

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

SEATTLE SHORELINES COALITION and
SEATTLE MARINE BUSINESS COALITION

FILE NO. MUP-83-071
FILE NO. MUP-83-072
APPLICATION NO. 83-343

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

Introduction

Appellants challenge the decisions of the Director, Department of Construction and Land Use, that the environmental impact statement for the Rusty Pelican restaurant is adequate and that the permit should be issued with certain conditions.

Parties to the proceedings were: appellant, Seattle Shorelines Coalition, represented by Virginia Richmond; appellant, Seattle Marine Business Coalition, represented by Thomas M. Kilbane, Jr., Garvey, Schubert, Adams, and Barer; the Director represented by Elizabeth A. Edmonds, assistant City Attorney; the Applicant/Respondent, Rusty Pelican Restaurant, Inc., represented by Judith M. Runstad and J. Richard Hill, Foster, Pepper and Riviera.

Appellants exercised their right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on December 12, 13, 14 and 15, 1983.

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

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

Findings of Fact

1. Rusty Pelican Restaurant, Inc. (Rusty Pelican), filed a master use permit application to establish a restaurant, marina and parking at 1111 Fairview Avenue North. An environmental impact statement (EIS) was prepared and found adequate by the Director, a shoreline substantial development permit was conditionally approved and the proposed action granted subject to conditions imposed pursuant to SEPA. Appellants filed timely appeals of the SEPA determinations with the Office of Hearing Examiner.

2. The property is owned by King County. In 1981, King County put out a request for proposals which resulted in two from restaurants. The Rusty Pelican bid was accepted and an option to lease agreement entered. King County made no environmental determination prior to the decision to enter into the agreement and has made none to the date of the hearing of these appeals.

3. The EIS was prepared to be used by both the City and King County.

4. As proposed by Rusty Pelican, the project consists of a two-story, 10,000 sq. ft. restaurant, a 26 pleasure boat marina and accessory parking for 111 cars.

5. The current use of the property is for commercial marine repair, Northwest Diesel Repair. The buildings housing that business would be demolished and moored ships would be removed. The owner stated in a comment letter in the final EIS (FEIS) that he owns other properties on Lake Union and the Duwamish Waterway to which the business could be relocated.

6. The draft EIS (DEIS) listed objectives of the "proponent" (Rusty Pelican) at p. 16. King County's objectives for developing the property were also listed.

7. The DEIS identifies Rusty Pelican Restaurant, Inc., as the action sponsor in the Introduction, states that Rusty Pelican "proposes to..." in the Summary and again describes Rusty Pelican as the sponsor in the Description of the Proposal.

8. The impact of the project on land use is disclosed or discussed at several points in the document. In the DEIS Summary section the discussion describes the changes from commercial to recreational and from water-dependent to combined water-dependent and non-water dependent, the alteration in mix of land uses because of the slight decrease in commercial moorage/ship repair activity and increase in recreational marina/restaurant activity, the possibility of complementing recreational/historical redevelopments planned in the area and the reduction of opportunities for location of new marine repair services in the area.

9. The Land Use section of the DEIS provides an inventory of existing land uses in South Lake Union, describes four other developments proposed at the time of the DEIS, describes the secondary influence area, i.e., Lake Union and Salmon Bay perimeters, in terms of the mix of uses and the use of waterfront property and looks at development trends in terms of the nature of substantial development permits issued and characteristics affecting desirability of Lake Union for water-dependent development.

10. The impacts of the proposal on the site of the change of character and the fact that this change would continue the redevelopment trend, on the primary influence area of altering the mix of land use and complementing recreational/historical redevelopments, and on the secondary influence area by adding to the recreational moorage and restaurant uses and reducing the potential opportunity for new marine repair services are disclosed. The document lists under the heading "Unavoidable Adverse Impacts", the change of the land portion from a water-dependent industrial use to a nonwater-dependent use and of the water portion from a commercial use to a recreation use, stating that these changes may be perceived as an unavoidable adverse impact.

11. The FEIS includes supplemental information on land use in the form of inventory data which were compiled in DCLU's comprehensive study of nonresidential shorelines leading to proposals for changes in the Shoreline Master Program. The data show the amount and percentage of water-frontage on Lake Union occupied by each water-dependent category and the data are discussed as to trends shown, etc.

