

## FINDINGS AND DECISION

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

In the Matter of the Appeals of the

MAGNOLIA COMMUNITY CLUB  
and ALLAN D. LOUCKS, JOHN D.  
FERLUGA and CHARLES W. MCHUGH

FILE NOS. MUP-81-043(W)  
MUP-81-044(W)

from a decision of the Director  
of the Department of Construction  
and Land Use

ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT and  
PARTIAL JUDGMENT OF  
DISMISSAL

#### Introduction

The Magnolia Community Club, Allan D. Loucks, John D. Ferluga and Charles W. McHugh, appellants, appeal the determination of the Director of the Department of Construction and Land Use that the environmental impact statement (EIS) for the Auckland Arms low income housing for the elderly proposal is adequate.

A hearing was held before the Office of Hearing Examiner on October 26, 1981.

Appellant, Magnolia Community Club, was represented by Joel Haggard, Haggard, Tousley and Brain; appellants Loucks, Ferluga and McHugh were represented by Allan D. Loucks, attorney at law; the Director was represented by the City Attorney, P. Stephen DiJulio, assistant, and the project sponsor, John K. Stipek, was represented by Stephen J. Crane, Crane, Stamper Boese and Dunham.

A Motion for Summary Judgment was filed by appellant Magnolia Community Club prior to the hearing, denied by the Hearing Examiner and renewed by Magnolia Community Club after presenting one witness.

Bases for appellant's motion were:

1. that a concern was expressed through a comment regarding flooding problems in the basement of the church rectory and a potential for off-site impacts from effect on sub-terranean water courses but that the response was not responsive in that it referred to taking care of any problem through the Building Code at the time of permit and that the Director, as a policy, does not test soil or water conditions off-site;
2. that a significant adverse impact from construction noise is disclosed in the EIS with mention of potential mitigating measures of keeping school windows closed or scheduling construction in non-school months or periods, but the feasibility and effectiveness of the window closing was not discussed or quantified and no construction schedule was provided;
3. that the range of alternatives should have included one with fewer units; and
4. that because a rezone is part of the proposal, the consideration of alternative sites should have included any which would have met the City's objective in rezoning the property, not just those sites appropriately zoned.

Based on the environmental impact statement and the testimony of Jan Arntz, senior environmental specialist, the Hearing Examiner makes the following findings of fact and conclusions.

#### Findings of Fact

1. The EIS responded to a comment about impact on adjacent structures due to hydrostatic pressure from loading the site with a four story building by reference to City codes which require an on-site water retention plan.
2. The Director believes that he has no authority to condition a project based on a project's impact on soil, water, and drainage conditions off-site except through the Building Code so no off-site analysis was done.
3. The EIS shows that on-site test borings were done at three locations, one at the southwest corner, across the alley from the church rectory. No underground aquifers were found.
4. The EIS discloses that noise caused by construction activity will be an adverse impact. According to Jan Arntz, it is considered a significant impact. The EIS predicts that during construction activities the school will receive noise impacts at levels between 41 and 67 dBA which "may interfere with or at times exceed the general classroom noise levels; most notably if classroom windows are open rather than closed." FEIS, p. 61.
5. A possible mitigating measure listed is scheduling noisiest construction activities during the summer months.
6. The EIS does not state a proposed construction schedule.
7. The EIS does not disclose whether closing the school windows is a feasible measure nor does it quantify the noise level if windows must be open.
8. The subject site is currently zoned RS 5000. A rezone to RM 800 would be required for the project.
9. The Director required and the EIS contains consideration of other sites but limited that consideration to sites on Magnolia which would not require a rezone.
10. The EIS does not consider an alternative to the project with fewer units. The Director intended to require analysis of only alternatives meeting the sponsor's objectives.
11. The objectives listed in the EIS (FEIS, p. 1) are
  - (1) to not demolish any existing housing stock in the city, (2) to not exceed 50 units for housing in the project and to ensure that the scale of the project is consistent with surrounding development;
  - (3) to locate the project in the Magnolia area;
  - (4) to develop the project on a relatively flat topography (sic) location due to both the costs of construction and the age of the proposed residents;
  - and (5) to commence development within the near future.
12. The EIS states, at p. 43, FEIS, that an alternative with fewer units was not considered because of the sponsor's contention that the project would not then be economically feasible. No figures supporting that contention are provided.

