

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**RICHARD LUNDQUIST
CENTRAL NEIGHBORHOOD ASSOC.
AND
CENTRAL NEIGHBORHOOD ASSOC. ET AL.**

Hearing Examiner Files:
**MUP-90-101(W)
MUP-90-103(W)
S-91-004**

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

DCLU Application:
8506175
DCLU Interpretation:
90-019

**ORDER
ON REQUEST FOR
RECONSIDERATION**

The applicant, O'Day, submitted a motion for reconsideration to the Hearing Examiner on February 27, 1992. Applicant asserted that there is new evidence, that the Hearing Examiner failed to consider all the data in the record regarding the scarcity of property with the characteristics of the subject property, and the applicant's desire to amend the application.

The appellants object to the requested reconsideration arguing that the Hearing Examiner has limited authority to reconsider her decisions and that applicant has not established good cause for reconsideration.

The Hearing Examiner Rules do not address reconsideration and it has been the practice of the Hearing Examiner to consult the Superior Court Civil Rules for guidance in dealing with requests for reconsideration. CR 59 includes, inter alia, the following grounds for reconsideration: irregularity in the proceedings; misconduct; accident or surprise; newly discovered evidence that could not, with reasonable diligence, have been discovered and produced at trial; no evidence to justify the decision; and error in law.

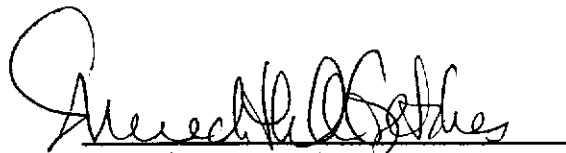
The evidence that applicant asserts is "new" regarding the purchase of adjacent property, smaller tower footprint, and smaller studio building may arguably have evidentiary value but are all factors in the control of the applicant and could have been (and, in the case of the potential for a smaller tower footprint, was) presented at hearing by the applicant.

The argument that data was presented at hearing regarding the relative scarcity of possible sites for the proposal, is not persuasive. The exhibits referred to in the applicant's motion were considered in the decision. They do not present data as to the number and distribution of sites in the City having similar or greater elevation as the subject property, with information as to the nature of development and the type of land use regulation in effect at those locations. Further, the FEIS at pages 1-A-2 (10) and (11), suggests that there are also potential sites outside the City, but information as to the number and distribution of such locations is not provided. Moreover, a demonstration that the subject site is one of a relatively small number of desirable locations and that it is the applicant's preferred location for the project, would not be the equivalent to showing a property-related hardship as is necessary to meet the variance criterion.

If the applicant desires to amend the application, or cancel it and submit another, no action by the Hearing Examiner is necessary or appropriate. When the decision was rendered in this matter, the Hearing Examiner's jurisdiction was terminated (see Hearing Examiner Rule 1.30).

Having considered the information and arguments presented by the parties, and having found no error in law or other basis for reconsideration, the motion for reconsideration should be, and hereby is, DENIED.

Entered this 10th day of March, 1992.


Meredith A. Getches
Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, Washington 98104
Telephone: (206) 684-0521

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

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Introduction

Appellants object to the Master Use Permit decision by the Director of the Department of Construction and Land Use "Director" granting the applicant's request for two variances, the determination by the Director as to the adequacy of the Environmental Impact Statement "EIS", and the adequacy of the conditions required by the Director. Appellants also appeal the Director's Interpretation of land use code issues related to the proposal.

Appellants exercise the right to appeal the Interpretation pursuant to Seattle Municipal Code, Chapter 23.88, and the components of the Master Use Permit "MUP" decision pursuant to the Master Use Permit Ordinance, Chapter 23.76 and the SEPA Ordinance, Chapter 25.05.

As is required by Seattle Municipal Code Section 23.88.020E.3, the appeals related to the Master Use Permit decision were consolidated for hearing with the appeals of the Interpretation.

Late in 1990, one individual (Richard Lundquist) and several groups (Central Area Neighborhood Association, Robert and Theresa Wainger/1916 Associates, and Central Area Chamber of Commerce) appealed the Master Use Permit decision. By Order dated March 19, 1991, the Hearing Examiner granted the requests the Capitol Hill Community Council and the Queen Anne Community Council to be intervenors in the Master Use Permit appeals. Robert and Theresa Wainger/1916 Associates and the Central Area Chamber of Commerce withdrew their appeals prior to hearing.

The Central Area Neighborhood Association, Capitol Hill Community Council, Miller Park Association, Mount Zion Baptist Church, Mount Zion Development Corporation, and the Queen Anne Community Council (Central Area Neighborhood Association, et al.), have also appealed the Interpretation issued by the Director.

A prehearing conference was held before the Hearing Examiner on October 21, 1991. Prospective witnesses, order of proceedings, and other procedural matters were discussed.

The hearing began on November 13, 1991, and was continued November 14, 15, 19, and 20. An evening session was held on November 14, 1991. The record remained open through January 6, 1992, for receipt of post-hearing submittals. On January 16, 1992, the Hearing Examiner reopened the record to admit information from DCLU's official records regarding whether other transmission facilities (KSTW and KCTS) had received variances. The record was closed on January 31, 1992.

Represented at the hearing were: appellants Richard Lundquist, Central Neighborhood Association, Capitol Hill Community Council, Miller Park Association, Mount Zion Baptist Church, Mount Zion Development Corporation, and Queen Anne Community Council by attorney David A. Bricklin, accompanied by Tom Buchanan; the applicant, Pat O'Day by attorney Stephanie Johnson O'Day; and the Director, Department of Construction and Land Use by Faith Lumsden, Senior Land Use Specialist and William K. Mills, Land Use Specialist. Queen Anne Community Council, as an intervenor in the MUP appeal, was represented by Keith Nissen.

Issues

There are four major subjects to these appeals. Appellants object to: (1) the Director's conclusions in the Interpretation of the Land Use Code; (2) the Master Use Permit decision to approve the requested variances; (3) the adequacy of the conditions imposed by the Director in the Master Use Permit decision; and (4) the Director's determination that the EIS is adequate. Each of these areas raise a number of questions.

Interpretation:

Should the proposed tower be considered a "building" for the purposes of applying height restrictions?

Is there a "studio" to which the proposed tower is accessory?

Does the easement on the adjacent residentially-zoned property create a *de facto* rezone of that adjacent property?

Did DCLU provide notice and comment opportunity consistent with the requirements of the Code?

SEPA:

Does the EIS present sufficient information and analysis regarding potential impacts relative to health hazard, interference, aesthetic, and land use, to be considered adequate under the requirements of the SEPA Ordinance?

Are the conditions imposed by the Director adequate?

Variance:

Have all facts and conditions been demonstrated to justify authorizing the two variances requested?

The notes from the pre-application conference indicate that eight parking spaces would be required for the proposal. The application included five spaces and the current application indicates three. Parties did not raise the issue of whether the proposed parking meets Code requirements and it is not addressed in this decision.

For purposes of this decision, all sections numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated.

After due consideration of the evidence in the record and as a result of the personal inspection of the subject property and 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 of Fact**Site**

1. The subject property, addressed as 1924 East Madison Street, is located at the northwest corner of East Madison Street and 20th Avenue East. The property is legally described as Lots 4, 5, and 6, Stewart Tracts (Unrecorded).
2. Comprised of 3 lots, the site has a total of 11,622 sq. ft. and an irregular (5 sided) shape. The site has approximately 114 ft. of frontage along East Madison Street and, where the rear lot line is parallel to East Madison (approximately 61 ft.), it is 100 ft. in depth. The present zoning is Neighborhood Commercial 3, with maximum height 65 ft. Prior to 1986, and when the application for the proposal was filed, the zoning was Business Commercial.
3. Development on the site consists of an old, poorly maintained residential structure, and a large double-sided billboard.

Vicinity

4. The site is part of a commercial "strip" which lines both sides of East Madison Street for many blocks. The commercial zoning on both sides of East Madison Street abuts to property that is residentially zoned and developed.

