

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

HOWARD LEV,  
JAMES MANNING AND  
JEFFORY A. WILSON

FILE NOS. MUP-89-025(W)  
MUP-89-026(W) and  
MUP-89-029(W)  
APPLICATION NO. 8800448

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

#### Introduction

Appellants appeal the determination of nonsignificance issued by the Director, Department of Construction and Land Use, for a 40-unit apartment building proposed for 420 Melrose Avenue East.

The appellants 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 July 10, 1989.

Parties to the proceedings were: appellants, Howard Lev and James Manning, pro se; the Director, Department of Construction and Land Use, by Patrick Doherty, land use specialist; and the applicant, Lee Associates, by Robert Baronsky, Beresford, Booth, Baronsky & Trompeter.

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. Lee Associates applied for a master use permit to demolish three single family houses and to construct a 40-unit apartment building at 420 Melrose Avenue East. The Director, Department of Construction and Land Use ("Director"), issued a determination of nonsignificance (DNS) and approved the application subject to certain conditions. Appellants filed these appeals.

2. The subject site is zoned Midrise (MR) and is on west Capitol Hill, midblock on the east side of Melrose Avenue East. The site contains 14,225 sq. ft. and slopes down from east to west at an average grade of around 25 percent with slopes as steep as 50 percent. The site has a great variety of large trees, shrubs and other vegetation. The site is elevated well above the street.

3. The proposed building is to be made up of two modules of units stepping up the hillside. The downhill (westerly) module will have five floors. The uphill module is to be four levels of residential units plus a penthouse over two levels of parking. The height to the roof of the downhill module is to be 45.5 ft. above the street and the uphill module, 52 ft. above the alley. Looking at the site from the west across the freeway, the building would appear to be 9 to 10 stories high.

4. A total of 54 parking spaces for the 40 units is proposed with all vehicular access off the alley which is

required to be widened. Pedestrian access will be available from Melrose Avenue.

5. Buildings in the area range greatly in height. There are a few single family houses, a number of buildings in the three to six-story category and 10 and 12-story buildings. On the north side of the site is a single family house near Melrose and a duplex near the alley. The next lot north is developed with a 10-story, 112-unit building. South of the subject site is a 6-story, 49-unit building. To the east, across the alley, are 6-story, 34-unit and 3-story, 24-unit buildings.

6. The MR zone extends to the north, east and south of the subject site. The I-5 freeway is to the west at a lower level.

7. All parties concede that utilization of on-street parking in the area far exceeds capacity. Hazards are created by cars parked illegally and issuance of parking tickets does not appear to solve the problem.

8. Melrose Avenue East is a residential access street and is 24 ft. wide with parking only on the east side.

9. Bellevue Avenue East, the next street to the east, is a collector arterial and transit corridor. It connects to Denny Way and Olive Way, the closest east-west arterials.

10. The proposed building is projected to generate 250 average weekday trips with 27 in the PM peak period.

11. The Director's staff found 14 other developments proposed in the area which would add 517 units of housing.

12. The applicant was required to provide a traffic analysis of the impacts of the proposal and that of other proposals known to the Department. The study addressed the intersections of Melrose and Bellevue with East Denny and Olive Ways. The consultant found that the addition of the project traffic would result in a negligible increase in traffic congestion and an imperceptible effect on levels of service (LOS). The project's traffic, cumulated with that from the other development proposed, would add slightly to the delay at the intersections reducing the LOS at the intersection of Bellevue Avenue and East Olive Way from B to C, still an acceptable LOS.

13. The 27 vehicles during the PM peak would use Bellevue Avenue turning to or from either East Harrison and East Republican Streets. These are low traffic volume intersections and typical as to safety and space for Seattle streets, according to the consulting traffic engineer.

14. Car ownership on west Capitol Hill was found to average one car per unit by a survey earlier this year. The survey included units comparable to those proposed. The Department decided that this rate is reasonable for the area considering the excellent transit service to downtown and numerous shopping, recreational and employment opportunities within walking distance.

15. The provision on-site of 1.35 parking spaces per unit would be adequate to meet the parking demand generated by the proposed units so no spillover onto area streets is reasonably foreseeable.

16. Two of the houses to be demolished do not have on-site parking so contribute to the demand for on-street parking.

17. The site is not identified as being environmentally sensitive so detailed grading and drainage plans were not required for SEPA review but will be required for construction permits. A drainage plan has been submitted to the Department with runoff detained on site.

18. The maximum height permitted in the MR zone is 60 ft.

19. Because the building will start above the street level it will give the perception of greater height. To alter that perception the Director required landscaping in the intervening right-of-way and in the front setback.

