

THE HEARING EXAMINER OF THE CITY OF SEATTLE

MAGNOLIA COMMUNITY COUNCIL,)	
MIKE APPEL, M. JEANNE COULSON,)	
EDWARD R. COULSON, DEBBIE)	Hearing Examiner File: MUP 21-016
MULLINS, JONATHAN E. MULLINS, and)	and MUP 21-017
JANIS TRAVEN,)	
)	Department Reference: 3028072-LU
Petitioners,)	
)	MCC RESPONSE TO APPLICANT'S
v.)	MOTION TO DISMISS
)	
CITY OF SEATTLE,)	
)	
Respondent.)	
_____)	

I. INTRODUCTION

As Dorothy and her friends begin to catch on to the deception of the Wizard of Oz, he desperately warns them "Do not look behind the curtain!" Here, Oceanstar, LLC ("Oceanstar"), asks the Hearing Examiner to commit the same fundamental error that it persuaded SDCI to commit: make a decision about a conditional use permit without being aware of the relevant facts needed for an informed exercise of discretion. By moving to dismiss this appeal, Oceanstar is attempting to avoid an evidentiary hearing about its plans for the use of the Project buildings and about the Project's adverse impacts, including its impacts on the public view from Ursula Judkins Viewpoint ("UJV"). Those facts are relevant to the exercise of discretion under SMC 23.42.042 regardless of whether the Project is SEPA exempt. Oceanstar is simply shouting "Do not look behind the curtain!"

As explained in detail below, the claimed grounds for dismissal raised by Oceanstar are without merit and attempt to further conceal the facts needed to support the informed exercise of discretion to impose mitigating conditions under SMC 23.42.042. MCC requests that the Hearing Examiner deny the Motion and proceed to the needed evidentiary hearing so that informed decisions can be made about adverse impacts and appropriate mitigation of those impacts.

II. AUTHORITY

A. SDCI's failure to exercise discretion is an abuse of discretion.

No applicant is entitled to a conditional use permit as a matter of right. Rather, a conditional use permit is issued only after SDCI considers a variety of factors, including the proposed Project's impact on the public interest, harmony with other properties and land use code provisions and methods to mitigate any adverse impacts. This process is embodied in SMC 23.42.042:

In authorizing a conditional use, the Director or City Council may impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity.

SMC 23.42.042 requires SDCI to investigate and process an application to balance the competing interests of the applicant and other properties and the public interest and approve—or not, or approve with mitigating conditions—a particular proposal, a process that fundamentally requires the exercise of discretion. *Kelly v. City of Chelan*, 157 Wn. App. 417, 428, 237 P.3d 346 (2010) (Grant or denial of conditional use permit is adjudicatory in nature and there is discretion to issue the permit or not). Furthermore, the failure to exercise discretion is an abuse of discretion and can be corrected by an appeal. *Brunson v. Pierce Cty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009) (*citing Pettitt*, 93 Wn.2d at 295–296, 609 P.2d 1364) ("Failure to exercise discretion is an abuse of discretion").

In this case, Oceanstar's obfuscation or concealment of many factors during the permit process caused SDCI to omit consideration of the adverse public impacts of many key aspects of Oceanstar's proposal and thus unknowingly failed to exercise its discretion to mitigate those adverse impacts. The most notable example of the damage caused by Oceanstar's conduct is the absolute

lack of any protection for the Project's obliteration of the public view from UJV. For the purposes of this appeal, SDCI's failure to exercise its discretion is an abuse of discretion that the Hearing Examiner should correct by denying the Motion and proceeding to an evidentiary hearing so informed decisions can be made about adverse impacts and reasonable mitigation of those impacts.

B. Oceanstar cannot meet its burden to dismiss MCC's appeal for failure to state a claim upon which relief may be granted.

Hearing Examiner Rules ("Rules") Rule 2.16(e) provides that motions to dismiss should be made at the earliest possible time to ensure that the Hearing Examiner "will consider the motion on the merits." When considering matters of practice and procedure not addressed by the Rules, Rule 1.03(c) states that the Hearing Examiner may look to the Superior Court Civil Rules (CR) for guidance. CR 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief may be granted and reflects the same preference as Rule 2.16(e) for considering a motion on the merits of the claims being addressed.

Cases considering CR 12(b)(6) have set a high burden on the moving party to prevail on such a motion. "Motions to dismiss should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Paradise, Inc. v. Pierce Cty.*, 124 Wn. App. 759, 767, 102 P.3d 173 (2004). In other words, a motion to dismiss can only be granted when it "appears beyond a reasonable doubt that no facts exist that would justify" a ruling in favor of the non-moving party. *Id.*; see also *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008) (a motion to dismiss cannot be granted "if any set of facts could exist that would justify recovery"). Also, when considering a motion to dismiss, the non-moving party's allegations are presumed to be true. *Yurtis*, 143 Wn. App. at 689 (*citing Cutler*, 124 Wn.2d at 755, 881 P.2d 216), and the nonmoving party's evidence, together with all reasonable inferences that may be drawn from it, must be accepted as true. *Tyner v. State, Dep't of Soc. & Health Servs., Child Protective Servs.*, 92 Wn. App. 504, 514, 963 P.2d 215 (1998), *rev'd on other grounds*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (*citing Holmes v. Wallace*, 84 Wn. App. 156, 161, 926 P.2d 339 (1996)).

These guidelines are particularly appropriate in considering Oceanstar's motion. Although MCC members and others were able to present their comments at a public meeting over a year and a half ago, the first opportunity for MCC to learn of SDCI's determinations was less than two months ago, when the Decision was issued. Based on the evidence in the record described in MCC's appeal and discussed in detail below, along with all reasonable inferences from that evidence, MCC is entitled to present at an evidentiary hearing the facts concealed from SDCI and to obtain an informed decision about adverse impacts of the Project and appropriate mitigation. Oceanstar's Motion should therefore be denied.¹

C. MCC is not challenging SDCI's SEPA exempt determination in this appeal.

The first Wizard of Oz deceptive curtain Oceanstar promulgates in its Motion is that MCC is challenging SDCI's SEPA-exempt decision and asks for dismissal based on cases that support the Hearing Examiner's lack of jurisdiction for such a challenge in this appeal. MCC believes that the SEPA exemption is clearly erroneous and will be reversed in an appropriate LUPA proceeding, if necessary. For this appeal, however, MCC is contending that SDCI's inability to consider the true facts and mitigate the adverse impacts of Oceanstar's use of the Property resulted in an abuse of discretion under SMC 23.42.042 and is squarely within the jurisdiction of the Hearing Examiner to reverse or remand. The Motion completely fails to address SDCI's likely unintended abuse of discretion and for that reason alone should be denied.

