

FINDINGS, CONCLUSIONS AND DECISION
OF THE CITY COUNCIL OF THE CITY OF SEATTLE

In the Matter of the Appeal by)	C.F. 310914
)	FINDINGS, CONCLUSIONS AND
1507 Group, L.L.C.,)	DECISION
)	
From a Recommendation by the)	
City Hearing Examiner the)	
Imposition of Controls and)	
Incentives on the Landmark Eitel)	
Building.)	

Introduction

This matter involves the appeal by 1507 Group L.L.C. (Owner) from the Hearing Examiner's recommendation for controls and incentive for the Eitel Building (Building), which is located at the northwest corner of the intersection of Pike Street and Second Avenue. The seven-story Building was purchased by the Owner in 1975. In August 2006, the Landmarks Preservation Board (Board) designated the Building as a landmark based on the designation criterion that it "embodies the distinctive visual characteristics of an architectural style, period, or of a method of construction." The Building was nominated for designation by Historic Seattle. In January 2010, the Board recommended controls and incentives. In February 2010, the Owner filed a timely objection to the Board's recommended controls and incentives. The Hearing Examiner conducted a hearing on April 13, 14, and 15 and briefly reconvened on May 12, 2010. On June 9, 2010, the Hearing Examiner recommended that the Council accept the Board's recommendation. On June 23, 2010, the Owner filed an appeal from the Hearing Examiner's recommendation with the City Council. On December 8, 2010, Council's Committee on the Built Environment heard oral argument from the Owner and the Board. On January 12, 2011, the Committee on the Built Environment recommended that the Council deny the appeal by the Owner and affirm the recommendation of the Hearing Examiner.

Findings of Fact

The Council, after considering the record before the Hearing Examiner, hereby adopts the Hearing Examiner's Findings of Fact as stated in the Findings and Recommendation of the Hearing Examiner dated June 9, 2010, a copy of which is attached.

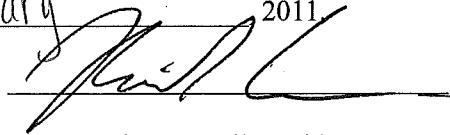
Conclusions

The Council hereby adopts the Hearing Examiner's Conclusions as stated in the Findings and Recommendation of the Hearing Examiner dated June 9, 2010.

Decision

The Council denies the appeal by the Owner and affirms the Hearing Examiner's recommendation that the Council accept the Board's recommended controls and incentives for the Building.

Dated this 31st day of January 2011.



City Council President

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

In the Matter of Controls and
Incentives for

THE EITEL BUILDING
1501 Second Avenue

Hearing Examiner File:
LP-10-001

Board File:
22/10

Introduction

The Landmarks Preservation Board issued a recommendation on controls and incentives for the Eitel Building, located at 1501 Second Avenue, and the property owner timely filed an objection to the recommendation. The matter was heard before the Hearing Examiner on April 13, 14, and 15, and May 12, 2010. Parties represented at the hearing were the property owner, 1507 Group LLC (Owner), by Lawrence A. Costich and Curtis R. Smelser, attorneys-at-law; and the Landmarks Preservation Board (Board), by Roger D. Wynne, Assistant City Attorney. The Examiner visited the property, and the record was held open through May 28, 2010 for post-hearing filings:

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

Findings of Fact

1. The subject property is known as the Eitel Building (building) and is addressed as 1501 Second Avenue. It is located on the northwest corner of the intersection of Second Avenue and Pike Street, within the central business district and two blocks east of the Pike Place Market. It abuts the 38-story Opus condominium tower on the north and is bordered on the west by an alley that runs parallel to Second Avenue. Across the alley is the two-story Liberty Building.
2. The building is a seven-story rectangular structure with tan-colored brick cladding and terra-cotta ornamentation. Six stories were built in 1904 of unreinforced masonry with a steel column and lintel base support system on the southern and eastern sides, and an interior steel column and girder system supporting wood floor and roof framing. The seventh story was added in 1906. The southern and eastern façades are considered primary. Exhibit 26.
3. The building covers most of the 5,592-square-foot site and is approximately 90 feet tall. The basement extends partially under the adjoining sidewalk, and there is a light well that begins with the second floor on the western elevation.

4. The Owner purchased the building in 1975 as an investment in the hope that future renovation would be possible. When renovation to building code standards proved too costly, the Owner rented out the ground floor to commercial tenants and has kept the upper six floors vacant. The Owner also leases out billboard space on the west exterior of the building. Over the years, deterioration and earthquake damage have required structural work to stabilize the building.

