

FINDINGS AND DECISION OF
THE CITY COUNCIL OF
THE CITY OF SEATTLE

In the Matter of the Appeals of)

QUEEN ANNE COMMUNITY COUNCIL)
ROBERT H. JACOBSON)
ST. ANNE'S JOHN HORAN)
UNITED SOUTH SLOPE RESIDENTS (USSR))
AND THOMAS TOWLE)
QUEEN VISTA PARTNERS)

HEARING EXAMINER
FILE NOS.
MVP 82-080 (W) - 085 (W);
C.F. No. 293623

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

INTRODUCTION

Victoria Tower Partnership proposes to construct a 76-unit addition to the Victoria Apartment Building at 100 West Highland Drive. By decision dated June 27, 1984, the Director of the Department of Construction and Land Use denied the proposed project because of its significant unmitigated adverse impacts. The Hearing Examiner, by decision dated October 11, 1984, upheld the Director's denial. On October 24, 1984, pursuant to Section 25.04.210 of the Seattle Municipal Code, the Victoria Tower Partnership filed with the City Council a timely notice of appeal of the Hearing Examiner's decision alleging that:

"DCLU is without legal authority to deny the proposal. Victoria Tower Partnership has vested rights to develop its proposal. No identified adverse environmental impact of the proposal justified denial."

After considering the record of the proceedings before the Hearing Examiner and the argument of counsel for the various parties, the City Council does hereby adopt the following findings of fact and conclusions of law.

I

Findings of fact 1-37 and conclusions 1, 10 and 12-13 of the Hearing Examiner's September 9, 1983 decision and findings 3-13 of the Hearing Examiner's October 11, 1984 decision are hereby adopted as findings and conclusions of the Council. Further the Findings and Conclusions of the City Council on DCLU's Request for Interlocutory Review, dated June 18, 1984 are hereby incorporated into these findings and decision.

II

ADDITIONAL FINDINGS

1. The tower as proposed is totally inconsistent with the existing land use pattern in the vicinity of the site and is also inconsistent with the City's adopted policies to insure that multiple use housing is built in scale with the neighborhood. FEIS p. 12-15. The disproportionate height and overall scale would have a devastating impact on the neighborhood (see pp. 128-40 and 149-50 DEIS and pp. 5, 10, 53, 62, 63, 82, and 177-79 of the FEIS).
2. The unmitigated adverse impacts of the project as proposed include cumulative construction impacts, increased noise levels, increased traffic and parking demand and inconsistency with neighborhood scale (DEIS pp. 61-62, 78-82, 92-110; FEIS pp. 155-56, 371, 387, 392-96).
3. Reducing the tower to a height comparable in size to the One Eleven Condominium across the street to the south would substantially mitigate adverse impact of the proposal on the land use pattern in the vicinity of the site.
4. An eight-story tower can be constructed on the site and would be compatible with neighboring structures. While eight stores is one

1 story less than the height of the adjacent One Eleven Condominium,
2 the terrain slopes upward from south to north so that the relative
3 impacts of the two buildings would be approximately the same.

4 III

5 ADDITIONAL CONCLUSIONS

- 6 1. The project applicant asked that the Council reconsider its con-
7 clusions in the interlocutory review that: the Council did not
8 intend to apply the transition rule to SEPA review; and did not
9 intend that specific zoning should overrule other policies con-
10 tained in Appendix A of the SEPA Policies Ordinance. Those con-
11 clusions are here reaffirmed.
- 12 2. The applicant also contends that the Council should be bound by
13 the provisions of the new SEPA ordinance which became effective on
14 October 1, 1984 and which prohibits application of policies
15 enacted after a project's draft EIS is completed. Section
16 25.05.-916(2) of the Seattle Municipal Codes states that the new
17 SEPA ordinance applies only to those elements of SEPA compliance
18 initiated after the effective date of the ordinance. The imposi-
19 tion of SEPA conditions, which is the "element of SEPA compliance"
20 involved here, was initiated prior to the effective date of the
21 SEPA ordinance, and it is, therefore inapplicable.
- 22 3. The Director denied the permit application on the ground that suf-
23 ficient mitigation through reduced height would result in economic
24 infeasibility for the project and that infeasibility bears on the
25 question of whether mitigation is "reasonable". The test of rea-
26 sonableness should be limited to whether the required mitigation
27 bears a "reasonable" relationship to or is "reasonably" in propor-
28 tion with the identified adverse impact. Whether or not an alter-
native is economically feasible is for the project applicant to

1 determine and the facts necessary for such a determination are
2 almost always within the control of the applicant. If a condition
3 is imposed which is reasonably related to an adverse impact, and
4 that condition alone or in conjunction with others makes the pro-
5 ject infeasible, the applicant is free not to go forward with the
6 project.

