FINDINGS, CONCLUSIONS AND DECISION BY THE HEARING EXAMINER OF THE CITY OF OLYMPIA

CASE NO: 10-0140 (Appeal of the Land Use Approval and Determination of Nonsignificance for conversion of an existing building to a hotel)

APPELLANTS:

Daniel J. Evans, Albert D. Rossellini, Booth Gardner, Ralph Munro, Norman J. Johnston, Michael S. Hamm, Robert V. Jensen, Gerald Reilly, the National Association of Olmsted Parks, the Friends of Seattle's Olmsted Parks, Friends of the Waterfront, and the Black Hills Audubon Society.

RESPONDENTS:

The Applicant, The Views on Fifth Avenue, LTD.; and the Olympia Department of Community Planning and Development.

SUMMARY OF APPEALS:

On February 16, 2011 the Site Plan Review Committee and the State Environmental Policy Act Official for the City of Olympia issued a Notice of Land Use Approval and Determination of Nonsignificance (DNS) for the conversion of the existing nine-story building at 410 Fifth Avenue SW to a hotel. The appeal asks that the Land Use Approval be reversed and the DNS be invalidated for the reasons set out below.

LOCATION:

That portion of Thurston County Assessor's Tax Parcel No. 91005201000 comprising Lots 6 through 10 of Block 80, Olympia Tidelands. The address of the building to be converted is 410 Fifth Avenue SW.

SUMMARY OF DECISION:

The Land Use Approval and DNS are upheld, subject to conditions.

HEARING AND RECORD:

On April 18, 2011 the Respondents filed a number of dispositive motions challenging certain bases of the appeal. Oral argument was held on these motions on May 13, 2011, and the

Hearing Examiner issued an Order on May 20, 2011, granting the motions in part and denying them in part. That Order admitted Exhibits 1 through 13, set out below into the record. No testimony was received on these motions.

The hearing on the merits of the appeal was held before the undersigned Hearing Examiner on May 31, June 1 and June 6, 2011. The following Exhibits 14 through 36 were admitted at the hearing. Exhibits 37 through 49, set out below, were admitted after the hearing during the time the record was held open.

On June 21, 2011 the Respondents filed motions to strike portions of Appellants' Post Hearing Brief, and on June 29, 2011 the Hearing Examiner issued an order granting the motions in part and denying them in part. That order is admitted as Exhibit 50. No testimony was received on these motions to strike. The record closed on June 29. The Hearing Examiner made an unaccompanied site visit to the Capitol campus, including the Law Enforcement Memorial near the Temple of Justice, on July 14, 2011.

The following exhibits are admitted into the record in this proceeding:

Exhibit 1. Appeal of Administrative Decision to Hearing Examiner in this matter, dated and filed on March 8, 2011; and Notice of Land Use Approval and SEPA Determination of Nonsignificance in this matter, dated February 16, 2011 and issued by Todd Stamm.

Exhibit 2. Application for Land Use Approval in this matter, dated December 1, 2010, and associated environmental checklist, dated December 6, 2010.

Exhibit 3. Applicant's Motion to Strike and Brief in Support of Motion to Strike, dated April 18, 2011, with attached Declaration of James Potter in Support of Motion to Strike, dated April 15, 2011.

Exhibit 4. Community Planning and Development's Motion for Partial Summary Judgment, dated April 18, 2011, with the following attachments: Appeal of Administrative Decision to Hearing Examiner in this matter; Notice of Land Use Approval and SEPA Determination of Nonsignificance in this matter; Site Plan by Glenn C. Wells, Architect, date stamped November 10, 2010; letter dated March 2, 2011 from Allen T. Miller to Todd Stamm; and Olympia 2010 Parks, Arts and Recreation Plan.

Exhibit 5. Brief of Appellants in Response to Community Planning and Development's Motion for Partial Summary Judgment and Applicant's Motion to Strike, dated May 2, 2011, with the following attachments: Declaration of Susan Olmsted, dated May 2, 2011, with attachments; Declaration of Bob Jacobs, dated May 2, 2011, with attachments; Declaration of Robert V. Jensen, dated April 29, 2011, with attachments; Declaration of Gerald Reilly, dated April 28, 2011, with attachments; undated Declaration of Eliza Davidson; Declaration of Norman J. Johnston, dated April 29, 2011, with attachments; Declaration of Michael S. Hamm, dated April 26, 2011, with attachments; Declaration of Daniel J. Evans, dated April 23, 2011, with attachments including a DVD; Declaration of Ralph Munro, dated May 2, 2011, with attachments including a DVD.

Exhibit 6. Exchange of e-mails between Hearing Examiner and the parties concerning appearance of fairness matters, including the following: e-mail sent March 24, 2011 from Thomas Bjorgen to the parties; e-mail sent March 25, 2011 from Todd Stamm to the Hearing Examiner and the parties; e-mail sent March 30, 2011 from Allen T. Miller to Thomas Bjorgen; e-mail sent March 31, 2011 from Richard Phillips to Thomas Bjorgen; e-mail sent May 11, 2011 fro the Hearing Examiner to the parties; e-mail sent May 11, 2011 from Richard Phillips to the Hearing Examiner; e-mail sent May 11, 2011 from Allen T. Miller to the Hearing Examiner; and e-mail sent May 11, 2011 from Darren Nienaber to the Hearing Examiner.

Exhibit 7. E-mail sent March 31, 2011 from Allen T. Miller to Thomas Bjorgen and e-mail sent April 1, 2011 from Richard Phillips to Thomas Bjorgen, each regarding recording of prehearing conference.

Exhibit 8. E-mail sent April 1, 2011 from Thomas Bjorgen to the parties on topics for prehearing conference.

Exhibit 9. E-mail sent April 7, 2011 from Thomas Bjorgen to the parties summarizing results of prehearing conference.

Exhibit 10 E-mail sent April 13, 2011 from Todd Stamm to the Examiner and the parties on submitting documents to the Examiner, and e-mail sent April 13, 2011 from Thomas Bjorgen to the parties and staff on the same topic.

Exhibit 11. Applicant's Reply Brief dated May 9, 2011, with attached Declaration of Scott Shapiro dated May 9, 2011 and Declaration of Service.

Exhibit 12. E-mail sent May 10, 2011 from Darren Nienaber to the Hearing Examiner.

Exhibit 13. E-mail sent May 11, 2011 from the Hearing Examiner to the parties concerning oral argument.

Exhibit 14. Order on Motions, dated May 20, 2011, with cover e-mail from Thomas Bjorgen, sent May 20, 2011.

Exhibit 15. Community Planning and Development's Witness List, dated May 4, 2011.

Exhibit 16. Appellants' Witness List, dated May 5, 2011.

Exhibit 17. Applicant's Witness List, dated May 6, 2011.

Exhibit 18. E-mail sent May 10, 2011 from Richard G. Phillips to Hearing Examiner, objecting to telephonic testimony.

Exhibit 19. E-mail sent May 11, 2011 from Todd Stamm to the parties on location of hearing.

Exhibit 20. E-mail from Thomas Bjorgen to parties and staff on telephonic testimony.

Exhibit 21. E-mail sent May 12, 2011 from Allen T. Miller to the Hearing Examiner on telephonic testimony.

Exhibit 22. E-mail sent May 16, 2011 from Allen T. Miller to the Hearing Examiner on telephonic testimony, with attached Declaration of Brian Johnston.

Exhibit 23. E-mail sent May 16, 2011 from Allen T. Miller to the Hearing Examiner on telephonic testimony, with updated Declaration of Brian Johnston.

Exhibit 24. E-mail sent May 20, 2011 from Thomas Bjorgen to the parties on telephonic testimony.

Exhibit 25. E-mail sent May 23, 2011 from Allen T. Miller to the Hearing Examiner on Hamm testimony.

Exhibit 26. E-mail sent May 24, 2011 from Thomas Bjorgen to the parties on Hamm testimony.

Exhibit 27. E-mail sent May 25, 2011 from Allen T. Miller to the parties, with attached order of witnesses.

Exhibit 28. Appellants' exhibit list and exhibits, dated May 20, 2011, and amended exhibit list and exhibits, dated May 26, 2011, with cover e-mail from Danielle Oliver, sent May 26, 2011.

Exhibit 29. E-mail sent May 27, 2011 from Thomas Bjorgen to the parties on order of testimony.

Exhibit 30. Staff Report by Todd Stamm, dated May 31, 2011, with agenda and attachments A through D.

Exhibit 31. E-mail sent May 27, 2011 from Allen T. Miller to the parties on Brian Johnston testimony.

Exhibit 32. E-mail sent May 29, 2011 from Allen T. Miller to the Hearing Examiner and parties on order of testimony.

Exhibit 33. E-mail sent May 30, 2011 from Thomas Bjorgen to the parties, listing exhibits.

Exhibit 34. Exterior design of proposed hotel, as approved by the Design Review Board.

Exhibit 35. Deed of portion of parking lot from Applicant to 410 Parking, L.L.C.

Exhibit 36. Commercial Tenant Improvement Permit Application No. 10 3309.

Exhibit 37. E-mail sent June 6, 2011 from Thomas Bjorgen to the parties and staff, with post-hearing directions.

Exhibit 38. Statutory warranty deed of portion of parking lot from Applicant to 410 Parking, L.L.C., dated June 10, 2011, real estate excise tax affidavit and copy of cashier's check, and accompanying e-mail sent June 10, 2011 from Richard Phillips to the Hearing Examiner and parties,

Exhibit 39. E-mail from Thomas Bjorgen to the parties and staff on holding record open.

Exhibit 40. E-mail sent June 13, 2011 from Darren Nienaber to Hearing Examiner and parties on scope of post-hearing briefing on vesting.

Exhibit 41. Statutory warranty deed of portion of parking lot from Applicant to 410 Parking, L.L.C., dated June 10, 2011, with notations showing recording and payment of real estate excise tax.

Exhibit 42. E-mail sent June 14, 2011 from Richard Phillips the Hearing Examiner and parties regarding deed of portion of parking lot.

Exhibit 43. E-mail sent June 16, 2011 from Thomas Bjorgen to Darren Nienaber and parties on scope of post-hearing briefing on vesting.

Exhibit 44. Applicant's Brief on Vesting, dated June 20, 2011.

Exhibit 45. Department's memorandum on vesting issues, through letter dated June 20, 2011 from Darren Nienaber to Thomas Bjorgen, with attached articles on vesting in 2009 WSBA Environmental and Land Use Law Section newsletter and in 2001 Seattle University Law Review.

Exhibit 46. Appellants' Post Hearing Brief, dated June 20, 2011, with attached excerpts from Olympia Comprehensive Plan.

Exhibit 47. Community Planning and Development's Motion to Strike, dated June 21, 2011, with attached exchange of prior e-mails on scope of post-hearing briefing.

Exhibit 48. Applicant's Motion to Strike Sections I through VII of Appellants' Post Hearing Brief, dated June 21, 2011.

Exhibit 49. Appellants' Response to Motions to Strike Portions of their Post Hearing Brief, dated June 24, 2011.

Exhibit 50. Order on Motions to Strike Portions of Appellants' Brief, dated May 20, 2011.

Exhibit 51. Master Plan for the Capitol of the State of Washington, pp. 5-2 through 5-7 and Map M-9, through official notice in this decision. The version used is that found on the website of the state General Administration Department on the date of this decision.