5. Until recently, the zoning on the property was DMC (Downtown Mixed Commercial) 240, which would have allowed construction of a 240-foot building. However, in 2004, the Owner obtained a permit to renovate the building within the existing shell. Although the renovations proved too costly for the Owner to proceed, the building permit has been repeatedly renewed and remains active.

6. In 2006, the Owner learned that the property would be rezoned to its present zoning, DMC 240/290-400. The Owner determined that the new zoning would allow one property on the block to be developed to a height of 400 feet but would limit other development on the same block to a maximum height of 160 feet. The Opus tower to the north was to be constructed to approximately 400 feet. Therefore, the Owner decided to construct a 240-foot building on the subject property before the new zoning took effect.

7. The Owner hired an architect, who developed plans for a 22-story building with 92 residential units above 23,000 square feet of administrative office space and 3000 square feet of retail space. The proposal, which included demolition of the existing building, was reviewed in a meeting with the Design Review Board in February of 2006. Exhibit 18.

8. In August of 2006, the Landmarks Preservation Board (Board) designated the building as a landmark following nomination by Historic Seattle. The Board determined that the building "embodies the distinctive visible characteristics of an architectural style, period, or of a method of construction." See "Staff's Recommendation on Controls and Incentives" (January 13, 2010) attached to January 26, 2010 letter from Karen Gordon to the Hearing Examiner (Staff's Recommendation). The Owner then retained counsel to negotiate with the Board on a Controls and Incentives Agreement for the building.

9. Following designation, the Owner revised the development proposal for the site to remove the seventh floor and add a 16-story tower above the existing six-story building, preserving the south and east façades. The building would be 16 floors of residential above one level of retail use and five floors of office use. See Exhibit 29. The Design Review Board met to consider the revised proposal in October of 2006. Exhibit 19.

10. In January of 2007, the Owner filed a Master Use Permit (MUP) application, thereby vesting to the then-existing 240-foot zoning. At the same time, the Owner submitted the MUP drawings and a project description to the Board's staff and asked to schedule a meeting with the Board's Architectural Review Committee (ARC). Exhibit 27.

11. The ARC is a subcommittee of the Board composed of members with architectural expertise. The ARC is available to meet with an owner to review a proposal, and provide feedback and suggestions on it, before the owner seeks a Certificate of approval from the full Board. The process is collaborative, and the goal is to achieve a design solution that meets both the owner's needs and the Board's goal of preserving the designated historic features. Testimony of Sarah Sodt, 4/15/10 at 1:22. *See* SMC 25.12.750 (reproduced below).
12. A certificate of approval is required from the Board before the owner of a designated landmark may alter or significantly change the designated features or characteristics of the landmark. *See* SMC 25.12.080, .670.
13. The Board's coordinator testified that the Board has granted certificates of approval that resulted in the destruction of some designated features of landmark buildings when the aspects of the buildings that remained were sufficient to convey their historical importance. The coordinator cited two recent examples: the Pacific McKay Ford Building on Westlake Avenue, where the primary façades were removed and are in storage for future installation on a new development; and the Terminal Sales Annex Building at 1931 Second Avenue, a narrow building for which the Board approved retention of the street-facing façade and the addition of a multi-story tower atop the landmark. Testimony of Sarah Sodt, 4/15/10 at 1:22-1:26 and 2:20. She did not know of any certificate of approval application for construction of additional stories atop a landmark that has been denied. Testimony of Sarah Sodt, 4/15/10 at 2:22.
14. It is not necessary for controls and incentives for a building to be in place before an owner seeks a certificate of approval for proposed changes to it. Testimony of Sarah Sodt, 4/15/10 at 1:18.
15. Working with an architect not known to have experience with historical structures, the Owner presented the MUP proposal to the ARC in March of 2007. The ARC suggested that the architect consider an alternative that reduced the tower height and explore a tower setback. The ARC did not state that the design needed to stay within the existing shell of the building. Testimony of Sarah Sodt, 4/15/10 at 1:28-130.
16. To determine the economic impact that might result from controls and incentives that could be adopted for the building, the Owner retained an appraiser to evaluate the feasibility of three development scenarios. The first appraisal was produced on June 8, 2007. The three development scenarios evaluated were office and retail, residential condominium and retail, and residential apartment and retail. They were based on the renovation plans developed for the 2004 building permit. Thus, for each scenario, the appraiser assumed that forthcoming controls and incentives for the building would limit construction to the building's existing shell. *See* Tab 2 to Exhibit 1¹ at 211, 279, 289 and

¹ Tab 2 to Exhibit 1 consists of bound documents, the content of which is essentially the same as the compact disc included under Tab 2 of Exhibit 1. The page numbers referenced in Exhibit 1 and Tab 2 to Exhibit 1 are the Bates-stamped numbers at the bottom of the pages.

