



February 5, 2018

Greetings:

**Subject: Views on 5th – Land Use Decision
Case #17-2528**

The enclosed decision of the Olympia Hearing 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 (21) days. See Revised Code of Washington, Chapter 36.70C, 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.

Please contact the City of Olympia, Community Planning and Development Department, at 601 4th Avenue East or at PO Box 1967, Olympia, WA 98507-1967, by phone at 360-753-8314, or by email cpdinfo@ci.olympia.wa.us if you have questions.

Sincerely,

Suki Bell-Sullivan
Program Specialist

Enclosure

BEFORE THE CITY OF OLYMPIA HEARING EXAMINER

VIEWS ON FIFTH, LLC,

Applicant.

) HEARING NO. 17-2528
)
)
)
) FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION
APPROVING PROJECT

APPLICANT: Views on Fifth, LLC

REPRESENTATIVES:

Ron Thomas
Thomas Architecture Studio

Heather Burgess
Phillips Burgess, PLLC
724 Columbia Street N.W., Suite 320
Olympia, Washington 98501

SUMMARY OF REQUEST:

(1) A determination that the proposed "live/work" units included in the project area are a permitted use in the UW-H zone; and (2) Approval of the proposed multi-family and commercial complex including the demolition of the onsite single story structure, the reuse of the existing tower (Capitol Center Building), and construction of two new mixed use buildings. The project will result in 140 new residences including live/work units and a mix of ground floor restaurant and retail uses.

LOCATION OF PROPOSAL:

410 5th Avenue S.W., Olympia, Washington.

SUMMARY OF DECISION:

(1) The proposed live/work units are a permitted use in the UW-H zone, and (2) the proposed use is **approved** subject to conditions.

BACKGROUND

The Applicant seeks to reuse the "Capitol Center Building" as apartments and ground floor restaurant, and construct two new buildings for apartments and ground floor commercial.

*Findings of Fact, Conclusions
of Law, and Decision
Approving Project - 1*

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299 N.W. CENTER ST. / P.O. BOX 939
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1 The project site at 410 5th Avenue S.W. is in the middle of the isthmus connecting Downtown
2 Olympia with West Olympia and is arguably the most controversial property in the City of
3 Olympia. The 9-story Capitol Center Building has frequently been derided as the "Mistake on
4 the Lake" and has long been the bane of those who wish to see a sweeping view of Puget Sound
5 from the Capitol grounds, as well as a reverse view from Budd Inlet to the Capitol.

6 The Capitol Center Building was constructed in the 1960's and used as an office building
7 until approximately ten years ago. Since then it has sat empty and has steadily deteriorated,
8 growing increasingly unattractive. The remaining project site, consisting of most of the block, is
9 also largely unused. The result is a block of unused, unattractive buildings in a key area of the
10 isthmus linking West Olympia and Downtown. A loud and long public war has been waged over
11 the long term use of the property between those who have long wished to see this building
12 removed and views to and from the Capitol restored, and those who see benefit to restoring the
13 Capitol Center Building as part of attempts to revitalize the isthmus area and Downtown.

14 **A. THE PREVIOUS "CAPITOL CENTER PROJECT"**

15 The current project is referred to as the "Views on Fifth". A relatively similar project was
16 proposed in 2010. To distinguish that earlier project from the current one the earlier project will
17 be referred to as the "Capitol Center Project".

18 A discussion of the Capitol Center Project is an important starting point for any review of
19 the current Views on Fifth project. The 2010 Capitol Center Project initially incorporated the
20 entire block between Sylvester and Simmons and 4th and 5th Avenues, including a parking lot in
21 the northeast portion of the block. The Owner/Applicant, Views on Fifth, Ltd. (which is not the
22 current Owner/Applicant, Views on Fifth, LLC) proposed to convert the Capitol Center Building
23 to a hotel. The project would have updated the exterior to the existing building but not increase
24 its height, width or bulk. On February 16, 2011, City Staff gave administrative approval of the
25

1 proposed use and, as the SEPA responsible official, issued a SEPA Determination of
2 Nonsignificance (DNS).

3 A large group of individuals and organizations, including all of the then living former
4 State Governors, former Secretary of State, Ralph Munro, and various other individuals and
5 organizations, appealed the project approval and the DNS on a number of grounds. The most
6 important being:

- 7 • That the continued existence of the Capitol Center Building violated the
8 initial design of the Capitol Campus by Wilder and White;
- 9 • That it violated the Olmsted Brothers landscape plans for the Capitol;
- 10 • That it violated the City's Comprehensive Plan;
- 11 • That development was in violation of the Shoreline Management Act
12 (SMA);
- 13 • That continued existence of the Capitol Center Building violated the
14 Public Trust Doctrine;
- 15 • That the remodeling of the nine-story building violated the City's 35-foot
16 height limit on buildings located in the isthmus; and
- 17 • That the project was inconsistent with the City's Park and Recreation Plan.

18 The Appellants' challenge to the project under the SMA was based upon a portion of the
19 parking lot located in the northeast corner of the site being within 200 feet of the Ordinary High
20 Water Mark (OHWM) of Budd Inlet and therefore within SMA jurisdiction. This led to a
21 conclusion that the entire project would therefore be under SMA regulation. The then owner
22 responded by selling the northeast parking lot to a third party thereby eliminating any property
23 within SMA jurisdiction.

24 The Appellants' challenges came before then City Hearing Examiner, Thomas Bjorgen,
25 ("Mr. Bjorgen"), Case No. 10-0140. On July 22, 2011, Mr. Bjorgen issued his written decision

1 ("Mr. Bjorgen's Decision"). Mr. Bjorgen's Decision provides an excellent history of the Wilder
2 and White Capitol Campus Design; the Olmsted Brothers' Landscape Design; and the
3 incorporation of these designs into the City's Comprehensive Plan. Mr. Bjorgen concludes that
4 while the City's Comprehensive Plan seeks to protect views to and from the Capitol and the
5 Sound, it does not restrain projects which do not increase the height or bulk of existing buildings
6 already impairing these views. Mr. Bjorgen thus concluded that the project was consistent with
7 the Comprehensive Plan and, for similar reasons, did not violate the Public Trust Doctrine. Mr.
8 Bjorgen also concluded that the project was no longer under SMA jurisdiction since no part of
9 the revised project site was within 200 feet of the OHWM. Mr. Bjorgen dismissed all of the
10 Appellants' other challenges. He did, however, impose additional conditions on the project's
11 approval to ensure that it did not later attempt to incorporate SMA-regulated properties into the
12 project. (Mr. Bjorgen's Decision will be reviewed in greater detail in the Analysis Section.)

13 Both the Owner/Applicant and the Appellants appealed Mr. Bjorgen's Decision to the
14 Thurston County Superior Court. The Appellants challenged Mr. Bjorgen's Decision to uphold
15 the permit and the DNS, while the Owner/Applicant challenged Mr. Bjorgen's Decision to
16 impose additional conditions on the use of adjoining properties. On February 27, 2012, Superior
17 Court Judge Christine Pomeroy denied the Appellants' appeal but granted the Owner/Applicant's
18 appeal. Judge Pomeroy confirmed that Mr. Bjorgen's Decision properly analyzed the project's
19 conformity with the City's Comprehensive Plan and other plans; that the project did not violate
20 the Public Trust Doctrine; that it did not invoke SMA jurisdiction; and that all other challenges
21 were unfounded. In granting the Owner/Applicant's appeal Judge Pomeroy determined that Mr.
22 Bjorgen had imposed too great of limits on the use of adjoining, unrelated properties. Judge
23 Pomeroy remanded the case to the City's Hearing Examiner for refinement of any conditions
24 imposed on the use of nearby properties.

1 The matter returned to Hearing Examiner Pro Tem Jacqueline Brown-Miller who, on
2 October 31, 2012, revised Mr. Bjorgen's Decision in an attempt to improve upon his language
3 restricting the use of adjoining properties. Mr. Brown-Miller's Decision was also appealed by
4 the Applicant to the Thurston County Superior Court for similar reasons to the Applicant's first
5 appeal. On May 3, 2013, Judge Christine Schaller granted this second appeal and ruled that Mr.
6 Brown-Miller's revisions were, like Mr. Bjorgen's, excessive in their scope. The matter was once
7 again remanded to the Hearing Examiner by which time I had been appointed as the City's new
8 Hearing Examiner. In July 2013, I issued an Decision modifying Mr. Bjorgen's condition to read
9 as follows:

10 "The hotel or any commercial use on the project site shall be prohibited from
11 using the adjoining property lot currently owned by 401 Parking, LLC and legally
12 described as Lots 1 and 2 of Block 80, Olympia Tidelands. Further, the hotel or
13 any commercial use on the project site shall not use any property within the
14 Shoreline jurisdiction, unless the owner of the property for the proposed use has
15 complied with all applicable permitting requirements of the Shoreline
16 Management Act."

17 My revision to Mr. Bjorgen's Decision was not appealed.

18 **B. THE CURRENT PROPOSAL**

19 The current Views on Fifth Project is similar to the Capitol Center Project in many
20 respects. Like the earlier Capitol Center Project, the current proposal calls for the reuse of the
21 existing Capitol Center Building but would instead convert it to upper floor apartments and a
22 ground floor restaurant. And like the earlier project, the current proposal does not call for any
23 increase in the height, width or bulk of the existing building, and may actually reduce its height
24 by several feet. More specifically:

25 1. The Capitol Center Building would be given a new exterior appearance and its
second through ninth stories would be converted to apartments and its ground floor would
become a restaurant.

1 2. The Capitol Center Annex Building would be demolished.

2 3. The remainder of the project site would be used to construct two new buildings
3 referred to as the "Southwest Building", comprised entirely of residential units, and the
4 "Northwest Building", comprised of a mix of ground floor live/work units and upper story
5 apartments.

6 4. A "Woonerf" (a pedestrian-oriented alley) would be established along the north
7 side of the Capitol Center Building and continued westward between the Southwest and
8 Northwest Buildings until reaching Simmons Street.

9 5. An automated parking structure would be located in the Northwest Building.

10 6. The height of the Northwest and Southwest Buildings would be limited by the 35-
11 foot height restriction imposed in the isthmus area.

12 7. The project would result in 140 new residences along with a mix of ground floor
13 restaurant and commercial spaces.

14 **ISSUES BEFORE THE HEARING EXAMINER**

15 The matter comes before the Hearing Examiner for three reasons:

16 1. A group of individuals and organizations very similar the Appellants in the
17 Capitol Center Project, including all living former governors, the former Secretary of State,
18 Ralph Munro, and various other individuals and organizations, have appealed the SEPA DNS
19 issued by City Staff.

20 2. The proposed use of the new Northwest Building would include "live/work units"
21 allowing commercial activities in the front of each unit and living quarters to the rear. Live/work
22 units are not expressly recognized in the list of permitted uses within the Urban Waterfront-
23 Height (UW-H) zone. City Staff seeks a ruling from the Hearing Examiner pursuant to OMC
24 18.02.080(B) that the proposed live/work units are consistent with other permitted uses in the
25 UW-H zone.

*Findings of Fact, Conclusions
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3. City Staff has deferred to the Hearing Examiner for a final ruling on the application as allowed under OMC 18.60.080(C).

The first of these issues involving an appeal of the SEPA DNS has been addressed by separate Order. By Order dated January 25, 2018, the appeal of the SEPA DNS was denied largely under the Doctrine of Res Judicata, that is, that the issues on appeal were identical to those raised in the earlier Capitol Center Project and had been fully adjudicated. The remaining two issues are addressed in this Decision.

STAFF REVIEW

The history of the Project's review is found in the Staff Report (Exhibit 1) prepared by Nicole Floyd, Senior Planner. The current application was submitted on June 14, 2017. The site was posted on June 21, 2017, in accordance with OMC 18.78.040(C). This included notice of a neighborhood meeting and a Design Review Board Meeting. The site was reposted July 11, 2017, to clarify the public comment period. A neighborhood meeting was held on July 12, 2017, to inform the neighborhood of the proposed project. A summary of that meeting is contained in Exhibit 3. A Design Review Board Meeting was then held on August 10, 2017. The Design Review Board recommends approval of the concept design provided specific conditions are met (Exhibit 7). A second, more detailed review of the project design will be conducted by the Design Review Board prior to issuance of a building permit.

Following approval by the Design Review Board, City Staff undertook a "substantive review" and proposed a revised set of conditions for project approval including those earlier suggested by the Design Review Board, all of which are contained in Exhibit 6. These recommendations prompted the Applicant to submit a revised set of application materials on October 11, 2017. Following the receipt of these materials the City Site Plan Review Committee

1 (SPRC) issued its SEPA Determination of Nonsignificance (DNS) and recommended conditional
2 project approval to the Hearing Examiner.