At the hearing on the merits of this appeal on May 31, June 1 and June 6, 2011, the following individuals testified under oath:

Gerald Reilly
1017 Cardigan Loop NW
Olympia, WA

Robert V. Jensen
4728 Lakeshore Lane SE
Olympia, WA

Bob Jacobs
720 Governor Stevens Avenue SE
Olympia, WA

Brian Johnston
President, Behind the Badge Foundation
21115 179th Place SE
Monroe, WA

Ralph Munro
5041 Houston Road
Olympia, WA

Eliza Davidson
Architect and board member of Nat'l. Assoc. for Olmsted Parks
1906 14th Avenue East
Seattle, WA

Glenn Wells, Architect
324 West Bay Drive
Olympia, WA

Todd Stamm
City of Olympia Community Planning Manager
P.O. Box 1967
Olympia, WA 98507-1967

Tom Hill
City of Olympia Building Official
P.O. Box 1967
Olympia, WA 98507-1967

Iris Gestram
Executive Director, Nat'l. Assoc. for Olmsted Parks
1111 16th Street
Washington, D.C. 20036

Michael S. Hamm,
President of the Portico Group
1500 Fourth Avenue, Suite 300
Seattle, WA

Allen T. Miller appeared and presented legal argument for the Appellants; Richard G. Phillips appeared and presented legal argument for the Respondent/Applicant, The Views on Fifth Avenue, LTD; and Deputy City Attorney Darren Nienaber appeared and presented legal argument for Respondent Olympia Department of Community Planning and Development.

After consideration of the testimony and exhibits described above, the Hearing Examiner makes the following findings of fact, conclusions of law, and decision.

I. FINDINGS OF FACT

A. Nature and procedural background of the appeal.

1. On February 16, 2011 the Site Plan Review Committee and the State Environmental Policy Act (SEPA) Official for the City of Olympia issued a Notice of Land Use Approval and Determination of Nonsignificance (DNS) authorizing the Applicant, The Views on Fifth Avenue, LTD, to convert an existing nine-story building at 410 Fifth Avenue SW to a hotel. The nature of the proposal is described in Part B of the Findings, below.

2. On March 8, 2011 Daniel J. Evans and the others listed above filed an appeal of this Land Use Approval and DNS, which is found at Ex. 1. The Appellants asked that the Land Use Approval be reversed and the DNS be invalidated for the reasons set out in Sections 1 and 2 (a) through 2 (h) of the appeal at Ex. 1.

3. On April 18, 2011 the Applicant filed a motion to strike and dismiss the bases of the appeal listed in its Sections 2 (b), 2 (c) and 2 (e). On April 18, 2011 the Olympia Community Planning and Development Department (the Department) filed a motion for partial summary judgment, requesting judgment in its favor on the bases of the appeal set out in Sections 2 (b), 2 (c), 2 (e) and 2 (h) of the appeal.

4. After hearing oral argument, the Hearing Examiner on May 20, 2011 issued the order at Ex. 14 on these motions. That order

> denied the motions relating to Section 2 (b) of the appeal and held that the proposal is subject to the state Shoreline Management Act (SMA);
>
> denied the motions challenging Section 2 (c) of the appeal on the ground that the SMA does not apply;
>
> granted the motions challenging the claim of Section 2 (c) that the land use approval and DNS do not comply with RCW 36.70A.480 or .481;

granted the motions with respect to Section 2 (e) of the appeal, with one exception: if this proposal were held not to be subject to the SMA, then the application of the public trust doctrine to it would need to be decided; and

granted the motion by the Department concerning Section 2 (h).

5. With this motion order, the following bases of appeal remain for decision, with a brief summary of their contents:

Section 1 of the appeal at Ex. 1: that the Applicant's proposal is contrary to the design principles of the architects of the state Capitol campus, Wilder and White and the Olmsted Brothers;

Section 2 (a) of the appeal: that the Land Use Approval and DNS fail to comply with the Olympia Comprehensive Plan and violate the listed provisions in that Plan, because they fail to preserve the scenic views, open space and the historic design principles of the state Capitol campus;

Section 2 (b) of the appeal: that the Land Use Approval and DNS fail to comply with RCW 90.58.020, since they allow piecemeal, uncoordinated development and perpetuate an unlawful and nonconforming use and building on the Isthmus;[1]

That part of Section 2 (c) of the appeal which alleges that the Land Use Approval and DNS fail to comply with RCW 90.58.020, RCW 90.58.340, and the holding of Sato v. Olympia, SHB No. 81-41; The remaining claims of Section 2 (c) were dismissed by the motion order;

Section 2 (d) of the appeal: that the Land Use Approval and DNS fail to comply with the substantive policies of SEPA by violating the historic design principles of the state Capitol campus and by failing to avoid the irreversible and piecemeal damage of the public views to and from Puget Sound, the Olympics, and the state Capitol campus;

Section 2 (e) of the appeal: that the Land Use Approval and DNS fail to comply with the public trust doctrine by irreversibly damaging the public views to and from Puget Sound, the Olympics, and the state Capitol campus[2];

Section 2 (f) of the appeal: that the Land Use Approval and DNS fail to comply with RCW 43.21C.030 (2), due to claimed flaws in the DNS, omissions in the environmental

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[1] The "Isthmus" is the area bounded on the north by Puget Sound, on the south by Capitol Lake, on the west by the waterway connecting the two, and on the east generally by Water Street.

[2] The Order on Motions at Ex. 14 stated that if this proposal were held not to be subject to the SMA, then the public trust doctrine claims would need to be decided. As held in the Conclusions, below, with the conveyance of part of the parking lot and subject to conditions, this proposal is not subject to the SMA. Therefore, the public trust claim remains part of the appeal.

checklist, and violation of a public trust protecting the view corridor to and from the state Capitol campus;

Section 2 (g) of the appeal: that the Land Use Approval and DNS fail to comply with City ordinances limiting the height of buildings to 35 feet.

6. As found below, by deed recorded on June 13, 2011, the Applicant conveyed to 401 Parking, L.L.C. any portion of this proposal which is subject to SMA jurisdiction. The effect of this conveyance on the bases of the appeal is discussed in the Conclusions of Law, below.

B. Nature of the proposed project.

7. The Land Use Approval on appeal authorizes the conversion of the existing nine-story building at 410 Fifth Avenue SW to a hotel with up to 140 rooms. The building was constructed in 1965. The building is pictured in the Declaration of Norman J. Johnston, part of Ex. 5.

8. According to Ex. 5, the building has been vacant for five years. However, remodeling activities have been carried out in this building at least since structural upgrades beginning in 2007 (Ex. 30) and a 2008 permit for interior demolition. See test. of Hill and Jacobs. As noted below, the building was used for offices before it became vacant.

9. According to the application at Ex. 2, the project site, Thurston County Assessor's Tax Parcel No. 91005201000, is 40,577 square feet.[3] The current gross floor area of the building is approximately 74,958 square feet. It is nine stories and 104 feet tall. The environmental checklist projects the hotel will have a capacity of approximately 219 daily guests and will have 20 daily employees. The proposal will add no impervious surfaces, maintaining the current total of 38,962 square feet, largely roof and parking lot. No landscaping area will be added, but the present 1615 square feet will be kept.

10. The proposed conversion to a hotel use would not increase the height, width or bulk of the existing building. No other buildings would be constructed as part of this proposal. Aside from the conveyance described below, no changes in the existing parking lot are proposed.

11. The Application for Land Use Approval at Ex. 2 states that that the project site is Thurston County Assessor's Tax Parcel No. 91005201000, also described as Lots 1, 2 and 6-10 of Block 80, Olympia Tidelands. The environmental checklist at Ex. 2 also lists Parcel No. 91005201000 as the land to which it applies. The Applicant points out through the Declaration of Scott S. Shapiro at Ex. 11 that the building and parking lot are combined into one tax parcel for appraisal purposes only and that the aggregation of lots for this purpose is unrelated to the proposal to change the use of the building. The fact remains, though, that the application described the proposal as including Tax Parcel No. 91005201000, instead of narrowing its area

[3] Due to the conveyance of a small portion of the parking lot, discussed below, the figures for site area, parking area and impervious surfaces will be somewhat less than these discussed here from the application. These reductions are small and are not significant.

to only the lots on which the building is located. Thus, the proposal as described in the application must be deemed to include that entire tax parcel.

12. The application states that it includes 86 parking spaces and paved parking of 27,788 square feet. No indoor parking is proposed for the hotel. Since the project description in the application is "change use from office to hotel" and the application includes all of Parcel No. 91005201000, it must be inferred that these 86 spaces are on that parcel and would be used for hotel parking. This is consistent with the site plan attached to the application at Ex. 2, which shows 84 parking stalls in close proximity to the hotel on Parcel No. 91005201000. The application, therefore, shows that these 84 spaces are proposed for potential hotel parking. The site is within Olympia's exempt parking area and is exempt from requirements to provide parking spaces. The parking area on Parcel No. 91005201000 is currently a public parking lot managed by Diamond Parking.

13. The configuration of Parcel No. 91005201000 and those adjacent to it is shown on the first map attached to the Declaration of Bob Jacobs, which is part of Ex. 5. Parcel No. 91005201000 is shown in red on that map. The Thurston GeoData Center sheet attached to the Jacobs Declaration shows the Applicant, The Views on Fifth Avenue, LTD, as the owner of this parcel.

14. The same map attached to the Jacobs Declaration shows two parcels, 91005700000 and 91005600000, just across Fourth Avenue to the north of the Applicant's parcel. The site plan attached to the Land Use Application at Ex. 2 shows 100 parking stalls on these parcels. These parcels, however, are not part of the application, which is restricted by its terms to Parcel No. 91005201000. The Thurston GeoData Center sheet at Ex. 2 to the Jacobs Declaration shows Capitol Center L.L.C. as the owner of Parcels 91005700000 and 91005600000, across Fourth Avenue. The website of the Corporations Division of the Washington Secretary of State's Office on May 17, 2011 shows Joseph Yencich, Jr. and James Potter as the two managers of Capitol Center L.L.C., with James B. Potter as the registered agent. The same source on May 17, 2011 shows Joseph Yencich, Jr. as the President and Vice President of The Views on Fifth Avenue, LTD and James B. Potter as the Secretary and Treasurer, with Scott E. Shapiro as the registered agent.

15. The map noted as Exhibit 2 attached to the Jacobs Declaration shows the nearby area subject to the Shoreline Management Act as shaded. That area includes a small part of the northeast corner of Parcel No. 91005201000, approximately two-thirds of Parcel No. 91005600000 and a small portion of the northeast corner of Parcel No. 91005700000. The map at Exhibit 4 attached to the Jacobs Declaration superimposes the shoreline boundary onto the site plan in a manner that approximates the shaded areas on the map at Exhibit 2 of the Jacobs Declaration. The evidence shows, therefore, that a small part of the project site described in the application, the northeast corner of Parcel No. 91005201000, is within 200 feet of ordinary high water of Budd Inlet and is within jurisdiction of the SMA.

16. By statutory warranty deed dated June 10, 2011 and recorded on June 13, 2011, see Ex. 41, the Applicant conveyed Lots 1 and 2 of Lot 80, Olympia Tidelands, to 401 Parking, L.L.C. The website of the Corporations Division of the Washington Secretary of State's Office on July 11, 2011 shows Scott Shapiro as the governing member of 401 Parking, L.L.C. This

conveyance removes from the Applicant's ownership any portion of this proposal which is subject to SMA jurisdiction. Mr. Phillips stated at the hearing that the Applicant does not intend to use any part of the conveyed property for parking for the hotel. These and related restrictions are included as conditions, below.

C. History of permits and ordinance changes relating to this proposal.

17. When constructed in the mid-1960s, the building at issue, known as the Capital Center Building, was zoned "Central Retail", which allowed buildings of up to eight stories and 100 feet in height. A variance was granted for the ninth floor of the building. The building was the national headquarters of Capital Savings and Loan and later housed the headquarters of the state Department of Corrections and other state agencies.

