

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

In the Matter of the Appeal of

**SEATTLE COMMITTEE TO
SAVE SCHOOLS, et al.**

from a decision issued by the Director,
Department of Planning and Development

Hearing Examiner File:
MUP-14-018 (DD,W)

Department Reference:
3015707

Introduction

The Director of the Department of Planning and Development issued a decision approving an application by the Seattle School District to allow a new elementary school at the existing Thornton Creek Elementary School site. The Director's decision approved development standard departures and imposed conditions on the project related to those departures. The Appellants exercised the right to appeal the decision pursuant to Chapter 23.76 of the Seattle Municipal Code.

The appeal hearing was held on February 26, 2015, before the Hearing Examiner (Examiner). The Appellants, Seattle Committee to Save Schools, et. al., were represented by Chris Jackins; the Applicant, Seattle School District (District), was represented by G. Richard Hill, attorney-at-law; and the Director, Department of Planning and Development (Director or Department), was represented by Holly J. Godard, Senior Land Use Planner. The record closed with the Examiner's site visit on March 9, 2015.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. Having considered the evidence in the record and viewed the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The subject site, which is addressed as 7711 43rd Avenue NE, is approximately 10 acres in size and is zoned Single Family (SF) 7200. It is bounded on the north by NE 80th Street, a two-lane street, on the south by NE 77th Street, also a two-lane street, on the west by 40th Avenue NE, a two-lane collector arterial, and on the east by 43rd Avenue NE, a two-lane local access road. Surrounding areas are zoned SF 5000, SF 7200, Lowrise 2 and, several blocks to the west along 35th Avenue NE, neighborhood commercial. Surrounding development is single-family residential.

2. The existing Thornton Creek School structures include the Decatur Building, Decatur Building Addition, and Shearwater Building. There are also five existing portables on the site. The school has an enrollment of 390 students and 45 staff members. The District is expecting 450 students at the school during the next school year. Twenty vehicle parking spaces are located at the northeast corner of the site, and 25 spaces are located southwest of the existing structures. School bus loading and unloading occurs along the west side of 43rd Avenue NE and the north side of NE 77th Street.

Proposal

3. The District proposes to construct a new elementary school on the Thornton Creek Elementary School site, with associated parking and outdoor playfields, that could accommodate up to 660 students and 75 staff members. The Decatur buildings will be retained for potential future use as a school for up to 250 students. The five portable classrooms on the site will be removed.

4. The proposal includes a total of 83 on-site parking spaces¹ located in an expanded lot at the northeast corner of the site, with access from NE 80th Street and 43rd Avenue NE, and in a new lot on the west side of the site, with access from 40th Avenue NE. In light of the narrow streets and periodically congested traffic in the area, the District's intent is to have most school-related traffic circling the site in a clockwise direction. Special education buses would use 40th Avenue NE to access the site. Other bus loading and unloading would be consolidated along the eastern side of 40th Avenue NE. Bus loading and unloading for any students attending the Decatur buildings would remain on 43rd Avenue NE. A parent load and unload zone for some grades would be marked on NE 80th Street and for other grades on NE 77th Street, which would restrict parking in these areas during peak student drop-off and pick-up times. Northeast 80th Street will also be improved with a new curb, gutter, planter strip and sidewalk. Curb bulbs would be constructed on all four corners of the 40th Avenue NE intersections with NE 80th and NE 77th Streets. A 15-foot shared use sidewalk would be constructed along 40th Avenue NE.

5. The site includes approximately 143 trees.² Six of the trees meet the City's standards for exceptional trees, and 53 on-site trees and nine right-of-way trees meet the definition of a significant tree. The project would require removal of 62 on-site and right-of-way trees, including 28 significant trees. In addition, the District's consulting arborist recommended removal of one tree, Tree 50, because it is likely to damage infrastructure on the site, and one right-of-way tree because it is in poor health. Seventy-nine trees, including all exceptional trees, will be retained, and the proposal calls for planting 163 replacement trees. See Exhibit 7 at page MUP-4B. At maturity, the tree canopy is expected to cover approximately 19% of the site, an increase from the present 6% canopy coverage.

¹ The District's Senior Project Manager for Capital Projects testified that there would be 91 on-site parking spaces, but the TIA reports the number as 83.

