

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

In the Matter of the Application of

PRESCOTT, INC.

FILE NO. 8800564 & 8805690  
C.F. NO. C.F. 297454

for a Council conditional use  
pursuant to the provisions of  
Title 23, Seattle Municipal Code  
as amended

Introduction

For purposes of this recommendation, all section numbers refer to the Seattle Municipal Code, Title 23, as amended, unless otherwise indicated.

Applicant seeks a master use permit to demolish five (5) buildings and establish use for future construction of a thirty-three (33) story office/retail tower and a three (3) story performing arts theater with parking for 729 vehicles.

The Director's report, submitted by the Department of Construction and Land Use (DCLU), recommended that the application be granted with conditions.

This matter was heard before the Hearing Examiner on November 16, 1989.

After due consideration of the evidence presented by the applicant, the information provided by the Director's report, all evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the recommendation of the Hearing Examiner on this application.

Findings of Fact

1. The proposal site is located at 1401 Third Avenue in the retail core of the Seattle central business district. The area of which the site is a part is zoned as Downtown Retail Core (DRC). It consists of the full city block bounded by Second and Third Avenues and Union and Pike Streets. Total surface site area is approximately 83,746 square feet.

2. The proposal site is located at the southwestern corner of the DRC zone, near the middle of the traditional retail core. Immediately west is the Downtown Mixed Commercial (DMC) District. To the south is the large Downtown Office Core-1 (DOC-1) district.

3. This block is bisected from north to south by a sixteen (16) ft. wide improved alley. Vacation of the alley has been applied for and is pending. Site topography generally slopes downhill at an average grade of four to five percent (4-5 %) from east to west.

4. Currently, the site is developed with six structures. The Kress, KFC, and the landmark Mann buildings, each a two to three (2-3) story commercial/office building and the forty (40) unit Glen Hotel are on the Third Avenue side of the site area. The two (2) story commercial Fenton Building, a nine (9) story, 509 space parking garage and a surface parking lot occupy the Second Avenue side of this city block.

5. There are several new developments in the immediate vicinity either planned or under construction:

a. The Marathon Crown Center office towers are sited south of the project block. That site is currently being used as a staging area and storage yard for the Metro bus tunnel project. This Metro related use is scheduled to continue through 1990 (MUP No. 8901260);

b. The Metro bus tunnel and transit improvements project is presently under construction along and beneath Third Avenue. A major Metro bus station is to be located one-half (1/2) block south of the project site boundary of Third and University streets. A second station will be located one (1) block north and two (2) blocks east of the project site boundary of Fifth and Pine Streets;

c. One (1) block south of the proposal address at Second Avenue and University Street is the future site of the Seattle Art Museum (SAM), currently under construction (MUP No. 8600579);

d. To the west of the proposal site, across Second Avenue, will be sited the Newmark, a twenty (20) story residential/retail/cinema/restaurant redevelopment of the defunct J.C. Penney commercial site (MUP No. 8707197);

e. The Phase II expansion of Century Square proposes a hotel/department store project one block to the north of the subject proposal site (MUP No. 8806656);

f. Three blocks south of the subject site on Second Avenue is the site of a proposed twenty-two (22) story office/retail building plus the redevelopment of the Washington Mutual Savings Bank (MUP No. 8805940). Several other sites are also proposed or under construction in this general vicinity. Included are the Pacific First Center and the PC-1 garage in the Pike Place Market (See DEIS Figure 17).

6. The subject proposal has been revised from the time of the original application, through the DEIS, to the FEIS. The original proposal was modified by applicant in response to specific issues raised in the DEIS and to letters commenting on the DEIS. Those incorporated changes would increase garage parking capacity to a total of 729 spaces. The parking capacity under the "No Action" alternative is presently 509 spaces; under the "No Alley Vacation" alternative is 605 spaces; under the "No Theater Bonus" alternative (including an alley vacation) is 685 spaces; and under the 1984 "Title 24" alternative, in effect at the time of the filing of the application, is 532 spaces. The changes in impact from these various alternatives also effect uses, height, floor area and the number of proposed towers. Those additional impacts will be discussed as germane to the resolution of the issues presented.

