

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

In the Matter of the Appeal of

**EARL B. DILLER and
ELIZABETH CAMPBELL**

**FILE NOS. MUP-90-050(W)
MUP-90-051(W)
APPLICATION NO. 9000101**

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

Introduction

This matter concerns property at 1201 1st Avenue.

Appellants exercise the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code, regarding the adequacy of the environmental review and the mitigating conditions applied to the subject project under Seattle's SEPA Ordinance, Chapter 25.05, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on October 15 and 16, 1990. The Hearing Examiner visited the subject property on October 29, 1990 and the record on this matter was officially closed following that visit.

Parties to the proceedings were: appellant, Earl B. Diller, pro se; appellant Elizabeth Campbell, represented by Gregory Hill; applicant Harbor Steps Development Company represented by attorney Robert I. Heller; and the Director, Department of Construction and Land Use (DCLU), by John Doan, senior land use specialist.

Prior to hearing, the applicant filed a motion to consolidate, dismiss claims and to expedite hearing. Parties responded to the motion in writing and at the pre-hearing conference held on July 24, 1990. All parties were represented at the pre-hearing conference, at which time witness lists were exchanged and oral argument given on applicant's motion to dismiss.

The Hearing Examiner issued a prehearing order consolidating the two appeals, affirming the October 15, 1990 date of hearing, instructing as to certain procedural matters, and ruling on the elements of the appeals subject to the dismissal motion. The motion to dismiss was granted as the following: population and housing, light and glare, shadows, public views, and parking.

The prehearing order also specified that appellant Diller's pending appeals before the Hearing Examiner (File Nos. MUP-88-883 and S-90-005) which relate to the parking lot which currently exists on a portion of the project site, would be heard after this decision is issued by the Hearing Examiner.

In June 1990, appellant Diller requested that DCLU provide an interpretation regarding SEPA issues related to the subject project. The Director denied the requests, finding that the issues raised not subject to the interpretation process .

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

After due consideration of the evidence and as a result of personal inspection of the subject property and the surrounding area by the Hearing Examiner, the following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings

1. Appellants Diller and Campbell appeal the adequacy of the Director's SEPA review and conditioning of the subject project and request increased and/or modified conditions. Appellant Diller also appeals the adequacy of final the supplemental environmental impact statement (PSEIS) asserting factual errors regarding the project's background, project description, environmental conditions and impacts, and insufficient response to public comments.
2. The applicant, Harbor Development Company (Harbor), has applied for a master use permit (MUP application #9000101) for the demolition of two existing buildings (Erickson and Oceanic) and the future construction of four mixed-use buildings containing residential, hotel, and retail uses, with associated parking. The project, between First Avenue and Western Avenue, consists of 2.3 acres located along the western edge of the downtown central business district (CBD).
3. The subject property is comprised of four "sites": the Southeast (SE) site, bounded by First Avenue, Post Alley, Seneca and University Streets; the Southwest (SW) site, bounded by Post Alley, Western Avenue, Seneca and University Streets; the Northeast (NE) site, bounded by Post Alley, First Avenue, and University Street extending 120 feet north of University Street; and the Northwest (NW) site, bounded by Post Alley, Western Avenue, University Street and extending 120 feet north of University Street.
4. The subject project would consist of two 16-story buildings and two 24-story buildings containing a total of 650 residential units, 300 hotel rooms, and 71,000 sq. ft. of

commercial retail space. The buildings comply with Title 23 zoning development standards.

