculated that under the existing zoning he could place 40 dwelling units on the site for a maximum potential density of 128.6 dwelling units per acre. This is substantially greater than the density projected by the Land Use and Transportation Project in the EIS for the policies where the maximum density was projected to be 89.9 dwelling units per acre. With the amendments and a single purpose residential building on the site adjacent to L-3 zoning, the potential density would be 27 dwelling units or 86.6 dwelling units per acre for a 33 percent reduction in density. Mr. Harader pointed out that greater loss of density would be experienced if the lot was adjacent an L-2 or L-1 zone instead of the L-3 zone.

22. Mr. Harader developed examples of mixed use development under the existing code and proposed amendments on an NC3 40 ft. lot. Under the existing zoning the maximum density he was able to achieve was 36 dwelling units along with the required commercial use for a ratio of 116 dwelling units per acre. Under the proposed amendments he found he could include 30 dwelling units for a ratio of 96 dwelling units per acre. The loss in density for this mixed use project between the existing and proposed regulation would be 17 percent. If the site could have been developed in single purpose residential and now must have mixed development the loss of density would be about 25 percent.

23. Mr. Harader projects that the recent change to parking requirements also will lower densities by 10 to 15 percent.

24. Ms. Crossman presented in Exhibit 10 a comparison of development potential for selected sites in commercial zones. The loss in number of units in her examples range from around 3 to 23 percent. She had chosen large projects that have been proposed but not yet approved as worst case since the larger projects are affected more severely by the changes.

25. Mr. Harader used the south slope of Queen Anne as a sample area to demonstrate the loss of potential for single purpose residential buildings. He prepared a map, Exhibit 4, which shows those areas where single purpose residential buildings would be permitted and those where they would not within the NC and C zones. He calculated that roughly 84 percent of the land area where single purpose residential development is currently allowed would no longer be available. Assuming that all properties in this area, including the Metro bus site, are eligible for redevelopment, over 360,000 dwelling units could be placed on the land using single purpose development under the existing code. Even doubling 32 percent his estimate of the amount of commercially-zoned land on which single purpose residential development could be placed, he calculates a new maximum density after the amendments for single purpose residential buildings and mixed use buildings of 237,000 for a loss of some 34 percent in capacity.

26. The EIS for the multi-family policies and code projected a holding capacity for the residential zones of approximately 560,000 units in the City.

27. The City had some 230,000 dwelling units in all areas as of 1980. Seventeen thousand of the dwelling units, representing 7 percent of the housing stock, are located in neighborhood commercial zones. Seattle's annual production goal for housing units is 2,000. Approximately 20 percent or 400 units per year are being constructed in neighborhood commercial zones.

28. Exhibit No. 7, a map of the entire City, shows that the new area where single purpose residential development would not be permitted is substantial. There is substantial area remaining where it could be developed, however.

29. While appellant's witness McDermott testified that some 10,000 new jobs per year in Seattle are being projected to fill the office and commercial space being constructed, the population of the City, under 500,000, is not expected to grow substantially.

30. A small fraction of the holding capacity of the neighborhood commercial areas would be required to meet the need for housing growth.

31. Permit applications involving housing in commercial areas for the first twenty months under the present neighborhood commercial code regulations show a division of 56 percent for single purpose residential and 44 percent mixed use.

32. Ms. Crossman testified that not more than 10 percent of the 400 dwelling units developed in NC zones per year would be lost due to the amendments. No specific foundation was shown for that opinion.

33. Jim Potter, a developer who has developed over 1,000 dwelling units in the City since 1977, demonstrated the effect of the proposed open space amendments on two projects which he has proposed. He shows in each case an increase in open space required greater than a 100 percent. For one project, the amendments would cause a 25 percent loss of units unless he chose to reduce the size of the units. He described this increase in open space requirement as "radical" and indicated that it would force him to reassess whether to build multifamily housing in commercial areas at all when considering other changes that have occurred such as the increase in parking requirement. He disputes the City's description of the change as "modest" since it may make the difference between developing or not developing.

34. Under checklist item 2 on page 13 the response refers to a "modest increase" in landscaped areas due to the increased open space requirement. This does not give any means of predicting the actual effect but the impact being discussed in this question is on plants, animals, fish or marine life so it is unlikely to be significant in the urban setting.