3 City Staff has received substantial public comment throughout the review process as well
4 as in response to the SEPA DNS. The majority of public comments oppose the project although
5 there is a significant minority in support. Public comment continued to be received before,
6 during and after the public hearing before the Hearing Examiner with expressions of opposition
7 remaining in the majority.

8 To the extent that this substantial public comment can be quickly summarized, those in
9 opposition are primarily concerned with the lost opportunity to remove the Capitol Center
10 Building from the isthmus and open the view between the Capitol and the Sound as long
11 envisioned in the Capitol's design, and to expand Heritage Park further north to 4th Avenue.
12 Opponents secondarily voice concerns about the potential liquifaction of the site's soils in the
13 event of a major earthquake; continued rise in sea levels and flooding and their impacts to the
14 site; potential adverse impacts to traffic and regional transportation; and concerns that the project
15 will not provide needed low income housing.

16 Supporters of the project can arguably be divided into two groups: (1) individuals and
17 organizations, such as the Thurston County EDC and the Downtown Merchants Association,
18 who believe that the project will revitalize a blighted area and will increase activity and the
19 density of development in downtown; and (2) other individuals, including many local planners,
20 who believe that the project will help fulfill City and County Planning goals to increase the
21 number of residential units in the downtown; create residential units which allow for getting to
22 work without the use of vehicles; and increase housing units along major transportation routes
23 for more effective public transportation.

24 These public comments will be discussed more fully in the later Analysis.
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PUBLIC HEARING

The public hearing commenced at 6:30 p.m. on Tuesday, January 9, 2018. The hearing was relocated from the City Council Chambers to the Olympia Center in anticipation of a large audience. Several hundred individuals were present. The Applicant was represented by the project's architect, Ron Thomas, and its attorney, Heather Burgess. The City appeared through Nicole Floyd, Senior Planner, as well as several other City Staff, and was represented by special counsel, Dale Kamerrer. Testimony was received from the City through Ms. Floyd and later through other staff. Testimony from the Applicant was received from Mr. Thomas, project architect, and from Michael Szramek, project engineer. A verbatim recording was made of the public hearing and all testimony was taken under oath. Documents considered at the time of the hearing were the City Staff Report including all attachments, as well as public comment received before and during the hearing. Many additional documents were received after the hearing. A full list of exhibits is attached.

Ms. Floyd provided a history of this project and summarized the findings and recommendations found in the Staff Report. Ms. Floyd confirmed that City Staff recommends approval of the project subject to the many conditions found at the conclusion of the Staff Report. Following Ms. Floyd's testimony Mr. Thomas and Mr. Szramek spoke on behalf of the Applicant and addressed many of the concerns expressed in public comments. Following their testimony the hearing was opened to public testimony. Several dozen individuals testified while many others presented written testimony. The hearing continued for five hours and concluded at approximately 12:30 a.m. Out of concerns that the length of the hearing may have prevented some individuals from testifying, the public was allowed until noon on Friday, January 12, 2018, to submit written testimony. A substantial amount of additional written testimony was received during the week. All together more than 100 citizens have testified orally or in writing. City

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1 Staff responded to public comment by a written supplemental statement (Exhibits 44 and 46),
2 while the Applicant offered its own responses (Exhibits 28, 29, 31 and 47). The Applicant
3 submitted its final written response to public comment to the City on Friday, January 19, 2018,
4 received by the Hearing Examiner on Monday, January 22, 2018, thus bringing the hearing to a
5 close and commencing the 14-day period for the Hearing Examiner's Decision.

6 FINDINGS AND ANALYSIS

7 As earlier noted the remaining issues before the Hearing Examiner are: (1) whether the
8 proposed "live/work" units are a permitted use in the UW-H zoning district; and (2) whether the
9 project has satisfied all requirements for approval.

10 1. Whether "live/work" units are a permitted use in the UW-H zoning district.

11 The project proposes to convert the existing Capitol Center Building into apartment units
12 on the second through ninth floors and a restaurant on the ground floor. Two new buildings, the
13 Northwest Building and the Southwest Building, would be added to the project site. The
14 Southwest Building would be comprised entirely of residential units. The Northwest Building's
15 ground floor units would be "live/work" units and its upper story units would be apartments.
16 The Northwest Building would also house the automated parking garage.

17 With the exception of the live/work units all other proposed uses are expressly permitted
18 in the UW-H zoning district. The zone permits apartment units; ground floor restaurant,
19 commercial and retail; and parking. OMC 18.06.020, Table 6.01. But live/work units are not a
20 listed use. Ms. Floyd believes that this may simply have been an oversight. Pursuant to OMC
21 18.06.040(B):

22 "Land uses which are not listed as permitted or conditional uses are prohibited
23 unless authorized by the Director of Community Planning & Development (or the
24 Hearing Examiner on appeal) consistent with Section 18.02.080, interpretations."
25

1 OMC 18.02.080(B) provides:

2 "Classification of Use. Recognizing that there may be uses not specifically
3 mentioned in this title, either because of advancing technology or any other
4 reason, the Director may permit or condition such use if it is clearly evident that
5 the use is in conformity with the designated principal uses of the district in which
6 it is to be located. When there is doubt as to the proper classification of a use, the
7 Director may refer the matter to the Hearing Examiner who shall rule on the
8 matter."

9 The purpose of the UW-H zoning district is found at OMC 18.06.020(14):

10 "This district is intended to:

11 (a) Provide for a neighborhood of residential housing with the option
12 of limited retail/commercial/office or other uses able to locate in a street edge
13 storefront configuration.

14 (b) Help meet downtown housing and sustainability density goals,
15 through the use of land for housing in a location, and at a density, that makes the
16 use of a car a choice and not a necessity.

17 (c) Contribute to downtown vitality.

18 (d) Result in well-designed buildings on continuous urban street
19 edges.

20 (e) Increase residence surveillance and all day use of public spaces to
21 increase safety and decrease vandalism or other security problems.

22 (f) Help the City achieve land use, transportation, environment, and
23 housing goals."

24 Expressly permitted uses in the UW-H zoning district include: ground floor restaurant;
25 recreation and cultural uses; retail and services; apartments; apartments above ground floor;
mixed use developments; co-housing; quarters for night watch person/caretaker; and
townhouses.

The "live/work" concept is not mentioned in the Development Regulations but it is
addressed in the City's Building Code. Olympia has adopted the International Building Code
(IBC). Chapter 16.04 OMC. IBC Chapter 2, Section 202, defines "live/work" units as "a
dwelling unit or sleeping unit in which a significant portion of the space includes a

1 nonresidential use that is operated by the tenant." IBC Chapter 4, Section 419 imposes the
2 following conditions on live/work units:

- 3 1. The live/work unit is permitted to be not greater than 3,000 square feet in
4 area;
- 5 2. The nonresidential area is permitted to be not more than 60% of the area
6 of each live/work unit;
- 7 3. The nonresidential area function shall be limited to the first or main floor
8 only of the live/work unit; and
- 9 4. No more than five nonresidential workers or employees are allowed to
10 occupy the nonresidential area at any one time.

11 The proposed live/work units would include ground floor storefront commercial use with
12 residential use to the rear or above. (Testimony of Floyd)

13 Ground floor commercial and retail activities are widely permitted in the district and all
14 forms of apartments are permitted as well. The live/work unit concept is consistent with all of
15 the designated principal purposes identified in OMC 18.06.020(14). I have examined the list of
16 permitted uses in the UW-H zoning district, and compared that list to the purposes of the district
17 as found in OMC 18.06.020, and conclude that the proposed live/work units are clearly
18 consistent with the designated principal uses of the UW-H district.

19 2. Has the project satisfied all requirements for approval.

20 The City Staff Report, commencing at page 8, analyzes the project's consistency with the
21 City's Comprehensive Plan and its compliance with the City's Development Regulations. City
22 Staff concludes that, subject to the conditions imposed, the project is consistent with the
23 Comprehensive Plan and is in compliance with Development Regulations. Staff recommends its
24 approval subject to the recommended conditions. As will be more fully explained in this
25 analysis, I concur with City Staff that the project meets all requirements for approval. I will
attempt to analyze the project in approximately the same order as in the Staff Report.

1 A. Consistency with the Comprehensive Plan. It is important to begin any
2 review of the project's consistency with the Comprehensive Plan by returning to Mr. Bjorgen's
3 earlier examination of this same issue when reviewing the Capitol Center Project. Mr. Bjorgen's
4 Decision begins with a detailed discussion of the Wilder and White Capitol Design, and the
5 Olmsted Brothers' Landscaping Design, and their relation to the City's then Comprehensive Plan.
6 Mr. Bjorgen finds that: "In views from the Capitol grounds, the Capitol Center Building intrudes
7 into this imagination like an errant thumb to a photo of Mt. Rainier. In any reasoned view of
8 these circumstances, this building is contrary to and inconsistent with the design elements and
9 overall concept of the Wilder and White and Olmsted plans for the State Capitol group." Mr.
10 Bjorgen also finds that the design principles of both the Olmsted Brothers and Wilder and White
11 are acknowledged by the State Master Plan for the Capitol of the State of Washington. But he
12 concludes that neither the Wilder and White/Olmsted principles or the Master Plan for the State
13 of Washington are expressly adopted by or incorporated into the City's Comprehensive Plan.

14 Nonetheless, based upon various Goals and Policies in the Comprehensive Plan
15 Mr. Bjorgen goes on to conclude that the Wilder and White and Olmsted design principles have
16 *indirectly* been incorporated into the City's Comprehensive Plan. He adds that the
17 Comprehensive Plan is unusually direct in its language and that it calls for "protecting" the views
18 "to the greatest extent practical." Mr. Bjorgen concludes by declaring that the Capitol Center
19 Building is inconsistent with the City's Comprehensive Plan.

20 But Mr. Bjorgen then finds that nothing about the proposed Capitol Center Project
21 "would increase the height, width or bulk of the building to any degree . . . thus, this proposal
22 will have no effect on any of the views protected by the Comprehensive Plan. A proposal
23 having no effect on views cannot be denied because of its effect on views."
24
25

1 To summarize all of the above, Mr. Bjorgen concludes that while the City's then
2 Comprehensive Plan had indirectly incorporated the Wilder and White and Olmsted design
3 plans, and while the Plan protected views of the Capitol, it did not prohibit the reuse of buildings
4 if it did not worsen existing view impacts. Mr. Bjorgen's conclusions were affirmed on appeal
5 by Judge Christine Pomeroy.

6 The City updated its Comprehensive Plan in 2014 after the Capitol Center Project
7 was concluded. As the current project is guided by this new Comprehensive Plan, blind reliance
8 on Mr. Bjorgen's earlier analysis would therefore be inappropriate. Nonetheless, the general
9 principles announced by Mr. Bjorgen and affirmed by Judge Pomeroy remain effective today *if*
10 the current Comprehensive Plan does not speak in different language than the earlier Plan.

11 Policy LU 2.2 of the previous Comprehensive Plan was to "protect, to the greatest
12 extent practical, scenic views of the Capitol Dome, Budd Inlet, Mt. Rainier, the Black Hills,
13 Capitol Lake, and the Olympic Mountains from designated viewing points and corridors." By
14 comparison, the new Comprehensive Plan addresses the same policy at PL 3.3 and PL 18.9
15 which read:

16 "PL 3.3. Protect historic vistas from the Capitol Campus to Budd Inlet
17 and the Olympic Mountains and from Budd Inlet to the Capitol Group."

18 "PL 18.9. Limit building heights to accentuate, and retain selected public
19 views of, the Capitol Dome."

20 Like the former Comprehensive Plan, the current Plan recognizes the need to
21 protect important existing vistas by limiting future construction, but does not speak to "restoring"
22 views, or of "removing" impediments to historic views. Stated differently, while the current
23 Comprehensive Plan uses slightly different language its goals and policies are the same as found
24 in the earlier Plan.

1 It is important to add that the current Comprehensive Plan was enacted soon after
2 Mr. Bjorgen's and Judge Pomeroy's interpretations of the earlier Plan. The City Council would
3 have been well aware of these interpretations and yet did not impose any stronger language in the
4 new Comprehensive Plan than what was found in the earlier version.

5 To summarize, the conclusion reached by Mr. Bjorgen and affirmed by Judge
6 Pomeroy is unaffected by the enactment of a more recent Comprehensive Plan. The current Plan
7 seeks to protect existing views. It does not prohibit projects which do not worsen existing
8 impediments to these views. Just as with the earlier Capitol Center Project, the Views on Fifth
9 does not increase the height, width or bulk of the Capitol Center Building and therefore does not
10 impair existing views. The project is therefore consistent with the policies found at PL 3.3 and
11 PL 18.9.

