

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

In the Matter of the Appeal of

QUEEN ANNE-MAGNOLIA NOISE  
ABATEMENT GROUP

FILE NO. MUP-87-050(W)  
APPLICATION NO. 8701702

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

Introduction

Appellant, Queen Anne-Magnolia Noise Abatement Group, appeals the decision of the Director, Department of Construction and Land Use, to issue a determination of non-significance and her failure to impose additional mitigating conditions for a proposal by Burlington Northern Railroad Company to establish a diesel locomotive servicing facility at 3630 Gilman Avenue West.

The appellant exercised the 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 October 26, 1987. The record remained open for submission of memoranda on certain legal issues.

Parties to the proceedings were: appellant by its attorney, Peter T. Jenkins, the Director, Department of Construction and Land Use, by John Doan, land use specialist, and the applicant, Burlington Northern Railroad Company, by Newell D. Smith, Kurt W. Kroschel and Associates.

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. Burlington Northern Railroad Company ("Burlington") applied for a master use permit to establish use for future construction of a lunch/locker room, parking area and locomotive servicing facility. The Director, Department of Construction and Land Use, ("Director") issued a determination of non-significance for the proposal and imposed certain conditions. Appellant, Queen Anne-Magnolia Noise Abatement Group ("NAG"), filed the instant appeal of those decisions as related to the locomotive service facility.

2. The existing locomotive servicing facility for the Interbay railroad yard is located at the north end of the yard just west of the roundhouse, south of Emerson Street. The location of the proposed facility is at the south end of the yard, about in line with Newton Street, some 6,000 ft. distant from the existing facility. The existing facility is enclosed within a building and can accommodate four locomotives at one time. The new facility would not be enclosed and could accommodate eight locomotives.

3. The railroad yard was zoned IG at the time of application and decision. Since that time the zoning designation has been changed to IGI U/45.

4. In addition to considering the environmental checklist,

the Director considered a sound level survey performed by a Burlington employee under the direction of the consulting engineer, a soils engineer who had not previously done noise testing. Based on these documents, the Director concluded that there would be adverse noise impacts but that they would not be significant. The Director's written analysis recognizes that the existing railroad yard generates high noise levels and the topography of the area results in noise impacts on residences on the hillsides. The testimony of the Director's staff showed the basis of the decision to be that there would not be additional noise or a change in the time of activity which generates the noise but that the noise would be shifted to the south. The distance of the move was believed to be 600 ft. instead of a distance closer to 6,000 ft.

5. The noise information provided by Burlington's consulting engineer was not detailed. The land use specialist found it to be sufficient, however.

6. The land use specialist has had no formal training in noise level analysis.

7. A condition requiring the planting of trees was imposed by the Director to reduce noise, among other effects. At hearing the Director's staffperson stated that the intent of the condition was directed more to aesthetics than noise reduction.

8. The railroad yard occupies the flat base of a "bowl" with the hills of Magnolia and Queen Anne rising up on both sides. The south end of the railroad yard is flanked on both sides by the Naval Supply Depot. The hillsides are residential except for a commercial area on both sides of 15th West.

9. The new facility would contribute to greater efficiency in the yard. Because many functions such as refueling, load testing, sanding, major repairs, etc., are located in close proximity to each other at the north end of the yard and there is only one line in the fueling station, there is great congestion and a need to move the locomotives around constantly to gain access to the different facilities. Locomotives awaiting fueling line up from the north. When they are refueled they line up south of the facility awaiting a call into use. Locomotives waiting for fueling and to be sent out are kept running because it is cheaper than to stop and restart them.

10. No new activity would result from the new facility. Burlington represents that existing activity would diminish due to the more efficient layout which would eliminate the need to shuffle locomotives and for them to idle as long.

11. At the present time there is intermittent movement of locomotives at the south end of the yard in the area of the proposed facility.

12. The existing service facility is enclosed in a building, some 30 to 35 ft. high, with doors. That building will be used for light maintenance when the new facility is operational. Burlington has shifted to unenclosed fueling facilities except where extreme weather conditions require enclosure.

13. The Environmental Protection Agency (EPA) regards a limitation to an average of 55 dBA necessary to protect human health. A level of 55 dBA outside a typical house would measure 32 dBA inside with all windows closed. Other studies show that a level exceeding 32 dBA indoors at night may cause annoyance and at 40 dBA significant sleep disturbance.

14. Low frequency sounds (like those from locomotives) are attenuated less by structures than higher frequency sounds. A lowering of a sound level of only ten dBA by a closed house is likely for low frequency sounds.

15. An increase of more than five dBA is considered a significant change in noise level. An increase of ten dBA is a

doubling of the noise level.

