

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

In the Matter of the Appeal of

Hearing Examiner File:

**SEATTLE COMMITTEE TO
SAVE SCHOOLS**

MUP-14-008(DD,W)

From a decision by the Director of the Department
Of Planning and Development

Department Reference:
3016023 and 3015311

Introduction

The Director, Department of Planning and Development issued a decision and the Appellants timely appealed.

The appeal hearing on the above-referenced matter was held on August 5, 2014, before the undersigned Deputy Hearing Examiner. Parties represented at the proceeding were: the Appellants, Seattle Committee to Save Schools et al. (SCSS), by Chris Jackins; the Director, Department of Planning and Development, by Holly Goddard, Land Use Planner; and the Applicant, Seattle School District (District) by G. Richard Hill, attorney at law. The record was held open after the hearing to allow the Hearing Examiner to view the site, which occurred on August 12, 2014.

On August 7, 2014, the District filed a "Motion to Correct Record" together with a Declaration of Eric Becker. SCSS filed a "Reply" on August 11, 2014, objecting to the motion. The record was closed at the end of the hearing, except for the purpose of the Examiner's site visit. The District's motion seeks to add or change testimony offered at hearing, but no good cause has been shown for why such information could not be offered at hearing. The motion is therefore denied.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. After due consideration of the evidence elicited during the hearing and the Examiner's inspection of the site, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The site is the Genesee Elementary School, addressed as 5012 SW Genesee Street in West Seattle. The site is bounded by SW Dakota Street on the north, 51st Avenue SW on the west, and SW Genesee Street to the south.
2. The site is six and one-half acres, and is zoned Single Family 5000 (SF 5000).

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3. The School District proposes to demolish the existing school and to construct a multi-story 90,763 square foot new elementary school with parking and outdoor play fields. The project proposal is more fully described in the Director's Report and other documents in the record.
4. The District as lead agency issued a SEPA Determination of Nonsignificance (DNS) for the project on December 6, 2013. The DNS was appealed, and the District Hearing Examiner heard the appeal on February 4, 2014. The District Hearing Examiner issued a recommendation on February 14, 2014, that the DNS be affirmed, and the District Superintendent affirmed the DNS.
5. The site includes an area mapped as a steep slope environmentally critical area (ECA), running northeast to southwest. The tree assessment conducted by the applicant's consulting arborist, Tree Solutions, Inc., identified ten trees on the site as "exceptional" under SMC 25.11. One of the exceptional trees, tree #979, is an American elm that is designated as a "Heritage Tree" under the City's Heritage Tree program. Of the 10 trees, tree #937, a western white pine, and tree #940, a Douglas fir, are slated for "removal" as defined in SMC 25.11.020. Because of disturbance activities, specifically removal of asphalt and grading, within the dripline of those trees, DPD has determined that the trees are subject to irreversible damage to their root systems.
6. The tree/vegetation management plan for the project is shown at Ex. 7. Among other measures, the plan states that "all demolition and excavation occurring near Tree Preservation Areas will be monitored by the project Arborist." The plan identifies issues with regard to individual trees, including the elm tree, and notes that in "location E – proposed stairway down to parking lot," the elm's tree roots may be present."
7. The state Department of Archaeology and Historic Preservation (DAHP) Statewide Predictive Model classifies the northeast corner of the project site as being at "high risk" for presence of archaeological remains. The District therefore retained a consulting firm, ESA, to conduct a cultural resources assessment for the site. The assessment, shown at Ex. 12, describes the results of the on-site investigation. The previously demolished remains of basements associated with two residences were found, but ESA concluded that the context of the remains suggested the former houses may have been removed from the project area, and that "the potential for additional historic archaeological resources appears limited, and unlikely to provide important historic information." Ex. 12, page i.
8. ESA prepared an Archaeological Resources Inadvertent Discovery Plan (IDP) for the proposal, shown at Ex. 13. The plan identifies communication protocols, including tribal notification.
9. The District submitted a request for a development standard departure to allow a maximum height of 50 feet for a portion of the project. The request was considered by a Departure Advisory Committee convened by the Department of Neighborhoods. The Committee's recommendations are shown in its report dated November 2013; Ex. 9. The Committee recommended that the departure be conditionally granted.

10. DPD reviewed the proposal and issued a decision conditionally granting the departure request and imposing certain mitigating conditions pursuant to its substantive SEPA authority.