5. The rear lot line of the subject site is the boundary between the commercial zoning and a multifamily (Lowrise 3; L-3) zone. This L-3 zone to the north is developed in multifamily and single family residences. There is a single family residence immediately to the northeast on 20th Avenue East and senior citizen housing (owned by Mt. Zion Baptist Church) immediately to the northwest and fronting on 19th Avenue East. Adjacent to the west on the same side of East Madison Street, is an boarded-up motel and an dilapidated two-story house, and at the corner of East Madison Street and 19th Avenue East, is an office building. To the east, across 20th Avenue East, fronting Madison between 20th Avenue East and East Denny Way, is a restaurant, a vacant lot, and buildings containing a few businesses, apartments and a restaurant. Across East Madison Street, between 19th and 20th Avenues East, is the Mt. Zion Baptist Church. Further west on that side of Madison, is the Hearing and Speech Clinic and the broadcast towers noted in Finding #6. Along the southern side of East Madison Street, east of the site, are a variety of retail sales and services including a pest control business, a lumber/hardware store, tool rental, meat market, and a take-out food business. Several of these establishments are relatively new (e.g., the tool rental, meat market, and take-out food). Others (e.g., pest control, church) have been at their locations for many years.

6. Approximately 800 ft. to the west of the subject property, are three existing broadcast towers (KCTS, KSTW, and KTZZ) near the intersection of East Madison Street and 18th Avenue at the crest of Capitol Hill.

7. The subject property is located in an area of the City that has been depressed economically. Economic revitalization has been occurring on other portions of East Madison Street, most prominently near the intersection of East Madison Street and Lake Washington Blvd. and along East Madison Street from about 30th Avenue East to approximately 23rd Avenue East. Although there are some new and successful enterprises west of 23rd Avenue East, the indications of economic revitalization seen further to the east, are not apparent in the vicinity of the subject site.

Proposal

8. Application for this proposal was filed originally on December 12, 1985 (Exhibit 24). The original application was for a 2-story, 2390 square ft. transmission building with basement, a tower approximately 900 ft. in height, with three legs, 85 ft. apart at the base, and parking for 5 vehicles. An 18 ft. tall wall was proposed around the perimeter. The tower could hold up to 11 FM radio stations and two UHF TV stations.

9. The applicant revised the proposal in August 1986 and the application subject to appeal is for a Master Use Permit to demolish a single family residence and to establish use for the future construction of a broadcasting facility consisting of tower, approximately 1000 ft. in height (with three legs, 100 ft. apart at the base), and a 1-story transmission building with basement. On-site surface parking for three vehicles would be provided. The proposed building would have a footprint of 7,170 sq. ft. and would occupy most of the westerly two-thirds of the site, the parking would be in the northeast corner.

10. The proposal includes landscaped open space along East Madison Street between the perimeter wall and the sidewalk. A design committee, composed of a landscape architect, a representative from Mt. Zion Baptist Church, and a representative of each of the Capitol Hill, Miller Park, and Squire Park Community Councils, would develop a design for the treatment of the base of the tower site. Landscaping and a waterfall would be the primary elements for this area and is intended to provide an enhanced street-level environment for pedestrians.

11. The three legs of the tower would span the transmitter building on its north, southwest, and southeast sides. The legs gradually taper to a meeting point a little less than halfway up the tower. A single steel column then would extend upward to the top, with additional height being added by several antennas. The Tower Study prepared by the City's Office for Long-Range Planning, refers to the tower as a "self-supporting triangular lattice tower."

12. The applicant stipulated at hearing that although the tower could accommodate more, it would have no more than six FM stations and two television stations.

13. The applicant indicates that the tower is designed to improve free television viewing and broadcast reception to over 300,000 households in western Washington.

14. The Federal Communications Commission (FCC), which regulates broadcasters, promulgated rules in 1983 that requires broadcasters to be at least 1,108 ft. above sea level in order to maintain their "Class C" license. All Seattle stations are currently below that level. Those who do not raise their antennas can be reclassified downward and be eligible for FCC license protection to a radius of 250 miles rather than the 300 mile radius for the Class C licensees.

15. The City's Office of Long Range Planning (OLP) in its review of telecommunication facilities for the preparation of a city-wide tower study, did not conclude that there was a need for new towers, but that new towers could improve broadcasters' ability to serve the area's population. Several broadcasters have indicated their desire for and support of this proposal.

16. FM and UHF broadcast depends upon line-of-sight transmission and "shadows" are created behind hilly terrain (such as Seattle's) where signals cannot reach or reach

poorly. In order to have clear and comprehensive "reach," broadcasters would prefer to locate on hills.

17. To date no radio or television stations have committed to broadcast from the proposed tower.

18. Two of the tower legs would be located within three feet of the property line along Madison Street and the third tower leg would be about 2 ft. 4 in. from the northern property line. The transmitter building would provide no setback from the western and northern property lines and would be set back about 14 ft. from the East Madison Street property line. Appellant's survey indicates 10 ft., rather than 14 ft., to Madison Street.

19. The Director's decision includes a condition requiring that the owner "provide satisfactory documentation...that no new structures will be located on the southerly 30 ft. of the easterly 128 ft. of the L-3 zoned property abutting the subject property on the north."

Zoning

20. When the application for the proposal was filed the zoning of the site was Business Commercial (BC). This zoning was changed to Neighborhood Commercial (NC3) on June 10, 1986. This change was part of a general, Citywide rezone that accompanied the change in commercial zoning from Title 24 to Title 23. As permitted under the special transition rule (SMC 23.04.010), applicants with projects pending when zoning is changed, may elect to have their proposals reviewed under either the old or the new zoning. This applicant chose to proceed under the old BC zoning of Title 24, rather than the new NC3 zoning created by Title 23.

21. The purpose of the BC zoning classification is to provide "for larger business centers serving the greater needs of several neighborhoods or the community district. (SMC 24.44.070C)

22. The uses allowed in BC zoning (SMC 24.44.030) include: retail stores and personal service establishments, banks and financial institutions, business and professional offices, hotels, catering establishments, trade or business schools, experimental or testing laboratories, taxidermy shops, locksmiths, appliance repair, convalescent and retirement homes, dance and music studios, antique and secondhand shops, frozen food lockers, retail ice cream dispensary, motels, mortuary, storage for household goods, car wash, residential tower structures, radio and television studios, and artist studio/dwelling.

23. The current, NC zoning allows a variety of commercial uses including: personal, household, marine, and automotive retail sales and services; medical services (under 10,000 sq. ft.); business support services; construction materials sales and equipment

rental; offices; some types of entertainment uses; showrooms and warehouses; food processing and craft work; recycling collection station; utility service uses; light manufacturing; and institutions.

24. In an NC3 zone "communication utilities" (defined in SMC 23.84.040 as utilities where *"the means for transfer of information, such as radio or television transmission towers...are provided"* not including *"studios of broadcasting companies, such as radio or television stations which shall be considered administrative offices"*), are allowed as Administrative Conditional Uses. Administrative offices are also permitted outright in all NC zones.

25. The administrative conditional use criteria for communication utilities in NC3 zones include: satisfying a public necessity or being an integral element in the communication network, expanding an existing facility and avoiding the need to construct a new communication utility. (SMC 23.47.006) As with all conditional uses, no material detriment or injury to property in the zone or vicinity is to result. Transmission towers in the NC3 zone are exempt from height controls, except as regulated by the Airport Height District (SMC 23.47.012I.4) Structures between 12 ft. and 65 ft. in height are required to be setback 10 ft. back from an abutting residential zone and 0 ft. from the side lots. (SMC 23.47.014B.3)

26. Telecommunication facilities can be permitted in single family residential zones and downtown as a Council Conditional Use, and outright in Commercial 1 and 2 zones and Industrial zones. If institutional development standards are met, they can be allowed outright in multifamily zones but require Council Land Use Approval if height limits or other standards not met.