7. The existing nine (9) story parking garage will be rehabilitated and the exterior clad with panels of concrete or a similar material. The garage will be restriped to increase capacity from 509 to 524 spaces. Access to the garage will consist of the existing entrance and exit lanes on Second Avenue and Union Street.

8. 205 parking spaces will be constructed under the office tower in order to achieve the project total of 729 spaces. Access to the new parking will also be through the existing garage.

9. In order to aid mitigation of traffic congestion along University Street during the 4:00 to 6:00 p.m. peak hour, the revised proposal incorporates the additional modification of a vehicle exit from the parking garage through the alley onto Pike Street.

10. Applicant proposes truck loading berths along the existing alley. The alley will also be used as a drop-off area for theater patrons who arrive by bus. The requested alley vacation is to allow the alley to be placed under project sponsor control for security purposes. Vacation of the alley requires City Council approval.

11. The revised proposal as envisioned under the FEIS will construct a full block development which retains the facades of the landmark Mann Building on the southeast corner of the block and the present nine (9) story parking garage (with small retail space) on the southwest corner of the block. The remaining five (5) onsite structures (hotel, office, retail, restaurant) are to be demolished. Future construction of a 33 story office tower, with a two (2) story base containing both office and retail space on the eastern part of the block, and a three (3) story performing arts theater on the northwest corner of the site will replace the demolished structures.

12. As modified in response to DEIS issues and comment letters to that DEIS, the original proposal will now retain or replicate portions of the terra cotta north and east facades of the Kress Building. Its second floor retail space will be removed. The Kress Building is sited on the northwest corner of Third Avenue and Pike Street. The replacement structure to be developed is to be two (2) stories in height.

13. The exterior of all new buildings will consist of glass and stone, as well as terra cotta or a similar type material yet to be determined. According to DCLU the nature of the Third Avenue Building materials is important because of the exterior character of the present development. Thus, cladding of the new construction with terra cotta or similar type materials is, in DCLU's opinion, essential to harmonizing the proposed development with that which already exists. This concern was not considered critical with respect to the building materials used to clad the project development along Second Avenue, with the exception of the existing garage, as the existing structures are more modern and reflect a greater diversity of building materials.

14. The proposed three (3) story, 720 seat, performing arts theater would actually have two independent and fully operational stages (proscenium and thrust stages) with 360 seats each. It is intended to house A Contemporary Theater (ACT) and would occupy 77,720 sq. ft. A red brick exterior, reminiscent of its present facility, is planned for the new theater. The main theater entrance will be on Second Avenue. Applicant has committed to a ten (10) year lease with ACT and occupancy is currently scheduled for spring 1991. Annual rent is in the amount of one hundred dollars (\$100). ACT has the option under the lease agreement to four (4) ten (10) year extensions. Applicant Exhibit 3. This complies with DCLU's application of the Public Benefit Rule (PBR) in order to impose as an additional condition that the applicant commit to securing a ten (10) year lease from a prospective theater operator or resident theater group with acceptable credentials, within two (2) years of the date that the first Certificate of Occupancy is issued for the bonused project, or when the final certificate is issued, whichever is first.

Pursuant to the further DCLU condition imposed pursuant to the PBR, the lease reflects the frequency of performances to be presented at the proposed theater.

15. Subsequent negotiations have led to further modifications in the lease agreement. Susan Moritz, Managing Director of ACT, presented evidence that applicant will provide free parking for theater subscribers and will reduce parking fees for non-subscribing theater goers. In addition, applicant is contributing five million dollars (\$5,000,000) towards construction of the proposed theater and seven hundred thousand dollars (\$700,000) toward architectural fees. Total construction costs and architectural fees are given as ten million seven hundred thousand dollars (\$10.7 million). The ACT must make a matching contribution of five million dollars (\$5,000,000) with 85% of match pledges on hand by spring of 1990. To date, one million five hundred thousand dollars (\$1.5 million) in matching pledges have been obtained.