12. The DEIS examines the proposal's relationship to the city's Shoreline Goals and Policies, Resolution No. 25173, and recognizes several conflicts. The proposal is noted to be in conflict with Use Goal A5, to "(l)ocate all nonwater-dependent uses upland...", with Economic Development Goal E1 because the restaurant is nonwater-dependent, and with E2 because the major use would be the nonwater-dependent restaurant.

13. Alternatives to the proposal included for discussion in the DEIS were the "no action" alternative, a project with additional public access, a project with a larger marina, development with a commercial marina, increased mix of uses and a commercial marina and boat repair facility.

14. The discussion of economic factors in the DEIS consists of a description of the nature of the existing business and number of employees and the assessed valuation of the property and leasehold tax. The discussion of impacts of the proposal discloses that the business would be moved to north Lake Union, the number of construction people to be employed, the number of permanent employees, payroll, annual expenditures for services, supplies, etc., increase in assessed valuation and leasehold taxes.

15. Comment letters in the FEIS added discussion of restaurant revenue figures, competition, assessed valuation, moorage return and the potential loss of revenues from the distant water fishing fleet if the number of marine service businesses drops below a "critical mass".

16. The Lake Union/Ballard/Ship Canal area is the location of a complex of service activities related to the fishing fleet--shipyards, marine sales, moorage, suppliers, financial services, etc.

17. The DEIS at p. 84, describes characteristics which make Lake Union desirable for water-dependent development.

18. The EIS did not discuss the interrelationships within the industry and the "critical mass" of services necessary to be competitive with other areas seen by appellants. The "critical mass" refers to the grouping necessary to maximize the efficiency of operation.

19. Roy C. Allen of Allen Plumbing located on the H.C. Henry Pier described his business' need to have direct access to the ships to be competitive. Moving away from the water would not be efficient. His current lease terminates in 1985. He needs about 4,000 sq. ft. for his shop and warehouse but because of noise, fumes and traffic he could not co-exist compatibly with a restaurant.

20. A master use permit application for the Crazy Lobster restaurant which would be located on the site designated No. 22 in Figure VIII, DEIS, p. 75, adjacent to the subject site, was filed during environmental review of the Rusty Pelican proposal. DCLU personnel involved in the review became aware of the proposal after the FEIS had been sent to the printer so the fact of the application was not disclosed in the EIS. The personnel involved in making the decision in this case were aware of the application and its nature at the time of decision-making.

21. The total frontage of land on Lake Union is 25,830 lineal ft. The total area in waterfront lots is 8,245,480 sq. ft. South Lake Union has 6,760 lineal feet of frontage.

22. The Rusty Pelican site has 260 lineal ft. of waterfront and 125,000 sq. ft. of area, slightly more than one percent of both frontage and area of the lake and less than four percent of that at South Lake Union.

23. The Rusty Pelican, Crazy Lobster and H.C. Henry Pier sites combined represent about 2.7 percent of the lineal footage of waterfront on the lake and about 5 percent of the acreage. In South Lake Union the combination makes up about 10 percent of the frontage.

24. Of the waterfrontage in South Lake Union, 80.9 percent is in water-dependent use, 7 percent is in mixed use with some part water-dependent and 13 percent is either nonwater-dependent or is water-related use.

25. Of the 65 percent of the entire lake frontage currently in water-dependent use, 28 percent is industrial, 24 percent recreational, 13 percent mixed and 35 percent floating homes.

26. There are approximately 8,300 maritime jobs in King County.

27. Northwest Diesel Repair, on the subject site, has employed as many as 30 people in the past, 5-6 a few years ago, and only one currently.

28. Roy Ellis, an expert in economic aspects of maritime affairs, testified that the proposed change of use for the Rusty Pelican site and H.C. Henry Pier and Crazy Lobster sites would be unlikely to have any significant detrimental effect on the maritime industry in Seattle and would not have a substantial effect on the diversity of uses around the lake.

29. Mr. Ellis sees a net economic benefit to the City and King County from the proposal from the increase in jobs. He finds that no jobs will be lost because the existing business will relocate and new jobs will be created.

30. Bill Mundy, M.A.I. and expert in real estate economics research, did a recent survey of properties on Lake Union and found eight listed for sale. He reports that sites are available for water-dependent uses.

31. From a study done by Mundy and Associates, Inc., for the City, Economics of a Proposed Policy, Mr. Mundy concludes that water-dependent uses are similar in their ability to generate income so can bid competitively for land.