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4. The Director and the Hearing Examiner erred in concluding that a reduction in the height of the tower would be unreasonable mitigation. Specifically, a reduction to eight stories would reasonably mitigate the adverse impact of the tower's height, bulk and scale, and the benefits of the resulting project would then outweigh its combined unmitigated adverse impacts.

5. The requirement that conditioning be "reasonable" is also mandated by State law. If, upon further appeals, a court determines that a reduction in height to eight stories is unreasonable because it makes the project economically infeasible, then the only appropriate alternative course for the City would be denial of the application since, without such mitigation, the project's adverse impacts will outweigh its benefits.

IV
DECISION

The decision of the Hearing Examiner is hereby modified to authorize construction of the proposed project provided:

- 1) that the tower shall not exceed eight stories; and
- 2) that the parking ratios established in the Hearing Examiner's conclusion 13 in the September 9, 1983 Findings and Decision shall be maintained.

This matter is remanded to the Director for action on the permit application consistent with the requirements of this decision.

Adopted by the City Council this 28th day of May, 1985.

By *Richard B. Rice*
President, Seattle City Council

FINDINGS AND DECISION

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OCT 11 1984

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

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In the Matter of the Appeals of

QUEEN ANNE COMMUNITY COUNCIL
ROBERT H. JACOBSON
ST. ANNE'S PARENTS CLUB
THE REVEREND JOHN HORAN
UNITED SOUTH SLOPE RESIDENTS (USSR)
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FILES NO. MUP-82-080 (W)
MUP-82-081 (W)
MUP-82-082 (W)
MUP-82-083 (W)
MUP-82-084 (W)
MUP-82-084 (W) ^{85m}
APPLICATION NO. EIS-021

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

Introduction/Procedural Synopsis

The appellant, Victoria Tower Partnership, proposes to construct a 76 unit addition to the Victoria Apartments at 100 West Highland Drive. Appellants contested the adequacy of the Environmental Impact Statement (EIS), and also urged that the proposal should have been denied or more reasonably conditioned pursuant to Chapter 25.04, Seattle Municipal Code.

The appellants exercised their right to appeal pursuant to Seattle Municipal Code Chapter 23.76.

This matter was heard before the Hearing Examiner on June 6, 7, 8, 9, 10, 13, 14, 15 and 16, 1983. The record remained open for post hearing closing memoranda through August 17, 1984.

Parties to the proceedings were: The Director of the Department of Construction and Land Use (Director) by James E. Fearn, Jr., assistant city attorney; project applicant by Judith Runstad and G. Richard Hill, attorneys at law; the Queen Anne Community Council by William Blair, pro se; the United South Slope Residents and Thomas Towle by Thomas Goeltz and Susan Agid, attorneys at law; the St. Anne's Parents Club and the Reverend John Horan by Ray Siderius, attorney at law; and Robert H. Jacobson, pro se. Queen Vista Partners deferred to the presentation by USSR and was not represented at the hearing.

The hearing parties waived the ordinance period for decision.

The Hearing Examiner entered his decision September 9, 1983, that "based on the evidence of record the Director's determination that the EIS is adequate was not shown to be clear error." Conclusion 9, Findings and Decision. The decision also remanded the matter to the Director "for reconsideration of reasonable conditions pursuant to Section 25.04.190." The re-evaluation was to include consideration of "the environmental impacts of height, bulk and scale." Jurisdiction was retained by the Hearing Examiner of the proceedings.

In January 25, 1984, the DCLU Director requested City Council "Interlocutory Review."

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The Council granted review and on June 18, 1984, entered conclusions as follows:

- 1) Section 7 of the SEPA Policies Ordinance was intended to deal comprehensively with the question of shadow impacts. No subsequent legislation has expanded or superceded Section 7. Therefore, consideration of the shadow impacts of the Victoria Apartments project is limited to impacts on publicly owned parks.
- 2) The RMH 350 zoning classification controls the maximum height of the Victoria Apartments project pursuant to the special transition rule, SMC 23.04.10(D) However, the substantive authority of the Director of DCLU under SEPA is not limited by vested zoning rights. The Council did not intend to apply the transition rule to SEPA review, and, under current law, policies adopted subsequent to vesting under the zoning ordinance may be considered for the purpose of conditioning or denying permits under SEPA.
- 3) When the Council included the prior residential zoning for the site (Ordinance 86300) in Appendix A of the SEPA Policies Ordinance it did not intend that such zoning should override other policies contained in Appendix A. This is particularly true for those policies which have been adopted subsequent to such zoning.

