

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

In the Matter of the Appeals of

GEORGE KOTOLARIS

File Nos. MUP-90-009(W)
MUP-90-011(W)

and

APPLICATION NO. 8708403

ALLIED ARTS OF SEATTLE

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

Introduction

George Kotolaris and Allied Arts of Seattle ("Allied Arts") separately appealed the decision of the Director, Department of Construction and Land Use ("DCLU") to issue a determination of non-significance and to approve, with conditions, a master use application by the applicant, Clise Agency, to demolish an existing theater (Music Hall), and to establish use for future construction of a 16-story multi-use facility. The multi-use facility would include hotel, restaurant, retail, and health club uses with three levels of parking for approximately 150 vehicles (herein the "Clise Proposal").

Parties to the proceeding were Patrick Doherty for DCLU; John W. Hempelmann and Terrence I. Danysh for the applicant, Clise Agency; and Richard Aramburu for the appellant, Allied Arts. No one appeared on behalf of the appellant, George Kotolaris, deceased.

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

Motions to dismiss the appeals were filed by the Applicant on or about April 10, 1990. An Order partially granting the motion to dismiss the Allied Arts appeal was entered on April 23, 1990. That Order is attached hereto (Exhibit A) and incorporated herein by this reference. The Hearing Examiner reserved decision on the Applicant's motion to dismiss other parts of the Allied Arts appeal until Pre-Hearing Conference. The Pre-hearing Conference, originally scheduled for April 18, 1990 was, by agreement of the parties, continued to April 26, 1990. At the Pre-Hearing Conference, the Examiner granted other portions of the Applicant's motion to Dismiss the Allied Arts appeal and a second Order was entered on May 11, 1990. That Order is attached hereto (Exhibit B) and incorporated herein by this reference. The Applicant's motion to dismiss the Kotolaris appeal was denied without prejudice.

This matter was heard before the Hearing Examiner on May 15, 1990. As a preliminary matter, the Examiner noted that Mr. Kotolaris was given notice of the motion to dismiss his appeals. Mr. Kotolaris was not represented at the public hearing, therefore, the applicant's motion to dismiss the Kotolaris appeal was granted.

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. The following is a summary of the Clise Proposal:

a. The Music Hall Theater, a/k/a Emerald City Palace, would be demolished to establish use for future construction of a building containing hotel, restaurant, retail, and health club uses, with a three level parking garage.

b. The new building would be 16 stories (approximately 157 ft.) in height, above Olive Way and three floors below, including parking. The base floor would occupy the entire area, and 15 floors of hotel suites (240 guest rooms) would be located at the south end of the site, fronting on Olive Way.

c. The hotel would have a total gross floor area of approximately 218,000 sq. ft. (excluding parking), of which about 12,500 sq. ft. will be retail and restaurant. The total project FAR will be about 6:1, which is below the permitted base FAR of 8:1.

d. A typical hotel floor will consist of 16 rooms with balconies. The first floor will have meeting rooms, hotel offices, a restaurant, and health club, with the main pedestrian access and lobby off Olive Way. The lower floor, directly below the first floor, will include retail, hotel "back of the house", parking, an interior automobile loading and drop-off circle, and vehicle access via a two-lane curb-cut midblock on Seventh Avenue.

e. Vehicular access to the parking garage will be from the lower level interior dropoff circle off Seventh Avenue. The parking garage will consist of two full levels below ground and a portion of the lower level. Total parking capacity will be approximately 146 spaces. Three truck loading berths are proposed on the lower level, with access from the north end of the alley.

f. All ground-floor, street-front facades will consist of clear storefront glazing and concrete. Second-story facades along Stewart Street and the northern half of the block along Seventh Avenue will be similar to those on the ground floor. Exterior materials on the hotel tower will be primarily concrete and vision glass. The largest portion of vision glass will face to the north and south of the hotel tower.

