BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY THE CITY OF SEATTLE TO H. C. HENRY PIER/HESTER/JSA CORPORATION/HENRY TRUST, SEATTLE SHORELINES COALITION, SEATTLE MARINE BUSINESS COALITION, & LEAGUE OF WOMEN VOTERS OF SEATTLE, Appellants, v. CITY OF SEATTLE, H. C. HENRY PIER COMPANY, MEL HESTER, JSA CORPORATION & HENRY TRUST, Respondents.	SHB Nos. 82-46, 82-47, & 82-48 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the Request for Review of the issuance of a substantial development permit by the City of Seattle, came before the Shorelines Hearings Board, David Akana (presiding), Gayle Rothrock, Chairman, Rodney M. Kerslake, Nancy R. Burnett, Lawrence J. Faulk and A. M. O'Meara on April 28 and 29, 1983, in Seattle and May 4, 1983, in

Lacey. Written closing statements were filed after the hearing.

Appellants Seattle Shorelines Coalition and League of Women Voters of Seattle were represented by their attorney, Janet E. Quimby; appellant Seattle Marine Business Coalition was represented by its attorneys, Richard J. Goldsmith and Thomas W. Malone; respondent City was represented by Elizabeth A. Edmonds, assistant city attorney; respondent permittees were represented by their attorney, Richard R. Wilson.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

On June 19, 1981, the H. C. Henry Pier Company, Mel Hester, JSA Corporation and Henry Trust filed application number 81170-0133 to conduct certain work at 809 to 819 Fairview Place North within the shoreline and wetlands of Lake Union in Seattle. The site is located at the south end of Lake Union between waterways No. 4 and No. 5.

II

The proposed work includes the demolition of three existing buildings, the construction of a new two-story commercial building and the conversion of an existing 430 foot by 24 foot commercial pier and moorage to recreational moorage and marina.

One existing building is occupied by a photographer and Associated Marine Industries (AMI). AMI owns and maintains research vessels and repairs other vessels.

The second existing building is occupied by AMI, Blue Water/Seabird Company, and Surefreeze Refrigeration. Blue Water is a business similar to AMI's. Surefreeze assembles refrigeration equipment for fishing vessels.

The third existing building is occupied by Blue Water, a carpenter shop, an insulation shop, and a plumbing shop.

Except for the photographer, the foregoing business tenants either depend upon shoreline location or are oriented toward conveniently serving marine vessels. Vessels moored at the site may be there for maintenance, repairs, refurbishing, or lay-over. Public access over the pier is not prevented or encouraged.

III

The proposed construction would include restaurant space (7,665 SF), retail shop (16,825 SF), office space (3,650 SF), a 42-slip marina, and a two-level parking garage. As a part of the development, public access would be provided on an existing concrete-decked pier, an existing concrete deck, and throughout the retail and restaurant areas. Transient moorage would be available at the north end of the existing pier. Some marina space would be used by business tenants for boat sales.

IV

The site is zoned manufacturing ("M") and is within the Urban Stable/Lake Union (US/LU) environment designation of the Seattle Shoreline Master Program (SMP).

V

On October 30, 1981, the city issued a Declaration of Significance. A draft environmental impact statement (EIS) was issued on May 4, 1982. After circulation, review and public hearing, a final EIS was issued on August 31, 1982. On October 19, 1982, the city determined that a shoreline substantial development permit and a master use permit should issue. The adequacy of the EIS and master use permit were challenged using the city's appeal process. After hearing, the EIS was determined to be adequate and the master use permit was affirmed by a hearing examiner on January 5, 1983. Appeal of the decision was taken to superior court. Separate appeal of the shoreline substantial development permit and adequacy of the EIS was filed with this Board on November 19, 1982.

VI

Permits for uses in the US/LU environment are evaluated using the following order of preference: 1) water dependent; 2) non-water dependent with regulated public access; 3) non-water dependent without regulated public access. Section 21A.71, SMP.