Code Interpretation

27. The interpretation was requested by owners of property immediately adjacent and to the west of the subject property and in the same block. Four questions were raised for interpretation:

- (1) Whether the proposed transmission building and tower are permitted by the applicable zoning;
- (2) Whether the applicant should have applied for a height variance instead of or in addition to variances from setback requirements;
- (3) Whether providing for a undeveloped "buffer" on one of the adjacent residentially zoned property as a buffer for the proposed use constitutes an illegal *de facto* rezone of the residential property; and
- (4) Whether the notice and comment period for the proposal were

adequate under the requirements of Chapter 23.76 of the Seattle Land Use Code.

Uses Permitted in Zone:

28. The Director's Interpretation concluded that: (1) applicable BC zoning permits radio or television studios and a "transmitting tower" is allowed on the lot with the studio; (2) transmission towers are specifically exempted from height limitations of the BC zone and consequently no variance for height is necessary; (3) a voluntary agreement between property owners to restrict development of a part of an adjacent property does not create any rezone or change the "use" of the affected area; and (4) the notice and opportunity to comment had been provided consistent with the requirements of the Code.

29. SMC 24.44.030 provides, in pertinent part:

The following uses are permitted [in the BC zone]:..

F. Radio or television studio, subject to the following conditions:

- 1. The principal building shall be located one hundred feet (100) or more from any lot in an R [residential] zone,*
- 2. Any transmitting tower located on the lot shall conform to the provisions of Section 24.62.040A;.. "*

30. In the section that describes the "proposed action," the EIS indicates that a "transmitter building (including a studio)" is proposed and in the description of the "principal features" it is noted that "a small, standard broadcast studio" is to be included in the transmitter building. The variance application, mentions a small studio to be included in the transmitting building as does the application intake worksheet.

31. At the time of application, DCLU staff considered whether the building proposed would be consistent with the "studio" permitted by the BC zone. When staff inquired of the applicant, the applicant indicated that a studio would be included in the building. Plans dated August 20, 1986, note on the transmitter building would have "automatic equipment."

32. Webster's 7th Collegiate edition (1983, 1988 copyrights) includes as pertinent definitions: "a place maintained and equipped for the transmission of radio or television programs" and "a place where audio recordings are made." Webster's New World Dictionary College Edition (1951-1953 copyrights) defines "studio" as "a room or rooms especially designed for producing and transmitting radio or television programs."

33. DCLU determined that the "studio" envisioned by the Code could be either (or

both) a place where programs were produced or a place where programs were transmitted.

34. None of the television stations discussed at hearing (KIRO, KOMO, KING, and KTZZ) now have their studios and transmission towers on the same lot.

35. Until around the end of World War II, KIRO had a studio and transmission tower on the same lot at a location on Queen Anne Hill. When live broadcasting was the rule, programs were produced in the studio. Substantial numbers of people were involved in these live broadcasts and studios were places of considerable activity. Prior to microwave transmission, large, heavy cables were necessary links between program and transmission and the two functions could not be separated beyond the reach of the cables.

Height Limitation:

36. SMC 24.62.040A provides, in part:

The following type of structures or structural parts shall not be subject to a height limitation except in airport areas as specified in Section 24.62.030:

...transmission towers...provided such structures or parts shall be fifty feet or more from any adjoining lot line...

37. "Structure" is defined in the Code in two places. In SMC 24.08.200 it is defined as: "...anything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground..." SMC 23.84.036 gives the following definition: "...anything constructed or erected on the ground or any improvement built up or composed of parts joined together in some definite manner and affixed to the ground..."

38. SMC 24.44.120 provides that in the BC zone "[n]o building...shall exceed a height of sixty feet..."

39. SMC Section 24.08.030 defines "building" as:

...any structure for the support, shelter or enclosure of persons, animals, mechanical devices or chattels, or property of any kind...

40. The proposed tower is composed of steel girders that do not shelter or enclose anything. There is no roof or walls. The tower is self supporting and the antenna is an extension of the tower.

41. Hank McGinnis, tower engineer and owner of Adelphon Towers Inc., testified that

the proposed tower is subject to a separate set of rules governing its construction than are buildings. The tower is subject to the construction requirements for towers as delineated by the American National Standards Institute (ANSI) for towers.

Effect of Easement:

42. SMC 23.84.040 defines "use" as "...the purpose for which land or a structure is designed, built, arranged, intended, occupied, let or leased." In SMC 24.08.220, "use" is defined as "...the purpose for which land or a building is designed, arranged or intended, or for which it is occupied or maintained, let or leased."

43. The applicant has obtained an easement from an adjacent property owner, for a 30-ft. "buffer" along the edge of the property to the north which is zoned L-3. The covenant (Exhibit 44) provides for no dwelling units to be erected or maintained in the area covered by the easement but does not limit use of the area for parking or garage purposes.

Notice and Comment:

44. SMC 23.76.012 sets forth, in pertinent parts, the procedure for giving notice of application as follows:

...the Director shall provide notice of application and an opportunity for public comment as described in this section...

...the applicant shall post a large sign on the site...located so as to be clearly visible from the adjacent street or sidewalk, and shall remain posted until final City action on the application has been completed...

...the Director shall provide notice by general mailed release...after certification is received by the department that the large sign has been posted.

4. In addition, for variances,...the Director shall provide mailed notice...

C. Contents of Notice. The notice shall identify the nature and location of the project, and shall include a statement that persons who desire to submit comments on the application or who request notice of the decision may so inform the Director in writing within the comment period ... Except for the large sign requirement, each notice shall also include a list of the land use decisions sought. The Director shall specify detailed requirements for large signs.

D. Comment Period. The Director shall provide a fifteen (15) day public comment period...that the comment period shall be extended to

thirty (30) days if a written request for extension is submitted ...

E. When a Master Use Permit application includes more than one (1) decision component, notice requirements shall be consolidated and the broadest applicable notice requirements imposed."

45. DCLU Director's Rules 54-88, 22-82, and 12-85, set forth the standards and procedures that have regulated "large signs" since the time of application. The rules specify the type of information to be displayed on the large sign. The text of the sign is to be determined by Department staff and provided to the applicant. Height of a structure is not specified as required information to be included.

46. Notice of the application, in the form of a DCLU "large sign," was posted at the site on December 16, 1985. This sign included the approximate height of the tower to be 900 ft. The sign has remained posted on the property since time of application. A "Large Sign Correction Sheet" was issued on January 3, 1991, indicating that the sign had fallen down and needed to be reposted. When the site was reinspected by DCLU staff on February 7, 1991, the sign had been restored to the standing position.

47. DCLU also mailed notice of the MUP application on January 3, 1986, to the applicant and to all property owners within 300 ft. of the property boundaries. Notice was also published in the Seattle Daily Journal of Commerce and sent to interested civic groups. On January 2, 1986, four placards were posted within 300 ft. of the property. Notices described the project as a two-story radio transmitter building" of approximately 7170 sq. ft. and a "mono-pole antenna" approximately 900 ft. in height. The notices also indicated that the project was subject to SEPA Environmental Determination and that the two setback variances had been applied for. Eleven comment letters were received in response to the notice. The letters indicates the writers' understanding that a broadcast tower was proposed.

48. SMC 23.76.014 requires notice of a Determination of Significance (DS) be provided as follows:

- a. General mailed release;*
- b. Publication in the City official newspaper;*
- c. Submission of the general mailed release to at least one (1) community newspaper...in the area affected by the proposal;*
- d. Mailed notice to those organizations and individuals who have submitted a written request for it;*
- e. Posting in the Department; and*
- f. Filing with the SEPA Public Information Center.*

49. For issuance of a Draft EIS, the following is required (SMC 23.76.014):

A draft EIS is subject to a 30 day comment period. Notice of the

availability of the Draft EIS is to be provided by general mailed release, publication in the City official newspaper and one community newspaper in the area affected, mailed notice to those who have commented, posting in DCLU, and filing with the SEPA public information center.

