

## FINDINGS AND DECISION

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

In the Matter of the Appeal of

DR. RICHARD VOORHEES

FILE NO. S-89-011

DCLU FILE NO. 89-015

from an interpretation of the  
Director, Department of  
Construction and Land Use

#### Introduction

The appellant exercised the right to appeal pursuant to the Seattle Municipal Code, Section 23.88.020.

Parties to the proceedings were: appellant Dr. Richard Voorhees was represented Peter J. Eglick; respondent DCLU was represented by Pat Schneider, and Swedish Hospital represented by Peter Buck. The record closed on August 29, 1990. Parties submitted closing memoranda.

This matter was heard before the Hearing Examiner on July 17, 20, and August 13, 1990.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code, Title 23, as amended, unless otherwise indicated.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

#### Findings of Fact

1. This is an appeal from an interpretation of the Director of the Department of Construction and Land Use (DCLU) of a portion of the Swedish Hospital Master Plan. The interpretation, Director's No. 89-015, is Exhibit 1.

2. Appellant is, apparently, the owner of an interest in real property located within the institutional boundary of Swedish Hospital Medical Center (SHMC). That boundary was established in the Master Plan.

3. There is no dispute over the standing of Dr. Voorhees to bring this appeal. His interests are therefore deemed to be significantly affected by the Director's decision.

4. The Master Plan for SHMC was adopted by the Seattle City Council in Ordinance 11993 and approved by the Mayor on November

1984. Exhibit 2. SHMC's Master Plan was the first Institutional Master Plan adopted under SMC 23.48.

5. In advance of the City Council action adopting the plan, it Land Use Committee held hearings in September and October of 1984. That committee was then chaired by Councilmember Jim Street. Exhibits presented at hearings in this appeal contain certain of the proceedings in the committees hearings.

6. Before the City Council and the Mayor took action on the Master Plan a citizens advisory committee was created to review and comment on the proposed plan as required by SMC 23.80.50(B). In addition, the environmental impact statement process had earlier been initiated.

7. The draft environmental impact statement document (DEIS) was published in May, 1983. Exhibit 8. It envisioned a five year plan for development from 1983 through 1988.

8. The final environmental impact statement and proposed Master Plan (FEIS/MP) is dated December 1983. Exhibit 10. The forward to it notes SHMC planned two phases of development; one for 1983-1988 and another for 1989-2003. It goes on to state that approval of only the first, i.e., 1983-1988, phase was being sought. It adds, however, that the later phase "is presented for broader context."

9. The FEIS/MP acknowledges, in several places, that a major 20 year development program is described. Likewise, it observes that approval of only the first phase was then being sought. See, Exhibit 10 at page MP 16: "Note that City approval of only Phase one ...is being requested...." and see page MP 35, "although SHMC is not seeking approval of the 2003 plan development proposals...." Just as surely, however, there is recognition and discussion of the likely impacts of the later phase development. The FEIS/MP, for example, sets out mitigating measures for the second phase. Exhibit 10 at page 112. There is also identification of unavoidable adverse impacts. Id at 112. There is no requirement that 1983-1988 development occur before later development can take place. The Master Use Permit and EIS process must be followed with respect to this development. The Master Plan is not an exemption from either process. Rather, it is a zoning tool.

10. As part of the major institutions master plan process, the Hearing Examiner was required to consider the proposal. The report of the Director of DCLU to the Hearing Examiner dated May 1, 1984, stated that the Master Plan "shall have an approval period of at least five years and not to exceed 7 years...." Exhibit 7 at page 37, Recommendation A.

11. The Hearing Examiner began hearings on the proposed Master Plan on June 4, 1984. On June 5, 1984, the Director of DCLU sent a memorandum to the Hearing Examiner entitled "Clarifications of the Department's Report and Recommendation on the proposed Swedish Hospital Medical Center Plan." Exhibit 5.

Among other things this memo states that DCLU erred when it earlier proposed no more than a seven year life for the Master Plan. See Exhibit 5 at page 1 paragraph 1. The memo goes on to state that the Major Institutions Chapter of SMC as well as the Department's own recommendation of May 1, 1984, Exhibit 7, contains procedures by which the Master Plan might later be revised. Both envision the existence of "substantial" and "minor" revisions. Each type of revision requires, in turn, a different intensity of public involvement and City participation.

12. That part of the clarifications memo dealing with the duration of the Master Plan was due, in part, to the intercession of SHMC's special counsel for land use, Judith Runstad, a Seattle lawyer. Ms. Runstad, on behalf of her client, expressed misgivings about a process which would have to be re-initiated by the end of the decade, although her client had already established a plan far more extensive than that which DCLU initially approved.