Therefore, the DCLU Director shall consider other policies such as the new Multi-Family Policies and the Goals for Seattle 2000, for the purpose of conditioning or denying the Victoria Apartments project to mitigate specific adverse impacts relating to height, bulk and scale.

DCLU then issued a June 27, 1984, decision which stated, in relevant part:

As provided in Section 25.04.190 of the Seattle Municipal Code and in consideration of the unmitigated, significant adverse impact of the proposed building's height, bulk and scale on the surrounding neighborhood and the resultant inconsistency with the Multi-family policies, which are included in Appendix A of the SEPA Policies (Section 25.04.500 B), the proposed action is DENIED.

p.4. (emphasis in original).

The Victoria Tower objection to the DCLU decision and the parties' replies thereto are included in the file of record. The response period ended August 6, 1984.

On August 20, 1984, the Hearing Examiner remanded the matter to the DCLU Director for "consideration of reasonable conditions designed to mitigate or prevent the adverse environmental impacts of height, bulk and scale." Specific reference was made to evaluation of alternatives nine stories or less.

By letter of September 14, 1984, DCLU reiterated its view that denial was appropriate, based on proponent's representations that a 9-story alternative project would be financially infeasible; and on the fact that low and midrise development predominated in the vicinity.

The record remained open for further reply to 5:00 p.m., September 27, 1984. Proponent repeated its claim that the DCLU Director was without authority to consider the Multi-Family policies in project conditioning or denial. Proponent stated further that even if the policies were considered, it was "clearly erroneous for the Director not to approve the project as proposed by the Partnership."

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

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

Findings of Fact

1. The Findings entered September 9, 1984, are adopted by reference. Summaries of specific findings are reprinted below.
2. The Victoria Tower Partnership proposes to construct a 76-unit addition to an existing three-story brick apartment building addressed as 100 West Highland Drive.
3. The subject site, all of Block 8 of the Comstock Addition to the City of Seattle, is near the crest of Queen Anne Hill. West Highland Drive is south adjacent to the subject site, while West Comstock Street is directly north. First Avenue West lies to the east and Second Avenue West to the west of the proposal site.
4. Of the 76 units, project applicant proposes that 11 be townhouse units beginning in elevation approximately 4 ft. above West Comstock. The remaining 65 units would be within a 16-story tower located approximately mid-site that would rise roughly 160 ft. from West Comstock Street. Parking, landscaping and other details of the proposal are described in the EIS and in the previous DCLU and Examiner decisions.
5. The tower portion of the proposal is inconsistent with the existing vicinity land use pattern. As stated at p. 396 of the FEIS, the tower addition would introduce a "strong individual vertical element to the lower scale of the older and historical structures along Queen Anne Boulevard."
6. The proposal is inconsistent with the Multi-Family Land Use Policies' midrise height limit of 60 ft. FEIS p.12. The Policies were adopted subsequent to the application at issue. The proposed tower is also inconsistent with the City's goal to insure that multiple unit housing is built in scale with the neighborhood. FEIS p. 399.
7. The Ballard Howe Mansion is directly across First Avenue West from the project site. Across Comstock is the St. Anne's School complex with its playfield and three 2-story buildings.

8. Directly south of the project site is the 9-story One Eleven condominium, constructed in 1972. Southeast are two older 4-story apartment buildings. Two and 4-story apartments are west of the project site. Single family use predominates going westerly from Third Avenue.

9. The EIS discussion of alternatives included the no action; midrise (6-story); and a 13-story tower development alternative.

10. Proponent's view is that the midrise alternative is not feasible. No evidence of record showed that the return on the investment in a midrise alternative was feasible. Subsequent to the Examiner's remand of August 20, 1984, DCLU indicated proponent's further view that a 9-story alternative would be financially infeasible.

11. In his October 19, 1982 decision, from which appellants submitted appeals, the DCLU Director concluded:

...Although the proposal in its final form does not eliminate every adverse impact (cumulative construction impacts; short- and long-term increased noise levels; increased shadows; the building's inconsistency with neighborhood scale and new Midrise zone designation, increased traffic and parking demand; view blockage), it is my judgment that the merits of the proposal (creation of construction employment opportunities; provision of housing within walking distance of transit, shopping and services; provision of additional landscaping contributing to an attractive pedestrian environment; provision of visitor parking; economic gains to the Queen Anne community and City through increased revenues) outweigh the adverse environmental impacts which cannot be reasonably mitigated... (emphasis added).

