

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of

Save Bainbridge Trees

From a Mitigated Determination of
Nonsignificance

And

SPRA 13408

In the Matter of the Appeal of

Winslow Holdings LLC

From Site Plan Amendment Conditions

Introduction

Winslow Holdings LLC proposes development of a site at Wyatt Way and Madison Avenue and appeals certain conditions imposed by the City of Bainbridge Island on the Site Plan Amendment. Save Bainbridge Trees appeals the Mitigated Determination of Nonsignificance issued by the City pursuant to SEPA.

An open record public hearing was held on November 21, 2008. The hearing record was closed as to the appeal by Save Bainbridge Trees but the hearing on the appeal by the applicant will continue on January 23, 2009. Appellant Save Bainbridge Trees was represented by Ryan Vancil, Vancil Law Offices, the applicant was represented by Matt Adamson, Jameson Babbitt Stites & Lombard, and the Department of Planning and Community Development by Rosemary Larson, Inslee Best.

All references to sections in this decision are to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner on this appeal.

Findings

1. Winslow Holdings LLC (“Applicant”) applied for a site plan and design review amendment to a previous Site Plan and Design Review Permit (SPR13408B). The development

proposal in the revised plans include construction of a mixed-use development to include two three-story buildings with mixed use and two three-story buildings for multi-family residential use on a 60,113 square foot property at the northeast corner of Madison Avenue and Wyatt Way. The development would have 7,000 square feet of commercial space and 21 residential units.

2. Four large trees line the north side of the street along the southerly property line of the subject site, two black locusts, one willow and one bigleaf maple. The proposal includes removing all but the bigleaf maple.

3. The City of Bainbridge Island (“City”) issued a Notice of Administrative Decision and SEPA Mitigated Determination of Nonsignificance (MDNS) for the proposal on September 18, 2009. The administrative decision was to approve the application with conditions.

4. Appeals were filed by Save Bainbridge Trees (“Appellant”) challenging the MDNS based on historic and aesthetic impacts, and the applicant regarding certain conditions imposed on the property as a part of the MDNS.

5. Riley Hoskinson came to Bainbridge Island in 1878 and ran the first government weather bureau west of the Mississippi for twelve years. His writings in New York papers attracted additional settlers to the area including Ambrose Grow who homesteaded land next to Mr. Hoskinson’s land. The Hoskinson family homesteaded 160 acres that included the subject site and farmed the area which is now in central Winslow. Riley Hoskinson funded and helped build the Eagle Harbor Congregational Church in 1882. He eventually divided the land so family members and friends could establish houses. In 1895, Riley’s son William built a house on the subject site. In 1907 John Pratt bought the house and had a water tower built. For the past fifty years, businesses have occupied the house and artists have used the tower. The house, which has been demolished, was included in the historic property inventory. The water tower was saved by the City and moved to a new site. It was recently listed as a historic landmark.

6. The corner at which the subject site is located was an important landmark for those who wanted to go towards Port Blakely or Crystal Springs, according to Ralph Munro. Carl Pratt, apparently a son of John, was one of the founders of the Bainbridge Island Fire Department. The trees along Wyatt provided shade to people walking from the ferry to their homes. Exhibit 45.

7. Barbara Winther, an historian and a member of the Historical Preservation Commission and on the Board of the Historical Society, testified that if the trees are 85-100 years old they would have been planted by the Pratts or, if older, by William Hoskinson. Ms. Winther believes the trees might be eligible to be landmarks, if the owner agreed, as objects over 50 years old, with physical integrity, associated with the lives of historically significant persons in that historic figures may have planted them and they are the only remaining vestiges of that early development on the site. She opined that their removal would cause more than a moderate impact on historic value of the corner and the beauty of Wyatt Way.

8. Ms. Sutton was aware of the historical significance of the site, as she was the planner who prepared the staff report for the nomination of the water tower to the Historic Register and noted on the environmental checklist the water tower’s removal to another site. She also added a comment to the environmental checklist submitted by the applicant to indicate that the willow and black locust trees would be removed.

