

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

In the Matter of the Appeal of

Hearing Examiner Files:
R-24-002

L & B PROPERTY INVESTMENTS LLC,

from a Decision of the Pioneer Square
Preservation Board, Seattle Department of
Neighborhoods.

FINDINGS

1. Background. The Pioneer Square Preservation Board, Department of Neighborhoods, denied a certificate of approval for the screened enclosure of an outdoor storage area comprised of eight dumpsters. Applicant L&B Property Investments LLC appealed to the Hearing Examiner. Summary judgment was granted in the Board's favor on alleged procedural errors, leaving the substantive issues for hearing.¹

2. Hearing. A hearing was held November 5, 2024. L&B appeared through Ron Wright. The Board appeared through Maxwell Burke and Patrick Downs, Seattle City Attorney's Office.

3. Post-Hearing Briefing. The parties agreed to present written closing arguments, with the Board filing an opening brief, L&B responding, and the Board's reply due December 13. L&B then filed a sur-reply, which the Board moved to strike. A sur-reply was not provided for and was not required to address new issues, so is stricken. L&B also filed a sur-reply to the motion to strike. It is stricken for the same reason.

4. Witnesses and Exhibits. No witnesses were called. The Board and L&B both filed declarations for their witnesses, which were admitted as pre-filed testimony.² The Board submitted Exhibits 1-29. The Appellant submitted Exhibits 1-13. Without objection, all exhibits were admitted.

5. Project Description. The screening area for the eight dumpsters is at 600 Alaskan Way near Alaskan's intersection with Yesler Way, directly in front of citizenM hotel's outdoor dining area.³ The dumpsters serve not the hotel, but the Polson Building and the 619 Western Building. The larger site was historically used as one lot and the hotel's property owner does not own the area where the dumpsters are now placed.

6. Screening Design. The aluminum slatted fence screening area is larger than needed for screening, so impinges more than necessary on the view from the citizenM hotel's

¹ Order on Motion for Summary Judgment (October 31, 2024).

² Declarations of Nashem and Wright, filed with summary judgment.

³ Ex. B-8 (Application), p. 1; Ex. B-14 (Applicant presentation), pp. 17-19; Ex. A-6.

outdoor dining area.⁴ The architectural drawings also depict a structure which is taller than needed.⁵ L&B initially proposed a three-sided fence, with the side facing the dining area open, but following staff prompting, enclosed the fourth side.⁶

7. History. Before Alaskan Way Viaduct removal, L&B's containers were stored in front of the Polson and 619 Western Buildings, with the area now at issue used for parking.⁷ L&B asserted the City's Office of the Waterfront established the new location to accommodate new bus stops on rebuilt Alaskan Way.⁸ The agency disputes this,⁹ and the evidence supports curb ramp installation to facilitate garbage pickup in front of the 619 Western Building, not 600 Alaskan Way.¹⁰ Regardless, L&B claims storage adjacent to its building violates a rule requiring refuse storage be within 50-feet of pick-up, so cannot be placed there.¹¹ The dumpsters were relocated to their present location, an enforcement action ensued, and the Seattle Department of Construction and Inspections determined:

Seattle Municipal Code 23.54.040 sets out the regulations for solid waste and recyclable materials storage and access.... The space must be on the lot of the structure it serves. In this case, the bins are being used by the Polson and 619 Western buildings and they are on property that is and has been used as part of one lot. Further, the City placed them in this location as part of SDOT's Alaskan Way Main Corridor project in order to facilitate a bus stop. **However, the bins must be screened from public view and a permit is required.**

The NOV [Notice of Violation] is amended. Amendments include updating the parcel of the violation, removing the requirement to discontinue the use of the parcel for solid waste and recyclable materials storage and access, and to require a construction permit to establish the screen storage area.¹²

Following this decision, L&B sought approval from the Board for screening.

8. Board Decision. The Board denied the proposal, concluding per SMC 23.54.040.F.1.a, that dumpster storage must be within 50-feet of refuse pick-up. Also, the space was viewed as larger than necessary for screening, inconsistent with SMC 23.54.E.6. The decision was without prejudice. Denial "does not preclude the applicant from submitting a new application for screened dumpsters...."¹³ L&B's appeal followed.

⁴ Exs. A-12 and A-13.