12. In his decision of June 27, 1984, subsequent to the Examiner's Order of Remand and the City Council's Interlocutory Review conclusions, the Director stated that:

...The merits of the proposal...outweigh many of the adverse impacts which cannot be entirely mitigated or eliminated... However, the proposed building's height, bulk and scale is significantly inconsistent with existing neighborhood scale... The benefits... can be comparably provided by development that does not impose adverse impacts on the neighborhood as a result of incongruous height, bulk and scale...

(emphasis added).

The Director's June 27, 1984, decision then noted that:

...in consideration of the unmitigated, significant adverse impact of the proposed building's height, bulk and scale on the surrounding neighborhood and the resultant inconsistency with the Multi-family Policies, which are included in Appendix A of the SEPA Policies... the proposed action is denied. p.4...

13. Proponent here contests the Director's decision to deny the proposal.

Conclusions

1. As an environmental determination, the Director's decision to deny the proposal is accorded substantial weight. Section 23.76.36(B)(7); Section 25.04.200(C). To overcome that weight the proponent must show clear error. Polygon Corporation v. Seattle, 90 Wn. 2d 59, 578 P. 2d 1309 (1978). As stated in Polygon, 90 Wn. 2d at page 69:

In applying the clearly erroneous test to an administrative decision, we examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision. Ancheta v. Daly, 77 Wn. 2d 255, 461 P. 2d 531 (1969). The court does not substitute its judgment for that of the administrative body and may find the decision "'clearly erroneous'" only when it is "'left with the definite and firm conviction that a mistake has been committed.'"...

2. Section 25.04.190(A) states the authority for the DCLU Director to "deny or reasonably condition any proposal so as to mitigate or prevent adverse impacts." In his June 27, 1984, decision, the DCLU Director exercised the authority and denied the proposal. See Conclusion 3, Hearing Examiner decision of August 20, 1984. This denial was reaffirmed per the Director's September 14, 1984, letter to the Hearing Examiner.

3. The Examiner must review the Director's decision in accord with the dictates of Polygon and examine the entire record and evidence "in light of the public policy contained in the legislation authorizing the (Director's) decision." Only if left with a "definite and firm conviction" that the DCLU decision was mistaken should the Examiner set aside the DCLU decision. As that "definite and firm conviction" is not present here, the Director's decision is affirmed.

4. Section 25.04.190(C) provides that any proposal may be denied where significant adverse impacts have been identified in the environmental documents which impacts "cannot be substantially mitigated or prevented by the imposition of reasonable conditions." The referenced section continues that "The merits of the proposal shall be weighed against the environmental impacts." It is unspecified how the "reasonableness" of conditions are to be determined.

5. The Director's initial decision declared that the proposal benefits outweighed the adverse environmental impacts. This was not specifically challenged by appellants. This Examiner therefore concluded that the "Director's decision not to deny the proposal pursuant to Section 25.04.190 was not shown to be clear error." Conclusion 11, Hearing Examiner Findings and Decision of September 9, 1984. The Examiner made no affirmative conclusion as to whether the proposed benefits would outweigh the adverse impacts.

6. Although it is not clear from the record presented, it appears that the Director's second balancing test considered the Council's mandate to:

...consider other policies, such as the new Multi-Family Policies and the Goals for Seattle 2000, for the purposes of conditioning or denying the Victoria Apartments project to mitigate specific adverse impacts relating to height, bulk and scale.

Page 3 of the DCLU Supplemental decision then continued, "The Director must now issue a new decision in keeping with the Council's mandate..." The Supplemental Decision then stated in relevant part that (while) the merits of the proposal outweighed "many" of the adverse impacts, (nevertheless) "...The proposed building's height, bulk and scale is significantly inconsistent with existing neighborhood scale..."; further, that the benefits of in-City living, construction employment etc. could be "comparably provided by development that does not impose adverse impacts on the neighborhood as a result of incongruous height, bulk and scale." The Examiner concludes that it was not "clear error" for the Director to reevaluate the proposal in specific light of the attention to be given the Multi-Family Policies.

7. The Director then, "given the disclosure of a significant adverse impact with respect to the proposal's height, bulk, and scale", considered possible mitigation measures, and concluded that only a 6-story building envelope designed for consistency with the Midrise zone would sufficiently mitigate the impacts. Acknowledging proponent's claim that the mid-rise alternative was infeasible the decision was made to deny the proposal, citing RCW 43.21C.060, and it is that denial that is accorded substantial weight. RCW 43.21C.090, Seattle Municipal Code Section 25.04.200.