D. SDCI was not able to consider the non-residential use of the Property.

MCC's appeal lists plentiful evidence of Oceanstar's non-residential use of the Property, none of which was considered by SDCI and thus not mitigated in the Decision. This evidence

¹ Most of the proof of facts MCC believes have been concealed from SDCI are of course uniquely within the knowledge, possession, custody or control of Oceanstar. If the Hearing Examiner has any question about the sufficiency of MCC's proof and all reasonable inferences from it, in order to deny the Motion, MCC requests that the Motion be continued so that MCC may conduct discovery to gather additional evidence. Such a continuance is encouraged under a long line of cases under CR 12(b)(6). Motions to dismiss should be granted "sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits." *Fondren v. Klickitat Cty.*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). The trial court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." *Keck v. Collins*, 181 Wn. App. 67, 87, 325 P.3d 306 (2014).

includes the need for an underground parking garage for 13 cars, shared amenities, obscured ownership and imaginary property lines. Appeal, pp. 3-4. There are additional considerations that should have prompted SDCI to exercise its discretion. First, in 2017, the City enacted Ordinance No. 125483, which added SMC 23.42.060, and imposes comprehensive rules regarding short-term dwelling unit rentals, such as requiring owners to obtain licenses, tax certificates and restricting the number of guests, before offering short-term rentals of a dwelling unit. Ordinance 125483, December 8, 2017. The rules were passed in part to "protect the safety and livability of residential neighborhoods" and were necessary "to protect and promote the health, safety, and welfare of the general public." *Id.* Significantly, the City also classified short-term rentals as a lodging use, which it defined as a commercial use. Ordinance, p. 8, SMC 23.84A.024"L". These considerations are well within the jurisdiction of SDCI under SMC 23.42.042. The Hearing Examiner must deny the Motion and allow this evidence to be presented at a hearing to make informed decisions about adverse impacts and appropriate mitigation.

E. MCC does not raise a code enforcement issue.

Oceanstar also uses the SEPA-exempt curtain to claim MCC seeks a code enforcement issue outside the Hearing Examiner's jurisdiction. Oceanstar acknowledges that its SEPA exemption is based on the physical characteristics of the buildings proposed for the Project but claims because MCC is not objecting to those characteristics, it is bringing an enforcement issue on the USE of the buildings. To make this illogical argument, Oceanstar conflates or purposely mischaracterizes the physical characteristics of a building with its USE, stating that the Decision limits the buildings "to the residential USES described by the Applicant in its application" and the City's failure to "enforce the permit conditions limiting the Applicant to residential USE of the Property." Motion, pp. 6-7. However, there are NO restrictions of the buildings to residential USE in the Decision because, as pointed out in the Appeal, Oceanstar used this same tactic to avoid an answer to the question to describe the Property's USE (Appeal, p. 4), and did not limit the building's USE to residential anywhere else in the rest of their application. Oceanstar's conduct prevented

SDCI from considering the true planned USE of the buildings in exercising its discretion to impose conditions on the Property's USE, constituting an abuse of discretion squarely within the Hearing Examiner's jurisdiction to address on this appeal. The Motion should be denied and this appeal should proceed to an evidentiary hearing.

F. MCC is not seeking to enforce a private covenant.

The Decision contains NO protection for the UJV public view. The Appeal cites numerous factors that should have triggered exercise of SDCI's discretion to provide protection for that view, including a history of recorded deed covenants and other restrictions. Rather than address these factors, Oceanstar argues that MCC's position is simply attempting to enforce a private view covenant. This argument fails for several independent reasons.

First, the covenants and restrictions, particularly in the original transfer by the US Navy to Oceanstar's predecessor in interest, demonstrate the public interest and need for protection of the UJV public view and should have guided SDCI's discretion and imposition of conditions to mitigate adverse impacts. RCW 2.08.010, cited by Oceanstar in support of its flawed argument, is completely irrelevant to the imposition of such conditions.

Second, Oceanstar's argument is even more baseless in the context of the representations and references its representatives made during the approval process. The recorded view covenant is referenced under a section entitled "Easements of Record" in the various iterations of plans submitted by Oceanstar. See, e.g., "Revised Plan Sheets – Land Use_Cycle 2," 11/27/19, SDCI Permit and Property Records, No. 3028072 (web6.seattle.gov/dpd/edms) ("SDCI Records"), Global Seas ACUP Submittal Set, 11/27/19, p. 3. In its "ACUP Submittal Report", dated May 10, 2019, Oceanstar's architect promised to perform an analysis of the existing view corridor (established by the recorded view covenant) and to select species "with an average mature height" that would not exceed predevelopment heights. "Miscellaneous Site (1)", 5/13/19, SDCI Records, ACUP Submittal Report, May 10, 2019, p. 11. The architect also told SDCI: "Rooflines area [sic] held below Ursula Judkins' average grade to maintain views from the park into Elliott Bay and beyond to the Seattle

skyline", and proposed a buffer screen with the goal to "maintain current views to Elliott Bay and Seattle skyline for park users and nearby homeowners." *Id.* at p. 10. These statements are Oceanstar's direct admissions of the importance of the public interest in the UJV view **and** the reasonableness of conditions to mitigate the adverse impacts on that view.² Yet, SDCI did not impose any conditions to protect the UJV view, and, as pointed out in the Appeal and dramatically demonstrated by Exhibit 2, the average mature height of Oceanstar's proposed buffer will totally obliterate the UJV public view. The Hearing Examiner must deny the Motion and at the hearing admit and consider the evidence that will support an exercise of discretion to impose appropriate conditions to correct this glaring lack of protection for UJV and its public view.

G. MCC's suggested mitigating conditions are reasonable.

Oceanstar's attempts to refute the reasonableness of MCC's proposed mitigating conditions employ a variety of Oz-like deceptions easily overcome by pulling back the curtains used.

1. The UJV public view is entitled to protection by regrading UJV.

In opposing the suggested improvements to UJV, such as regrading it to raise the public view above the proposed obstructions, Oceanstar relies on the very Code provisions that Oceanstar claims it is exempt from: SMC Chapter 25.05. Oceanstar makes the remarkable assertion, contrary to its admissions of public view protection in the record and contradicting promises made directly to SDCI: "Under the plain language of the Code, there is no right to a view here." Motion, p. 8. However, by its very title, there is no right to a conditional use permit and the granting of one is conditioned on the exercise of SDCI's discretion under SMC 23.42.042 to protect the public interest from adverse impacts. Given Oceanstar's SEPA-exempt assertions, it is disingenuous to argue that SMC 25.05.675.P applies and exclusively limits public view protection only to the locations listed in Attachment 1.

² These admissions are similar to representations made by Oceanstar's project architect at the public meeting on September 23, 2019, where he stated the developer's commitment to protect the views of UJV. "Public Comment: Moehring 10-2-19", 10/4/19, SDCI Records, Email from David Moehring, October 2, 2019, p. 2.

