

**INTERPRETATION OF THE DIRECTOR
PURSUANT TO TITLE 23 OF SEATTLE MUNICIPAL CODE**

In the Matter of)

the Use of the) Interpretation

Property at) No. 07-001

5721 – 35th Avenue South)

Background

This interpretation was requested by attorney Patrick J. Schneider on behalf of his client Van Gogh Development Corporation, the owner of the subject property. The property includes a wetland designated under Seattle Municipal Code (SMC) Chapter 25.09, Regulations for Environmentally Critical Areas. An exception to the critical areas regulations was approved in 2002 that established a 25-foot buffer area around the wetland. An assisted living facility also was proposed for development on the property under a separate project in 2002. Current regulations require a buffer of not less than 50 feet. The property owner now proposes a multifamily apartment building on the property instead of assisted living. At issue is whether a new exception request must be submitted and reviewed under current Critical Areas Regulations, given that a different development is proposed now than was proposed in 2002, or whether the approved 2002 exception established a 25-foot buffer around the wetland as a permanent condition applicable not only to development proposed at the time it was approved but also to current or future applications for development on the property. A related issue is whether the permit that granted the exception has expired.

Findings of Fact

1. The subject property is addressed in Department of Planning and Development (DPD) records as 5721 35th Avenue South. The property has a lengthy metes and bounds legal description but is listed in records of the King County Assessor’s Office under property tax account number 222404-9086. For the sake of simplicity, the property will hereafter be referred to as Parcel 9086 in this interpretation. The property is presently undeveloped, except for some fencing as well as replanting and restoration activity for the existing wetland.

2. According to the DPD Arcview Land Use Map and a survey prepared for Van Gogh Development, Parcel 9086 is about 315 feet wide measured north to south and about 102.9 feet deep. Its total area is about 32,393 square feet. The wetland on the property is located toward the southerly end of the site and has a total area of about 3,115 square feet. According to a report dated February 2007 prepared by ESA Adolfsen, an environmental consulting firm, the wetland includes 1,799 square feet of enhanced original wetland and an additional 1,316 square feet of new wetland adjacent. The 25-foot buffer is presently established around the existing and created wetland.
3. The zoning for Parcel 9086 is MR: Midrise Multifamily Residential. The property is also designated an Environmentally Critical Area under Seattle Municipal Code (SMC) Chapter 25.09, Regulations for Environmentally Critical Areas, because of the presence of the wetland.
4. On March 6, 2001, an application was submitted “by Patrick Schneider for Van Gogh Development Corporation” to DPD for an exception from the development standards of the Critical Areas regulations for wetlands to allow filling of 658 square feet of “degraded” wetland on Parcel 9086, construction of 1,316 square feet of new wetland, and restoration of the remaining 1,799 square feet of existing “degraded” wetland (DPD Project 2101168). The exception also included reduction of the required buffer adjacent to the wetland from 50 feet to 25 feet. The “summary of proposed action” on page 1 of the written land use decision for the project further says “[t]his would allow construction of 100 assisted living units on the site, as opposed to 60 units.”
5. The critical areas exception was “conditionally granted” in a decision dated August 23, 2001. As set forth on page 6 of the decision, the conditions of approval were to provide a plan for enhancing and/or restoring the original wetland and buffer prior to issuance of the MUP and then, prior to final inspection and occupancy of any new structures, to enhance and restore the entire wetland and buffer according to the recommendations in an approved plan. Master Use Permit No. 731176 was then issued on October 10, 2002. The “project description” on the permit states that it is an “ECA exception for wetlands” and further states the “use per Land Use Code” as “ECA exception.”
6. On September 4, 2002, an application was submitted by “John Caruso, Michael Fancher and Associates, for Van Gogh Development Corporation” for a Master Use Permit to establish the use for the future construction of a five-story, 72-unit assisted-living facility (DPD Project 2006763). Required approvals, as stated on page 1 of the published decision, included Design Review pursuant to SMC Chapter 23.41 and SEPA (State Environmental Policy Act) determination. The decision discusses “related sites and projects” on page 2 and notes, in part: “A separate MUP (#2101168) granted an ECA exception to relocate portions of the wetlands on the subject site and to provide mitigation for the wetland relocation.” The decision in Project 2006763 was published April 7, 2003.