12 I concur with City Staff that the project is also consistent with various other goals
13 and policies of the current Comprehensive Plan. The project is consistent with the Land Use and
14 Urban Design Goals GL 1, GL 12, GL 13, GL 16, and GL 17, along with Policies, PL 1.3, PL
15 12.5, PL 12.9, PL 13.3, PL 13.7, PL 16.3, and PL 17.3. The project is also consistent with
16 Traffic Related Goals and Policies including Goals GT 14, GT 16, GT 17, GT 25, and GT 26,
17 along with supporting Policies PT 14.1, PT 16.3, PT 17.2, and PT 17.5. The project is also
18 consistent with the Economic Goals GE 1, GE 3, GE 11, and supporting policies PE 1.1 and PE
19 3.1.

20 Project opponents have argued that the project is inconsistent with the Parks, Arts
21 and Recreation Plan as it would prevent the expansion of Heritage Park into the project site. But
22 as Staff explains, while the 2016 Parks, Arts and Recreation Plan encourages the public
23 acquisition of isthmus properties it does not deny development of private property that has not
24 been purchased for public use. The project is therefore not inconsistent (i.e. is consistent) with
25 the 2016 Park's Plan.

*Findings of Fact, Conclusions
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1 In addition to evaluating the project's consistency with the above stated Goals and
2 Policies, the Staff Report provides additional analysis of the project's overall consistency with
3 the Comprehensive Plan. The Hearing Examiner has considered the Staff's proposed findings at
4 pages 8 through 12 and incorporates them herein by reference. These include:

5 • The Plan envisions one quarter of the City's population growth, or 5,000
6 new residents, to be housed in the downtown area, and promotes mixed use and multi-family
7 development in the downtown core to provide necessary residential units.

8 • The future Land Use Map designates the project site within an area of
9 "residential mixed use." Development within this land use designation is encouraged to provide
10 opportunities to live close to work, shopping and services and envisions high density multi-
11 family housing and multi-story structures combined with other uses.

12 • Higher density, multi-use structures will add needed density to the
13 downtown core, thus contributing to the vitality of downtown.

14 • The current Plan envisions greater focus on higher residential densities
15 downtown and along the City's Urban Corridors. The project is located between 4th and 5th
16 Avenues, both of which are designated as Urban Corridors and are also designated as Strategy
17 Corridors in the Transportation 2030 Plan.

18 • The Comprehensive Plan stresses greater walking, biking and public
19 transit options. 4th and 5th Avenues are designated as "first priority" bus corridors as streets
20 with high quality transit. The project will further improve density along this important corridor.
21 In addition, the project will and provide an important bike lane identified in the 2009 Bicycle
22 Master Plan.

23 • The current Plan identifies the area surrounding the project as "blighted".
24 The project will eliminate this blight and provide needed development to this area of downtown.

1 To summarize all of the above, the project advances a long list of Goals and
2 Policies found in the current Comprehensive Plan and, at the same time, is not inconsistent with
3 other Goals and Policies which encourage the protection of existing views. In total, the project is
4 consistent with the City's current Comprehensive Plan.

5 B. Compliance with Development Regulations.

6 1. Floor Area Ration (FAR). OMC 18.06.060(hh) requires that in the UW-H
7 zoning district up to a maximum of 1 FAR (Floor Area Ratio) can be made up of allowed uses
8 other than residential. The Staff Report, at page 13, finds that the project will satisfy this
9 required ratio even if the live/work unit are characterized as commercial. Ms. Floyd provided
10 further confirmation of this in her testimony. The requirements of OMC 18.06.060(hh) have
11 therefore be met.

12 2. Setbacks/Overhangs. The UW-H zoning district anticipates high density
13 development and therefore does not provide standards for building setbacks, building coverage
14 or impervious surface coverage.

15 The initial design of the project called for upper stories of the Northwest Building
16 to project eastward over the boundary line with the adjoining parking lot, and southward over the
17 alley right of way. City Staff has demanded that these projections be removed and the Applicant
18 has complied.

19 3. Height Limits for New Buildings. OMC 18.06.080, Table 6.02, imposes a
20 maximum building height of 35 feet for all new structures. This height limit can be exceeded for
21 certain roof structures including elevator housings, stairways, etc. OMC 18.06.100(a). The
22 earlier design of the Northwest and Southwest Buildings proposed some clearstory windows
23 which exceeded the allowed exception. During the public hearing the Applicant announced that
24 the design was being revised to remove the clearstory windows to ensure that the new structures
25

1 comply with the height limit for the site. With these modifications the Northwest and Southwest
2 Buildings are in compliance with the site's height limits.

3 4. Existing Structure Height. The Capitol Center Building has an
4 approximate height of 100 feet. Its height is clearly in conflict with the 35-foot maximum height
5 limit discussed above. The building's violation of maximum height limits has caused many
6 individuals to demand that the project be denied. The City responds that the existing Capitol
7 Center Building is a "nonconforming building" as opposed to a "nonconforming use", and that as
8 a nonconforming building it "may be enlarged or remodeled if such alterations do not contribute
9 to further nonconformity". OMC 18.37.040(a).

10 The project does not propose to increase the height, width or bulk of the Capitol
11 Center Building in a manner which would increase its nonconformity. Modifications to the
12 mechanical equipment on the rooftop could *reduce* its height by nearly 14 feet, as encouraged by
13 OMC 18.37.040(a):

14 "To the extent practical and feasible, any such alterations shall bring the
15 building structure into closer conformance with the provisions of this
16 title."

17 Pursuant to OMC 18.37.040, the reuse of the Capitol Center Building, without
18 increase in its height, bulk or width, and with a possible reduction in its height, is permitted.

19 5. Landscaping. The project's landscaping must satisfy the requirements of
20 Chapter 18.36 OMC. The Applicant has submitted a Landscaping Plan (Exhibit 9) which
21 proposes an "Alternate Landscaping Plan" allowing for reduced depth of perimeter landscaping
22 along the north side of the woonerf. City Staff has reviewed the Applicant's proposed Alternate
23 Landscaping Plan and finds that it adequately demonstrates that existing development will not
24 allow for five feet of vegetation between the project and the adjacent parking lot. OMC
25 18.36.160 allows perimeter landscaping strips to be averaged provided that the minimum width

1 is not less than fifty percent. The Applicant's proposed Alternate Landscaping Plan provides for
2 landscaping at a depth of at least 2.5 feet and is therefore in compliance with this requirement.
3 City Staff concludes that the Landscaping Plan "shows that the project design can adequately
4 provide landscaping as required by code. A more detailed review will be conducted with the
5 construction permits where specific plant types, locations, soil, fencing, and installation methods
6 will be reviewed. . . . The exact type of screening along the property line has not yet been
7 determined but will be resolved through the building permit process."

8 6. Vehicular Parking. The automated parking system proposed for the
9 Northwest Building will provide 136 parking spaces. Site plans also include 3 surface parking
10 spaces along the Woonerf. This results in a total of 139 project-related parking spaces.

11 The Staff Report at page 15 calculates that the required number of parking spaces
12 for the project is 18. During the public hearing Ms. Floyd testified that the actual number of
13 required parking spaces would be 23. Following the public hearing City Staff corrected both of
14 these numbers and explained that the actual required number of parking spaces is 17 as is set
15 forth in Exhibit 46. This number includes 11 required parking spaces for the commercial area
16 within the live/work units and 6 parking spaces for the commercial areas in the Capitol Center
17 Building. All other aspects of the project are exempt from vehicular parking requirements. The
18 project therefore provides far greater parking spaces than required.

19 7. Vehicle Parking Design Standards. The three parking stalls within the
20 Woonerf and the three loading bays in the parking structure will be accessible to the public.
21 These 6 publicly accessible parking spaces must therefore comply with the dimensional size
22 requirements of OMC 18.38.220. Staff finds that the dimensions of these public parking stalls as
23 shown on the site plans meet or exceed the code requirements with the only exception being that
24
25

1 the designs do not show an 8-foot access aisle for van assessible stalls. Staff has conditioned
2 project approval on the inclusion of necessary access aisles in the final construction permit plans.

3 8 Automated Garage Loading. The proposed automated parking garage is
4 the first of its kind in the Olympia area and the parking lot requirements in the City's
5 Development Regulations provide little guidance.

6 The automated garage operates by using machinery to stack and store vehicles
7 and then retrieve them upon request. The Parking Operations Plan (Exhibit 11) explains the
8 parking process and the need for queueing of vehicles. City Staff is concerned about the
9 effective use of the parking system and, in the absence of clear direction in the City's Parking
10 Regulations, has proposed its own set of conditions to ensure that parking queues do not block
11 traffic back through the Woonerf and into the street, and that wait times for car recovery is
12 minimized. City Staff has therefore conditioned project approval upon the implementation of
13 these additional requirements:

- 14 • The use of parking attendants during high volume hours.
- 15 • Clear designation of the queueing area.
- 16 • Clearly marked pedestrian walkways.
- 17 • Designated use of the Woonerf parking spaces for queueing during peak
18 hours.

19 The Applicant does not object to these conditions.

20 9. Bicycle Parking. Both long term and short term bicycle parking is
21 addressed at page 17 of the Staff Report. Staff finds that the project will require a total of 21
22 short term biking spaces and 81 long term spaces. These calculations are slightly different than
23 the Applicants and Staff has recommended that the Applicant revise its calculations to be in
24 accordance with the City's.

1 The location of these spaces as shown on the plans is found to be generally
2 consistent with the code except that some spaces have been positioned within right-of-ways or
3 public areas. This will require minor modifications to the plan to correct these deficiencies. City
4 Staff has conditioned the project approval upon the necessary relocation of these spaces and
5 upon proper signage as required by OMC 18.38.220(c)(2).

6 10. Important Habitat Species. OMC 18.32.325 requires an Important Habitat
7 and Species Report if endangered and threatened species are located within 1,000 feet of the
8 project. The project is within 1,000 feet of Budd Inlet and Capitol Lake, both of which are home
9 to endangered and threatened species. The City can waive the requirement of the report when
10 consultation with WDFW indicates that such a plan is unnecessary. WDFW submitted a letter
11 (Exhibit 22) stating that the project should be exempt from the reporting requirements due to the
12 existing developed nature of the site and surrounding properties as well as a lack of connectivity
13 to the important habitat areas. City Staff concurs with the assessment by WDFW and has waived
14 the requirement for an Important Habitat and Species Report.

15 11 Pedestrian Streets. The project is located between 4th and 5th Avenues.
16 4th Avenue is designated as an "A" Street in the Pedestrian Street Overlay District, while 5th
17 Avenue is designated as "B" Street. The project is located within the Pedestrian Street Overlay
18 District and therefore its design standards must be satisfied to ensure an aesthetically pleasing
19 streetscape.

20 Within the Overlay District "A" Streets are required to locate buildings at the
21 street edge, establish a minimum street wall height of 16 feet, provide awnings, marquees, and
22 canopies, eliminate parking between the building and the street frontage, and include retail
23 elements directly facing the street. Both "A" and "B" Streets must meet blank wall limitations
24 and include primary building entries at the street level.

1 The Staff Report, at page 18, finds that the project meets these "A" Street
2 standards on both 4th and 5th Avenues. In addition, the project's north/south pedestrian
3 walkway, east/west Woonerf and plaza at the corner of 5th and Sylvester further enhance the
4 pedestrian environment. City Staff concludes that the project exceeds all requirements of the
5 Pedestrian Street Overlay District.

6 12. Scenic Vista Overlay. A great deal of public comment has been devoted
7 to the impairment of views from the Capitol Grounds to Puget Sound, and from the Sound to the
8 Capitol, as a result of the Capitol Center Building. The issue was discussed earlier in this
9 Decision in reference to the City's Comprehensive Plan, resulting in the conclusion that the reuse
10 of the Capitol Center Building is consistent with the Plan.

11 This issue arises again under the City's Development Regulations. OMC
12 18.110.060 requires:

13 "In order to protect the existing outstanding scenic views which significant
14 numbers of the general public have from public rights of way, applicants
15 for development must consider the impact their proposal will have on
16 views of Mt. Rainier, the Olympic Mountains, Budd Inlet, the Black Hills,
17 the Capitol Building, and Capitol Lake or its surrounding hillsides. All
18 development must preserve a reasonable portion of such territorial and
19 immediate views of these features for significant numbers of people from
20 public rights of way, and shall provide lookouts, viewpoints, or view
21 corridors so that visual access to existing outstanding scenic vistas is
22 maintained."
23 Refer to the Scenic Vista Overlay Zoning Maps . . ."

