

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

In the Matter of the Appeal of

Hearing Examiner File:  
**MUP-21-016 (ECA, CU)**

**MAGNOLIA COMMUNITY COUNCIL  
AND OTHERS,**

Department Reference:  
3028072-LU

from a decision issued by the Director,  
Seattle Department of Construction  
and Inspections.

**I. FINDINGS OF FACT**

**1. Background.** The Seattle Department of Construction and Inspections (“Department”) approved an Environmental Critical Areas Administrative Conditional Use Permit (“ECA CUP”) for Oceanstar, LLC’s two residence project. Magnolia Community Council and Others (“MCC”) appealed.<sup>1</sup>

**2. Project.** The ECA CUP allows two, three-story residences with below ground parking for 13 vehicles on a 3.89-acre site. The legal parcel the Project is on includes the Admiral’s House, a designated landmark with an associated landmark protection boundary. The Project is outside this area. Three zones transect the site. Two are single-family, the other is industrial. The Project is within the single-family zones (primarily SF-7200, with a small portion in SF-5000). An ECA CUP is required not to authorize the single-family homes, which are permitted outright, but because the Project is within the site’s nearly two acres of steep slopes.

**3. Hearing and Witnesses.** A remote hearing was conducted September 7, 8, and 21, 2021. The parties called these witnesses:

**MCC.** Mr. Houston, SDCI Planner; Ms. Campbell, project neighbor and community activist; Mr. Mullins, neighbor; Ms. Mullins, neighbor; Mr. Moehring, an architect; Karen Kiest, landscape architect, former Seattle Landmarks Board member, and former Seattle Design Commission Chair/Member; and Ms. Woo, Director of Preservation Services, Historic Seattle.

**Oceanstar.** Mr. Drivdahl (architect) and Mr. Stamm (landscape architect).

**Department.** Mr. Houston (Department land use planner) and Ms. Carr (Department land use planner).

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<sup>1</sup> Friends of the Last 6,000 also appealed. MUP 21-017. The case settled and was dismissed.

**4. Exhibits.** The Examiner admitted Department Exhibits 1-45, and MCC Exhibits 1-11, 19-20, 23, 25-26, 30-33.<sup>2</sup> Oceanstar Exhibits 1 and 9-13 were also admitted. Oceanstar objected to MCC Exhibits 22, 23, 25, 26, and 30-33, based on relevance. All were admitted with the understanding they would be appropriately weighed. Exhibit 33 is a 25 minute documentary. It provides background on Ms. Judkins, which the Ursula Judkins Viewpoint (“UJV”) is named after. Oceanstar objected as it contains hearsay and is not directly relevant. As it provides background on UJV it was admitted, but with the understanding it would be appropriately weighed.

MCC also sought to admit two photographic exhibits as illustrative exhibits. They had been attached to the appeal, so were admitted (MCC Exhibit 35). Due to their late submittal, the additional photographs were not. Similarly, Oceanstar sought to admit two photographs as rebuttal exhibits. One was not objected to (Applicant Exhibit 13) so was admitted. As the Prehearing Order had established a rebuttal exhibit deadline, the second photo was not.

**5. Site Visit.** The Examiner completed a site visit on September 12, driving below and above the site and entering Ursula Judkins Viewpoint (“UJV”). The visit provides context, not evidence.

**6. Appeal Issues.** MCC’s appeal raises two overarching concerns. One is Project view impacts from UJV. UJV is adjacent to the Project site and overlooks it. The other concern is Project impacts on Admiral’s House, which shares the site with the Project.<sup>3</sup>

**7. Views from UJV.** Views from UJV include Queen Ann Hill, the downtown skyline, and Elliot Bay. The two residences would be constructed on the steep slope between UJV and the Admiral’s House. View blockage depends on building height and location on the steeply sloped site, landscaping, and fencing.

City height measurements are based on grade. The two residences are placed on a plane at 116 feet. The grade at the property fence line adjoining UJV is 138 feet. UJV slopes upward from this fence line.<sup>4</sup>

The zoning code allows the structures to go up to 146 feet, or 151 feet with sloped roofing. At its highest point, the Project roof is at 144. Some chimneys exceed that, but most of the roof is at about 142.