The City of Seattle's Department of Parks and Recreation ("Parks and Rec") would also disagree with Oceanstar's current argument. Members of MCC posed questions to Mr. Jesus Aguirre, Superintendent of Parks and Rec, following his appearance at a community meeting in Magnolia on February 26, 2020. One of the questions posed was whether UJV was an official park viewpoint. Mr. Aguirre responded in the affirmative and in a Memorandum following the meeting provided a list of 16 official park viewpoints that included UJV (along with other parks viewpoints, some included and some not included in Attachment 1). He also noted Parks and Rec had no control over the private property below UJV and to direct concerns about plantings there to SDCI. A copy of Mr. Aguirre's Memorandum is attached as Exhibit 1.³

Finally, SMC 25.05.675.P, while not currently controlling, does offer by analogy guidance to the exercise of SDCI's discretion under SMC 23.42.042. In that regard, 25.05.675.P.2.d.4 specifically recognizes requiring enhancements to off-site view corridors as a possible mitigating factor to adverse impacts on public views. Coupled with Oceanstar's promises to protect the view and the potential for absolute obliteration of that view, a condition requiring it to regrade UJV is an eminently reasonable exercise of SDCI's discretion. The Hearing Examiner should deny the Motion and proceed to a hearing to determine whether this condition should be imposed under SMC 23.42.042.

2. SDCI was not able to consider the Project's adverse impact on the MOA.

The Decision fails to consider the Magnolia Bridge replacement or the MOA. As with its arguments regarding protection of the UJV public view, Oceanstar attempts to hide behind a curtain of enforcement of a private covenant to justify this failure. Motion, p. 9. From its research to date, MCC understands the MOA was part of decades long and continuing efforts of numerous governmental agencies to replace the seismically challenged and deteriorating Magnolia Bridge.⁴

³ The Parks and Rec Memorandum was received by Magnolia resident Carol Burton and sent to appellant Janis Traven in an email dated March 5, 2020. A true and correct copy of the Memorandum is attached as Exhibit 1.

⁴ MCC has been unable to locate a copy of the MOA, despite continuing efforts greatly hindered by time and governmental agency COVID measures. The MOA is discussed in a Magnolia Bridge Replacement Environmental Assessment ("Assessment"), dated May 2015, conducted by Seattle Department of Transportation, Washington State

These agencies' efforts and agreements with property owners such as Oceanstar's predecessor in interest are part of the government's role to protect the health, safety, and welfare of the public. Despite its unfounded arguments in the Motion, Oceanstar has actually acknowledged the Project's potential adverse impact on the public interest and UJV. Oceanstar submitted a depiction of a bridge replacement proposal in its application materials, but never presented the MOA or additional information to SDCI. "Site Plan (2)", 6/20/17, SDCI Records, Admiral House Global Seas LLC, 6/16/17, p. 5. As a result, SDCI did not consider the Project's impact on any aspect of the bridge replacement. MCC requests the Hearing Examiner deny Oceanstar's motion and proceed to an evidentiary hearing to make informed decisions about the Project's adverse impacts on the bridge replacement and appropriate mitigation under SMC 23.42.042.

3. Removal of the north side exterior access is within SDCI's discretion.

As with its faulty SEPA-exempt arguments Oceanstar attempts to leave the UJV public view unprotected, discussed above. Oceanstar again claims without authority that because it is SEPA exempt, none of the SEPA mitigating factors, such as a change in access, may be considered by SDCI under SMC 23.42.042. Motion, p. 9. MCC submits there is no such bright line between possible mitigation conditions under SEPA and when SEPA does not apply. Quite the contrary, SMC Chapter 25.05 is extremely broad and comprehensive, and contains literally thousands of potential mitigating factors to the extensive policy areas covered by SEPA, all of which can be considered for guidance when exercising discretion under SMC 23.42.042, whether SEPA applies or not. SMC 25.05.030 codifies that SEPA may be a guideline for SDCI: "The policies and goals set forth in SEPA are supplementary to existing agency authority." Accepting Oceanstar's argument contradicts SMC 25.05.030 and would deny SDCI the right to consider reasonable options to

Department of Transportation, and the Federal Highway Administration. The Assessment states of p. 5-5.6 that the MOA was signed in 2011 between the Federal Highway Administration, State Historic Preservation Office, Washington Department of Transportation, City of Seattle, and the private owner [of the Admiral's House] to address adverse effects on the property and stipulates protocols that must be followed to mitigate the impacts of the bridge replacement during and after construction. A true and correct copy of the cover, table of contents, and Chapter 5.5 of the Assessment is attached as Exhibit 2.

mitigate adverse impacts on the public interest under SMC 23.42.042 and totally eviscerate its important public interest and property protections.

As stated in its appeal, MCC believes Oceanstar's non-residential use of the Project buildings will create an unreasonable vehicular and pedestrian burden on UJV. Appeal, p. 7. Because Oceanstar concealed its potential use of the Property in its application and the Decision does not address the numerous factors that point to future non-residential use of the Property (Appeal, p. 3), SDCI has not been able to make an informed decision under SMC 23.42.042.

In addition, Oceanstar has acknowledged historical evidence that the north property access was originally created for the benefit of the residents of an enlisted sailors' barracks that once stood on the UJV grounds, presumably so those sailors could walk to and from their duty stations at the facilities on Elliott Bay. "Land Use Pre-submittal Conference Application, April 3, 2017", SDCI Records, Pre-Sub Application & Questions, 6/16/17, p. 6. With the long ago demolition of the barracks and abandonment of the access to Elliott Bay, there is no reason to have that access today. For these reasons, the Motion should be denied and facts regarding the north property access should be presented at an evidentiary hearing to allow an informed decision about the Project's adverse impacts and appropriate mediation for the north property access.

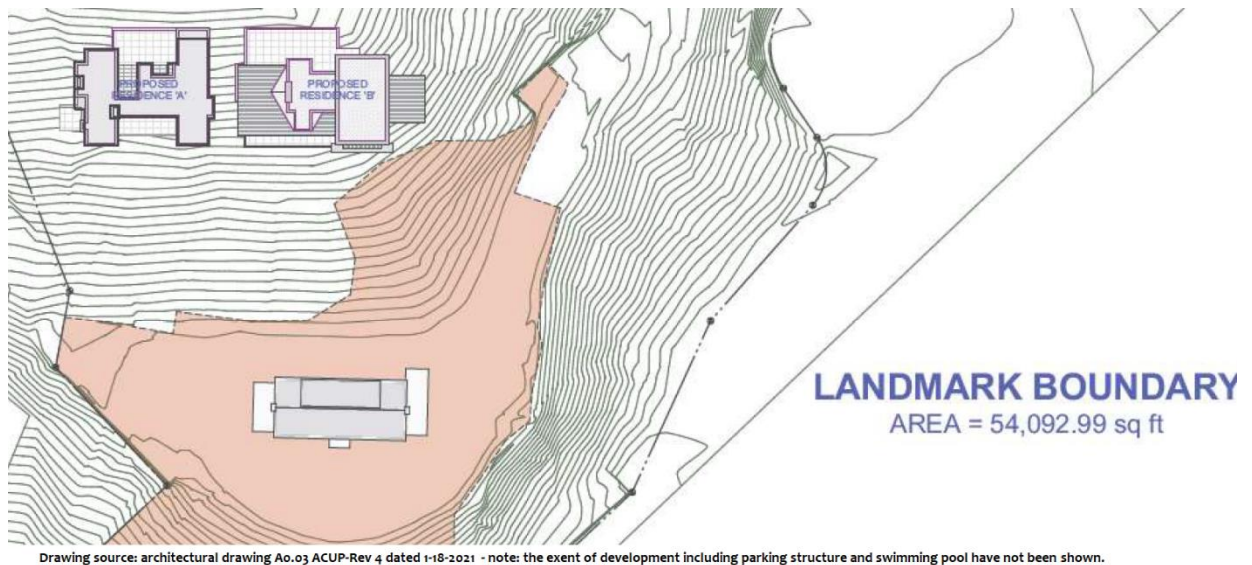
4. The Decision does not consider impacts to the Landmark Area that should require advance approval of the Landmarks Preservation Board or others.