299. The appraiser concluded that none of the three development scenarios would be "expected to produce a sufficient return on investment necessary to attract capital to the project." Tab 2 to Exhibit 1 at 193.

17. Under the caption, "Extraordinary Assumptions and Limiting Conditions," the 2007 appraisal notes that the three development scenarios considered "are believed to reflect reasonable and realistic use constraints" that may be imposed on the property through the controls and incentives process. The appraiser reserves the right to modify the appraisal's conclusions if "any or all of the ... assumptions utilized prove to be in error." Tab 2 to Exhibit 1 at 211.

18. The Owner chose not to return to the ARC with a revised design proposal and, instead, filed an application for a certificate of approval in October for essentially the same proposal the ARC had reviewed in March. Exhibits 28 and 29. On November 5, 2007, the Board's staff sent the Owner an application checklist showing which pieces of the certificate of approval application were still missing.

19. On November 15, 2007, as part of the MUP process, the Director of the Department of Planning and Development (DPD) issued a SEPA determination of significance, requiring that an environmental impact statement be prepared to analyze the proposal's historic preservation and land use impacts. Exhibit 22. The Owner retained an environmental consultant to begin work on the EIS. Testimony of Richard Nimmer, 4/13/10 at 10:33.

20. On May 7, 2008, the Owner's appraiser issued an updated appraisal to evaluate the likely economic impact of controls that might be imposed on the building. Tab 2 to Exhibit 1 at 144. Again, the appraisal assumed that any of the three development scenarios would involve "essentially 'rebuilding' the existing seven-story improvement and, in addition, foregoing the opportunity to develop the site to the full extent of the remaining 15 stories." Tab 2 to Exhibit 1 at 172. Under these assumptions, the appraiser again concluded that none of the three scenarios would be capable of producing a sufficient return on investment to attract capital. Tab 2 to Exhibit 1 at 172.

21. The 2008 appraisal also considered the feasibility of the 22-story revised MUP proposal, including demolition of the building, for residential condominium use and residential apartment use. Assuming a minimum rate of return required to attract capital of 75 percent, the appraisal concluded that both of these development scenarios would be feasible. *See* Tab 2 to Exhibit 1 at 169, and 174-76.

22. The Owner believes that as a result of the landmark designation, the building is capped at 90 feet with the exception of a possible small "penthouse" addition. Testimony of Richard Nimmer, 4/13/10 at 10:30. However, the Owner acknowledged that if controls on the building did not prevent an increase in building height, the air rights above the building would be valuable to the owners of adjacent buildings. As an alternative to a tower atop the existing building, the Owner agreed that the air rights could be sold to help fund renovation of the existing building. Testimony of Richard

Nimmer, 4/13/10 at 11:18. The Owner's appraiser agreed that a purchase of air rights could make building renovation possible. Testimony of Brian O'Connor, 4/14/10 at 11:54.

23. On May 9, 2008, the Owner submitted the 2007 and 2008 appraisals to the Board, together with a letter from the Owner's architect, indicating that the application now included demolition of the building, and other materials required to complete the October 2007 certificate of approval application. Exhibit 31.

24. On April 22, 2009, the Owner inquired of DPD concerning the ramifications of placing the revised MUP application on hold while continuing to pursue a certificate of approval from the Board. DPD responded on May 8, 2009, that the Owner would need to terminate the certificate of approval process in order to remove the MUP from active status. Exhibit 24.

25. On May 14, 2009, the Owner notified the Board that it was withdrawing its application for a certificate of approval to demolish the building. Exhibit 25.

26. The Owner and Board continued to discuss controls and incentives for the building. On January 12, 2010, the Owner declared that the negotiations were at an impasse.