50. On June 2, 1986, DCLU issued a Declaration of Significance (DS), requiring the preparation of an environmental impact statement (EIS) for the project. A copy of the notice of the DS appears in the DCLU file but the affidavit of notification does not. Notice should have been published and distributed, as required by SMC 23.76.012 and .014. Six comments were received; three specifically mention that they were responding to the June 2, 1986 mailing.

51. The Draft EIS (DEIS) was issued February 18, 1988. Notice of the availability of the DEIS was sent to over 200 groups and individuals, including those who had previously sent comments, several newspapers, and those with property within 300 ft. DCLU received two dozen comment letters and a petition signed by many more individuals in response to this notice. Sixteen speakers presented their views about the project and the DEIS at a public meeting held by DCLU for that purpose on March 14, 1988.

52. Notice of the DEIS included notification that the height of the proposed tower had been revised from the original 900 ft., to 1000 ft. The notice stated: "This project was previously described as being approximately 900 ft. in height. The project has been revised to be approximately 1000 ft. in height."

53. The Final EIS (FEIS) was issued on October 13, 1988. (No affidavit of notification appears in the DCLU files but staff notes and initials indicate mailing on that date.) The notice describes the proposed height of the antenna as approximately 1000 ft. Notice was sent to 98 individuals and organizations. Notice was also published in the community newspaper called "The Facts." Only a few comment letters were received in response to publication of the FEIS.

SEPA Issues

54. The DCLU Director determined that the EIS was adequate and attached eighteen conditions to the approval of the variances. Six of the conditions were also conditions of SEPA compliance. The major conditions include the requirements that the applicant:

Provide street trees, wherever appropriate and approved by the Seattle Engineering Department, within a three-block radius in line-of-sight of the tower.

Ensure that one of the existing towers on Capitol Hill will be removed (includes posting a \$1 million bond for removal).

Design the facility to house and accommodate a minimum of ten broadcast facilities (including at least one television station).

Provide satisfactory documentation that a buffer 30 ft. wide will be created on an adjacent residential lot to the northeast.

Form a committee with citizen participation to design the base of the tower.

Shield and direct FAA-required strobe lights so that the light emitted does not reach the ground for a radius of at least 6 miles.

Provide professional engineering consultation as necessary to ensure trouble-free operation of the sound system at the Mt. Zion Baptist Church.

Sign an agreement with the Seattle-King County Health Department to ensure that radiation levels do not exceed $1,000 \text{ uW/cm}^2$ for occupational exposure (i.e., for those working at the facility) and 200 uW/cm^2 for non-occupational exposure.

Conduct annual monitoring of radiation levels in a two block radius.

Restrict access to the rooftop of the transmitter building and provide signs to inform of potential radiation hazard.

Establish an interference response and remediation service to correct interference problems caused by the tower for a one year period.

55. The appellants' objection to the Director's determination include that: the EIS did not consider the precedential effect of the Director's approval of the requested variances; the mid-range aesthetic impacts; the adverse impacts of the street tree mitigation measure required by DCLU and did not provide adequate information regarding ground level radiation or discuss in detail proposed mitigation measures for responding to electronic interference.

56. The appellants argue that the conditions imposed by the Director are not adequate in that: the radiation emitted from the transmission tower will produce a health hazard and is not properly mitigated; the interference remediation program is not adequate; the required condition to plant street trees will have adverse impact on public views; and, the aesthetic impacts have not been mitigated.

EMR:

57. Electromagnetic (EM) fields are found everywhere in the environment today. Radio, television, electric lights, and electric appliances all contribute.

58. Transmission facilities emit non-ionizing electromagnetic radiation (NIER). (This should not be equated with ionizing radiation which includes ultraviolet, x-rays, gamma rays). Non-ionizing electromagnetic radiation includes emissions associated with radio frequencies (television, radio, radar, cellular telephones, etc.). Also on the spectrum of non-ionizing electromagnetic radiation is the extra low frequency (ELF) associated with electric power.

59. Under certain exposure conditions, "extremely low frequency" (ELF) can affect biological processes (e.g., speed up or slow down cell functions) and systems in non-equilibrium states (e.g., embryonic, healing, etc.) may be more sensitive. There is no evidence that ELF effects are either safe or unsafe.

60. The appellants' expert indicated that there are no studies to-date regarding ELF and FM broadcasting. The applicant's expert indicated that FM does not have an ELF component and UHF has some ELF present.

61. There is not consensus in the scientific community as to the potential for health risks due to the radiation associated with a facility of the type proposed. The projected levels of radiation anticipated to be emitted would be very small increases to the existing levels and the cumulative levels are all well below the standard of 200 $\mu\text{W}/\text{cm}^2$.

62. In general, as the height of a broadcast antenna is increased, the radiation at ground level is decreased.

63. The Federal Communications Commission (FCC) has adopted an American National Standards Institute (ANSI) guide regarding exposure levels. For FM and television frequencies, the ANSI work place/occupational standard is 1000 microwatts per square centimeter ($\mu\text{W}/\text{cm}^2$). Development of this ANSI standard was concerned with tissue heating and discomfort and developed before the recent concern regarding potential ELF effects.

64. King County's exposure standard and the standard being considered by the City of Seattle is 200 ($\mu\text{W}/\text{cm}^2$), one-fifth of the occupational standard of 1000 $\mu\text{W}/\text{cm}^2$. This is also the standard adopted by Portland, Oregon, and the State of Massachusetts. The States of New Jersey and Connecticut, and the U.S. military, and others have an exposure standard of 1,000 $\mu\text{W}/\text{cm}^2$. The USSR standard is 25 $\mu\text{W}/\text{cm}^2$.

65. The EIS discussion of the environmental effects of non-ionizing electromagnetic

radiation (NIER) included existing levels and cumulative levels with the expected contribution of the proposed tower. A mathematical model was used to calculate existing and potential (i.e., existing, plus the proposal) ground level radiation for five locations in the vicinity. The projections assumed 11 FM stations and 2 UHF television stations would use the tower. The estimated impacts are as follows;

<u>Location</u>	<u>Existing Levels *</u>	<u>% of ANSI</u>	<u>With Proposal*</u>	<u>% of ANSI</u>
At Site	5.3	0.50	16.1	1.35
Mt. Zion	6.2	0.58	14.3	1.15
Meany School	3.1	0.24	6.9	0.57
E. Madison/ 18th	24.9	2.3	31.1	2.8
First Hill Plaza roof	5.6	0.53	8.4	0.75

*In terms of microwatts per square centimeter ($\mu\text{W}/\text{cm}^2$)

66. Analyses prepared by two professional engineers using different methodologies and instrumentation reached similar conclusions regarding expected levels of NIER associated with the proposal. Both concluded that the proposals contribution would be minor and well below the $200 \mu\text{W}/\text{cm}^2$ level.

67. In predicting future NIER levels around the proposed facility with it in operation, the City's Tower Study presumed that there would be 12 FM stations and 2 UHF television stations. For this study, existing levels were measured and the contribution of the proposal estimated to project cumulative levels. The proposal was estimated to add approximately $5 \mu\text{W}/\text{cm}^2$ to the existing maximum level. The Tower Study concluded that the increase would be negligible in relation to any existing or proposed standard.

68. The Director found that the benefits of expanded TV and FM radio broadcast areas, coupled with the removal of one existing tower on Capitol Hill, outweighed the expected adverse impacts of tower construction and use.

Interference:

69. In the vicinity of East Madison Street and 18th Avenue East, many citizens presently experience interference with use of their home electronics equipment (stereo receivers, televisions, tape recorders, etc.) The interference is believed to be primarily caused by the broadcasters located on the three existing towers on Capitol Hill. Some instances of interference are substantial and chronic and have made use of common equipment difficult. Interference has been an on-going problem with the sound system at the Mt. Zion Baptist Church.

70. The EIS discusses the current situation regarding interference and the potential for impact with the proposal. The EIS indicates that negative impacts (interference resulting in "ghosting", interruptions of reception, interference with two-way communications, and disruptions of FM) could occur. The EIS also includes discussion of the applicant's proposed mitigation to reduce these potential impacts, including: orienting the tower so that "ghosting" would not occur, using filters to eliminate transmission interference, placement and orientation of antennae to reduce potential for interference with existing radio and television transmitters and receivers. The EIS concludes that no significant impacts would result.

