

FINDING AND DECISION

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OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

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In the Matter of the Appeal of

PAUL E. NOLAN

FILE NO. W-86-007

from a Environmental Determination  
of the Department of Construction  
and Land Use

Introduction

On October 31, 1986, the Department of Construction and Land Use (DCLU) Director issued an environmental determination of non-significance (DNS) for a proposed amendment of Section 23.44.10B of the Land Use Code. According to DCLU, the proposed amendment would prohibit the demolition of existing housing for the purpose of developing multiple contiguous undersized lots in Single Family residential zones; require new single family structures replacing old single family structures to be built on the same number of lots; and apply city-wide to all single family zoned properties. (Exhibit 1).

Paul Nolan appealed, by letter received by the Hearing Examiner on November 17, 1986, pursuant to Chapter 25.05, Seattle Municipal Code.

Robert Hale requested permission to intervene as an additional appellant by letter received by the Hearing Examiner on December 31, 1986.

This matter was heard before the Hearing Examiner on January 6, 1987. There was no objection to Mr. Hale's request to intervene and the Hearing Examiner verbally granted intervention at the beginning of the hearing.

Parties to the proceeding were the appellants, Paul Nolan and Robert Hale, each pro se; and the DCLU Director, by Assistant City Attorney Gordon Crandall.

DCLU, by letter received by the Hearing Examiner on December 26, 1986, requested clarification of portions of Nolan's appeal and a ruling on the relevancy of certain of Nolan's objections. A responsive letter from Mr. Nolan, dated January 2, 1987, clarifying and expanding the grounds for appeal, was received by the Hearing Examiner on January 1 (sic), 1987.

The Hearing Examiner responded to DCLU's request and at the beginning of the hearing, following oral argument by the parties, ruled on the relevancy of two of Nolan's objections, as follows:

1. The issue of whether DCLU's answers to questions in the environmental checklist were adequate is relevant in a SEPA appeal. (Section 25.05.680, Seattle Municipal Code).

2. The issue of whether DCLU should have included economic value considerations in its SEPA analysis, pursuant to RCW 43.21H, is not subject to review by the Hearing Examiner in a SEPA appeal. (Section 25.05.680, Seattle Municipal Code).

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 of law and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. In response to a request by the Mayor and City Council of Seattle to evaluate the impacts of small lot development on Seattle's single family neighborhoods, DCLU proposed to amend the Land Use Code, Section 23.44.10B1. The purpose of the proposed amendment was to stop demolition of existing housing for purposes of developing multiple contiguous undersized lots. (Exhibits 2 & 3).

2. According to DCLU, the proposed amendment, prohibiting the use of the lot size exception for new construction when an existing house straddling more than one lot is demolished, would: (a) mitigate negative impacts caused by housing demolition and density increases on neighborhoods with undersized lots; and, (b) preserve and reinforce the existing housing pattern in residential neighborhoods, because new structures replacing old would have to be built on the same number of lots used by the old. (Exhibits 2 & 3).

3. DCLU apparently began its evaluation as early as 1984. In July, 1984, DCLU prepared an extensive draft report entitled "Land Use Text Amendment - Small Lots in Single Family Zones" (herein the "1984 Draft Report"). (Exhibit 6). In the 1984 Draft Report, DCLU analyzed three general alternative approaches for the use of small lots and recommended: (a) retaining the then existing 1982 code provisions permitting individual use of existing platted, or otherwise established lots; and, (b) the addition of specific development standards designed to encourage or require the houses on small lots to appear more compatible with existing development. The DCLU recommendation was to be accomplished through amendments to Section 23.44.10B, Section 23.44.14C and to Section 23.44.14D. (Exhibit 6).

4. On October 28, 1986, DCLU published a "draft Director's Report on a Land Use Code amendment regarding small lot development" (herein the "1986 Draft Report"). (Exhibit 2). The cover letter attached to the 1986 Draft Report states, in part, that:

DCLU is also evaluating the broader issues and implications of the development of vacant undersized lots. A separate report and recommendation will be available for public review in early 1987. As a result of the study, DCLU may propose further amendments to the code regulations.