Oceanstar mistakenly asserts that MCC does not dispute that the Project does not propose changes to the Admiral's House or the landmark portion of the Property. Motion, p. 10. To the contrary, MCC believes the Project does propose changes to the Admiral's House and the landmark buffer that Oceanstar concealed from SDCI and should have required advance approval of the Landmarks Preservation Board ("Board") as a reasonable mitigating factor under SMC 23.42.042.

a. Construction activities will change the landmark portion of the Property.

Oceanstar's submittals include depictions of the boundaries of the designated landmark area protected by the ordinance designating the Admiral's House as an historic landmark, Ordinance

No. 124135, passed March 11, 2013 ("Ordinance"). Those depictions show that there is less than **three feet** between the proposed buildings and the designated landmark area. See, e.g., "Plan Set - Land Use_Cycle5", 1/20/21, SDCI Records, Global Seas ACUP Submittal Set, 1/18/21, p. A0.03:



While the completed proposed building may be outside the landmark area, Oceanstar submitted no information regarding the impact of construction activities on the site. Construction practices for equipment access, excavation and construction on this steeply sloped and environmentally critical site will undoubtedly require excavation and construction access to the landmark area to erect retaining walls, foundations and exterior walls. Without this information, SDCI was unable to consider any of these encroachments and make an informed decision under SMC 23.42.042 as to their adverse impacts and appropriate mitigation, including securing approval of the Board. SDCI has indeed requested from other applicants to provide a document that describes the area of excavation that directly corresponds with the locations of the buildings' construction excavations. SDCI has not been provided such information for this Project, and thereby has insufficient information to make an informed decision about the adverse impacts and appropriate mitigation. The Motion should be denied so this appeal can proceed to an evidentiary hearing to allow consideration of these encroachments.

b. The proposed buildings will impact designated features of the Admiral's House.

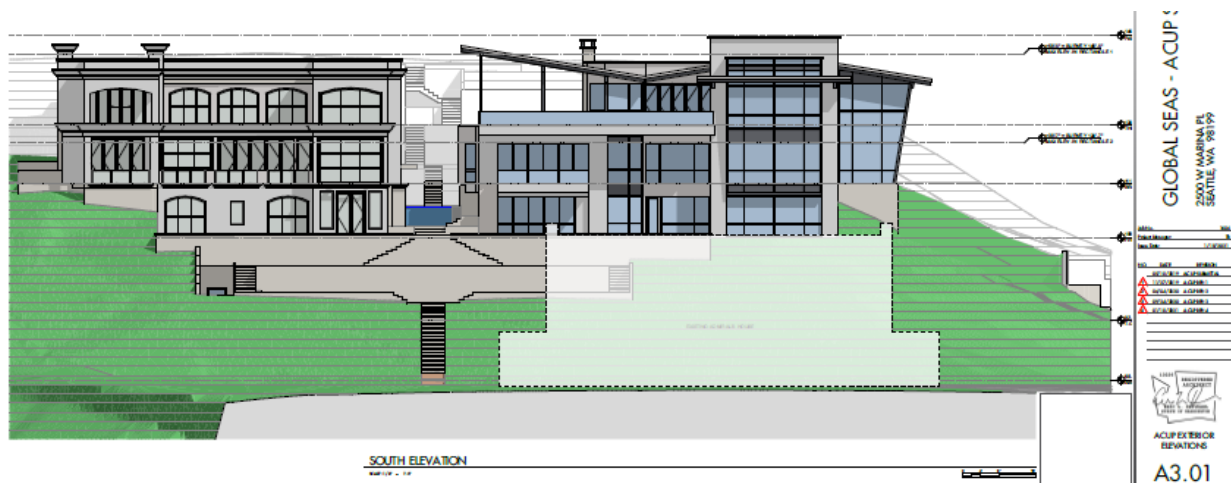
The Admiral's House was designated an historic landmark in part because of its iconic architecture and its predominance and spatial location on the site. Ordinance, p. 6. There is nothing in the record that demonstrates any consideration of the effect of the proposed buildings' location and mass on the Admiral's House architecture and location on its site. This is especially relevant given the two original reasons for granting landmark status to the Admiral's House included (1) the architectural style of the Admiral's House, and (2) the predominance of the Admiral's House within the context of the site's area. *Id.* The Project significantly impacts both of the criteria used in justifying the ordinance for landmarking the Admiral's House property. Throughout the application process, the project architect began its plans with a picture demonstrating the distinctive architecture and location of the Admiral's House:



Plans Cycle5, p. A0.01

The south elevation of the Project in the plans dramatically demonstrates how the proposed buildings will completely dominate the Admiral's House, depicted in the grayed out area within dotted

lines below and destroy its protected style and spatial location on the site:



Plans Cycle5, p. A3.01

The Ordinance requires that Oceanstar obtain the approval of the Board before making these devastating changes to the features and characteristics of the Admiral's House. Ordinance, p. 6. Oceanstar acknowledges this requirement in the Motion, and the authority of the City to require such review under SEPA (Motion, p. 10), but then again hides behind the SEPA-exempt curtain and claims the Code has no authority for SDCI to ask the Board to review the Project. However, as set forth in detail above, the policies and mitigating factors contained in SEPA can by analogy provide guidance and options to SDCI in exercising its discretion under SMC 23.42.042. Interestingly, the options in SMC 25.05.675.H.2.d, cited by Oceanstar, deal with projects adjacent to landmarks (such as Oceanstar's), and include conditions for reference to the Board and "sympathetic" treatment of the facades and design of the adjacent project to mitigate its impacts on the landmark. There is nothing MCC found in the record demonstrating Oceanstar's submittal of any information regarding consideration of the Project's impacts on the features of the Admiral's House. Accordingly, SDCI did not have the facts it needed to make an informed decision about adverse impacts and appropriate mitigation of those impacts. MCC requests that the Hearing Examiner deny the Motion so this matter may proceed to an evidentiary hearing so an informed decision under SMC 23.42.042 may be made based on the relevant facts presented.