² The District's Senior Project Manager for Capital Projects testified that there are 147 trees on the site, but the District's consulting arborist reported that there are 143 trees.

6. The proposal would reduce the size of existing playfields on the site by approximately 56%, although the remaining fields would meet the District's educational specifications for student recreation area. Playground improvements are proposed, as are improvements to the nearby View Ridge Playfield.

7. The Washington State Department of Archaeology and Historic Preservation's Statewide Predictive Model shows the site at moderate risk for the presence of precontact archaeological resources. To determine the actual risk level, the District's archaeological consultant looked for evidence of the site's geologic history by reviewing evidence of modifications to the site and considering historical maps, aerial photographs and similar sources. The consultant compared this information with the proposed construction plans and determined that the site presents a low risk for the presence of precontact resources due primarily to prior modifications of the site when, for example, U.S. Navy-related housing was constructed on it. The consultant recommended that the District prepare an inadvertent discovery plan (IDP). The IDP includes communication protocols (including tribal notification) to resolve any archaeological resource matters that arise during project construction, orientation meetings, and directions on handling inadvertently discovered archeological resources and human remains. Exhibit 8 at 5-12.

8. The District's transportation consultant prepared a transportation impact analysis (TIA) for the proposal. Exhibit 1, Appendix B. The TIA assumed a 660 student capacity and 75 staff at the new school and a 250 student capacity and 22 staff at the Decatur Building. It analyzed future trip generation and parking demand for the schools and associated impacts on eight off-site intersections and parking availability. The counts for traffic generation were done on one day and for parking on four different days. The trip generation analysis assumed staggered start times for the two schools, as the District has agreed in the Checklist, Exhibit 1, to a minimum difference of 45 minutes in school start times.

9. School-related traffic would cause additional delay to the NE 75th Street/40th Avenue NE intersection, which already operates at level of service (LOS) F during the AM peak hour and is forecast to operate at LOS F in the morning with or without the proposal. In the PM peak hour, proposal-related traffic is expected to degrade the intersection LOS from E to F. The TIA recommends a traffic signal with channelization for new turn lanes to mitigate these impacts. SDOT would determine if and when such improvements would be constructed. All other study-area intersections would operate at LOS A overall. Most of the intersection turning movements would operate at LOS E with or without the proposal. However, in the PM peak hour, westbound movements at the intersection of NE 80th Street and 35th Avenue NE would be degraded from LOS D to LOS E, although project-related delays would be less than three seconds per vehicle for westbound and eastbound movements. Exhibit 1, Appendix B at 30.

10. The TIA states that there are 934 on-street parking spaces available within an 800-foot walking distance of the subject property. On weekday evenings, 31 percent of the 934 spaces are utilized. The typical utilization rate for the 924 unrestricted spaces available during midday is 20%. *Id.* at 15. The projected parking demand for the proposal is 92 spaces for the new Thornton Creek School and 27 spaces for the Decatur Buildings, or a total of 119 spaces. With 83 spaces provided in the two on-site parking lots, this leaves a spillover parking demand of 36 spaces. Eighteen to 24 school-related vehicles currently park on the street, so

there would be a maximum of 18 new vehicles looking for street parking. This number can be easily accommodated in available on-street spaces. *Id.* at 32-33. Special evening events would be expected at both schools one to two times per month and could generate a parking demand of 370 to 435 vehicles. Approximately 91 vehicles could be accommodated on-site, and the spill-over could be accommodated on the street within the 800-foot study area, although parking would likely be congested along the streets closest to the site. *Id.* at 33-34.

11. The TIA includes ten recommendations to reduce the traffic and parking impacts of the proposal. *Id.* at 37-38. Most of the recommendations are incorporated into the proposal as mitigation measures outlined in the SEPA Checklist. Exhibit 1 at 33-34. The TIA recommends that if SDOT determines the intersection of NE 75th Street and 40th Avenue NE should be signalized, the District should contribute a proportional share to the costs of the project. Exhibit 1, Appendix B at 38. The Checklist does not include this recommendation as a mitigation measure, but it is described as a potential requirement in the discussion of transportation impacts, exhibit 1 at 30, and would be required by SDOT in any event.