16. The topography of the area has a great influence on the noise situation of the area. With flat conditions, noise is attenuated by the ground and intervening structures. With receiving properties on hillsides there is a direct line of sight to the noise source so there is no attenuation except from the distance and, to a slight degree, the atmosphere.

17. The locomotives awaiting fueling at the existing facility are in a cut and therefore, may not be in the line of sight of many of the residences in that area.

18. The closest residences with line of sight to the railroad yard are 1,300 ft. to the east and 1,400 ft. to the west of the site of the proposed facility. Burlington's study considered houses approximately 2,000 ft. away.

19. Readings of locomotives taken by a Burlington employee showed that the mid-range of sound generated by one locomotive at 100 ft. is 67 to 69 dBA. One reading, which was above 70 dBA, may have been affected by a nearby refrigerator car.

20. The maximum permitted noise level for locomotives is 70 dBA at 100 ft.

21. The sound at 1,300 ft. from eight idling locomotives emitting 68 dBA would be 55 dBA. With one more locomotive moving at a throttle setting of two to three, the combined level could be around 57 dBA.

22. Assuming a "worst case" of average noise generation of 70 dBA at 100 ft. by each locomotive and eight locomotives idling at the facility, the sound received at the residence 1,300 ft. away would be 57 dBA. If another locomotive is moving at the same time, assuming a medium (4) throttle setting, the combined level at 1,300 ft. would be 60 dBA. Since the throttle setting would actually be between one and two, the noise produced would be less than that.

23. Studies done for the Port of Seattle of nighttime noise levels in the area showed that a railroad was the dominant source of noise. The A-weighted Leq from two locations, one on the Queen Anne hillside and one on the Magnolia hillside, between 10:00 p.m. and 2:00 a.m. range from 48.1 to 59.1 dBA.

24. The sound level projected from eight idling and one moving locomotive at 1,300 ft. is 9 dBA above the existing average levels between 1:00 and 2:00 a.m. and 7 dBA above the City's nighttime standard. An increase of 9 dBA constitutes a significant change in noise level.

25. The current level of noise emanating from the railroad yard is very high and has been increasing. James Smith, who lives at 1410 11th West, presented a record of the number of times per night that noise awakens him. Complaints over the years have not resulted in appreciable improvement but there is a Mayor's committee currently attempting to address the problem.

26. Curt Horner, supervisor of the noise abatement project of the environmental health division of the Health Department, was asked by the Director's staff to evaluate the noise impact of the proposal. He based his opinion on his understanding that the proposed activity already exists some 600 ft. from the proposed location with the same day/night split and on his opinion that the level of noise generated in the yard is already excessive. He believes the amount from the proposed facility would be below the level of noise in general and be overshadowed.

27. Two moving diesel locomotives are allowed by federal regulations to generate up to 93 dB at 100 ft. Even if the level during idling per engine at 100 ft. is 75 dBA, (Horner's view of "worst" case) or 84 dBA with eight engines idling, which would be 61.7 dBA at 1,300 ft., there would be no appreciable change,

according to Horner, because of the much higher level of noise being generated by moving locomotives in the yard. The record does not show nighttime noise at levels this high at receiving properties.

28. Horner agreed that if eight locomotives generating 70 dBA were idling at the same time, the noise at 1,300 ft. would be significant. However, if each generated 68 dBA and the moving locomotives are already present at the south end, then the increase at the points of reference in the Port studies would change only 3-4 dBA which is within the "slight" impact range.

29. Horner testified that in his opinion the consulting engineer did not do a good job on the noise study and that if Horner was not so familiar with the characteristics of noise in the area he would need better data.

30. Appellant's noise consultant, Jan Hauge of Towne, Richards and Chaudiere, opined that there is a reasonable probability of a significant noise increase from the proposed facility in the surrounding residential neighborhood.

31. The land use specialist believed that trees have some ability to mitigate noise impacts. Trees, as proposed, however, would not have an appreciable noise attenuation effect. In general, trees are not an effective means of attenuating sound. For low frequency sounds it takes several hundred feet of forest to get any significant attenuation.

32. The land use specialist was not aware that the existing refueling facility is enclosed within a building.

33. The amount of noise attenuation from the building enclosure has not been determined.

#### Conclusions

1. Respondent, Burlington, filed a motion to dismiss this appeal based upon federal preemption of local governmental regulation of noise emissions by railroad yards pursuant to 42 USC 4916(c)(1).