III. CONCLUSION

The Decision contains no protection for UJV's magnificent public view. MCC respectfully requests that the Hearing Examiner, like Dorothy, pull back Oceanstar's curtains, deny its Motion and allow MCC's appeal to proceed to an evidentiary hearing. For all the reasons set out above, the hearing is necessary so an informed decision can be made under SMC 23.42.042 based on all relevant facts of the Project's use and adverse impacts and to exercise discretion to impose appropriate mitigating conditions in the Project's conditional use permit.

DATED this 17th day of June, 2021.

/s/

Edward R. Coulson
Authorized Representative for Appellants
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THE HEARING EXAMINER OF THE CITY OF SEATTLE

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I declare under penalty of perjury under the laws of the State of Washington that on this date,
I sent true and correct copies of the attached MCC RESPONSE TO APPLICANT'S MOTION TO
DISMISS to each person listed below, in the manner indicated.

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DATED this 17th day of June, 2021.

/s/

Edward R. Coulson

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EXHIBIT 1

MAGNOLIA COMMUNITY MEETING FOLLOW-UP

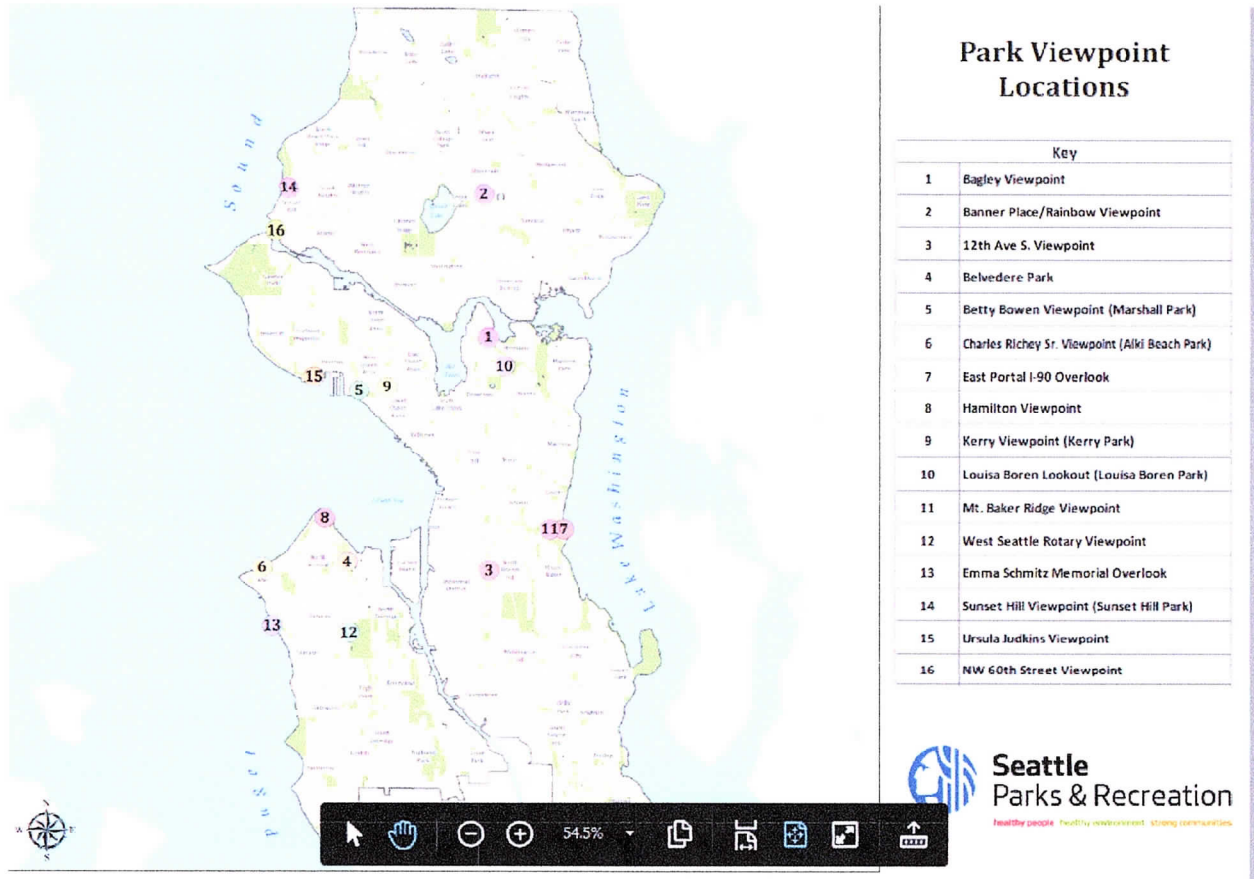
Thanks for taking the time out of your day to learn more about what is happening in Seattle Parks and Recreation and sharing your thoughts on planning for the future. Below are responses to the questions we promised to follow-up on.

Who is the current Crew Chief for Magnolia, specifically Thorndyke Park?

The Crew Chief is currently Terry Masterjohn (206)684-7258 and team leads are Drew Silva and Josh Bishop.

Is Ursula Judkins an official Park Viewpoint?

There are 16 in the City of Seattle and Ursula Judkins is on the list (see below). We have no control of the private property beneath the viewpoint and any concerns about plantings and/or slope stability should be directed to SDCI <https://www.seattle.gov/sdci>

