

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

EARLE M. JORGENSEN CO., et al.,

FILE NO. W-81-011

from an environmental determination of
the Department of Community Development

Introduction

Appellants, Earle M. Jorgensen Co., et al., challenged the adequacy of the final environmental impact statement (FEIS) for the South Park/Duwamish Annexation Area Comprehensive Plan prepared by the Department of Community Development (DCD).

The appellants exercised their right to appeal pursuant to Chapter 25.04 of the Seattle Municipal Code (SMC), as amended.

This matter was heard before the Hearing Examiner on January 7, 8, 21, 22, 29 and February 5, 1982. Written closing argument or post-hearing briefs were submitted. The parties were represented as follows: appellants by Edmund J. Wood and Jack Jones and DCD by the City Attorney, P. Stephen DiJulio, assistant.

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. A citizen petition for election on the annexation of an area in King County was accepted by the Seattle City Council. The petitions requested a comprehensive plan for the area which would then be submitted to the voters for approval at the time of the annexation election.

2. A proposed South Park/Duwamish Annexation Area Comprehensive Plan (AACP) was issued in July, 1981. DCD prepared and issued a draft environmental impact statement (EIS) and then the FEIS on the AACP in November, 1981. The instant appeal followed.

3. The AACP divides the annexation area into three parts, discusses the characteristics and problems of each part and makes a series of 42 recommendations.

4. A neighborhood plan, the South Park Neighborhood Plan, (SPNP) for the portion of South Park now within the City also has been proposed and a draft EIS issued. Discussions between the City and South Park community about an acceptable plan have been going on since 1973. Two plans have been proposed and rejected.

5. Because of the common City boundary shared by the two areas on the west side of the Duwamish River, the AACP and SPNP have a great deal in common, according to the AACP. In fact, recommendations in the AACP are based on the objectives of the SPNP. Jerry Jones, who worked on the AACP and draft EIS, represented that all of the recommendations in the AACP, other than those for capital improvements responding to petitioners' request, are related in some way to the objectives of the SPNP. The FEIS states that the recommendations are based on the requests in the annexation petition and/or the objectives in the proposed SPNP, pp. 6, 16.

6. The plan should be viewed as a supplement to the SPNP. References are made throughout the AACP to applicable recommendations in the SPNP. It is important that the reader review the SPNP in detail to fully understand the impact of its recommendations and how they may affect the proposed annexation area if annexation is approved. AACP, p. 4.
7. The FEIS recognizes, at p. 4, that "(o)ne of the basic goals of the annexation is to unify the neighborhood."
8. In the description of the proposal at p. 22, FEIS one part of the intent underlying the proposed zone changes is to "ensure consistency with the South Park Neighborhood Plan zoning recommendations."
9. The "interdependence of the residential areas" is acknowledged by the coordination of the plans and scheduling their consideration as closely together as possible", according to the FEIS at p. 104. The plans, however, are independent, according to the FEIS at p. 101 and the Introduction.
10. One of the drafters of the FEIS testified that he did not feel he could write an understandable EIS if he included a discussion of the relationship of the AACP to all of the alternatives in the EIS for the SPNP.
11. One of the drafters of the FEIS acknowledged that a reader would have to have considerable knowledge about South Park and its conditions to understand the impacts of the AACP after reading only the FEIS. He would recommend the SPNP EIS for background material.
12. The draft EIS for the SPNP states that it should be read with the SPNP "since each contains information needed to understand the proposal and not included in the other." SPNP, DEIS, p. 19.
13. The recommendations in the AACP assume the adoption of the proposed SPNP.
14. One drafter of the FEIS did not look at capital improvements proposed in the SPNP when reviewing impacts of the AACP as he questioned whether it would ever be adopted.
15. The FEIS generally considers the impacts of the recommendations in the AACP on adjacent areas.
16. All recommendations except for those involving capital improvements in response to the residents' petitions would reduce the effects of industry on uses in areas now within the City.
17. Recommendation 3, AACP, proposes to downzone the area south and east of the 16th Avenue South Bridge from Heavy Manufacturing (MH) to General Commercial (CG). The SPNP proposes to downzone the area in the City adjacent to the west from General Industrial (IG) to Single Family Residence High Density (RS 5000). That change is recommended despite the small size of the area involved which would disqualify it for downzoning under the Single Family Residential Policies. If the SPNP-proposed downzone in the City is not implemented or any one of three alternatives is, the reason for the AACP proposal for the area would be obviated.
18. The FEIS does not discuss any alternative to Recommendation 3 to correspond to any other change or lack of change to the classification of the area in the City.