16. ACT is seeking to extend the lease to fifty (50) years. It also is attempting to negotiate outright ownership of the theater and the parcel on which it is to be constructed within ten to twelve (10-12) years of the life of the lease. The land parcel is valued, according to Ms. Moritz, at approximately six million dollars (\$6,000,000). Applicant's response has thus far been favorable.

17. The proposed performing arts theater is an amenity under the Land Use Code and is thus subject to Council conditional use approval. Such approval would permit a 400 ft. height for the proposed office building, plus an additional 514,648 sq. ft. of floor area over and above the 418,730 sq. ft. allowed outright by the DRC zone.

18. The 33 story office/retail tower structure has been substantially redesigned since the initial application in order to modify its profile, primarily to mitigate its shadow impacts on Westlake Park. It will be set back from Union and Pike Streets by fifty (50) ft. from floors three (3) through five (5) and sixty-five ft. from floors six (6) through thirty-three (33). Above the eighth floor, the tower will be set back approximately eighty (80) ft. from Pike Street. Floors twenty-nine (29) through thirty-three (33) will be terraced even farther back from Pike Street. About forty percent (40%) of the tower facade along Third Avenue would be set back three (3) ft. from the property line with the remaining sixty percent (60%) set back eighteen (18) ft. Height would be 400 ft. plus a fifteen (15) ft. mechanical penthouse.

19. Five (5) separate and distinct structures are simulated by the project design so that the project appears to be a group of separate buildings rather than one single, large development. The stated purpose of this design approach is retention of the present scale of relationship of building size to pedestrians. Evidence presented establishes that design will vary from building to building in order to further convey this image.

20. Total net chargeable gross square feet (gsf), minus a 3.5% mechanical exemption is calculated by DCLU at 933,378. Total floor area of the proposed project, as measured by DCLU for the various applicable purposes is as follows:

Total existing gsf to remain:	201,526
Total new construction gsf:	983,124
Total existing and proposed gsf:	1,184,650

Total new construction gsf minus parking:	776,567
a. gsf of office uses	27,237
b. gsf of retail and restaurant	77,720
c. gsf of theater	5,481
d. gsf existing (to remain) minus parking	887,005

Total base floor area (site size x base FAR 5):	418,730
Total base floor area (theater bonus)	514,648

Total net chargeable gsf (new construction plus existing):	933,378
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21. The main pedestrian access for the proposed project will be at mid-block along Third Avenue. Secondary entrances to retail spaces are proposed from all abutting streets. There will be no direct access to the Metro bus tunnel from the proposed project.

22. Street level uses are to be enhanced by use of transparent storefront facades, signage, pavings, canopies and landscaping. In its presentation DCLU noted that overhead weather protection was not clearly provided in the design plans submitted by applicant. As such, DCLU advised that the project would be further conditioned to require this protection. Applicant, during its presentation, stated that overhead weather protection will be provided sidewalk pedestrians in the form of glass and metal canopies.

23. Three agreements exist which affect the proposal site and the proposed development:

a. The first agreement is the Controls and Incentives for Recommendation to City Council made between the Seattle Landmarks Preservation Board and applicant in 1985. It describes specific restrictions regarding changes or alterations of the Mann Building and economic incentives granted applicant as consideration for the proposed controls. Affected building features are the south and east facades and a portion of the roof. This agreement awaits City Council approval as part of Council consideration of the proposed development.

b. The second agreement is with respect to the Glen Hotel and addresses voluntary mitigation for its demolition. According to the DCD Housing Division, the structure houses 41 low income, single-room-occupancy (SRO) units. All tenants will be displaced when it is demolished. In 1985, applicant and the Downtown Neighborhood Alliance (DNA) entered into an agreement committing applicant to sponsorship of construction of eight (8) low-income units.

c. The third agreement made between applicant and DCLU on February 8, 1988, supersedes the preceding agreement. It stipulates a number of mitigating options applicant may choose should the Glen Hotel be demolished. The options are:

- 1) construct ten (10) units of low-income housing;
- 2) construct forty (40) units of housing which are not low-income; or
- 3) make a contribution to the City for housing replacement as defined by Seattle Municipal Code Section 22.210.30.