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 23.76.022 and SMC 23.79.012. The Code directs the Examiner to accord "substantial weight" to the Director's SEPA and departures decisions. This is a deferential standard of review. The party appealing the Director's decision bears the burden of proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn.App 762, 637 P.2d 1005 (1981), so that the Hearing Examiner is left with a definite and firm conviction that a mistake has been made. *Moss v. Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001) (citations omitted). The

2. On August 1, 2014, the School District moved to dismiss issues 3, 4 and 5 from the appeal. Issue 3 claimed that DPD erred because the School District issued its DNS after the Departure Committee voted to recommend the approval of the height departure. Issue 4 claimed that DPD should not have allowed the School District to continue to conduct on-street bus loading. Issue 5 claimed that the project was not providing the number of Code-required parking spaces, and that a departure was therefore required. The Appellants filed their response on August 8, 2014. The Hearing Examiner heard from the parties regarding the motion at the beginning of the hearing, and at that time granted the motion, dismissing those issues from the appeal. Issue 3 identified no error under SEPA, since the Departure's Committee's recommendation was not an action under SEPA. Issues 4 and 5 claimed DPD had not correctly interpreted the Code requirements concerning on-street bus loading and off-street parking, both of which are Type I decisions which cannot be appealed to the Hearing Examiner except by means of the interpretation process of SMC 23.88.020, which was not followed here.

3. The remaining issues in the appeal are: whether the decision is in error for failure to impose adequate conditions to protect archeological resources at the site; whether the decision erred by allowing removal of and impacts on exceptional trees; whether impacts on account of the loss of park and open space and construction noise and dust required additional mitigation; and whether the District should be required to consider a smaller capacity school, including keeping a portion of Schmitz Park school open at its current site, in order to reduce impacts.

4. The Appellants assert that the proposed mitigation for potential impacts to Native American archaeological resources is not adequate. The District's IDP identifies the procedures that are to be followed if archaeological resources are discovered during construction. SCSS asserts that this plan simply allows the damage to occur, but that assertion is not supported by the evidence in the record. Instead, the cultural resource assessment, the IDP, and the testimony of Ms. Johnson, show that even if archeological resources are present at the site, the protocols in the plan are sufficient to reasonably avoid loss of or damage to such resources. SCSS also asserts that involvement and notification of the Duwamish Tribe is insufficient. Section 3.1 of the IDP requires SPS to notify tribal representatives of the project schedule and invite them to observe. SCSS noted that the District gave the Duwamish Tribe notice on a Friday of its intent to proceed

with a test dig the following Monday. This seems a very short time frame for meaningful notice, but the IDP requires that the Tribe be notified of the overall construction schedule, and presumably this will give the Tribe more time to respond. In any event, no error was shown as to DPD's SEPA decision on account of any impacts to cultural resources.

5. SCSS argued that the footprint of the new structure would not require that these trees be removed, rather that the trees were being removed because of asphalt demolition. But DPD has determined pursuant to SMC 25.11.060 that lot coverage could not be achieved on the site without the trees' removal, and the evidence in this record does not show that additional mitigation, i.e., preservation of the two trees, would be reasonable and capable of being accomplished under SMC 25.05.675. Although SCSS argued that having an arborist on site to observe was not effective as a mitigation measure, the District's witnesses confirmed that the on-site arborist would have authority to halt activities and to enforce the identified tree protection measures. SCSS also raised concerns about impacts on the Heritage elm tree from the placement of construction (stairs and a ramp) on both sides of the elm. Ms. Galbraith, the District's expert, did not recall this being shown on the plans she reviewed, but that in any event, given the location of the elm tree's roots, there was little risk to the tree's stability. Her opinion was persuasive as to the effectiveness of the protections being given to the Heritage elm. While the Appellants' witness voiced reasonable general concerns about the elm tree's future health, that evidence is not sufficient to meet the Appellants' burden to show a clear error in DPD's SEPA decision.

6. SCSS's witness also contended that under the City's Tree Protection ordinance, SMC 25.11, there were other exceptional trees on the site, but that is outside the scope of the Examiner's review in this appeal.

7. The remaining issues in the appeal contended that impacts from loss of open space and park space, and from construction noise and dust, and from the proposed school's capacity, required additional mitigation. However, no evidence was presented which showed that the SEPA decision was in error on account of the alleged impacts.

8. No clear error was shown as to the Director's decision, and it should be affirmed.

Decision

The Director's decision is hereby **AFFIRMED**.

Entered this 13th day of August, 2014.



Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner concerning the appeal of the Director's environmental and decision review decisions is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the Hearing Examiner's decision must be commenced within twenty-one (21) days of the date the City Council decision on the Type IV decision is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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