18. At some point after the 1982 decision of the Shoreline Hearings Board in Sato v. Olympia, the zoning was changed to limit heights in this area to 35 feet, at which time the building became a legal nonconforming use with respect to height. Effective January 1, 2009, the City Council rezoned the property from Urban Waterfront (UW) to Urban Waterfront Housing (UW-H), which allowed buildings up to 90 feet in height. On January 12, 2010 the City Council adopted ordinance No. 6692, an interim zoning measure which returned the zoning classification to UW, with a maximum building height of 35 feet. The Council subsequently adopted Ordinance No. 6727, which rezoned the area to UW-H, but with a height limit of 35 feet. The effective date of Ordinance No. 6727 was January 1, 2011.

19. Construction related to this project included, among other matters, structural upgrades beginning in 2007, an exterior face-lift authorized by permit in 2008, and a permit for interior demolition issued in 2008. See test. of Hill, Stamm, Wells and Jacobs. Ex. 34 depicts the final design of the exterior work. On November 10, 2010 the Applicant applied for a "Commercial Tenant Improvement Permit"; see application for Permit No. 10 3309 at Ex. 36. The application characterized the work as a "structural retrofit" and included plans for each floor entitled "shell permit for change of use from office to hotel." Ex. 36. The permit application characterized the type of work as "Building use classification: change from B to R-2." Ex. 36. The "B" classification includes offices and R-2 includes hotels, although this permit could be used for offices, too. Test. of Hill. This structural work is all interior to the building. Test. of Hill.

20. The Applicant will still need to apply for another tenant improvement permit under the same file number to carry out work needed to convert the interior to a hotel. Test. of Hill. Permits for ancillary work such as electrical and mechanical will also be needed. Applicant's Brief on Vesting, Ex. 44.

21. This sequence of permits, from demolition to structural work to interior construction and remodeling, is not uncommon for remodels of existing buildings. Test. of Hill. The Applicant applied first for the structural retrofit to ensure it was feasible before going to the internal improvements. Test. of Wells. Both the 2010 Commercial Tenant Improvement Permit and the permit to come for the interior remodel are reviewed under the International Existing Building Code and would be deemed building permits under that Code. Test. of Hill. A commercial tenant improvement permit is the City's name for these building permits. Test. of Hill.

22. On December 1, 2010 the Applicant applied for Land Use Approval to change the use of the building from office to hotel. Ex. 30. Land Use Approval was issued on February 16, 2011, which is the approval here on appeal. On December 6, 2010 the Applicant submitted an environmental checklist under SEPA for this proposal. The Department assigned a vesting date of December 6, 2010 to the Land Use Application.

23. The Department did not issue a letter or written determination that these applications were incomplete.

D. <u>The environmental checklist</u>.

24. The Appellants contend that the SEPA environmental checklist is deficient in the ways listed in the letter dated March 2, 2011 from Allen T. Miller to Todd Stamm, part of Ex. 1, and because it failed to disclose the presence of unstable soils in the immediate vicinity as shown by prior earthquakes. The legal sufficiency of the checklist is discussed in the Conclusions of Law, below.

25. Of the list of claimed deficiencies in Ex. 1, Items 1 and 3 state that the checklist failed to give the shoreline designation of the property and to state the project will require a shoreline permit. This is correct. The checklist did not state these matters.

26. Items 2, 6, 7, 9, and 10 state that the checklist omits information relating to the proximity and extension of Heritage Park, the proximity of the Capitol campus and its listing on historic registers, and the proposal's effect on views and view corridors. The Appellants are correct that this information was not included in the checklist.

27. Item 8 states that the checklist failed to state that light or glare from the building interferes with historic view corridors. This is correct. The checklist stated that light or glare would not interfere with views.

28. Item 4 points out that the Applicant did not attach the geotechnical report it referred to in the checklist. This is correct.

29. Part 2 (f) of the appeal states that the checklist did not disclose the presence of unstable soils in the vicinity as shown by recent earthquakes. This is correct. In fact, Item 1 (d) of the checklist affirmatively stated that there is no history of unstable soils in the immediate vicinity. Mr. Stamm, the City SEPA official who issued the DNS, testified that he inspected the damage to Deschutes Parkway after the 2001 Ash Wednesday earthquake, that he is aware the Isthmus consists of fill, and that he consulted with Mr. Hill, the Building Official, on this issue. No claim was made that this information on the part of Mr. Stamm and Mr. Hill was inadequate to serve as the basis of a DNS on this issue.

30. Item 5 of the deficiencies claimed in Ex. 1 is the failure to list a number of fish and wildlife species found in the vicinity. Mr. Stamm testified that the City's review of nearby species was not based on the checklist, but on the staff's own knowledge of species known to be near the site. No claim was made that the staff's knowledge in this regard was deficient.

E. Design principles of the state Capitol group and their relation to this proposal.

31. The Appellants submitted extensive evidence on the history of and the design principles underlying the state Capitol group of buildings, including the Legislative Building and those around it. See Ex. 5, Ex. 28 and related testimony. The Findings in this part summarize and are based on that evidence.

32. In 1911 the legislature authorized the State Capitol Commission to hold a nationwide design competition for a group of buildings to serve as the Capitol of the state. The program issued for the competition set the basic premise that a north-south axis should be the defining alignment of the group, with the Capitol Building facing north and major approaches from the north and east. In August 1911 the firm of Wilder and White was announced as the winner.

33. At the same time, Governor Hay sent a telegram to the Olmsted Brothers firm, the most prominent landscape architects in the nation, asking if they would advise the state in preparing a landscape plan for the Capitol group and its campus. The Olmstead Brothers were hired for two years for this purpose. The firm developed a site plan in 1912 which established a connection between the Capitol grounds and the city, the Sound and the Olympics to the north. Professor Johnston in his Declaration at Ex. 5 characterizes it as giving priority to the drama of the site as its vistas sweep northward across the lake, the Isthmus, Puget Sound, and the Olympic Mountains. Consistently with this, the 1912 Olmsted design placed the Temple of Justice behind or to the south of the Legislative Building, with an open prospect to the north from the Legislative Building and a diagonal street running from it to the downtown area. The Commission and Wilder and White, however, held to their plans to place the Temple of Justice to the north of the Legislative Building, and the Olmsted Brothers soon left the employ of the state.

34. The Wilder and White plans went through several revisions from 1911 to construction of the Legislative Building in the 1920s. The 1911 Wilder and White design drawing at Ex. 28, Tab 8, and the 1912 Wilder and White revised group plan perspective at Ex. 28, Tab 1, each show a group of buildings similar but not identical to thse in place today, with the exception of a classical building in place of the Governor's mansion. The 1911 design also shows two sweeping promenades leading down the slope north of the Temple of Justice to a triumphal arch near water level. From the arch a landscaped esplanade leads north to a towered building near the location of present Fifth Avenue, which the testimony indicated was proposed as a railroad station.

35. Mr. Hamm testified that the railroad station shown in this design had a small footprint and that its tower would be from 40 to 50 feet in height. However, Mr. Wells estimated the tower to be 70 to 80 feet in height and testified that it is directly in line with the view corridor north from the Capitol. The 1911 design at Ex. 28, Tab 8 also shows fairly dense building along the Isthmus and widening of the Isthmus through filling. Mr. Hamm estimated the buildings shown on the Isthmus in the 1911 plan were around four stories in height. Mr. Wells also testified the buildings drawn on the Isthmus appeared to be four stories. Professor Johnston estimated their height from one to three stories in his Declaration at Ex. 5. Mr. Wells testified that at that time stories ranged from 12 to 15 feet in height, so the buildings could be 50 feet

high. Mr. Hamm testified that at that time first floors were from 8 to 10 feet and upper floors approximately eight feet in height.

36. Governor Lister, elected in 1912, felt that the 1912 Wilder and White plan was too extravagant and disagreed with its north-south orientation. He proposed the more modest plan shown at Ex. 28, with an east-west orientation, abandoning the north-south axis of Wilder and White and the Olmsted Brothers. The Lister plan was not implemented, and design of the Capitol group returned to that of Wilder and White.

37. In 1927 the Olmsted firm was retained by the state to design and carry out the landscaping for the Capitol campus. In 1928 the firm completed its design, which is found attached to the Declaration of Susan Olmsted at Ex. 5 and at Ex. 28, Tab 3. Cross-examination brought out that in the 1928 plan the east-west axis of the design was as strong as the north-south. One of the key elements of this plan was a large overlook terrace to the north of the Temple of Justice from which the borrowed landscapes of the Sound and the Olympics could be enjoyed. This terrace is now the site of the state Law Enforcement Memorial, which is designed to incorporate views to the north to create a place to reflect in a spectacular setting. Test. of B. Johnston. The Memorial is on the site of the overlook shown in the Wilder and White plan. Test. of Hamm.

38. The evidence speaks eloquently to the foresight and design principles of the Olmsted plans, both those of 1912 and 1928, and the Wilder and White plans. The Wilder and White design was based on the concept of a group of civic buildings set on a hill above the city center with a broad vista of the surrounding natural area, including Puget Sound and the Olympics to the north. Although the main approach to the Capitol was from the east, the defining alignment of the group was north-south, with its principal vista to the north.

39. The Olmsted firm was known for creating civic, democratic spaces of beauty and refreshment for the public, including New York's Central Park, landscape design for several state capitols, and design improvements to the U.S. Capitol Grounds. Of their work on capitol grounds, the ones in Washington D.C. and Olympia are the most significant. Test. of Gestram. The firm's civic designs attempted to evoke the "genius of place", drawing the individual into a larger world of beauty and inspiration.

40. In the northwest, Olmsted designs served this end by making available to the public the views that are characteristic of the area, such as the Rainier vista at the University of Washington campus. In their work for the Washington State Capitol, the commanding prospect atop the bluff and its majestic panorama to the north across Capitol Lake, the Isthmus, Puget Sound and out to the Olympics were central to these aims, as were the views of the classical Capitol buildings from the lower surrounding areas. Here, in other words, the design joined the sublimities of nature to an architectural style evoking the Mediterranean roots of our democracy. More potent materials to inspire civic stewardship are difficult to imagine. The view to the north, the evidence shows, was central to this inspiration.

41. Neither the Wilder and White nor the Olmsted plans are incorporated in the City's Comprehensive Plans or development regulations. Their role in interpreting the Comprehensive Plan is discussed in the Conclusions of Law, below.

42. Neither the Olmsted nor the Wilder and White plans were carried out fully or precisely according to their terms. As examples, the Temple of Justice was built between the Legislative Building and the vista to the north, contrary to the initial Olmsted plan (but consistent with Wilder and White); the grand promenades down the bluff and along the shore to the north in the 1911 Wilder and White plan were not built; the later General Administration building blocked views to the northwest from parts of the campus with a bland, uninspired facade sharing nothing of the magnificence of its neighbors; and the distribution of trees is not that foreseen in 1911 or 1928. On the other hand, former Secretary of State Ralph Munro testified that the state Capitol Campus Design Committee, of which he was a member, always examined the effect any proposed new campus building would have on views of the Capitol. Mr. Munro testified also that vistas from the Capitol are very important in a monumental building.

43. Although some of these changes, especially placement of the Temple of Justice, may raise a dissonance with the Olmsted and Wilder and White plans, none compromise their foundational principles. The place remains a democratic space in the Olmsted tradition, given life through both the grandeur of what mankind can create and the hints of our better selves through what nature does create. The views to the north are at the center of this.

F. <u>Subsequent planning and construction related to views and connections north from the Capitol</u>.

44. In 1956 the City commissioned the 50-year Plan for Olympia and the Capitol, excerpts from which are at Ex. 28, Tab 5. The Comprehensive Plan map in that 50-year Plan designated the Isthmus as "Parks and Public Uses". Its Central Circulation Plan noted the Isthmus as "Civic Area".