2. The proposal site is located on the half block bounded by 7th and 8th Avenues, Olive Way, and Stewart Street. The Music Hall Theater, a dollar Rent-A-Car agency, and a surface parking lot currently exist on the site. Total lot area is 35,807 sq. ft., with approximately 120 ft. of frontage on Stewart Street and Olive Way, and approximately 286 ft. along Seventh Avenue. An alley, 16 ft. wide between the Music Hall and the adjacent Marsh McLennan building, borders the east property line. The site is located immediately north of the retail core of Seattle's central business district, and is zoned Downtown Office Core-2 ("DOC-2").

3. The following is a summary of actions taken by the Seattle Landmarks Preservation Board, the Seattle Hearing Examiner and the Seattle City Council, related to designation of

the Music Hall Theater building as a Seattle Landmark without controls or incentives to preserve all or part of the structure:

a. The landmark process began in 1974 when the Seattle Landmarks Preservation Board approved designation of the Music Hall Theater Building as a Seattle Landmark pursuant to Landmark Preservation Ordinance No. 102229.

b. A new Ordinance, No. 106348, superseded the old ordinance in May, 1977 before the designation procedure had been completed. The Board subsequently re-approved the theater building for designation as a historic landmark. However, agreement on controls and incentives could not be reached between the owner and the Board. Consequently, the Board approved "Controls and Incentives for Recommendation to City Council for the Music Hall Theater" and filed them with the Hearing Examiner. The proposed controls were to be placed on the theater building's south and west facades, including the cast stone elements and windows; the roof; the lobby; the decorative elements of the proscenium; the ceiling; and the ship hull motif projecting from the auditorium's east wall. Economic incentives for preservation included those available to all Seattle landmarks under the zoning code or otherwise.

c. The building owners objected to the controls and incentives. Following a public hearing, the Hearing Examiner recommended "no controls be imposed because the effect of imposing controls would be to prevent the owner from realizing a reasonable return on the site."

d. After review of the Hearing Examiner's findings and recommendations, the City Council voted not to impose controls because "any control would prevent profitable use of the site as it is presently developed or as it might be developed." Moreover, the council also decided that it would be inappropriate to require a Certificate of Approval from the Landmarks Board prior to demolition and site redevelopment. The Council further determined that provisions of the Land Use Code (SMC 23.49.70A.1.a) regarding floor area ratio (FAR) limitations on landmark sites are not applicable to the Music Hall theater site.

e. The result of the City Council's actions is that the theater building is a City Landmark, approved for designation by Landmarks Board, without an adopted "designating ordinance" or specific controls to protect it from demolition. There are no controls or incentives to preserve all or part of the structure.

f. In January, 1990, several citizens requested the Landmarks Board to consider the Music Hall theater building and an additional parcel (the Dollar Rent-A-Car site) for a new nomination and designation; and to review this matter under the City's SEPA policy on historic preservation (SMC 25.05.675.H(2)(c)), which provides that sites not yet designated as landmarks may be referred to the Board by DCLU or any interested citizen.

g. On April 17, 1990, an Order was entered by Judge George T. Mattson, in Music Hall Theater, Inc. v. Landmarks Preservation Board, The City of Seattle, and Allied Arts of Seattle, Inc., King County Superior Court Cause No. 90-2-03065-2, which provides in part that:

The Landmarks Preservation Board, an agency of the City of Seattle, the City of Seattle, and Allied Arts of Seattle, Inc., are hereby ordered to desist and refrain from taking any further action on the January 16, 1990 nomination by Allied Arts of Seattle, or on any other nomination, nominating the Music Hall Theater for landmark status under the City of Seattle Landmarks Preservation Ordinance until June 23, 1990.

h. The moratorium on nominating the Music Hall Theater for landmark status under the City of Seattle Landmarks Preservation Ordinance will expire on June 23, 1990.

4. The decision of the Hearing Examiner, referred to in paragraph 3c, above, was based on the conclusion that the expert testimony clearly showed that: no present profitable use of the Theater property exists; a profitable use requires redevelopment; incorporation of the features proposed for control in new development is not economically feasible" (Conclusion 5, page A-11).

5. The proposed project and alternatives presented in the Clise Draft EIS were not before the Hearing Examiner. The essential issue and Hearing Examiner's finding, at that time, was that preserving the theater would prevent the owner from realizing a reasonable return on the site. It is unclear whether that finding remains valid.