13. The decision of the Hearing Examiner is dated July 3, 1984. Exhibit 6. It recommended to the City Council adoption of the Master Plan with certain conditions. Most of those conditions were suggested in the DCLU report of May 1, Exhibit 7. The Hearing Examiner found that the proposal before him was for a "two phase, 20 year Master Plan...." Exhibit 6 at page 1 Finding of Fact 2. The Examiner found that the 1983-1988 increase in hospital space would be 62,000 sq. ft. Exhibit 2 at Finding 24. This parrots DCLU's analysis of May 1, 1984, Exhibit 7 at page 6. Likewise, both recognized MOB development of 450,000 sq. ft. in the same period. See also Table 5 to the FEIS.

14. The recommendation of the Hearing Examiner was the action item before the City Council and its land use committee when what became Ordinance 111993 was considered. The text of the ordinance, in the preamble, refers to: the DCLU report of May 1, 1984; the Hearing Examiner recommendation of July 3, 1984 and a proposed master plan. The latter document was not generated by City officials. Rather, it was drafted by Ms. Runstad to incorporate the operative portions of the decision of the Hearing Examiner. No City official expressed a desire to draft the document. It was circulated to the Hearing Examiner and staff persons at DCLU and some changes were made while in draft. The final version of the plan was filed on October 19, 1984, in C.F. 292619, the date the Council approved the Master Plan.

15. Along with the Ordinance, the City Council adopted findings, conclusions and a decision with respect to the application of SHMC for approval of its master plan and in response to the report and recommendation of the Hearing Examiner. These were also dated October 29, 1984. Exhibit 3. This document refers to the DEIS/MP; FEIS/MP; the proposed master plan; DCLU recommendation of May 1, 1984 and the decision of the Hearing Examiner.

16. The issue in this case has to do with the meaning of

part C.1 of the Master Plan adopted by the City Council. See Exhibit 2 at page 3. It states:

1. Hospital.

Hospital space has the first priority for development within the boundaries of SHMC. A proposed expansion of hospital floor area by 62,000 square feet shall be permitted. Hospital uses may occupy any existing building or floor area within the boundaries not currently in hospital use. Hospital expansion above the 62,000 square foot level can be made, provided that:

- (a) Total hospital expansion above the floor area existing in 1983 shall not exceed 256,000 square feet;
- (b) The 1983-88 Phase Program office space of 450,000 square feet is reduced by the amount equal to any corresponding increase in hospital space;
- (c) Parking spaces meeting the code standards relevant to the increase in hospital space shall be provided by the time of the Certificate of Occupancy issuance for such space;
- (d) There has been no increase in the deficit of parking below code requirements between the approval date of this Master Plan and the request for expansion above 62,000 square feet.

17. Part I of the Master Plan deals with revisions to it. Sub-part 1.(a) states that a minor revision is, "an increase of hospital floor area over 62,000 square feet, if in lieu of an equal amount of medical office space." A substantial revision is an increase in hospital space beyond 256,000 square feet.

18. The original DCLU analysis of May 1, 1984, Exhibit 7, contains a condition on hospital expansion virtually identical to that found in the later Master Plan and set out in Finding 16. It likewise contains a minor revision proposal identical to that in Finding 17. See Exhibit 7 at p. 38 and 46.

19. In 1989 Ms. Runstad approached DCLU officials about her understanding of part C.1 of the Master Plan. In general terms, it was her belief that after 1988 it would not be necessary to offset medical office building (MOB) by any increase in hospital space in excess of 62,000 sq. ft. up to a maximum of 256,000

square feet above the amount of hospital space existing in 1983. The advantage to Ms. Runstad's client of this approach is with the use of the minor revision process of the Master Plan. Otherwise, the more complex and time consuming major revision process would be required. DCLU officials declined to agree to Ms. Runstad's belief without use of the interpretation process of SMC 23.88.020.

20. An initial draft of the Department interpretation was prepared by Arthur Lee. Exhibit 12. That draft was not adopted by the Director of the Department. Mr. Lee concluded that the hospital/MOB offset or tradeoff applied for the duration of the Master Plan. Instead, an interpretation dated December 18, 1989 was signed by the Director. In essence, it states that after 1988 there is no offset in MOB space required for hospital development above 62,000 sq. ft.

21. The interpretation ultimately given to the Master Plan was, in large part, drafted by Guy Fletcher, now a Deputy Hearing Examiner and not related by blood, marriage or otherwise to the undersigned.