19. A number of recommendations in the AACP, analyzed by the FEIS, deal with reducing truck traffic on Dallas Avenue S. and its effects by traffic control devices and other capital improvements. The intent of these recommendations is to reduce land use conflicts between residentially developed lands in the City and commercial and industrial uses in the County.

20. The EIS for the SPNP considers an alternative which would remove the conflict by designating the entire area in the City for industrial use. Alternative 2 in the FEIS which would allow the land use designations in the County to remain the same and would provide only those capital improvements requested in the petition would correspond with the SPNP alternative. The need for such alternatives to correspond with the possible change in the SPNP or differing impacts were not explained.

21. Recommendation 14 proposes upgrading S. Elmgrove Street from 10th Avenue S. to the City boundary, within the City.

22. Recommendation 16 includes improvement of 17th Avenue S. from Dallas Avenue S. to S. Donovan have a buffer on one side, all within the City.

23. The residents' petitions for annexation election contain several specific requests, with slight variations, but generally: (1) water mains at City expense; (2) sewers at City expense with possibility of waiver; (3) street lighting, paving and curbs at City expense; (4) possible sidewalk paving; (5) capital improvements to be started within one year and completed within three years after annexation; (6) no high-rise apartments; and (7) no changes in residentially-zoned areas.

24. The FEIS states that the recommendations in the AACP are based, in part, on the requests in the petition, although that is not acknowledged in the AACP.

25. Recommendation 23, at p. 70, FEIS, includes construction of sewers and indicates a requirement that houses hook up to the sewer but that the cost be funded with non-local funds.

26. The request that there be no change in residentially-zoned areas is not addressed directly. At p. 6, FEIS, the summary indicates recommendations for zoning in Area A are generally consistent with existing designations. From further discussion throughout the document the reader is supplied with information as to the current designations and proposed changes.

27. The Comprehensive Plan is described at p. 100, FEIS as "...official City policy, legally guiding future decisions." At p. 81, the FEIS states:

If adopted it (the plan) becomes official City policy guiding future activity in the annexation area. City Code (Chapter 24.72) requires that amendments to zoning must "demonstrate the manner in which the action carries out or tends to implement the goals and objectives of the comprehensive plan." While the goals and intent of the plan represent a commitment by the City for 3-5 years following annexation, it can be modified in light of changing circumstances. Such modification requires extensive public review, and Council approval.

28. No alternative was considered by one drafter of the EIS to preserve the land in agricultural use because he believes it will be developed. Alternatives to ensure preservation which were suggested as those which could have been discussed are a special review district and special zoning for agricultural use.

29. Examples of capital improvements recommended in the AACP which would occur in the City for the benefit of the area in the City are a cul-de-sac at Sullivan and 14th Avenue South and diverter at S. Director and 8th Avenue South. Alternatives to this solution to a City problem were not presented.

30. Recommendation 27 would downzone an area used for truck farming to RS 5000. The SPNP propose maintenance of single family zoning on the adjacent properties north and east.

31. Recommendation 30 proposes traffic control devices, one at the City-County line and one inside the City, to prevent truck traffic from travelling through the residential neighborhood, a problem identified in the SPNP. Alternatives in the SPNP could affect or remove the need for these devices. The FEIS does not discuss alternative means of solving the problem or the alternatives in the SPNP EIS.

32. Part of Area A, dealt with by Recommendations 1 and 2 proposing RS 5000 zoning, is in the Shoreline District along the Duwamish River. The FEIS does not discuss the implications of the Shoreline Management Act (SMA) for the area. The FEIS drafter assumed that the designation would be Urban Development as is the City property on both sides of this area. That designation would make existing residential uses non-conforming and would not permit most new residential uses despite the proposed RS 5000 zoning.