27. On January 20, 2010, the Board adopted recommended controls and incentives, which were forwarded to the Hearing Examiner on January 26, 2010. The recommended controls and incentives require that the Owner obtain a certificate of approval from the Board before making alterations or significant changes to the exterior of the building with the exception of the light well on the western elevation. *See Staff's Recommendation.*

28. The Owner timely filed a statement of objections to the Board's recommended controls and incentives. The objections state that the recommended controls are not supported by applicable law and substantial evidence in the record; prevent the owner from realizing a reasonable return on the site; resulted from consideration of factors other than, and in addition to the factors listed in SMC 25.12.590 for determining a reasonable return on the site; deprive the owner of a reasonable economic use of the site; and deny the Owner substantive due process and amount to an inverse condemnation (taking) of the site, in violation of the constitution.

29. In preparation for the hearing on the Owner's objections to the Board's recommended controls and incentives, the Owner's appraiser issued a March 30, 2010 summary appraisal of the property that updated information on its market value. Exhibit 1, Tab 11 at 489. The appraiser determined that the "highest and best use" of the property was to "hold for future development" and valued it at \$2,500,000 under the "vested MUP" proposal, and \$1,650,000 under the existing 160-foot zoning assuming that no controls were imposed. Exhibit 1, Tab 11 at 493, 582 and 587.

30. On April 7, 2010, the Owner's appraiser issued an updated appraisal to evaluate the economic impact of the imposition of controls on the property. Exhibit 1, Tab 12 at 603.

The appraiser again assumed that the Owner would be required to preserve the existing shell of the building other than the light well. Exhibit 1, Tab 12 at 626. And the appraiser again reserved the right to modify the conclusions in the report should the assumption on controls be proven incorrect. Exhibit 1, Tab 12 at 626. As in the earlier appraisals, the appraiser concluded that "rehabilitation of the existing improvements is not considered to be feasible" under the assumed controls. Exhibit 1, Tab 12 at 605.

Applicable Law

31. SMC 25.12.570 provides that "[o]n the basis of all the evidence presented at hearing," the Examiner is to determine whether to recommend that the proposed controls and incentives recommended by the Board be accepted, rejected or modified. Further, the Examiner "shall not recommend any control which is inconsistent with any provision of this chapter, or which requires that the ... [landmark] be devoted to a particular use," or that imposes any use restriction, control or incentive if the effect, alone or in combination, "would be to prevent the owner from realizing a reasonable return on the [landmark]." SMC 25.12.590 lists the factors to be considered in determining a reasonable return on the landmark.

32. SMC 25.12.580 states that "in no event shall ... any proceedings under or application of this chapter deprive any owner of a ... [landmark] of a reasonable economic use of such ... [landmark]."

33. SMC 25.12.750 lists the factors that the Board and Examiner are to take into account in considering an application for a certificate of approval. The factors relevant to this case are the following:

A. The extent to which the proposed alteration or significant change would adversely affect the specific ... [landmarked] features or characteristics...;

B: The reasonableness or lack thereof of the proposed alteration or significant change in light of other alternatives available to achieve the objectives of the owner and the applicant;

C. The extent to which the proposed alteration or significant change may be necessary to meet the requirements of any other state law, statute, regulation, code or ordinance; [and]

D. Where the Hearing Examiner has made a decision on controls and economic incentives, the extent to which the proposed alteration or significant change is necessary or appropriate to achieving for the owner or applicant a reasonable return on the ... [landmark], taking into consideration the factors specified in Sections 25.12.570 through 25.12.600 and the economic consequences of denial; provided that, in considering the factors specified in Section 25.12.590 for purpose of this subsection, reference to the times before or after the imposition of controls

shall be deemed to apply to times before or after the grant or denial of a certificate of approval;

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 25.12.540.
2. The Owner's constitutional issues of inverse condemnation and substantive due process are beyond the jurisdiction of a quasi-judicial body, and the Examiner has not considered them. See *Yakima Cy. Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975).
3. Under the scheme of Subchapter V. of Chapter 25.12 SMC, the Hearing Examiner's recommendation on controls and incentives is essentially *de novo*. The issue before the Examiner under SMC 25.12.560.B is whether the Board's recommended controls and incentives are supported by substantial evidence in the record before the Examiner. "Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan Cy.* 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (citations omitted). The "appellant bears the burden of proving that the Board's recommendation should be rejected or modified." SMC 25.12.560.B. The "appellant" in this case is the Owner.
4. The Owner objects to the Board's recommendation as not being supported by applicable law and substantial evidence in the record before the Board. As noted, however, the Examiner's review under the Code is *de novo*. Therefore, the record before the Board is immaterial in this proceeding.
5. The Owner asserts that the Board erroneously considered factors other than, and in addition to the exclusive factors listed in SMC 25.12.590 for determining a reasonable return on the site. However, the Owner did not establish what factors the Board considered in reaching its recommendation on controls and incentives. Moreover, the issue before the Examiner is not what the Board considered but whether the Board's recommended controls and incentives are supported by substantial evidence in the record before the Examiner.
6. The Owner's entire case, including all the work of the Owner's appraiser, rests on the premise that the Board's recommended controls would limit any development of the property to the shell of the existing building. Yet there is no evidence in record to support that premise.
7. The recommended controls require only that the Owner obtain a certificate of approval from the Board before making exterior alterations to the building, with the exception of eliminating the light well. Both the evidence in the record and the