22. That the City Council and the Mayor ultimately approved a Master Plan which was to be in affect beyond 1988 was due to Ms. Runstad's advocacy. Ms. Runstad is also the primary drafter of the Master Plan itself. The conditions originally proposed by DCLU in May 1984 had to do with what was then thought to be a plan with a life of no more than seven years.

23. SHMC in the 1983-1988 phase proposed to construct two medical office buildings, MOB 1 and MOB 2. There was no requirement that SHMC actually undertake development of both MOB 1 and MOB 2. Presumably, with the seven year life of the Master Plan initially proposed by DCLU, SHMC could seek another plan or extension of the existing plan. The finite life of the plan would trigger this requirement. The change in DCLU's position with respect to the term of the plan was not accompanied by a proposal for further MOB development in the after-1988 Phase.

#### Conclusions

1. It was not contested that the Hearing Examiner has jurisdiction over the subject matter and the parties to this appeal.

2. Appellant, Dr. Richard Voorhees, has standing to bring this appeal.

3. In reviewing an interpretation of the Director of DCLU of a provision of either Title 23 or Title 24 of SMC the provisions of SMC 23.88.020E.5-7 applies. Sub-part 5 states, in pertinent part:

Appeals shall be considered de novo and the decision of the Hearing Examiner shall be made

upon the same basis as was required of the Director. The Interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant.

The text seems painfully clear at first blush. But giving thought as to how it is to guide the Hearing Examiner creates problems. The lesson here is either not to think, just do, or to construct a scaffold upon which to climb from the code and deal with the merits.

4. The hearing is to be de novo, that is clear. Yet, the hearing shall be upon the: "same basis as was required of the Director." One could claim that this means the Examiner is to look only at what the Director saw. That would ordinarily be the case of some sort of third party review of agency action. But plainly, that is at odds with the portion of the ordinance requiring a de novo hearing. That clearly implicates a hearing where the Examiner has the opportunity to bring forward new evidence. One can assume, of course, that Latin is not the language of choice of the Seattle City Council and Mayor. But, on another point, how does the concept of a de novo hearing square with the notion of giving the Director's decision "substantial weight?" Most judicial review of agency action requires deference based upon the record produced by the agency. See e.g., RCW 34.04. Here there is something of an anomaly: Substantial weight is to be given to the agency action even though a new record is created independent of that produced by the agency.

5. All parties recognize that the Hearing Examiner may substitute his or her judgment as to what constitutes a proper interpretation of either Title 23 or Title 24. The issue comes to this: under what circumstances is that proper? Given two possible interpretations of the same legislation, each equally plausible, it would not be appropriate to hold that the Examiner's approach should be substituted for that of the Director. For that to be so, it would make little sense to require the Director to make an interpretation at all.

6. Then, what is to occur if the competing interpretations are not in all ways equally plausible? If the decision of the Director is, objectively, the less plausible of two interpretations what effect is the substantial weight accorded to the Director's point of view? Appellant suggests, at one place, that the Examiner "need only come away with a firm view that the Director's decision is in error, not that it is totally implausible." Appellant's Post Hearing Memo at 7/20-22. In another place, he states the Examiner may, "correct an obvious mistake,...." Id at 2/14. And in still another place, it is suggested that "clear error" need be shown. Id at 3/7-8, and initial post-hearing memo at 33/3. SHMC advocates that so long as the Director's decision is reasonable it must be upheld. SHMC's post-hearing memorandum at 3/18-19. Conversely, only an

unreasonable interpretation of the Director would therefore be subject to challenge. Counsel for DCLU cites authority for the proposition of the Director's interpretation must stand unless it is clearly erroneous. DCLU post-hearing memo at 5/3-15. Are these not all nearly synonymous with each other? Very likely so.

7. All three parties recognized and tried to grapple with the notion that there is some obstacle in the way a Hearing Examiner substituting his or her judgment for that of the Director. The code requires the Director to take action, that much is clear. The deference ordinarily to be given to the agency's action evaporates if the agency interpretation is based upon something which is legally or factually an obvious mistake i.e., clear error. Whether the record of DCLU reveals the mistake on the face of its record is of no consequence; the evidentiary hearing before the Examiner allows creation of a record which allows revelation of the error, if any. Thus, the code invites, and perhaps even requires, hindsight. Appellant must then convince the Examiner that the Director's interpretation was wrong. Implicitly, this, then, may suggest that there is a "right" way to interpret a piece of legislation or a master plan. This Examiner rejects that approach because it implies that the appellant would have to prove some sort of fraud, collusion or underhandedness on the part of the Director in promulgating his or her decision. My test is this: whether an objective person, hearing all the facts, would reject outright the Director's decision. If so, relief is required under SMC 23.88.020E.7.