5. The portions of Post Alley and University Street between the four sites have been vacated so that the sites could be consolidated to allow underground parking for 892 vehicles. The conditions of street vacation require that these sections of both Post Alley and University Street be made available for 24-hour pedestrian corridors through the project.
6. The vacated portion of University Street is to be developed into a public staircase with fountains, landscaping, street furniture and lighting. This staircase is intended to be a park-like connection between the business/commercial area of First Avenue and the waterfront area of Western and Elliot Avenues, giving rise to the project being referred to as "Harbor Steps". From the sidewalk at First Avenue there is an abrupt drop-off (approximately 40-45 feet) down to the level of Post Alley and Western Avenue. Currently there is no vehicle or pedestrian connection. Until it was demolished in 1985 under a street use permit, a wooden trestle provided a pedestrian connection between First and Western Avenues (and historically, provided vehicular access to buildings adjacent to University Street).
7. At present, the northeast and northwest sites are occupied by the Erickson and Oceanic Buildings, respectively. The southwest site and most of the southeast site are currently used as surface parking lots.
8. In the northern portion of the southeast site, near the base of the retaining wall and the vacated University Street right-of-way, are a dozen large cottonwood trees (some are tall enough so that their tops extend above the level of First Avenue).
9. Other development in the vicinity south of the subject property includes mid-rise buildings with retail and other commercial uses along First Avenue (with residential and office uses in the upper floors). A 22-story building is being constructed at First and Seneca and, a block to the south, is the 22-story Watermark Tower. To the east, in the downtown CBD, commercial and retail uses predominate along street frontages and building heights are considerably higher (e.g., 55-story Washington Mutual Tower, 43-story Key Bank Tower). Immediately east, at the northwest corner of First Avenue and University Street, the new Seattle Art Museum is currently being constructed. East of the subject property are low-rise brick buildings containing office and other commercial uses.
10. The history of proposed development involving some or all the subject property has been extensive. In 1981, Harbor proposed a 26-story residential structure atop a 9-story hotel on the SE site. In 1982, a master use permit (MUP) was issued for the SE site and an application filed for development on the other three sites. This latter project needed a

rezone to accommodate an 8-story building on the NE site, a 12-story building on the SW site, and a 35-story building on the SE site. The rezone was finalized in 1984 and in 1988 Harbor applied for a MUP to develop consistent with that rezone.

11. An environmental impact statement (EIS) was prepared in 1981 for the original proposal and another in 1982/83 on the second proposal. In 1988 a supplemental environmental impact statement was required when Harbor applied to construct consistent with the rezone. By the time the draft supplemental EIS (DSEIS) was published, an alternative proposal was considered "preferred". This preferred alternative, which is the subject of the Director's analysis and decision appealed here, includes the same types and intensity of uses but substantially modified the sizes of the buildings so as to conform to the development standards of Title 23 zoning rather than the larger dimensions allowed under Title 24 to which the project had previously vested. The previous, Title 24, application remains active but only the "preferred" alternative has been subject of the Director's decision. Harbor will have to cancel one of the applications in order for DCLU to issue a master use permit.

12. The Director used the six environmental impact statements in the preparation of the analysis and decision. Seventeen conditions are attached to the decision, including requirement for: plans for exterior glass; 10 ft. by 10 ft. sight triangles at driveway exits; limiting construction hours; and, a Transportation Management Plan.

13. Section 25.05.44 of the City's SEPA ordinance establishes those elements which are to be considered the "environment" for purposes of the City's review process.

14. In his appeal, appellant Diller questions the adequacy of the Director's assessment of impact and the sufficiency of the Director's conditions regarding the following elements: earth (soil stability and shoring), plants and animals (removal of cottonwood trees), population and housing (need for low income housing), noise (increased levels due to "canyon effect"), light and glare (need to limit reflectivity and reduce shadow cast on new art museum), land use (height, bulk and scale dwarfing other buildings; view corridor inadequate; transportation (inadequate capacity of streets, entrances, and exits; inadequate parking provided on-site); stairs and hillclimb assist (escalator and elevator inadequate/inconvenient), recreation (question of existing park and need for downtown open space).

15. Appellant Campbell seeks mitigation regarding the following: height, bulk and scale (proposal incompatible with neighborhood), land use (auto skybridge inconsistent; pedestrian/vehicle conflicts), public facilities (barrier-free route and escalator inadequate), transportation (driveway locations; need for signal).

16. The Hearing Examiner's prehearing order dismissed a number of issues initially raised by appellants because the relief sought was beyond the scope of authority granted by Section 25.05.675. Issues remaining on appeal at the time of hearing related to: earth impacts; plants and animals; open space/park; skybridge; escalator location; barrier-free routes within the project; height, bulk and scale; and traffic. This decision is limited to a consideration of these issues insofar as they are cognizable under Chapter 25.05.

Earth Impacts

17. Appellant Diller questioned the adequacy of proposed construction methods (i.e., use of lag bolts) and sought to require use of a licensed engineer.

18. No testimony was presented regarding lag bolts. Testimony was entered to the effect that soils in the area have shown differential settling as reflected in changes in the structural fit of a least one building. The original proposal in 1981 was subject to a soils and foundation study. The Director's decision notes (consistent with information received from the Seattle Engineering Department) that there appears to be some instability along the First Avenue sidewalk, but that the existing retaining wall appears stable. The Director looks to the project's compliance with the City Grading and Drainage Control Ordinance to provide necessary mitigation. The existing retaining wall is to be reinforced and structural plans must meet the approval of both DCLU and SED.