12. The District acted as lead agency pursuant to SEPA and issued a Determination of Non-Significance (DNS) for the proposal, which was appealed to the District's Pro Tem Hearing Examiner. The Pro Tem Examiner issued a recommendation that the DNS be affirmed, and the District Superintendent affirmed it on October 24, 2014. Exhibit 3.

13. Neighbors were concerned about contaminated soils at the site in light of the fact that it once held U.S.-Navy related housing for those who worked in Navy facilities at what is now Magnuson Park, where radioactive material has been discovered in one of the buildings. The District employed a hazardous waste consultant to perform an environmental assessment of the site and identify potentially hazardous materials. The consultant advised that radioactive contamination was not an issue at the site and did not recommend testing for it. The Appellants raised this issue in their appeal of the DNS issued for the proposal. The District's Pro Tem Hearing Examiner determined that the proposition that workers could have carried radioactive contamination home to the site from the Magnuson Park building, and that it could remain on the site after the site's development as a school, was speculative. The Pro Tem Examiner concluded that the DNS' lack of discussion about possible radioactive contamination did not render it clearly erroneous. Exhibit 3, Conclusion 7.

Development Standard Departures

14. The District requested departures from certain City development standards to allow: 1) greater than allowed building height; 2) less than required off-street parking; and 3) continued on-street bus loading and unloading.

15. The Department of Neighborhoods convened a Development Standards Departure Committee to consider the requested departures. The Committee met on June 3, July 9, and July 23, 2014 to hear public comment, deliberate, and develop its recommendations on the departures in accordance with the criteria listed in SMC 23.79.008.C.1.

16. The Committee determined that if the District retained the existing Decatur buildings as part of the proposal, some departures would be required to facilitate

construction of the new school. Exhibit 5 at 9. The Committee recommended that the departure to allow greater than allowed height, in order to enclose the mechanical equipment located on the roof, be approved without modifications and without conditions. *Id.* at 10.

17. The Committee determined that the other two departures were closely interrelated. *Id.* Because open space on the site would be severely restricted if the District accommodated all required parking and/or bus loading/unloading on site, the Committee recommended approval of both departures subject to a set of conditions. *Id.* at 10-15. Two members of the Committee submitted separate minority reports explaining their votes against approving the departures for parking and bus loading/unloading. Exhibit 5, Appendices 3 and 4.

Director's Decision

18. The Director reviewed the proposal and issued a decision on it on October 30, 2014. Exhibit 6. Pursuant to SMC 23.79.010.A, the Director's decision evaluated the Committee's reports and the Committee's recommendations on the requested departures in accordance with the Code-required criteria. The Director accepted the Committee's recommendations on the departures together with most of its recommended conditions. As required, the Director explained modifications made to the Committee's recommended conditions. Exhibit 6 at 9-10.

19. The Director also reviewed the environmental impacts of the proposal as disclosed in the District's environmental documents. The Director concluded that all adverse environmental impacts would be sufficiently mitigated either by measures described in the Checklist and thus, incorporated into the proposal, or by applicable City regulations. The Director did not impose additional mitigation pursuant to SEPA.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.79.012 and SMC 23.76.022. The Hearing Examiner must give "substantial weight" to the Director's decision. SMC 23.79.012.D; SMC 23.76.022.C.7. Accordingly, the party appealing it has the burden of proving that the decision is "clearly erroneous". *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This means that the Examiner must be 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).

2. The Appellants' appeal issue on impacts to plants states only that the "City construction permit covers mitigation for the removal of many trees." This is not sufficient to state an issue under SEPA. The Appellants' testimony at hearing merely raised questions about how the loss of trees at the site will be mitigated. The Appellants have presented no substantive evidence demonstrating unmitigated impacts to plants and thus, have not shown that the Director's decision was clearly erroneous in this regard.

3. As noted above, the District has prepared an IDP for the proposal that includes tribal notification. The Appellants ask that the IDP be “acknowledged as part of the District’s construction plans and that the District be required to follow it.” The IDP was not part of the proposal approved by the Director, as it was prepared at a later date. However, the IDP is discussed in the Checklist, which states that the plan, when prepared “will be implemented during construction.” Exhibit 1 at 26. The IDP dated February 2015 is part of the proposal and must be implemented.