Applicant has agreed to sponsor the construction or renovation of ten (10) low-income housing units as the chosen option for mitigating the demolition and displacement impacts. This satisfies the conditions of the DCLU Agreement and exceeds those of the previous DNA Agreement.

24. With regard to the action proposed in this application, an environmental impact statement (EIS) has been prepared pursuant to the State Environmental Policy Act of 1971 (SEPA) and Ordinance 105735, as amended, Chapter 25.05, Seattle Municipal Code, and is part of the record.

25. The DEIS and FEIS identified the range of proposed activities and alternatives expected as a consequence of the subject development. The environmental analysis of those proposed actions determined that a number of probable, significant, adverse impacts beyond those related to construction will occur. DCLU determined the following elements of the environment to be among those so impacted: air quality; aesthetics, historic, and cultural resources; energy, land use; public services/utilities transportation; and shadows.

26. Temporary, demolition and construction related impacts were identified as temporary soil erosion; decreased air quality from increased dust and suspended air particulates (such as asbestos); increased noise due to construction activities and machinery; increased traffic and parking demand because of construction personnel; construction vehicles tracking mud onto adjacent streets; and vehicle/pedestrian congestion adjacent to the site. While not significant because of this temporal nature these impacts have, nevertheless, been determined adverse, thereby warranting mitigation.

a. DCLU has determined and the Hearing Examiner finds that Grading and Drainage Control and Street Use Ordinances will provide adequate mitigation for storm water runoff, temporary soil erosion, site excavation, tracking of mud onto public streets and obstruction of right-of-way.

b. Construction noise will not be sufficiently abated by the Noise Ordinance as it does not limit hours of construction. Therefore, in order to minimize this impact on nearby residences and other noise sensitive land uses, construction hours will be limited to non-holiday weekdays between the hours of 7:30 a.m. and 6:00 p.m.

c. If asbestos is found to be on the site following an inspection prior to demolition by the Puget Sound Air Pollution Control Agency (PSAPCA) it is to be removed pursuant to PSAPCA, L & I and EPA regulations. In order to ensure PSAPCA is notified of the proposed demolition DCLU has imposed the added conditions requiring notification to PSAPCA of the applicant's intent to demolish the existing structures. Applicant does not contest this condition.

27. According to the FEIS the air quality impacts of the revised proposal would be similar to, but slightly less than, those of the "No Theater Bonus" alternatives. These impacts would be allowed by incorporating the garage exit onto Pike Street during the p.m. peak hour, thus more widely distributing project generated traffic. By so doing, Carbon Monoxide (CO) emission would resemble those of the "No Theater Bonus" alternative. The garage exit will cause increased traffic congestion at the intersections of Third Avenue/Pike Street and Fourth Avenue/Pike Street. However, the proposed action and the "No Theater Bonus" alternative both will only raise CO levels by 1 part per million (ppm) over the projected 1990 level. This latter CO level is less than that existing in 1988 due to the anticipated reduction in CO emissions per vehicle as older, more polluting vehicles are phased out. Other alternatives have little or no impact. The DEIS, FEIS and the Director's report all concur that CO emissions for the revised project are less than for the original proposal. Based on the data provided, the Hearing Examiner agrees that the revised project should result in only minor increases in nearby CO levels and further that none of them should exceed EPA 8-hour attainment standards.