Guidance for evaluating proposals in the US/LU environment is also provided in section 21A.25 describing the purpose of the environment:

> The purpose of the US/LU environment is similar to the purpose of the US environment, but also incorporates additional goals based on the particular characteristics of Lake Union:
>
> (a) Enhance the form and appreciation of Lake Union and environs as a major component in Seattle urban structure;
>
> (b) Preserve a maximum of open water commensurate with reasonable economic development;

(c) Develop a diversity of commercial and residential activities related to the use and enjoyment of the waterfront, the service and maintenance opf water-related activities, and public access to the water;
(d) Encourage multiple use concepts having a wide range of intensity while preserving views of the water from upland and adjacent properties; and
(3) Eliminate physical and visual blight from areas surrounding Lake Union and Portage Bay.,

Section 21A.24 provides:

> The purpose of the US environment is to provide areas for controlled development and redevelopment, encouraging a variety and mixture of compatible uses while also maintaining the existing character, scale and intensity of use.

VII

The SMP, provides that retail shops, restaurants, marine sales, public marinas, and accessory parking are permitted uses within the US/LU shoreline environment. Section 21A.40, Table 3, SMP. Offices are not a permitted principal use in the US/LU environment, but are allowed as an accessory use customarily incidental to a permitted use where not otherwise prohibited. Section 21A.74, SMP.

Retail shops, restaurants and accessory offices are permitted on the uplands subject to the provisions of section 21A.74 of the SMP. Such non-water dependent uses are allowed if regulated public access is provided.

Off-street, on-site parking as an accessory use to an allowed principal use is permitted subject to certain design requirements. Section 21A.89, SMP.

Public marinas are permitted uses subject to the provisions of

section 21A.100. One requirement is that off-street parking areas be provided in accordance with section 21A.89. Another requirement is that views from upland lots be preserved, and viewing areas for the non-boating public be provided.

VIII

Applicable bulk requirements for the proposed substantial development are provided in section 21A.35 of the SMP. A view corridor of 35 percent of the lot width, a maximum lot coverage of 50 percent, and a maximum structure height of 35 feet are required.

IX

The Shoreline Use Goals 1, 3 and 5 of the SMP are to establish uses which result in long-term over short-term benefit, provide a management system to prioritize uses, and locate all non-water dependent uses upland.

The proposed substantial development was not shown to be inconsistent with the first two goals. There is an apparent inconsistency with the goal to locate all non-water dependent uses upland. However, when this goal is reviewed in content with other goals, such as Economic Development Goal 2 and the regulations of the SMP, the inconsistency is more apparent than real. There is no inconsistency of the proposal with the foregoing SMP provision.

X

The Economic Development goal of the SMP seeks to provide for "economic activity and development of water dependent uses by planning for the creation of new developments in areas now dedicated to such

uses." Goal 1. To further the goal, new developments for industrial and commercial shoreline uses are to be concentrated in areas now dedicated to such use. Policy (a). Appropriate land adjacent to deep water is to be identified and reserved for industry or commerce that require such locations. Policy (c). A "multi-use" concept of development is directed if the "major use" is water-dependent and public access to the shoreline is economically consistent with the use. Goal 2.

The proposed project is a multi-use development oriented to marine uses and marina. It is an economic activity of a commercial nature. The proposed development would be situated on an area now used for commercial water dependent or related uses. The proposed development is not inconsistent with the economic goals of the SMP.

XI

The Access goals of the SMP are to provide for the optimum amount of physical and visual public access to the shorelines and to preserve and enhance views from the upland area where appropriate. Goals 1 and 2. These goals are developed further in several policy statements. The policy statements, in turn, anticipate the development of standards and criteria to achieve these goals. Specific standards related to these goals, and at issue, are sections 21A.71, 21A.100 and 21A.35.

XII

The view corridor provisions of the SMP appear correctly calculated. The particular placement of the view corridor on the

instant irregular-shaped site can raise differing opinions. It has not been established that the City incorrectly applied its own SMP, however.

XIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The burden of proving inconsistency with the SMA or SMP is upon the appealing parties. RCW 90.38.140(7). The burden of showing that an EIS is inadequate is also on the appealing party. In a review to determine compliance with SEPA, the determinations made are given substantial weight. RCW 43.21C.090.