24 Similarly, OMC 18.120.030 requires:

25 "On waterfront sites, provide for public view corridors of Capitol Lake
and Budd Inlet. All development shall incorporate into the site and
building design both territorial and immediate views for significant
numbers of people from public rights of way. (Except: intermittent
partial views of the water may not be deemed necessary to incorporate into
the site and building design.)"
See Scenic Vista Overlay Zoning Maps . . .

1 Both of the above referenced ordinances refer to the City's Scenic Vista Overlay
2 Zoning Map for further guidance. A copy of the Scenic Vista Overlay map is found in the Staff
3 Report at page 19 and was also presented during the public hearing. The map identifies two
4 important scenic vistas in the general area of the project site looking south toward the Capitol,
5 but both of these vistas are south of 5th Avenue, that is, on the opposite side of 5th Avenue from
6 the project site. The Scenic Vista Overlay Map does not identify any important vistas north of
7 5th Avenue looking back toward the Capitol. The project is therefore not in violation of the
8 Scenic Vista Overlay Map.
9

10 In addition to protected views as identified by the Scenic Vista Overlay Map,
11 OMC 18.110.060 requires that consideration be given to "protecting" *existing* outstanding scenic
12 views . . ." but, again, this ordinance does not prohibit the reuse of structures in a manner which
13 does not increase the impact of the structure's height, width or bulk. Reuse of the Capitol Center
14 Building will not exacerbate the impairment of any important public view and therefore does not
15 violate OMC 18.110.060.

16 It might be argued that the two *additional* buildings, the Southwest Building and
17 the Northwest Building, impair existing scenic views, but the view analysis provided by the
18 Applicant (Exhibit 7) adequately demonstrates that the views toward Capitol Lake and the
19 Capitol from 4th Avenue are not worsened by these additional buildings.
20

21 The Staff Report also notes that the Applicant has proposed to wrap the Capitol
22 Center Building in a "glass curtain wall" so that it will blend in with the surrounding colors of
23 sky and water. If proven true this will be an important public benefit, but the Development
24 Regulations do not require this.
25

1 13. Historic Preservation. The Capitol Center Building has been identified as
2 having historical merit and has been determined eligible for the National Register of Historic
3 Places (NRHP). It is also a candidate for listing on the Olympia Heritage Register. To date it
4 has not been designated on the local, state or National Registry of Historic Places, nor on the
5 Olympia Heritage Register. The owner is not obligated to list the building and, unless it is listed,
6 the City's Historic Preservation Ordinance (OMC Chapter 18.12) does not regulate its alteration.
7 The project is also outside the Olympia Downtown Historic District as well as the Washington
8 State Capitol Historic District.
9

10 As noted in the Staff Report at page 20, the Department of Archaeology and
11 Historic Preservation (DAHP) is authorized to determine if a building is of local, state or national
12 significance. The comment letter from DAHP dated August 10, 2017, does not indicate any
13 concerns over the reuse of the Capitol Center Building as proposed, nor does it have any
14 recommended mitigation. Similarly, Olympia's Historic Preservation Office concurs with DAHP
15 that no measures are required to avoid, minimize or compensate for the loss, changes to,
16 disturbance to historic resources in the project area.
17

18 City Staff has, however, conditioned project approval on the addition of policies
19 addressing inadvertent discoveries of archaeologically significant artifacts. OMC 18.12.120.
20

21 14. Urban Forestry. The Staff Report, at page 20, finds that in order for the
22 project to comply with Chapter 16.60 OMC, a minimum of 32 tree units are required. The
23 Applicant proposes to plant 5 trees on site and satisfy the balance of the tree unit requirement by
24 payment of a fee of \$380 to the City Tree Fund in lieu of additional tree planting. City Staff
25 concurs with this approach.

1 15. Flood Prevention. Concerns over flood prevention have been much
2 discussed. Project opponents argue that not enough has been done to protect the project from
3 traditional flooding, most likely from Capitol Lake, as well as from flooding caused by sea level
4 rise. They question the adequacy of the project's floodwater protection system and of the Staff's
5 reliance on current regulations (which opponents believe to be outdated). Opponents question
6 the wisdom of allowing any significant new development in the isthmus area given its proximity
7 to sea level.
8

9 The project is subject to two separate flood prevention requirements, Chapter
10 16.70 OMC (Flood Prevention) and Chapter 16.80 OMC (Sea Level Rise). Somewhat by
11 coincidence, these two ordinances result in the same flood prevention requirements for this
12 project.

13 The Flood Prevention ordinance, Chapter 16.70 OMC, is discussed at page 70 of
14 the Staff Report. The southeast corner of the Capitol Center Building lies within a Flood Zone
15 and has a Base Flood Elevation (BFE) of 15 feet. The ordinance requires the Capitol Center
16 Building to be floodproofed up to 16 feet BFE, or one foot. Meanwhile, the Sea Level Rise
17 ordinance, Chapter 16.80 OMC, requires both the Capitol Center Building and the new structures
18 to be protected by approximately one foot of barrier. The protection required by both ordinances
19 can be accomplished through "dry" floodproofing. The project's architect, Mr. Thomas, provided
20 testimony on the various means by which this dry floodproofing can be accomplished. Methods
21 of dry floodproofing are becoming well established as an ever increasing number of projects
22 must include such protection. The chosen method will be in accordance with the City's
23 requirements and approved by Staff.
24
25

1 City Staff confirms that dry floodproofing will meet the City's requirements under
2 both Chapters 16.70 and 16.80 OMC. A more detailed review of the proposed methods will be
3 conducted during building permit review.

4 16. Liquifaction. A great many individuals have expressed concerns over the
5 potential liquefaction of the soils at the project site in the event of a significant earthquake. It is
6 argued that the existing Capitol Center Building's foundation cannot be assured to withstand the
7 forces of liquefaction, and that a building not guaranteed to withstand these forces should not be
8 allowed to be reused.

9 The Staff Report, at page 21, explains that the Capitol Center Building is
10 constructed on wood piling ranging 80 to 90 feet in depth. The building has an approved permit
11 for structural retrofitting to add additional support elements and also to drive 30+ additional coil
12 piles for seismic strengthening. The two new buildings will have steel piles driven to the point
13 of refusal to provide required seismic support. The City confirms that all of these retrofitting
14 projects will be continuously evaluated through permit plan review process to ensure that the
15 project will comply with the IBC provisions for soil conditions and complex structural design.

16 During the public hearing Mr. Kenneth Neal, who identified himself as a licensed
17 geologist, expressed a number of concerns about the Applicant's seismic reports and analyses
18 (Exhibit 43). The Applicant's engineer, Mr. Szramek, testified in response to these concerns. He
19 explained that when the existing building was constructed in the mid 1960's the code provisions
20 for earthquake protection were minimal, but that the building was designed to withstand
21 earthquakes through a two-part system: an "elevator core" responsible for 80% of the load, and
22 additional bracing at the ends of the building to provide the remaining 20% support, with the
23 entire system designed to support 120% of the actual load. The building has 248 existing piles,
24 110 supporting the core and the remaining 138 supporting the rest of the building. These piles
25

1 have been driven to a depth of 90 feet. In 2012, excavation was conducted under the slab to
2 more closely examine the original piles. This examination found them to be still "solid and
3 sound". As part of the building's retrofit new, modern braces will be installed in the building and
4 36 helical piers will be installed. All engineering plans will be reviewed by City Staff during the
5 building permit process to approve compliance with the IBC.

6 The Applicant further responded to Mr. Neal's comments by written materials
7 submitted after the public hearing (Exhibit 47, Tabs B and C). These materials include a
8 responsive letter from Mr. Szramek which incorporates earlier geotechnical review done in 2012.
9 The Applicant's supplemental materials also include a response from Ricky Wang, Principal
10 Engineer for the Riley Group. The Riley Group provided the Geotechnical Engineering Report
11 for the project, updated December 20, 2017.

12 Some of the more important points found in these responses:

13 • In response to Mr. Neal's concerns about there being "competent" soils at
14 90 feet below the surface to support steel pilings, past borings at the site have confirmed that
15 competent native soils are to be found at depths of 60 to 90 feet below ground surface. Piles will
16 therefore be installed in competent material.

17 • In response to Mr. Neal's concerns that liquefaction analysis is based on a
18 magnitude 7 earthquake, this is the designed earthquake relied upon by both the International
19 Building Code and the American Society of Civil Engineers (ASCE) minimum design loads for
20 buildings and other structures. In other words, a magnitude 7 earthquake is the standard design
21 event in Western Washington.

22 • The building was in existence during the 1965 and 2001 local earthquakes.
23 While some nearby properties, including the Deschutes Parkway, suffered damage during the
24 2001 event the Capitol Center Building did not have any indications of damage or seismic-

1 induced features. Additionally, land within one-half a mile of the project site did not have any
2 evidence of ground movement.

3 • The isthmus has been constructed on since the early history of the City
4 and has been subject to seismic shaking without liquefaction or lateral spreading.

5 • There are more than ten other projects with similar soil conditions
6 currently being safely built in Downtown Olympia in the vicinity of the project site. The current
7 project is not unique in its soil conditions.

8 • The engineers believe that it can be safely built.

9 Having considered Mr. Neal's concerns and the responses of City Staff and the
10 Applicant, I conclude that the project is in compliance with the City's structural and geotechnical
11 engineering requirements, recognizing that the project will be further evaluated to ensure
12 compliance during permit review.

13 17. Engineering Design and Development Standards (EDDS) Review. The
14 project has been reviewed for compliance with EDDS including compliance with storm, surface
15 water utility, drainage, and erosion control requirements. This review is technical in nature and
16 is discussed at pages 21 and 22 of the Staff Report. Most of this analysis is unremarkable. Staff
17 recommends approval of certain deviations from standard frontage improvements as well as
18 several recommended conditions for solid waste handling. The only matter in controversy
19 among the EDDS issues is storm drainage. Included in public comment is a letter from the
20 Deschutes Estuary Restoration Team (DERT) expressing concerns about the project's water
21 quality impacts. The project's Stormwater Engineer, Steven Hatton, has responded to these
22 concerns by letter dated January 16, 2018, attached as Tab D to Exhibit 47. DERT asserts that
23 converting the site to a park would improve the area's overall stormwater quality. Mr. Hatton
24 responds that the issue is not whether better stormwater management would occur by restoring
25

1 the site to its natural condition, but whether the project satisfies the City's engineering and code
2 requirements for stormwater management. Mr. Hatton and City Staff agree that the storm
3 drainage system will be designed to comply with the most recent drainage manual and erosion
4 control manual as well as Chapter 5 of the EDDS.

5 I conclude that the project, as conditioned, is compliant with EDDS.

6 18. Traffic Impact Analysis. As part of its application the Applicant provided
7 the City with a Traffic Impact Analysis (TIA) (Exhibit 10), prepared by Jeff Schramm of
8 Transportation Engineering Northwest (TENW). The current TIA supersedes an earlier one
9 which envisioned an athletic club as part of the project. This change to the project has slightly
10 reduced all anticipated traffic counts.

11 Included among public comments have been various concerns about the project's
12 impact upon traffic, but the findings of the TIA have not been challenged:

13 • The project is anticipated to generate 1,022 new trips per weekday with 81
14 new trips occurring during AM peak hour and 62 new trips during the PM peak hour.

15 • The project is not expected to create a significant impact to current
16 bicycle, pedestrian or transit facilities in the immediate site vicinity.

17 • Intersection Level of Service (LOS) is anticipated to operate as LOS A in
18 2018 during the PM peak hour at all four studied intersections.

19 • The project will have one enter-only driveway on Sylvester Street and one
20 exit-only driveway on Simmons Street. Both site access locations are anticipated to operate as
21 LOS A during the PM peak hour.

22 • Nearby studied intersections and the site access on Simmons Street are
23 anticipated to operate as LOS B or better. The project is anticipated to increase the northbound
24
25

1 queue on Simmons Street approaching 4th Avenue and the southbound queue approaching 5th
2 Avenue by up to one vehicle during the PM peak hour.

3 Based upon these findings the Applicant proposes to mitigate the traffic impacts
4 by payment of a Traffic Impact Fee of \$167,224.83 per the City's Traffic Impact Fee Schedule.

5 The Staff Report, at page 23, finds that, in addition to payment of the Traffic
6 Impact Fee, the addition of a U-turn and new bike lane on Simmons Street will adequately
7 accommodate the project's increased traffic.

8 3. Other Issues.