28. The aesthetic, historic, and cultural resources impacts will be addressed by incorporating the south and east Mann Building facades into the proposal's two (2) story base structure. In addition, street setbacks will be in excess of the distances recommended by the Landmarks Preservation Board. The existing parking garage exterior will be re clad with concrete panels and glazing, accented with ceramic tiles, grill work and scoring. The proposed project is designed to appear from street level as several separate buildings. Combined with the lower setbacks, this will aid in maintaining a general sense of human scale when the project is viewed from a street perspective. Conditions relating to Council Conditional Use requirements include terra cotta detailing on Third Avenue facades, overhead weather protection along the projects perimeter, and a lighted theater marquee. Appellant has no objection to any of these conditions.

29. DCLU states, and applicant does not dispute, that the project's demand for electricity together with other projects currently under construction, would temporarily exceed the site area's capacity. The degree of the excess demand is not known at this time by either DCLU or City Light. A six year improvement plan begun in 1989, is designed to increase capacity in this area. In addition, City Light believes the BPA sponsored Smart Design Program can mitigate the impact by enhancing the energy efficiency of the project design. City Light can either perform or pay the developer to perform the requisite computer efficiency measure analysis.

30. Land use impacts with respect to housing preservation result from the loss of the Glen Hotel. Applicant's agreement to sponsor construction or renovation of ten (10) low-income housing units mitigates this impact.

31. Applicant takes the position that some of the 415,000 square ft. of bonused floor area provided by the performing arts theater could be used on another lot through the combined lot option provided by Seattle Municipal Code Section 23.40.096.B. DCLU does not concur with this assertion and in its FEIS stated it will issue a formal code interpretation regarding this provision of Title 23.

32. Public utilities and services would not, for the most part, be impacted. Total water capacity of existing lines in adjacent streets is many times that required by the proposal. Sanitary sewer lines on adjacent streets have sufficient capacity

to meet project demands. Stormwater facilities as mandated by the grading and drainage ordinance (Seattle Municipal Code 22.800.010 to .040) will be provided to reduce any increase in stormwater runoff. Gas consumption can be accomplished by the existing capacity for the area. The substantial increase in the use of telephones on the site can be accommodated without disrupting area service to others. Excess electricity demands will result and have been addressed above.

33. Demand for Fire and Police department protection will be met. The revised proposal and all alternatives will be fully sprinklered and protected by fire detector devices. Prior to issuance of a building permit, the fire department will review the proposal's compliance rules for compliance with applicable fire codes. An annual building inspection lasting at least sixteen (16) hours will be necessary. Inspection will also take place during the construction period. The fire department will be notified by applicant in advance of any temporary sheet blockages related to construction.

34. A complete security staff will be provided for the revised project proposal and all alternatives except that of "No Action." The alley would be vacated, secured, and patrolled by project security staff for the revised proposal and the "No Theater Bonus" alternative. The result would be an increase in the safety level of the alley under these two alternatives. The "No Alley Vacation" and "Title 24" alternatives include the proposed theater, but the alley could not be secured as it would not be vacated.

35. During construction, police officers may be required to direct traffic near the site. These would be off-duty officers, hired by applicant. Police protection, headquartered in the Public Safety Building, provides patrol officers, foot patrol officers, and bike patrol officers in the project vicinity.

36. Several parks and recreation facilities are within walking distance of the development site. Included are Westlake Park, Victor Steinbrueck Park, McGraw Square, and Pike Place Market. The estimated 2,780 employees and 2,000 daily visitors would create some demand for passive recreation, primarily fair-weather sitting or outdoors eating at breaks and realties. The proposal's retail shops and restaurants will mitigate this impact by providing additional recreation for employees and visitors.

