

## FINDINGS AND DECISION

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

In the Matter of the Appeals of

GREEN LAKE COMMUNITY COUNCIL AND  
VITAMILK DAIRY

FILE NOS. MUP-86-091(W) and  
MUP-86-093(W)

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

#### Introduction

Appellant, Green Lake Community Council, appeals the determination of non-significance issued by the Director, Department of Construction and Land Use, for a proposal to install an additional milk storage tank at 427 N.E. 72nd Street, the Vitamilk Dairy, and her decision not to impose additional conditions on the master use permit pursuant to SEPA. The applicant, Vitamilk Dairy, appeals the imposition of Condition No. 8.

The appellants exercised their right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on January 16, 27 and 30, 1987.

Parties to the proceedings were: appellant represented by T. Allan Tebb, president, and Steve Rubstello, vice president; the Director represented by Malli Anderson, land use specialist; and the applicant, Vitamilk Dairy, represented by Sarah E. Mack, Hillis, Cairncross, Clark and Martin.

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

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

#### Findings of Fact

1. Vitamilk Dairy (Vitamilk) applied for a master use permit to install a 25,000 gallon milk storage silo at 427 N.E. 72nd Street. The Director, Department of Construction and Land Use (Director), issued a determination of non-significance (DNS) for the proposal and imposed certain conditions. Green Lake Community Council (Green Lake) appealed the DNS and failure to impose additional conditions. Vitamilk appealed the imposition of Condition No. 8.

2. The proposed storage silo would be installed in the existing building in the block between N.E. 71st and 72nd Streets, 72 ft. west of the east property line. It would extend above the roof of the existing building to a height of 35 ft. 4 in. above finished grade at the east line and 36 ft. 4 in. above the north line. An existing silo extends 8 in. higher. The diameter of the proposed silo would be 11 ft. 10.75 in.

3. The parties stipulated that the decision of the Director may be modified in two respects: 1) to state specifically that the decision does not authorize violation of City ordinances, e.g., noise or traffic, and 2) to amend the language of Condition No. 7 as follows:

When double tanker truck movements using 5th Avenue Northeast would block the sidewalk to load and unload milk, the tanker shall be uncoupled to prevent blocking the sidewalk.

The second tanker shall be temporarily parked in a legally established off-street truck parking space.

4. An environmental checklist was prepared and filed June 5, 1986, by Vitamilk and approved by Malli Anderson for the Director, November 5, 1986. The checklist asks whether applications are pending for government approvals of other proposals. Vitamilk responded that applications regarding existing parking lots would be filed in June, 1986.

5. Application to install a blow molder had been approved earlier. Expansion of a loading dock is now under consideration. There was no showing that application for either was pending in June or November, 1986.

6. Ms. Anderson indicated in her testimony that several responses in the checklist could have or should have been different, for example, number 8 which asks that any environmental information that known to have been prepared or to be prepared directly related to this proposal is to be listed. She indicated that the Tudor Engineering study on parking and the Lilly noise study could have been listed in response to this item. Item 10b regarding views in the vicinity that would be altered had a response of "none" where some views were shown to be affected. Item 8.i which asks how many people would work in the completed project has an answer of "20" where the record shows some 82 to 85 employees divided between two shifts.

7. The only environmental impact identified in the DNS was that from the bulk and scale of the proposed silo. The decision explained that tanker truck traffic is expected to be reduced slightly with an accompanying decrease in impacts from truck emissions, truck noise and truck movements.

8. The evidence at hearing showed there would be no change in the amount of truck traffic with the addition of the proposed silo.

9. The checklist showed other impacts including the consumption of natural gas, noise from construction and possible reflective glare from the silo surface.

10. Green Lake's evidence showed that the existing environment around the Vitamilk plant is affected greatly by Vitamilk's operation. Truck movement and parking disrupts traffic and pedestrian passage and generates diesel exhaust and noise. Refrigeration units on trucks and movement of trucks during the night disrupts sleep. Parking on and off the site apparently has been haphazard and unsightly. These impacts have been the basis of earlier appeals, lawsuits and negotiations over the past years. Some steps have been taken by Vitamilk such as installation of clutch fans to limit the running of the radiator fans on certain trucks, insulation to engine hoods, substitution of better quality mufflers, change in the location of tanker truck parking, all in an attempt reduce the conflict between the use of the site and residential uses surrounding. Noise reduction has been achieved but is still at a level which interrupts sleep.

11. The site of the proposed silo within the Vitamilk plant is within a C1 40' zone. To the north of the alley between N.E. 72nd and N.E. 73rd Streets, the block north of the silo site, the zoning is L-3. East of 5th Avenue N.E., which appears to be 60 ft. wide, the zoning is L-3. There are residences north of the alley between N.E. 72nd and 73rd Streets, east of 5th Avenue N.E. and on the south half of the block between N.E. 70th and 71st Streets.