45. In the 1980s Bob Jacobs, Gerald Reilly and others became aware of Wilder and White's plans to connect the Capitol campus to the shore of Budd Inlet (now Capitol Lake) to the north with a promenade and landscaped area. Out of their and others' efforts, the North Capitol Campus Heritage Park Development Association was formed, which advocated for completion of the Wilder and White plan to the north of the campus.

46. Eventually, in 2005 the state completed the present Heritage Park along the shores of Capitol Lake. The planning for this park was influenced by the Wilder and White plan, and it implemented much of that plan's basic design, although in a different form. For example, one now walks from the top of the bluff at the Capitol grounds to Capitol Lake by a switchback trail, instead of the more formal twin promenades. The walkway along the lake follows the arc of the wall along its shore, instead of running in a straight line to the north. These and other differences, though, do not obscure the fact that Heritage Park implements the central notion of a direct physical and visual connection from the Capitol group to the water and the city.

47. After height limits were raised in 2008, a successful initiative petition required the City to conduct a study of the feasibility of extending Heritage Park onto the Isthmus. Excerpts of the study, completed in 2009, are at Ex. 5 and Ex. 28, Tab 18.

48. In 2010 the City adopted an update to its Parks, Arts and Recreation Plan, excerpts from which are at Ex. 5 and at Ex. 28, Tab 20. The 2010 update on pp. 84-85 contains a

section entitled "Isthmus Park". Its first paragraph sets out history and background, and it ends with the following "proposed action" statement: "Funding sources have not been identified for this project. The City should explore the concept of a public/private partnership to implement an Isthmus Park project."

G. Effect of the Capitol Center building on the Wilder and White and Olmsted plans and on views north from the Capitol.

49. The Declaration of Norman J. Johnston at Ex. 5 contains a photograph of Capitol Lake, the Isthmus with the Capital Center Building, and Puget Sound and the Olympics beyond. It is the same photograph as that identified at Ex. 28, Tab 13 as taken from the Law Enforcement Memorial. This photograph gives a fair impression of the prospect from the Capitol to the north with the Capital Center Building in place. Also attached to the Norman Johnston Declaration at Ex. 5 and found at Ex. 28, Tab 14 is an edited version of the same photograph, showing the same view without the Capital Center Building. Ex. 28, Tab 30 also includes a number of photographs of similar views with the Capitol Center Building, as well as views of the building from other locations. Some of the photographs at Ex. 28, Tab 30 obviously are through a long lens, which would not give a fair impression of the view with the unaided human eye.

50. A number of witnesses with expertise expressed critical opinions of the Capital Center Building. In his Declaration at Ex. 5, Professor Johnston stated that the building violates the design principles the City faces in considering the future of the Olmsted/Wilder and White plans. Ms. Gestram testified that the contemplated views to the north are intact except for this building. She characterized the building as destroying the intent of the design. Ms. Davidson characterized the building as unfortunate.

51. By their nature, aesthetic standards lack the specificity with which the law is most comfortable, and aesthetic judgments carry a subjectivity with which the law is least comfortable. Nonetheless, such judgments can lie at the heart of those land use decisions which define much of the physical place in which we live. Thus, these judgments must be made, and made with the objective discipline and disciplined discretion counseled by cases such as Anderson v. Issaquah, 70 Wn. App. 64 (1993). As described in detail above, the Wilder and White and Olmsted plans all incorporated the majestic views to the north as conspicuous elements of their designs. In the Olmsted conception, those views were more than pretty sights, but were at the heart of their offered civic inspiration, when majestic architecture is joined to sublime nature. In views from the Capitol grounds, the Capital Center Building intrudes into this imagination, like an errant thumb into a photo of Mt. Rainier. In any reasoned view of these circumstances, this building is contrary to and inconsistent with the design elements and overall concept of the Wilder and White and Olmsted plans for the State Capitol Group.

II. CONCLUSIONS OF LAW

A. The nature of the appeal and the standards for its resolution.

1. The present matter is an appeal of the Notice of Land Use Approval and Determination of Nonsignificance (DNS) issued February 16, 2011, authorizing the Applicant,

The Views on Fifth Avenue, LTD, to convert an existing nine-story building at 410 Fifth Avenue SW to a hotel. The nature of the proposal is described in the Findings, above.

2. The Appellants asked that the Land Use Approval be reversed and the DNS be invalidated for the reasons set out in Sections 1 and 2 (a) through 2 (h) of the appeal at Ex. 1. After the decisions on the motions found at Ex. 14, a number of the grounds for reversal were denied, leaving those listed in Part A of the Findings, above.

3. The basic standard governing issuance of land use approval is whether the proposal is consistent "with the standards and provisions of the City of Olympia as expressed in the various adopted plans and ordinances, including this Title." Olympia Municipal Code (OMC) 18.60.080 B. 5.

4. Appeals of administrative decisions are subject to the following standards:

". . . With regard to decisions of city staff, the Examiner shall accord due deference to the expertise and experience of the staff rendering such decision. The Examiner shall only grant the relief requested by an appellant upon finding that the appellant has established that:

1. the staff engaged in unlawful procedures or failed to follow a prescribed procedure;

2. the staff's decision was an erroneous interpretation of the law;

3. the decision is not supported by substantial evidence within the context of the whole record;

4. the decision is a clearly erroneous application of the law to the facts;

5. the decision is outside the authority or jurisdiction of the decision-maker;

6. the decision violates the constitutional rights of the party seeking relief, or

7. the decision is clearly in conflict with the City's adopted plans, policies or ordinances."

OMC 18.75.040 F.

5. The standard for issuance of a DNS is drawn from the SEPA rules and case law. A DNS is a type of threshold determination under SEPA, which is the decision by an agency whether an EIS, or environmental impact statement, is required for a proposal that is not exempt from SEPA. WAC 197-11-797. An EIS is required for actions having a probable significant, adverse environmental impact. RCW 43.21C.031. A DNS is the decision that the proposal will not have any probable significant, adverse environmental impacts and that an EIS is consequently not required. WAC 197-11-340.

6. The Court in Norway Hill v. King County, 87 Wn.2d 267, 278 (1976), stated that this standard for EIS preparation is met "whenever more than a moderate effect on the quality of the environment is a reasonable probability." "Significant", in this context, includes the examination of at least two relevant factors: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." Narrowsview v. Tacoma, 84 Wn.2d 416, 423 (1974). A threshold determination does not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, considers whether a proposal has any probable significant adverse environmental impacts. WAC 197-11-330 (5).

7. Consistently with the standards of review set out above, OMC 14.04.160 (5) states that any procedural determination by the City's SEPA official shall be given substantial weight in any appeal proceeding. Threshold determinations are a procedural determination under SEPA.

B. The vested rights doctrine.

8. Before examining the specific challenges on appeal, the state vested rights doctrine must be consulted to determine whether the proposal is subject to certain recent changes in the City's zoning ordinance. More to the point, it must be determined whether the proposal is subject to the Urban Waterfront (UW) zoning classification, which allows hotels, or whether it is subject to Urban Waterfront – Housing (UW-H), which does not. As found above, the project site was rezoned from UW to UW-H (with a 35-foot height limit) by Ordinance No. 6727, which was effective January 1, 2011. The site had been zoned UW (with a 35-foot height limit) since January 12, 2010. Before that time, the site had been zoned UW-H (with a 90-foot height limit) since January 1, 2009. Before then, it was zoned UW.

9. The state's vested rights doctrine is a sort of temporal choice of law doctrine, supplying the rules for determining which set of standards applies to a specific development application. The doctrine's basic rule is that an applicant has the right

> "to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations."

Erickson v. McLerran, 123 Wn.2d 864, 868-68 (1994). To trigger this right, the application must be fully complete, RCW 19.27.095, and must comply with the standards it vests under. See Valley View v. Redmond, 107 Wn.2d 621, 638 (1987).

10. This basic rule is found also in RCW 19.27.095, which states:

> "(1) A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

(2) The requirements for a fully completed application shall be defined by local ordinance . . ."

A separate statute, RCW 58.17.033, sets the time for vesting of subdivisions at submission of a preliminary subdivision application. No subdivision is involved in this appeal.

11. As the Applicant argues, one of the central purposes of vesting is to provide certainty to developers and to protect their expectations against fluctuating land use policy. See e.g. Noble Manor v. Pierce County, 133 Wn.2d 269 (1997). However, these ends do not reflect the whole of the policy behind the vested rights doctrine. In Erickson, 123 Wn.2d at 873-74, the Court stated that

> "[d]evelopment interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted."

The vested rights doctrine attempts to avoid this subversion of the public interest by balancing "the private property and due process rights against the public interest by selecting a vesting point which prevents "permit speculation", and which demonstrates substantial commitment by the developer . . ." Id. at 874.

12. Thus, the vested rights doctrine does not automatically compel the earliest vesting or the result that provides the most certainty to an applicant. In any interpretation of the doctrine, all of its purposes must be taken into account.

13. A recurring issue under the doctrine has been the determination of vesting when a number of different permits are required, such as use permits, subdivision approvals and building permits. Here, the Applicant applied for a "Commercial Tenant Improvement Permit" on November 10, 2010. As found above, the application characterized the work as a "structural retrofit" and plainly indicated the purpose of the work was to convert the prior office to a hotel. The Building Official, Mr. Hill, testified that this is a building permit. On December 1, 2010 the Applicant applied for Land Use Approval to change the use of the building from office to hotel. On December 6, 2010 the Applicant submitted an environmental checklist under SEPA for the proposal.

14. Mr. Wells, the Applicant's architect, testified that the Applicant did not receive a letter of incomplete application. RCW 36.70B.070 (4)(a) states that an "application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete . . ." Thus, by operation of law, these applications must be deemed complete. Each of these applications vested, therefore, when the site was zoned UW, allowing hotels.

15. As found, the Applicant will still need to apply for another tenant improvement permit to carry out work needed to convert the interior to a hotel. Permits for ancillary work such as

electrical and mechanical will also be needed. With this, the issue is presented: when an applicant submits a complete building permit application for a structural retrofit to convert an office building to a hotel and a complete application for land use approval for the same conversion when hotels are permitted, but does not submit a complete building permit application to actually convert the interior to a hotel until after the zoning is changed to prohibit hotels, may the building be converted to a hotel?

16. Part of the issue is answered by the decision in Abbey Road v. City of Bonney Lake, 167 Wn.2d 242 (2009), and Olympia's own vesting ordinance. In Abbey Road an applicant for a multi-family condominium development applied for site plan approval, but not for a building permit, before the law changed prohibiting the development. Site plan approval in Bonney Lake appears analogous to land use approval in Olympia. Bonney Lake did not have a vesting ordinance. The Court held that the application for site plan approval did not vest the project, since the Applicant could have applied for a building permit but did not. Under RCW 19.27.095 the Court held, the Applicant needed to apply for a building permit to vest.

17. Unlike Bonney Lake, Olympia has adopted a local vesting ordinance, as authorized under Erickson, supra. The ordinance adopts the general rule that

> "any project permit application shall be considered under the laws, ordinances, regulations, standards, and fees in effect at the time that the particular complete application is received by the City of Olympia."

OMC 18.02.130 A. This rule is refined by OMC 18.02.130 D, which states:

> "Only when a complete building permit application for a structure to be used in a manner permitted under the land use regulations in effect on the date of such application is submitted will the applicant be entitled to improve and use land under the ordinances of the City in effect on the date of the complete building application. Where a change in occupancy is proposed, such building permit application shall not be deemed complete unless preceded or accompanied by a complete land use approval application."

18. Under both Abbey Road, supra, and Erickson, supra, this ordinance meets the requirements for local vesting controls, since the applicant controls vesting through its ability to submit a building permit application at any time, and vesting occurs in any event no later than the submission of a complete building permit application. See Abbey Road, 167 Wn.2d at 252.