9 A. Public Trust Doctrine. Project opponents commonly add an objection
10 based upon the Public Trust Doctrine, that is, that the ongoing impairment of the views to and
11 from the Capitol and Puget Sound is in violation of this Doctrine. This issue was addressed in
12 Mr. Bjorgen's Decision at page 30, Findings 67 and 68. These Findings succinctly address the
13 issue and are worth incorporating into this Decision:

14 "67 . . . The Public Trust Doctrine protects interests of the public in
15 tidelands and shorelines, including rights of fishing, boating, swimming,
16 water skiing, and other related recreational purposes generally regarded as
17 corollary to the right of navigation and the use of public waters. . . . The
18 beauty of one's surroundings can be an elemental part of recreation on the
19 water and that therefore the Public Trust Doctrine, by its terms, might
20 prevent or control upland construction which destroyed views from
21 tidelands and shorelands which were a demonstrated part of recreational
22 enjoyment on those areas. . . . Since the public's right to recreation on
23 tidelands and shorelands is not affected by the inability to see those areas
24 from upland locations, such as the State Capitol, any public trust interest
25 here at stake based on views would have to be based on views **from** the
shorelands, Capitol Lake or the tidelands of Budd Inlet.

68 . . . However, even if the Doctrine is given 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

1 of a hotel in this location will adversely affect tidelands or navigable
2 waters due to traffic, noise, or light. Thus, even under the broad reading
3 of the Doctrine, this conversion proposal does not affect interests
4 protected by the Public Trust Doctrine. . . ."

5 Mr. Bjorgen's Decision was affirmed on appeal by Judge Pomeroy.

6 As the current proposal similarly has no adverse effect on existing views the
7 Public Trust Doctrine is not invoked.

8 B. Jurisdiction of the Shoreline Management Act (SMA). Opponents
9 commonly assert that the project should fall within Shoreline Management Act (SMA)
10 jurisdiction.

11 This argument is raised in two separate forms:

12 1. Many opponents argue that, like the Capitol Center Project, the adjoining
13 parking lot in the northeast corner of this City block has a high likelihood of being incorporated
14 into the project. During the earlier Capitol Center Project this parking lot was found to lie within
15 SMA jurisdiction and, had it remained as part of the project, would have caused the entire project
16 to come under SMA jurisdiction. But the *possible* use of property within SMA jurisdiction is
17 not sufficient grounds to invoke the SMA, especially when the property is held under unrelated
18 ownership. As the project itself is not within SMA jurisdiction Mr. Bjorgen earlier concluded,
19 and Judge Pomeroy agreed, that SMA jurisdiction is not invoked. The same applies here.

20 2. An altogether different argument has been raised by other opponents
21 including Robert Jensen. Following the earlier Capitol Center Project the project site was
22 designated within a FEMA Flood Zone. Opponents assert that this new designation places the
23 project site within SMA jurisdiction. Ms. Floyd of City Staff responds and explains that this
24 argument misunderstands how SMA jurisdiction is invoked. The inclusion of the project site in a
25

1 FEMA Flood Zone does not trigger SMA jurisdiction. The result would be different if the
2 project site was found to be within a *floodway* or within a *floodplain associated with a floodway*,
3 but the project site is not within either category. In summary, the project site remains outside of
4 SMA jurisdiction in the same manner as the earlier Capitol Center Project.

5 C. Application of the City's Downtown Strategy. During her testimony Ms.
6 Floyd testified that the project site was within the covered area of the adopted Downton Strategy,
7 and that it was consistent with the goals of the Strategy. These comments sparked a strong
8 response from various citizens, including Gerald Reilly, who had been involved in formulating
9 the Downtown Strategy and were surprised to hear Staff claim that it extended to the isthmus
10 area. This discussion ultimately led to a statement by Keith Stahley, the City's Director of
11 Community Planning and Development, confirming that while the project site and the remaining
12 isthmus were included in the maps of the Downtown Strategy area, no specific master planning
13 has been done for the isthmus as part of the Downtown Strategy. Mr. Stahley confirms that there
14 remains a need to develop a specific plan for the isthmus but that this process was well beyond
15 the scope of the Downtown Strategy. The Hearing Examiner takes note of this clarification.

16 D. Use of Adjoining Parcel. The most litigated issue of the earlier Capitol
17 Center Project was whether to impose restrictions on the use of adjoining properties located
18 within SMA jurisdiction in order to avoid "piecemealing" the project. The first two attempts at
19 crafting appropriate language were reversed on appeal by the Thurston County Superior Court.
20 The matter came up a third and final time before me in 2013 and I revised the condition on use of
21 other properties as quoted earlier in the Decision.

22 During the public hearing I reminded City Staff that the condition I had imposed
23 applied to the hotel "or any commercial use on the project site" and therefore questioned why
24
25

1 this condition should not be applied to the Views on Fifth Project. Following the hearing both
2 City Staff and the Applicant responded to this question in slightly different ways: The City's
3 written response (Exhibit 44) indicates that it would not object to a similar condition but feels it
4 is unnecessary as circumstances have sufficiently changed, including new ownerships of the two
5 properties. The City adds a caution that, if a condition is imposed, its language not encumber
6 property not part of the project due to concerns over potential taking claims. The Applicant's
7 written response (Exhibit 47) concurs with the City's position that the condition is no longer
8 necessary, but then more forcefully argues against its inclusion. The Applicant asserts that
9 "there is no evidence in the current project record suggesting improper future 'piecemealing' is
10 likely to occur as to the parking lot parcel - or as to any other parcel within the shoreline
11 jurisdiction - that would serve as adequate basis to impose a similar condition of approval on the
12 Views on Fifth Project."

13 Recognizing the points being made by the City and the Applicant, I nonetheless
14 conclude that a similar condition to that reached in the Capitol Center Project is necessary. If
15 this project was within SMA jurisdiction it would be subject to an altogether different and more
16 difficult set of requirements, not to mention the express hostility shown the building by the
17 Shorelines Hearing Board in *Sato v. Olympia*. It has therefore been of critical importance to the
18 project that boundaries remain out of SMA jurisdiction. But there has been in the past, and most
19 certainly will continue, a temptation to incorporate adjoining properties within SMA jurisdiction
20 once the project has been approved. As was noted repeatedly during the Capitol Center Project,
21 this result would conflict with the purpose of SMA and must be prevented.

22 The following condition, similar to the one imposed in the Capitol Center Project,
23 shall be imposed on this project:

24 "Any commercial use on the project site shall not use any property within
25 the Shoreline jurisdiction unless the owner of the property for the

1 proposed use has complied with all applicable permitting requirements of
2 the Shoreline Management Act."

3 The above condition does not preclude the owners of adjoining properties from
4 making reasonable use of them - it merely precludes the project from using these properties
5 without undergoing SMA review. And, this condition does not prohibit individuals from parking
6 wherever they wish (any such restriction would be impossible to enforce).

7 SUMMARY

8 The Capitol Center Building is unattractive and its location is truly unfortunate. In a
9 perfect world it never would have been constructed, and it could not be constructed today.
10 Nonetheless, the Capitol Center Building is a "nonconforming building" that "may be enlarged or
11 remodeled if such alterations do not contribute to further nonconformity". OMC 18.37.040(A).
12 Although I share in the popular dislike for this building I am left with no alternative but to grant
13 it the same protection given to every other nonconforming building in the City. The alterations
14 proposed by this project do not "contribute to the nonconformity". The Capitol Center Building
15 is therefore entitled to be reused so long as the project is consistent with the City's
16 Comprehensive Plan and complies with the City's Development Regulations.

17 The project is consistent with the City's Comprehensive Plan for the reasons explained
18 earlier, including the well-reasoned conclusions previously reached by Mr. Bjorgen and affirmed
19 by Judge Pomeroy. The enactment of a new Comprehensive Plan does not alter this outcome.

20 The project is in compliance with the City's Development Regulations for the reasons
21 previously given. It is not a violation of the SMA, nor does it violate the Public Trust Doctrine.

22 In his earlier Decision Mr. Bjorgen correctly observed that "the proposal cannot be
23 denied simply because it would make its ultimate removal more likely." Refusing to allow this
24
25

1 project to go forward in the absence of any conflict with the Comprehensive Plan or
2 noncompliance with Development Regulations, just to encourage the removal of the building,
3 would constitute a taking. This would impose a significant, involuntary burden on the City - a
4 burden it has declined to voluntarily take.

5 Based upon the foregoing, the Hearing Examiner makes the following:

6 **CONCLUSIONS OF LAW**

- 7 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.
- 8 2. Any Conclusions of Law contained in the foregoing sections are hereby
9 incorporated by reference and adopted by the Hearing Examiner as his Conclusions of Law.
- 10 3. All notice requirements have been met.
- 11 4. The proposed "live/work" units are consistent with the designated principal uses
12 of the UW-H District and are a permitted use.
- 13 5. The project is consistent with the City's Comprehensive Plan.
- 14 6. The project, as conditioned, is compliant with the Floor Area Ratio (FAR)
15 requirements of OMC 18.06.060(hh).
- 16 7. The project, as modified, satisfies the maximum building height limit of 35 feet
17 for all new structures. OMC 18.06.080, Table 6.02
- 18 8. The Capitol Center Building is a nonconforming building.
- 19 9. The Capitol Center Building's reuse does not result in contributing to further
20 nonconformity. OMC 18.37.040(a).
- 21 10. The project, as conditioned, complies with the requirements of Chapter 18.36
22 OMC for landscaping.
- 23
24
25

1 11. The project, as conditioned, complies with the requirements for vehicular parking
2 and for vehicle parking design standards.

3 12. The project, as conditioned, complies with all requirements for bicycle parking.

4 13. The project satisfies all requirements for Important Habitat Species Review.

5 14. The project complies with the requirements of the Pedestrian Street Overlay
6 District.

7 15. The project complies with the Scenic Vista Overlay Zoning Map.

8 16. The project complies with OMC 18.110.060 for protecting existing outstanding
9 scenic views.
10

11 17. The project complies with all City requirements for historic preservation. OMC
12 Chapter 18.12.

13 18. The project complies with urban forestry requirements. Chapter 16.60 OMC.

14 19. The project complies with the Flood Prevention Ordinance, Chapter 16.70 OMC
15 and the Sea Level Rise Ordinance, Chapter 16.80 OMC.

16 20. The project, as conditioned, complies with seismic requirements including
17 minimum design loads from buildings and other structures, and IBC and ASCE provisions for
18 soil conditions in complex structural design.

19 21. The project, as conditioned, complies with the EDDS.

20 22. The project's traffic impacts have been determined and properly mitigated.

21 23. The project, as conditioned, complies with all other Development Regulations.

22 24. The project does not violate the Public Trust Doctrine.

23 25. The project is not within Shoreline Management Act (SMA) jurisdiction.
24
25

26. Similar to the earlier Capitol Center Project, the project should be conditioned to avoid the later incorporation of SMA-affected properties without first undergoing SMA review.

27. The denial of the project for purposes of encouraging the demolition of the Capitol Center Building would constitute a taking.

28. The project, as conditioned, should be **approved** subject to the conditions recommended by City Staff and the further condition imposed by the Hearing Examiner relating to the later incorporation of SMA-affected properties.

DECISION

The Hearing Examiner having issued his Findings of Fact and Conclusions of Law,
orders as follows:

1. The proposed live/work units are a permitted use in the UW-H zoning district.
2. The project is consistent with the City's Comprehensive Plan and satisfies all Development Regulations and the permit is **approved** subject to the following conditions.

CONDITIONS

1. The site plan (sheet A.101) shall be revised and submitted with the construction permit plans. Modification to the site plan shall include:
 - a. Provide all features identified in the EDDS Deviation Approval letters dated November 22, 2017. At a minimum this shall include:
 - i. Recess the building entries 13' on the first floor on 4th Avenue. The recess shall be measured from the existing curb face on 4th Avenue to the recessed entry walls.
 - ii. Show the angled building entry on the first floor at the intersection of Simmons Street and 4th Avenue.
 - iii. Offset street trees from the building alcoves to maximize the sidewalk area available to pedestrians.

- 1 iv. Eliminate obstructions/projections in the right-of-way such as bike
2 racks, benches, and doorway ingress/egress. Revised locations
3 shall be reviewed with the construction permits.
4 v. Show the illuminated bollards at approximately 8' intervals.

5 b. Demarcate all accessible routes throughout the site pursuant to the
6 International Building Code (IBC) and the American National Standards Institute (ANSI
7 117.2). Accessible routes shall be provided between each accessible parking stall to each
8 building. Decorative pavement markings shown on the site plan may need to be modified
9 to accommodate the accessible route markers; this will be determined with the
10 construction plan review.

11 c. Provide a minimum of 50' clear zone, free of trees, shrubs, or other
12 obstructions on the leading side of the bus at the bus stop locations on both 4th Avenue
13 and 5th Avenue as requested by Intercity Transit. A clear zone around the bus shelter
14 and bench shall be provided to allow for good visibility for both vehicle safety and
15 security of pedestrians at the bus stop; and pedestrian amenities such as lighting, signage,
16 and trashcans as warranted by the anticipated use shall be provided.