13. The testimony of Ms. Arntz showed that because the sponsor stated a desire for 44 units, the Director did not require analysis of an alternative with fewer.

14. The EIS contains, in Appendix D, p. 185, FEIS, a letter from HUD giving preliminary approval for 30 units.

#### Conclusions

1. The question to be determined in a summary judgment motion is whether there are any genuine issues of material fact. While the response with regard to hydrostatic pressure did not address the specific concern raised and that concern was not considered for analysis because of the Director's belief regarding his authority for summary judgment in appellant's favor a probable significant impact must be disclosed. No probable significant impact may be inferred especially in a case where the determination of the Director is given substantial weight. A material fact being at issue, summary judgment may not be granted.

2. The consideration of the noise impact on the school and mitigating measure is not adequate but that inadequacy alone does not make the document inadequate as a matter of law.

3. WAC 197-10-440(12)(a) requires an "evaluation of any reasonable alternative action which could feasibly attain the objective of the proposal." Reasonable alternatives are to include "any action which might approximate the proposal's objective, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-10-440(12)(a)(i). The objective referred to is to be the City's objective, not the project sponsor's as is made clear by Barrie v. Kitsap County, 93 Wn.2d 843, 613 P.2d 1148 (1980).

4. The limitation to the sponsor's site or other sites owned by the sponsor does not apply because the proposal involves a rezone. The Director recognized this when he required examination of sites not owned by the sponsor.

5. Limiting consideration of sites to those on which the project could be built without a rezone may have eliminated sites from consideration which could be rezoned for the City's purpose with fewer adverse impacts. A determination as to what the City's objective is must be made and then consideration of sites, if any, which could be rezoned to carry out that purpose at a lower environmental cost should be made. A failure to conduct that evaluation of alternatives makes the EIS inadequate.

6. Any reasonable alternative which could feasibly attain the objective of the proposal must be described and evaluated. The sponsor's objective, in part, is to construct not more than 50 units of housing. The HUD approval, on its face, makes 30 units appear feasible. The EIS's assertion that evaluation of fewer units was not undertaken because of the sponsor's contention violates the general rule that discussion must go beyond mere assertions and provide the data and reasoning of the agency. See Sierra Club v. ICC, 11 ERC 1245 (DC Cir. 1978).

7. Section 25.04.150(A) provides:

The following additional elements covering social, cultural and economic issues are part of the environment for EIS purposes only:

1. Economic factors, including but not limited to employment, public investment, and taxation where appropriate, provided that this section shall not authorize the city to require disclosure of financial information relating to the private applicant or the private applicants' proposal.

Since that section may be interpreted to limit the authority of the Director in obtaining data, when an alternative appears to be reasonable to the Director, and to involve lower environmental costs, it should be included without regard to unsupported contentions of the sponsor.

At the close of appellants' cases the Director moved for a judgment of dismissal of the appeal as to allegations regarding parking, shadow, noise, soil and water and overall non-responsiveness to comments. The examiner makes the following additional findings of fact and conclusions:

#### Findings of Fact

15. The garage access to the building is to be from 32nd Avenue West. That street is a 25 ft. wide local residential street with parking on both sides leaving only one lane for travel. The street is two-way.

16. The on-street parking supply in the vicinity of the subject site is approximately 109 spaces. (DEIS, p. 78). Surveys were done which showed the spaces were used to not more than 31 percent of their capacity. Surveys were done during softball games showing on-street occupancy of approximately 47 percent.

17. The garage access from 32nd will probably eliminate two parking spaces. A loading zone will probably eliminate another one to two spaces. Neither loss is disclosed in the EIS.

18. A study of car ownership and parking demand in low income elderly facilities in King County showed one tenant vehicle for each 3.5 units and an average of one guest vehicle for 16.5 units. Using that survey the demand for the proposed project could be 16.

19. The City's parking requirement of one space for every six units is based on a 1976 study of 20 Seattle Housing Authority low income elderly projects. The code would require 8 spaces for the project. The sponsor proposes 12 spaces on-site.

20. Pictures in the FEIS supplied by Charles McHugh accurately reflect the parking conditions during softball games. Many vehicles are parked in church parking lots or illegally.