37. The FEIS notes that changes incorporated in the revised project, a revision of background traffic, a refinement of cumulative traffic impacts, and analysis of impacts on intersections at the I-5 ramp terminals as requested by the Washington State Department of Transportation (WSDOT) affect original estimates of cumulative transportation impacts. In addition, traffic volumes from DCLU-approved projects, either recently constructed or under construction, are included in the 1971 baseline volumes against which the revised project's impact is measured. Those projects are set forth at page 12 of the Director's report. In sum, the project's impact aggregated with those of four (4) additional projects (Union Station redevelopment, Intrawest Block Two (Marathon Site), Third and Pine (Century Square Phase II), and Second and Seneca) would result in more generalized intersection delay throughout the project area, ranging from 0.1 to 35 seconds. Applicant will be required pursuant to the SEPA Traffic and Transportation Policy, to enter into an agreement with SED to fund on a proportional basis any costs associated with signal timing changes or other signal improvements on any of the intersections projected to operate at LOS (level of service) F, as described in the FEIS



curulative 1991 scenario. This requirement will be for a period of five (5) years following initial occupancy of the building. The intersections and applicant's proportionate, funding costs are as follows: Second/University (31%), Third/University (31%), Fourth/Union (27%), Fourth/University (29%), Sixth/Union (31%), and Sixty/University (33%).

38. No spillover parking demand is anticipated from the project as the peak weekday parking demand of 650 spaces will not exceed the supply of 729 spaces. An unknown number of current parking space users who work outside of the project block will, however, be displaced by the proposed development. This result will be caused by the long term spaces being dedicated largely to the subject project. In order to address this impact, as well as discourage excessive single-occupant-vehicle (SOV) use of the proposed development's parking supply, a transportation management plan (TMP) will be needed. DCLU is requiring that it include carpool and transit incentives, and carpool parking set-asides. DCLU, Metro and applicant are to execute a memorandum agreement to fulfill this requirement.

39. The DEIS and FEIS analyze in detail the revised project's redesigned tower profile and likely shadow impacts on nearby Westlake Park and Plaza, as well as Pike Place Market Park (Victor Steinbrueck Park). These parks are identified in Seattle Municipal Code Section 23.49.096B.4.a(2) as parks to be protected under the performing arts theater height bonus criteria. They are also identified as subject to protection from shadow impacts under the City's SEPA policy, Seattle Municipal Code Section 25.05.675.Q. Figures 18-21 of the FEIS show that shadows cast by the revised proposal are not as extensive as those from the original proposal. Figures 22 through 36 show shadow patterns of the proposed lower profile redesign at the times of greatest impact.

40. DCLU considers and the Hearing Examiner concurs, that Westlake Park is probably one of the City's most heavily used public areas due to its location in the heart of the DRC. It is surrounded by the region's retail and office hub, is near major tourist attractions, and is located over the METRO bus tunnel and a major tunnel station. Heaviest use is likely to occur during normal business hours, and would coincide with the warmer weather months of the year (roughly April 15 to October 10).

41. Considerable evidence was presented by DCLU and applicant regarding the shadow cast by the redesigned tower during the period of March 21 to September 21 (spring and summer). This is within the time of the year when Westlake Park is expected to have its greatest pedestrian use. The FEIS illustrates and the evidence shows that at those times of the year encroachment by shadows on Westlake Park and Plaza would be minimal. (See figure 24 and 25 pages 58-59 of FEIS). The shadows which occur fall on the southernmost tip of the Park, south of the "Granite Monoliths" area. On September 21 and March 21 during the hour of 2:30 to 3:30 PDT (1:30 to 2:30 PST), these shadows would encroach on this area covering approximately 20 ft. by 20 ft. DCLU characterizes this area as principally a transitional entry/exit point for the park, being a meeting point of the Fourth Avenue sidewalk, Pike Street sidewalk and Park area. It is devoid of seating, planting or other features and thus is not an area where park users would be able to enjoy solar exposure for more than a few moments while transversing through or past the park.

42. Heavy foot traffic through this exit/entry point plus the lack of seating almost completely eliminates any potential for sitting in the sun for enjoyment, reading or picnicing. Sitting on the pavement would be hazardous to the sitting

individual and would unduly impede pedestrian foot traffic.

43. The revised project design substantially mitigates shadow impacts on Westlake Park and Plaza. In order to fully eliminate remaining shadow impacts on the park on the September 21/March 21 date, a small, approximately 6,000 sq. ft. portion of the northeast corner of the building down to the 26th floor would have to be removed (See Applicant Exhibit 10).

