



City of Seattle

Gregory J. Nickels, Mayor

Department of Planning and Development

D. M. Sugimura, Director

**Interpretation of the Director
Under Seattle Municipal Code Title 23**

Regarding the Use of the

Property at

1301 Fifth Avenue

DPD Interpretation No. 09-008

(Project No. 3010895)

Background

This interpretation has been requested by attorney Ryan Durkan on behalf of the University of Washington, which owns a ten-acre parcel of land in downtown Seattle known as the Metropolitan Tract, between Union and Seneca Streets, in the vicinity of Fourth and Fifth Avenues. Portions of this property have been improved and used as parts of University Street and Fifth Avenue, however the University asserts that that use has been permissive, and that these areas have never been dedicated to or acquired by the City as right-of-way. The issues raised are whether this ground area may be counted as lot area for the purpose of applying the Floor Area Ratio ("FAR") standard to calculate the permitted floor area, and whether the portion of the Metropolitan Tract east of Fourth Avenue may be regulated as a single lot for purposes of the Land Use Code.

Findings of Fact

1. The Metropolitan Tract is a ten-acre property including the half-blocks on both sides of Fourth Avenue and both sides of Fifth Avenue extending from Seneca Street to Union Street. This interpretation relates to the portion of the property east of Fourth Avenue. Included within this area is the Rainier Plaza, a full-block development at 1301 Fifth Avenue; the Fairmont Olympic Hotel site, a full-block development at 411 University Street; the IBM Building, a half-block development at 1200 Fifth Avenue, and the Skinner Building, a half-block development at 1326 Fifth Avenue which includes the Fifth Avenue Theater. All of this property is within a DOC1 U/450-U zone (Downtown Office Core-1).
2. The Metropolitan Tract was first set aside for university purposes by the legislature for Washington Territory in 1860, and private owners executed deeds the next year to transfer the property for this purpose. The University of Washington originally operated at this location, but moved to its current, much larger campus in 1895.

3. The portion of Fourth Avenue running through the Metropolitan Tract was condemned in 1905 under Ordinance No. 13074. A five-foot strip along the northwest edge of the property was condemned in 1908 under Ordinance No. 18188 for the purpose of widening Union Street. However, the remaining portions of University Street and Fifth Avenue running through the Metropolitan Tract were never condemned or dedicated as rights-of-way.¹
4. There is ample documentation that the University, its long-term lessees and the City have treated the roads through the Metropolitan Tract, other than Fourth Avenue, as State property rather than City right-of-way. The matter has been addressed in quiet title actions (*State v. Seattle*, 57 Wn. 602 (1911); *Board of Regents v. Seattle*, 108 Wn.2d 545 (1987)) resulting in decisions consistent with the University's assertion.²
5. The University and its lessees have over the years paid the cost of paving and street improvements such as provision of lighting over the roadways in the Metropolitan Tract. At times the University or Unico, the lessee, have obtained street use permits, but language has been included stating that the permits were being voluntarily obtained, at no cost, in order to create a public record of the location of the improvements.
6. Seattle Municipal Code Section 23.84A.024 provides:

"Lot" means, except for the purposes of a TDR sending lot for Landmark TDR or housing TDR, one or more platted or unplatted parcels of land abutting upon and accessible from a private or public street sufficiently improved for vehicle travel or abutting upon and accessible from an exclusive, unobstructed permanent access easement. A lot may not be divided by a street or alley (Exhibit 23.84A.024 A). For purposes of a TDR sending lot for Landmark TDR, "lot" means the parcel described in the ordinance approving controls for the sending lot. For purposes of a sending lot for housing TDR, "lot" means the smallest parcel or combination of contiguous parcels, as described in the County real property records at any time after January 4, 1993, that contain the structure or structures that make the TDR eligible for transfer.

7. "Street" is defined at Section 23.84A.036 as:

a right-of-way that is intended to provide or that provides a roadway for general vehicular circulation, is the principal means of vehicular access to abutting properties and includes space for utilities, pedestrian walkways, sidewalks and drainage. Any such right-of-way shall be included within this definition, regardless of whether it has been developed or not.

¹ It appears there may be some disagreement as to whether the alleys in the blocks to the east of Fifth Avenue, on the easterly edge of the Metropolitan Tract, are rights-of-way or University property. However, that question was not raised in the request for interpretation, and is beyond the scope of this interpretation.