6. The Seattle Landmarks Preservation Ordinance (Ordinance No. 106348) states that no new control proceeding may be commenced within 4 years from the date terminating the previous proceeding (June 23, 1990), without written approval of the owner.

7. The examiner adopts and incorporates herein the Director's "Background Data: regarding Land Use, the Street System, Parking and Other Development in the vicinity of the proposed site, as set forth on pages 3 and 4 of the Director's analysis and decision.

8. The following three development alternatives were presented in the EIS in addition to the No Action and Renovate Theater alternatives: (a) Theater facades; (b) Hotel North; and (c) Apartment. With the exception of the No Action alternative, each of the alternatives was required to illustrate potential mitigation for the historic/cultural impacts of demolishing the Music Hall Theater. The applicant does not agree that these alternatives meet his goals and objectives.

9. Under the Renovate Theater alternative, the Music Hall would be rehabilitated for use as a theater or assembly hall. The landmark features of the theater would be protected voluntarily and the surface parking lot and car rental office would remain as they are on the north lot.

10. The No Action alternative would maintain existing conditions. The theater would remain vacant (without precluding future use) and the car rental office and surface parking lot would remain as they are.

11. The Theater Facades alternative would construct a hotel while preserving the south and west facades and lobby of the theater. The rest of the theater would be demolished. The hotel

structure would be set within the theater facades and would have the same uses, floor area, number of guest rooms and parking spaces as the proposal. The hotel tower would be taller (285 ft. compared with proposed 157 ft.) and narrower than the proposed hotel. The Music Hall lobby would be incorporated into the hotel as part of its lobby entrance. The parking garage would be above ground and would occupy the site of the existing surface lot and car rental office. Vehicles would access the garage from Seventh Avenue.

12. The Hotel North alternative would rehabilitate the Music Hall as a theater or assembly hall and build a hotel on the north one-third of the site, replacing the surface lot and car rental office. All of the features proposed for protection by the Landmarks Board would be retained under this alternative. Like the Theater Facades alternative, this alternative would have the same uses, number of rooms, etc. as the proposed hotel, but would only have approximately 11,000 gross sq. ft. of retail and restaurant spaces (compared with 12,500 under the proposed action). The hotel tower would be 225 ft. high and the parking garage would extend four levels below grade and would be accessed from Stewart Street.

13. The Apartment alternative would have a configuration similar to the Hotel North alternative, and would also retain and rehabilitate the Music Hall as a theater or assembly hall. The Apartment building would not contain office, meeting room, and restaurant spaces, but would have street-level retail uses. The floor area would be greater than the proposal, and it would have 240 apartments, the same number of units as the hotel alternatives. Parking capacity would be for 240 vehicles (one per unit), compared with 246 spaces under the proposal. This alternative would reach a height of 285 ft., and would have six levels of below grade parking, with access from Stewart Street.

14. In December 1987, the Music Hall Theater, Inc. (MHT) met with DCLU in a pre-MUP application conference to discuss the Clise Proposal. On May 19, 1988, MHT submitted its MUP application for the Clise Proposal. On July 18, 1988, DCLU issued its determination of significance (DS) requiring preparation of an Environmental Impact Statement (EIS) for the Clise Proposal. On October 7, 1988, MHT submitted a substantially complete building permit application to DCLU.

15. On January 6, 1989, R.C. Hedreen Co. (Purchaser) and Music Hall Theater (Seller) entered into a Letter of Agreement in which Purchaser agreed to acquire from the Seller and Seller agreed to sell to the Purchaser, the property known as the Music Hall Theater. Terms and conditions of the sale are contained in a Real Estate Purchase and Sale Agreement dated February 23, 1989.