12. Some of the existing milk storage space at Vitamilk is obsolete and has raised health concerns. Some 19,000 gallons of capacity would be removed from service and be replaced by the one

25,000 gallon storage silo. The change would free up some 80 sq. ft. of floor space. No plans currently exist for the use of that space.

13. Green Lake contends that more storage space logically leads to more production.

14. Witnesses Butler, production manager for Vitamilk, and Vander Pol, chief financial officer, both testified that the larger storage capacity will allow a more efficient operation but is not related to volume of finished product. The production figures introduced by Vitamilk and by Green Lake show no correlation between the increase in storage capacity by 25,000 gallons in 1982 and the volume of milk produced. (Exhibit 21 and testimony of Richard White.) The increase in production for March of 1982 shown on Exhibit 1 preceded the installation of the silo and is attributed to a major competitor going out of business.

15. Since no evidence supports the probability of increased production related to installation of the proposed storage silo evidence of impact from increased truck traffic and its noise in the record is not relevant and should be stricken. That evidence includes the following exhibits which were admitted subject to establishing relevance: 2, 6, 7, 8, 10, 14, 17 and testimony related to noise and traffic impacts by Turnberg, Horvath, Rollins, Lilly and Wilson.

16. There may be a small reduction in the view of mountains from a few residences to the east of the site caused by the new silo.

17. There is potential for reflected glare from the surface of the silo.

18. The impacts on the environment from bulk and scale, of view blockage and of glare would not be more than moderate.

19. The Director imposed conditions to mitigate construction impacts including limitations on the use of loud equipment to the hours between 7:30 a.m. and 6:00 p.m. on non-holiday weekdays.

20. The concrete foundation for the silo would take two to three days to construct, according to Butler. Installation of the tank by dropping it through a hole in the roof would take a few hours. It would be reasonable to assume that removal of the other tanks and preparation, e.g., cutting the hole in the roof, would take a few days.

21. A project to demolish two single family residences and construct a 4-story, 48-unit apartment building in an L-3 zone was conditioned to restrict the use of loud equipment to the hours of 8:00 a.m. to 5:00 p.m. on weekdays.

22. The construction of a 48-unit apartment building would take longer than the week or so involved in the installation of a tank.

23. Condition number 4, imposed by the Director, requires that a flag person be present for maneuvering of tanker trucks in the street.

24. A flag person has been used by Vitamilk for some time. There has been no history of accidents resulting from the maneuver either before use of the flag person commenced or in the period where the flag person has assisted. The video tape shown at the hearing demonstrated that a flag person could position himself or herself to be visible to oncoming traffic from both directions.

25. The proposed silo would have no exterior lighting.

26. Condition number 6 limits the hours when tanker trucks may be moved to 6:00 a.m. to 10:00 p.m. except during "the holiday production period."

27. The "holiday production period" was left vague intentionally, according to Anderson, but contemplates the period from before Thanksgiving to after Christmas.

28. Condition number 8 provides:

The Comprehensive Plan which has been initiated by Vitamilk shall include a landscape plan for the site, and a truck management plan which considers truck noise and emissions, truck movement on the site, and satellite truck parking alternatives. Measures shall be suggested and implemented to reduce the impacts of trucks in the vicinity. A landscape plan shall be submitted to DCLU for approval by April 30, 1987. A truck management plan shall be submitted to DCLU for approval by August 31, 1987.

29. Anderson, the land use specialist, testified that condition number 8 was designed to address and mitigate the existing situation and problems. The Director relied on Section 25.05.902D for authority to impose that condition.

#### Conclusions

1. The Hearing Examiner has jurisdiction over this matter and the parties thereto pursuant to Section 23.76.050C. On review the Director's determination is to be given substantial weight by the Hearing Examiner. Section 23.76.052C.5. To overcome that weight, appellants must establish that the decision made was clearly erroneous. Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

2. Appellant contends that an environmental impact statement (EIS) should be required for the proposal. An EIS is required when the proposal would significantly affect the quality of the environment. Section 25.05.330. If the Director determines there will be no probable significant adverse environmental impacts, she is to issue a DNS. Section 25.05.340. "Significant" is defined for use in SEPA as a "reasonable likelihood of more than a moderate impact on environmental quality." Section 25.05.794A.

3. The impacts of the new storage silo are limited to those from construction which are very short term in this case, from its bulk and scale, from possible reflection and from view obstruction. Because these impacts would not have more than a moderate impact on the quality of the environment, they are not significant.

4. Appellant suggests that other proposals, i.e., expansion of the loading dock and installation of a blow molder, should also be considered when assessing the degree of impact. SEPA does require consideration together of closely related proposals in one document. Proposals are "closely related" if the proposals cannot proceed unless the other proposal is implemented simultaneously or the proposals are "interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation." Section 25.05.060C.2. The three proposals are not closely related so need not be reviewed together.