⁵ Ex. B-11a (photographs/design renderings), pp. 1-3, with imaging on the last page clearest on this point.

⁶ Ex. B-8 (Application), p. 1-16, specifically pp. 15-16; Ex. B-17 (Correction Response), pp. 1-13, specifically, pp. 2 and 13.

⁷ Ex. B-5 (Applicant letter), pp. 1-2, and 5.

⁸ Ex. B-5 (Applicant letter), p. 2.

⁹ Ex. B-13 (Staff Report), p. 1; Ex. B-22 (Staff Report), p. 1; Nashem Decl. ¶¶ 5, 12.

¹⁰ Ex. B-5 (Applicant letter, attaching Office of Waterfront Site Plan), p. 8; Ex. B-19 (Applicant Correction Response), p. 7; Nashem Decl. ¶¶ 5 and 12.

¹¹ Ex. B-19 (Correction Response), pp. 1-2.

¹² Ex. B-6 (SDCI Order), p. 3, emphasis added; Ex. B-17 (Comment Response), p. 2.

¹³ Ex. B-29 (Board Decision), p. 2.

CONCLUSIONS

1. Jurisdiction and Review Standard/Design Review. The Hearing Examiner has jurisdiction.¹⁴ Appeals are considered de novo, meaning the record is open and disputed facts may be reviewed anew, but the decision is only reversed if arbitrary and capricious.¹⁵ When there is room for two opinions, Board action taken after due consideration suffices, even if the Examiner would have decided the matter differently.¹⁶ However, if new evidence is presented “or if the Hearing Examiner determines that additional information is required, then the Hearing Examiner shall remand the decision ... for consideration of the additional information or evidence.”¹⁷

2. Review Criteria. The Board is required to “review applications for certificates of approval” and “make a recommendation ... to the Department of Neighborhoods Director.”¹⁸ The recommendation is based on consistency with three sets of criteria: “Chapter 23.66, the district use and development standards, and the purposes for creating the district.”¹⁹ Development is also subject to the Land Use Code, Chapter 23 SMC.²⁰

3. Screening. Visual impact and aesthetics were concerns dominating application review as outdoor waste storage spaces must be “screened from public view.”²¹ “With the new ferry terminal opening and the investments along the waterfront, we are dismayed that this corner may be the entryway into Pioneer Square from those new investments.”²² The Pioneer Square Preservation District was created to address such concerns.

The Pioneer Square Preservation District is unique because it is the site of the beginning of The City of Seattle. The area also retains much of the original architecture and artifacts of its early history. The District has played a significant role in the development of Seattle, the Puget Sound region and The State of Washington. It was the first location of industry, business, and homes in early Seattle and the focus of commerce and transportation for more than a half-century.

As a collection of late nineteenth and early twentieth-century buildings of similar materials, construction techniques and architectural style, the District is unique, not only to the City but to the country as well. Most of the buildings within the District embody the distinctive characteristics of the Late Victorian style. Many buildings are the work of one architect, Elmer H. Fisher. For these and other reasons, the buildings combine to

¹⁴ Ch. 23.66 SMC, SMC 23.66.030.E.

¹⁵ SMC 23.66.030.E.4.

¹⁶ *Rios v. Wash. Dept. of Labor & Industries*, 145 Wn.2d 483, 501 (2002).

¹⁷ SMC 23.66.030.E.5.

¹⁸ SMC 23.66.020.D.

¹⁹ SMC 23.66.030.D.2.c.

²⁰ SMC 23.66.025.B; SMC 23.66.100.B (“All property in the entire District shall be developed and used in accordance with ... the use and development standards for the underlying zone....”).

²¹ SMC 23.54.040.D.3.

²² Ex B-23 (Board Mtg., 6/26/24), p. 3:13-16.

create an outstanding example of an area that is distinguishable in style, form, character, and construction representative of its era.