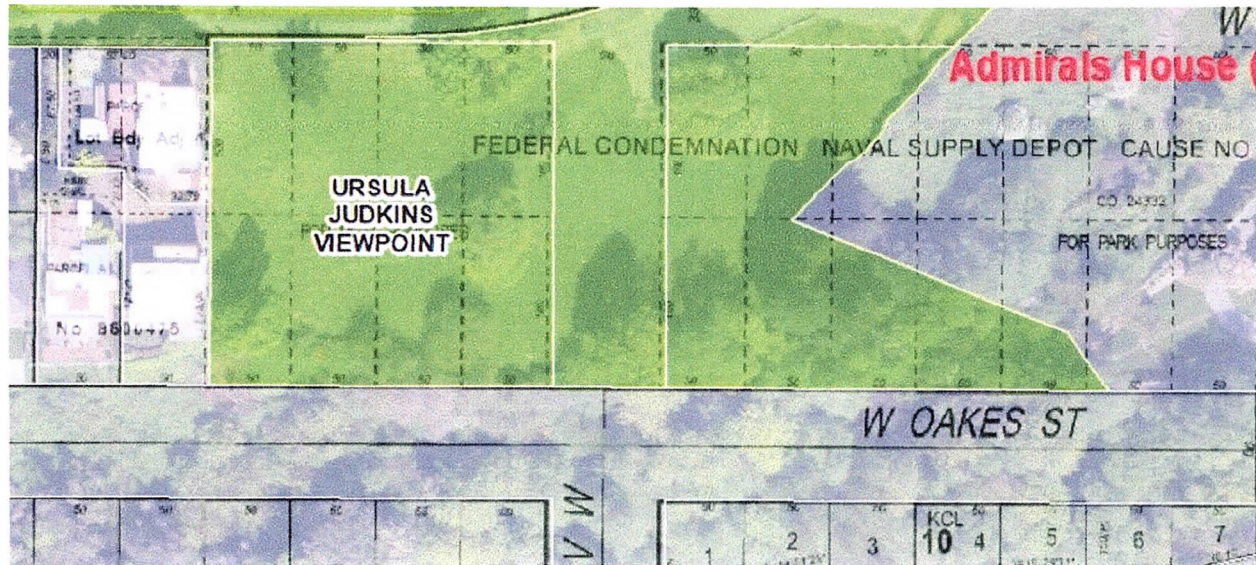


How are existing Master Plans being considered during the Strategic Plan for the next six-year Park District funding cycle?

SPR staff thoroughly reviewed the parks plans that have been developed over the past 5 years to ensure they are considered during the strategic planning process. The Strategic Plan does not overwrite other plans and they will continue to be factored into our everyday work.

Who owns the property west of Ursula Judkins Viewpoint?

This is privately owned property. See the map below.



Smith Cove

Phase I project information can be found at: <https://www.seattle.gov/parks/about-us/current-projects/smith-cove-park-development> Design for Phase II should begin in 2021/2022.

Where can I find a copy of the Magnolia Community Center design and current information on the timeline, repair list, etc.?

We are currently working on the design, and the planned improvements are included on the website. <https://www.seattle.gov/parks/about-us/current-projects/community-center-stabilization-overview/magnolia-community-center-stabilization>

Concerns about the availability of the restroom in Magnolia Park? Can we contract out the maintenance work?

Most of our restrooms require winterization to protect the infrastructure during the cold months. Seattle Parks and Recreation has installed a number of sanicans at Discovery Park and can look at installing one up near the Magnolia Park parking lot in October to ensure there is restroom facility available at Magnolia Park next winter.

Can we get updates from project staff at a future meeting?

Once our Magnolia Community Center and Smith Cove Phase II projects are further along, our project staff would be more than happy to attend a future Magnolia Community Council meeting and provide project updates.

EXHIBIT 2

MAGNOLIA BRIDGE REPLACEMENT



Environmental Assessment

May 2015



Seattle Department of Transportation
Agreement No. T12-64



Washington State
Department of Transportation



U. S. Department of Transportation
Federal Highway Administration

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May 2015



Seattle Department of Transportation
Agreement No. T12-64



Washington State
Department of Transportation



U. S. Department of Transportation
Federal Highway Administration

Americans with Disabilities Act (ADA) Information



Materials can be provided in alternative formats—large print, Braille, cassette tape, or on computer disk—for persons with disabilities by calling the WSDOT Office of Equal Opportunity (OEO) at (360) 705-7097. Persons who are deaf or hard of hearing may contact OEO through the Washington Relay Service at 7-1-1.

Civil Rights Assurance Statement

Washington State Department of Transportation (WSDOT) hereby gives public notice that it is the policy of the department to assure full compliance with Title VI of the Civil Rights Act of 1964, the Civil Rights Restoration Act of 1987, Executive Order 12898, Executive Order 13166, and the related statutes and regulations in all programs and activities. Title VI requires that no person in the United States of America shall, on the grounds of race, color, sex, national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which WSDOT receives federal financial assistance.

Availability and Cost of Document

The cost of this document is \$____, which does not exceed the cost of printing.

This document is available for public review at the following locations:

The FHWA has determined that this preliminary document is an intergovernmental exchange that may be withheld under the Freedom of Information Act request. Premature release of this material to any segment of the public could give some sectors an unfair advantage and would have a chilling effect on intergovernmental coordination and the success of the cooperating agency concept. For these reasons, we respectfully request that the public not be given access to this document.

May 2015



Seattle Department of Transportation
Agreement No. T12-64



Washington State
Department of Transportation



U. S. Department of Transportation
Federal Highway Administration

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May 2015



Seattle Department of Transportation
Agreement No. T12-64



Washington State
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Chapter 5.5 Historic, Cultural and Archaeological Resources/Section 106

To complete the environmental review of a project, the project must demonstrate that it is in compliance with Section 106 of the National Historic Preservation Act (NHPA). This chapter summarizes the Section 106 evaluation that was completed for the project. The detailed analysis can be found in the Historic, Cultural and Archaeological Resources Discipline Report, Appendix I.

1 What are cultural resources?

The term “cultural resources” includes archaeological sites, Native American and traditional cultural places, historic buildings and structures, historic districts, and planned landscapes. The National Historic Preservation Act of 1966 was passed to recognize the importance of these resources to our national, regional, and local culture.

Section 106 of the National Historic Preservation Act requires federal agencies to account for the effects of their undertakings on historic properties and cultural resources and to afford the Advisory Council on Historic Preservation an opportunity to comment. FHWA and WSDOT also seek to ensure that each tribe has the opportunity to identify and address any concerns regarding identification and evaluation of cultural resources and potential effects of the undertaking upon such resources.

Archaeological resources are places where past peoples have left physical evidence of their occupation. Archaeological sites may include deposits of debris such as artifacts, food remains (shells and bones), or the ruins of dwellings or other structures. **Historic properties (per Section 106)** include prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places; artifacts, records, and remains that are related to and located within these National Register properties.

2 How are impacts to cultural resources evaluated under Section 106?

- The first step in evaluating cultural resources is to develop an **Area of Potential Effect (APE)** then consult with the State Department of Archaeology and Historic Preservation (DAHP) to finalize the APE.
- Once an APE is established, information is gathered to decide if there are any cultural resources in the area.
- If cultural resources are found an evaluation (by a historic preservation professional and/or archaeologist) is conducted to determine how those cultural resources might be affected.
- If it is found that a project would have an adverse effect on a cultural resource, measures to avoid or reduce harm are developed.
- DAHP is consulted on these measures. Typically agreement is reached on the range of project impacts and ways to minimize them.

What is an APE?

An APE (Area of Potential Effects) is the geographic area within which an undertaking may directly or indirectly cause alterations to the character or use of historic properties.

3 What is the Magnolia Bridge Replacement Project Area of Potential Effect?

An APE was established in consultation with WSDOT, FHWA, interested tribes, DAHP, the City of Seattle Office of Historic Preservation, and other consulting parties²³. **The APE was determined to be 100 feet on each side of the Preferred Alternative footprint, the Admiral's House property, Piers 90 and 91 and the northernmost building on Pier 89** (see Exhibit 5.5-1).