19. After receiving the November 10, 2010 building permit application, the Department required submittal of a land use application and environmental checklist. Test. of Stamm. The Applicant states that the Department required submittal of a land use application for change of use as an element of a complete building permit application. Ex. 44, p. 3. Even though the land use application was not filed simultaneously with the November 10 building permit application, the Department promptly requested it after reviewing the November 10 application, and the Applicant promptly submitted it on December 1. This is sufficient to comply with the last sentence of OMC 18.02.130 D, above.

20. With submittal of the December 1 land use application, the November 10 building permit application was complete. Under OMC 18.02.130 D, the applicant is entitled "to improve and use land under the ordinances of the City in effect on the date of the complete building application". The question is which of the building permit applications for this single project trigger that right.

21. This issue is sharpened by the need for two building permits to actually convert the building to a hotel; the structural retrofit permit and the coming permit to redo the interior into a hotel. This not an issue of a single building permit followed by ancillary plumbing and electrical permits, as argued by the Applicant, or of somehow divesting a vested application, as argued by the Department. Rather, it is which of two building permits, equally needed to convert to a hotel vests the right to use the property as a hotel.

22. The key to the analysis is that the vested right at issue is to use the property in a certain way. As noted, both the 2010 building permit and the one still to come are for work equally needed to convert the use to a hotel. However, the 2010 application characterized the type of work as changing the use classification from B, which does not allow hotels, to R-2, which does. The application included plans for each floor entitled "shell permit for change of use from office to hotel." Ex. 36. Perhaps more to the point, the Department required that a land use application for conversion to a hotel be submitted in order to deem the 2010 building permit application complete. Under OMC 18.02.130 D, above, this is required only if the building permit proposes a change in occupancy.

23. Thus, under the City's vesting ordinance, the 2010 building permit application proposed a change in use, and the application for the land use approval for that change was incorporated as part of the building permit application. Of the building permits needed for the conversion, this is the one most closely related to a change of use. Further, this application was filed at the same time as the land use approval, so it was not an attempt to distort the doctrine to achieve especially early vesting. Under RCW 19.27.095, it vests the right to use the property under the law in effect on December 1, 2010.[4]

C. Nonconforming uses.

24. OMC 18.02.180 defines a nonconforming building or structure as one

"which was lawfully erected or altered and maintained, but because of the application of this title no longer conforms to the yard, height or area requirements of the use district in which it is located."

[4] Whether the vesting date instead is December 6, 2010, as stated by the staff, is not necessary to decide, since the use regulations were the same on both December 1 and 6.

Similarly, OMC 18.02.180 defines a nonconforming use as

> "[a]n activity in a structure or on a tract of land that was legally established, but because of the application of this title no longer conforms to the use regulations of the district in which it is located.

25. Our state Supreme Court has held that "nonconforming uses are uniformly disfavored . . . ", because they limit the effectiveness of land use controls, imperil the success of community plans and injure property values. Rhod-A-Zalea v. Snohomish County, 136 Wn. 2d 1, 8 (1998). For these reasons, our court "has repeatedly acknowledged the desirability of eliminating such uses." Rhod-A-Zalea, 136 Wn. 2d at 8. Further, our court has characterized the right to a nonconforming use as "the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use". Id. at 6.

26. The building at issue complied with applicable standards when built, but no longer conforms to the current height limitation of 35 feet. Therefore, it is a nonconforming building due to its height. Nonconforming buildings are governed by OMC 18.37.040, which states that with some inapplicable exceptions,

> "[a]ny building or structure that . . . is nonconforming as to development/building coverage, yard, building setback, height, open space or density provisions of the use district in which it is located, may be enlarged or remodeled if such alterations do not contribute to further nonconformity. To the extent practical and feasible, any such alteration shall bring the building or structure into closer conformance with the provisions of this title."

27. The current proposal would not increase the height of the building, a restriction which is also contained in a condition below. Therefore, the proposal does not contribute to further nonconformity due to height. Further, it is not practical or feasible to expect the Applicant to remove stories as part of its proposal. With that, the proposal meets the requirements to remodel a nonconforming building.

28. Turning to nonconforming uses, OMC 18.37.060 A 1 states that "[a] nonconforming use may be changed to a permitted use at any time." As just shown, a hotel is a permitted use under the zoning ordinance under which this proposal is vested. Thus, even if the current or prior uses were nonconforming, the ordinance allows conversion to a hotel.

29. Another provision governing nonconforming uses, OMC 18.37.060 E, states that a "nonconforming use, when abandoned or discontinued, shall not be resumed." As held above, the proposal vested under the UW classification, which allows hotels. Thus, this proposal is for a permitted use. Even if the prior use was nonconforming and was abandoned, this provision does not prohibit establishment of a permitted use.

D. Analysis of the claimed errors on appeal.

30. The assignments of error of the appeal are set out in its Section 2 at Ex. 1. Section 1 of the appeal also contains the claim that the proposal is contrary to the design principles of

Wilder and White and the Olmsted Brothers, which is considered in the first assignment of error, below.

1. The first assignment of error: that the land use approval and DNS violate the Olympia Comprehensive Plan, because they fail to preserve the scenic views, open space and the historic design principles of the State Capitol Campus.

31. As set out in detail in the Findings of Fact, the presence of this building is inconsistent with and contrary to the design principles of both the Olmsted Brothers and Wilder and White in designing the State Capitol and its campus. Those principles are acknowledged by the state Master Plan for the Capitol of the State of Washington. More specifically, that Plan states at p. 5-6 that certain view corridors, including those to the Capitol from Puget Sound and from the Capitol to the Olympics, should be preserved.[5]

32. However, neither the Wilder and White/Olmsted principles nor the Master Plan for the Capitol of the State of Washington are expressly adopted by or incorporated into the Olympia Comprehensive Plan. As noted above, land use review is confined to determining compliance with City plans and ordinances.

33. On the other hand, Policy LU 2.2 of the Comprehensive Plan is to

> "[p]rotect, to the greatest extent practical, scenic views of the Capitol Dome, Budd Inlet, Mount Rainier, the Black Hills, Capitol Lake, and the Olympic Mountains from designated viewing points and corridors."

In addition, Policy HP 1.1 is that "[t]he Capitol dome should be a focal point in the design of the City" and Policy HP 1.2 states that outstanding views of the Olympic Mountains, Budd Inlet, Capital Lake and the Capitol building "must be protected." Similarly, Policy HP 1.4 specifies that "[t]he City should safeguard and manifest its heritage which is represented by those sites, buildings, districts, structures and objects which reflect significant elements of the City's history."

34. These policies combine awareness of the City's rich history with express directions to safeguard that heritage, including the very views at issue here. To assure full implementation of this combination of policies, the design principles at the heart of the most magnificent element of that heritage, the State Capitol, should inform the application of these Comprehensive Plan principles. In that way, consistency with the Olmsted and Wilder and White principles are an element of the review of this project.

35. The Comprehensive Plan policies just excerpted are phrased in unusually direct language for comprehensive plans. LU 2.2 uses the imperative "protect" the views it lists "to the greatest extent practical". Policy HP 1.2 exceeds that by stating that outstanding views of the Olympic Mountains, Budd Inlet, Capital Lake and the Capitol building "must be protected", mandatory language more at home in development regulations. These strong polices, read

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[5] This Plan was referred to in the evidence. Official notice is taken of its Policy 5.1, at pp. 5-2 through 5-7 and Map M-9, which is admitted as Ex. 51.

against the backdrop of what Olmsted and Wilder and White were attempting to accomplish, leads to one conclusion: given its effects found above, the building at issue is inconsistent with the Comprehensive Plan.

36. This proposal, though, would only affect the inside of the building. It would not increase the height, width or bulk of the building to any degree. No evidence suggested that the prior exterior work would harm views through increased glare or reflection. Thus, this proposal will have no effect on any of the views protected by the Comprehensive Plan. A proposal having no effect on views cannot be denied because of its effect on views. This assignment of error does not describe any legal flaw in the land use approval.

37. Similarly, the absence of any effect on views cannot be deemed a probable, significant environmental impact under SEPA. Therefore, under RCW 43.21C.031 and WAC 197-11-340 the DNS was proper.

38. Alternatively, one could argue that denying the proposal will tend to keep the building unoccupied, which would increase the chances of its removal, thus serving the policies of the Comprehensive Plan described above. This proposal, however, complies with all zoning standards under which it is vested, including that allowing remodeling of nonconforming buildings. Our Supreme Court has held that conflicts between a comprehensive plan and more specific regulations are resolved in favor of the more specific regulations, usually zoning regulations. Citizens v. Mount Vernon, 133 Wn.2d 861, 873 (1997). Stated another way, a specific zoning ordinance will prevail over an inconsistent comprehensive plan. Cougar Mountain Assocs. v. King County, 111 Wn.2d 742, 757 (1988). More specifically, if a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 43 (1994). However, if the code itself expressly requires a site plan to comply with a comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan.

39. No provision of the zoning ordinance which expressly requires compliance with the Comprehensive Plan under these circumstances was pointed out, and I am not aware of any. Thus, under these cases the building's effect on views cannot be grounds for denial under the Comprehensive Plan when it complies with the zoning ordinance. This is especially true when the building was constructed in compliance with applicable standards, and the zoning provisions on nonconforming structures expressly allow it to be remodeled in this manner. For these reasons, the proposal cannot be denied simply because it would make its ultimate removal more likely.

40. In addition, state court decisions on regulatory takings draw a distinction between action which safeguards the public interest in health, safety, the environment or the fiscal integrity of an area and one which goes beyond preventing a public harm and instead enhances a publicly owned right in property. See Orion v. State, 109 Wn.2d 621 (1987), and Presbytery of Seattle v. King County, 114 Wn.2d 320, 329 (1990). Other cases characterize the second category as one which "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit". See Guimont v. Clarke, 121 Wn.2d 586, 594-95 (1993). If the action (a) falls into the second category, (b) does not deprive the owner of

all reasonable economic use or constitute a physical invasion, and (c) substantially advance a legitimate state interest, then the court

> "performs a balancing test. The court asks whether the state interest in the regulation is outweighed by its adverse economic impact to the landowner. In particular, the court considers: (1) the regulation's economic impact on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action."

Guimont, 121 Wn.2d at 603-04.

41. Here, the evidence showed that removal of this building would enhance views from the Capitol and from state-owned Heritage Park and that it is located in an area targeted for expansion of the adjacent Heritage Park. If this proposal were denied on the rationale that it would make removal of the building more likely, even though the building and the use are in full compliance with the zoning ordinance, the denial would fall much more in the second category from Orion, Presbytery and Guimont that it would the first. When one considers the unambiguous nature of the building's nonconforming status under the zoning ordinance, the Applicant's likely investment-backed reliance on that status, and the fact that removal of the building would likely make it cheaper and easier to expand Heritage Park onto the site, the three final criteria from these cases, listed above, point in one direction: denying approval to make removal of the building more likely would run close to the edge of a regulatory taking. Because the issue was not argued, this decision does not decide whether use of this rationale would constitute a taking. However, the analysis on this record shows enough signs of that result that any denial should not rest on its increasing the likelihood that the building will be removed.

42. The proposed conversion has no effect on views. Therefore, it cannot be denied due to its effect on views. The first listed error is not a reason for reversal.

2. The second assignment of error: that the land use approval and DNS fail to comply with RCW 90.58.020, since they allow piecemeal, uncoordinated development and perpetuate an unlawful nonconforming use and building on the Isthmus.

43. RCW 90.58.020 is part of the state Shoreline Management Act (SMA). Thus, it applies only if the proposal is subject to that Act.