The District is an area of remarkable business diversity. The street level of the area north of S. King Street is pedestrian-oriented, with its storefronts occupied primarily by specialty retail shops, art galleries, restaurants, and taverns. The upper floors of buildings in the historic core are occupied by professional offices, various types of light manufacturing, and housing for persons with a wide range of incomes.²³

The requirement for solid waste storage screening follows this purpose, as is the requirement that solid waste storage space may not be enlarged to serve other purposes.²⁴

4. 50-Foot Rule. If solid waste and recycling “containers 2 cubic yards or smaller” will be “manually pulled,” they “shall be placed no more than 50 feet from a curb cut or collection location”²⁵ All but two of L&B’s dumpsters were shown on L&B’s site plan as compliant with the 50-foot rule.²⁶ L&B asked the Board if it could submit a site plan showing same, but the Board denied the request.²⁷ L&B submitted a site plan showing relocated dumpsters immediately following the Board’s hearing.²⁸

L&B’s position is that the 50-foot rule only applies to where containers must be temporarily placed for pick-up, not stored. This interpretation conflicts with code. The code uses the term “storage space,” not temporary pick-up location.

Access for services providers **to the storage space from the collection location** shall meet the following requirements: 1. For containers 2 cubic yards or smaller: a. Containers to be manually pulled shall be placed no more than 50-feet from a curb cut or collection location....²⁹

This plain language follows L&B’s original interpretation, in which, due to this rule, it asserted it could not locate the containers adjacent to its own business.³⁰ The Board’s interpretation is consistent with the actual code language and how L&B originally interpreted it, so is not arbitrary and capricious.

²³ SMC 23.66.100.C (1, 2 and 4).

²⁴ SMC 23.54.040.E.6 (“The storage space shall not be used for purposes other than solid waste and recyclable materials storage and access.”).

²⁵ SMC 23.54.040.F.1.a.

²⁶ Ex. B-19 (Applicant’s Correction Response), p. 7; SMC 23.66.030.C.2.i.1 (site plan required).

²⁷ Ex. B-28 (Board Mtg., 8/27/24), pp. 22-24.

²⁸ Exs. A-12 and A-13.

²⁹ SMC 23.54.040.F.1.a, emphasis added.

³⁰ Ex. B-19 (Correction Response), p. 2 (“The use of this area for the storage of waste containers would hinder the economic viability of the ground floor tenant spaces of the Western Building, both of which are designed to accommodate the potential for full-service restaurant operations.”)

5. Waste Storage and Access. The code requires that the refuse storage area be used only for “solid waste and recyclable materials storage and access.”³¹ Yet the proposed screening was sized to exceed the area needed to store the waste receptacles by at least one third.³² L&B asserts the space was enlarged as other refuse containers may be stored there in future, but did not substantiate this.³³ And in conflict with this assertion, the record includes references to a dispute with the adjacent business interest, along with an expressed interest in placing the area adjacent to this business rather than adjacent to L&B’s business.³⁴ The code does not authorize using excess waste storage to block competitor views. Regardless, inconsistent with code, the unused portion of the solid waste storage area was not designed to screen the proposed waste bins.

6. Dumpster Location. L&B maintains the dumpsters are in the only feasible location. The Board had requested that L&B explain the alternatives it had considered.³⁵ L&B declined to elaborate on its previously discarded alternatives, stating that “the Owner intends to continue using the 600 Alaskan Way parcel for storage of recycle and waste containers” as SDCI (Seattle Department of Construction and Inspections) established the location as acceptable.³⁶ SDCI, in an enforcement action, had determined that the storage bins “may remain in the current location.”³⁷ This enforcement decision did not preclude an alternate dumpster location; it simply allowed the current one based only on its reading of SMC 23.54.040.E.1 (“storage space shall be located on the lot of the structure it serves”). By accepting the location, but not precluding others, the Board’s holding is consistent.³⁸

7. Board Decision. It was not arbitrary and capricious for the Board to require compliance with the 50-foot rule and provide for tailoring screening to the use. However, where code conflicts are readily remedied through conditions, in lieu of denial, conditioning the approval should be considered. And, where new evidence is presented to the Examiner or is required, the Examiner shall remand to re-open the record and allow for same.

³¹ SMC 23.54.040.E.6.

³² Exs. A-12 and A-13.

³³ L&B’s Closing Brief, p. 7:6-8.

³⁴ Ex. B-19 (Correction Response), p. 2; Ex. B-23 (Board Mtg., 6/26/24), p. 27 (containers would be “a detriment to the value of those spaces”); Ex. B-5 (Applicant letter), p. 2 (“The non-ownership of this parcel by Citizen M has generated dispute issues between the two property owners.”); Ex. A-2 (“Without going into depth on this, there are ongoing disagreements between the two property owners.”); Wright Decl. ¶¶ 9, 12; Nashem Decl. ¶¶ 9, 12.