4. The Appellants’ challenge to the sufficiency of the DNS’ consideration of hazardous materials, including potential radioactive contamination at the subject site, was decided in their appeal of the DNS. It cannot be raised again in this forum and should therefore be dismissed.

5. The Appellants state that the proposed school is unreasonably large for the subject site, citing primarily traffic and parking impacts on the neighborhood, and concerns with the way in which the District relates to the neighborhood. They ask that the requested departures from development standards therefore be denied. The District’s relationship with the neighborhood is not an environmental impact and so cannot be considered by the Examiner.

6. Concerning traffic impacts, the District’s Pro Tem Hearing Examiner concluded that the “record shows that large increases in the number of vehicle trips would accompany the proposed new school and that the existing school already causes congestion on the surrounding streets during morning arrivals and afternoon departures.” Exhibit 3, Conclusion 1. The Pro Tem Examiner then pointed to the proposal’s mitigation measures, which should also improve the existing situation, as the basis for her conclusion that the proposal’s traffic impacts would not be considered significantly adverse under SEPA: defining parent pick up and drop off sites; moving most of the bus parking to the arterial, staggering school start times; establishing a Transportation Management Plan that would, among other things, educate parents on the desired circulation patterns to avoid delaying oncoming traffic on narrow streets; and, if required by SDOT, participating in funding intersection improvements. *Id.* The Director also concluded that, in light of the mitigation measures included in the project, no further mitigation was required under SEPA. Exhibit 6 at 14. The Appellants have expressed frustration with the congested conditions surrounding the existing school and concern that the District’s proposed mitigation measures will be ineffective. But a SEPA challenge requires more than an expression of concern. It requires an affirmative showing through objective, substantive evidence that additional mitigation is required. The Appellants have not made that showing and thus, have not demonstrated that the Director’s decision on traffic impacts is clearly erroneous.

7. The same is true with respect to parking impacts. There was no affirmative demonstration of a need for mitigation beyond that incorporated in the proposal for daytime on-street parking impacts, which the TIA demonstrated were insignificant, or for the occasional large event parking demand, which the TIA showed could be accommodated within 800 feet of the school site.

8. The Appellants assert that if the departures are not denied, the Examiner should revise the conditions imposed by the Director so that they are more closely aligned with the Committee's recommended conditions. They request six specific revisions.
9. The Appellants ask the Examiner to clarify that the allowed height for the proposal, with the departure, is 43 feet. Page 1 of the Director's decision included a typographical error in describing the requested height departure as 50 feet, although it was properly referred to elsewhere in the decision as 43 feet. When the decision was re-noticed following a remand, the Director corrected this error. No further clarification is required.
10. The Director imposed a departure condition that states "if the Old Decatur Annex building is demolished by SPS then parking should be considered to be installed at that location. Surrounding mature trees should be retained with as large as possible landscape buffer. The Appellants ask that the Examiner revise this condition to include the Committee's preference that the landscape buffer be 15 feet wide, if feasible. See Exhibit 5 at 16. The expression of this preference in the condition would be informational in nature rather than restrictive, and it should be included.
11. The Committee recommended a condition that limits the total capacity for all schools or programs on the site to 910 students. Exhibit 5 at 16. The Director did not impose this condition because the District controls student enrollment. Exhibit 6 at 9. The Appellants ask that the Examiner impose a condition requiring one additional parking stall for every six students enrolled above 910. They believe such a condition would address the concern underlying the Committee's recommendation by requiring mitigation for the impacts of an enrollment that exceeds 910 students. However, the Appellants have not shown the required relationship between additional students and midday parking demand, which is based on the number of school staff requiring parking, not the number of students attending the school. While there is undoubtedly a rough correlation between the projected number of staff and the projected number of students at the two schools, any assessment of the potential midday parking impacts of the additional students would require more information than the Appellants have provided. Other potential variables, such as future changes in the school program, or in class sizes, would also need to be considered. Calculating future demand for special event parking based on the number of additional students would be even less reliable. See Exhibit 1, Attachment B at 33-34. The Director's decision denying the Committee's recommended condition was not clearly erroneous.
12. The Committee recommended a condition that prohibits portable classrooms on the site so long as the old Decatur building remains. Exhibit 5 at 16. The Director did not impose this condition because the "City will review any additions to the Schools and site through the established permit process." Exhibit 6 at 9. The Appellants ask that the Examiner impose a condition requiring five additional on-site parking stalls for each portable at the site so long as the old Decatur building remains. Again, they believe such a condition would address the concern underlying the Committee's recommendation by requiring mitigation for the impacts of the additional students that would be

accommodated in portable classrooms. This request presents the same issues as those discussed in Conclusion 11. The Director's decision denying the Committee's recommendation on portable classrooms was not clearly erroneous.