44. The Order on Motions of May 20, 2011, found at Ex. 14, held that under governing case law the entire proposal is subject to the SMA, since a part of the parking lot for the hotel was within shoreline jurisdiction. The legal analysis supporting that conclusion is at pp. 6 through 9 of the Order on Motions and is incorporated herein by reference.

45. As found, the Applicant has now conveyed that portion of the parking lot within shoreline jurisdiction to another entity. Thus, the entire proposal and project site now lie just outside shoreline jurisdiction. This raises the question whether the modified proposal remains subject to the SMA.

46. The SMA itself applies to shorelines of the state, RCW 90.58.040, and requires shoreline development permits only on shorelines of the state. See RCW 90.58.140. Accord,

Weyerhaeuser v. King County, 91 Wn.2d 721, 736 (1979), ("Only those developments within the shorelines are subject to regulation by permits.") Shorelines are defined by RCW 90.58.030 (2) (e) to include, as relevant, the water areas of the state above a certain size or volume and associated shorelands. Shorelands, in turn, are defined by RCW 90.58.030 (2) (d) in relevant part as "those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark". With the recent conveyance, no part of this proposal is within the shorelines of the state. Thus, these provisions indicate it would not fall within SMA jurisdiction.

47. Another SMA provision, RCW 90.58.340, requires municipal corporations to review regulations, plans and ordinances relative to lands adjacent to the shorelines of the state to achieve a use policy on the adjacent lands which is consistent with the policy of the SMA. According to Weyerhaeuser v. King County, 91 Wn.2d at 736, this limits direct authority to regulate uses of lands adjacent to shorelines to the function of land use planning. A hearing examiner has no jurisdiction to adopt or amend regulations, plans or ordinances. Therefore, RCW 90.58.340 cannot enter into Hearing Examiner review of appeals of permit decisions such as this.

48. As discussed in the Order on motions, the Supreme Court's decision in Weyerhaeuser and the Shoreline Hearings Board decisions in Washington Environmental Council v. Department of Transportation, SHB No. 86-34 (1988), and Allegra v. Seattle, SHB No. 99-08 and 99-09 (1999), stand for the rule that a unified proposal partly within and partly outside shoreline jurisdiction must be deemed entirely within SMA jurisdiction. For that reason, the Order on Motions deemed the entire proposal to be subject to the SMA. With the recent conveyance, however, this proposal is now entirely outside shoreline jurisdiction. Therefore, these decisions no longer support SMA jurisdiction over this proposal.

49. One issue which as far as I know is not definitively resolved in the case law is whether the policies and standards of the SMA and the local shoreline master program may apply to a local permit, whether or not under the SMA, for a project outside the shorelines, but which would have a direct, adverse effect on the shorelines. WAC 173-26-186 (6), part of the state shoreline guidelines, makes clear that a master program's permitting or regulatory function does not extend beyond the shorelines. Accord, Weyerhaeuser, supra. However, if a proposal just outside the shoreline boundary harmed the shorelines through, say, stormwater or septic emissions, a strong factual case could be made that the proposal was using the shorelines for its waste disposal, a function just as central to it as a building or parking lot. Under Weyerhaeuser and the other authority above, the argument could be made that the entire proposal, including its use of shorelines, falls under the SMA.

50. Here, however, there is no evidence that converting this building to a hotel would cause any adverse effect to the shorelines. Stormwater and sewage would be handled by the municipal system. No evidence suggested that any increased traffic, pedestrians, noise, odor or lights would have any adverse effect on shorelines.

51. The evidence does show that this building compromises and in some cases destroys some distinguished and incomparable views to and from Budd Inlet and its shorelines and from Capitol Lake and its shorelines. The Shoreline Hearings Board decision in Sato v.

Olympia, SHB No. 81-84 (1982), leaves little doubt that the building at issue could not be approved under the SMA if proposed today. However, neither construction nor enlargement of the building is proposed. The proposal is to remodel the inside and convert the use of the structure to a hotel. The height, width and profile of the building would remain unchanged. As concluded above, the proposal at issue would do nothing to change or affect any views. Therefore, if the SMA applied to a proposal outside the shorelines due to its adverse effect on the shorelines, the evidence shows no such adverse effects of this proposal. Under the SMA provisions and case law discussed above, this proposal is entirely outside SMA jurisdiction and is not subject to that Act.

52. However, if the portion of Parcel No. 91005201000 which was conveyed away were used for hotel parking, or if those portions of Parcel No. 91005600000 or Parcel No. 91005700000 across Fourth Avenue and within SMA jurisdiction were used for hotel parking, whatever the ownership of the respective parcels, then circumstances would return to those of the Order on Motions. Under those circumstances, as discussed, the case law requires the conclusion that the entire project is under the SMA.

53. The SMA would not be served in these circumstances simply by requiring that any such parking expansion into the shorelines undergo SMA review, since under the law the entire project should have been subject to the SMA in those circumstances. Merkel v. Port of Brownsville, 8 Wn. App. 844, 850-51 (1973), announced a strongly worded policy against segmenting single proposals in review under the SMA:

> "The question, therefore, is whether the port may take a single project and divide it into segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compels us to answer in the negative."

54. Allowing a hotel to be established just outside the shorelines without SMA review and later to expand its parking into the shorelines with only review of that expansion would raise the sort of piecemeal review condemned by Merkel. Therefore, this decision is conditioned to prohibit this hotel from expanding its parking into the shoreline jurisdiction and to require that restriction to be embodied in a recorded covenant running with the land covering future hotel or other commercial uses.

55. For these reasons, under the terms of the SMA and the case law interpreting it, this proposal is not subject to the SMA. Therefore, RCW 90.58.020 does not apply to it.

56. In addition, the current proposal does not lead to the piecemeal review condemned by Merkel. To avoid precisely that piecemeal approach, the Order on Motions held that the entire proposal was subject to the SMA. The Applicant responded by conveying away and removing from the proposal all portions within SMA jurisdiction. When a proposal is entirely outside SMA jurisdiction and, for the reasons above, has no effect on SMA jurisdiction, it is simply not subject to the Act. In that situation, nothing is being divided or "piecemealed" in the review process.

57. This statement of error also claims that approval perpetuates an unlawful nonconforming use and building. However, this cannot be an unlawful nonconforming use under the SMA, since the SMA now does not apply to it. Further, as shown above, the building is a lawful nonconforming structure under the zoning ordinance, and a hotel use is permitting under vested zoning.

58. For these reasons, the second listed error is not a reason for reversal.

3. The third assignment of error: that the land use approval and DNS fail to comply with RCW 36.70A.480, RCW 36.70A.481, RCW 90.58.020, RCW 90.58.340, and the holding in Sato v. Olympia.

59. The Order on Motions at Ex. 14 denied the challenges based on RCW 36.70A.480 and RCW 36.70A.481. This decision held above that with the conveyance of the portions of the site within SMA jurisdiction and the conditions imposed below, the proposal is not subject to the SMA. The claims based on RCW 90.58.020 must therefore be denied. This decision also held above that under Weyerhaeuser v. King County, 91 Wn.2d at 736, a hearing examiner has no jurisdiction to carry out the actions covered in RCW 90.58.340 or to review permit decisions under it. Therefore, the only remaining claims in this assignment of error are those based on Sato v. Olympia.

60. In Sato v. Olympia, SHB No. 81-41 (1982), the Shoreline Hearings Board held that a proposed six-story, 70-foot high building for offices, shops and a restaurant located on or near the present Bayview Thriftway on the Isthmus in Olympia violated RCW 90.58.020 of the SMA. The principal reasons for the violation were the proposal's adverse effect on views, including those from the state Capitol, and its incompatibility with the scale of other development on the Isthmus. Significantly, the decision stated that the nearby Capital Center Building also impairs views and "serves as an example of adverse visual effects which should be limited".

61. Sato is powerful precedent against taller buildings in the areas of the Isthmus subject to the SMA. It might also play a role in the interpretation of shoreline master program provisions governing conversions of taller buildings in the shorelines to other uses. As held, however, with conveyance of part of the parking lot, no portion of this proposal is within SMA jurisdiction. Therefore, Sato does not apply to this proposal. For these reasons, the third listed error is not a reason for reversal.

4. The fourth assignment of error: that the land use approval and DNS fail to comply with the substantive policies of SEPA by violating the design principles of the state Capitol campus and by failing to avoid the irreversible and piecemeal damage to the listed public views.

62. SEPA plays a substantive role in permit decisions in two ways. First, a threshold determination may contain substantive conditions which remove probable, significant environmental impacts which would require preparation of an EIS. Such threshold determinations are called mitigated determinations of nonsignificance or MDNSs. Second, the permitting entity may deny or impose substantive conditions on the underlying permit to serve

SEPA policies, subject to the restrictions of RCW 43.21C.060. This authority is typically called "substantive SEPA".

63. This assignment of error alleges that the land use approval is in error, because it should have denied the proposal under this substantive SEPA.[6] OMC 18.75.040 G states that on appeal, the examiner has "all the powers of the officer from whom the appeal is being taken, insofar as the decision on the particular issue is concerned . . ." Thus, the Hearing Examiner apparently has authority to deny or to impose conditions under substantive SEPA, if warranted.

64. Substantive SEPA authority, however, may only be imposed "to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter." For the reasons set out above, because this proposal makes no change to the height, bulk or profile of the building, it will have no adverse effect on views. Thus, the environmental impacts needed to justify the exercise of this authority are not present. For these reasons, the fourth listed error is not a reason for reversal.

5. The fifth assignment of error: that the land use approval and DNS fail to comply with the public trust doctrine by irreversibly damaging the public views to and from Puget Sound, the Olympics and the state Capitol campus.

65. The heart of the public trust doctrine is well described in the following holdings from Caminiti v. Boyle, 107 Wn.2d 662 (1987):

> ". . . the State's ownership of tidelands and shorelands is not limited to the ordinary incidents of legal title, but is comprised of two distinct aspects.
>
> The first aspect of such state ownership is historically referred to as the jus privatum or private property interest. As owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands. Thus, the state may convey title to tidelands and shorelands in any manner and for any purpose not forbidden by the state or federal constitutions and its grantees take title as absolutely as if the transaction were between private individuals . . .
>
> The second aspect of the state's ownership of tidelands and shorelands is historically referred to as the jus publicum or public authority interest . . . More recently, this jus publicum interest was more particularly expressed by this court in WILBOUR v. GALLAGHER, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), CERT. DENIED, 400 U.S. 878 (1970) as the right
>
> > 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'

[6] If this claim alleges the DNS is flawed for failure to comply with substantive SEPA policies, it must be denied. The validity of a DNS depends on whether the proposal will have probable, significant environmental impacts. As decided above, this proposal has no effect on views.

> The state can no more convey or give away this jus publicum interest than it can "abdicate its police powers in the administration of government and the preservation of the peace . . . Thus it is that the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from TITLE, always remains in the State, and the State holds such dominion in trust for the public. It is this principle which is referred to as the 'public trust doctrine'. "

Caminiti, 107 Wn.2d at 668-670 (footnotes and citations omitted). See also Wilbour v. Gallagher, 77 Wn.2d 366 (1969), State v. Longshore, 141 Wn.2d 414 (2000), and Washington State Geoduck Harvest Assoc. v. DNR, 124 Wn. App. 441 (2004).

66. The Court also stated that the requirements of the public trust doctrine "are fully met by the legislatively drawn controls imposed by the Shoreline Management Act . . ." Caminiti, 107 Wn.2d at 670. Following this holding, the Order on Motions at Ex. 14 held that since it decided that this proposal was within shoreline jurisdiction, the public trust doctrine is followed by complying with the SMA and the local shoreline master program. The Order held also that if this building were deemed to be outside of SMA jurisdiction, then the application of the public trust doctrine to this proposal would need to be decided. As stated above, the conveyance of part of the parking lot has removed the entire proposal from SMA jurisdiction. Thus, the application of the public trust doctrine to this proposal must now be reached.