³⁵ Ex. B-24 (Board/Applicant e-mail exchange), p. 2.

³⁶ *Id.* at 1; Nashem Decl. ¶ 22.

³⁷ Ex. B-6 (SDCI Order), p. 3; Ex. B-17 (Comment Response), p. 2; Ex. B-23 (Board Mtg., 6/26/24), p. 8.

³⁸ Ex. B-29; *see also* City’s Closing Brief, p. 10:18-19. That the Board deferred to the SDCI approach, despite the narrow purview of that enforcement action, does not mean the use complies with Ch. 23.54 SMC, or with Ch 23.66 SMC, the latter of which vests use authorization with the Board. In fact, at this location, the use may very well be prohibited under both chapters. SMC 23.66.122(A)(17) and (22); SMC 23.54.040(E)(1). SDCI did not address these provisions and these issues are not decided here.

If evidence is presented to the Hearing Examiner that was not presented to the Board, or if the Hearing Examiner determines that additional information is required, then the Hearing Examiner shall remand the decision to the Department of Neighborhoods Director for consideration of the additional information or evidence.

L&B submitted a revised site plan after the Board's record closed.³⁹ That plan shows receptacle placement in a manner that appears to follow the 50-foot rule but with fencing at least one-third larger and possibly taller than necessary to screen the facility, potentially making it more obtrusive and in conflict with neighboring businesses, which raises code conflict concerns.⁴⁰ However, a new application process is not required. The Board can simply re-open the hearing to allow a revised, code-compliant site plan to be submitted and condition its final decision as needed to meet code requirements, including SMC 23.54.040.F.1.a. and SMC 23.54.040.E.6.⁴¹

The decision should be remanded to allow the Board to re-open the hearing and allow L&B to submit a revised site plan. The Board would then have an opportunity to consider the new materials and determine whether approval conditions are needed to address code requirements, consistent with District purposes.

DECISION

The appeal is **GRANTED** in part and **DENIED** in part. The matter is returned to the Board for further review consistent with this Decision. Jurisdiction is not retained.

Entered December 19, 2024.



Susan Drummond, Deputy Hearing Examiner

³⁹ Ex. A-13.

⁴⁰ SMC 23.54.040.E.6; SMC 23.66.100.C (1, 2 and 4).

⁴¹ L&B's Closing Brief, pp. 8-9; City's Closing Brief, p. 10:18-19. Though this decision provides for re-opening the hearing, rather than a new application process, this does not mean close attention to the updated plans will not be necessary. To the contrary, the decision is being returned for careful consideration.

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult code sections and other appropriate sources, to determine applicable rights and responsibilities.

The Hearing Examiner's decision is the final decision for the City of Seattle. Under RCW 36.70C.040, a request for the decision's judicial review must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case the judicial review request must be commenced within twenty-one (21) days of the date the reconsideration order is issued.

The person seeking review must arrange for and initially pay for preparing a verbatim hearing transcript. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date below I sent true and correct copies of the attached **FINDINGS AND DECISION** to each person below in **L&B INVESTMENTS LLC**, Hearing Examiner File **R-24-002** in the manner indicated.

Party	Method of Service
<p>Appellant</p> <p>Representative, Ron Wright & Associates/Architects, P.S.</p> <ul style="list-style-type: none"> Ron Wright, rwright@rwaa.com <p>L&B Property Investment LLC</p> <ul style="list-style-type: none"> stanley@stanleyre.com 	<p><input type="checkbox"/> U.S. First Class Mail</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p>Board</p> <p>Legal Counsel, City Attorney's Office</p> <ul style="list-style-type: none"> Patrick Downs, patrick.downs@seattle.gov Maxwell Burke, maxwell.burke@seattle.gov <p>Department of Neighborhoods</p> <ul style="list-style-type: none"> Genna Nashem, genna.nashem@seattle.gov 	<p><input type="checkbox"/> U.S. First Class Mail</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

Dated: December 19, 2024

/s/ Angela Oberhansly
Angela Oberhansly
Legal Assistant