2. The federal regulation states:

...No state or political subdivision may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

42 USC 4916(c)(1).

3. The procedural requirements of SEPA, providing for consideration of the environmental impacts of a proposal, are not preempted by federal law. Even though the preemption is explicit in the Noise Control Act of 1972, *supra*, procedural aspects of SEPA, specifically the preparation of an environmental impact statement (EIS), are not preempted since their purpose is not to "adopt or enforce any standard" conflicting with those established by the federal regulation but to "assure(s) that the environmental cost will be fully considered...." ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979).

4. Further, the preparation of an EIS, if required, would not have the effect of enforcing standards stricter than federal noise standards. Respondent assumes that the only function of an EIS is to serve as the basis for mitigating conditions. An EIS is chiefly a full disclosure document. Sisley v. San Juan County, 89 Wn.2d 78, 89, 569 P.2d 712 (1977). The analysis of alternatives in the EIS assures that all possible approaches to the problem to be solved by the development are considered.

Grazing Fields Farm v. Goldschmidt, 15 ERC 1285 (D.C. Mass. (1980)).

5. The evidence shows that the noise level at the closest of the new receiving residential properties will increase significantly during the nighttime. The Director's assumption that the same amount of noise would be moved a short distance south was shown to be in error. The current noise emission from the facility was shown to be likely to be attenuated by an enclosure but there is no enclosure included in the proposal. Moreover, appellant showed that there is question whether the determination also assumed similar topographical conditions when that conditions at the south end of the yard are different from the north end. Since the determination was based upon an erroneous assumption, it should be remanded to the Director for further consideration.

6. A request pursuant to Section 25.05.340.C(1)(c) for remand of the decision was received from the Director dated November 12, 1987. Since the examiner had concluded that a remand was required, the remand will be ordered based upon that determination rather than upon the request of the Director, however, the Director will be permitted to make full consideration of the new facts and the correction desired.

7. The Director's substantive authority to impose conditions to mitigate the noise impacts of this proposal is preempted by the federal regulation. The imposition of a condition to reduce a noise level below that permitted in the federal regulations would serve effectively to enforce a higher standard which is not permitted. There appears to be no question that the imposition of conditions is equivalent to regulation in the cases cited by respondent. Appellant offers California v. Department of the Navy, 624 F.2d 885 (1980), regarding that state's authority to deal with air pollution from jet engine test cells as analogous to this case. In California v. Navy, the state regulation was permitted as long as the regulation did not affect the engine itself. Appellant urges that this reasoning would allow the City to impose a condition, such as requiring enclosure of the facility, because the condition would not interfere with the federal interest of uniformity of standards which affects interstate commerce. The scheme of the federal Clean Air Act is that the states are responsible for implementing the standards which standards must be at least as strict as the federal standards but that certain moving sources of pollution are exempted, or their regulation is preempted. The issue before the court was whether an engine in a test cell was intended to be exempt so the intent of Congress had to be considered. Under the Noise Control Act, all local regulation inconsistent with the federal regulations is preempted. The cases are not analogous because the approaches of the regulations to the problem are quite different.

8. Appellant urges that since the refueling facility is not specifically addressed in the noise regulations, local regulation is not preempted. This argument was answered in Baltimore and Ohio R. Co. v. Oberly, 606 F. Supp. 1340 (Del. 1985). The outline of the history of the regulations controlling railroad noise showed that the EPA had concluded that its standards for equipment were sufficient to control emissions from the rail facilities. A conscious decision that separate standards are unnecessary has "as much preemptive force as a decision to regulate." Baltimore, supra, at 1344, citing Arkansas Elec. Co-op. Corp. v. Arkansas Public Commission, 461 U.S. 375, 103 S.Ct. 1905, 1912, 76 L.Ed. 1 (1983); Ray v. Atlantic Richfield Co., 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1977).

9. Since the City cannot regulate noise from the locomotives in any way, the motion to dismiss as to appellant's appeal of the Director's failure to impose conditions to mitigate noise impacts should be granted.

Decision

Respondent's Motion to Dismiss Appeal Based upon Federal Preemption Pursuant to Rule 1.4 is denied as to the appeal of the DNS and is granted as to the appeal of the Director's determination as to the imposition of conditions pursuant to Section 25.05.660. The matter is remanded for consideration by the Director of the effect of the new or corrected information. The Hearing Examiner retains jurisdiction of the matter. The Director shall give notice to the parties of her determination after her reconsideration. If her decision is to reaffirm the DNS, any objection to that determination must be filed with the Office of Hearing Examiner within 10 days of service of that determination. If objection is filed, the examiner will determine whether further proceedings are necessary prior to issuance of the final decision. If the Director concludes that her decision to issue a DNS was incorrect, she may withdraw the DNS pursuant to Section 25.05.340C and issue a DS or take other appropriate action.

Entered this 16th day of November, 1987.

M. Margaret Klockars  
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Deputy Hearing Examiner