19. Denny P. Onslow, Vice President and General Manager of Harbor Development Company, has consulted structural engineers regarding the foundation requirements. He testified that Harbor will continue to use licensed professionals and comply with all code requirements for excavation and shoring and foundation design and construction.

Plants and Animals

20. Section 25.05.675.N. provides the authority to relocate or reduce projects, limit uses and operations, and retain existing vegetation if:

"...a proposed project would reduce or damage rare, uncommon, unique or exceptional plant or wildlife habitat...of substantial aesthetic, educational, ecological or economic value..."

21. Appellant Diller sought the retention of the existing cottonwood trees which were planted in 1974 after the demolition of the buildings which formerly occupied the southeast site. Groups of trees of this size are not generally found in the downtown area. Credible testimony indicates that birds or various species used to frequent the site but in recent years numbers have declined, so that finches, crows and other species better adapted to the urban setting now predominate.

22. The Director found the trees "attractive" in the downtown urban environment but of marginal value and in a poor location (i.e., 40 ft. below First Avenue at the base of the retaining wall) to be appreciated. The Director further found that the retention of the trees would be an unreasonable mitigation because it would require substantial changes, even the elimination of some of the project, and possibly some change in the staircase.

23. No evidence indicates that the species, size, or other characteristics of these trees suggest they are rare or that any valuable habitat is provided by them.

Skybridge

24. The auto skybridge has been eliminated from the project. A 9-12 ft. wide pedestrian skybridge may be present in the final design. No testimony or argument was presented at hearing indicating any environmental impacts or need for mitigation relative to a pedestrian skybridge.

Public Services - Parks

25. Around 1971, there was an attempt to create an "urban recreational site" under the Seneca Street ramp of the Alaskan Way viaduct, between Post Alley and First Avenue. At that time the Mayor requested and was granted authorization by the City Council to seek State grant monies to acquire and develop several urban sites.

26. No evidence was presented indicating that Seneca Street was ever vacated for park purposes or that any land associated with the subject property had been acquired for park purposes.

27. In 1974, as an interim measure after the demolition of the building that had occupied the southeast site, the area was landscaped (see discussion above regarding the cottonwood trees), improved with pathways, and used by the public. In the early 1980's most of the trees were removed and a surface parking lot developed.

28. No evidence was presented that establishes the southeast site as a public park but appellant Diller indicated his belief that the public had, through approximately fifteen years of use, evolved a prescriptive right to the use of the southeast site as a park.

29. Project residents and hotel guests will increase the demand for open space and recreational opportunities downtown. Open space and recreational opportunities in the vicinity of the project include Pier 62/63, Westlake Park, the new art museum, and the "street park" to be developed as a part of this project.

Public Services - Escalator Location and Barrier-Free Routes

30. Appellants assert that the City Council's requirement for an escalator from Western Avenue to Post Alley as a part of the vacation of University Street and Post Alley, means that the escalator will be a "public facility", and brings the escalator design and location within the ambit of SEPA review and conditioning.

31. Section 25.05.675.0., Public Services and Facilities, provides authority to condition (including improving or adding services or facilities) where a project "would result in adverse impacts on existing public services and facilities". "Public services and facilities" includes "facilities such as sewers, storm drains, solid waste disposal facilities, parks, schools, and streets and services such as transit, solid waste collection, public health services, and police and fire protection, provided by either a public agency or private entity."

32. To access the escalator and elevator proposed as the "hillclimb assist" from Western Avenue up to Post Alley, one would enter the building on the southwest site approximately 30 ft. south of the foot of the public staircase. The up-only escalator would be within a few feet of the entrance and the elevator would be approximately 50 ft. away. Upon reaching Post Alley one would have to leave the elevator, and go to another elevator located in the southeast site building in order to reach First Avenue. The escalator is not proposed to continue from Post Alley up to First Avenue.

33. Appellants assert that the escalator and elevator being proposed within the building on the southwest site, would be inconvenient and dangerous for the public because it is separated from the public staircase by the retail uses which are proposed to line the south side of the staircase. Further, the one-way nature of the escalator and the non-direct route to access the elevator are seen as dangerous to users due to the existence of potential hiding places which could be used by criminals.