8. Both Swedish and Appellant urge the Examiner to look at the history of the legislation and the Master Plan itself. The Examiner is reluctant to consider some of this evidence because of the opportunity it naturally invites to pad the record. At any hearing or in any stage of consideration any reasonably clever person can write a memo or create a colloquy which will support just about any point of view. Especially is this so when the public's business is done in public or in close proximity to photocopy machines

9. A substantial change in the Swedish Master Plan occurred when DCLU agreed with Swedish that a seven year limit to the life of a plan was not required. From the recognition of that flows most of the issues of this appeal. The Master Plan, as adopted, recognizes the possible construction of 450,000 sq. ft. of medical office space. See section C.4 of Exhibit 2. Half of that, or 225,000 sq. ft. may be developed during the 1983/88 phase almost outright, i.e., with relatively minor conditions imposed. Another medical office building, MOB 2, may be built at a later date. As originally propounded that later date would have to be no later than 1989. However, now it can occur at any time because the Master Plan has no time duration. MOB 2 may not exceed 225,000 sq. ft. This later structure has more rigorous conditions imposed before development may begin. That space, may but need not, be developed before 1988.

10. Up to 62,000 sq. ft. of hospital space may be developed outright. Up to 256,000 sq. ft. of hospital space may ultimately be developed. What is of concern here is what is to happen if more than 62,000 sq. ft. of hospital space is developed under the Master Plan but after 1988? Appellant contends, as the Examiner understands him, that MOB 2 must be reduced in size by an amount equal to hospital space in excess of 62,000 sq. ft. SHMC and DCLU contend that in effect the trade-off is simply not applicable after 1988. They reason that Exhibit E and F to the Master Plan show hospital space development in the post-1988 phase which exceeds 62,000 sq. ft. along with 450,000 square feet of MOB. Said Exhibits are specifically incorporated into the master plan. See Exhibit 2, part B.

11. Had the seven year duration of the Master Plan not been changed, SHMC could not claim as it now does, that it can operate on a clean slate after 1988, if only because there would be no plan and therefore no slate.

12. The interpretation of the Director notes the inconsistencies between the minor and substantial revisions portion of the plan. Exhibit 1 at p. 4. It also concluded that MOB 2 was to be developed after 1988 lending credence to the notion that development after that date is on the clean slate. Yet the attachment to the interpretation, Exhibit 5 to the FEIS, clearly demonstrates MOB 1 and MOB 2 to be part of 1983-1988 phase which now may be of indefinite duration.

13. The Examiner remands this to the Director pursuant to SMC 23.88.020.E.7 along with the record developed in this hearing for review and if necessary, reconsideration in light of these findings and conclusions and the claims of the parties to this proceeding. The Examiner believes the Director should have the opportunity to make an interpretation based upon all the facts and circumstances. The proceedings before the Hearing Examiner may have elicited evidence not before the Director.


14 The Examiner is not, at this point concluding that error exists with the Director's interpretation. The Examiner is suggesting that there may not be any magic to the 1988 date; that Exhibit E and F may not comport with the text of the plan and that portions of Conclusion 6 of the Director may not be supported by the facts.

#### Decision

The Interpretation of the Director is REMANDED for proceedings consistent with these Findings and Conclusions. The undersigned will retain jurisdiction for further proceedings in this forum.

Entered this 13<sup>th</sup> day of September, 1990.



  
Kelby Fletcher

Hearing Examiner Pro Tempore

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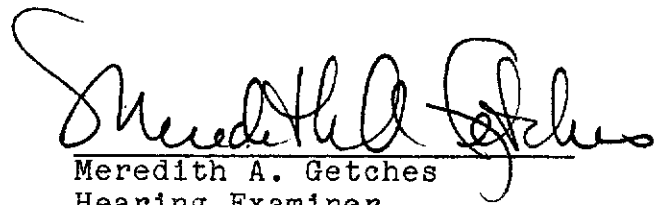
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ORDER OF DISMISSAL

The appellant has withdrawn the appeal in this matter involving an interpretation regarding the Swedish Hospital Master Plan.

For good cause shown, the request for withdrawal is granted and an order of dismissal is hereby entered.

Entered this 5th day of November, 1990.



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