44. DCLU contends this mitigation is required pursuant to be Council conditional use criteria. Thus, removal of the 6,000 sq. ft. portion has been imposed as a condition for approval of applicant's proposal.

45. Applicant does not wish to reduce the structure profile in order to remove the shadow from the impacted park area. In applicant's opinion the conditions should be stricken as not being necessary because the area at issue cannot be used for passive recreation.

46. Applicant also contends that Westlake Park and Plaza is not a legal park. Dave Olson offered evidence on applicant's behalf that the necessary right-of-ways have not been vacated and dedicated as required. He stated that a portion of the park is actually in the existing Fourth Avenue and Pike Street right-of-ways. DCLU responded that the Parks and Recreation Department perceives the entire area from curb to the edge of the Seaboard Building as constituting the Westlake Park and Plaza. DCLU conceded, however, that technicalities remain unresolved regarding the requisite right-of-way vacations.

47. Applicant offered into evidence a copy of the March 21, 1988, application and permit for Westlake Park (Applicant Exhibit 11, Exhibit J thereof) which purportedly shows that only the area previously occupied by the old Bartell Drugstore was sought to be established as a park. The application checklist of December 3, 1986, described the location of the proposed park as the "triangle formed by Westlake Avenue, Fourth Avenue and Pine Street (south of Pine Street) in downtown Seattle." (Applicant Exhibit 11, Exhibit I thereof, page 2). Applicant's Exhibit 11, (Exhibit D, p. A20), Exhibit E (Figure 1), Exhibit F (Figure 3) and Exhibit G (Site Map thereof) purport to further show the envisioned dimensions of the park. See also Exhibit 11, Exhibit B thereof, regarding the necessity of vacation of all or portions of a street in order to establish the area as a park. All of these latter exhibits of applicant show that the area projected as Westlake Park and Plaza is what presently exists today.

### Conclusions

1. The Hearing Examiner has jurisdiction of this matter pursuant to the procedures of Title 23, Seattle Municipal Code.

2. The criteria for all conditional uses in the DRC are set forth at Seattle Municipal Code Section 23.49.096. Those criteria require that the use be determined not to be materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located. In addition, adverse negative impacts are to be mitigated by imposing requirements or conditions deemed necessary for the protection of other properties in the zone or vicinity and the public interest in order for a conditional use to be authorized. The Director or the Council must deny the conditional use, if it is determined that the negative impacts cannot be mitigated satisfactorily. Seattle Municipal Code Section 23.49.096A.1 and 2. With respect to such impacts the proposed revised project may be conditioned, approved or denied pursuant to the authority granted the City under SEPA to mitigate significant adverse environmental impacts identified in a EIS. Seattle Municipal Code Section 25.05.660.

3. The general conditional use criteria have, for the most part, been met by the proposed project. The redevelopment of this site with a thirty-three (33) story retail/office tower and a proposed theater would be comparable with the uses permitted or already established in the DRC. All adverse negative impacts, except for shadow impacts, have been satisfactorily mitigated by applicants revisions of the original proposal in response to the DEIS and comment letters thereto.

4. With respect to the shadow impacts, they are a direct result of the increased height and floor area ratio which DCLU has recommended be granted to applicant by the Council as a public benefit bonus for providing a theater for live performances of drama, dance and music pursuant to Seattle Municipal Code Section 23.49.096B.2. It is concluded that applicant's revised proposal meets the standards for such bonus set forth in Seattle Municipal Code Section 23.49.096B. 2a. The proposed theater also will meet the access and street orientation standards of Seattle Municipal Code Section 23.49.096.2c (1), (2), (3), (4) and (5).