8. The Examiner decision of August 20, 1984, then asked the DCLU Director to view the issue with respect to alternative potential development of no more than 9 stories. The Examiner made no request for review of a specific 9-story alternative. According to the September 14, DCLU reply to the Hearing Examiner remand, the project applicant had responded that a 9-story alternative was not financially feasible. The question was put to the proponent because, according to the DCLU Director, "... if the proponent considers the 9-story alternative to be financially infeasible, then this has a bearing on whether the alternative is reasonable mitigation or not (emphasis in original)." Thus the reiteration of the denial.

9. No party addressed the development feasibility conclusions.

10. The Examiner is then left with the question of whether proof has been adduced sufficient to overcome the Director's conclusion that reasonable mitigation measures are insufficient to mitigate the identified impact, RCW 43.21C.060, such that the Director's decision should be affirmed. Proponent would urge the Examiner to approve the project as proposed. In light of the entire record; the weight to be accorded the Director's determination; and in light of the "public policy contained in the legislation" the Director's decision must be affirmed.

11. Chapter 25.04, Seattle Municipal Code, clearly provides that the City shall exercise the authority to deny or reasonably condition any proposal to mitigate or prevent adverse impacts. Section 25.04.190(A). Where significant adverse impacts cannot be substantially mitigated or prevented, any proposal may be denied. Section 25.04.190(C). The authority to deny a proposal is also stated in RCW 43.21C.060. Since the proposal would result in EIS identified significant adverse impacts and since there is no challenge to the assertion that reasonable mitigation measures are insufficient to mitigate the identified impact of height, bulk and scale, the Director could properly have denied the proposal. RCW 43.21C.060 (amended by Laws 1983, Chapter 117, Section 3, eff. October 20, 1983). See also WAC 197-11-660(1)(f).

12. Further, it is a recognized purpose of the State Environmental Policy Act (SEPA) to prevent further environmental degradation, ASARCO Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 707,

601 P. 2d 501 (1979); and maintain and improve environmental quality. R. Settle, Washington Land Use and Environmental Law and Practice (1983), p. 166. See also RCW 43.21C.010,020. The court in Polygon, supra, noted that traffic, noise, visual cumulative, indeed all factors:

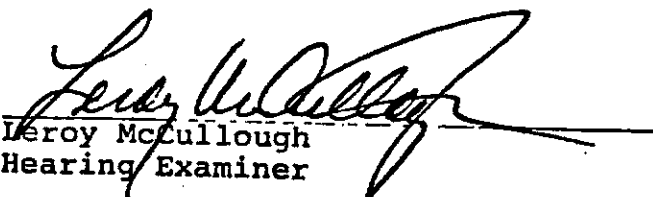
are to be considered in light of the public policy expressed in SEPA of maintenance, enhancement and restoration of the environment.

90 Wn. 2d, at p.70. Further, it is a recognized purpose of SEPA to prevent further degradation of the environment. ASARCO Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 601 P. 2d 501 (1983). Maintenance of environmental quality could not be achieved if recognized significant adverse impacts of a proposal, including extremely incompatible bulk and scale, were allowed simply because reasonable alternatives thereto are self-declared as infeasible. Polygon, supra, p.70. The Director's decision is affirmed.

Decision

The decision of the DCLU is Affirmed.

Entered this 11th day of October, 1984.


Leroy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

Pursuant to Section 25.04.210, Seattle Municipal Code, a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fourteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.04.190. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council should be consulted regarding their appeal procedure.

If an appeal is taken pursuant to Section 25.04.210, the time for judicial review of the underlying governmental action and/or other SEPA issues is stayed until the City Council renders a final decision on this Section 25.04.190 appeal.

If no appeal is taken pursuant to Section 25.04.210, the decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review of the decision on the underlying governmental action must be filed in King County Superior Court within fourteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.36.(B)(11); Akada v. Park 12-01 Corporation, 37 Wn. App. 221 (1984); JCR 73.

Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075 (6)(c). SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington, 98104, within fourteen days of the date of this decision. WAC-197-11-680 (4)(d).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost of preparing a verbatim written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on 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 the taped transcript relating to issues raised on review.

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

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FILES NO. MUP-82-080 (W)
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MUP-82-083 (W)
MUP-82-084 (W)

MUP-82-085 (W)

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

Findings

1. Victoria Tower Partnership proposes to construct a 76-unit addition to the Victoria Apartments addressed as 100 West Highland Drive. By decision on October 12, 1982, the DCLU Director conditionally approved the proposal.