The buildings are stepped back from the property’s boundary with UJV by 24 feet, which is greater than the minimum required five-foot setback and results in the buildings

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<sup>2</sup> MCC withdrew MCC Exs. 24 and 27-29. After closing arguments MCC changed position but as the record had closed by then, the admission request was denied.

<sup>3</sup> MCC also raised structure use and ownership issues. As the Examiner ruled these issues were outside her delegated authority, their merits were not addressed. Order on Motion to Dismiss (June 28, 2021).

<sup>4</sup> Dept. Ex. 18 (Geotechnical Report), p. 4 (“We understand that neighbors have noticed ground settlement over the years within the upper portion of Ursula Judkins Viewpoint Park.”).

being located further down the hillside, reducing view blockage from UJV. Project roofing includes green roofs, which improves views for those standing at the park edge.

What this layout means for view impacts is illustrated through before and after graphics, with relatively minimal impacts from the two residences shown with the flat-roofed structures, and considerably greater impacts if sloping roofs had been used.<sup>5</sup> The graphics assess views from a mid-point within UJV; MCC would have relied on photos taken at the fence line. Oceanstar stated there are multiple views available in the park. Its position was that while there is a view directly adjacent to the fence more people use the broader area, which is where the view simulations were taken from. The simulation demonstrates that while the two residences do extend just above the UJV grade and do result in some view blockage, it is relatively minor.

View blockage has been an ongoing issue at this site, even before the present ownership. The federal government previously owned the site. It did not trim back the blackberries, so people would climb the fence for photographs.<sup>6</sup> Vegetation is also overgrown and affecting views. This will be cut back with the Project, which will temporarily reduce view blockage and improve views.<sup>7</sup>

**8. Fencing and Power Lines.** Power lines will be undergrounded, so are not a visual impact issue.<sup>8</sup> Fencing has not been specified. An eight-foot cyclone fence is now present. While lacking in aesthetic appeal, it does allow for views.<sup>9</sup> MCC's landscaping witness described code allowances for fencing on the property line up to six feet high or eight with mediated views. She recommended that the fencing be transparent and shown on plans.<sup>10</sup>

**9. Landscaping.** Trees to the right of the telephone pole at the top of the site and blocking views will be removed, opening views to the south and west. This will also open up views to West Seattle.<sup>11</sup> However, after existing vegetation is removed the 24-foot setback area between the property line and residential structures will be re-planted. Depending on how the site is landscaped, view blockage could occur.

MCC's landscape architect reviewed the landscape plan and generally found the approach thoughtful in how the vegetation has been placed around what she described as a "fairly significant building development." She supported the landscape plan's coupling with a conservation easement and five-year monitoring program. However, while the

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<sup>5</sup> Applicant Ex. 12; Testimony, Mr. Drivdahl.

<sup>6</sup> MCC Ex. 31 (2011 e-mail exchange with neighbor and MCC member), p. 2 ("Historically, the Navy and Forest City have prevented trees and bushes from blocking the stunning views from the front of the Admiral's House, while, at the same time, allowing trees and bushes to grow uncontrollably behind the house, blocking the views from the viewpoint park.").

<sup>7</sup> Applicant Ex. 12; Testimony, Mr. Drivdahl.

<sup>8</sup> Testimony, Mr. Drivdahl, referencing Dept. Ex. 4 at p. 27. A Parks Department permit will be required to run the power line below ground.

<sup>9</sup> Testimony, Ms. Carr.

<sup>10</sup> Testimony, Ms. Kiest; Dept. Ex. 4 (Mitigation Planting Plan Enlargement), Sheet L4.2.

<sup>11</sup> Testimony, Mr. Drivdahl; Applicant Exs. 11 and 12; *see also* SMC 23.44.014(C)(10)(a).

smallest trees are on the site's uppermost portion, given UJV location, she determined the tree canopy does not favor preserving public views. She testified that the ECA requirements can be met without these trees in that specific location between the building and property line with UJV. She opined that the planned vegetation should not grow above building heights and the permanent impact defined by the buildings should not be added to.

The landscape plan the Department reviewed and approved does show 24 Amelanchier Alnifolias which can grow 25-30 feet. While these trees can be maintained and pruned, and are deciduous, which reduces winter blockage, they cannot be topped.<sup>12</sup> Mr. Moehring testified to vegetation blockage if trees grow to 20-25 feet. The existing chain link fence is eight feet tall. If its height as depicted in the photograph (MCC Illustrative Exhibit 35) is multiplied by three this is about 24-feet. Mr. Moehring drew a yellow line at what he believed would be about 24-feet on this photograph. The line is only approximate, and blockage would depend on the tree type and spacing, but overall, the evidence does demonstrate that the approved vegetation will eventually increase view blockage over existing conditions.