5. The appellant showed certain errors in the answers to the checklist. None was shown to lead to the identification of impacts not otherwise identified.

6. The Director did not err in issuing a DNS for the proposal.

7. Appellant requests that additional conditions be imposed on the approval. The Director has authority pursuant to Section 25.05.660 to mitigate environmental impacts subject to certain limitations. Those limitations are that the conditions be based on policies designated in Section 25.05.902 as a basis for the exercise of substantive authority, that they be related to specific impacts clearly identified in the environmental documents, that the measures be reasonable and capable of being accomplished and that responsibility for the condition be imposed on the applicant only to the extent attributable to the impact of the proposal. Section 25.05.660.

8. The probable impacts identified are those from construction, bulk and scale, reflection or glare and on view. Conditions have been imposed to mitigate impacts during construction. Given the brief time period involved in construction the hours for noisy operations are not unreasonable and additional conditions would not be reasonable. As to impact on views, the view policy in Section 25.05.902G does not provide authority for the imposition of conditions to protect private views. As to the potential for glare, the Director required that any lighting be directed away from residential uses but did not find reflective glare to be an impact otherwise in need of mitigation. No evidence was adduced to the contrary.

9. Appellant urges that two flag persons be required to assist with maneuvering tanker trucks in the public right-of-way. Assuming any authority exists for the imposition of the condition, the record does not show that the Director erred in requiring only one.

10. The bulk and scale of the part of the silo extending above the roof was identified as an adverse impact. The Director did not regard it as an impact in need of mitigation. Two measures were suggested by appellant or its witnesses, i.e., landscaping and, indirectly, reduction in size. The Director is authorized to require landscaping as a mitigating measure "when it can provide a buffer between incompatible land uses or zones...." Section 25.05.902E.2.a. Given the small addition to the bulk of the building, landscaping of the nature which would be needed to buffer an addition to the roof, presumably tall trees on all sides, would not be reasonable.

11. The other policy basis suggested to be available for mitigation of the effects of bulk and scale was referred to as the "edge" policy. Goal I.B.9 of the Neighborhood Commercial Area Land Use Policies is to:

Provide for a transition in scale and use between residential and commercial areas, buffering residential areas from the impact of heavier commercial uses, wherever possible:...

p. 23-74.2.

12. The silo would join an existing silo which is slightly higher. It would be set back 72 ft. from the property line nearest to the residential zone and it would further be separated by a street from the lots in that zone. The total height of the silo is less than that allowed in the zone which designation was selected through use of the referenced policy. Appellant has not shown the decision of the Director not to mitigate that impact to be clearly erroneous.

13. Additional conditions, including requiring a comprehensive development plan, are requested by appellant to address

existing traffic, noise and other problems. The Director has been given authority to impose measures to mitigate only those impacts attributable to the proposal. Therefore, no error has been shown.

14. Condition number 7 should be amended as stipulated and the statement that the decision does not authorize the violation of any ordinance should be added.

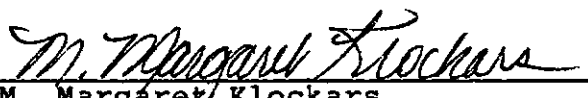
15. Applicant appeals the imposition of condition number 8 requiring a landscape plan for the site and a truck management plan on the basis that the Director has exceeded her authority in imposing that condition. The decision itself and the testimony of Anderson clearly reflect that the condition is imposed to address existing conditions, not the identified impacts associated with the proposal. The authority conferred by Section 25.05.660 does not extend to mitigation of existing conditions. The Director erred in imposing that condition and the condition should be deleted.

#### Decision

The determination to issue a DNS for the proposal is affirmed and the conditions of approval are modified as follows:

1. Below the heading "Conditions" is added the following statement: "No violation of any City ordinance is authorized by the following conditions."
2. Condition number 7 is amended to read: When double tanker truck movements using 5th Avenue N.E. would block the sidewalk to load and unload milk, the tanker shall be uncoupled to prevent blocking the sidewalk. The second tanker shall be temporarily parked in a legally established off-street truck parking space.
3. Condition number 8 is deleted.

Entered this 13th day of February, 1987.

  
M. Margaret Klockars  
Deputy Hearing Examiner

#### CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 25.05.680(C), a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to Section 25.05.680(C), 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 Section 25.05.680(C) appeal.

If no appeal is taken pursuant to Section 25.05.680(C), the decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review of the decision on the underlying governmental action must be filed in King County Superior Court within fifteen days of the date of this Hearing Examiner decision.

Seattle Municipal Code Section 23.76.22(C)(12)(c). Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington 98104, within fifteen days of the date of this decision. Section 25.05.680(D)(4).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost of preparing a verbatim written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review.