²³ Tribes contacted included Federally recognized Tribes (Suquamish Tribe, Snoqualmie Tribe, Tulalip Tribes, Muckleshoot Tribe, Yakama Indian Nation), non-Federally recognized Tribes (Duwamish Tribal Organization, Kikiallus Indian Nation). Only the Snoqualmie Tribe consulted on the APE. The Tribe requested the APE be modified and that a paid Tribal Monitor be allowed to participate in archaeological monitoring during construction.

4 What historic resources are located within the Area of Potential Effect?

There are two historic properties in the Magnolia Bridge Replacement Project APE. One structure, the Admiral's House (labeled #3 on Exhibit 5.5-1), has been listed on the federal National Register of Historic Places (NRHP). One structure (labeled #9 on Exhibit 5.5-1), a warehouse formerly occupied by Snider Petroleum, is eligible for listing in the NRHP.

The Admiral's House

The Admiral's House was constructed in 1944 by the U.S. Navy to house the commanding admiral and his family, and serve as a center for official government entertaining (Sheridan 2013). The Admiral's House is listed in the NRHP, and designated as a Seattle Landmark (April 2013). It is significant for its association with the U.S. Navy and its role in Seattle from World War II until the 1990s. The Admiral's Residence is also significant for its embodiment of the Colonial revival architecture.

Warehouse, Port of Seattle

The warehouse building (#9 in Exhibit 5.5-1) was constructed in 1929 for the Texas Company Refinery. The warehouse provided support to the U.S. Navy during World War II and the Korean and Vietnam wars. In the 1970s, it was declared a surplus property and transferred to the Port of Seattle along with most of the Terminal 91 property. In 2005, the building was recommended as eligible for listing in the NRHP under Criterion A for its association with Seattle's history. Since that time, many of the buildings and storage tanks associated with the refinery have been demolished.

5 What archaeological resources are located within the Area of Potential Effect?

Cultural resources staff conducted field investigations in September 2003 to identify archaeological resources along each alternative alignment and to identify significant historic structures in the project area as part of the Section 106 analysis.

What is the National Register of Historic Places (NRHP)?

The National Register of Historic Places (NRHP) is the United States federal government's official list of districts, sites, buildings, structures, and objects deemed worthy of preservation.

What is a Seattle historic landmark?

In Seattle, a building, object, or structure may be eligible to be listed as a historic landmark if it is more than 25 years old and the Seattle Landmarks Preservation Board determines it is of historic significance. The Admiral's Residence was listed as a Seattle Landmark in 2013.

Subsurface archaeological investigation and testing was also completed in February and March 2006 at sites along the project alignment. No known archaeological sites were identified within the study area. (For additional information see 2006, *HRA, Archaeological Investigations for the Magnolia Bridge Replacement Project Seattle, Washington, See Appendix I*)

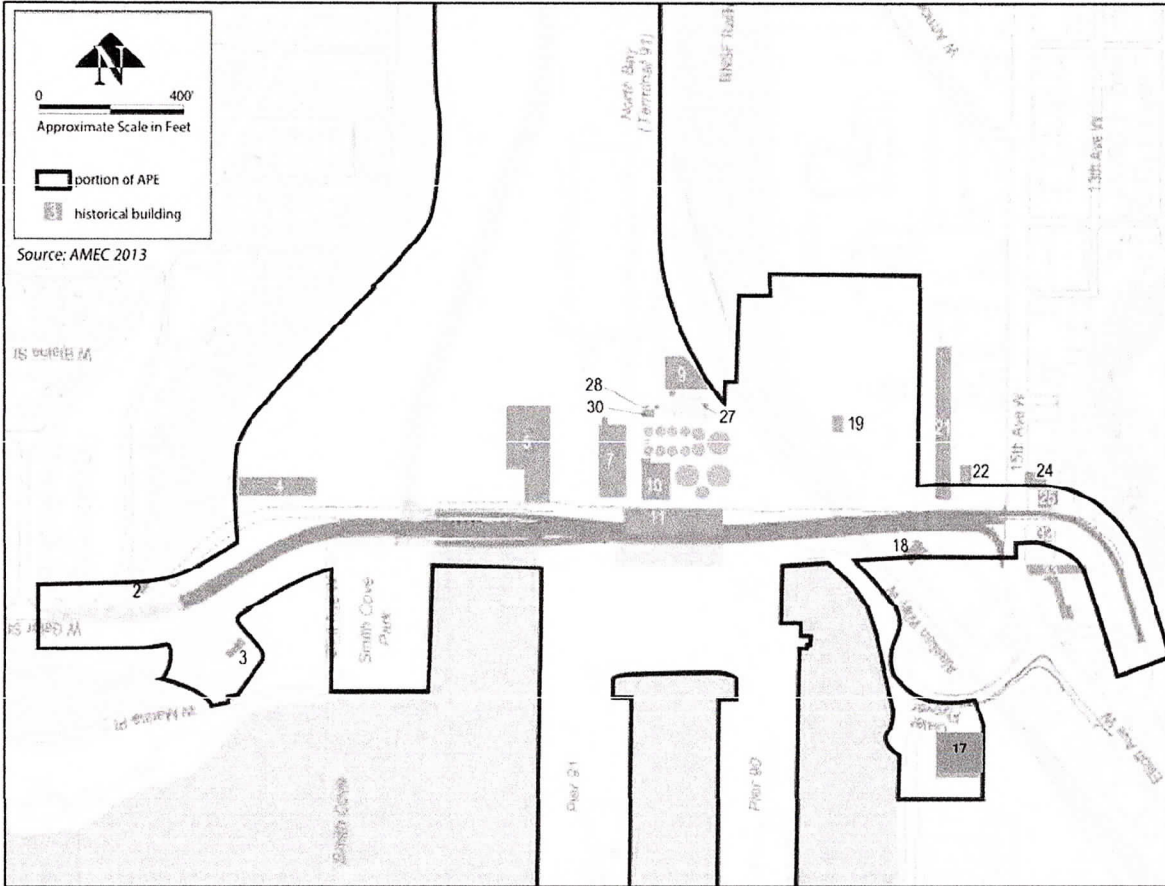
6 Would any cultural resources be affected by the project?

The FHWA has determined that the construction of the Preferred Alternative would modify the character-defining attributes of the Admiral's House and have an adverse effect. A Memorandum of Agreement documents this finding and sets out stipulations for protection of the property and mitigation of construction effects.

The extent of archaeological resources below the ground surface is unknown. None were discovered during the investigations described in Appendix I. However, due to the location of the project near the historic shoreline it is possible that archaeological finds may be encountered during construction.

Construction activities would be temporary and would not have substantial long-term access, aesthetic, air quality, noise, or water quality/quantity related effects on any Section 106 property.

Exhibit 5.5-1
Historic Resources in the APE



Note: Exhibit 5.5-1 includes a number of buildings that were evaluated in 2006. Since that time, these buildings have either been removed or determined not to be eligible for listing on the National Register of Historic Places.