13. The Committee recommended a condition that would require staggered start and stop times if both the new Thornton Creek and the old Decatur buildings remain and are in use on the site, and that would prohibit changes to the staggered times without notification to the neighborhood and at least one public meeting to receive neighborhood comment. Exhibit 5 at 16. The Director did not impose this condition because the "School District has committed to staggered times for separate schools as noted in the SEPA checklist." Exhibit 6 and 10. The Appellants state that they have seen a problem with knowledge transfer among District officials concerning staggered start and end times at other school sites and ask that the Examiner therefore impose a condition reflecting the District's commitment to the staggered times. The District indicated at hearing that it would not oppose such a condition, and it will be imposed.

14. The Committee recommended a condition that would require a 40 foot extension of the area on 40th Avenue NE where bus loading is prohibited. The Director revised the condition to state that the curb bulb and bus loading area "shall be designed to maximize safe sight lines." Exhibit 6 at 15. The Appellants ask that the reference to 40 feet be restored as a minimum for SDOT to use in determining the maximum safe sight lines. The apparent purpose of the Committee's recommendation was to maximize safe sight lines. The Appellants did not present any engineering basis for the specific request for a 40-foot extension of the restricted area. SDOT has the expertise to determine what distance is required to maximize sight lines. There is no clear error here.

15. The Director's decision was not shown to be clearly erroneous. However, the decision should be modified to revise the conditions imposed on the proposal, as discussed above.

Decision

Appeal issue 4 concerning radioactive contamination at the site is **DISMISSED**.

The Director's decision approving the development standard departure is **MODIFIED** to revise the conditions of approval to read as follows:

CONDITIONS – DEVELOPMENT STANDARD DEPARTURES


For the Life of the Project:

1. If the Old Decatur Annex building is demolished by SPS then parking should be considered to be installed at that location. Surrounding mature trees should be retained with as large a landscape buffer as possible, preferably one 15 feet in width, if feasible.

2. Item A of the transportation mitigation measures contained in the Transportation Technical Report and Transportation Management Plan prepared by Heffron Transportation Inc., dated March 11, 2014, as outlined on pages 37 and 38 of that report, must include neighbors in plans and updates: at least one who lives on each perimeter street.
3. No parking shall be allowed on the west side of 40th Avenue NE between NE 77th and 80th Streets during the AM and PM bus loading and unloading periods if SDOT approves.
4. The curb bulb and bus loading area along the eastside of 40th Ave NE, at the intersection of NE 77th, shall be designed to maximize safe sight lines.
5. While the Thornton Creek and Decatur Buildings both remain in use, their start and end times shall be staggered. Once the staggered times are established, any changes that would eliminate the staggering shall first require notice to the surrounding neighborhood and at least one public meeting to receive public comment.

As modified, the Director's decision is **AFFIRMED**.

Entered this 11th day of March, 2015.


Sue A. Tanner
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 in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration 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.
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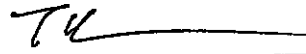
**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify 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 Findings and Decision to each person listed below, or on the attached mailing list, in the matter of Seattle Committee to Save Schools, et al., Hearing Examiner File: MUP-14-018 (DD, W), in the manner indicated.

Party	Method of Service
Chris Jackins Seattle Committee to Save Schools P.O. Box 84063 Seattle, WA 98124	<input checked="" type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
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Holly Godard DPD SMT-18-00 holly.godard@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
DPD Routing Coordinator DPD_Routing_Coordinator@seattle.gov Sue Putnam DPD Sue.Putnam@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: March 11, 2015



Tiffany Ku
Legal Assistant