applicable law demonstrate that the certificate of approval process is a collaborative one, designed to achieve both the owner's and City's needs with respect to the landmark.

8. The Owner argues that the addition of floors to the building would "significantly change and adversely affect" the features or characteristics specified in the designation, and that it is not clear the Board would approve such a change. However, the certificate of approval process exists to examine and, if possible, resolve such challenges. The ARC works with the owner toward development of alternative designs. The Board considers several factors, including the reasonableness of the proposed alteration in light of the alternatives available to achieve the owner's objectives. *See* SMC 25.12.750.B (Finding 33). The Code does not dictate a particular outcome, nor does it require preservation of all designated historic features. Moreover, past Board practice, including this Owner's experience with the ARC, demonstrates that approval of a tower above the landmark is in no way foreclosed.

9. The Owner states that if the Board had believed additional height was acceptable, it would have said so in its recommendation, as it did with the exception allowing infill of the light well. The Board is not a legislative body, and it is not clear that the rules of statutory construction apply to its recommendation. In any event, the fact that the Board did not include an exception for additional height above the landmark does not indicate that additional height is precluded; rather, it suggests that the addition of floors above the landmark would require the exploration of alternatives that is an inherent part of the certificate of approval process.

10. The Owner correctly asserts that the evidence fails to demonstrate that adding floors to the building could be accomplished and would provide the Owner a reasonable rate of return. The evidence does show that from 2006 through 2007, the Owner pursued the original 22-story MUP proposal that included preservation of the south and east façades and construction of a tower above the existing landmark. Working with an architect not known to have experience with historical structures, the Owner met with the Design Review Board and the ARC on the MUP proposal. Both bodies asked for revised alternatives, although for slightly different reasons. The evidence shows that in 2008, the Owner received an appraisal that indicated demolition of the landmark and sale of the property for construction of a 240-foot or 160-foot tower would result in a rate of return necessary to attract capital to the project. The evidence also shows that in 2008, the Owner decided to demolish the building and terminated the certificate of approval process. During the intervening two years, the Owner has directed resources toward convincing the Board that any controls and incentives placed on the landmark would prevent the Owner from realizing a reasonable return and deprive the Owner of a reasonable economic use. As a result, we do not know with certainty whether a tower can be built atop the landmark, and there is no evidence in the record on whether development available to the Owner through the MUP and certificate of approval processes would provide the Owner with a reasonable return and a reasonable economic use. The Board's recommended controls and incentives would afford the opportunity for development of the information necessary to make those determinations. *See* SMC 25.12.750.D (Finding 33).

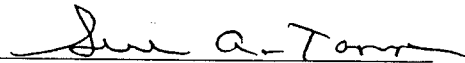
11. The Owner drew an analogy between this case and In re Bon Marche Stables, LP-08-004, which also involved an owner's challenge to the imposition of controls and incentives that required a certificate of approval for exterior alterations. In that case, however, the Board did not dispute that the imposition of controls and incentives would limit future development to the shell of the existing building.

12. Because all of the Owner's evidence is based on an invalid assumption, the Owner has not met the burden of proving that the Board's recommended controls and incentives should be rejected or modified.

Recommendation

The Hearing Examiner recommends that the City Council accept the Board's recommendation on controls and incentives for the Eitel Building.

Entered this 9th day of June, 2010.


Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking further review of a Hearing Examiner recommendation to consult appropriate Code sections to determine applicable rights and responsibilities.

SMC 25.12.620 provides as follows:

Any party of record before the Hearing Examiner may appeal the recommendations of the Hearing Examiner regarding controls and incentives to the Council by filing with the City Clerk and serving on all other parties of record a written notice of appeal within fourteen (14) days after the Hearing Examiner's decision is served on the party appealing.