

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

LINDA JORDAN, ET AL.,

FILE NO. MUP-87-058(W)

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

ORDER DISMISSING APPEAL

The Seattle School District No. 1 (School District), by G. Richard Hill, Foster, Pepper & Riviera, filed Seattle School District's Motion to Dismiss in this matter. Appellants, Linda Jordan, et al., by Linda Jordan and Mary E. Haggerty, pro se, filed their Response to Motion to Dismiss. The Director, Department of Construction and Land Use, by the City Attorney, Vicki J. Toyohara, assistant, and Tamara Van Ness, intern, filed City of Seattle's Motion to Dismiss File No. MUP-87-058(W), however, the filing of that motion was not timely so it will be treated as a response.

Allegations by appellants of error in the determination by the Director are: 1) that the final supplemental environmental impact statement (EIS) prepared by the School District is not adequate; 2) that the application should have been conditioned or denied based upon housing impacts; 3) that the application should not have been accepted because the School District does not own two of the houses proposed for demolition; and 4) that the Director has allowed the School District to circumvent SEPA.

1. Adequacy of EIS

Appellants do not contend that the School District is not properly the lead agency. When the city is not the lead agency, "all departments shall use unchanged...a final EIS subject to the limits of Subchapter VI of this chapter in connection with the decisions of the City on the proposal." Section 25.05.050C, Seattle Municipal Code. Under Subchapter VI, Chapter 25.05, Seattle Municipal Code, a supplemental EIS is required if there are substantial changes to a proposal which would cause the proposal to have significant environmental impacts or there is new information available which shows probable significant impacts. Section 25.05.600C.2, Seattle Municipal Code. Changes cited by appellants since issuance of the EIS are the Superintendent's proposal that all elementary schools be K-5 and a reduction in the proposed enrollment for the school from 500-600 to 300-500 students. There is no assertion that a possible reduction in the number of students at the school would constitute a "substantial change(s) to a proposal so that the proposal is likely to have significant adverse environmental impacts...." Section 25.05.-600C.2.a., Seattle Municipal Code.

Appellants refer to Section 23.76.022C.6, Seattle Municipal Code, which lists "the adequacy of an EIS upon which the decision was made" as one of the issues which may be entertained by the Hearing Examiner. On its face, that language would appear to give the Hearing Examiner authority to consider the issue. This general description of the scope of Hearing Examiner review cannot override the specific provisions of Chapter 25.05, Seattle Municipal Code, relating to the determination of adequacy of an EIS in the case of a lead agency other than the City. Since the Director was without authority to find the EIS inadequate, except for the case of substantial change, the Hearing Examiner has no authority to entertain the appeal of its adequacy. Therefore, that portion of the appeal should be dismissed.

2. Conditions for Housing Impacts

The Director may impose conditions to mitigate environmental impacts pursuant to SEPA based on policies which have been formally designated by the City Council as bases for the exercise of substantive authority. Section 25.05.660A.1., Seattle Municipal Code. Where Council intent is clear that the Director's discretion is limited by the SEPA policy ordinance, she may not look beyond the policy ordinance to other policies in Appendix A for policy basis for conditions. cf., In Re Elmer, C.F. No. 293040 (1984). In the case of housing, Section 25.05.902J.2.c., Seattle Municipal Code, strictly limits the Director's authority to mitigate housing impacts to compliance with the Housing Preservation Ordinance (HPO). Since appellant has not alleged that the mitigation measures in the proposal by the School District do not comply with the HPO, there is no claim before the Hearing Examiner upon which relief can be granted so dismissal is appropriate.

3. Application

Section 23.76.010A, Seattle Municipal Code, provides that master use permit applications are to be made by "the property owner, lessee, contract purchaser, or a City agency, or by an authorized agent thereof." The Director maintains that it was not error to accept the application because SEPA requires notice and disclosure at an early stage. Section 25.05.055.B, Seattle Municipal Code. If the application could not be accepted until the School District owned all properties, the intent of SEPA could be thwarted. Further, the argument put forward by both School District and the Director that the School District's power of eminent domain places it in a position analogous to contract purchaser was not disputed by appellants. Dismissal, as a matter of law, is appropriate.

4. Circumvention of SEPA

Appellants' final basis for appeal is their allegation that the Director has allowed the School District to frustrate the SEPA process. This claim is based on the School District's acquisition of some of the residences proposed for demolition prior to the SEPA and advisory committee processes. The purchase of real estate is categorically exempt from threshold determination and EIS requirements pursuant to Section 25.05.800, Seattle Municipal Code. Even if it could be shown that the categorical exemption should not apply in this case, the City is not the lead agency so does not have the authority to make that decision. Therefore, this portion of appellants' appeal should be dismissed as a matter of law.

Based on the above reasons, the appeal is hereby dismissed.

Entered this 23rd day of November, 1987.

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from a decision of the
Director, Department of
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permit application

ORDER DENYING REQUEST
FOR RECONSIDERATION

Appellants, by Mary E. Haggerty, filed a Response to Hearing Examiner Decision of Nov. 23, 1987, requesting reconsideration of the Order Dismissing Appeal entered on that day. The Seattle School District, by G. Richard Hill, filed its Reply to Motion for Reconsideration objecting. The Department of Construction and Land Use by the City Attorney, Vicki J. Toyohara, assistant, filed a letter indicating it supports the School District's position.

Reconsideration is requested of all four issues decided in the Order Dismissing Appeal: the adequacy of the EIS, conditioning housing impacts, the application and certain procedural defects.

The Office of Hearing Examiner, as an administrative agency, has a limited ability to reconsider its decisions if the examiner ascertains that he or she has made an error because of fraud, mistake or misconception of facts. Hall v. Seattle, 24 Wn.App. 357, 602 P.2d 366 (1979).

As to the adequacy of the EIS for Phase 1 and the FSEIS for Whitworth School, appellants recite facts to show that there either has been a substantial change in the proposal or a misrepresentation or lack of disclosure as to the proposal either of which necessitates a new supplemental EIS pursuant to Section 25.05.600c, Seattle Municipal Code. Though the facts cited in the Response to Hearing Examiner Decision are different from those relied upon in the Order Dismissing Appeal, the legal conclusion remains that the Seattle School District, as lead agency, has sole authority to determine adequacy of the documents.

Appellants suggest no mistake of fact underlying the conclusion reached that the Director's authority to mitigate housing impacts is limited to compliance with the Housing Preservation Ordinance (HPO). Despite the Supreme Court ruling on the constitutionality of the City's regulation, the School District has volunteered to abide by the terms of the HPO. No more could be required by the Director even absent the Supreme Court's ruling.

Appellants now disagree with respondents' contention that because the School District has the power of eminent domain it is in a position similar to that of a contract purchaser under Section 25.05.055.B, Seattle Municipal Code. Even though it is possible that the School District will not be successful in its effort to take the property, the examiner finds no facts are shown which would require a finding of error in the Director's decision to accept the School District's application since Seattle's SEPA process is triggered by an application.

The Response to Hearing Examiner Decision recites a series of facts which appellants contend are procedural errors which should invalidate the Director's decision. Even though one or more may represent procedural defects, they were made by the School District as lead agency, not by the Department of Construction and Land Use during its process, so the City Hearing Examiner has no authority to review or remedy them.

Since appellants have not shown a basis for reconsideration, it cannot be granted.

The request for reconsideration is denied.

Entered this 12th day of January, 1988.

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