34. Testimony of the representative of the Seattle Police Department regarding the relative safety of the proposed hillclimb assist was not supportive of the contention that the proposed location or configuration would be especially dangerous for users.

35. To mitigate what appellants perceive as adverse impacts relative to the proposed escalator, they suggest that it should be a two-way escalator located immediately adjacent to the south side of the staircase. The applicant objects to this location because the escalator would form a barrier between the staircase and the retail uses.

36. Appellants argue that the elevators within the project are located in such a way as to be inconvenient for persons in wheelchairs. They seek SEPA mitigation in order to improve what they see as a less than optimum arrangement. The applicant asserts that

Harbor will provide barrier-free access in compliance with building codes and that this is not a subject within the authority of SEPA or the jurisdiction of the Hearing Examiner.

Height, Bulk and Scale

37. Appellants argue that the height, bulk and scale of the project will be incompatible with the surrounding neighborhood and that the decision should be remanded to DCLU with the requirement that the buildings be made smaller. Appellant Campbell seeks to have the buildings on the southeast and southwest sites limited to 100 ft. wide above the fourth floor, have the buildings along both sides of the staircase set back at least 30 ft. one-story above the University Street/First Avenue intersection, set back the southwest building 90 ft. above the fourth floor, split or modulate the buildings to break up the facades, and provide additional modulation at the tops and ends of the buildings. The requested modifications would leave more light and air between buildings, reduce the size and appearance of bulk, reduce the shadows cast by the buildings, and provide a greater view corridor down University Street from the University Street/First Avenue intersection.

38. SEPA policies authorize mitigation to reduce height, bulk and scale impacts where applicable codes do not anticipate and properly mitigate impacts and there are substantial problems of transition in scale not specifically addressed by applicable zoning. Section 25.05.665.D.

39. The northeast and southeast sites (on the uphill side of the property) are zoned Downtown Mixed Commercial with a 240 ft. height limit (DMC 240) and the northwest and southwest sites are Downtown Mixed Commercial with a 160 ft. height limit (DMC 160). Across First Avenue, uphill and east of the property, the zoning is DMC 240 for one-half block then, at mid-block it becomes Downtown Office Core 1 with a 450 ft. height limit (DOC 1) which extends for several blocks. South of the subject property, across Seneca, the zoning follows the same pattern. To the north, the rest of the block which contains the northeast and northwest sites, has the DMC 240 and DMC 160 zoning; beyond Union Street the zoning becomes Pike Place Mixed with an 85 ft. height limit. Across Western Avenue, to Alaskan Way, the zoning is DMC 160.

40. Exhibit 5 indicates that the Land Use and Transportation Plan for Downtown Seattle (LUTP) intended that the heights of buildings would step up from the waterfront (i.e., allow taller buildings as distance from the waterfront increases). Policy 15 of the LUTP states that this pattern of height limitations is to "provide transition to the edges of downtown". Credible testimony at hearing established that the development standards of the downtown zones - specifically the maximum height limits - implement the height concept of the LUTP by allowing increasing heights in successive blocks uphill from the waterfront.

41. The LUTP also envisioned the preservation of view corridors down public streets to the waterfront by increasing building setbacks for blocks closer to the waterfront. This telescoping setback, with the greatest setbacks nearest the waterfront, was also translated into code development standards for the downtown zones.

42. As currently proposed, the project conforms to the use and development standards of the DMC 160 and 240 zoning.

Traffic Access

41. Two access driveways are proposed on First Avenue. The driveway north of University Street would be provided for access to the hotel on the northeast site and a limited access (for loading/unloading and approximately ten parking spaces) to the residential building on the southeast site would be between University and Seneca Streets. Movements at both driveways would be limited to only right turns in and out; no left turn entering or exiting would be permitted.

43. First Avenue is a Class I pedestrian street and public policy disfavors having driveways cross the sidewalk as proposed here. When vehicles cross the sidewalk, it can result in pedestrian/vehicle conflicts and potential for accidents as well as disrupting pedestrian progression. Also, vehicles waiting in the street for driveways to be clear of pedestrians can cause disruption and traffic delays.

44. Neither University or Seneca Streets go through to or from First Avenue, and without direct access on First Avenue, Western Avenue would be the only route to the project.

45. The Director's analysis and decision looked at four options for configuring driveway access, including no access on First Avenue. With the elimination of direct access at First Avenue, traffic impacts increase considerably at Western Avenue intersections over the impacts anticipated with access on First Avenue. The impacts to First Avenue intersections would not be substantially lessened with the elimination of access driveways on First Avenue; pedestrian/vehicle conflicts would be reduced there but increased at the Western Avenue driveway access points.