9. A building, structure, site or object is eligible to be listed on the Bainbridge Island Historic Register if it is significantly associated with the history, architecture, archaeology, engineering or cultural heritage of the community, has physical integrity, is at least 50 years old and is either associated with events that have made a significant contribution to settlement history locally, the state or nationally, or reflects special elements of the city's history, or is associated with the life of persons significant in history.

10. The City has a voluntary Heritage Tree Program, Council Resolution 1006-11, which is intended to acknowledge trees of significant size to increase the awareness of trees in the community. Trees listed in Exhibit 47 are the trees in the Heritage Tree Program as of 2007.

11. The City engaged Tree Solutions, consulting arborists, to evaluate trees that would be impacted by proposed street widening and construction of a new roundabout at the intersection of Madison Avenue North and NE Wyatt Way. The Tree Solutions report, Exhibit 24, rated the trees as to whether they should be removed, saved if possible, or worthy of special protection. The report recommended removal of the locusts, which they counted as three, because of poor structure and a failed stem. The report described the willow as unique and having a scaffold limb over the street. The report recommended that it be considered for heritage tree status. The bigleaf maple at the corner of the site was described as a significant native tree in good condition and could qualify as a heritage tree.

12. Jim Trainer, a certified arborist, agreed with the Tree Solutions report that the bigleaf maple and the willow should be considered heritage trees. He said that the threes are typical old homestead trees. Mr. Trainer measured and assessed the age of the trees and agrees with the health assessment of the report and that the trees are between 80 and 100 years old.

13. In considering whether a proposal is likely to have an impact on the historical element of the environment the City looks at whether any part of the property is on the historic register or on the historic property inventory and any review by the historic preservation commission. Testimony of Sutton.

14. Kristin Tollefson has an MFA, is a member of the Design Review Board, and is a public artist specializing in the connection between the human and the environment. She recognizes that cultural and sensory values are hard to quantify but are present in the trees in their affect on the quality of filtered light which is associated with a relaxed response, the texture of the branches, bark and leaves, scale in that it induces a humbling, humanizing shelter effect, changing colors with the seasons, interest in the sizes and shapes of leaves, sound from the rustling of the leaves, the importance of grouping. The loss of the trees along the site would remove the sheltering effect of the canopy over the street, and have a negative effect on the physical space and cultural fabric of the city, according to Ms. Tollefson. She advised that the loss of the symbolism of what the community stands for and its shared goals would be more pervasive than their actual loss. She does not accept that replacement of the trees would actually mitigate the loss.

15. In determining that the proposal would not have a significant adverse impact, the City recognized that the requirement to retain at least 15 percent of significant trees and required landscaping would mitigate any significant adverse impacts to vegetation. Section 18.85.060 requires the retention of 15 percent of the number of significant trees on a development site or 30 percent of the canopy. The planner, Jennifer Sutton, accepted the count of significant trees submitted by the applicant. She made a number of site visits, as did several other City officials.

The existing condition as to number of trees was not shown on any plans submitted. The City determined that there are four significant trees on-site so only one tree would have to be retained. Conditions were imposed intending to protect the maple and for replacement if that failed.

16. The City defines a “significant tree” as a deciduous tree at least 12 inches in diameter 4 feet above grade. Evergreen trees are “significant trees” if at least 10 inches.

17. Olaf Ribeiro, a certified plant pathologist and certified arborist, who has a specialty in saving heritage trees through soils mitigation, examined the maple and willows three or four years ago and found them healthy then. He looked at them again just before the hearing in this matter. He measured the bigleaf Maple and found it to be 43 inches at breast height. One locust is four-stemmed and each stem measures 14-16 inches. The other is three-stemmed and measures around 12-14 inches apiece. The willow measures 50 inches at breast height. He made a visual tree assessment and saw no evidence of insects or decay. The resistograph readings showed only a spot of decay in the willow but Dr. Ribeiro explained that decay is normal in willows and they are able to compartmentalize quite a bit of decay and live for a long time. The other trees showed no decay. Though the trees on the site are in a state of neglect and need to be cleaned up and pruned, they could live for decades more and another 100 years if their root systems were given a boost. He, along with another arborist, took core samples of the trees and analyzed them to determine the age of the trees. Dr. Ribeiro determined that the trees are at least 85 to 100 years old. He testified that they could live another 100 years. He did not agree with the recommendation in the Tree Solutions report that the locusts be removed.