71. In general, as the height of a broadcast antenna is increased, interference decreases.

72. The elimination of one of the existing towers, with the broadcaster(s) becoming part of the proposed facility, could reduce some the interference currently experienced by some persons. The proposed tower is not expected to solve all existing interference problems in the vicinity and, the applicant does not expected it to create new interference problems.

73. A condition imposed in the Director's decision would require that the applicant guarantee that the sound system of the Mt. Zion Baptist Church be made, and remain, trouble-free. Another condition requires that the applicant to provide professional remediation service for those within a one-mile radius who experience interference problems. This program would last for one year to address interference problems attributable to the proposal.

74. There are ways to identify sources of interference and shielding devices, weight traps, new/replacement equipment, and other approaches can be employed to resolve interference problems. A basic shielding device costs under \$100. Solving some interference problems can be costly.

75. The FCC regulates interference produced by broadcasters. FCC rules require that broadcasters satisfy all complaints occurring within 2 1/2 miles for a year after operation begins. The FCC regulations do not protect everything and some of the items not covered are: malfunctioning, mistuned, and improperly installed equipment; phonograph; tape recorders; and video tape machines.

76. Federal preemption disallows the City from imposing regulations on broadcasters. No evidence specifically indicated that the City could not require the owner of the facility to implement the mitigating measures embodied in the Director's conditions. The applicant testified that he would not be covered by the federal preemption because he would not be a broadcaster (*i.e.*, he does not hold an FCC license).

Aesthetic Impact:

77. The existing site conditions, boarded-up house, billboard, weeds, and accumulated trash, are not aesthetically pleasing. In the subject block, only the building at the corner of East Madison Street and 19th Avenue East is occupied and in good repair. Although the conditions of a number of the buildings along East Madison Street in the vicinity of the subject site could be improved, the subject block is the only one that appears so unkempt.

78. The 1,000 ft. transmission tower would be easily noticeable near and far. According to the applicant there would be "eye contact" with the tower along the I-5 corridor from SeaTac to Northgate.

79. The proposed tower would be gray (rather than the red and white of the existing towers on Capitol Hill). The tower's lacy, lattice-look, and slender, tapering design would likely present a more aesthetically pleasing silhouette from distant viewpoints than do the existing towers.

80. The tower would be out of scale with existing development and would change the visual character of the area. Many area residents believe the size and appearance of the tower will be unpleasant. At its 1000 ft height, the tower would be nearly as tall as the tallest structure in the City (Columbia Center in downtown) and would be substantially taller than familiar landmark structures like the Smith Tower and the Space Needle.

81. The heights of the existing transmission towers on Capitol Hill are 639 ft. (KTZZ), 590 ft. (KCTS), and 637 ft. (KSTW). These towers are within "clustered" (*i.e.*, all within approximately 250 ft. of one another) near the intersection of East Madison Street and 18th Avenue East at the crest of the hill.

82. The commercial zoning on either side of East Madison Street generally allows a height of 65 ft., but most of the existing buildings are only one-to three-stories.

83. The EIS discussed aesthetic impacts. The existing conditions are described. Under the view protection policies of the SEPA ordinance effective at the time (Ordinance 111866), public views of "mountains, water, skyline, and greenery" from specified locations must be assessed and can be protected. The eight parks mentioned in the EIS analysis and East Madison Street are included in the list of specified locations covered by the view protection policy. Miller Park is not in that list. The EIS discusses the view impacts from the named parks and indicates no views from them would be blocked.

84. Photos in the EIS, taken from nine vantage points in the immediate vicinity (one-half to approximately two blocks away), show the proposal drawn in. The photographic representations show the proposed tower looming large above its surroundings and indicate that views from the sidewalk could block the views of the

tower from pedestrians passing by. (It appears that the wall portrayed in the drawings is the 18 ft. version originally proposed.)

85. The EIS also presents of eleven other photos and visual analyses from the City Tower Study. These photos also have the proposal drawn in. Three photos are of close range (less than one mile), four at mid-range (1 1/2 to 2 1/2 miles), and long range (3 to 5 miles). The tower, significantly taller than its surroundings, would be quite prominent at close range (and in some mid-range views) and become less so as the distance from it increases. At long range, although it would be visible, the tower would appear as just one element in the skyline of the city.

86. The City Tower Study studied the impacts of all of the proposed towers from 25 viewpoints within the City of Seattle. It also analyzed the impacts of the proposed tower from close range and long range viewpoints.

87. The DCLU found that a tower at this new site would have substantial impact and concludes that there would be unavoidable adverse impact due to the height, bulk, and scale of the proposed tower. The condition imposed by the Director for additional landscaping (*i.e.*, street trees in a block radius) was based upon the SEPA Landscaping policy and the Land Use policy (SMC 25.05.902; Ordinance 111866) aimed at mitigating for height, bulk and scale impacts. The 30 ft. easement required by the Director is intended to act as a "buffer," to separate the "visually incompatible" tower from the adjacent residential use. This area, as described in the decision, is to be "extensively landscaped with substantial specimens to ensure an effective buffer."

88. DCLU concluded that removing one of the three existing towers would significantly mitigate the adverse aesthetic impact.

89. A condition of the Director's decision requires the applicant to provide street trees within a three block radius on street segments within line of sight of the tower. Street trees presently exist along some streets in the three block radius. The applicant also intends to plant trees on the street-side of the perimeter wall on both East Madison Street and 20th Avenue East. Street trees and buildings would serve to block some views of the tower and thereby some mitigation.

90. The EIS did not consider the potential for the street trees required by the Director to impact views from East Madison Street. It is possible that from approximately 18th Avenue East to almost 20th Avenue East, pedestrians and drivers traveling east on East Madison Street could have some of their views of the Cascade Mountains disrupted or blocked. (Until one reaches the crest of the hill at 18th, there is no view of the Cascades. At about 20th Avenue the street flattens out and the views are blocked by buildings along the street.)

Land Use Impacts:

91. The DCLU did not reach a firm conclusion on the existence, or extent, of property value impact.

92. Appellants believe the proposed tower would have an adverse impact on the trend toward economic revitalization along East Madison Street because the tower would break up the commercial strip. DCLU did not come to this conclusion in its analysis.

93. A study of properties on Queen Anne Hill adjacent to existing transmission towers concluded that there was, "no convincing evidence" that the towers "have a quantifiable effect on the prices being asked for property in the immediate neighborhood." The preparer of the study indicated that his conclusion did not mean that no impact exists. The question of whether there has been an impact on actual selling prices was not studied.

94. A Portland study of property values adjacent to towers was conducted in an area not comparable to Caption Hill (*i.e.*, an area with few roads fully improved, with steep grades so that travel is difficult in inclement weather, where natural drainage courses provide for drainage rather than storm sewers).

95. Despite not finding statistical documentation of a correlation between property values and towers, the Office of Long Range Planning (OLP) maintains there is a potential for property value effects to increase with the increasing size and obtrusiveness of a tower. The City Tower prepared by OLP states at page 2-B-3(7):

The potential for property value effects increases as the size and obstructiveness of a tower increases. Also the potential for a property value effect is higher for a new tower site than for a site where a tower has been situated for a long time. Therefore the new tower site proposed on Capital Hill is more likely than the other proposed and potential facilities to have property value effects, because the proposed tower is relatively large, it puts a tower where there has not been one before, it is far enough removed from existing towers to have an independent effect, is the only tower on the north side of Madison Street, an otherwise major dividing line for land uses, and adjoins residences.

96. The proposed transmission facility would not have employees, customers, and deliveries coming and going as do the retail sales and services uses in the commercial strip along East Madison Street in this vicinity.