33. Recommendation 39, regarding fire protection for the area on the east side of the Duwamish, is discussed at pp. 68, 69. The discussion represents that a negotiated contract between Fire District No. 1, which would be left with the responsibility of providing service for 900 homes and 3,400 people without sufficient assets to buy equipment or pay personnel, and the Seattle Fire Department "will provide a solution to these problems". The FEIS sets out general provisions for the agreement, the details of which "must remain confidential during negotiations". One provision states that the "Seattle Fire Department will assist FD #1 in providing equal or better fire protection to the population remaining...."

34. Appellants showed an absence of intent that any negotiations be kept confidential contrary to the statement in the FEIS.

35. No agreement with, or formal commitment to, Fire District No. 1 to provide equal or better fire protection has been made.

36. The discussion of Recommendation 13, to provide policy protection from the South Precinct, represents that the savings to King County would be \$98,476, but that the additional cost to the City would be \$5,800. The difference is explained by the Police Department's taking into consideration the possible annexation in its 1980 design of the beats and giving one a light work load so that the additional responsibility could be absorbed without additional personnel. The EIS reflects the additional costs but not the actual cost of that coverage.

37. The discussion of Recommendation 7, which would minimize curb cuts for commercial access on certain streets, recognizes that three businesses would have to reorient their access from Dallas to 14th Avenue S. or S. Orr Street at "some renovation cost...." FEIS, p. 50. For Spencer Aircraft, one of the businesses which would be affected, the implementation of Recommendation 7 could require modification of the building, costing some \$500,000 or approximately five years profit.

38. The authority for use of Community Development Block Grant Funds for private property owners' benefits, such as for sewer hookups, is given in the FEIS at p. 76, a 1970 State Attorney General opinion on the "conduit theory", and at B-10, an article referring to Community Development Block Grant regulations which mention that water and sewer connections on private property are eligible.

39. The FEIS states, at p. 107, that it is "unrealistic to contemplate an alternative where no non-local funds would be available to finance \$315,000 in improvements that are discussed here." The statement represented the political opinion of the drafter. A conclusion which can be drawn from testimony at hearing is that the reality may have changed so that such an alternative is possible.

40. The FEIS does not discuss City code which requires the abutting property owner to pay costs, such as that of sidewalk construction pursuant to Section 15.70.020, SMC.

41. The FEIS provides discussion of potential capital expenses, which could flow from Recommendations 37 and 38, in response to comments on the draft EIS. One such item involves the 16th Avenue South Bridge. The discussion describes possible costs of \$7,550,000 which include a 50 percent contingency amount and funds for an underwater study of the condition of the bridge. The discussion, at p. 78, suggests the possibility that the cost could be greatly reduced. Evidence adduced at hearing in the form of testimony from Joe Ralph, Assistant Director, Roadway Maintenance and Utilities, Engineering Department, showed that the estimate assumed repairable pilings and piers. If the substructure had to be replaced the cost could be many millions in excess of the \$7.5 million figure.

42. The other capital improvement package not directly recommended by the AACP but discussed briefly is signalization along E. Marginal Way. That is also included in Alternative 3. Recommendation 37 provided for a proposal by the Engineering Department for improvements to E. Marginal Way to meet City standards and/or address severe safety and maintenance problems. Those improvements were not proposed as an alternative in the FEIS because the roadway was adjudged by the Engineering Department to be functioning adequately even though substandard and in need of improvement. The FEIS at pp. 66, 67 describes improvements needed.

43. The maximum allowable height for a residential building under the AACP recommendation would be 35 ft.

Conclusions

1. The decision to be reviewed by the Hearing Examiner on appeal pursuant to Section 25.04.200, Seattle Municipal Code, is the adequacy of the final EIS as filed in the SEPA Public Information Center for the proposed action, the AACP. The test to be used is whether the AACP FEIS is adequate under the "rule of reason" as a full disclosure document, i.e., does it provide a "reasonably thorough discussion of the significant aspects of the probable environmental consequences...." Cheney v. Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976). In applying that test the Examiner is to accord substantial weight to the determination by DCD that the document is adequate. Section 25.04.200, Seattle Municipal Code.