35. Paul Krug, a Seattle developer, and Tom McDermott, a mortgage banker and developer, agree that mixed use, i.e., combined commercial and residential, buildings are unlikely to be built. Mr. Krug believes that the greater open space requirement than in the residential zones, the cost and awkwardness of parking, security problems, absence of demand for additional commercial space (except in certain areas), are deterrents to creation of mixed use buildings. Mr. McDermott testified that small projects, with 30 units or fewer, are just not financeable because there is not sufficient density in these areas to support the commercial use.

36. Mr. Krug would expect land costs to go up in areas eligible for single purpose residential buildings. Because the cost could not be offset by increased density there will be less development.

37. Steve Bolliger, a Seattle developer, expects that with the additional open space required it will be too costly to develop residential in commercial zones where people will not pay higher prices to live. That will result in greater development pressure on the lowrise zones with greater impacts in those zones.

38. Steve Burgor testified that the "DNA" response was incorrect to checklist item B.14.a which directs that public streets serving the site be identified. Since there is the potential that development would be shifted from the commercial areas to others, the systems could be affected. Also, the response to checklist item B.14.d which asks whether any new streets or improvements to streets would be required, refers to improvements on a project-by-project basis rather than any shift in development to other areas. The response to checklist item B.14.g regarding proposed measures to reduce or control transportation impacts indicates that a project-by-project review could lead to mitigation measures if necessary.

39. Mr. Staeger would find information as to streets likely to be affected useful as a way to get an overview of where pro-

blems exist that might be exacerbated if traffic is increased in other areas due to a shift in development.

40. Mr. Staeger does not find the answer to checklist item B.14.c to be clear. The question is about parking spaces. The answer is "multifamily parking requirements would apply to all multifamily structures proposed." Exhibit 1, p.10. The broader issue is whether shifting single purpose residential out of core areas will increase the parking demand in adjacent single-family and multifamily areas rather than commercial areas and what the effect on parking demand from the change in ratio of commercial to residential uses would be.

41. Mr. Staeger sees the potential for change in impacts on streets since the EIS for the existing policies and code projected fewer vehicle trips due to the proximity of housing to jobs so if nearby residential development is restricted, greater volume should be expected. If the trips are from outside the City then there needs to be an understanding of where they will go in order to assess the problem areas.

42. Checklist item B.15.a asks if the proposal will result in increased need for public services and asks for a description. The response was:

Since the proposal would limit the amount of dwelling units which could be established in commercial areas from what is not (sic) possible, the overall effect on public services is diminished. Any individual project which is subject to environmental review would be assessed for its impacts on public services.

Exhibit 1, p.11. Also, Item 6 on page 14 addresses demands on transportation or public services and utilities by saying, "proposal could result in a modest reduction of development potential thereby reducing demands on transportation or public services." However, if the demand for housing remains and is met, the need for public services would remain but would occur in a different area. Again, transportation could be markedly increased, depending on the number of units involved, if development occurs outside the city because of the reduction of housing in the city.

43. Ms. Crossman opined that there would be no major shift of housing development but that more mixed use would be developed and that housing will continue to be developed at the level that is contemplated in the city. Therefore, there would be no increase in demand on the systems. On the contrary, she testified, there would have to be additional commuting to outlying areas if the neighborhood commercial areas were fully utilized for housing since one third of the jobs in the City are located in these areas.

44. Mr. Skelton believes the possibility of increase in energy consumption due to transportation is remote.

Conclusions

1. A DNS is appropriate if the "responsible official determines there will be no probable significant adverse environmental impacts from a proposal." Section 25.05.340.A.

2. "Probable", as used in SEPA, means "likely or reasonably likely to occur" and is "used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative." Section 25.05.782. "Significant", for the purpose of SEPA, means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." Section 25.05.794.A.

3. Appellant attacks the determination on two fronts: it alleges that the checklist is inadequate as a full disclosure

document and that the decision ignores impacts from potential loss of or shift in housing development which will cause additional impacts and the combination of more marginal impacts.

4. The examiner agrees with appellant's expert on environmental review that the checklist is unusually conclusory and abbreviated and would expect in normal circumstances that DCLU would require additional information of an applicant before making a threshold determination. The review of the correctness of the determination in this case is affected, however, by the fact that the lead agency or responsible official is the the proponent of the proposed action. While the responsible official normally must rely on information provided in the checklist and supporting documents to conduct its review, Section 25.05.330, unless it requests the applicant to submit more information or makes its own study, Section 25.05.335, OLP has extensive resources on land use and housing from staff members' preparation of the EIS's for the legislation now proposed be amended to draw upon in addition to the answers in the checklist.