20. Residential units to the east of the site have views to the west, unimpeded by anything existing on the site except for the trees. The proposed building will eliminate views across the site. There are no designated public places with views across the site.

21. The downtown and the I-5 freeway are nonattainment areas for carbon monoxide. The addition of CO due to additional automobile trips would be slight.

22. The site is in a green area on Capitol Hill. Even with the proposed and required landscaping, the amount of vegetation would be substantially reduced.

23. The DNS issued by the Director identified adverse impacts from or on construction, view, traffic, height, bulk and scale, air quality, stormwater runoff, airborne emissions and increased energy consumption. None of these impacts was found to be significant.

#### Conclusions

1. The Hearing Examiner has jurisdiction over these parties and this subject matter pursuant to Section 23.76.022C.

2. The Hearing Examiner is required to give substantial weight to the determinations of the Director. Section 23.76.022C7. The burden then is on appellants to show those determinations were clearly erroneous. Brown v. Tacoma, 30 Wn.App. 762, 637 P.2d 1005 (1981).

3. An environmental impact statement is required for proposals which may have a probable significant adverse environmental impact. Section 25.05.360. If the Director determines there would not be a significant adverse impact he is to issue a DNS. Section 25.05.340. "Significant" means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." Section 25.05.794. Appellants have not shown that the Director's determination that there will no significant adverse impact is in error.

4. The Director has authority to impose conditions requiring measures to mitigate adverse impacts subject to several limitations. Section 25.05.660. Two of these limitations prevent the Director from imposing conditions in addition to those already imposed. One is that the measures be based policies or regulations formally designated as the basis for exercise of this authority. The other applicable limitation is that the adverse impact must be identified in the environmental document.

5. The loss of view opportunities over the site was identified in the DNS but SEPA policies specifically exclude private view protection through project specific review. Section 25.05.675P.1(f). Therefore, the Director was correct that, despite the impact, no condition could be imposed.

6. Since the Director found that the height, bulk and scale of the proposed structure would fit within the range of structures in the vicinity, no condition was imposed except landscaping to address the appearance of greater height due to the elevation of the site above the street. Even if the height, bulk and scale of the structure was determined to be an adverse impact, the SEPA policy has been interpreted to authorize conditioning to reduce the height, bulk and scale only when there are unusual circumstances which would not have been contemplated in the zoning of the area or when the project is on the edge of a zone where problems of transition are not fully accommodated by the zoning. In re Oden Investment, C.F. No. 293557 (1985). That

approach has been more recently affirmed in In re Paulson, C.F. No. 296647 (1989). Since the site does not present unusual circumstances except for the elevation, which has been addressed, and is not on an edge there is no authority for imposition of further conditions.

7. The Director's determination that there will be no parking spillover, so no impact to mitigate, was not shown to be in error.

8. Since the DNS identified only a very slight effect on traffic circulation, the decision not to impose mitigating conditions was not shown to be erroneous.

9. The Grading and Drainage Control Ordinance establishes the requirements for drainage measures unless certain conditions are present. Section 25.05.675C.2. Since the site is not located in an environmentally sensitive area, not shown to be an area where drainage facilities are known to be inadequate and does not drain into streams identified as bearing anadromous fish, no conditions may be imposed based solely on SEPA authority.

10. The SEPA policy on air quality requires the finding of a substantial adverse impact and that federal, state and regional regulations are inadequate to address the problem before mitigating measures pursuant to SEPA may be imposed. The Director's determination that there would not be a substantial adverse effect was not shown to be erroneous.

11. Vegetation is protected under the SEPA policies if the project would "reduce or damage rare, uncommon, unique or exceptional plant or wildlife habitat, wildlife travelways, or habitat diversity for species (plants or animals) of substantial aesthetic, educational, ecological or economic value." Section 25.05.675N. Appellants did not sustain their burden of proof as to any of these features.

12. Since the Director's determination was not shown to be clearly erroneous, the decision must be affirmed.

#### Decision

The decision of the Director is affirmed.

Entered this 30th day of July, 1989.

  
M. Margaret Klockars  
Deputy Hearing Examiner

#### CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 23.76.024, a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center, 5th Floor Municipal Building, 684-8322. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to Section 23.76.024, the time for filing a request 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 City Council appeal.

If no appeal is taken to the City Council, 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 fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.22.(C)(12)(c). Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. 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 fifteen days of the date of this decision. See Chapter 43.21C, RCW and Chapter 25.05, Seattle Municipal Code.

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 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, Room 1320 Alaska Building, 618 Second Avenue, 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 the taped transcript of testimony and evidence to be reviewed. Parties are encouraged 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.