2. Appellants' first contention is that a comprehensive EIS, looking at the environmental impacts of both the AACP and SPNP, is required because of the interrelationship of the two plans. The Examiner may consider that contention in the context of whether the SPNP is actually part of the "total proposal", under WAC 197-10-060, or in the context of the adequacy of the disclosure of impacts and consideration of alternatives in the FEIS for the AACP.

3. The SEPA guidelines in WAC 197-10-060 require that the scope of the project to be considered for the EIS preparation be the "total proposal" which is defined as "the proposed action, together with all proposed activity functionally related to it." DCD has acknowledged that the future activities such as rezones and capital improvements are related. It is permitted under subsection 4 and has chosen to divide the proposal into segments and prepare later EIS's as recommendations are to be implemented. DCD, however, maintains that the two plans are independent activities which are compatible but may be evaluated separately. Unlike the factual situation in Kleppe v. Sierra Club, 427 U.S. 390, 49 L.Ed.2d 567, 96 S.Ct. 2718 (1976), cited by both parties to this appeal, where no regional plan was proposed and no interrelationship of the actions was found, interrelationships are clearly shown in this case. DCD acknowledges the relationship of the AACP and SPNP, both in the discussions in the FEIS and the AACP, such as the direction, at p. 4 of the AACP, that the plan is to be reviewed as a supplement to the SPNP, and in testimony of departmental witnesses called by appellants at the hearing on this appeal. The Kleppe Court, in dicta, while not finding the circumstances to be right in the case before it, stated that when several proposals are pending concurrently which would have cumulative or synergistic impacts upon the region, the environmental consequences must be considered together. "Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." Kleppe, supra, p. 409. The two plans, because of their interrelationships, would then be treated as the total proposal since they are pending concurrently and have synergistic impacts. Further, case law under NEPA does not permit separation of otherwise related activities based solely on different jurisdictions involved or different decision-making agencies.

4. For adequate disclosure of the impacts of the AACP, a comprehensive evaluation again would appear to be indicated. Several examples of the interrelationship of the plans are set forth in the findings of fact. The effects of, for instance, a change of land use may not be fully understood without full disclosure as to the adjacent land use and to the proposed change of that use. The AACP assumes the adoption of the recommendations in the SPNP and impacts of the recommendations are discussed in that context. Appellants assert that change in a recommendation or the failure to adopt the SPNP and implement the recommendations could change the probable impacts that the recommendations of the AACP would have. Evidence of existence of changed impacts was not presented.

5. The alternatives selected by DCD for consideration in the FEIS do not include one directly responding to a possible decision by the Council not to adopt the SPNP. Such an alternative does not meet the test of a "required" alternative, which is any action which could feasibly obtain the objective of the proposal. WAC 197-10-440(12). If the objective of the AACP is to respond to the request by petitioners and further the objectives of the SPNP, such an alternative would not feasibly attain the objectives of the proposed action. What appellants have made a case for is a truly "comprehensive" plan for the area or for phasing so that the SPNP could be adopted and then the AACP in response. The decision as to design and process of the plan adoption is not subject to review by the Examiner, however.

6. DCD urges that even if a comprehensive EIS is required practical considerations are relevant to and would permit the separate environmental reviews which are being or have been conducted by that Department. The record reflects that the Department has operated in good faith and has not attempted to avoid preparation of an EIS by this separate review process. In fact, two documents are being issued. DCD points to the two different processes for adoption of the plans with different scheduling requirements and different decision-makers as practical

considerations. Also, the intent of the City, expressed in Section 25.04.500, Seattle Municipal Code, that the SEPA review process be integrated into the existing decision-making process was urged as further justification for conducting a separate review. The possible size of a comprehensive EIS and the timing considerations are factors which would argue for the separation. While the inextricable relationship of the AACP to the SPNP would appear to require a comprehensive look, the Hearing Examiner may not substitute her judgment for that of the responsible official without proof of impacts otherwise not disclosed.