18. Dr. Ribeiro counted a total of 19 trees on the subject site that would qualify as “significant” trees under the City’s definition, though he could not be certain of all property lines and whether some trees were on the line. He found a cluster of locusts with each stem over 12 inches. In a row of poplars, at least one of which appears to be 13 inches and another could be 12 inches. An apple tree was shown to be over 12 inches in the Tree Solutions report, though with severe decay. Dr. Ribeiro observed that apples survive with a lot of decay. A Scouler’s willow is 14 inches in diameter and a dogwood has multiple stems which, when aggregated, would exceed 12 inches.

19. Michael Oxman, a certified arborist, viewed the site and counted nineteen trees he believes are at least 12 in. in diameter at chest height. Both the dogwood and apple are that size or greater.

20. A member of the applicant LLC understands that the actual property line is some distance east of the fence that may have appeared to be the property line to some who counted trees on the site. Testimony of Elmquist.

21. Ms. Sutton has not decided whether trees on property lines are subject to the retention requirement of Section 18.85.060.

22. Other trees were not included in the inventory of significant trees for the following reasons: the poplar is on the adjoining property to the east or on the property line; the apple is diseased or damaged; the willow listed as #39 in the Tree Solutions report is on the adjacent property or on the property line; the dogwood was under the size for significance; and the Scouler’s willow is on the property to the east or on the line.

23. A publication, “Garden Wise” (Exhibit 28) describes the Black Locust as invasive in the Pacific Northwest because it can form dense stands and displace native vegetation and reduce herbaceous understory.

24. Mr. Oxman reviewed the utility plan (Exhibit 51) for the proposed development and found that the depiction of the maple to be preserved is not accurate as to the size of its canopy. He believes the canopy to be approximately 75 ft. wide and the plan drawing shows it to be about 25 ft. Ms. Sutton explained that the circles are not intended to represent the canopy but the opening in the tree grate and area of permeable paving. Mr. Oxman's concern is that the root zone can be up to 2.5 times the diameter of the crown area or dripline. A rule of thumb for protecting the critical root zone (CRZ) is a foot of setback for each inch of diameter, so 43 feet would be the CRZ for the maple. He reads the utility plan to provide for a utility line just outside the depicted canopy or about 13 ft. away and the building setback to be 13.5 ft. In Mr. Oxman's opinion, necessary mitigation would be a fence at the dripline, 30 ft. from the trunk to mark a no construction zone. Because the roadway on the south side impacts the roots, he feels it is especially important to protect the roots on the other sides. He feels the health and stability of the tree are at stake.

25. There are newer methods for trenching that could be used whereby the roots might be avoided in installation of the utility line.

26. MDNS condition No. 1 requires recommendations from a certified arborist for measures needed to ensure protection of the root zone of the maple. Ms. Sutton expects that the arborist could recommend use of low impact construction techniques. If the arborist recommended that the building be set back further from the tree, Ms. Sutton does not know what the City would require.

27. MDNS Condition No. 40 requires a replacement tree, 20 ft. tall, if the big leaf maple dies or becomes severely diseased within three years. Mr. Oxman estimates that it would take 75 twenty-foot tall trees to provide the air conditioning and soil conditioning of the existing tree.

28. The City's storm drain system includes a pipe, part of the closed conveyance system, on the frontage of the subject site. The Public Works Department has responded to flooding on several occasions at the site because of root blockage of the pipe caused by the willow. The Director of that department believes that the problem is likely to recur until the willow is removed.