5. However, Westlake Park and Plaza is identified in Seattle Municipal Code Section 23.49.096B.4a(2) as a park to be protected from shadow impacts generated by height bonus awards. That protection, provided pursuant to SEPA authority (Seattle Municipal Code 25.05.675.Q), is intended to preserve the existing sense of openness and the human scale environment which exists in the Downtown Retail Core. Thus, applicant, in return for being granted the height bonus for providing the theater amenity, must mitigate shadow impacts so as to minimize or prevent the extent to which those impacts block light from public open spaces.

6. The applicable Code provision states that:

The shadows cast on the Westlake Park south of Pine Street...from 11:00 a.m. to 2:00 p.m. on March 21st and September 21st will not be increased beyond those cast by existing structures.

Seattle Municipal Code Section 23.49.096B.4.a(2). It is undisputed that the revised tower profile casts a shadow on the southernmost tip of the park at the time and on the days specified in the Downtown Zoning Code. See FEIS figure 24 and 25 and Applicant's Exhibit 7. The only issue is the extent to which the tower causes a shadow impact on this corner of the park. Given the three hour time period during which such impacts cannot be increased beyond those of existing structures and the fact that the tower profile as proposed does in fact do so, it is not necessary to address this issue. Assuming arguendo that the Westlake area in question is a park, applicant must eliminate the remaining shadow impacts.

7. However, park means an open space use in which an area is permanently dedicated to recreational, aesthetic, educational or cultural use. Seattle Municipal Code Section 23.84.030. Appellant has presented evidence and DCLU concedes that Westlake Park, while perceived by the general public and considered by the City Department of Parks and Recreation as a park, has not been permanently dedicated as such. Construing the provisions of Seattle Municipal Code Sections 23.84.030 and 23.49.096B.4a(2) as a whole the Hearing Examiner has no choice but to conclude that the Westlake area under discussion is not an open space permanently dedicated to park uses.

8. It is though an "open space most used by the public." Seattle SEPA Ordinance, Seattle Municipal Code Section 25.05.675Q.2. While SEPA recognizes that it is not practical to prevent blockages of all public open spaces downtown, it specifically designates those areas downtown where shadow impacts

may be mitigated. Westlake Park and Plaza is one of those areas. But, the southernmost tip of the park area is an entry/exit point into Westlake Park. In addition, it is a public thoroughfare for pedestrian foot traffic and a meeting point for the Fourth Avenue and Pike Street sidewalks and park area. The Hearing Examiner concludes therefore that in reality this disputed area at the southernmost tip of the open space area cannot be construed as part of the park.


9. The Office of Hearing Examiner is not empowered to create legislation; rather its purpose and function is to interpret and construe as written ordinances which fall under its jurisdiction. Based on the these foregoing conclusions the Hearing Examiner deems it inappropriate to require further mitigation of the revised tower's shadow impacts on the affected area and thus cannot recommend that this condition be imposed.

10. The Hearing Examiner further concludes that the DCLU imposed conditions with respect to cladding the proposed development with terra cotta or similar materials is appropriate in that this condition will ensure that the architectural and ornamental integrity of area structures will be retained.

#### RECOMMENDATION

In accord with the foregoing, the Hearing Examiner recommends that the Council conditionally approve the Council Conditional Use application.

Entered this 1st day of December, 1989.

  
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Stan Taylor  
Acting Hearing Examiner

#### NOTICE OF RIGHT TO PETITION FOR FURTHER CONSIDERATION

Pursuant to Seattle Municipal Code Section 23.76.054, as amended, any person substantially affected by a recommendation of the Hearing Examiner may submit a petition in writing to the City Council requesting further consideration. The petition must be submitted within fifteen days after the date of mailing the recommendation of the Hearing Examiner and addressed to: City Council, Urban Redevelopment Committee, Municipal Building, Seattle, Washington 98104. The request for further reconsideration shall clearly identify specific objections to the Hearing Examiner's recommendation, facts missing from the record, and the relief sought.

Pursuant to Seattle Municipal Code Section 23.76.054(D), if there is no request for further consideration Council action shall be based on the record established by the Hearing Examiner.

The City Council Urban Redevelopment Committee should be consulted for further information on the Council review process.