7. Most of the specific deficiencies alleged by appellants relate to the failure to address potential impacts from different SPNP recommendations. Several others need to be addressed independently. Appellants' objection that the format of the EIS is such that the voter decision-makers would find it difficult to find the City's response to the request in their petitions appears to be valid. The purpose of the FEIS is, however, to disclose and analyze the impacts of the Comprehensive Plan and in that way respond to the petitioners' request for a Comprehensive Plan. Its central purpose is not to respond to the other specific requests, except in the context of the plan for the area. Since the information is contained in the FEIS, although not set apart from the remainder of the plan, the FEIS is not inadequate on that count.

8. The definition and descriptions of the legal status of a Comprehensive Plan found in the EIS is not incorrect or misleading.

9. The land use implications of the operation of the Shoreline Management Act on the area recommended for rezoning to RS 5000 is significant and should have been included.

10. The discussion of Recommendation 39, regarding fire protection for the east side of the Duwamish, offered conclusions, such as that the solution to the problem will be provided, that are not supported by evidence. A careful reading would show that such agreement has not been reached but that discussion contains an over-abundance of optimism.

11. The discussion of Recommendation 13 regarding police protection is technically accurate as to additional cost but, for full disclosure, facts as to the cost of the available surplus time that would be applied to this area should have been provided.

12. The discussion of Recommendation 7 which would affect Spencer Aircraft, among others, does not provide sufficient information for a true balancing of the impacts.

13. The discussion of funding including legal problems surrounding use of public funds for private property and availability of funds is sufficient to apprise the reader of potential problems although statements of personal opinion about availability are not appropriately placed in the EIS.

14. Since neither the improvement to the 16th Avenue South Bridge nor improvements on E. Marginal Way are recommendations of the AACP, the discussion of costs of those are sufficient. It is necessary to remember that the FEIS is to disclose impacts of the plan, not of the annexation itself.

15. The contention that the discussion of potential high-rise apartment buildings be required because of the 35 ft. height limit is unfounded. Section 24.16.080 permits single family houses to be 35 ft. high so it is not reasonably foreseeable that the residents would consider that height "highrise".

16. A number of suggestions for alternatives to the recommendations to be considered were made by appellants. Included in those were preservation of farmland and suggestions that there were other means to accomplish some of the objectives. Appellants failed to show that any alternative suggested was reasonably feasible or in some cases would meet the objectives of the Comprehensive Plan. DCD argues that alternatives to individual recommendations should not be considered because of the comprehensive nature of the plan. The SPNP, however, has numerous alternatives to recommendations. Even were a showing made that the alternatives proposed were feasible, the agency is not obligated to consider every conceivable variation of the alternative. See Monroe County Conservation Council v. Adams, 566 F.2d 419, (2d Cir. 1977), cert.den., 98 S.Ct. 1879.

17. Others of the appellants' alleged errors appear to have been dropped as issues and those for which specific findings and conclusions have not been made are deemed by the Examiner to have been dropped or are considered to have been without merit, such as the allegation that DCD should have included in the alternatives one calling for a City-initiated petition.

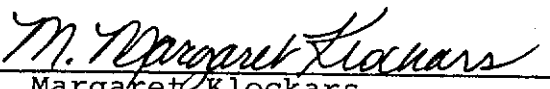
18. Under the Statement of Relief sought by appellants is the request that the Examiner declare that the AACP is supplemental to and related to the SPNP, that the environmental impacts on both neighborhoods be considered simultaneously and that both plans be consolidated and reviewed together. While the two plans together make up the total proposal or are so interrelated with synergistic impacts on the area that a comprehensive environmental review appears desirable, appellants have not sustained their burden of proving the existence of impacts which would then be disclosed that have not been included in the FEIS. Further, DCD's assertion of practical considerations causing the responsible official to prepare separate documents despite the plans' relationships was not shown to be unfounded by the appellants.

19. A number of shortcomings in the document have been proven by appellants. Despite those errors proven the document will permit the decision-makers to consider and balance the environmental factors. Therefore, the document is adequate under the rule of reason.

Decision

The determination of the Department of Community Development is AFFIRMED.

Entered this 31st day of March, 1982.


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.