DPD records show that Master Use Permit 234992 was then issued April 21, 2003. The “project description” on the permit states that it is “for future construction of an assisted living facility with accessory parking” and further states the “use per Land Use Code” as “assisted living facility.” No building permits have been issued for an assisted living facility on the property.

7. On July 29, 2002, an application was made for “wetland mitigation measures all per plan” under DPD Project 2205394. According to DPD records, Project 2205394 was analyzed as a grading permit application (the plan type shown in the record is “grading routed.”) Permit No. 731177 was issued on October 10, 2002. DPD records show that Permit 731177 has expired. However, DPD does not dispute that work was performed under this permit to fill a portion of the wetland on the subject property, construct new wetland, and restore the remaining wetland as described in MUP 731176. The extent of the work is summarized on page i of the February 2007 report by ESA Adolphson.
8. On October 25, 2006, representatives of Van Gogh Development Corporation and DPD Senior Land Use Planner Michael Dorcy met in a “pre-submittal conference,” which is a service that DPD offers to property owners and project applicants to discuss proposed development and the DPD permit process prior to application for use and development permits. The discussion, according to the pre-submittal conference file, was about a potential development of a six-story multifamily residential project, with 80 proposed units and an underground parking garage. Among the issues discussed, according to the pre-submittal application documents, was whether DPD would “confirm 25’ buffer around existing delineated wetland will remain.” As summarized in a letter from Van Gogh’s attorney Patrick Schneider to Mr. Dorcy dated November 7, 2006, DPD indicated to Van Gogh, following some discussion among DPD staff, that the standards of the amended ECA Ordinance, effective May 9, 2006, would apply to the proposed new multifamily development, including different wetland buffer standards than the 25-foot buffer required under Project 2101168.
9. In his November 7 letter to Mr. Dorcy, Mr. Schneider contends that the 25-foot wetland buffer applied to the property in Project 2101168 and Permit 731176 “is still in effect.” In the letter, as summarized in his final paragraph, Mr. Schneider says “. . . DPD must give effect to SMC 23.76.032 A.2.b, which states that MUP 2101168 ‘shall not expire,’ and this unexpired MUP establishes the wetland buffer on the site at 25 feet.” DPD responded with a letter dated December 8, 2006, declining to apply Section 23.76.032 A 2 b as requested by Mr. Schneider and informing him that a new Critical Areas exception decision would be needed for the development proposal that was the subject of the October 25, 2006 pre-submittal conference. The December 8 letter also notes that DPD records show that permits issued under Project 2101168 and Project 2006763 for the assisted living facility have all expired. The request for this interpretation was then submitted on December 19, 2006.

10. SMC Section 23.76.026 governs vesting of development rights and provides in part as follows:

“A. Master Use Permit Components Other Than Subdivisions and Short Subdivisions. Applications for all Master Use Permit components except subdivisions and short subdivisions shall be considered under the Land Use Code and other land use control ordinances in effect on the date:

1. Notice of the Director's decision on the application is published, if the decision can be appealed to the Hearing Examiner, or the Director's decision if no Hearing Examiner appeal is available; or
2. A fully complete building permit application, meeting the requirements of Section 106 of the Seattle Building Code, is filed.”

11. SMC Section 23.76.032, effective May 17, 2003 per Seattle City Ordinance 121112, governs expiration and renewal of Type I and Type II Master Use Permits. It provides in part as follows:

“A. Expiration.

1. An issued Type I or II Master Use Permit shall expire three (3) years from the date a permit is approved for issuance as described in Section 23.76.028, except as follows:

. . .

2. At the end of the three (3) year term, Master Use Permits shall expire unless one (1) of the conditions in subsections a through d of this subsection 2 prevails:

- a. A building permit is issued before the end of the three (3) year term, or an application for a building permit is: (1) submitted at least sixty (60) days before the end of the three (3) year term; (2) made sufficiently complete to constitute a fully complete building permit application as defined in the Seattle Building Code, or for a highrise structure regulated under Section 403 of the Seattle Building Code, made to include the complete structural frame of the building and schematic plans for the exterior shall of the building, in either case before the end of the three (3) year term; and (3) subsequently issued. In such cases, the Master Use Permit shall be extended for the same term as the building permit is issued. For highrise structures regulated under Section 403 of the Seattle Building Code, the building permit application may be a partial one, provided that it includes the complete structural frame of the building, and schematic plans for the exterior shall of the building.

b. For projects that do not require a building permit, the use has been established prior to the expiration date of the Master Use Permit and is not terminated by abandonment or otherwise. In such cases the Master Use Permit shall not expire.”