46. In weighing the adverse impacts of access on First Avenue against the increased impacts with that access eliminated, the Director concluded that access on First Avenue was the preferable option.

Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.76, Seattle Municipal Code.

2. The Hearing Examiner must give "substantial weight" to the Director's decision. Section 23.76.022.C.7. The burden is on an appellant to overcome this weight by proving that the decision is "clearly erroneous". Brown v. Tacoma, 30 Wn. Ap. 762, 637 P. 2d 1005 (1981). Under this standard of review, decisions of the Director can be overcome only when the reviewer is left with the definite and firm conviction that a mistake has been committed. Cougar Mt. Assocs. v. King County, 111 Wn. 2d 742, 747, 765 P. 2d 264 (1988).

3. Section 25.05.660 provides the authority to impose mitigating measures as conditions of approval subject to certain limitations: 1) conditions must be based upon policies, plans, rules or regulations designated in the Seattle Municipal Code as a basis for the exercise of substantive authority; 2) the conditions must be related to specific adverse environmental impacts clearly identified in an environmental document; 3) the conditions must be reasonable and capable of being accomplished; and 4) responsibility for mitigation must be proportional to the extent of the impact caused by the subject proposal. Section 25.05.660.A.

4. No evidence has been presented that supports the contention that compliance with applicable codes and the use of licensed professional engineers, is not adequate to address the potential earth impacts.

5. The loss of the existing trees on the southeast site does not represent a significant impact and retention of the trees would not be a reasonable mitigation.

6. No testimony or argument was presented regarding any potential impacts or mitigation related to the proposed pedestrian skybridge and this issue is hereby dismissed from the appeal.

7. Evidence was not presented which supports the contention that a public park on the subject property was established by the City. The Hearing Examiner does not have jurisdiction to determine if prescriptive rights have evolved, but the evidence does not suggest that they have.

8. The development of the public staircase and the provision an escalator and elevator available for public use, does not represent an adverse impact to existing public facilities. The stairs, escalator and elevator will provide access where no access currently exists. While some may argue that what is proposed is less than the optimal configuration, there is no adverse impact recognizable by SEPA policies that would support requiring modifications.

9. The adequacy of barrier-free access for circulation within private developments is controlled by the building code compliance. The code has not been shown to be

inadequate or otherwise meeting the requirements of the overview policy and conditioning under SEPA is not appropriate.

10. The SEPA policy regarding height, bulk and scale declares that it is the City's policy that the height, bulk and scale of development projects be generally consistent with the adopted land use policies and should provide for a reasonable transition between areas of less intensive zoning and more intensive zoning.

11. As a certainty, the proposed buildings will be very large and development of the project will result in a dramatic change in the subject property. However, the buildings are of a size and scale specifically anticipated by zoning to provide transition. By complying with the use and development standards of Title 23 for the applicable zones, this project provides adequate transition in height, bulk and scale. Incompatibility between the proposed development and existing development(s), and/or preferences for smaller structures or structures of different design, do not form the basis for the application of SEPA mitigation.

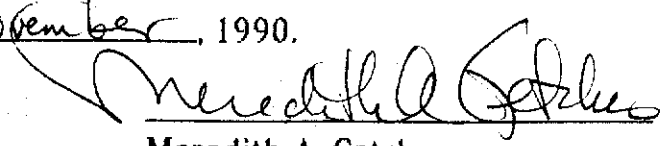
12. The impacts associated with the limited vehicle access proposed on First Avenue have not been shown to be so substantial as to conclude that the Director erred in allowing that access rather than eliminate it and incurring additional adverse impacts to Western Avenue intersections. The evidence supports the Director's conclusion, involving a difficult impact "trade-off", is reasonable one.

13. Reasonable minds may disagree as to how much mitigation is necessary in order to reduce impacts. After reviewing the evidence elicited at hearing, and hearing the arguments of all parties, the Hearing Examiner is not left with the firm and definite conviction that a mistake has been made. The Director's conditions bear a reasonable relationship to the adverse impacts anticipated from the project and the Director did not err in requiring those conditions rather than other conditions.

Decision

The Director's decision is **AFFIRMED**.

Entered this 13th day of November, 1990.


Meredith A. Getches
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 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, 400 Yesler Building, 5th Floor, 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.