29. Sally Adams has been a member of the City's Community Forest Commission (CFC) for five years. The CFC was instrumental in getting an amendment to the Comprehensive Plan to clarify the policy regarding trees. CF 1.1 provides that

The City shall encourage protection, restoration and maintenance of existing vegetation that has environmental, wildlife habitat and aesthetic qualities, including tree groves, significant tree stands, forested hillsides, and vegetation associated with wetlands, stream corridors and riparian areas.

30. The CFC developed a Community Forest Management Plan. (Exhibit 55) The forest cover on the island was estimated to be 72 percent in 2004 with the Winslow core having 29 percent, down by two percent since that time, and the Mixed Use Town Center having 42 percent coverage. The goal of the plan is to retain 35 percent coverage in both the Winslow Core and the Mixed Use Town Center. The subject site is in the Mixed Use Town Center zone. The goal for the Mixed Use Town Center zone reflects the expectation that there will be some loss of vegetation in the area where growth is desired and urban services will be provided. The next step for the CFC is the development and passage of a tree ordinance.

31. The proposal includes adding 69 new trees to the site.

32. The development standards require that the front setback be at least 10 ft. and no more than 20 ft. The building is proposed to be set back approximately 13.5 ft. from the tree to meet the standard. The
33. The Hearing Examiner is authorized to hear and decide SEPA appeals by Section 16.04.170.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide the appeal of the MDNS.
2. The SEPA threshold determination made by the City's responsible official in this case, an MDNS, is to be given substantial weight on review. Section 16.04.170(E). The MDNS is reviewed under the clearly erroneous standard, *Norway Hill Preservation and Protection Assn. v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), so the MDNS must be affirmed unless the hearing examiner is "left with a definite and firm conviction that a mistake has been committed." The record must show that "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA" and that the determination was based on information sufficient to evaluate the environmental impact of the proposal. *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 452 (1997). The burden of proving that the determination does not satisfy the procedural standards of SEPA and that there will be a probable significant adverse impact from the proposal, defined as a reasonable likelihood of more than a moderate adverse impact on environmental quality, WAC 197-11-794, is on the Appellant.
3. Appellant contends that the MDNS fails to adequately identify and analyze impacts due to the removal of historical trees and does not demonstrate how mitigation will address the impacts; the SEPA review failed to identify significant impacts concerning historical trees; the SEPA review failed to review the proposal for impacts to scenic resources and aesthetic values due to removal of the trees; and the SEPA review failed to review the proposal for impacts to unique physical features due to removal of the trees.
4. The City made a *prima facie* showing that, though the checklist itself did not identify the loss of the trees as an aesthetic impact or as historical objects, it was aware of the aesthetic value of the trees proposed for removal and of the history related to the site. It also showed that it considered the effect of the loss of the trees on these values but believed it could not impose conditions necessary to save them because the regulations specifically addressed retention of trees and preservation of trees beyond that required was voluntary.
5. Whether the site plan meets the standards of the Code for significant tree retention is not within the hearing examiner's authority to review in a SEPA appeal. If the authority lay with the hearing examiner, Appellant's inability to prove that the several of the disputed trees are within the bounds of the subject site would have defeated the claim that the plan does not meet the standard and, moreover, as testified by Ms. Sutton, even if an additional significant tree were within the site, the required retention would still be one tree.

6. Appellant contends that because the opinions by an artist and an historian that the loss of the three trees would be more than a moderate adverse impact on the environment is unrebutted in the record, it has overcome the substantial weight to be accorded the City's determination that their loss, with the retention of the corner tree, would not be a significant adverse impact. The hearing examiner could not find any guidance from reported cases so believes that the issue of whether a public artist's opinion that there would be a significant adverse impact on the aesthetic quality of the environment overcomes the substantial weight to be given the responsible official's determination that there would not be, is a case of first impression. Likewise, whether an historian's opinion that the loss would cause a significant adverse impact on the historic element of the environment overcomes that weight, also must be decided without precedent.