12. Prior to May 17, 2003, SMC Section 23.76.032 A read in part as follows:

“A. Expiration.

1. A Type I or II Master Use Permit shall expire eighteen (18) months from the date a permit is approved for issuance as described in Section 23.76.028, except as follows:

. . .

2. At the end of the eighteen (18) month term, Master Use Permits shall expire unless:

a. building permit is issued before the end of the eighteen (18) month term, or an application for a building permit is: (1) submitted at least sixty (60) days before the end of the eighteen (18) month term; (2) made sufficiently complete to meet the requirements of Section 106 of the Seattle Building Code before the end of the eighteen (18) month term; and (3) subsequently issued. In such cases, the Master Use Permit shall be extended for the same term as the building permit is issued. . . .; or

b. For projects which do not require a building permit, the use has been established prior to the expiration date of the Master Use Permit and is not terminated by abandonment or otherwise. In such cases the Master Use Permit shall not expire;”

13. Prior to May 9, 2006, SMC Section 25.09.160 B required a minimum wetland buffer of 50 feet “. . . within which no development shall be permitted and all vegetation shall remain undisturbed. Effective May 9, 2006, per Seattle City Ordinance 122050, current Section 25.09.160 establishes four ratings categories for wetlands according to the Washington State Wetland Rating System for Western Washington (Categories are I, II, III, and IV). Wetland buffers now vary from no buffers for certain Category IV wetlands to not less than 50 feet for all other Category IV wetlands, while Category III wetland buffers are either 60 feet minimum or 85 feet for moderate or greater level habitat function, and Category I and II wetland buffers are a minimum of 100 feet, or 110 feet for moderate level habitat function and 200 feet for high level of habitat function.

14. The 2006 amendments to the Environmentally Critical Areas Regulations were supported by a review of the “best available science,” which is summarized in a DPD report dated August 2005, Environmentally Critical Areas Code Update: Best Available Science Review. On page 2-1 of the report, the report indicates that the best available science for the City’s regulations of wetlands is found in Freshwater Wetlands in Washington State, a two-volume document produced in 2003 by the Washington State Departments of Ecology

and Fish and Wildlife. Page 2-1 of the DPD report includes the following statement about the State publication:

“Volume 2 contains options and recommendations for managing and protecting wetlands based on the synthesis of the science presented in Volume 1. This includes the western Washington wetland rating system and guidance on buffer and ratios for compensatory mitigation. These documents are adopted as the best available science for wetlands in Seattle.”

Conclusions

1. Van Gogh Development does not dispute that its current project application is a new proposal for development on Parcel 9086. It has not sought review of this application under any superseded Land Use Code or SEPA regulations. The pre-submittal conference scheduling documents, as well as notes in the DPD Hansen computer project tracking system, prepared prior to the meeting on October 25, 2006, indicate a new development project, No. 3005902, including environmental (SEPA) review and Design Review under SMC Chapter 23.41. (See Finding of Fact No. 8.) There is no information to suggest that Project 3005902 is “vested” under SMC Section 23.76.026 (Finding of Fact No. 10) to Land Use Code standards or SEPA requirements predating the current application, which still has not been submitted to DPD for review. However, the argument is made that review of Project 3005902, though not vested to any other regulations, should be considered under standards for review of wetlands found in superseded versions of the Regulations for Environmentally Critical Areas.
2. Van Gogh’s argument rests on the scope of Seattle Master Use Permit No. 731176, which allowed reconfiguration of the existing wetland and established the 25-foot buffer in effect for it. While there is discussion in the record about whether Permit 731176 and related permits are expired, it is not necessary to decide that question. The main issue is whether Permit 731176 had an expansive or narrow scope. Mr. Schneider proposes that Permit 731176 established a permanent 25-foot buffer around the existing wetland on Parcel 9086, which then became the site-specific standard for all future development proposals for Parcel 9086 notwithstanding subsequent changes to site conditions or Code standards. The DPD position is that Permit 731176 was a narrow approval of work proposed at the time it was issued. The permit authorized an exception to the 50-foot wetland buffer standard applicable in 2002, reducing the buffer to 25 feet, and DPD has no issue with applying the 25-foot buffer to site work connected to that wetland exception. However, future work, particularly development of new structures, must be reviewed under current standards. There are two reasons for the DPD position as discussed in Conclusions 3 and 4 below.
3. First, Permit No. 731176, on its face, either does not establish a use of the property or, at best, establishes a wetland restoration use on the property. Thus, its scope is very narrow.