The Purchase and Sale Agreement provided in part, that:

a. "...the term "Property" refers to the real property described on Exhibit A attached..., all improvements thereon and appurtenances thereto; the right to use, refer to and incorporate by reference all reports, studies, applications, permits, environmental impact statements, and other written documentation concerning or related to the development of the Property..." (Section 1.3);

b. "...Seller and Purchaser believe that the Department will accept an application from Purchaser and will process Seller's application for Seller's Project and Purchaser's application for Purchaser's Project simultaneously." (Section 1.4);

c. "...Purchaser's obligations under this Agreement are contingent upon the Department

issuing a permit for the demolition of all the improvements on the Property...If Prior to closing a demolition permit is issued with respect to the said improvements, Seller may elect to proceed to demolish the improvements. The cost of such demolition shall be in addition to the purchase price of the Property. Because the cost of demolition will increase the purchase price, Seller agrees that Purchaser shall have the right to approve the contractor and the contract for such demolition, which approval will not be unreasonably withheld or delayed...Purchaser may elect, by written notice to Seller, to cause Seller to refrain from obtaining issuance of said demolition permit, in which event Purchaser shall be deemed to have waived the issuance of said permit and shall be obligated to close within twenty (20) days after Seller's receipt of said notice" (Section 6.3);

d. "...If any of the above conditions is not satisfied, Purchaser by written notice to Seller may terminate this Agreement...Each of the above conditions is for the benefit of Purchaser and may be waived by Purchaser at any time, and Purchaser may elect to close whether or not any such condition has been satisfied..." (Section 6.4);

e. "...Seller covenants and agrees with Purchaser to fully cooperate with Purchaser in connection with Purchaser's efforts to file a fully complete building permit application by May 15, 1989, and to obtain all the requisite permits for Purchaser's intended development, including any continuing efforts of Purchaser after the date of closing. Seller also covenants and agrees with Purchaser to use all reasonable efforts to obtain a demolition permit as soon as possible. Purchaser and Seller acknowledge that Purchaser intends to refer to and incorporate by reference the environmental impact statement and other submissions by Seller to the Department when Purchaser files its applications with the Department, and Seller agrees to fully cooperate with Purchaser in that regard." (Section 6.5);

f. "...Purchaser shall reimburse Seller within thirty (30) days after receipt of an invoice for the first \$25,000 of all fees and expenses incurred by Seller after January 6, 1989, in connection with an environmental impact statement for Seller's Project...Purchaser shall be responsible for paying all expenses relating to Purchaser's Project (including without limitation all permits, studies and design work relating thereto)." (Section 6.6);

g. "...If this Agreement is terminated for any reason other than default on the part of Seller, Seller shall have returned to it all documents delivered to Purchaser pursuant to Paragraph 7.4 and shall succeed to all ownership and use rights of Purchaser in all plans, specifications, permits, studies, reports and contracts pertaining to Purchaser's Project, the costs of which shall have been fully paid by Purchaser, and Purchaser agrees to furnish Seller with

evidence from any and all architects, contractors, and others who have prepared such plans, specifications, permits, studies, reports, or contracts, or who have any interest therein, that they have acknowledged Seller's right to succeed to the ownership and use rights of such items...." (Section 10.1).

16. On May 3, 1989 Hedreen filed its MUP application and building permit application along with Building Plans with the City of Seattle. Unlike Clise, Hedreen did not apply for a permit to demolish the Music Hall Theater. Alternatively, under the terms of the Purchase and Sale Agreement, Hedreen may use a demolition permit issued to Clise. Hedreen proposes to construct a 31-story hotel with 435 rooms and parking for 212 vehicles on the same site as the Clise Proposal (the "Hedreen Proposal").

17. On May 11, 1989, DCLU issued the DEIS for the Clise Proposal and on June 1, 1989, a public hearing was held on the DEIS. Although the Hedreen MUP application and proposal were received by DCLU prior to issuance of its DEIS and FEIS, DCLU did not discuss or evaluate the Hedreen Proposal in those environmental documents. There is no evidence that DCLU had knowledge of the Purchase and Sale Agreement at that time.

18. On September 21, 1989, DCLU issued a DS requiring Hedreen to prepare an SEIS for the Hedreen Proposal based on the Clise Proposal. On November 2, 1989, DCLU issued the FEIS for the Clise Proposal. On January 22, 1990, DCLU issued its decision approving issuance of the MUP for the Clise Proposal. By contrast, a preliminary draft of the Hedreen Proposal is now being discussed, but DCLU has not issued a draft SEIS. CH2M Hill has been retained by Clise and Hedreen to develop the information required by DCLU for its environmental review of the two proposals.