(Exhibit 2).

5. The 1986 Draft Report contained an analysis of (a) existing code provisions; (b) the distribution of undersized lots and their development; (c) problems with small lot development under Section 23.44.10B1; and, a recommendation and proposed text amendment. DCLU recommended that Section 23.44.10B1 be amended by using the proposed language contained in the 1986 Draft Report. (Exhibit 2).

6. On or about October 30, 1986, DCLU completed an Environmental Checklist (herein the "Checklist") based upon the the 1986 Draft Report. (Exhibit 1).

7. On October 31, 1986, DCLU reviewed the 1986 Draft Report and the Checklist and determined that the proposal does not have a probable significant adverse impact on the environment; and that an environmental impact statement is not required. (Exhibit 1).

8. On November 19, 1986, DCLU published its final Director's Report on the proposed amendment of Section 23.44.10B1 (herein the "1986 Final Report"). (Exhibit 3).

9. There is conflicting evidence about whether the analysis and the proposed text amendment in the 1986 Final Report is substantially the same as (Ip testimony) or significantly different from (Nolan testimony) the analysis and proposed text amendment in the 1986 Draft Final Report. Appellants argue that because the content of the two reports is different, DCLU was required to prepare another or revised checklist and conduct additional environmental review.

10. The pertinent information in the analysis sections of the 1986 Draft and Final Reports is substantially the same. (Exhibits 2 & 3).

11. Appellants testified that the description of the proposal was incomplete; and, that many of the answers to questions in the Checklist were incomplete, inadequate, speculative and/or non-responsive. Appellants argued that the City deliberately chose to minimize the impact of the proposal by its comments in the Checklist; and that DCLU's answers are misleading, impede effective public comment and, therefore, provide unreliable environmental information upon which to base a threshold determination. (Nolan and Hale testimony).

12. The description found at Section A-11 of the Checklist adequately defines the proposal. (Exhibit 1). When supplemented with the more detailed information, including the proposed text amendment in the 1986 Draft Report, the description of the proposal is complete. (Exhibit 2).

13. Except as provided below, DCLU's answers to questions in the environmental checklist were adequate and/or sufficiently responsive to permit an effective environmental review:

A. Background: In response to questions 6 through 9, DCLU could have: described City Council procedures for review and adoption of ordinances (proposed timing or schedule); identified the pending DCLU study evaluating the "broader issues and implications of the development of vacant undersized lots" and discussed the status of the "report and recommendations" that the study is expected to produce, (plan for further activity related to this proposal); identified the 1984 Draft Report and any other information relied upon in preparing the 1986 Draft Report and the proposed text amendment (environmental information that has been prepared that is directly related to the proposal); identified the agency reports that it expected to receive (environmental information that DCLU expected to be prepared that is directly related to the proposal); researched and identified building and other permit applications, pending at the time, in affected single family zones (applications pending for governmental approval); and, identified the required City Council vote, (a governmental approval that is needed for the proposal). (Nolan and Hale testimony, Exhibits 2 & 6).

B. Environmental Elements: DCLU relied primarily upon its analysis in the 1986 Draft Report to respond to questions about environmental impacts. The DCLU response would have been clearer if specific references had been made to pertinent portions of the 1984 and 1986 Draft Reports. (Nolan and Hale testimony).

14. Appellants argued that there are considerable impacts whenever 1,975 blocks of the City are affected and that DCLU's threshold DNS was incorrect because it did not find probable significant adverse impacts on: housing (reduction of medium-priced housing); transportation (increased use of highways and transit to access downtown from outside Seattle); aesthetics; public services (greater need for fire and police protection); utilities (inefficient use of energy resources in older homes); and, conflicts with other city policies (stops development of legally platted lots and affects the use and value of private property following fire or natural disaster). (Nolan and Hale testimony).

15. In Seattle, 790 blocks are platted in 25-foot wide lots, 485 blocks are platted in 30-foot wide lots and 700 blocks are platted in 40-foot wide lots. Most of these lots are located in SF 5000 zones. Each typical lot is 100 feet deep and each typical block has 48 lots, 24 on each side (Exhibit 2).