17 d. Ensure all proposed development shown on the site plan, as revised, is
18 contained on the project site and does not trespass onto the adjacent parcel (Parcel
19 91005201000).

20 2. Construction permits are required. Plans shall demonstrate compliance with the
21 City of Olympia Construction Codes as adopted through the Olympia Municipal Code, Chapter
22 16.04; Flood Damage Protection and Sea Level Rise Ordinances as adopted by the Olympia
23 Municipal Code; Chapter 16.70 and 16.80 as applicable; and other applicable statutes for
24

1 construction or flood damage protection including, but not limited to the International Building
2 Code, Federal Emergency Management Agency Regulations, the American Society of Civil
3 Engineers (ASCE 24) or as otherwise prescribed by the City of Olympia through the Olympia
4 Municipal Code.

5 3. Building Permit Plans shall ensure code compliant accessible parking is provided
6 in both the automated parking garage and surface parking area within the Woonerf. Both the
7 garage and surface parking shall include at least one van accessible space pursuant to the
8 requirements of the International Building Code (IBC), International Code Council (ICC), and
9 the American National Standards Institute (ANSI 117.1).
10

11 4. Bicycle parking shall meet the standards of OMC 18.38.220(c). Signage for short
12 term bicycle parking shall be identified on construction permit plans. Signage shall be provided
13 in all locations where the customer entry is more than 50' from the required bicycle parking
14 space or when the required bicycle parking space cannot be seen from the customer entry.

15 5. Building permit plans shall clearly demonstrate that there are no encroachments
16 over the eastern property line encroaching onto the adjacent private property (Parcel
17 91005201000) including but not limited to; footings, balconies, or roof overhangs.

18 6. Building Permit Plans shall clearly demonstrate that all new structures meet the
19 height limit of 35'. Additional height of up to 18' may be permitted provided the increased
20 height is used for roof structures for the housing of equipment to operate and maintain the
21 building, parapet walls, or other similar rooftop structures as prescribed in OMC 18.06.100(a).
22 In no case shall the occupiable or habitable space within new structures exceed the 35' height
23 limit as shown in Figure 6-1A.
24
25

1 7. An easement/agreement prepared by the Applicant and adjacent property owner
2 (Parcel 91005201000) that recognizes this project's impacts on the future developability of the
3 adjacent parcel shall be recorded against the adjacent property prior to building permit issuance.
4 The easement/agreement shall be submitted with the construction permit plans to ensure
5 compliance with IBC requirements and must address fire protection, egress and maintenance.

6 8. Lot consolidation is required and shall be completed prior to building permit
7 issuance.

8 9. All recommended conditions of approval from the Conceptual Design Review
9 Board meeting shall be incorporated herein as follows:
10

11 a. Provide plans with the detailed design review packet that show the
12 textured pavement with the necessary painted pavement markings for directional traffic
13 movement, parking stalls, and accessible routes and consider revising the textured
14 patterns to emphasize these safety and circulation features pursuant to OMC 18.110.030,
15 18.110.050 and 18.120.110.

16 b. If mid-block crossing is proposed, revise plans to show the stamped
17 concrete adjacent to Sylvester Street aligning with the park pathway and add the
18 appropriate crosswalk features to the roadway. Provide the appropriate revision with the
19 Detailed Design Review packet pursuant to OMC 18.120.110.
20

21 c. Provide plans with the Detailed Design Review packet that show all
22 directional signage for vehicles and any proposed signage that emphasize that pedestrians
23 have the right of way pursuant to OMC 18.120.
24
25

1 d. Work to disperse the short-term bike parking (visitor parking) as evenly as
2 possible to provide convenient covered parking for all business entries. Show covered
3 areas on plans. In areas where bike parking spaces are more than 50' from a business
4 entry, signage will be required and should be shown on detailed design plans pursuant to
5 OMC 18.110.050 and OMC 18.38.220(c).

6 e. Plans must show which buildings or units will be assigned use of the bike
7 storage room and which will have space in the individual units. Signage for long-term
8 bike storage will be required in and around buildings as appropriate. Show proposed
9 signage locations on plans at Detailed Design Review pursuant to OMC 18.110.050 and
10 OMC 18.38.220(c).

11 f. Should fencing of the outdoor seating area be proposed in the future with
12 the tenant occupation of the restaurant/bar, staff should review the fencing and ensure it
13 maintains a human scale by providing openings at frequent intervals and that the fencing
14 material is compatible with the structure pursuant to OMC 18.110.040.

15 g. Proposed lighting locations and fixture types shall be provided with the
16 Detailed Design Review packet including lighting for the pedestrian walkway, Woonerf,
17 and all three of the buildings pursuant to OMC 18.110.050 and 18.110.160.

18 h. Provide plans that clearly identify all site utility and mechanical
19 equipment locations and the anticipated measures to screen such features pursuant to
20 OMC 18.110.190.

21 i. Look at any potential issues with the 45-degree angle parking associated
22 with physical barriers as outlined in OMC 18.110.030.

1 h. Define landscaping and planter boxes on the east side of the building as
2 outlined in OMC 18.110.180.

3 10. The engineering permit application shall comply with the 2016 Engineering
4 Design and Development Standards (EDDS) and the 2016 Drainage Design and Erosion Control
5 Manual (DDECM). Engineering construction plans address the following prior to permit
6 issuance:

7 a. The new water line within the Woonerf shall be designed as a private 6"
8 fireline serving all three structures, connecting into both Sylvester Street and 5th Avenue.

9 b. All water services shall be connected directly to existing water mains
10 located within rights-of-way. The meters shall be located within the rights-of-way
11 adjacent to the project, not on private property.

12 c. The solid waste compactor shall be placed such that the lifting bale is
13 located directly adjacent to the door opening and shall exceed the EDDS 8.035(3) which
14 requires it to be within two feet of the door.

15 d. The solid waste compactor guide rails shall be designed in an "L" fashion,
16 so that they guide the compactor wheels into the room on concrete, not on steel. Guide
17 rails designed in a "T" fashion shall not be allowed.

18 e. To better facilitate the rolling dumpsters, the concrete extending a
19 minimum distance of 25' in front of the trash compactor cannot be stamped as it would
20 impede loading and unloading. Similarly, concrete extending to the north of the solid
21 waste room extending to the cardboard dumpster(s) collection location cannot be
22 stamped. A light, brushed texture commonly used to prevent slips and falls is acceptable
23 in both locations.
24
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1 f. In order to ensure effective vehicular and pedestrian circulation within the
2 Woonerf, the refuse containers and dumpsters shall be removed from the Woonerf and
3 returned to their designated locations by the Applicant immediately following pick-up.

4 g. Two perpendicular curb ramps shall be provided, at each of the three street
5 corners of the project, meeting the standards established in Chapter 4 of the EDDS.

6 h. At the southeast corner of the project - the crosswalk for 5th Avenue shall
7 have the bollards with lighting re-installed.

8 i. If a mid-block crossing is proposed on Sylvester Street, it shall be revised
9 to include: 1) a bulb-out feature on the east side of Sylvester Street; 2) the design shall
10 address safety needs of both the pedestrians and vehicles, and 3) it shall have an
11 identifying feature to enhance pedestrian safety as determined by the City.

12 j. A street lighting analysis shall demonstrate compliance with standards for
13 lighting levels and uniformity. Lack of compliance shall require the installation of
14 additional streetlights on any of the street frontages in order to achieve compliance.

15 k. A final landscape plan shall be submitted for review and approval at the
16 time of engineering permit review. The plan shall meet the requirements of OMC 18.36
17 and at a minimum, enhanced screening of site utilities, information about native
18 plantings, and a cost estimate for the purchase, site preparation, installation and 3 years of
19 maintenance of all landscaping and irrigation.

20 l. A minimum of 32 tree units are required for this project, however
21 adequate area onsite is not available for compliance. A fee of \$380 shall be paid as a fee-
22 in-lieu into the City Tree Fund for each tree unit deficiency prior to issuance of the
23 engineering permit.
24
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1 m. Street tree locations, species selection, tree walls and planting islands shall
2 be reviewed and approved by the City Forester. The existing flowering cherry trees on
3 the east side of Simmons shall be replaced.

4 11. A Right of Way Performance Bond other allowable securities will be required by
5 the City to guarantee the performance of work within the subject site and rights-of-way, or
6 maintenance of required public infrastructure intended to be offered for dedication as a public
7 improvement. See both EDDS Section 2.030.F and Volume 1 Section 2.6.1 of the 2016
8 DDECM for more information.

9
10 12. A vegetation maintenance bond (or other assurance) shall be provided following
11 City acceptance of the landscape installation including street trees before issuance of the
12 Certificate of Occupancy. The bond amount shall be 125% of the cost estimate submitted with
13 the Landscape Plan and approved by the City.

14 13. At no point shall the width of the east/west Woonerf be revised to a width of less
15 than 12 feet. Any proposed changes to the Woonerf shall demonstrate the ability for all solid
16 waste and recycle vehicles to adequately maneuver and facilitate collection and shall be shown
17 on the site plan associated with the construction permit plans.

18 14. Development shall comply with all recommendation of the geotechnical report
19 dated December 23, 2016 (or as updated/amended). Should alternatives to steel piles for
20 foundations be proposed, such materials shall be reviewed for environmental impacts by the City
21 prior to installation.

22
23 15. The SEPA Checklist provided by the Applicant identifies use of bird friendly
24 window glazing with a reflective ultraviolet coating on the tower structure to help reduce the
25

1 number of migratory birds inadvertently colliding with the tower. Building permit plans shall
2 identify the "bird friendly" materials selected and shall use materials significantly similar to
3 those advised by the American Bird Conservancy.

4 16. Signage shall be provided on the entry to the automated parking garage that
5 clearly indicates that the parking is available for customers of all commercial uses within the site.
6 Such signage shall be identified on construction permit plans.

7 17. Development and garage operation shall be consistent with the recommendations
8 within the City Lift Preliminary Parking Operation's Plan, dated September 19, 2017. At a
9 minimum this shall include:
10

11 a. The project shall ensure a minimum of one dedicated staff person is
12 assigned to facilitate the use of the automated parking garage during peak hours (8:00
13 a.m. to 9:00 a.m. and 5:00 p.m. to 6:00 p.m.).

14 b. Clearly defined pedestrian walkways from the parking bay(s) to the
15 parking kiosk shall be provided to facilitate safe pedestrian travel. Defined areas shall be
16 identified on the site plan with the construction permit plans.

17 18. Permits plans shall include signage that designates the surface parking spaces
18 within the Woonerf for queuing/valet only during peak AM and PM hours to ensure adequate
19 space is available.

20 19. Pursuant to OMC 18.12.120, whenever in the course of excavation or
21 development, archaeological materials (e.g., bones, shells, stone tools, beads, ceramics, old
22 bottles, hearths, etc.) or human remains are observed during project activities, all work in the
23 immediate vicinity shall stop. The Department of Archaeology and Historic Preservation, the
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1 City of Olympia Building Official, the City of Olympia Historic Preservation Officer, the
2 affected Tribe(s) and the county coroner (if applicable) shall be contacted immediately by the
3 property owner or the City in order to help assess the situation and determine how to preserve the
4 resource(s).

5 20. Hours of Operation/Construction Noise. Pursuant to 18.40.080.C.7, construction
6 activity is restricted to the hours between 7:00 a.m. and 6:00 p.m.

7 21. If contamination of soil or groundwater is readily apparent, or is revealed by
8 sampling, the Applicant shall notify the Department of Ecology's Environmental Report
9 Tracking System Coordinator for the Southwest Regional Office at 360-407-6300.
10

11 22. Should more than 250 cubic yards of inert, demolition and/or wood waste be used
12 as fill material the Applicant shall coordinate with the Thurston County Health Department to
13 obtain all necessary permits.

14 23. In addition to any required asbestos abatement procedures, the Applicant shall
15 ensure that any other potentially dangerous or hazardous materials present are removed prior to
16 demolition.

17 26. Any commercial use on the project site shall not use any property within the
18 Shoreline jurisdiction unless the owner of the property for the proposed use has complied with
19 all applicable permitting requirements of the Shoreline Management Act.
20

21 DATED this 2nd day of February, 2018.

22
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24 
Mark C. Scheibmeir
City of Olympia Hearing Examiner

RECONSIDERATION/APPEAL

This is a final decision of the City. Any party may file a Motion for Reconsideration within 10 days of service of this decision in accordance with OMC 18.75.060. Appeals shall be made to Superior Court pursuant to provisions of Chapter 36.70C RCW. The filing of a Motion for Reconsideration is not a prerequisite for seeking judicial review. If a Motion for Reconsideration is filed, the time for filing an appeal shall not commence until disposition of the Motion.