² The first of these cases related to a 34-foot-wide strip on the easterly edge of the University tract. The City and neighbors asserted that the strip, through prescription, had become a public street, which, in combination with the adjacent alley, was 50 feet wide. The Supreme Court concluded that the State property was not subject to claims of prescription or adverse possession, nor could it be asserted that the regents had voluntarily given up the property, as that would have been beyond their authority, as according to law certain processes would be required, including legislative approval, before the University could give up land. Although this case did not specifically relate to the portions of the property now used as Fifth Avenue or University Street, the same reasoning would apply to these areas. The second case cited, *Board of Regents v. Seattle*, concluded that the City in 1906 had effectively condemned the portion of Fourth Avenue running through the Metropolitan Tract, and the University was estopped from claiming 80 years later that the University was not bound by the actions of the Attorney General representing them in the condemnation and a later quiet title action concerning the same property. As a result of these lawsuits, the City has an easement for street purposes in Fourth Avenue through the Metropolitan Tract.

8. "Right-of-way" is defined, at Section 23.84A.032, as "a strip of land platted, dedicated, condemned, established by prescription or otherwise legally established for the use of pedestrians, vehicles or utilities."
9. "Floor area ratio" is defined at Section 23.84A.016 as "a ratio expressing the relationship between the amount of gross floor area or chargeable floor area permitted in one or more structures and the area of the lot on which the structure is, or structures are, located, as depicted in Exhibit 23.84A.012 A."
10. In 1972, by Ordinance No. 101027 Seattle adopted a formal process for approving short subdivision of land. Prior to that time, lots were effectively divided in many ways, such as separate conveyance of portions of a larger property, or issuance of a building permit with a legal description calling out a portion of a larger property.
11. Development standards for Downtown properties in general and properties in the DOC1 zone, specifically, are found in Chapter 23.49 of the Land Use Code. Sign standards for off-premises signs are found at §23.55.014 and standards for signs in Downtown zones are found at §23.55.034. These standards are incorporated in this Interpretation as a Finding of Fact.

Conclusions

1. Based on the code definitions, a "lot" may not be divided by a street or alley. If Fifth Avenue or University Street are "streets" where they cross the Metropolitan Tract, then the portion of that tract on the east side of Fourth Avenue cannot be a single lot. A street is a right-of-way providing or intended to provide a roadway for general circulation. Fifth Avenue and University Street both provide roadways for general circulation. However, based on court decisions and the practices of the City and the owners and lessees of the properties within the Tract, it appears well-settled that the segments of Fifth Avenue and University Street crossing the Metropolitan Tract are not rights-of-way, i.e. that they are not "platted, dedicated, condemned, established by prescription or otherwise legally established" for the use of pedestrians or vehicles. The use of these areas is by permission, and not as of right.³
2. The specific questions posed in the interpretation request were whether the entire portion of the Metropolitan Tract east of Fourth Avenue is considered one "lot" for FAR purposes, and whether the portions of University Street and Fifth Avenue within that property are considered a part of that "lot" when calculating permitted lot area. Answering this question is complicated by the fact that there is some ambiguity as to what is meant by the word "lot". By the code definition, it is essentially a contiguous piece of property with vehicular access, which may include multiple "parcels". However, in general practice, as reflected by its usage throughout the code, the word "lot" means a single development parcel, the unit to which development standards are applied.

³ It is beyond the scope of this interpretation, and beyond the authority of the Department, to resolve a question of legal ownership of property. This interpretation reflects a determination of how standards in the Land Use Code apply to the Metropolitan Tract property, in light of our understanding of how the status of apparent rights-of-way crossing the property has been legally resolved in the past.