32. Appellant's fisheries expert, Dr. Dayton L. Alverson, and Respondent's fisheries expert, Dr. Robert L. Stokes, differ to some extent as to their opinions regarding the future makeup of the Alaska waters fishery industry. They agree that the crab fleet is declining. Dr. Alverson forecasts growth in the at-sea trawler/processors with new 200-300 ft. boats and new and converted ground fishing boats for joint venture fishing. Dr. Stokes believes there will be no large increase in number of boats. Crab boats will continue to be converted for joint venture arrangements as long as the government's policy toward foreign processors is reasonable but no new U.S. catcher/processors will be built absent unusual circumstances because of the economics involved, he opines.

33. If Dr. Stoke's forecasts are accurate, the demand for services, moorage, etc., in Seattle will not increase. Because of the longer periods for fishing for ground fish, the converted crab boats may find it more economical to locate their home base in Alaska, as well.

34. If larger ships are built, more moorage space with heavier docks would be required. If the ground fishing fleet increases from new construction, instead of just conversions, there could be more demand for marine-related services. Again, the ground fishing fleet in joint ventures would stay away longer periods and would not be seasonal.

35. Folke Nyberg, an architect and urban planner, testified that the design shown for Rusty Pelican in the EIS could be altered to provide parking underneath or space for retail or other use. His opinion did not take into account any specific site conditions or zoning regulations.

36. The Director conditioned the proposal to, inter alia, relocate the restaurant, increase public access to the water, reduce the amount of parking provided to 86 spaces and double the number of boat slips in the marina. As a result, the marina and accessory parking occupy the greater proportion of the site.

37. The area of the site to be devoted to the marina and accessory parking is 61 percent and to the restaurant and accessory parking, 39 percent.

38. The restaurant is expected to generate greater revenues than the marina.

39. The Director interprets "major use" as used in Economic Development Goal 2 to mean the use occupying the largest portion of the lot. Appellants' witness, Folke Nyberg, testified that the use occupying the largest area is not necessarily the "major" use.

40. Restaurant uses were permitted outright in the M zoned property in the US/LU shoreline environment prior to the amendment of the Shoreline Master Program to permit restaurants on the dry land portion of waterfront lots as a conditional use. The amendment was not effective as of the date of the Director's decision on the Rusty Pelican's application.

Conclusions

1. Appellants challenge the adequacy of the EIS as to its discussion of the proposal's relationship to the Goals and Policies for the Seattle Shoreline Master Program and the economic and land use impacts of the proposal, the range of alternatives considered and the document's clarity as to who the proponent is and which alternatives the Director has authority to impose as conditions. Various other deficiencies are alleged regarding the document as it relates to King County's lease of the land. Since the only proposal the City has jurisdiction over is that to establish a restaurant and marina, the Hearing Examiner is reviewing the document only as to its adequacy for that proposal.

2. The EIS must provide a "reasonably thorough discussion of the significant aspects of the probable environmental consequences...." Cheney v. Mountlake Terrace, 87 Wn.2d 338 (1976). This has been termed the "rule of reason". In reviewing whether the EIS meets this test the Hearing Examiner must give substantial weight to the Director's decision that the document is adequate. Section 23.76.36.

3. The discussion of the project's relationship with the Goals and Policies is sufficient to allow the reader to understand where the proposal is consistent and inconsistent with those goals and policies.

4. Appellants' evidence did not establish that the proposal is likely to have a significant adverse impact on the fisheries industry or on land use. No expert testified that it would and Respondent's expert witnesses opined that it would not. Since the impact is not certain to occur, the depth of discussion of the impacts on those elements is reasonable.

5. Seattle Marine Business Coalition assigns error to the Director's failure to include and analyze delay of the decision as an alternative. WAC 197-10-440(12)(a) requires inclusion of any reasonable alternative action which could feasibly attain the objective of the proposal. Proponent's stated objectives do not address timing, however, the alternatives considered must also be capable of being effected by the lead agency or one with jurisdiction. Section 24.60.430 requires the Director to make the decision on the substantial development permit within 15 days of the issuance of the EIS so a delayed decision would not be a reasonable alternative. No error was assigned to the failure of the EIS to include reserving the implementation of the proposal under the discussion of the relationship between short term environmental uses of the environment and maintenance and enhancement of long term productivity. WAC 197-10-440(9).