67. The holdings from Caminiti show that the public trust doctrine protects interests of the public in tidelands and shorelands, including rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. The Order on Motions noted that the beauty of one's surroundings can be an elemental part of recreation on the water and that therefore the public trust doctrine, by its terms, might prevent or control upland construction which destroyed views from tidelands and shorelands which were a demonstrated part of recreational enjoyment on those areas. The Order stated also that since the public's right to recreation on tidelands and shorelands is not affected by the inability to see those areas from upland locations, such as the State Capitol, any public trust interest here at stake based on views would have to be based on views **from** the shorelands of Capitol Lake or the tidelands of Budd Inlet.

68. Any final decision of issues such as these should be made only after briefing of them, which was not done here. However, even if the doctrine is given the broad reading suggested by the paragraph immediately above, it could only play a role in this appeal if the proposal affected the rights it protects. As held above, because this proposal makes no change to the height, bulk or profile of the building, it can have no adverse effect on views. No claim is made that the presence of a hotel in this location will adversely affect tidelands or navigable waters due to traffic, noise or light. Thus, even under the broad reading of the doctrine, this conversion proposal does not affect interests protected by the public trust doctrine. For that reason, the fifth listed error is not a reason for reversal.

6. The sixth assignment of error: that the land use approval and DNS fail to comply with SEPA due to errors and omissions in the environmental checklist.

69. Part D of the Findings lists the ways in which the Appellants argue the environmental checklist is deficient.

70. WAC 197-11-335 requires that agencies make their threshold determinations under SEPA "based upon information reasonably sufficient to evaluate the environmental impact of a proposal . . ." In doing so, the agency must

> "(a) Review the environmental checklist, if used:
>
> (i) Independently evaluating the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist; and
>
> (ii) Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant."

WAC 197-11-330. If the agency concludes that there is insufficient information after reviewing the checklist, it may require the applicant to submit more information, make its own further study, consult with other agencies or take other listed actions. WAC 197-11-335.

71. Turning to the list of deficiencies claimed by Appellants set out in the Findings, Items 1 and 3 of the list correctly state that the checklist failed to give the shoreline designation of the property or to state the project will require a shoreline permit. As set out in the Order on Motions at Ex. 14, the Applicant and Department took the position that the proposal was not subject to the SMA. The Order held the proposal to be subject to the SMA, due to part of the parking lot extending into shoreline jurisdiction. The Applicant then sold that portion of the parking lot. As held above, this removed the proposal from SMA jurisdiction. Thus, the initial omission of this information was the result of a good faith legal position taken by the Applicant. After that position was held incorrect, the Applicant removed all portions of its proposal from shoreline jurisdiction. Under these circumstances, the omission of this information from the checklist was not error.

72. Items 2, 6, 7, 9, and 10 of the list of deficiencies state that the checklist omits information relating to the proximity and extension of Heritage Park, the proximity of the Capitol campus and its listing on historic registers, and the proposal's effect on views and view corridors. Some of these claimed omissions were not required by the environmental checklist in the first place. Question 14 on p. 1 of the checklist asks whether the Applicant knows of any plans by others that may affect the site. The Applicant answered "no". The Appellants claim the Applicant should have disclosed that the City has "designated its property for acquisition" for the extension of Heritage Park. However, the vague statement in the 2010 Parks Plan update, discussed in the Findings, that "the City should explore the concept of a public/private partnership to implement an Isthmus Park project" is hardly a plan to acquire the site. Its omission from the checklist was not error. In Items 6 and 10 the Appellants state that the Applicant should have listed the state Capitol campus as adjacent property that is on various historic registers. In common usage, the Capitol campus is generally the west and east

campuses on top of the bluff. They are hardly "adjacent" to the project site. Further, if their omission was erroneous, the presence of the Capitol and its historic status is so obviously known to City staff as to make any error harmless.

73. More generally, Items 2, 6, 7, 9, and 10 all relate to the Appellants' claim that this proposal will illegally harm views to or from the Capitol. At the heart of this is Item 7, which claims the Applicant erred in not stating that historic views would be obstructed. The heart of Applicant's case, however, is that its proposal can have no effect on views, because it makes no change to the height or bulk of the building. Whether or not ultimately upheld, this is a rational position. SEPA does not require any party to make the other side's case for it by stating material, disputed facts as the other side would have them. The key is that the basic facts of the proposal are set out, which was done in this case. These items do not describe any error.

74. Item 8 states that the checklist should have stated that light or glare from the building would interfere with historic view corridors . However, the only evidence on this issue is Mr. Stamm's testimony that the Staff did consider whether light or glare from the building would adversely affect views and concluded that any effect on views was too speculative and that the proposal made no meaningful changes to light or glare. On this evidence, the checklist was correct in its response or lack of response on this count.

75. Item 4 points out that the Applicant did not attach the geotechnical report it referred to in the checklist. However, the failure to attach a document to which the checklist refers cannot be a basis for reversing a SEPA threshold determination under the WAC provisions above. If the SEPA Official desired to review the report, he could easily have requested it.

76. A more serious matter is the claim in Part 2 (f) of the appeal that the checklist did not disclose the presence of unstable soils in the vicinity as shown by recent earthquakes. In fact, Item 1 (d) of the checklist affirmatively stated that there is no history of unstable soils in the immediate vicinity. Although one may disagree about what is meant by "immediate" vicinity, the Appellants are correct that the history of nearby seismic instability should have been disclosed in the checklist, especially when the proposal is to convert the building to a hotel. However, Mr. Stamm, the City SEPA official who issued the DNS, testified that he inspected the damage to Deschutes Parkway after the 2001 Ash Wednesday earthquake, that he is aware the Isthmus consists of fill, and that he consulted with Mr. Hill, the Building Official, on this issue. No claim was made that this information on the part of Mr. Stamm and Mr. Hill was inadequate to serve as the basis of a DNS on this issue. Thus, the development of information followed the sequence contemplated by WAC 197-11-335, above: when information in the checklist on the issue was inadequate, the Staff developed additional information on it to its satisfaction. In addition, the 2010 building permit application was for a structural retrofit to enable conversion to a hotel. In the absence of evidence to the contrary, I must presume that the permit will only be issued if in conformance with all applicable seismic standards in the pertinent building codes. Even though the Applicant should have included this information in the checklist, the response by the Staff reached compliance with applicable SEPA rules.

77. Item 5 of the deficiencies claimed in Ex. 1 is the failure to list a number of fish and wildlife species found in the vicinity. As found, Mr. Stamm testified that the City's review of nearby species was not based on the checklist, but on the staff's own knowledge of species

known to be near the site. No claim was made that the staff's knowledge in this regard was deficient. This complies with the applicable WAC rules.

78. For these reasons, the environmental checklist does not warrant reversal of the DNS. To the extent this assignment of error is intended to challenge the threshold determination made in the DNS due to the presence of adverse impacts, it is answered by the discussion of the first assignment of error, above.

79. This sixth assignment of error also claims that the Land Use Approval and DNS violate a public trust protecting the view corridor to and from the state Capitol campus. To the extent this relies on the public trust doctrine, it is addressed above. If it relies on another aspect of trust or land use law it must be denied, since no explanation or legal basis for it was given.

7. The seventh assignment of error: that the land use approval and DNS fail to comply with Olympia Ordinances 6692 and 6727, which limit the height of buildings on the property to 35 feet.

80. As set out in Finding 18, above, Ordinance No. 6692 is an interim zoning measure adopted on January 12, 2010, which imposed a maximum building height of 35 feet on the project site. Ordinance No. 6727, effective January 1, 2011 rezoned the area in which the site is located to UW-H, but with a height limit of 35 feet. Thus, the maximum building height when this project vested and at the current time is 35 feet.

81. However, the analysis in Part C of the Conclusions of Law, above, shows that this structure is a nonconforming building or structure under OMC 18.02.180 and that it meets the requirements of OMC 18.37.040 for remodeling nonconforming buildings. Thus, City ordinances allow the building to remain and to be remodeled in the manner proposed, even though it far exceeds the current height limitation.

82. For these reasons, the building's failure to comply with current height limitations does not warrant reversal of the Land Use Approval or DNS.

7. The eighth assignment of error: that the land use approval and DNS fail to comply with the 2010 Parks and Recreation Plan for Olympia.

83. The Order on Motions at Ex. 14 entered summary judgment denying this claimed error.

DECISION

For the reasons discussed above, the Capital Center Building damages and is contrary to the design elements and overall concept of the Wilder and White and Olmsted plans for the state Capitol group. It is inconsistent with the Olympia Comprehensive Plan, especially as

informed by those design elements and would not be allowed today under the current zoning and Comprehensive Plan. The Comprehensive Plan and the design elements of the Wilder and White and Olmsted plans would be well served by removal of the building.

However, as also discussed above, this proposal would make no changes to the height, width or bulk of the building and would not increase light or glare. Further, the law does not allow an otherwise legal conversion to be denied, simply because it would make removal of the building more likely. Thus, this proposal to convert has no effect on views or on the design principles or Comprehensive Plan provisions at issue. For this and the other reasons discussed above, under the law the appeal must be denied and the Land Use Approval and DNS upheld.

The Olmsted and Wilder and White plans combined buildings evoking the classical roots of democracy with the perspective and longer view evoked by the prospect of sea and mountains. The Capital Center Building sets back this inspiration to civic stewardship. Nonetheless, perhaps this decision serves the deeper values evoked by the design, in that it elevates the requirements of law over the invitations of desire.

The Land Use Approval and DNS are upheld, subject to the following additional conditions:

A. The hotel or any other commercial use on the project site shall not use any property within the jurisdiction of the SMA for parking or for any other purpose. This includes, but is not limited to, those portions of Parcels No. 91005201000, 91005700000 or 91005600000 within shoreline jurisdiction. These restrictions shall be embodied in a recorded covenant running with the land covering future hotel or other commercial uses.

B. Any increase in building height is prohibited by the current height limitations and the restrictions on nonconforming uses, discussed above. Further, the analysis of a number of the assignments of error, above, relies on the conclusion that the proposal does not affect views, since it does not increase the height, width or bulk of the building. Therefore, the height, width or bulk of the Capitol Center Building shall not be increased, unless specifically authorized by a change to the zoning ordinance and a subsequent land use approval which addresses consistency with the Wilder and White and Olmsted plans, consistency with the Comprehensive Plan, compliance with the zoning ordinance, consistency with policies and laws governing substantive SEPA, compliance with the public trust doctrine, and whether the SMA is violated by the adverse effect of such increase on views from or to the shoreline.

Finally apart from the actual decision or its conditions, the importance of RCW 90.58.340, noted above, should be emphasized. It requires municipal corporations to review regulations, plans and ordinances relative to lands adjacent to the shorelines to achieve a use policy on them which is consistent with the policy of the SMA. Without that consistency, new structures like this building could conceivably be erected just outside shoreline jurisdiction with just as much harm to shoreline policies as if it were in the shoreline area. In reviewing and

updating the shoreline master program, the City should closely follow RCW 90.58.340 to assure that land use on adjacent lands is consistent with shoreline policies.

Dated this 22nd day of July, 2011.

Thomas R. Bjorgen
Olympia Hearing Examiner

Mailed 7/29/2011

N.L.

City of Olympia | Capital of Washington State
P.O. Box 1967, Olympia, WA 98507-1967

November 1, 2012

Greetings,

Subject: VIEWS ON 5TH – Remand to Hearing Examiner
Case# 10-0140

The enclosed decision of the Olympia Hearings Examiner hereby issued on the above date may be of interest to you. This is a final decision of the City of Olympia.