7. A hearing examiner is required to determine what weight to give testimony of experts, as well as lay witnesses. See *State v. Batten*, 17 Wn.App. 428, 563 P.2d 1287 (1977). Even when unrebutted, the expert opinion is to be weighed against the facts as the hearing examiner views them, especially when the opinions are in areas of common knowledge and not based on scientific study, and they go to the ultimate fact to be decided by the hearing examiner.

8. Appellant did show that the trees proposed for removal and the bigleaf maple to be retained provide character and the aesthetic qualities enumerated by Ms. Tollefson. And the hearing examiner agrees that the exhibits show a spot of incredible beauty and, for a city that takes pride in being a treed community, the loss of the trees would be felt. The retention of the corner tree would mitigate the loss of some of those qualities to an extent, especially given its prominent location, but the grouping that Ms. Tollefson considered important will be lost. Regarding the aesthetic impact, the environmental checklist, which elicits the information to be used in making the threshold determination, asks what views would be altered or obstructed by the proposal. WAC 197-11-960B(10). There is no question that the streetscape would be altered from the loss of three of the four trees. However, the adopted Community Forest Management Plan, while establishing the policy of protecting significant tree stands and setting goals for tree cover, anticipates the decline of tree cover in the Mixed Use Town Center due to development. Despite the negative effects, the hearing examiner cannot say that the record leaves her with a definite and firm conviction that the Director's determination that the impact on the aesthetic element of the environment would be more than moderate.

9. The possibility of the loss of the big leaf maple due to root damage from installation of a utility line or from the proposed building itself, adds to the potential aesthetic impact of the removal of the three trees. However, the condition that has been imposed to require recommendations from an arborist to the City for protection of the roots of the tree makes the loss of the tree too speculative to treat the loss of four trees as a probable adverse impact.

10. The degree of impact on the historical element of the environment depends in part upon the historical value to be accorded the connection with a descendant of one of the early settlers of the area. The local historians, and family members who testified, view the likelihood that the trees were planted by either the son of the settler or the next subsequent purchaser of the property as sufficient to make the loss of three of the trees a significant adverse impact even though the property no longer is the site of any historical structures. In fact, it is urged that the fact they are the last vestiges of the historical connection makes their loss more significant. The hearing examiner sees the historical value as reduced by the lack of certainty regarding the person who

planted them and by the destruction and removal of the historical structures on the site. Though old, by themselves the trees provide no historical context. The hearing examiner is not left with a definite and firm conviction that the loss of the three trees would be more than a moderate adverse impact on the historical element of the environment.

11. Though the City introduced evidence that the willow's roots are causing damage to the City's utility system, suggesting a benefit to the City from the trees removal, the benefits of a proposal may not be balanced against the adverse impacts at the threshold determination stage (WAC 197.11.330(5)), and will not be considered by the hearing examiner.

12. The challenge as to insufficient mitigation is dependent either upon a showing that the proposal, as conditioned in the MDNS, would have significant adverse impacts without further mitigation, which has been determined not to be the case, or that there is substantive authority pursuant to Section 16.04.160B that allows conditions to mitigate adverse impacts from the loss of trees, beyond the percentage retention of significant trees required by Section 18.85.060. Appellant has not shown that any of the policies adopted to provide substantive authority listed in Section 16.04.160D provides such authority and the hearing examiner has not found any.

13. The MDNS should be affirmed.

Decision

The appeal by the Save Bainbridge Trees is denied and the Mitigated Determination of Nonsignificance is affirmed.

Entered this 23rd day of December 2008.

/s/ Margaret Klockars

Margaret Klockars
City of Bainbridge Island
Hearing Examiner *pro tem*

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City on this appeal. A person with standing may make appeal of this decision to the Kitsap County Superior Court. To be

timely, a petition for review must be filed within the 21-day appeal period [see RCW Ch. 36.70]. However, for guidance as to when the appeal period begins in this matter with the two appeal decisions issued at different times, please consult the statute.