II

Whether an EIS is adequate is determined by the rule of reason. Appellants have appealed the city's determination using both the city's internal appeal process, and this Board's review procedure.

III

Appellants contend that the EIS's discussion of alternatives is inadequate as to scope and consideration. The absence of a "mixed use" alternative and consideration of only the site in question are said to "fatally flaw" the EIS.

The "no action" alternative discusses the retention of much of the existing mixed uses. It does not meet the objectives of the project

sponsor, however, especially as to marine oriented retail uses. The proposal is intended to be a "mixed use." While the possible combinations which could make up other "mixed uses" are many, the proposal and its alternatives have not been shown to be unreasonable choices, nor is it persuasive that a reasonable alternative has been omitted.

With respect to the site, it would not be reasonable to include the leased Abigail property in the consideration of the site. Permittees have no present effective control of that property. Also, there appear to be no other shoreline property owned or controlled by the "proponent" that could require the expansion of the alternative section of the EIS. WAC 197-10-440(12).

IV

Appellants did not demonstrate that the discussion of economics and relocation in the EIS was substantially incorrect.

V

The city's SEPA Ordinance is interpreted by the decision maker as a limitation of the city's ability to mitigate cumulative impacts. The ordinance identifies the SMP as a regulation that can be used to mitigate impacts. Although not considered by the decision maker in the SEPA analysis, mitigation of shoreline impacts under the SMP can be affected under SEPA, or under the SMA. Appropriate conditions could be added by this Board to a substantial development permit if the disclosed impacts justify it.

VI

The discussion in the EIS pertaining to consistency with SMP goals and policies was not shown to be inadequate.

The discussion in the EIS pertaining to displacement of the existing uses and the cumulative effect on water-dependent commerce was not shown to be inadequate.

VII

The criteria for review of permits for substantial developments are found in RCW 90.58.140(2). The applicable provisions in this case in subsection (b):

> After adoption or approval, as appropriate, by the department of an applicable master program only when the development proposed is consistent with the applicable master program and the provisions of chapter 90.58 RCW.

There is no provision in the SMA or SMP which requires that proposed developments must be compared to the existing developments which they replace. A proposed development must be consistent with the applicable SMP and the provisions of the SMA. Whether a proposed development is better, or worse, than what development already exists on the site is not a proper criterion in the absence of an appropriate SMP provision. Our focus, then, is on the provisions of the SMA and SMP.

VIII

Where a variety, diversity and mixture of compatible uses are allowed by the SMP, the selection of one of the uses does not diminish the variety and mixture contemplated by the SMP. Rather, it is in

furtherance of the very thing allowed. Where the proposal includes permitted multiple uses, the variety, diversity and mixture are enhanced.

IX

The SMP preference for water dependent uses, is not a prohibition of non-water dependent uses. It is a preference that ideally should, but need not, be selected in the adoption of a SMP. The proposed development is not inconsistent with this provision.

X

As discussed in the findings and conclusions, there is no SMP provision cited which has been shown to be inconsistent with the proposed development. Rather, inconsistencies shown are between the expectations of some very concerned citizens and the particular choices made by the legislative authority of the city. Any change in the SMP is for the city to make.

Were the Board to write a shoreline master program, no doubt its approach and results would differ. What the Board might write is not the test, however. Our review is limited by the SMA. And we cannot say that the SMP, as it is administered, was shown to be inconsistent with the SMA.

XI

It was not shown that the proposed substantial development was inconsistent with the provisions of the SMA.

XII

It was not shown that the city should have denied or placed additional conditions upon the proposal to mitigate or to prevent adverse environmental effects.

XIII

The action of the City of Seattle should be affirmed.

XIV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The action of the City of Seattle is affirmed.

DONE this 14th day of July, 1983.

SHORELINES HEARINGS BOARD

David Akana

DAVID AKANA, Lawyer Member

Gayle Rothrock

GAYLE ROTHROCK, Chairman

Rodney M. Kerslake

RODNEY M. KERSLAKE, Member

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NANCY R. BURNETT, Member

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