2. Appellants then challenged the adequacy of the project EIS and the DCLU Director action respecting conditioning or denial of the project pursuant to Chapter 25.04, Seattle Municipal Code.

3. The matter came on for hearing before the undersigned Hearing Examiner on June 6, 7, 8, 9, 10, 13, 14, 15, and 16, 1983. The Hearing Examiner decision, entered September 9, 1983, determined that "based on the evidence of record the Director's determination that the EIS is adequate was not shown to be clear error." Conclusion 9, Findings and Decision. The decision also noted the Director's overly restrictive reading of Appendix A, Chapter 25.04, and accordingly remanded the matter to the Director "for reconsideration of reasonable conditions pursuant to Section 25.04.190." The re-evaluation was to include consideration of "the environmental impacts of height, bulk and scale." Jurisdiction was retained by the Hearing Examiner of the proceedings.

4. The Hearing Examiner Findings and Decision entered September 9, 1983, is incorporated herein by reference.

5. The next procedural incident occurred in January 25, 1984, when the DCLU Director requested City Council "Interlocutory Review." Findings and Conclusions of the City Council on DCLU's Request for Interlocutory Review, p.2.

6. The Council granted review and on June 18, 1984, entered conclusions as follows:

- 1) Section 7 of the SEPA Policies Ordinance was intended to deal comprehensively with the question of shadow impacts. No subsequent legislation has expanded or superceded Section 7. Therefore, consideration of the shadow impacts of the Victoria Apartments project is limited to impacts on publicly owned parks.
- 2) The RMH 350 zoning classification controls the maximum height of the Victoria Apartments project pursuant to the special transition rule, SMC

23.04.10(D). However, the substantive authority of the Director of DCLU under SEPA is not limited by vested zoning rights. The Council did not intend to apply the transition rule to SEPA review, and, under current law, policies adopted subsequent to vesting under the zoning ordinance may be considered for the purpose of conditioning or denying permits under SEPA.

- 3) When the Council included the prior residential zoning for the site (Ordinance 86300) in Appendix A of the SEPA Policies Ordinance it did not intend that such zoning should override other policies contained in Appendix A. This is particularly true for those policies which have been adopted subsequent to such zoning.

Therefore, the DCLU Director shall consider other policies such as the new Multi-Family Policies and the Goals for Seattle 2000, for the purpose of conditioning or denying the Victoria Apartments project to mitigate specific adverse impacts relating to height, bulk and scale.

7. DCLU then issued a June 27, 1984, decision which stated:

As provided in Section 25.04.190 of the Seattle Municipal Code and in consideration of the unmitigated, significant adverse impact of the proposed building's height, bulk and scale on this surrounding neighborhood and the resultant inconsistency with the multi-family policies, which are included in Appendix A of the SEPA Policies (Section 25.04.500 B), the proposed action is DENIED.

p.4. (emphasis in original).

8. The Victoria Tower objection to the DCLU decision and the parties' replies thereto are included in the file of record. Proponent reiterated its position that the Director was without authority to consider the multi-family policies to condition or deny the subject project. Proponent's argument continued that even with the authority, the Director committed clear error "in failing to approve the project since the Examiner limited (the Director's authority) to imposition of reasonable conditions..."; and since weighing the merits of the proposal against the adverse environmental impacts would require approval. Applicant further presented that the height of the project "may not be reasonably conditioned since the issue is one of purely aesthetics."

9. Through its counsel of record the DCLU Director replied that the issue of applying the multi-family policies was resolved adverse to the proponent's position by the City Council's interlocutory review findings and conclusions; that the Director performed the required weighing of impacts vs. benefits; and that "the problems associated with height, bulk and scale are more than 'purely aesthetic'."

10. Representatives for appellants Queen Anne Community Council and the United South Slope residents also responded to proponent's criticism of the Director's supplemental decision and urged the Examiner to uphold the denial of the project. This decision of the Examiner is thus principally one to resolve the legal issues presented.

11. Although the September 9, 1983, Hearing Examiner Findings of Fact are incorporated herein by reference, the following proposal summary is presented so that the issues may be properly framed and viewed within the appropriate context.

12. The subject site is located near the crest of Queen Anne Hill between West Highland Drive on the south; West Comstock Street on the north; and between First and Second Avenues West on the east and west, respectively.

13. Project applicant proposes that 11 of the 76 units be townhouse units located roughly four ft. above Comstock Street. A mid-site hexagonal tower of 16 stories is expected to accommodate the remaining 65 units. The projected tower height from Comstock Street is 160 ft. The proposed minimum width is 79.5 ft. north-south and the maximum width 158.8 ft. through the interior midpoint of the building, east-west.

