

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

In the Matter of the Appeal of

PORTAGE BAY ASSOCIATES

FILE NO. MUP-89-070(W)
APPLICATION NO. 8806885

from a decision of the Director of
Construction and Land Use on
a master use permit at
3230 Eastlake Avenue

AND

In the Matter of the Appeal of

PORTAGE BAY/ROANOKE PARK COMMUNITY COUNCIL
ROANOKE PARK ASSOCIATION
EASTLAKE COMMUNITY COUNCIL

FILE NO. MUP-89-071(W)
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INTRODUCTION

These consolidated appeals came on for hearing before Hearing Examiner Pro Tempore Gordon F. Crandall on January 30, February 2 and February 13, 1990. Appellant/respondent Portage Bay Associates (PBA) was represented by Alison Moss. Appellants Portage Bay/Roanoke Park Community Council (PB/RP) and Roanoke Park Association (RPA) were represented by Shirley Mesher. Appellant Eastlake Community Council (ECC) was represented by Christopher K. Leman. The Department of Construction and Land Use (DCLU) was represented by senior land use specialist Patrick Doherty.

Preliminary

The appeals were filed on November 21, 1989, and the matter was originally set for hearing on January 9, 1990. No prehearing conference was scheduled. The representative of PB/RP and RPA requested replacement of the Hearing Examiner Pro Tempore for bias, based on his long service as an assistant city attorney representing the City and DCLU in land use matters, and a perceived bias in favor of DCLU and commercial interests. On January 3, 1990 the Acting Hearing Examiner denied the request.

Thereafter, the Hearing Examiner Pro Tem continued the hearing previously set for January 9, 1990 and a prehearing conference was held instead on that date. An order was entered on the prehearing conference, dated January 12, 1990. The hearing was reset for and held on January 30, and February 2, 1990. A third day, February 13, 1990, was added later. Appellants were permitted to submit additional testimony in writing after the hearing.

Following the conclusion of the hearing, the parties were requested to submit final argument in writing, and all parties did so. After due consideration of the testimonial and documentary evidence and the arguments submitted by the parties, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on these appeals. For purposes of this decision and unless otherwise indicated, all sections numbers refer to the Seattle Municipal Code (SMC).

FINDINGS OF FACT

1. The applicant, PBA, proposes to construct a four-story mixed use structure on a site at 3230 Eastlake Avenue East in Seattle containing 26 apartment units, two levels of administrative offices and underground parking for approximately 54 vehicles.

2. The site is located on the east side of Eastlake Avenue East on three platted lots. Total frontage is 150 feet, and the lots are 107 feet in depth. Total lot area is 16,050 square feet. A fifteen foot alley abuts the lots to the east.

3. The site is 120 feet south of the intersection of Eastlake Avenue East and Fuhrman Avenue East. The lot to the north is improved with an office building three stories in height. The lot to the south is improved with a two and one-half or three-story single family residence. The area to the east across the alley is improved with several small apartment buildings and some single family residences. Along Fuhrman Avenue East east of Eastlake Avenue East are the Red Robin restaurant and several large apartment buildings. The west side of Eastlake Avenue East is developed with a mix of retail sales and service uses, including restaurants and large office buildings.

4. The zoning of the site is Neighborhood Commercial 2 with a 40 foot height limit (NC2/40'). The area to the east across the alley is zoned Lowrise 3 (L-3). The block further to the east across Franklin Avenue East is zoned for single family uses (SF 5000).

5. The site is within the "Eastlake Corridor," a densely developed part of the city bounded by the Freeway, Lake Union, The University Bridge and East Galer Street, plus the area north of East Allison Street lying east of the freeway.

6. The proposal is to construct a four-story mixed-use residential/-commercial structure housing 26 apartment units and 6,711 square feet of commercial office space, together with 54 on-site parking spaces. The structure would be 120 feet wide along Eastlake Avenue East, and the maximum structure depth would be 85.5 feet. The ground floor would contain 4,500 square feet of office space and 28 parking spaces, accessed from Eastlake Avenue East at the south end of the project. Vehicles would exit the ground floor from the north end of the project. Parking here would be reserved for commercial tenants and for residential spillover by residents and visitors. The second floor would have 3,000 square feet of office space, two apartment units and 28 parking spaces, accessed from the alley at the north end of the site. Parking here would be reserved for residential tenants. The third and fourth levels would have 12 apartment units each.