In general, any appeal of a final land use decision must be filed in court within twenty-one days. See Revised Code of Washington, Chapter 36.70, for more information relating to timeliness of any appeal and filing, service and other legal requirements applicable to such appeal. In particular, see RCW 36.70C.040.

This decision may be subject to expiration if not exercised. For more information regarding possible expiration, or any other aspect of this decision, please contact the City of Olympia, Community Planning & Development Department, at 601-4th Avenue E or at PO Box 1967, Olympia, WA 98507-1967, by phone at 360-753-8314, or by e-mail at cpdinfo@ci.olympia.wa.us.

Sincerely,

DAVID NEMENS
Associate Planner
Community Planning & Development
(360) 753-8062
dnemens@ci.olympia.wa.us

BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

In the Matter of Appeal of Administrative Decision	)	NO. 10-0140
The Views on Fifth Avenue Ltd., Applicant and Petitioner,	)	**DECISION ON REMAND FROM JUDICIAL REVIEW OF HEARING EXAMINER'S DECISION**
Capitol Center LLC, Intervenor and Petitioner,	)	
Daniel J. Evans, et al Appellant and Petitioner,	)	
City of Olympia, Respondent,	)	

Hearing and Record
This matter came before the Hearing Examiner Pro Tem on Monday, October 15, 2012, pursuant to a decision from the Thurston County Superior Court titled *Order Denying Cross Petitioners' Evans, et. al., Land Use Petition and Remanding the Conditions of Granting the Views on Fifth Avenue, Ltd's Land Use Petition to the Hearing Examiner*. The parties appeared through their attorneys of record. The undersigned Hearing Examiner Pro Tem heard the arguments of counsel and has reviewed the full administrative record, including the following:

1. The full administrative record, pages AR 01 through AR 772.

2. The briefings of the parties of record before the Thurston County Superior Court, including:
    a. Opening Brief of Petitioner Evans.
    b. Opening Brief of Petitioner Views.
    c. Opening Brief of Intervenor Capitol Center.
    d. Response Brief of Respondent City of Olympia.
    e. Response Brief of Intervenor Capitol Center.
    f. Response Brief of Petitioner Evans.
    g. Reply Brief of Petitioner Views.
    h. Reply Brief of Intervenor Capitol Center.
    i. Reply Brief of Petitioner Evans.

3. The above-referenced Order by Judge Christine Pomeroy, dated February 27, 2012.

4. The briefings of the parties of record that were submitted on October 1, 2012, and argued at the October 15, 2012, administrative hearing, to wit:

a. Brief on Remand of Appellant Evans.
b. Brief on Remand of Applicant Views on Fifth.
c. Joinder in Brief on Remand of Intervenor Capitol Center.
d. Motion to Strike Brief on Remand of Appellant Evans from Applicant Views.
e. Joinder in Motion to Strike Brief on Remand of Appellant Evans from Intervenor Capitol Center.

Analysis and Decision
After hearing the arguments of the parties and reviewing the above record, the undersigned Hearing Examiner *Pro Tem* makes the following decision.

Analysis
Hearing Examiner Thomas Bjorgen, in his July 22, 2011, Decision, imposed the following two conditions on the City of Olympia's approval of the subject Land Use Approval and SEPA Determination of Nonsignificance (DNS). These conditions are the subject of the Thurston County Superior Court's remand order. To wit:

> A. The hotel or any other commercial use on the project site shall not use any property within the jurisdiction of the SMA for parking or for any other purpose. This includes, but is not limited to, those portions of Parcels 91005201000, 91005700000, or 91005600000 within the shoreline jurisdiction. These restrictions shall be embodied in the recorded covenant running with the land covering future hotel and other commercial uses.
>
> B. Any increase in building height is prohibited by the current height limitations and the restrictions on nonconforming uses, discussed above. Further, the analysis of a number of the assignments of error, above, relies on the conclusion that the proposal does not affect views, since it does not increase the height, width or bulk of the building. Therefore, the height, width or bulk of the Capitol Center Building shall not be increased unless specifically authorized by a change to the zoning ordinance and a subsequent land use approval which addresses consistency with the Wilder and White and Olmstead plans, consistency with the Comprehensive Plan, compliance with the zoning ordinance, consistency with policies and laws governing substantive SEPA, compliance with the public trust doctrine, and whether the SMA is violated by the adverse effect of such increase on views from or to the shoreline.

The Superior Court issued specific instructions for revising the above conditions.

Condition A: It appears the Court felt the breadth of the Hearing Examiner's restrictive covenant went beyond his legal authority because the restriction did not authorize uses that comply with the SMA's requirements. Hearing Examiners commonly use the restrictive covenant as a tool to assure that conditions are either made known to future property purchasers or that conditions are complied with into the future. The Superior Court provided no explanation for why a restrictive covenant, *per se*, would have gone beyond the legal authority of a Hearing Examiner. Additionally, during the hearing there seemed to be a general agreement among counsel of record that the Superior Court did not object to the use of a restrictive covenant *per se*.

Therefore, the undersigned interprets the Superior Court's remand order as instructing the Hearing Examiner to strike the requirement for a recorded covenant insofar as it prohibits the building owner or occupant from using any property lying within the jurisdictional boundary of the SMA outright. The Court instructed the Hearing Examiner to limit the prohibition to those uses that are not in compliance with all applicable SMA requirements. The Court also granted the Hearing Examiner permission, in re-crafting Condition A, to incorporate methods of prohibiting piecemeal development within state shorelines in violation of the SMA.

Condition B: The Court ordered the Hearing Examiner to modify this condition as follows. The building's height, width or bulk may not be increased except in compliance with the land use rules in effect at the time of the submission of a completed application. The phrase "completed application" was to be worded in a way that makes it clear that "completed application" is a term of art implicating vesting as defined in the Olympia Municipal Code. The Superior Court required that the Hearing Examiner modify Condition B to make it clear that the listed elements of compliance are applicable to future changes to The Views' building only to the extent that the same are required by the application of law in effect at the time that completed applications for future changes are filed.

Piecemeal Development under the SMA

The undersigned agrees with the Conclusion of Law Nos. 43 through 58 as written by Hearing Examiner Bjorgen in his July 22, 2011, Decision. There are two distinct issues presented under the SMA.

First, what portions of the project were, are, or could be in the future, within the physical jurisdictional boundaries of the SMA under RCW 90.58.030(d)?

Second, what activities would constitute "development" or "substantial development" and trigger the SMA's permitting requirements under RCW 90.58.030(a) and (e) and RCW 90.58.140, if those activities were done on a project site that was, in full or in part, inside the SMA's jurisdictional boundary?

The undersigned agrees that the legal transfer of the parking areas at issue, combined with testimony from the Applicant that those areas no longer are part of the proposed hotel project, results in there being no portion of the project site that lies within the jurisdictional boundary of the SMA. Therefore, at this time, there are no portions of the project site within the jurisdictional boundaries of the SMA. As discussed below, however, this could change at a future date.

Under the SMA, development includes the "exterior alteration of structures" except for normal maintenance and repair. If the Applicant were to alter the building's exterior in a manner construed as beyond normal maintenance and repair, it would trigger the SMA's permitting requirements if any portion of the project site were within the jurisdictional boundary of the SMA.

It is not completely clear from the record whether changes to the building have been or will be proposed that would trigger the SMA permitting requirement. The Applicant and the City have

stressed, and the Superior Court has accepted, that the development proposal at issue is an "interior remodel" only. It is not clear from the written record, however, that the November 10, 2010, or the December 1, 2010, permit applications limit work to just the building's interior. The November 10, 2010, Commercial Tenant Improvement Permit does not, by its terms, limit project work to the interior. Instead it shows that "structural retrofit" work will be done. In viewing the physical façade of the building as it exists, it does seem likely the Applicant would do exterior work in order to make the building more attractive as a hotel. As noted by the City of Olympia in its Reply Brief to the Superior Court, a sequencing of related permits under the same permit file is not uncommon in remodels of commercial buildings. It was the November 10, 2010, permit application that triggered the requirement for submitting the December 1, 2010, Land Use (site plan) Approval request, which is the next permit in the series of permits required under the Olympia Municipal Code. It is not clear whether external work to the building is authorized under the existing permit or whether additional permitting under the City code would be needed for any exterior work.

Conclusion 52 of the July 22, 2011, Hearing Examiner's Decision recognized the following. Transferring the parking areas that were, in fact, part of the initial permit application until they were transferred away does not eliminate the risk that that applicant or its progeny would pull parking areas from the SMA's jurisdictional boundary back into the project scope at a later date and, thus, thwart the SMA's prohibition against piecemeal development. The undersigned can see how this could occur in the future given the following: (1) ongoing phases of the hotel project would be authorized by the City of Olympia through a series of permits allowing the different phases of the project to occur; (2) there is the potential that the building's exterior would be altered in order to attract hotel customers and that those alterations would, themselves, trigger the SMA's substantial development permit requirements if there were areas of the project site within the SMA's jurisdictional boundaries; (3) not respective of parking not being mandated by City ordinance, the Applicant or its progeny could incorporate areas within the SMA's jurisdictional boundary into the project to support parking needs; and (4) the hotel's foreseeable parking needs could result in a parking development project that would trigger the SMA's substantial development permit requirements.

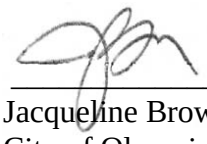
Unlawful piecemeal development could occur if parking areas that lie within the SMA's jurisdictional boundary are excluded from the proposal, this exclusion allows development that otherwise would require a Shoreline Substantial Development permit to proceed with no SMA permit, and then the parking areas from within the SMA's jurisdictional boundaries are used to support the hotel project and, thus, brought back into the project at a later date. The Superior Court recognized the legitimacy of the Hearing Examiner's goal of preventing unlawful piecemeal development under the SMA. The Court found the methods used by the Hearing Examiner to achieve his goals as overly broad because the restriction did not authorize uses that comply with all applicable SMA's requirements. In re-writing Condition A, the undersigned has attempted to balance the need to prohibit unlawful piecemeal development under the SMA with the goal of not being overly restrictive and prohibiting otherwise legal activities.

Decision
The Land Use Approval and DNS are upheld subject to the following conditions:

A. The hotel or any other commercial use on the project site shall not use any property within the jurisdiction of the SMA for parking or for any other purpose unless those uses are in full compliance with all applicable SMA requirements. These restrictions shall be embodied in the recorded covenant running with the land covering future hotel and other commercial uses. If areas within the jurisdictional boundary of the SMA are so used, the subject Land Use Approval and DNS shall be re-opened for administrative review and reconsideration of the project, including any project work done then to date. The administrative review shall include the provisions of the SMA, in particular the SMA's piecemeal development provisions.

B. Any increase in building height is prohibited by the current height limitations and the restrictions on nonconforming uses, discussed in the July 22, 2012, Hearing Examiner Decision. Further, the analysis of a number of the assignments of error relies on the conclusion that the proposal does not affect views, since it does not increase the height, width or bulk of the building. Therefore, the height, width or bulk of the Capitol Center Building shall not be increased or other changes to the building's exterior made except as authorized by the land use rules in effect at the time of the submission of a "completed application," as defined by the Olympia Municipal Code. Additionally, to the extent required by the application of law in effect at the time of a "completed application," no alterations to the building may be made without a land use approval that addresses consistency with any applicable legal provisions such as the Wilder and White and Olmstead plans, the Comprehensive Plan, the zoning ordinance, substantive SEPA, the public trust doctrine, and the SMA provisions regarding adverse effects on views from or to the shoreline.

Dated this date of October 31, 2012.



Jacqueline Brown Miller
City of Olympia Hearing Examiner *Pro Tem*