Testimony from Mr. Stamm stated that Oceanstar plans to replace these trees with a lower growing cultivar, with the intent that vegetation not exceed 4-6 feet. Department Planner Carr agreed the trees could be planted elsewhere and if cultivars demonstrate ecological equivalence the approach could be used but would require critical areas report revisions to ensure code requirements for ecological function are still met. It is the Applicant's intent to address this vegetation blockage.

There is no MUP language or other requirement specifying that cultivars be selected consistent with this testimony and limiting vegetation height to four to six feet.<sup>13</sup> If vegetation height requirements were specified, this would resolve the issue. Sufficient detail and specificity to provide necessary assurances could be included in a revised landscaping plan and/or MUP condition(s) added to resolve this.

**10. MCC Proposed Mitigation.** MCC outlined several view impact mitigation options:

- **Move Buildings.** Move the buildings 15-20' west and south. This keeps the buildings outside the landmark boundary while dropping height six-eight feet, or one-floor level. Elevation heights would drop from 144 to 136.
- **Reduce Project Height.** Remove each residence's top floor.
- **Fill at UJV.** Take Project cuts and apply to UJV's lower portion to elevate its height to about eight feet (from 136 to 144).
- **Landscaping.** Restrict landscape heights.<sup>14</sup>

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<sup>12</sup> Testimony, Ms. Carr; SMC 25.09.520, *see* normal pruning and maintenance definition.

<sup>13</sup> Testimony, Mr. Houston, explaining there is no language restricting heights.

<sup>14</sup> Testimony, Mr. Moehring.

**Moving the Buildings.** MCC's architect did not quantify the additional steep slope intrusion incurred with moving the building south and west. He also did not consider the prior history of slope stability. He stated he believed a soil retention wall would mitigate these concerns and did not believe the increase in tree removal would be significant when compared to the total now being removed. The move would place the buildings closer to Admirals House, increasing visual impacts on this structure.

The move would remove more trees, though the code favors tree retention. The move would increase steep slope intrusion due to the need to lengthen the driveway. Intrusion is now at 27%, below the allowable 30%. Also, the geotechnical report identified the very west portion of the site as an area of historical movement. Based on this analysis, the Applicant's architect recommended against moving into that area.<sup>15</sup>

**Top Floor Removal.** Oceanstar opposed removing the top floor based on interference with Project goals. There is no interference with the goal of building two residences; most homes are considerably smaller than what is proposed. Given the 13,256 square feet of combined living or "conditioned" space, which excludes the garages, pool, and other spaces, to construct a standard residence, a third floor is unnecessary, so there would be no need to place the space elsewhere and expand the structures' footprint.

The approach would alter Oceanstar's architectural vision, which may by happenstance have larger benefits, such as improved slope stability at UJV. The Project includes two engineered shoring walls running through the hillside which are about two and four stories in height.<sup>16</sup> "The slope remaining above the development will be no steeper than 2H to 1V and will be stable, effectively buttressing and stabilizing the adjoining park property," an area that may have experienced subsidence.<sup>17</sup>

These considerations aside, the central challenge with floor removal is not how much square footage or height is necessary to achieve Project goals, but that the code contains specific height and setback requirements and allows the square footage and height proposed. Levels 1 and 2 function as daylight basements as they are built into the hillside, with only Level 3 being above grade.<sup>18</sup> If the residences had the pitched roofs the code allows, they would be considerably more prominent and block more views. Instead, the two buildings are largely below height limits by two feet, and rather than the five-foot setback from UJV, a 24-foot setback was incorporated. Building tops are visible from UJV, but there is only limited view interference. Based on the before/after renderings, and the Project architect's testimony on design, even if there is discretion to require floor removal, building height does not create a significant view blockage issue, such that the blockage presents material detriment to the views from UJV or properties in the vicinity.

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<sup>15</sup> See also Dept. Ex. 18 (Geotechnical Analysis), p. 6 and illustrations at Figure 2A.