97. The subject could be developed in a variety of commercial uses, but due to the volume and speed of the traffic on East Madison Street, it is not a prime commercial property. It would be difficult for retail sales and service business(es) to be successful given access problems. A larger assemblage of property would be needed to better

cater to auto traffic (e.g., easy access with appropriate curbcuts, sufficient space for parking).

98. The proposed tower would conflict with the Mann-Minor Neighborhood Improvement Plan goal of developing a community shopping area. The Director concluded that by causing the removal of one of the existing towers and thereby free up property for the development of retail businesses, the proposal would be consistent with the goal of the plan.

Variance

99. The applicant's original proposal sought a variance for one tower leg to be 3 ft. from one lot line and 10 ft. from another, and for the building to be about 11 1/2 ft. from the adjacent residentially zoned property.

100. In the revised proposal, two of the tower legs are located within three feet of the property line along Madison Street, while the third tower leg would be about 2 ft. 4 in. from the northern property line. The BC code calls for a 50 ft. setback to adjacent lot lines. The transmitter building would provide no setback from the western and northern property lines and would be set back about 14 ft. from the Madison Street property line. The BC zone requires a minimum of 100 ft. from any residentially zoned lot. Both variances were granted by the Director in the MUP decision.

101. The applicants cannot build the proposed tower on this site without approval of the two variances requested. Given the 100 ft. depth of the subject lot from the street to the residentially zoned lot, it is not possible to set a studio building 100 ft. from the residentially zoned property. Nor is there sufficient area to set the tower legs 50 ft. back from every lot line.

102. The current (NC) zoning permits "communication utilities" as administrative conditional uses and the criteria for evaluating such uses does not specify any setback requirements except that "rooftop" communications must be set back a minimum of 10 ft. from all lot lines.

103. The Mayor's recommended Telecommunication Policy and Regulations proposes a 20 ft. setback requirement for transmission towers, with a reduction to 10 ft. if the tower site is adjacent to a residentially zoned lot, and is landscaped. New towers would be prohibited in residential and Neighborhood Commercial zones; Council conditional use would be required in other zones.

104. SMC 23.40.020 provides that a variance shall be authorized only when all the following are found to exist:

1. *Because of unusual conditions applicable to the subject property, including size, shape, topography, location or surroundings, which were not created by the*

owner or applicant, the strict application of this Land Use Code or Title 24 would deprive the property of rights and privileges enjoyed by other properties in the same zone or vicinity; and

2. The requested variance does not go beyond the minimum necessary to afford relief, and does not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which the subject property is located; and

3. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the zone or vicinity in which the subject property is located; and

4. The literal interpretation and strict application of the applicable provisions or requirements of the Land Use Code or Title 24 would cause undue and unnecessary hardship; and

5. The requested variance would be consistent with the spirit and purpose of the Land Use Code and adopted Land Use Policies or Comprehensive Plan component, as applicable.

SMC 23.40.020 also provides:

D. When a variance is authorized, conditions may be attached regarding the location, character or other features of a proposed structure or use as may be deemed necessary to carry out the spirit and purpose of this Land Use Code.

105. The applicant looked at other sites before selecting this one. Some properties were not available. The applicant determined that the Fratelli site at 19th Avenue East and East Madison Street was too close to the existing towers to be technical feasible. Another, much larger, site to the east on East Madison Street at 23rd Avenue East was rejected as too large and too far from the existing towers on Capitol Hill so as to be establishing a second "tower farm." The applicant chose this site because it required no businesses or residents be displaced and was two blocks of the existing Capitol Hill towers. The applicant is not a land developer and wants only to build the transmission facility, he has no interest in developing the site for anything else.

106. At the pre-application conference on November 19, 1985, the applicant was advised by DCLU staff that the proposal did not meet the development standards of the zone and that hardship would have to be proved.

107. DCLU concluded that the site's location near the top of a hill is an "unusual condition" because it believes the site to be one of the few places in the City where a broadcast tower can effectively be located. DCLU noted as an "unusual condition" that at time of application, there were other, larger BC zoned lots in other parts of the City.

Whatever information was provided by applicant to DCLU in order to establish that the subject site is singularly unique in combining desirable elevation and favorable land use regulation, was not presented at hearing.

108. The subject site is not at the top of the hill. The crest of the hill is to east, at about the intersection of East Madison Street and 18th Avenue East (where the other towers are located).

109. The subject property has a somewhat an irregular, five-sided shape in contrast to the quadrangles (four-sided shapes) commonly formed by the typical urban platting pattern. Because East Madison Street cuts diagonally across the grid of east-west and north-south streets, many such irregular shapes are to be found along East Madison Street. Exhibit 41, a copy of the City's official zoning maps for the time when Title 24 (BC zoning) was in effect, illustrates this. These maps do not show individual lots, but it is clear that at the corners of each East Madison Street intersection, from 15th to 27th Avenues East, are lots with an odd number of sides.

110. Similar to other commercial strip zoning in the City, the BC commercial zone along on both sides of East Madison Street, is generally one lot deep and abuts a residential zone. This "strip" of BC zoning is not of uniform depth, but is typically about 100 ft. in depth.

111. When the application was originally filed, the tower was to be 900 ft. in height and the tower legs 85 ft. apart. After the Federal Aviation Administration (FAA) determined the originally proposed height would not be a hazard, the applicant revised the proposed height upward by 100 ft., necessitating increasing the distance between the tower legs to 100 ft. The increased height would increase the "reach" of the tower.

112. DCLU found the revision of the tower design from 900 ft., with an approximate 10 ft. setback, to 1000 ft., with approximately zero setback, was reasonably necessary as it could improve reception for a greater number of persons.

113. A 100 ft. tower base for a 1000 ft. tower represents a 10:1 "aspect ratio." Mr. McGinnis, the tower designer and engineer, noted that the maximum aspect ratio for towers of this type is 11:1.

114. The current proposal seeks greater exception to the required setbacks than did the original proposal. When the proposal was revised and increased in size, the amount of variance "relief" requested also increased. The height of the tower increased by 100 ft., the span between the tower legs increased from 85 ft. to 100 ft., and the transmission building grew from a two-story, 2,390 sq. ft. building in the original application, to the two-story, 7,170 sq. ft. building now proposed.

115. Although many citizens believe the tower would have a negative affect, could have a significant adverse aesthetic impact, there is no documentation that the tower

would have adverse impact on property values or on economic revitalization of East Madison Street in the vicinity.

116. DCLU concluded that the impact would not translate to material detriment. DCLU relied heavily on the requirement to remove one existing tower and on the requirement to mitigate interference impacts in determining that no material detriment would result.

117. DCLU concluded that the denial of the variances would be an undue hardship because without the variance relief the proposal could not be developed here despite it being a use permitted in the BC zone. This conclusion relied in part on the fact that a variance for set backs was granted in 1984 for the KTZZ tower at East Madison Street and 18th Avenue. There the requested variances were to allow the studio building to be approximately 45 ft. from one residentially zoned lot and 78 ft. from another, instead of the 100 ft. required. (The apartment building to the south is approximately 15 ft. away from the proposed studio, but that portion of the lot was zoned BC, not residential.) The other variance was to allow the tower to be located approximately 17 ft. from the south lot line and 7 1/2 ft. from the east lot line, where the Code called for 50 ft. setbacks.

118. During DCLU's review of the KTZZ variance request, the City was considering rezoning the L-3 property to the south and the L-2 property to the east, to NC. The potential rezone is mentioned in the KTZZ variance application but is not referred to in the Director's decision. The properties were rezoned to NC and at this time the KTZZ studio is approximately 200 ft. from the closest residentially zoned lot on the south side of Pine Street.

119. The KTZZ tower is 650 ft. tall and 58 ft. per side. The KTZZ tower is located on a lot which 132 ft. front to back.

120. The two other towers, KCTS and KSTW, did not require variances and both are set back more than 100 ft. from the closest residential zone. The KCTS tower was authorized in 1964 pursuant to a City Council hearing. When the KSTW facility was proposed in 1977, proponents purchased some adjacent property in order to meet lot line setback requirements.