7. The site slopes to the east and the alley rises from north to south. Thus from the east only three of the four stories are visible at the north end of the site and only two stories are visible at the south end.

8. The front of the building would be landscaped with trees in the street right-of-way. Additional landscaping would be provided along the alley. Shrubs and ground cover are planned for the site, and covered decks are located at all four corners.

9. The applicant was required to fund a transportation impact analysis for the project. The applicant was also required to contribute to a cumulative analysis of the proposal and four other projects proposed within the Eastlake Corridor.

10. In the cumulative traffic analysis, the impacts of five proposed projects were assessed. The five projects are:

- 1800 Eastlake Avenue East. 46 unit apartment with 13 long-stay hotel rooms and 6,248 square feet of commercial space.
- 2901 Eastlake Avenue East. 47,200 square feet of office space, 11,340 square feet of retail space and two apartment units.
- 3100 Fairview Avenue East. A 32 unit apartment building.
- 3316 Fuhrman Avenue East. 18,300 square feet of office space and 6,000 square feet for a rowing club.
- this project at 3230 Eastlake Avenue East.

The five projects are expected to generate 332 PM peak hour trips. The study concludes that:

- Most turning movements at Eastlake Avenue East and Fuhrman Avenue East currently operate at LOS F in the PM peak hour, and this will continue with or without the cumulative projects. Installation of a recommended signal at this intersection would improve the level of service to C. An increase in traffic on Fuhrman Avenue East would be an undesirable side-effect of this signal.
- The intersection of East Lynn Street and Eastlake Avenue East which currently operates at LOS C in the PM peak hour would drop to LOS E with the cumulative projects, with LOS F conditions on westbound East Lynn Street and LOS E/F for southbound left turns onto Eastlake Avenue E.
- The intersection of East Lynn Street at Boylston Avenue East currently operates at LOS F in the PM peak hour, which will continue with or without the cumulative projects.
- The intersection of East Roanoke Street at Boylston Avenue East currently operates at LOS D/E, and will continue to do so with the cumulative projects.
- The intersection of East Roanoke Street at Harvard Avenue East currently operates at LOS F. In 1991 LOS F will continue, and westbound movements will be at failure conditions. The addition of the cumulative project traffic will add to and increase the delays and backups. The westward leg would improve to LOS C with geometry improvements. The signal improvements would improve traffic flow through the East Roanoke Street intersections.
- No specific mitigation was suggested for Fuhrman Avenue East, and further study was suggested to determine whether the number of through trips on this street was unacceptable.

11. In the project specific analysis, four nearby intersections were studied, with and without the traffic which the project would generate. The four intersections studied in the project-specific transportation study were: Eastlake Avenue East at Harvard Avenue East, Harvard Avenue East at East Allison Street, Eastlake Avenue East at Fuhrman Avenue East and Eastlake Avenue East at East Allison Street. A total of 339 average weekday trips and 38 PM peak hour trips will be generated by the project. The levels of service at all of the intersections will remain unchanged, and the additional traffic from the project will have a negligible impact on these intersections.

12. Most turning movements at the intersection of Eastlake Avenue East and Fuhrman Avenue East operate at level of service (LOS) F, indicating unacceptable delays. A traffic signal has been found warranted by the Seattle Engineer Department for this intersection, which would improve the LOS to C. The local community opposes such a signal because it believes that it would encourage the use of Fuhrman Avenue East as a by-pass from the University bridge to SR 520 at Montlake Blvd. East.

13. The Department of Construction of Land Use imposed as mitigation an obligation to fund a portion of any signals installed within five years at Eastlake Avenue East and East Lynn Street and Eastlake Avenue East and Fuhrman Avenue East, and geometry improvements at East Roanoke and Boylston Avenue East and East Roanoke and Harvard Avenue East. The pro-rata amount of the cost to be contributed was 4%, .8%, .6% and .6%, respectively. DCLU did not require that any of the improvements be in fact constructed.