<sup>16</sup> Dept. Ex. 4 (Site Sections), Sheet A1.02.

<sup>17</sup> Dept. Ex. 20 (Correspondence, GeoSciences, June 16, 2020), p. 1; see also FN 4 above.

<sup>18</sup> Testimony, Mr. Drivdahl; Dept. Ex. 4, Sheet A102.

**UJV Elevation Change.** Oceanstar does not own the park so this would require coordination with the Parks Department and approval. The Parks Department did not comment, so its position is unknown. MCC's architect did not conduct geotechnical analysis on this proposal or consult with a geotechnical engineer. The Applicant's architect was concerned with surcharging the top of a landslide-prone property and opined this was likely not recommended.

**Landscaping.** Landscaping is readily adjustable. Based on witness testimony from all parties (Applicant, MCC, and the Department), selecting vegetation with reduced heights is feasible and can be accomplished while meeting CAO requirements.<sup>19</sup> The Applicant stated it intended to select shorter vegetation. Finding 9 addresses the need for greater specificity in either the MUP or landscaping plan to ensure this occurs.

**11. Park Access.** MCC objected to the installation of stairs leading to the UJV. There is no code prohibition on park access and no policy was identified which would discourage access. This is an area open to the public. Entry by private parties is authorized, if not encouraged. If the Parks Department needs to enforce use requirements, it has code authority to do so.

**12. Landmark.** The Project is outside the Admiral's House landmark boundary. With shoring, MCC's architect agreed construction could avoid crossing this boundary. Mr. Drivdahl testified that the structure will retain its prominent special location with the Project, which is created to a large degree by the steeply sloped, mowed front lawn, as described in the geotechnical report ("The Admiral's House, built in 1945, resides upon a level bench forming a prominence nearly halfway up the slope.")<sup>20</sup>

MCC witnesses disagreed.<sup>21</sup> MCC provided a photograph to illustrate the Admiral's House prominence without the Project. The photographer is unknown, but the parties agreed it was likely taken from a cruise ship. It was not known if the image was zoomed, cropped, or otherwise altered.<sup>22</sup>

Architectural renderings illustrated impacts when viewing the Admiral's House from the right-of-way below it. The two residences are barely visible above, and two photos do illustrate that the setting is single-family with residences continuing up the hillside on smaller lots. The Project includes landscaping, setbacks, is at a lower height than allowed, is built into the slope, and is clustered. The approach mitigates visual impacts on the Admiral's House. The Admiral's House itself is 7,316 square feet.<sup>23</sup> As mitigated, the new residences are not materially incongruent.

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<sup>19</sup> Testimony, Mr. Hamm, Ms. Carr, and Mr. Stamm.

<sup>20</sup> Dept. Ex. 18 (Geotechnical Report), § 2 Site Background and Project Description; see also Applicant Exhibit 1 (Mr. Drivdahl's resume).

<sup>21</sup> Testimony, Mr. Moehring and Ms. Woo.

<sup>22</sup> MCC Ex. 1. See also Applicant Ex. 13 illustrating the viewscape from farther away.

<sup>23</sup> MCC Ex 30, p. 3; Testimony, Mr. Drivdahl.

## II. CONCLUSIONS OF LAW

**1. Jurisdiction and Standard of Review.** The Examiner has jurisdiction over appeals of administrative CUP decisions,<sup>24</sup> and the Director’s decision is not deferred to.<sup>25</sup>

**2. Conditional Use Permit Requirement.** Two single-family residences are proposed. The zoning is single-family residential, and the use is permitted outright.<sup>26</sup> The CUP is required as the use is within the geographically hazardous critical areas on site.<sup>27</sup>

**3. Authority Outside CUP Criteria for Addressing View Protection.** The City protects shoreline views and designated public views through SEPA.<sup>28</sup> UJV is not a designated public view and is not within the shoreline. It has also been determined to be exempt from SEPA. As the Examiner previously addressed, SEPA policies do not necessarily limit authority outside the SEPA context.<sup>29</sup>

The view covenant recorded against the property means that view protection has long been a concern with this property and puts a property owner on notice that the issue may be important to the surrounding community. It was admitted as it provides context for MCC’s concerns. However, the Examiner cannot review the covenant for compliance.<sup>30</sup>