Exhibit 5.5-2

Shoreline at Smith Cove - early 1930s

Looking southwest from Magnolia Bluff

Source: Museum of History & Industry, Seattle

7 What measures are proposed to avoid or minimize effects to historic, cultural and archaeological resources?**During construction**

A Memorandum of Agreement (MOA) was signed in 2011 between the Federal Highway Administration (FHWA), State Historic Preservation Office (SHPO), Washington Department of Transportation (WSDOT), City of Seattle, and the private owner to address the adverse effects on the property. It stipulates protocols that must be followed to mitigate the impacts of the Magnolia Bridge Project during and after construction.

To mitigate impacts to the Admiral's House, the FHWA has executed a Memorandum of Agreement (MOA). The MOA requires a pre-construction survey of the structural condition of the house, garage and access road, and a geotechnical investigation of the stability of the hillside on the property. Before construction may begin, repairs must be completed and storm windows installed to prevent dust and dirt from entering interior spaces and to reduce interior noise. If required, slope stability mitigation measures would be performed. Additional mitigation measures in the MOA can be found in Appendix B

**of the Historic, Cultural and Archaeological Discipline Report
(Appendix I).**

No specific construction mitigation measures are identified for the warehouse structure (building #9) on the Terminal 91 property. The building is currently (Spring 2014) vacant. When final design continues and construction dates are known, specific measures may be proposed.

A Construction Monitoring Plan would be developed prior to the start of construction that would outline monitoring protocols and identify areas of sensitivity for archaeological monitoring of select pre-construction and construction tasks. The development of an Inadvertent Discovery Plan (IDP) is also recommended. If significant archaeological resources are identified during construction, mitigation for potential impacts should be addressed following the protocols of the IDP. Should any prehistoric or historic cultural remains be discovered during the demolition or construction, all work in the area of the discovery shall cease and the IDP should be followed.

Prior to, and during construction, training would be provided to all on-site construction personnel to assist in the identification of cultural resources and to help them understand measures to avoid and protect historic properties.

A Traffic Management Plan (TMP) would be prepared to manage construction traffic in the vicinity of the project. The plan would identify mitigation measures to be implemented during the construction phases to ensure protection of public safety. The Joint Development Agreement could require that replacement parkland be established and open to the public prior to the beginning of bridge construction.

Before construction, a MOA signed by the City of Seattle, WSDOT, DAHP, FHWA, and any affected tribes would be prepared, identifying mitigation measures that would be carried out if archaeological resources are discovered during construction. If archaeological sites discovered during

construction are determined to be eligible for the NRHP and preservation of the resource in place is warranted, the Section 4(f) process would be expedited and the resource review process, including consultation with other agencies, would be shortened, as appropriate.

After Construction

Right of way or an easement would be acquired for construction and operation of the New Magnolia Bridge across the NRHP-listed Admiral's House property. An easement would contain provisions related to bridge maintenance access requirements and the protection of the historic characteristics of the Admiral's House property. The easement would be acquired when construction dates are known.

Chapter 5.6 Parks, Recreational and 4(f) Resources

To complete the environmental review, the project must demonstrate that it is in compliance with Section 4(f) of the U.S. Department of Transportation (USDOT) Act of 1966. This chapter summarizes the 4(f) evaluation that was completed for the project. The detailed analysis can be found in the Section 4(f) Evaluation in Appendix L.



Smith Cove Park waterfront site entry

1 What is Section 4(f)?

Section 4(f) of the U.S. Department of Transportation (USDOT) Act of 1966 prohibits the Federal Highway Administration (FHWA) from approving transportation projects that use land from important public parks, recreation areas, wildlife refuges, or land containing historical sites of local, state, or federal significance unless (a) there is no feasible and prudent alternative, and (b) the project includes all possible planning to minimize harm to these resources (49 USC 303). If resources protected by Section 4(f) are involved in a project's planning, a determination whether there is a "use" of those resources is required.

2 What are Section 4(f) resources?

Section 4(f) resources are significant publicly owned parks and recreation areas and wildlife and waterfowl refuges. Parks and recreation areas must be open to the public to qualify, but wildlife and waterfowl refuges may restrict access to preserve

What is "use" of a resource?

- "Use" of resources protected by Section 4(f) takes place when the following conditions are present:
 - Resource land is permanently incorporated into the transportation project.
 - There is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d), which is a subsection of Section 4(f).
 - There is a constructive use of a Section 4(f) property as determined by the criteria in §774.15 (another subsection of Section 4(f)).

Constructive use occurs when the transportation project does not incorporate land from a Section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resources are substantially diminished.

7 How would Section 4(f) resources be affected during construction?

For a period of approximately four months, construction activities would be ongoing within the northern one-third of the Smith Cove playfield site and within portions of the Ursula Judkins Viewpoint. During that period, the construction area would not be available for recreational use. In addition, noise, dust, and visual effects from construction would make use of the remaining park land to the south less desirable for potential park users. This would require the area immediately south of the existing bridge which would be needed for equipment access and to maintain a safe distance from the demolition.

Construction would be required on and over portions of the Admiral's House property. The area along west boundary of the property would require temporary occupancy for construction equipment for installation of drilled shaft foundations and the abutment, and for falsework for some portion of the bridge superstructure. There would be some ground disturbance along the east property line for construction of a column foundation for the Preferred Alternative.

Bridge demolition may have short-term noise and dust impacts on the adjacent Smith Cove Playfield site, the Ursula Judkins Viewpoint, and the Admiral's House property. The contract for bridge demolition would specify demolition procedures and noise and dust abatement measures to lessen and mitigate impacts.

8 What measures are proposed to avoid or minimize effects to parks, recreational and Section 4(f) resources?

During construction

Parks

A construction management plan would be prepared to manage construction traffic in the vicinity of the project. The plan would identify mitigation measures to be implemented during the construction phases to ensure protection of public safety.

The Joint Development Agreement could require that replacement parkland be established and open to the public prior to the beginning of bridge construction.

Historical Sites

To mitigate impacts to the Admiral's House, the FHWA has executed a Memorandum of Agreement (MOA). The MOA requires a pre-construction survey of the structural condition of the house, garage and access road, and a geotechnical investigation of the stability of the hillside on the property. Before construction may begin, repairs must be completed and storm windows installed to prevent dust and dirt from entering interior spaces and to reduce interior noise. If required, slope stability mitigation measures would be performed. Additional mitigation measures in the MOA, including landscaping restoration, are available in the Appendix I, Historic, Cultural and Archaeological Discipline Report. The Admiral's House was sold in 2013. The terms and conditions of the MOA were attached to the deed.

After Construction

Right of way or an easement would be acquired for construction and operation of the New Magnolia Bridge across the NRHP-listed Admiral's House property. An easement would contain provisions related to bridge maintenance access requirements and the protection of the historic characteristics of the Admiral's House property. The easement would be acquired when construction dates are known.