121. There are commercially zoned properties along East Madison Street on irregularly shaped lots in this vicinity that are successfully developed with retail sales and other commercial uses.

122. Any property of similar size would require variances in order to construct the project as proposed.

123. In other variance applications, DCLU has suggested that the applicant purchase other property to avoid need for a variance.

124. When transmission towers are not built on hills, additional height is necessary. The taller the tower is built, the more expensive it becomes. The applicant testified that after "a certain height" is reached, each additional 100 ft. can cost on the order of \$ 1.5 to \$2 million.

125. The declared purpose of business zones in Title 24 (SMC 24.06.070) is to *"...promote retail business development on the basis of function performed and to minimize conflicts within each zone and with uses in adjacent residential zones."* The BC zone was to provide *"for larger business centers serving the greater needs of several neighborhoods or the community district."* Title 24 had "commercial" zones as well as "business" zones. Three commercial zones were established to permit *"...nonretail services and other business activities protected from industrial uses."* A variety of nonretail commercial and business uses were permitted in these zones.

126. DCLU concluded that allowing a higher tower, which could decrease the amount of radiation and interference problems, would serve the general purpose of the zoning code to protect the public welfare.

127. DCLU imposed a condition requiring the applicant obtain an easement from one of the adjacent residential zoned property to preclude development within a 30 ft. strip of land directly adjacent to the subject property to the northeast. The easement condition required by DCLU contemplates that the easement would be landscaped but the easement as currently written, allows for a garage and other structures within the buffer area. The residentially zoned property adjacent to the northwest (site of the Mt. Zion apartments) is owned by appellant Mt. Zion Development Corporation, which will not grant a similar easement. (At hearing the applicant stipulated that the building would be set back 10 ft. from the residentially zoned property.)

Conclusions

1. The Hearing Examiner has jurisdiction over the appeal of the interpretation pursuant to SMC Chapter 23.88, and over the Master Use Permit decisions (EIS adequacy determination, SEPA conditioning, and variance) appeal pursuant to SMC Chapters 23.76 and 25.05.

2. The Hearing Examiner must give "substantial weight" to the DCLU Director decisions regarding adequacy of the EIS, SEPA conditioning (SMC 25.05.680A., 23.76.022C.7), and the Interpretation (SMC 23.88.020.E.1). The burden is on appellants to overcome this weight by proving that the Director's decision is "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 637 P2d 1005 (1981). Under this standard of review, the decision of the Director can be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been made. Cougar Mt. Associates v. King County, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

3. Under the terms of SMC Chapter 23.76, the decision of the Director on a variance application is to be given no deference.

Interpretation

4. Appellants argue that this proposal does not have a "studio" as that kind of facility was known and intended to be, in the days when the BC code was written. In those early days of live broadcasting, as evidenced by the applicant's testimony, a studio was a place of considerable activity and commercial interaction with other businesses in the vicinity. The proposed transmitter building, filled with automatic equipment and a small standard studio capable of, but not regularly, producing programming, would be different in many ways from the early day studio.

In support of their argument, appellants proffer a dictionary definition from the era when the BC zoning was enacted (circa 1957). In this dictionary, "studio" is defined as a place for "producing and transmitting". While this is helpful illustration, it is not persuasive in demonstrating that the Director was clearly mistaken in relying on another dictionary. A definition of "studio" was not included in the Code and there may have been other dictionaries from the era with definitions similar to that used by the Director. Present day speculation as to the preferred definition, cannot substitute for legislative history.

The appellants' view is certainly a reasonable one. But so is the Director's. The Director concluded that "studio" could be either where programs are produced and transmitted, or just transmitted. The proposal, by including a place where programs can be produced on-site, could do both. The evidence is not sufficient to conclude that the Director erred in finding "studio" to encompass a facility that would be engaged primarily in transmitting but also capable of producing programs.

5. Appellants also argue that given the relative sizes of the transmitter building and the tower, the tower must be the principal use, rather than the accessory use. This argument is not persuasive. The Code does not require that a principal use be larger or taller or have more square feet than uses accessory to it. "Use" relates to purpose, not size. Here, if there was no studio and transmission tower could function without the equipment and operation of the transmitter building, it could be seen as a principal use.

6. No variance from height limits is required because transmission towers on the same lot as a studio, are specifically exempted from the height limits of the BC zone.

7. Appellants' argument that creation of the 30 ft. easement "buffer" operates as an *de facto* rezone, is not persuasive. Such a view requires that the agreement to not develop the area, be seen as equivalent to putting the property into commercial "use." There is no evidence to support this conclusion. No commercial uses will occupy the area or be maintained within it and there is no indication that the land is being "let" or

"leased". The easement does not alter the zoning of the residential property.

8. DCLU provided notice and opportunity for comment during its review of the proposal. The required large sign was posted on the property in a location visible to both pedestrians and vehicles passing by on East Madison Street. Also, regarding other required notice, although the DCLU records do not contain the affidavit of mailing regarding the notice of the issuance of DS, it appears that this notice was properly distributed (three comment letters specifically mention the notice).

9. Appellants argue that the notice provided by DCLU was inadequate because the application was not renoticed when the applicant revised the height and increased the "footprint" of the transmission tower. Nothing in Code prevents an amendment to the height of a project or requires renote if the height is changed. Although the height of a project is not specifically required to be described, DCLU stated the tower's proposed height in every notice. When the applicant revised the tower height, DCLU included that information in a special note in the notice of publication of the Draft EIS. The comment letters received after the Draft EIS was issued, and the testimony of persons participating in the public hearing on the Draft EIS, indicate that interested parties were aware of the revision.

10. The Code does not require renoticing of a project based on the length of time the project has been under review by DCLU. No evidence was presented at hearing to suggest that interested persons were in any way disadvantaged or kept from knowing about this proposal because the length of time it has been under review. On the contrary, it would seem likely that the duration of the review has increased the public's awareness of the proposal.

11. Appellants object to DCLU considering this application under BC rather than NC zoning. The Code expressly provides for the applicant to elect to have a proposal reviewed under the former zoning. While it is not clear why the applicant chose to stay with the BC zoning, it was his option, and DCLU did not err to consider the proposal under this zoning.

EIS Adequacy and SEPA Conditioning

12. The Hearing Examiner has jurisdiction to hear appeals regarding the adequacy of an EIS. (SMC 25.05.680B.)

13. EIS adequacy is governed by the "rule of reason." Cheney v. City of Mountlake Terrace, 87 Wn. 2d 338, 552 P2d 184 (1976). An EIS is adequate if it provides a "reasonably thorough discussion of the significant aspects of the probable environmental consequences..." of the proposed action, citing Trout Unlimited v. Martin, 509 F.2d 1276, 1283 (9th Cir. 1974). EIS's need analyze only probable adverse impacts that are significant. (SMC 25.05.402A.)

14. An EIS is "not a compendium of every conceivable effect or alternative to a proposed project, but is simply an aid to the decision-making process." Toandos Peninsula Association v. Jefferson County, 32 Wn. App. 473, 483 (1982).

15. The EIS discusses electromagnetic radiation and concerns about health effects. In conjunction with the Tower Study, the EIS discloses anticipated emission levels and relates those levels to existing and proposed standards. The EIS is not inadequate in its discussion of potential health effects related to electromagnetic radiation.

16. The aesthetic impacts are adequately presented in the EIS. It is not required that photos be presented from every conceivable vantage point, or that the views and distances of interest to the appellants be used instead of, or in addition to, those that were presented. The photos and accompanying analyses provide a reasonable and representative sampling of close, near, and distance views of the tower. Evidence was not presented shows that the Director was mistaken in finding the photos and/or analyses were adequate.

17. While the EIS is sometimes confusing as to which version of the proposal is being analyzed, and objectivity sometimes gives way to project justification, appellants have not shown that the Director erred in finding the EIS adequate. The EIS discloses, discusses, and substantiates the electromagnetic radiation, interference, aesthetic, land use, and other impacts of the proposal.