16. The 25-foot and 30-foot wide lots can be found in almost all parts of the City, but are concentrated in four areas: South Park, areas south and east of Columbia City, West Seattle's Hilltop area and the Greenlake/Phinney Ridge/Greenwood/West Woodland/Loyal Heights areas. (Exhibit 2).

17. All these undersized lots, except 35 blocks which are within the Greenbelts, are located within the built up areas of Seattle, therefore, housing demolition for purposes of developing multiple undersized lots can potentially occur in any part of these neighborhoods. (Exhibit 2).

18. There have been about 50 instances since the adoption of the 1982 Land Use Code amendments in which one existing house which straddled or used more than one undersized lot was demolished and replaced by multiple new houses. Those cases are scattered in different parts of the City, with a high concentration in northwest Seattle; and, in almost all cases, two houses were built to replace one on each 25-foot wide lot. (Exhibit 2).

19. If the trend continues, one effect of the proposal would be to prevent the construction of about 12 1/2 new homes per year in the Seattle area. (Nolan and Ip testimony).

20. While the construction of some houses on undersized lots involved demolition of an older home, others were built as infill housing on vacant lots. (Exhibit 2).

21. From June, 1982, to September, 1986, 100 new homes replaced houses which straddled or used more than one lot and were demolished. During the same time period, 247 new infill houses were built on vacant undersized lots. (Exhibit 2).

22. In 1984, DCLU reported that 1,000 houses in Seattle were subject to demolition (Exhibit 6, Nolan testimony) but it is uncertain how many of those houses are still "available" for demolition. (Nolan testimony).

23. Dramatic change in housing density has not occurred as a result of the 1982 Land Use Code amendment. Only about 2,000 new single-family houses have been constructed since the adoption of the 1982 code amendment, 347 (17%) of which were on undersized lots; and only 100 (5%) of which were constructed as replacement homes on undersized lots. (Exhibit 2).

24. Factors which can affect the likelihood that a house will be demolished include its habitability, condition, location, potential for sale (Nolan testimony), economic factors and interest rates (Ip testimony). These factors can affect the probability that this proposal will have a significant adverse effect on the environment.

25. Seattle's housing vacancy rate ranges from 3% to 20%. (Nolan testimony). The vacancy rate can also affect the probability that this proposal will have a significant adverse effect on the environment.

26. The total single-family housing stock in Seattle is about 133,000, therefore, less than 0.1% of the total housing stock consists of replacement houses on undersized lots. (Exhibit 2).

27. The proposal will result in impacts on housing and energy which were not reported by DCLU in the 1986 Draft and Final Reports or in the environmental checklist. Some houses which currently occupy contiguous undersized lots may be obsolete and could be demolished and replaced with two moderately priced houses. An effect of the proposal could be the elimination of housing opportunities in the \$70,000 to \$85,000 range. (Nolan and Hale testimony).

28. The proposal may decrease the attractiveness to home builders, including appellants, of purchasing homes which have reached the end of their economic life, and thereby eliminate an opportunity to increase the energy efficiency of a portion of Seattle's housing stock, through new home construction. (Nolan and Hale testimony).

29. DCLU acknowledges that the proposal will have an effect on the environment, but following analysis, concluded that the probable impacts are not significant over time and that no significant impacts are expected. (Ip and Waldman testimony, Exhibit 2).

30. Appellants cited as an additional basis for appeal that DCLU committed technical errors in preparing, filing and circulating the DNS and environmental checklist. Appellants testified that the DNS was improperly signed by Land Use Specialist Waldman rather than the DCLU Director; that DCLU failed to send copies of the proposal, the 1984 and the 1986 Draft Reports to the SEPA Public Information Center; that DCLU failed to provide proper notice to the Department of Ecology and other affected agencies; and that there was no affidavit of publication in the SEPA Public Information Center files. (Exhibit 8 and Burgor testimony).