6. Though the EIS mentions the County's ownership of the property and objectives it is clear that the "proposal" is that of Rusty Pelican, the "proponent" or sponsor.

7. The Director's authority to impose various alternatives as conditions is not discussed in the document. This would not usually be an issue since only those alternatives which the agency

can require are "reasonable" and, therefore, required. This document, prepared for the County's use as well as the City's, includes alternatives which the Director has no authority to effect. An understanding of which agency has the authority to consider which alternatives could be helpful to the citizen desiring to address comments regarding the merits to the right decision-maker. There is no requirement that that information be included and the lack of clarity in that respect does not render the document inadequate.

8. Both appellants challenge the Director's decision as to conditioning the proposal. Seattle Shorelines Coalition urges that the project be required to include ship repair use to mitigate the loss of the existing facility to the industry. Seattle Marine Business Coalition assigns error to the failure to impose conditions to make the proposal conform to the Goals and Policies.

9. There is no evidence that the business itself will be lost to the industry.

10. The Director recognized that the proposal conflicts with some of the Goals and Policies and imposed certain conditions to make it more consistent. Even as conditioned, the project is not wholly consistent with the Goals and Policies because many of the policies are not intended to be site-specific but are for use in planning.

11. Section 25.04.190 gives the Director authority to deny or reasonably condition a project to mitigate adverse environmental impacts identified in the EIS based on policies developed pursuant to SEPA. To the extent that an adverse environmental impact is shown, the Shoreline Goals and Policies, which are listed in Appendix A to Chapter 25.04, may be the basis for mitigating conditions.

12. As to the conditions desired by appellants that the proposal be conditioned on greater water-dependency or inclusion of a commercial or industrial water-dependent or water-related use, the Director has increased the size of the marina thus increasing water-dependency. While the change in use from water-dependent industrial/commercial to nonwater-dependent/water-dependent recreational is listed as an unavoidable adverse impact, the Goals and Policies do not provide a basis for requiring commercial or industrial water-dependent uses over recreational water-dependent uses. Shoreline Use Goal 3 provides as policy that water-dependent use shall have priority but does not distinguish among them. Economic Development Goal 2, provides for multi-use development with the major use water dependent, again, not distinguishing among kinds of water-dependency. Therefore, under SEPA, the Director cannot require a particular type of water-dependent use.

13. Appellants urge that the "major use" should be that generating the greater revenue instead of that utilizing more land area. Where experts differ and one supports the Director's determination, the Director's determination should be affirmed if it is not shown to be clearly erroneous.

14. Appellants seem to contend that the project should be redesigned to move the restaurant farther back from the shoreline to be more consistent with Shoreline Use Goal 5. Assuming an adverse impact has been disclosed, there is no mitigating condition that can be reasonably imposed since the proponent is a private sponsor not shown to own any upland lots which could accommodate the use and the restaurant use is permitted in the US/LU environment. Merely moving the structure farther back on the waterfront lot would not "optimize shoreline use and access". Appellants' witness suggests that the building could be redesigned to accommodate parking underneath but did not offer any proof as to the feasibility of this design for the site even if the authority existed to require it and the redesign would, in some way, mitigate an adverse impact.

15. Appellants did not show any reasonable alternative, not already imposed by the Director, which would mitigate an adverse impact disclosed in the EIS which the Director had authority under SEPA-adopted policies to impose.

16. Other issues raised by appellants such as whether the "total proposal" includes King County's decision to accept Rusty Pelican's bid, etc., and those relating solely to the substantial development permit are without the jurisdiction of the Office of Hearing Examiner and are not considered.

Decision

The Director's determinations as to the adequacy of the EIS and the conditions imposed pursuant to SEPA are AFFIRMED.

Entered this 28th day of December, 1983.

M. Margaret Klockars
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Deputy Hearing Examiner

Notice of Right to Appeal EIS Adequacy

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App. 418 (1977); JCR 73 (1981). Should an appeal be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court.

Notice of Right to Appeal Failure To Condition

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 15th day after the date the decision appealed from is filed with the SEPA Public Information Center. The appeal must be filed with the City Clerk on the 1st floor of the Municipal Building. Rules have been adopted by the City Council governing the appeal procedure and should be reviewed prior to filing an appeal.