HEX

EXHIBIT #	DOCUMENT	DATE SUBMITTED
1	City – Staff Report	12.29.2017
2	Attachment of Staff Report: SEPA DNS with Checklist	12.29.2017
3	Attachment of Staff Report: Neighborhood Meeting Summary	12.29.2017
4	Attachment of Staff Report: Notice of Application	12.29.2017
5	Attachment of Staff Report: Applications	12.29.2017
6	Attachment of Staff Report: Substantive Review Table	12.29.2017
7	Attachment of Staff Report: Design Review Board Recommendation with checklists and view analysis	12.29.2017
8	Attachment of Staff Report: Architectural plans, Revised	12.29.2017
9	Attachment of Staff Report: Landscape Plans, Revised (includes Alternative Landscaping Analysis)	12.29.2017
10	Attachment of Staff Report: Traffic Impact Analysis, Revised (includes addendum)	12.29.2017
11	Attachment of Staff Report: Parking Operations Plan	12.29.2017
12	Attachment of Staff Report: Civil Plans, Revised	12.29.2017
13	Attachment of Staff Report: EDDS Deviation Approvals	12.29.2017
14	Attachment of Staff Report: Street Lighting Analysis Drawing	12.29.2017
15	Attachment of Staff Report: Geotechnical Report, Revised	12.29.2017
16	Attachment of Staff Report: Cultural Resource Report	12.29.2017
17	Attachment of Staff Report: Adjacent Species List	12.29.2017
18	Attachment of Staff Report: Thurston County Economic Development Letter	12.29.2017
19	Attachment of Staff Report: Phase II Subsurface Investigation Report	12.29.2017
20	Attachment of Staff Report: Live work space justification	12.29.2017
21	Attachment of Staff Report: Comments Received by 12.22.2017	12.29.2017
22	Attachment of Staff Report: Agency Comments	12.29.2017
23	Attachment of Staff Report: Applicant Response to DAHP Comment	12.29.2017
24	Attachment of Staff Report: Past Hearing Examiner Decision	12.29.2017
25	Attachment of Staff Report: SEPA Appeal with 25 Exhibits	12.29.2017
26	Applicant – Expert Witnesses Disclosure with Resumes	1.4.2018
27	City – Public Comments Received Following Packet Distribution (16 letters included)	1.6.2018
28	Applicant – Applicants Response to Staff Report, including: Tab A: Applicants Responses to Public Comment Tab B: Email from DAHP to City of Olympia	1.8.2018
29	Applicant – Supplemental Response to Public Comments Received Following Packet Distribution, including: Tab A – Letter from M. Szramek re Foundation Support Tab B – Maps from Thomas Architecture Studios Tab C – Excerpt from Downtown Olympia's Historic Resources, Olympia Heritage Commission, 1984 Tab D – Transcript of July 28, 2017 KIRO News Story	1.9.2018
30	City – Public Comments Received Day of Hearing Prior to 2:30PM (8 submittals included)	1.9.2018
31	Applicant – Response to Public Comments Received Day of Hearing Prior to 2:30PM	1.9.2018
32	City – Public Comments Received Day of Hearing After 2:30PM (11 submittals included)	1.9.2018
33	Applicant – PowerPoint Presentation	1.9.2018
34	Eliza Davidson – Written Testimony	1.9.2018

HEX

35	Judy Bardin – Written Testimony	1.9.2018
36	Jeanne Miller – Written Testimony	1.9.2018
37	Ralph Munro – Written Testimony	1.9.2018
38	Lon Freeman – Written Testimony	1.9.2018
39	Allen Miller – Testimony and Slides	1.9.2018
40	Gerald Reilly – Written Testimony	1.9.2018
41	David Schaffert – Written Testimony	1.9.2018
42	Bob Jacobs – Written Testimony	1.9.2018
43	Kenneth Neal – Written Testimony	1.9.2018
44	City – Supplemental Staff Report with 3 attachments International Building Code Sections Case 10-0140: Request for Reconsideration Examiner Decision Case 10-0140: 2 nd Remand Hearing Examiner Decision	1.12.2018
45	City – Post Hearing Public Comments (90 submittals)	1.12.2018
46	City – Post Hearing Staff Supplement	1.17.2018
47	Applicant – Response to Issues Raised at Public Hearing, including: Tab A: Department of Archaeology and Historic Preservation Map Tab B: Response to Testimony of Kenneth Neal from MC Squared Tab C: Response to Testimony of Kenneth Neal from the Riley Group	1.19.2018



January 26, 2018

Greetings:

**Subject: Views on 5th – SEPA Appeal
Case #17-2528 and SEPA #17-5531**

The enclosed decision of the Olympia Hearing 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 (21) days. See Revised Code of Washington, Chapter 36.70C, 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.

Please contact the City of Olympia, Community Planning and Development Department, at 601 4th Avenue East or at PO Box 1967, Olympia, WA 98507-1967, by phone at 360-753-8314, or by email cpdinfo@ci.olympia.wa.us if you have questions.

Sincerely,

Suki Bell-Sullivan
Program Specialist

Enclosure

BEFORE THE CITY OF OLYMPIA HEARING EXAMINER

In the Matter of the SEPA Appeal)	HEARING NO. 17-2528
of Daniel J. Evans et al.)	ORDER ON APPLICANT'S
Views on Fifth)	MOTION TO DISMISS/FOR SUMMARY
)	JUDGMENT

On June 21, 2017, the Applicant, Views on Fifth, LLC, submitted an application to change the proposed use of the existing Capitol Center Building, located at 410 5th Avenue S.W., from an earlier proposed hotel to a multi-family residential development, and to develop the balance of the project site into a mixed use commercial/residential project called "Views on Fifth". The City Staff, as responsible official, issued its Determination of Nonsignificance (DNS) for the project on December 4, 2017. Appellants, Daniel J. Evans et al., timely appealed the SEPA DNS to the Hearing Examiner.

THIS MATTER comes before the Hearing Examiner on the Motion by the Applicant to dismiss the SEPA appeal for lack of standing/lack of subject matter jurisdiction and, separately, for Summary Judgment. Having considered the Appellants' bases for appeal and the Applicant's Motion it is hereby ordered that:

1. The Applicant's Motion to Dismiss for Lack of Standing and/or Lack of Subject Matter Jurisdiction is **denied**; and

2. The Applicant's Motion for Summary Judgment is **granted**.

Having granted the Applicant's Motion for Summary Judgment, the Appellants' SEPA Appeal is hereby **dismissed**.

BACKGROUND

In 2010, the previous property owner, the Views on Fifth Avenue, Ltd. (the "Prior Applicant") applied for permits to convert the existing Capitol Center Building from an office to

1 a hotel (the "Capitol Center Project"). In 2011 City Staff gave permission to convert the
2 building's use and, as the SEPA responsible official, issued a SEPA Determination of
3 Nonsignificance (DNS). The administrative approval of the conversion and the DNS were
4 appealed by a large group of individuals and organizations (the "Prior Appellants"). Except for
5 those individuals who have since passed away the current Appellants include all of the Prior
6 Appellants as well as a few additional individuals or organizations.

7 The appeals of the administrative approval and the DNS went before the then City
8 Hearing Examiner Thomas Bjorgen ("Mr. Bjorgen") in 2011. Following extensive hearings Mr.
9 Bjorgen issued a lengthy, well-worded Decision denying the Prior Appellants' appeal of both the
10 administrative approval and the DNS, while also imposing additional conditions on the project.
11 These additional conditions included ones intended to avoid "piecemealing" of the project so as
12 to prevent the project from later expanding into areas under SMA regulation.

13 The Prior Appellants appealed Mr. Bjorgen's Decision to the Thurston County Superior
14 Court. The Prior Applicant also appealed Mr. Bjorgen's decision, challenging his additional
15 conditions relating to piecemealing of the project. On February 27, 2012, Judge Christine
16 Pomeroy dismissed the Prior Appellants' appeals of Mr. Bjorgen's Decision, but granted the Prior
17 Applicant's appeal and remanded the case to the Hearing Examiner for modification of the
18 conditions relating to use of adjoining properties within SMA jurisdiction (Thurston County
19 Superior Court Cause No. 11-2-01837-4). On remand Pro Tem Hearing Examiner Jacqueline
20 Brown-Miller issued modified conditions which were again appealed by the Prior Applicant to
21 the Thurston County Superior Court. On May 3, 2013, Judge Christine Schaller granted the
22 Prior Applicant's appeal and once again remanded the case for further clarification of the
23 conditions relating to use of the adjoining properties within SMA jurisdiction (Thurston County
24 Superior Court Cause No. 12-2-02609-0). The second Order of Remand returned the matter to
25

1 me as the City's new Hearing Examiner and on July 18, 2013, I entered an Order modifying the
2 conditions relating to the use of adjoining properties within SMA jurisdiction. My Order was not
3 appealed.

4 **PROCEDURAL BACKGROUND**

5 On December 26, 2017, the Appellants timely appealed the SEPA DNS for the Views on
6 Fifth project. The appeal sets forth ten challenges:

- 7 1. Failure to include information regarding the adverse effects on the Washington
- 8 2. Failure to acknowledge the adverse effects on the view corridor of the State
- 9 3. Failure to acknowledge the adverse impacts to the shorelines of the state (SMA).
- 10 4. Failure to acknowledge the adverse effects to the 35-foot height limit in the City's
- 11 5. Failure to acknowledge the adverse effects on the Public Trust Doctrine.
- 12 6. Failure to identify the adverse effects to the Master Plan for the Capitol and the
- 13 7. Failure to acknowledge adverse effects caused by building in a Flood Hazard
- 14 8. Failure to acknowledge the project will directly and adversely impact critical
- 15 9. Failure to acknowledge the adverse effects of building in a seismic High Hazard
- 16 10. Failure to acknowledge the underground storage tanks and hazardous waste
- 17 pollution in the soil and groundwater.

18 It was originally envisioned that the Appellants' SEPA appeal would be addressed
19 concurrently with the public hearing before the Hearing Examiner on the land use application,
20 scheduled for January 9, 2018. Shortly before this jointly scheduled hearing counsel for the
21 Applicant gave notice of her intent to file a motion seeking to dismiss the SEPA appeal.
22 Following this notice counsel for all of the parties agreed to separate any hearing on the SEPA
23 appeal from the public hearing on the land use application. The public hearing went ahead as
24 planned on January 9, 2018, without consideration of the SEPA appeal. At the conclusion of the
25 public hearing there was a brief colloquy between counsel and the Hearing Examiner regarding

1 the SEPA appeal. Counsel for the Applicant confirmed that she would soon be filing her
2 Motion to Dismiss. The Hearing Examiner agreed to then notify the parties as to how he
3 intended to proceed on the Applicant's motion and the Appellants' appeal.

4 The Applicant's Motion to Dismiss and for Summary Judgment was submitted to the City
5 and parties on January 12, 2018, and received by the Hearing Examiner on January 16, 2018.

6 Procedural issues relating to hearings before the Hearing Examiner, including motions,
7 are governed by the "Rules of Procedure before the Hearing Examiner of Olympia, Washington".
8 These rules give the Hearing Examiner broad discretion as to how to respond to any motion.
9 Following review of the Applicant's Motion to Dismiss I considered whether to allow for
10 additional briefing, oral argument, etc. as might be expected under the Civil Rules for Superior
11 Court. I concluded that as result of this matter's extensive history neither additional briefing or
12 argument would serve a beneficial purpose, and that a decision could be rendered directly,
13 somewhat in the manner of a motion on the pleadings. This approach might appear to disregard
14 the Appellants' right to be heard but has been carefully considered and results from this matter's
15 already lengthy history.

16 On Thursday, January 18, 2018, a telephone conference was convened with City Staff
17 and counsel for all parties. During this conference I announced that I had considered my
18 available options on how to proceed with the Applicant's Motion and that I had decided to
19 proceed directly to an Order granting the Applicant's Motion and dismissing the Appellants'
20 appeal. Counsel for the Appellants objected and asked to be allowed the opportunity to respond
21 in a manner similar to the process found in CR 56. The Appellants' objection was duly noted but
22 my decision to rule directly on the Applicant's Motion remained intact.

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A. Motion to Dismiss for Lack of Standing. The Applicant's first Motion to Dismiss argues that the Appellants lack standing to bring the SEPA appeal on the grounds that (1) the Appellants' interests are not within the zone of interests protected by SEPA, and (2) Appellants have not alleged any injury in fact.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Applicant separately moves to partially dismiss the SEPA appeal for lack of subject matter jurisdiction. The Applicant argues that the Hearing Examiner lacks jurisdiction to address the Appellants' claims brought under the "Public Trust Doctrine" as such challenges pertain to the State Constitution, and the Hearing Examiner does not have jurisdiction over constitutional issues.