21. The EIS does not disclose that there are five softball fields at the playfield across the street. The softball season runs from April to September or October. Two games per night are often played on each field as well as in use all day Saturday by leagues. Use of the park facility has increased 50 percent within the past year continuing a trend of increased use over the years.

22. Local figures developed by the Puget Sound Council of Governments (PSCOG) were used for trip generation which is approximately one half the Institute of Transportation Engineers figure. Both rates are disclosed as well as the rationale for using the PSCOG rate.

23. The Engineering Department's comment on the DEIS offering that the adverse traffic impacts using the alley for access suggests that 32nd Avenue West should be used, refers to that street as 32nd Avenue N.W. One of the bases stated for the opinion that street access should be used is that the "roadway is a wide neighborhood street...." (FEIS, p. 30)

24. The shadow diagram at p. 37, DEIS, does not show the outline of the two residences to the north which would be affected. The diagram refers single family residences without outlining them. The text discloses that the building would cast a shadow on properties to the north.

25. Charles McHugh, P.E., appellant and Magnolia Community Club witness testified that if aquifers were in that area which could be affected it is more probable than not that the construction of the proposed building would have a significant adverse impact.

26. Mr. McHugh lives within 400 ft. of the subject site. He is retired after having worked as a civil engineer for at least 18 years as a project engineer in highway construction and many years with other responsibilities.

27. A building with 49,000 sq. ft. of floor space would result in 125 lbs. live load with a safety factor of two, 6,000 tons of pressure on the site.

28. Response No. 25 to comment No. 25 does not fully address the comment.

29. Response No. 28 does not fully address the concern in comment No. 53 about underground water impact on the rectory from the project.

30. Response No. 94 to comment No. 94 states a conclusion based upon discussion in the DEIS.

31. Response No. 96 to comment No. 96 referring to response No. 2 and pp. 17 and 18 of the DEIS does not answer the question raised.

32. Response No. 129 to comment No. 129 does not fully answer the two questions raised.

33. Over 200 comments were responded to in the EIS.

#### Conclusions

1. For full disclosure of the impacts the loss of on-street parking from the accessway and loading zone should have been noted. If on-street parking is normally only around 31 percent occupied this loss should not be of enough significance to require reevaluation.

2. The photographs in the EIS appear to show a much greater occupancy of on-street spaces than the 47 percent observed by the EIS preparers during softball games. Both situations appear in the EIS so full disclosure is made.

3. The analysis of parking demand used zoning code requirements which are based on a study of comparable housing. While appellants contend that a different study should have been used they did not show any reason why the different study would be more appropriate or that use of the Seattle Housing Authority study is erroneous.

4. The reference to 32nd Avenue Northwest instead of West coupled with the description of a "wide" residential street suggests some misapprehension about the street involved. The purpose of the analysis is, however, to compare street access to alley access and that purpose is met even with the misidentification and faulty description.

5. The absence of building outlines in the shadow diagrams is not misleading with the text and the words indicating single family residences there.

6. Mr. McHugh's opinion regarding the probable impact of the project on aquifers was, and had to be, qualified to the effect that if the aquifers were present, the project would have an adverse impact. The tests showed no evidence of aquifers on the site and no other evidence was introduced to show that they are, in fact, present. Therefore, no analysis of such an impact can be required.

7. Incomplete or inadequate responses to 2.5 percent or even 5 percent of the comments is not sufficient to make the document inadequate under the rule of reason.

8. Appellants showed some minor weaknesses beyond the problems with the alternatives section. That showing is not sufficient to overcome the substantial weight to be given the determination of adequacy as to the remaining issues.

#### Decision

Partial summary judgment is GRANTED as to the issues of the range of alternatives to be considered as set forth above. The City's motion to dismiss the remaining issues is GRANTED and the appeal as to those issues is hereby dismissed. The EIS is remanded for the Director's reconsideration as to evaluation of alternative sites which may satisfy the City's objective in rezoning at a lesser environmental cost and as to an alternative with fewer units.

Entered this 9th day of November, 1981.

  
M. Margaret Klockars  
Deputy Hearing Examiner

#### Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App. 418 (1977); JCR 73 (1981). Should an appeal be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court.