19. The Purchase and Sale Agreement required MHT to secure the permit to demolish the Music Hall theater building by March 21, 1990; subject to Hedreen's right to extend that date to August 31, 1990. By letter dated April 9, 1990, Hedreen advised MHT of its decision to exercise its option to extend the outside date for issuance of the demolition permit to August 31, 1991.

20. If the Clise application for a permit to demolish the Music Hall theater building is granted, it may be transferred. If the permit is transferred and the Clise and Hedreen building permit applications are approved, either the Clise Proposal or the Hedreen Proposal may be constructed at the site. Under the terms of the Purchase and Sale Agreement the owner of the subject property, whether Clise or Hedreen, could have the right to develop the property under either the Clise Proposal or the Hedreen Proposal.

21. A factor in the timing of applications and the structure of the Purchase and Sale Agreement is the recently passed CAP Initiative. The CAP Initiative includes new height limits on structures in the DOC-2 zone and a reduced base floor area ratio. Prior to the CAP, a maximum height of 400 ft., a base FAR of 8 and a maximum FAR of 14 with bonuses, were allowed in this zone. The CAP reduces these to a height of 300 ft., a base FAR of 4 and maximum FAR of 10 with bonuses. The Clise Proposal has a height of 157 ft., an approximate FAR of 6 and does not include FAR bonuses. The CAP Initiative and its code modifications do not apply to either the Clise Proposal or the Hedreen Proposal because both applications are vested.

22. The Orders granting dismissal of several grounds for the Allied Arts appeal are attached hereto, as Exhibits B and C, and incorporated herein by this reference. Those orders limit the remaining issues before the examiner. The remaining basis for appeal is whether DCLU erred in not considering and combining the Clise Proposal and the Hedreen Proposal for demolition of the Music Hall Theater and development of hotel and associated uses at the site.

23. Allied Arts specifically contends it was error for the Director to not consider for purposes of SEPA mitigation and impacts, the second application for the site. Allied Arts argues, among other things, that SEPA policy discourages piecemeal segmented environmental review; the Clise and Hedreen Proposals are not only closely related, but are one proposal, because the two applications are currently pending and are joined through the terms of the Purchase and Sale Agreement. Allied Arts asks the Examiner to remand the application to DCLU for combined environmental review of the two proposals.

24. DCLU and the Applicant testified that the Hedreen and Clise Proposals are independent and therefore, SMC 25.05.060.C.2 is irrelevant; that either proposal may proceed without the other; that the two proposals are not legally connected (closely related) under Washington law; and that comprehensive simultaneous environmental review of the two proposals is not required under SEPA.

25. Many letters and comments were received during and after the initial 30-day comment period. Without exception the writers expressed concern about the loss of the Music Hall as a building of significance in downtown Seattle. Public comment was also received at several public meeting. In addition, several people testified at the Public Hearing.

26. The Examiner adopts and incorporates by this reference the discussion of the SEPA analysis found on pages 8 through 15 of the Director's Analysis and Decision.

Conclusions

1. The Hearing Examiner has jurisdiction over the parties and the subject matter of this appeal. (Chapter 23.76, SMC.)

2. The Director's decision (MUP Appeals) or determination (SEPA appeals) must be given substantial weight by the Hearing Examiner. (SMC 23.76.022(C) (7); Hearing Examiner Appeal Rules 2.8 and 3.7).

3. During environmental review, proposals or parts of proposals that are related to each other closely enough to be in effect, a single course of action shall be evaluated in the same environmental document...Proposals or parts of the proposals are closely related and shall be discussed in the same environmental document if they: (a) cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously; or (b) are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation. (WAC 197-11-060)(3)(B); and SMC 25.05.060.C.2.b.)