1 The Applicant's argument fails to recognize the unique authority given to the
2 Olympia Hearing Examiner by the City Council. Chapter 18.75 OMC expressly authorizes the
3 City's Hearing Examiner to consider constitutional issues. It is believed that Olympia is the only
4 jurisdiction to give this authority to its Hearing Examiner. There has not been occasion for court
5 review of this authority. Absent such review the City's ordinance is presumed valid and gives
6 the Hearing Examiner authority to consider constitutional issues. The Applicant's Motion to
7 Partially Dismiss for Lack of Subject Matter Jurisdiction is therefore denied.
8

9 2. Motion on Summary Judgment.

10 A. The Doctrine of Res Judicata. The Applicant argues that Issues 1 through
11 6 in the Appellants' Appeal were fully addressed and resolved by both Mr. Bjorgen and the
12 Superior Court during the 2011-2013 Capitol Center Project, and that the Appellants are barred
13 by the Doctrine of Res Judicata from re-litigating these issues. I agree.

14 Issues 1 through 6 of the Appellants' appeal were previously identified on page 3.
15 They are:

- 16 1. Failure to include information regarding the adverse effects on the
- 17 Washington State Capitol Campus.
- 18 2. Failure to acknowledge the adverse effects on the view corridor of the
- 19 State Capitol Campus.
- 20 3. Failure to acknowledge the adverse impacts to the shorelines of the state
- 21 (SMA).
- 22 4. Failure to acknowledge the adverse effects to the 35-foot height limit in
- 23 the City's isthmus area.
- 24 5. Failure to acknowledge the adverse effects on the Public Trust Doctrine.
- 25 6. Failure to identify the adverse effects to the Master Plan for the Capitol
- and the City's Comprehensive Plan.

As earlier noted, the 2011 Capitol Center Project involved the conversion of the
existing nine-story Capitol Center office building into a hotel, with no increase in height or width

1 of the building. The current project proposes to convert this very same existing structure into
2 apartments (and first floor retail), with no increase in height or width of the building. The only
3 difference between the two projects is that the current project would add two smaller buildings to
4 the project site. The current project site is identical to the earlier project site. For purposes of
5 Issues 1 through 6 in the Appellants' appeal the two projects are indistinguishable.

6 The Prior Applicant/Owner, Views on Fifth Ltd., sold the project site to the
7 current Applicant/Owner, Views on Fifth, LLC. The Prior Appellants are the same individuals
8 and organizations constituting the current Applicants, save for one or two who passed away and
9 one or two added parties.

10 The appeal of the 2011 Capitol Center Project led to extensive hearings and
11 briefing before Mr. Bjorgen who then rendered a 35-page Decision carefully analyzing and
12 ruling on the same Issues 1 through 6 as in the current appeal. The earlier appeal framed these
13 issues in an identical manner with nearly identical briefing. Mr. Bjorgen's analysis is thorough,
14 well-reasoned and complete and concludes that these challenges are not well founded. The
15 Appellants then appealed Mr. Bjorgen's Decision to Thurston County Superior Court where
16 Judge Pomeroy affirmed Mr. Bjorgen's rulings

17 As noted in the Applicant's Motion, our courts have applied a four-part test to
18 determine whether claims are subject to Res Judicata. There must be identity of (1) subject
19 matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or
20 against whom the claim is made. Although the current Applicant is a successor to the Prior
21 Applicant, and although the current group of Appellants is slightly different than the earlier
22 group of appellants, these differences are not substantive. Meanwhile, the two projects are
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1 indistinguishable in all material respects. The current Issues 1 through 6 were briefed, argued
2 and thoroughly reviewed by Mr. Bjorgen and then Judge Pomeroy. The Doctrine of Res Judicata
3 applies and bars further review.

4 Since the earlier Capitol Center Project there have been two changes, one legal
5 and one factual, which could be argued to preclude application of the Doctrine:

6 (i) Change to Comprehensive Plan. The one legal change is that the 2011
7 Capitol Center Project was reviewed under the City's *previous* Comprehensive Plan. Following
8 the Capitol Center Decision the City enacted a new Comprehensive Plan in 2014. This would
9 appear to raise a question as to whether the current challenge, at least as it relates to the City's
10 Comprehensive Plan, is barred by the Doctrine of Res Judicata. I conclude that, despite the
11 enactment of a new Comprehensive Plan, the Doctrine of Res Judicata continues to apply.

12 In his 2011 Decision Mr. Bjorgen spends considerable time examining the then
13 Comprehensive Plan and its provisions relating to the protection of views, including views from
14 the Capitol. Mr. Bjorgen concludes that, although the earlier Comprehensive Plan recognizes the
15 need to protect important views, it has no impact on projects which do not *worsen* existing view
16 impacts. Judge Pomeroy agreed with Mr. Bjorgen's analysis.

17 The current Comprehensive Plan includes view protection provisions that are
18 similar to, but not greater than, the provisions found in the previous Plan. As there are no
19 material differences between the two Comprehensive Plans, Mr. Bjorgen's and Judge Pomeroy's
20 Decisions would apply with equal force to the current Comprehensive Plan.

21 Separately, whether the project conforms to the City's Comprehensive Plan is
22 arguably not a SEPA issue. Rather, it is a permitting issue. In his 2011 Decision Mr. Bjorgen
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1 did not make this distinction simply because there was no reason to. For his purposes it was
2 easier to address both permit and SEPA appeals as one since his rulings had universal
3 application. His lengthy and well-reasoned examination of the project's consistency with the
4 Comprehensive Plan did not have anything to do with SEPA, and was instead related to the
5 administrative decision to approve the proposed use.

6 (ii) Change to Flood Zone. The factual change is that the FEMA flood zones
7 have been remapped since the earlier Capitol Center Project, and a portion of the project site now
8 lies within the mapped FEMA flood zone. But this change does not alter the fact that the project
9 site remains outside of SMA jurisdiction as the site is neither within 200 feet of the OHWM nor
10 in a mapped FEMA *floodway*. As the project site remains outside of SMA jurisdiction, Mr.
11 Bjorgen's and Judge Pomeroy's Decisions with respect to the Shoreline Management Act
12 continue to control.

13
14 To summarize, despite the enactment of a new Comprehensive Plan, and despite
15 recent inclusion of a portion of the site into a mapped FEMA flood zone, the Doctrine of Res
16 Judicata continues to apply to Appellants' Issues 1 through 6.

17 B. Shoreline Management Jurisdiction. Although the Applicant has already
18 argued, and I have concurred, that the Doctrine of Res Judicata bars the Appellants' Issue No. 3
19 relating to compliance with the Shoreline Management Act, the Applicant separately asks that
20 the project be found to not be within Shoreline Management Act jurisdiction as a matter of law.
21 I agree.

22
23 The current project site is the same revised project site as in the Capitol Center
24 Project. During the course of that earlier project the then owner, upon discovering that the
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1 parking area was partially within Shoreline jurisdiction, transferred ownership of the parking lot
2 so that none of the remaining project site was within Shoreline jurisdiction. Judge Pomeroy
3 found this transfer of ownership to be valid and concluded that it resulted in a project site free of
4 SMA jurisdiction.

5 As noted above, the current project site is not within 200 feet of the OHWM or in
6 a mapped FEMA floodway. The adjoining parking lot, Parcel No. 91005201000, is not part of
7 this current project and is not owned by the Applicant. As a matter of law there is no basis for
8 SMA jurisdiction over this project.

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10 3. There is no basis for appeal Issues 7 through 10 as a matter of law. As has been
11 previously noted, Issues 1 through 6 in the current appeal are identical to those raised in the 2011
12 appeal of the Capitol Center Project and should be denied by application of the Doctrine of Res
13 Judicata. The current appeal adds four additional issues not included in the previous appeal:

- 14 7. Failure to acknowledge adverse effects caused by building in a Flood Hazard
15 Zone.
- 16 8. Failure to acknowledge the project will directly and adversely impact critical
17 transportation links along 4th and 5th Avenues.
- 18 9. Failure to acknowledge the adverse effects of building in a seismic High Hazard
19 and Liquifaction Zone.
- 20 10. Failure to acknowledge the underground storage tanks and hazardous waste
21 pollution in the soil and groundwater.

22 The Applicant responds that each of these additional issues was fully disclosed in the
23 Environmental Checklist and that mitigation was provided. The Applicant therefore argues that,
24 as a matter of law, these additional issues have no legal basis. Again, I agree.

25 The following is a more complete examination of Issues 7 through 10:

A. Issue 7 - Failure to Acknowledge Effects Caused by Building in a Flood
Hazard Zone. The Appellants argue that the DNS fails to acknowledge adverse effects caused

1 by building in a flood hazard zone. But the SEPA Checklist discloses that the southeast corner
2 of the project site lies within the flood zone, and the flood zone was depicted on the site plans.
3 The City is well aware of this condition as is noted on page 20 of the Staff Report. City Staff
4 finds that this problem is mitigated through application of the Flood Damage Prevention
5 Ordinance, Chapter OMC 16.70, which will establish the appropriate flood protection.

6 As this issue was disclosed in the SEPA Checklist, and it will be mitigated
7 through application of the City's Flood Damage Prevention Ordinance, as a matter of law there is
8 no legal basis for appeal Issue No. 7.

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10 B. Issue 8 - Failure to Acknowledge that the Project will Directly and
11 Adversely Impact Critical Transportation Links Along 4th and 5th Avenues. Appellant's Issue
12 No. 8 argues that the DNS fails to recognize the impacts upon transportation links. But the
13 SEPA Checklist discloses all transportation impacts and incorporates an unchallenged Traffic
14 Impact Analysis (TIA) identifying necessary mitigation, including the addition of a turn lane on
15 Simmons Avenue. Once again, traffic issues are clearly identified in the Checklist and the City
16 has adopted the mitigation found in the unchallenged TIA. As a matter of law the Appellants'
17 Issue No. 8 is without a legal basis.

18 C. Issue 9 - Failure to Acknowledge Adverse Effects of Building in a Seismic
19 High Hazard and Liquifaction Zone. The Appellants argue that the DNS fails to adequately
20 recognize the risks associated with building in in seismic High Hazard and Liquifaction Zone.
21 But the SEPA Checklist discloses soil and surface conditions and includes an unchallenged
22 Geotechnical Report, with recommended mitigation. City Staff is well aware of this issue and
23 has conditioned approval upon compliance with all mitigation proposed in the Geotechnical
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1 Report together with more detailed review during building permit review, all to ensure
2 compliance with the International Building Code provisions for soil conditions and complex
3 structural design, as set forth at Page 21 of the Staff Report.

4 As these issues have been disclosed, and will be mitigated through compliance
5 with the City's Codes, as a matter of law there is no legal basis for appeal Issue No. 9.

6 D. Issue 10 - Failure to Acknowledge Underground Storage Tanks and
7 Hazardous Waste Pollutions in the Soil and Groundwater. Appellants argue that the DNS fails to
8 acknowledge underground storage tanks and hazardous waste pollution onsite. But the SEPA
9 Checklist includes an unchallenged Phase II Subsurface Investigation prepared for the project
10 that identifies and discusses these site conditions. The City is well aware of these conditions and
11 has mitigated them in the conditions of approval. As a matter of law there is no legal basis for
12 the Appellants' Issue No. 10.

14 As noted in the Applicant's briefing, the Responsible Official is entitled to rely on
15 existing plans, laws and regulations to determine that the requirements for environmental
16 analysis, protection, and mitigation of a project under SEPA are met. RCW 43.21C.240(1),
17 WAC 197-11-158. SEPA encourages responsible officials to rely as much as possible on
18 existing plans, rules and regulations, filling in gaps where needed by imposing mitigation
19 measures under SEPA. Despite the Appellants' assertions, Issues 7 through 10 of their appeal
20 were fully disclosed in the SEPA Checklist and mitigation was provided through application of
21 the City's Development Regulations and building codes. The requirements of SEPA have been
22 met and, as a matter of law, there is no basis for these additional challenges.

SUMMARY

The Appellants' Issues 1 through 6 were fully addressed and resolved during the 2011 Capitol Center Project and cannot be re-litigated. Appellants' remaining Issues 7 through 10, while not included in the 2011 appeal, have been clearly and fully disclosed in the Applicant's SEPA Checklist, and have been mitigated through application of the City's Development Regulations.

For the reasons set forth above the Applicant's Motion to Dismiss for Lack of Standing and/or Lack of Subject Matter is **denied** but the Applicant's Motion for Summary Judgment is **granted**.

Having granted the Applicant's Motion for Summary Judgment the Appellants' appeal of the SEPA Determination is hereby **dismissed**.

DATED this 25 day of January, 2018.



Mark C. Scheibmeir
City of Olympia Hearing Examiner