31. Cheryl Waldman testified that she is authorized by her job description to sign DNS's on behalf of the DCLU Director.

32. The documents available at the SEPA Public Information Center and provided to witness Burgor include copies of: (a) the DNS; (b) the Environmental Checklist (each containing a description of the proposal); (c) the November 3, 1986, DCLU Bulletin entitled Land Use Information Service (containing at page 3 under the heading "Other Land Use Actions", notice of the DNS, a description of the proposal and its intent, a description of the appeals procedure, reference to the 1986 Draft Report and how to secure copies of same, a referral name, address and telephone number for persons who wish to make comments or have questions about the proposal, notice of a public meeting of the City Council's Land Use Committee and a referral name, address and telephone number for persons with questions regarding the Council's public hearing). (Exhibit 8, Burgor testimony).

33. Appellants argued that DCLU improperly failed to consider and include within its environmental review the broader issue of vacant undersized lots (Nolan testimony). DCLU testified that the issue of vacant undersized lots is a separate proposal.

34. On December 15, 1986, the Seattle City Council approved and passed Ordinance No. 113216, amending Section 23.44.010(B) of the Land Use Code. The ordinance was approved by Seattle Mayor Charles Royer on December 19, 1986, and, by its terms, will take effect 30 days thereafter. (Exhibit 4).

35. The ordinance contained additional terms which were not included in the proposed text amendment of the 1986 Draft Report or the 1986 Final Report and which appellants contend create significant new impacts which were not evaluated by DCLU. (Exhibit 4, Hale testimony).

36. DCLU witnesses testified that the additional language merely clarified the original intent of the proposed text amendment. (Ip testimony).

37. Of particular concern to Appellants is the language found in the last paragraph of the ordinance which adds as conditions under which a lot would be disqualified for the minimum lot area exception, "destruction by fire or act of nature." (Exhibit 4).

38. Appellants testified that the DNS should have been withdrawn by DCLU because new language and a revised format of the ordinance, as adopted, make direct comparison with the proposed text amendment in the 1986 Draft Report impossible. (Nolan testimony).

39. Appellants offered evidence that a proposal must be reevaluated if it changes or information in the checklist change prior to approval. (Burgor testimony).

40. DCLU did not prepare a new or revised environmental checklist based upon changes in the proposed text amendment because there was no significant change from the 1986 Draft Report. (Ip testimony).

41. DCLU did not withdraw or revise its DNS to enable environmental review of changes in the proposed text amendment. (Waldman testimony).

#### Conclusion

1. The Hearing Examiner has jurisdiction over these proceedings pursuant to Chapter 25.05, Seattle Municipal Code.

2. Seattle Municipal Code Section 25.05.680(B)(3) states that the Director's environmental determination shall be accorded substantial weight and that the appellant has the burden of establishing the contrary. To meet its burden, appellant must show that the DCLU decision was "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. If a proposal may have probable significant adverse environmental impacts, a determination of significance and environmental impact statement are required. Section 25.05.360(A). If not, a DNS is appropriate. Section 25.05.340. The term "significant" means a reasonable likelihood or probability of more than a moderate adverse impact or effect on the quality of the environment. Norway Hill v. King County Council, 87 Wn.2d 267, 278, 552 P.2d 674 (1976); Section 25.05.794.

4. The primary question before the Hearing Examiner is whether the Appellants have met their burden of showing that probable significant adverse impacts are likely to result from the proposal. Other questions raised by the Appellants include: whether changes in the analysis section of the 1986 Draft and Final Reports were significant enough to require DCLU to prepare a new Checklist and conduct additional environmental review; whether the proposal was properly defined; whether DCLU's answers to Checklist questions were reasonably sufficient to permit evaluation of possible environmental impacts of the proposal; whether DCLU followed SEPA procedures regarding signing of the DNS, and notice and circulation of the proposal and the DNS; whether DCLU was required to evaluate the issue of vacant undersized lots along with this proposal; and, whether changes in the terms and format of the proposal required DCLU to prepare a new checklist and perform additional environmental review.

5. Appellants failed to show that changes in the analysis sections of its 1986 Draft and Final Reports were significant enough to require DCLU to prepare a new environmental checklist and to perform additional environmental review.

6. The proposal was properly defined for the purpose of SEPA environmental review. The "proposed text amendment", when read in the context of the 1986 Draft Report, described the proposal in terms of its objectives by a preferred course of action. Section 25.05.060(C).