4. Based on the Purchase and Agreement, there is evidence that the Clise Proposal and the Hedreen Proposal are interdependent parts of a larger proposal (the Purchase and Sale Agreement) on which they depend for their implementation. Neither Clise nor Hedreen are totally independent of one another and capable of developing the subject property as a result of their written agreement.

5. As interdependent parts of the larger proposal, only one applicant (Clise or Hedreen) will have the right to demolish the Music Hall Theater and construct a hotel and associated uses on the subject site. Under those circumstances, the two proposals would clearly be "related" and should be evaluated in the same environmental document.

6. The lead agency is required to prepare its threshold determination and environmental impact statement on a proposal at the earliest possible point in the planning and decision making process. (SMC 25.05.055). A proposal exists when an agency is presented with an application, is actively proposing to make a decision on one or more alternatives of accomplishing that goal and environmental effects can be meaningfully evaluated. (SMC

25.05.060). That proposals may require future agency approvals or environmental review shall not preclude current consideration as long as future activities are specific enough to allow some evaluation of their probable environmental impacts (SMC 25.05.055(B)(1)(a)).

7. The possibility that a demolition permit could issue under the Clise proposal MUP application followed by construction of new hotel under the Hedreen application (by either Clise or Hedreen) shows that the proposals are closely enough related to be, in effect, a single course of action.

8. Moreover, the two projects are "similar actions" which could have been and should have been analyzed in a single environmental document (SMC 25.05.060(C)(3)(a)). Common aspects of the two projects include: (a) types of impacts, (b) alternatives, and (c) geography. DCLU apparently did not consider to the two projects to be "similar actions" because it was unaware of the Purchase and Sale Agreement.

9. A major purpose of the environmental review process is to provide environmental information to governmental decision-makers for consideration prior to making their decision on any action (SMC 25.05.055(B)(2)). To allow demolition of the Music Hall Theater prior to evaluation of the two proposals in a single environmental document would be inconsistent with the spirit and intent of SEPA. Moreover, such a decision would defeat SEPA policies which require: (a) integration of the requirements of SEPA with existing agency planning and licensing procedures and practices, so that such procedure run concurrently rather than consecutively (SMC 25.05.030(B)(5); and (b) encouragement of public involvement in decisions that significantly affect environmental quality (SMC 25.05.030(B)(6)).

10. SEPA requires the environmental review process to be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values to avoid delay later in the process and to resolve potential problems (SMC 25.05.055(A)).

11. The Clise EIS was in draft form and being finalized when DCLU received the Hedreen application, on May 3, 1989. The information received from Hedreen was sufficient for DCLU to conclude that additional analysis was needed. The draft EIS was issued on May 11, 1989, but the final EIS was not issued until November 2, 1989. During that time period DCLU made a threshold determination on the Hedreen application and on September 21, 1989, DCLU required a Supplemental Environmental Impact Statement (SEIS) on Hedreen.

12. DCLU erred in not requiring the additional analysis to occur within the Clise EIS. Instead DCLU decided that the new information could be analyzed in a SEIS to be prepared as a separate document, at a potentially indefinite time, by Hedreen. As a result the Clise EIS was inadequate.

13. Allied Arts has met its burden of proving that the DCLU Director erred in not requiring the Hedreen Proposal and its impacts to be analyzed for decision within the Clise EIS. The Director had knowledge of the two proposals, but apparently was not informed by either Clise or Hedreen of the interrelationship of the two projects through the Purchase and Sale Agreement.

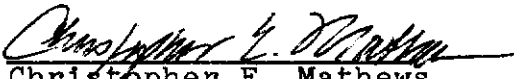
14. Except as provided above, the conditions recommended by the DCLU Director are reasonable and appropriate steps to mitigate some of the impacts of the Clise Proposal. The DCLU conditions meet the requirements of SEPA and other environmentally related policies adopted by the City Council.

DECISION

The decision of the Director, Department of Construction and Land Use, to conditionally grant the proposed action is REMANDED to DCLU for further environmental review of the Hedreen proposal

and its impacts in the Clise EIS.

Entered this 1st day of June, 1990.


Christopher E. Mathews
Hearing Examiner Pro Tempore