5. Appellant complains that the other resources and documents relied on by OLP were not referenced in the checklist. The assumption underlying this complaint is that the checklist is to be a full public disclosure document and that supporting documentation must be referenced to provide other readers with an understanding of the conclusions reached in the DNS. Section 25.05.-330B allows the responsible official to determine whether impacts have been analyzed in another environmental document which "can" be incorporated by reference. Here, the responsible official relied in part on information gathered for the earlier EIS's but chose not to reference those documents. While comments are accepted after the filing of the DNS and checklist from other agencies and the public, the checklist is a tool to assist the responsible official in reaching a proper determination. See Section 25.05.330. It is the EIS that is intended to provide full disclosure of environmental impacts to the public as well as decisionmakers. See Section 25.05.400, Barrie v. Kitsap County, 92 Wn.2d 843. 613 P.2d 1148 (1980). Therefore, abbreviated answers lack of description of areas affected, etc., lack of references and other documentation, are not errors unless it is shown that the responsible official, who also prepared the checklist, did not have the full and correct information. This was not shown.

6. Appellant's second basis for appeal was focused on the failure to recognize the impacts on land use, housing, transportation, natural resources, energy and public services. Since the determination made is to be accorded substantial weight by the Hearing Examiner on appeal, Section 25.05.680B.3, the issue is whether appellant's evidence shows the DNS to be clearly erroneous. Brown v. Tacoma, 30 Wn.App. 762, 637 P.2d 1005 (1981).

7. The amendments prohibiting single purpose residential development in core areas, 65 ft. height limit areas and NCL zones, reducing the bulk of single purpose residential buildings along the edges of the zones, and increasing open space requirements for buildings with residential uses were shown to have the potential for significant impact on housing. Appellant must show, however, that the potential or theoretical impact is also probable.

8. Appellant invites a conclusion that because it has shown that a significant portion of commercially-zoned land will be removed from that available for single purpose residential development, it has shown clear error in the Director's decision that there will be no significant impact. There are two flaws in that reasoning. One is that OLP showed that there is no intention that those areas be fully developed for housing as there is no need for that amount of housing so the loss of unneeded capacity would have no effect. In support of its decision, OLP has shown that the City's goal is to add some 400 units annually in commercial areas and that almost half of the permits to date for development with housing components are for mixed use. Appellant

has made no showing even if mixed use development does not occur to the extent expected by OLP the housing needed could not be accommodated in the land still available for single purpose development either in the commercial zones or in other zones. If the amount of housing needed can still be accommodated, no significant impact has been shown.

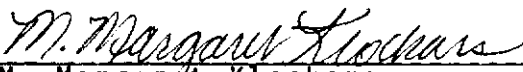
9. The other flaw is that even though a significant portion of the land which could potentially be developed into single purpose residential buildings would have that potential removed, there are numerous variables which would affect the probability of that housing ever being developed and, therefore, the amount of potential actually lost. Not shown was how much of the land affected is now vacant; the amount of the presently occupied land which is likely to be redeveloped; the amount which would be developed or redeveloped for commercial uses instead of residential uses with or without the amendment; the amount of housing that would have been developed in mixed use without the amendment; the amount of housing which would be included in mixed use development resulting from the amendment; and how much that housing of which is not built in neighborhood commercial areas can and will be built in residential zones. Because of the very limited amount of housing that is expected to be developed annually in neighborhood commercial areas and because the appellant made no showing of how the variables listed above would affect the amount of housing that would have been built, appellant has failed to show a probable significant impact on housing.

10. Appellant did show, in individual cases, what would be considered significant loss of density for that project. OLP, on the other hand, offered examples where the density would not necessarily be decreased. Further, appellant showed range of loss from levels that would not be considered significant for the individual project to significant levels. These individual examples cannot support a conclusion that, overall, the potential housing loss to the city would be significant.

Decision

The determination of OLP is affirmed.

Entered this 4th day of January, 1988.


M. Margaret Klockars
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW

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 must be by application for writ of review filed in King County Superior Court within fifteen days of the date of this 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 the decision on the underlying governmental action 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, 408 Seattle Municipal Building, Seattle, Washington 98104, within fifteen days of the date of this decision. Seattle Municipal Code 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 for preparing a verbatim written transcript of the hearing but will

be reimbursed if successful in court. Instructions for preparation of the transcript are available in the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104. In the alternative, RCW 43.21C.075(6)(b) provides that a tape may be used for the 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 designate only those portions of the testimony necessary 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 taped transcript relating to issues on review.