7. DCLU could have responded to questions in the background section of the Checklist with information that would have further clarified the proposal and assisted decision makers. The SEPA policies of full disclosure and consideration of environmental values require actual consideration of factors before a determination of no environmental significance can be made. Norway Hill v. King County Council, supra. at p. 275. However, the missing information did not include "environmental values", was provided in other sections of the Checklist by reference and/or was referenced in subsequent notices provided pursuant to SEPA procedures. Therefore, DCLU substantially complied with applicable SEPA policies and goals. Sections 25.05.030, 25.05.100.

8. DCLU properly used the "incorporation by reference" procedure for including its analysis from the 1986 Draft Report into its Checklist responses to questions about impacts on environmental elements. Sections 25.05.090 & 25.05.635. DCLU concluded and appellants failed to disprove that the information provided in response to questions in the environmental elements portion of the Checklist was reasonably sufficient to evaluate possible environmental impacts of the proposal. Sections 25.05.335 & 25.05.960.

9. The weight of the evidence supports DCLU's conclusion that this proposal has no probable significant adverse environmental impacts. Appellants' reliance on the fact that over 1,900 blocks of property is potentially affected by the proposal is insufficient to establish probable significant adverse environmental impact. Therefore, the DNS must be affirmed.

10. DCLU is required under SEPA procedures in some cases to send the DNS and environmental checklist to agencies with jurisdiction, the Department of Ecology, and affected tribes, the SEPA Public Information Center, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under 25.05.510. Sections 25.05.340(B)(1)(2).

11. DCLU is further required to use reasonable methods to inform the public and other agencies that an environmental document is being prepared or is available and that public hearings, if any, will be held. Sections 25.05.502(6) and 25.05.510.

12. Copies of all DNS's filed with the city and a DNS register containing a listing of all DNS's made by the City during the previous year, must be maintained by DCLU at the SEPA Public Information Center for public inspection. Section 25.05.510.

13. Notice of DNS's shall be provided as required by Section 25.05.510(D).

14. The DNS was properly signed by an authorized staff member of the DCLU Director and the notice and circulation requirements of SEPA were met. Section 25.05.502(F) & 25.05.510.

DCLU was not required to circulate the DNS and environmental checklist pursuant to Section 25.05.340(B)(2). because the DNS was not issued pursuant to Section 25.05.340(B)(1), DCLU's failure to send a copy of the proposal and DNS to Metro was not error because Section 25.05.340(B)(2) does not apply. Moreover, DCLU concluded that Metro's services would not be significantly impacted by the proposal. There are no other agencies with jurisdiction over the proposal, other than DCLU. (Exhibit 2, Ip and Waldman testimony, Section 25.05.714(C).

15. DCLU was not required to perform one combined evaluation of the construction of housing on vacant undersized lots issue and the issue of demolition of existing housing for the purpose of developing multiple contiguous undersized lots. The two proposals are not related closely enough to be, in effect, a single course of action. Appellants provided no evidence that the two proposals cannot be implemented simultaneously, that they are interdependent parts of a larger proposal or that they depend on a larger proposal as justification for their implementation. Section 25.05.060(C)(2).

16. The additional language and reorganized format of the ordinance is not a significant change in the proposal.

17. Appellants' evidence failed to show that DCLU's conclusion was clear error and there is no evidence of significant new information indicating that the proposal would have significant adverse environmental impacts.

18. The Hearing Examiner has previously concluded that the DNS was not procured by misrepresentation or lack of material disclosure of information. Therefore, it was not necessary for DCLU to perform additional environmental review based upon clarifying modifications to the language of the proposal. (Section 25.05.330(C)

#### Decision

The declaration of non-significance is AFFIRMED.

Entered this 21st day of January, 1987.

  
Christopher E. Mathews  
Hearing Examiner Pro Tempore

#### Concerning Further Review

The decision of the Hearing Examiner in this case is the final administrative determination of the City, 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 must be filed with the Superior Court pursuant to Chapter 34.04, RCW. Should such request be filed and a transcript required, instructions for preparation of a verbatim transcript are available from the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104.