3. It is clear that portions of the Metropolitan Tract historically were treated as separate development parcels, prior to 1972 when a formal process for short subdivision was adopted. For example, permits for the IBM Building described only the portion of the Tract that that building is built on. As a general rule, for purposes of Land Use Code development standards, as well as the standards of the previous zoning codes and other codes administered by the Department, improvements within the Metropolitan Tract have been reviewed treating the separate blocks or half-blocks as separate development sites, and the sides facing University Street and Fifth Avenue have been treated as street frontages, and projects have been approved on that basis.
4. Being contiguous and undivided by rights-of-way, the property that is the subject of the interpretation could qualify for development as a single building site. However, assuming the existing buildings, previously approved for discrete portions of this larger property, are to remain in place, it is necessary to re-evaluate the existing buildings with respect to the larger property, to ensure that nonconformities to development standards are not created or worsened by consolidating the development parcels. For certain types of development in certain zones, this would raise significant concerns. For example, two neighboring lots in a single-family zone, each developed with a house, could not be consolidated even though together they form a single, contiguous parcel, as the result would run afoul of the limit of one house per lot in single-family zones.
5. In the DOC1 zone, the base Floor Area Ratio is 6 and the maximum FAR is 20. There is no maximum height limit. FAR may be transferred between lots within a block or between lots located on different blocks that the code specifies as eligible TDR sending and receiving lots, so treating the portion of the Metropolitan Tract as a single lot as opposed to multiple contiguous lots would not increase the permissible amount of floor area. If one portion of the property was already over the maximum, considered on its own, and that portion was combined with another portion that was below the limit, the amount of additional development possible on the consolidated lot would be less than the additional development potential on the under-developed portion would have been, considered on its own. (See §§23.49.011 - 23.40.015.) So, consolidation of the property would not create or worsen any nonconformities with respect to the FAR standards.
6. Under §23.49.009, at least 75 percent of the street level of certain street frontages, as shown on Map 1G, must be devoted to certain uses. Retail uses are on that list, but other uses, such as hotels, vehicular entrances and pedestrian entries to office lobbies, are not. The map indicates that this requirement applies to the Fourth Avenue frontage between Seneca and University Streets (the Fairmont Olympic Hotel property), and between University and Union Streets (Rainier Square). It is possible that either or both of those properties, considered separately, are nonconforming with respect to this standard, but that nonconformity would not be worsened or changed as a result of consolidation of the properties and the intervening roadway to form a single building site.
7. Open space is required for office projects of 85,000 square feet or more, so it is possible that consolidation of lots, formerly treated as separate, could have the effect of triggering an open space requirement. Also, bonusing provisions for on-site and off-site open space differ somewhat, so there may be some ramifications if open space provided on a what has been

regarded as a different lot becomes “on-site”. However, we have not found any record that this would be an issue with respect to the properties within the Metropolitan Tract. (See §§23.49.016 and 23.49.017.)

8. Standards for off-premises signs are more stringent than those for on-premises signs. Consolidation of lots previously regulated as separate lots would not cause existing signs to become nonconforming, but could allow signs that previously would not have been allowed. (See §§23.55.014 and 23.55.034.) For example, if the properties were regulated as a single, consolidated site, a sign on the Fourth Avenue side of the Fairmont Olympic Hotel advertising a musical at the Fifth Avenue Theater would be permissively regulated as an on-premises sign. It does not appear that consolidation of the properties as a single development site would cause any existing signs to no longer meet standards.
9. The application of most other Downtown development standards, such as the standards for access and screening of parking, minimum sidewalk width, view corridors and solid waste and recycling storage, would be no different if the Metropolitan Tract property east of Fourth Avenue was reviewed as a single development site rather than multiple, separate sites. A thorough zoning review of all of the buildings within the Metropolitan Tract is beyond the scope of this interpretation. However, we are not aware of any development standards that would be violated as a result of consolidating the properties and regulating them as a single lot.
10. Because the areas of Fifth Avenue and University Street within this portion of the Metropolitan Tract are not right-of-way, but rather are owned by the University, they may be counted as lot area for purposes of determining how much floor area may be permitted on the lot or lots that they are a part of.⁴
11. It has been the Department’s practice to apply development standards relating to street and sidewalk frontages of the properties within the Metropolitan Tract along Fifth Avenue and University Street, such as the street-level use requirements of §23.49.009 and the street façade and upper-level development standards of §§23.49.056 and 23.49.058, in the same way that those standards are applied to properties in the DOC1 zone fronting on City-controlled rights-of-way. That practice is beyond the scope of this interpretation. This interpretation is not a determination that development standards other than those relating to lot area and Floor Area Ratio should be applied any differently to properties within the Metropolitan Tract than they are to other properties within the DOC1 zone.

⁴ This may be contrasted with the fact pattern result in *Mall, Inc. v. Seattle*, 108 Wn2d 369 (1987). In that case, an owner asserted a right to development potential based on the ownership of an underlying fee interest in the right-of-way adjacent to the property. Citing numerous other cases that decision distinguishes between the treatment of condemned or dedicated streets, which traditionally have not been treated as a part of the abutting lots for purposes of development standards, and properties where the owner retains broader rights of use, such as private easements. We believe this Interpretation is consistent with the reasoning in that case.

Decision

The portions of Fifth Avenue and University Street within the portion of the University of Washington Metropolitan Tract easterly of Fourth Avenue are privately owned, and, despite the fact that they have been made available for general pedestrian and vehicular circulation, they are not rights-of-way within the meaning of the Land Use Code. Those areas may appropriately be treated as a part of the abutting developed lots, and counted as lot area for purposes of determining the permissible amount of floor area under the applicable FAR regulations. The property may either be regarded as multiple development sites, divided along lines previously established in the public record, or else as a single, large lot.

Entered this 28 day of December, 2009.

(signature on file)

Andrew S. McKim

Land Use Planner - Supervisor