14. Left turns into Eastlake Avenue East from the project may be difficult if not impossible at times due to queues forming to turn left southbound into Harvard Avenue East. On the other hand, a "no left turn" restriction from the project would increase traffic on Franklin Avenue East, an essentially residential street. DCLU required a sign prohibiting left turns onto Eastlake Avenue East from the project.

15. The project will impair the views of properties to the east of the project. In addition, the project will shade properties to the east during the afternoon and evening. The project will not block the view from or shade any public places protected by the SEPA policies.

16. DCLU required the applicant to join a Cumulative Transportation Management Committee soon to be formed by DCLU, Metro and the Seattle Engineering Department.

17. Parking demand for the project is 47 spaces. The construction of the project will displace an existing parking use of the property by a flower vendor and adjacent property owners of up to 25 parking spaces.

18. The Land Use Code requires the provision of 36 parking spaces. The proposal is to provide 54 spaces. DCLU has required that seven of the spaces on the lower level be provided to accommodate spillover parking from the project and the nearby Anhalt Building when it is remodeled.

19. Ordinance 114630, as amended by Ordinance 114899, adopts interim standards for mitigation of impacts of land development on traffic and the environment in the Northgate area. The standards of the ordinance apply to proposals which would generate more than 30 PM peak hour vehicle trips. The ordinance requires mitigation or denial of a proposal when intersections impacted by the proposal will be degraded. The ordinance applies only in the Northgate area, and does not preclude or limit the application of SEPA to projects with transportation impacts.

20. The project height is approximately 39.6 feet on the Eastlake Avenue East frontage plus parapets and chimneys, and the building is 145.4 feet in width. The height of the building is generally the same as the buildings to the north and south, and with some of the buildings to the east. The zoning of the block to the east is L-3, which formerly had a height limit of 37 feet and now is limited to 30 feet. The rise in elevation of the site to the east and south mitigates the bulk of the building when viewed from the east, where it appears to be a 2-3 story building.

21. At the time of the Director's Decision, a lawsuit was pending in which an adjacent property owner claimed a portion of the development site by adverse possession. The Director required the applicant to hold the City harmless from any damages which might result from the failure of the owner to successfully resolve this issue. During the hearing, the attorney for the applicant advised the Hearing Examiner that the lawsuit had been settled and that the applicant had legal control of the entire site.

22. A DNS with conditions was issued on the project on November 6, 1989.

CONCLUSIONS

1. This appeal of the Director's Decision on a master use permit is authorized by SMC 23.76.022. A DNS is a type II decision appealable to the Hearing Examiner and a decision to approve, condition or deny a project based upon SEPA Policies is a type III decision appealable to the Hearing Examiner and also to the City Council. SMC 23.76.006.

2. An appeal under the foregoing sections may be initiated by any person significantly effected by or interested in the permit. SMC 23.76.022C2. All appellants have standing to appeal the foregoing decisions.

3. Appeals under SMC 23.76.022 are considered de novo, and the Hearing Examiner may consider issues which relates to procedural compliance, compliance with substantive criteria, DNS's, adequacy of EIS's or failure to properly approve, condition or deny a permit based upon disclosed adverse environmental impacts. SMC 23.76.022C6.

4. The Director's decisions on SEPA issues are given substantial weight. SMC 23.76.022C7.

Traffic

5. The impacts of the project upon nearby intersections will be minimal. No evidence was submitted to refute the conclusions of the Director that the addition of 38 PM peak hour trips or 339 average weekday trips would constitute and imperceptible increase in traffic at impacted intersections. Some of the intersections are operating at LOS F, however, and any increase in such intersections must be mitigated.

6. The Director conditioned the project upon an agreement to pay the fair share of certain intersection improvements:

- 0.8% of the cost of a traffic signal at Eastlake Avenue East and Fuhrman Avenue East.
- 4% of the cost of addition of a left turn signal phase at Eastlake Avenue East and East Lynn Street;
- 0.6% of the cost of geometry improvements at East Roanoke Street and Boylston Avenue East, and
- 0.6% of the cost of geometry improvements at East Roanoke Street and 10th Avenue East.