14. Vicinity development consists of church use, schools, low and midrise apartments and single family dwellings. Directly south of the site is the One Eleven, a 9 story, 16 unit condominium constructed in 1972. Southeast are two older 4 story apartment buildings. Two and 4 story midrise apartments are also to the west. Single family residential use is present at the southeast quadrant of the block immediately west. From 3rd Avenue West and westerly single family residential development predominates. Southwest is the popular Kerry Park and its commanding view.

15. The historic Ballard Howe Mansion is directly east of the project, across 1st Avenue West. St. Anne's School complex is directly north, across Comstock, and consists of three 2-story buildings and a playfield.

16. The tower portion of the proposal is inconsistent with the existing land use pattern. The FEIS acknowledges that the proposed tower addition would introduce a "strong individual vertical element to the lower scale of the older and historical structures along Queen Anne Boulevard." At p. 396. However, it is unlikely that a highrise proposal similar to the Victoria proposal would be developed in the zone without a required rezone from the current midrise designation to a more intensive zoning designation. p. 379.

17. That the proposal is inconsistent with the midrise 60 ft. height limit of the Multi-Family Land Use Policies, adopted subsequent to the application, is stated in the EIS, e.g., p. 12, FEIS.

18. Regarding the mid-rise alternative, proponent's expert stated that a reasonable return should be from 15 to 20 percent while the return on the midrise, even with deletion of \$300,000 in cost, would be roughly 4 percent, and that the alternative was not economically feasible. While appellants successfully showed mathematical inaccuracy in the revenue analysis the record does not reflect that the resulting return would make the project economically feasible.

19. The EIS provides a summary evaluation of consistency with land use plans and goals including Seattle 2000 and the land use goals for Queen Anne; DEIS, pp. 13-14. The DEIS assessment is that the proposed action is "partially consistent" with the goal to provide housing in scale with existing developments or the immediate vicinity since "townhouses are consistent, the highrise portion is not." At 176. FEIS p. 399 states that in general the proposed tower portion is not consistent with the City's goal to insure that multiple unit housing is built in scale with the neighborhood. Appellants say that responses are inadequate, taken out of context and misleading.

20. The following alternatives were listed and discussed in the EIS: no action; alternative for maximum redevelopment of site based on existing zoning description; midrise alternative; and development of a 13 story tower.

Conclusions

1. The DCLU Director's environmental determination is accorded substantial weight. Section 23.76.36.B.2 and Section 25.04.200(C). The burden rests with the party contesting the DCLU determination to show clear error. Polygon Corporation v. Seattle, 90 Wn. 2d 59, 578 p. 2d 1309 (1978).

2. As stated in the Conclusions entered September 9, 1983, Section 25.04.500(B) provides that in considering the conditioning or denial of a proposal pursuant to Section 25.04.190, the City official shall utilize SEPA and regulations or plans identified in Appendix A. Zoning Code Ordinance 86300 (and amendments thereafter) is included in Appendix A. The Director was therefore correct in considering the zoning code, the Multi-family policies, the Goals for Seattle 2000 and similar items that are included in Appendix A in the supplemental decision that project applicant challenges here. Cf. Findings and Conclusions of the City Council on DCLU's Request for Interlocutory Review.

3. Project applicant's second principal contention is that the Director only had authority to impose reasonable conditions pursuant to the Hearing Examiner order of remand. Such was not the intent of the Examiner's remand. The DCLU Director was legislatively mandated to review the project as per the requirements of Section 25.04.190, with or without the Hearing Examiner decision of September 9, 1983. Where, as here, project applicant declines to offer "reasonable alternatives" for the Director to consider, the Director could have applied the requisite balancing test and arrived at his conclusion to deny the project.

4. The Director's supplemental decision concluded in part that "(s)ufficient mitigation of these impacts (of height, bulk and scale) could only occur through an alternative of reduced building scale..." at p.3. The decision then continued by discussing the midrise (6 story) and 13-story alternatives. There is an absence of proof that the midrise alternative is economically feasible. As to the 13-story alternative the Director concluded that such would not

... substantially mitigate the adverse impacts... in that most structures in the vicinity are 4 stories in scale. The two exceptions, at 5 and 9 stories, are still of considerably less height and/or bulk than the 13-story building alternative...

at p.3. The Director's decision then specifically observed the proposed building's inconsistency with the Multi-family policies and denied the project. at p.4.