- (See Finding of Fact No. 5.) On the same day Permit 731176 was issued, October 10, 2002, DPD also issued Permit 731177, which authorized the wetland filling, construction of new wetland, and restoration of the remaining wetland. Permit 731177 notes the use of the property as “wetland mitigation.” Assuming Permit 731136 is a permit for a project (wetland mitigation) that does not require a building permit, then it may be unexpired under Section 23.76.032 A 1 b, but the use established is simply a restored wetland use. If a broader use of the property had been intended by either Permit 731176 or 731177, the permits would have included that broader use in the project description. Nothing on the face of either permit suggests that the intent was to establish a multifamily development for future construction.
4. Second, even if Permit 731176 were read more broadly in terms of the uses it established, the most that can be said is that the permit relates to a specific project for an assisted living facility, which the property owner now does not propose to build. The current proposal is for a new development containing different uses than previously approved by DPD, and thus another analysis of all applicable regulation, including the critical areas regulations, is required. As summarized in Finding of Fact No. 4, the written DPD decision on the critical areas exception granted by Permit 731176 (Project 2101168) specifically says that the purpose of the proposed wetland exception was to allow construction of an assisted living facility. Although the assisted living facility was analyzed in a separate DPD decision, Project 2006763, the separate decision does not mean that Permit 731176 is meant to be read independently of the proposed development. As summarized in Finding of Fact No. 6, the decision to allow the assisted living facility in Project 2006763 refers to Project 2101168 as a “related project.” Mr. Schneider argues that the assisted living facility approved in Project 2006763 was different and included fewer units than the conceptual facility referred to in Project 2101168, but both written decisions make clear that the contemplated development was a five-story development that relied in part on the 25-foot buffer permitted by the exception decision. Nothing in the approvals of the two written land use decisions suggest intent to extend them to entirely different projects involving completely different uses.
 5. In the DPD letter of December 8, 2006, discussed in Finding of Fact No. 9, the observation is made that Permit 731176 and both permits related to Project 2006763 (Permits 734992 and 746174) show as expired in DPD records. The owner contends that the permits have not expired. As noted above, this issue need not be decided by this interpretation. The critical areas exception decision establishes a limited use of the property (restored wetland or wetland mitigation), while the other permits are for an assisted living facility that is not now proposed for construction. If the property owner wants to revive the assisted living proposal, then DPD can review its records and determine if the issued assisted living facility permits should still be given effect. However, Van Gogh development has not proposed reviving the assisted living project and thus the validity of the previously issued permits is beyond the scope of this interpretation.

6. The pre-submittal conference of October 25, 2006, summarized in Finding of Fact No. 8, was clearly for an entirely new project. Van Gogh does not assert that their current proposal is vested to SEPA or Design Review decisions previously determined by DPD. Indeed, they recognized that the effect of the previous ECA exception decision was very much at issue, too, since determining its status was part of their set of questions for the conference. Their concern makes sense, because it is very clear that the regulations and the science supporting those regulations have changed since the time the wetland exception was granted in 2001. (See the summary of the differences in the regulations and the science in Findings of Fact Nos. 13 and 14.) The analysis of the regulations and science is beyond the scope of this interpretation, but it is clear that scientific information compiled in 2003 and regulations effective in 2006 postdate the review of Project 2101168 and related Project 2006763. Thus, a new DPD analysis of the new multifamily project proposed for the subject property is required under both the Land Use Code and the ECA regulations.

DECISION

The Critical Areas exception decision in Permit 731176 is not applicable to future proposed development of new structures or uses not previously considered and which are not vested to regulations in effect at the time the exception was granted in 2002. New development will require analysis under current Codes, including standards for wetlands in effect under current Codes. The buffer established in Permit 731176 is for a different development proposal, under regulations that have been superseded. The language of Section 23.76.026 and 23.76.032 does not compel DPD to allow a new project to take advantage of superseded Code provisions.

Entered this 23rd day of April, 2007.

(signature on file)

William K. Mills, Senior Land Use Planner
Department of Planning and Development

WKM: 07-001