18. The projected levels of radiation anticipated to be emitted by the proposal are all well below the standard contemplated by the City. Although there is not consensus in the field, there is authoritative expert opinion that the radiation associated with the proposal does not present a risk to health.

19. The appellants' expert witness suggests that because there is research showing low level radiation can have some affect on biological processes, we can't be certain that there is no danger, and consequently should not allow new transmission towers in populated areas. This was a credible witness and his caution is not illogical. However, the weight of the evidence in this record does not reveal that it was an error for the Director, relying upon the collective wisdom of experts, standard setting groups and the like, to conclude that the proposal would not have significant adverse impact in terms of health effects.

20. The Director and the applicant believe that the City can enforce its conditions on the owner of the proposed facility. Appellants' view, that the conditions to combat interference cannot be enforced against this applicant due to FCC's occupation of this field of regulation, was not substantiated by testimony or legal argument.

21. The appellants argue that the Director's condition requiring resolution of interference problems would not be effective. It is suggested that to resolve interference problems would be so expensive that it would not be done and that because

the remediation cost has not been estimated, the EIS is inadequate. The appellant presented information on this point through a witness who gave estimates of over \$35,000 to correct interference at his sound studio and \$77,000 if the studio had to be moved. These estimates include costs which do not appear credible (*e.g.*, \$200 for "miscellaneous nails screws and fasteners," \$2,000 for "600 sq. ft. new roof," and, if the business were to be moved, a double-counting of \$20,000 to "recoup" investment in the present location, and \$30,000 for 6 months of "lost opportunity costs").

22. Credible evidence indicates that interference problems can be identified as to source and can be corrected. There is no credible evidence that the costs of remediation would reach such levels as to be prohibitive. It is not an error for the Director to believe that such a condition could be effective for the time that it would be imposed.

23. There is, however, no mitigation required for inference problems which occur after the first year. This would leave unmitigated interference that could occur relative to stations being added or changed after the first year. To ensure effectiveness of this condition, it should be imposed for the life of the project.

24. Because the tower has a size and scale so much greater than existing and potential development in the neighborhood, it would have a significant aesthetic impact. The Director's condition to require street trees, would provide some mitigation for pedestrians within a three-block radius because their views of the tower (at least in Spring and Fall) would be obscured or blocked. This condition should be modified to ensure that protected views from East Madison Street are not blocked or existing mature street trees are not unnecessarily removed.

25. There is no way to provide mitigation for visual impacts that would affect those who would see the tower from distances outside the three blocks radius but less than 1 mile away. The tower would have an unavoidable "presence" for those living, working, or doing business in this vicinity. The record does not establish that the tower's impact is necessarily adverse. The Director concluded that the tower's aesthetic impact would not be fully mitigated but that, in weighing and balancing the trade-offs, granting the variances would serve the public interest. This conclusion has not been shown to be clearly erroneous.

26. The easement obtained by the applicant provides only that no structure(s) be built or maintained in the buffer area. It does not provide for the "extensive landscaping" that was intended by the Director in order to "ensure an effective buffer." The easement as presently written does not satisfy the condition and the impact remains unmitigated. A easement agreement consistent with the Director's condition must be provided.

27. The applicant's stipulation to limit FM stations no more that 6, conflicts with the spirit of the Director's condition requiring that the tower accommodate a minimum of 10 broadcast facilities. The number of stations accommodated on the tower should be consistent with the Director's conditions.

Variance

28. On appeal, the applicant must show that all the criteria for variance are met.

29. With a size of more than 11,000 sq. ft., the subject property is not unusually small nor unusually large. The irregular shape of the lot is not unusual for commercially zoned properties in this vicinity. This site has not been shown to have a size, lot depth, adjacency, or shape that could be considered "unusual" in the East Madison corridor or in some other commercial strip zones in the City. Businesses on such lots along East Madison have operated for many years and others have been developed in recent years.

30. The argument that the variance should be approved because tower has size requirements that cannot be met on this site without the requested variances, improperly focuses on the characteristics and requirements of the project rather than the property.

31. Rather than establishing that there is something unusual about the property which prevents the owner from using it the way others similarly situated use their property, the applicant argues that the variances must be granted because this is the optimum location for a tower. Even if the "unusual" condition language could properly be extended to encompass a combination of factors that make this property uniquely suitable due to the unusual needs of this project, the applicant has not made the necessary showing. The applicant presented no data to support his assertion about the relative scarcity of property with this combination of suitable topography (*i.e.*, elevations high enough for effective broadcasting) and agreeable land use regulation.

32. The variance criterion of "unusual condition" refers something that deprives the property of something that other similarly situated properties enjoy. The applicant argues that the existence of the KCTS and KSTW towers, and the setback variances approved for the KTZZ tower in 1984, establish a precedent that mandates approval of these requested variances in order that this property be able to be developed with the proposed tower. This is not persuasive. Two of the prior developments were established under different regulations making comparison difficult and dangerous. If examples of what had previously been permissible are used as the standard for "rights and privileges," current regulations can be undermined. Also, all three existing towers currently observe a 100 ft. distance to residentially zoned property and would not need to seek a variance for this requirement and one purchased property in order to meet a setback requirement.

33. As originally applied for, the requested variances were not as great as they are with the revised application. Those originally requested variances were enough to provide relief when the application was first filed. The FAA's lack of objection to the originally proposed height was used by the applicant as an opportunity to go higher with the tower, which meant even more deviation from the required setbacks was

requested. Through this revision, the requested variances became the "minimum necessary." The revised application seeks more relief than that originally proposed which is more than the minimum necessary to provide relief.

34. Unless the Director's condition regarding remediation of interference problems is extended for the life of the project, some public detriment could occur. It would be detrimental for interference problems to adversely affect residents and businesses in the area so that their use and enjoyment of common home electronic devices were disrupted or prohibited.

35. The applicant claims "hardship" in that without the variance he cannot develop a transmission facility on the subject property. The applicant's desire to only build a transmission facility, reflects the personal interest of the applicant, not a condition associated with the property. Although a larger assemblage of property at this location could increase its chance for successful retail operation, the applicant's own expert witness testified that there was no question that the property could be developed in some type of commercial use. Any of a variety of commercial uses are allowed by the former BC zoning or the current NC zoning. (Indeed, the NC zoning allows such transmission towers as a conditional use and does not require the setbacks sought to be avoided here.)

36. The applicant has not demonstrated that this request meets all the criteria for approval of the variances requested.

Decision

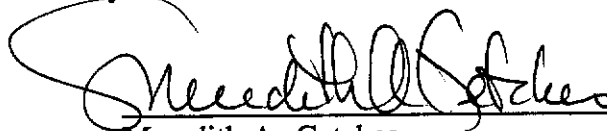
The interpretation of the Director is AFFIRMED.

The Director's determination on the EIS adequacy, is AFFIRMED.

The Determination of Non-Significance is AFFIRMED with the modification of Director's conditions in Conclusions 24, 25, 27, and 28 above.

The Director's decision on the requested variances is REVERSED. The variances requested to allow less than the required setbacks, are DENIED.

Entered this 18th day of February 1992.



Meredith A. Getches
Hearing Examiner

CONCERNING FURTHER REVIEW

SEPA Issues

Pursuant to SMC 23.76.024, a party to the hearing before the Hearing Examiner may file an appeal regarding decisions to approve, deny, or condition 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, Dexter Horton Building, Suite 200, 710 Second Avenue, 684-8322. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building.

The City Council review on appeal is limited to the issue of compliance with SMC 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to SMC 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

Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review of the underlying decision within 30 days after the date of the official notice of that decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director, Department of Construction and Land Use 710 Second Avenue, Suite 770, Seattle, WA 98104-1703, within the time limit set for appealing the underlying governmental action. (SMC 25.05.680D.4).

Interpretation, Variance, Adequacy of EIS Decisions

Any party's request for judicial review must be by application to King County Superior Court for a writ of review within fourteen (14) calendar days of the date of this decision.

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, 618 Second Avenue, Seattle, Washington 98104 (206) 684-0521.