During the hearing the Director offered to eliminate all but the East Lynn Street conditions. The Hearing Examiner declines the Director's offer. Any proposal which exacerbates conditions at intersections already operating close to failure must be mitigated. An agreement to pay a fair share of the cost of improvements which would counteract the project's impact is appropriate mitigation, even though some or all of the improvements may never be constructed.

7. The condition requiring a sign on the Eastlake driveway indicating "no left turn" must be sustained. Permitting left turns across the queue lanes for the Eastlake/Harvard intersection is hazardous at best and a movement which the applicant concedes would not likely be attempted in any event. The addition of traffic on Franklin Avenue as a result of the restriction which totals only 12 vehicles in the PM peak hours is an acceptable impact for this safety-related condition.

Parking

8. The land use code requires 36 spaces for this project. Additional parking may be required under SEPA when the project site presents unusual circumstances which would result in adverse environmental impacts which substantially exceed those anticipated by the land use code, or the project creates undue impacts based upon cumulative effects. Seattle Municipal Code 25.05.665D. The parking demand is 47 spaces. The applicant proposes 54 spaces. This project replaces existing on-site parking of up to 25 spaces including two spaces occupied by an existing tenant (flower vendor). The parking provided is adequate for the project, and no further mitigation is indicated. The project cannot be required to satisfy parking demands generated by other sites, even if those other sites are owned by the applicant. Grader v. Lynnwood, 45 Wn. App. 876 (1986).

9. The Director required the applicant to provide a minimum of seven on-site spaces in its garage to minimize cumulative parking spillover impacts from the project and the remodeled Anhalt Building when it reopens. In effect, the Director has required the applicant to provide off-street parking for another building which will probably have inadequate parking. This condition is not justified, and is likely precluded by the rationale of Grader v. Lynnwood, *supra*. The condition should be stricken as it relates to the Anhalt Building.

Height, Bulk and Scale

10. SMC 25.05.675G2, a SEPA Policy, provides that it is the policy of the City that the height, bulk and scale of development projects should be

reasonably compatible with the general character of development anticipated by the adopted Land Use Policies for the area in which they are located, and to provide for a reasonable transition between areas of less intensive zoning and more intensive zoning. The proposal is compatible with both the existing and anticipated height, bulk and scale of its vicinity. No conditions on height, bulk and scale are indicated.

11. The views of some properties to the east will be obstructed, and some shading will occur in the afternoon and evening hours. The SEPA policies do not permit conditions to protect private views, which are protected only through height and bulk controls of the land use code. SMC 25.05.675P. The same result obtains for shading of private property. Seattle Municipal Code 25.05.675Q.

Adverse Possession

12. Accepting counsel's assurance that the adverse possession lawsuit has been settled and that the applicant now owns or controls the entire site, this point is now moot. The Hearing Examiner is moved to comment, however, that the Director's solution of merely requiring the applicant to hold the City harmless from any damages arising out of the claim was inappropriate. The case of Halverson vs. Bellevue, 41 Wn. App. 457 (1985) holds that when it appears that an applicant may not own or control a site, a plat of the property should not be granted until such question is resolved. The same procedure should probably apply to development permits.

Cumulative Effects

13. The City's cumulative effects policy provides that a project may be conditioned or denied to lessen or eliminate its cumulative effects on the environment when it is determined that the project will use more than its share of present and planned facilities, services and natural systems. This determination is to be made after considering the project together with prior, simultaneous and future development, or after taking into account known future development under established zoning. SMC 25.05.670B. The Hearing Examiner concludes that only traffic impacts are subject to the cumulative effects policy, and that mitigation imposed to deal with such effects is sufficient.


DNS Decision

14. A DNS should be issued for a project when it is determined that the project will not have a significant effect upon the quality of the environment, using the procedures of SMC 25.05.300 et seq. The evidence submitted does not persuade the Hearing Examiner that the Director's DNS was error.

DECISION

The decision of the Director requiring that on-site spaces be reserved for the Anhalt Building is REVERSED. In all other respects the decision of the Director is AFFIRMED.

Entered this 15th day of March, 1990.


Gordon Crandall
Hearing Examiner Pro Tempore

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 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, 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.