5. It would have been useful to have been provided a delineated summary of Appendix A contents deemed relevant to this proposal. Some review is provided beginning at p.162 of the Draft EIS, where the proposal's relationship with the Seattle 2000; Seattle Comprehensive Plan; the Multi-family Policies; the zoning Code and others are discussed. See synopsis at DEIS, pp.11-13.

6. The proposal is in fact inconsistent with the midrise multi-family designation and with the portions of the Seattle 2000, Goals and Subgoals which provide that future growth be harmonious with existing residential patterns. On the other hand the RMH 350 zoning clearly would allow the project, so long as the elements of SEPA are met. Polygon, supra.

7. The Examiner is not persuaded however, that "no reasonable mitigation of a significant adverse impact is possible." The project applicant discussed for purposes of this decision only the 6 and 13 story alternatives. In light of the applicable zoning, RMH 350, the neighborhood scale, and the vicinity development including the 9 story One eleven, the Hearing Examiner does not view the project denial as an appropriate response to the mandates of Chapter 25.04 which suggest a reasonable, balanced approach to the various elements of Appendix A. Admittedly, some subjectivity is required in any effort to arrive at a "balanced approach" especially where, as here, the project applicant declines to submit alternatives within a given range.

8. The record does not reflect that the proposal's significant adverse impacts "cannot be substantially mitigated or prevented by the imposition of reasonable conditions...", Section 25.04.190(C), because alternatives within the ranges were not evaluated. (emphasis added). The Examiner agrees with the Director's supplemental decision that a 13- story tower would prove to be insufficient mitigation. However, the proposal should be evaluated for consideration of an alternative that would not exceed 9 stories. This would take into account the existing 9 story development and the applicable zoning code. To the extent that a 9-story project would exceed most of the vicinity's development scale, the City has the authority under SEPA to "reasonably condition a proposal so as to mitigate or prevent adverse environmental impacts." No issue of the adequacy of the EIS resurfaces because of this approach. Concerned about Trident v. Rumsfeld, 555 F.2d 817 (1977). Nor is the height of the proposed development simply one of "pure aesthetics."

Decision

This matter is remanded to the DCLU Director for consideration of reasonable conditions designed to mitigate or prevent the adverse environmental impacts of height, bulk and scale. The DCLU Director shall make every effort to have the required evaluation issued within 30 days of this decision. Parties will have the opportunity to comment in writing thereto. Office of Hearing Examiner jurisdiction is retained.

Entered this 20th day of August, 1984.


Leroy McCullough
Hearing Examiner

File

BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

In the Matter of the Appeals of

QUEEN ANNE COMMUNITY COUNCIL
ROBERT H. JACOBSON
ST. ANNE'S PARENTS CLUB
THE REVEREND JOHN HORAN
SOUTH SLOPE RESIDENTS AND THOMAS TOWLE
QUEEN VISTA PARTNERS

FILE NO. MUP-82-080 (W)
FILE NO. MUP-82-081 (W)
FILE NO. MUP-82-082 (W)
FILE NO. MUP-82-083 (W)
FILE NO. MUP-82-084 (W)
FILE NO. MUP-82-085 (W)

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

APPLICATION NO. EIS-021

ORDER ON MOTIONS

The undersigned issued a decision on the above-entitled matter on September 9, 1983.

The Director of the Department of Construction and Land Use submitted, by James E. Fearn, Jr., assistant city attorney, a Motion for Clarification.

Proponent Victoria Tower Partnership, by its attorneys G. Richard Hill and Judith M. Runstad, submitted a Motion for Reconsideration.

Appellants United South Slope Residents and Thomas Towle responded to both motions by their attorneys Susan R. Agid and Thomas A. Goeltz.

Appellants St. Anne's Parents Club and the Reverend John Horan replied through counsel Ray Siderius that they supported the views of the responding appellants.

Having considered all of the written arguments presented by counsel for the respective parties and being advised in the premises therefor, the attention of the parties is directed to the following:

1. The analysis and Decision of the Director, p.2, wherein it is stated that the adverse impacts, including "inconsistency with neighborhood scale and new Midrise zone designation," are outweighed by the merits of the proposal; and Section 25.04.190(A), Seattle Municipal Code, which provides that any proposal may be reasonably conditioned on the basis of identified adverse environmental impacts.
2. The conclusions and decision of the Hearing Examiner entered September 9, 1983.
3. The response of appellants USSR and Thomas Towle, specifically part B. thereof.

IT IS accordingly ORDERED:

The Motion for Reconsideration is denied. The Director shall reevaluate the project as per the decision entered September 9, 1983.

Entered this 18th day of October, 1983.


Leroy McCullough
Hearing Examiner