**4. CAO CUP Criteria.** The Department may approve an ECA CUP in a single-family zone “pursuant to Section 23.42.042 and this Section 25.09.260....”<sup>31</sup> SMC 25.09.260 contains the substantive criteria for approving a single-family home within a geologically hazardous area. The CAO CUP code structure addresses slope stability and habitat:

Regulations set out in this Chapter 25.09 are minimum requirements that shall be supplemented by mitigation sequencing in this Section 25.09.065 when needed to protect the ecological functions of steep slope erosion hazard areas and their buffers, wetlands, wetland buffers, fish and wildlife habitat conservation areas, and flood prone areas.<sup>32</sup>

Steep slope and ecological function are not at issue. Only view and landmark impacts were raised. The CAO CUP criteria contain no language specific to views or landmarks.

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<sup>24</sup> SMC 23.76.022; SMC 23.76.006(C)(2)(f). These are categorized as Type II MUP decisions.

<sup>25</sup> SMC 23.76.022(C)(7).

<sup>26</sup> SMC 23.44.006(A); *see* definitions at SMC 23.84A.032, Residential Use (23), SMC 23.84A.008 (dwelling unit is “a room or rooms located within a structure that are configured to meet the standards of Section 23.42.048 and that are occupied or intended to be occupied by not more than one household as living accommodations....”).

<sup>27</sup> SMC 25.09.260(A).

<sup>28</sup> SMC 23.60A.170; SMC 25.05.675(P).

<sup>29</sup> Order on Applicant’s Motion to Dismiss (June 28, 2021), § 5, referencing SMC 25.05.665(B).

<sup>30</sup> RCW 2.08.010 (Title restriction disputes go to the superior courts, which are assigned “original jurisdiction in all cases ... which involve the title or possession of real property.”). The covenant is a promise from the owner to itself. Due to merger, other enforcement hurdles may be present.

<sup>31</sup> SMC 25.09.260(A)(1).

<sup>32</sup> SMC 25.09.065(A).

The standard CUP criteria do contain broader language. “In authorizing a conditional use, the Director ... may impose conditions to mitigate adverse impacts on the public interest and other properties in the zone or vicinity.”<sup>33</sup> A CUP may be denied if the “adverse impacts cannot be mitigated satisfactorily,” or the use “is materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located.”<sup>34</sup>

In assessing the proposal, the Department applied this language to a permitted outright use. The more specific zoning code use table specifically authorizes the use in this zone at this location and does not require additional review as the Project is outside the landmark buffer and was found to be exempt from SEPA. There is no other supplemental authority specifically providing for view protection.

The substantive criteria only address steep slopes and ecological functions. But, in addressing these issues, mitigation designed to address the substantive criteria could create view or landmark impacts. As the Department may impose these conditions, it has authority to ensure the mitigation it is requiring does not create unintended consequences or impacts.

Vegetation heights are now planned to be no more than four-six feet to limit impacts. And while the final approved landscaping will be further reviewed and must comply with the MUP, including the landscape plan at Department Exhibit 4, there is no condition limiting the vegetation to those heights. Over time, with the plants initially selected, the vegetation would grow to block current views. The Department has authority to include MUP conditions and/or ensure the landscaping plan text is sufficiently specific to ensure that plantings, and the fencing, do not exacerbate view impacts by exceeding four-six feet in height and to require necessary maintenance to ensure that does not occur.

The Admiral’s House is a City of Seattle designated landmark and is surrounded by a landmark boundary. Construction within the boundary is subject to Landmark Preservation Board review.<sup>35</sup> As the Project is exempt from SEPA,<sup>36</sup> and outside the landmark boundary, specific code language does not require further review, so this concluded the Department’s analysis.

MCC raised a question on whether the CUP criteria at SMC 23.32.042(b) required additional mitigation to protect the structure. Oceanstar believes this approach relies on a de facto expansion of landmark boundary the Council did not make.

The Project was designed with attention to impacts on Admiral’s House. Impacts were depicted through before and after illustrations. These showed minimal intrusions into the viewscape and structures which while larger than surrounding residences, are also residences, and are comparable in size to the Admiral’s House. If the Department had

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<sup>33</sup> SMC 23.42.042(B).

<sup>34</sup> SMC 23.42.042(C).

<sup>35</sup> SMC 25.12.670.

<sup>36</sup> SMC 25.05.675(H)(2)(d).



imposed a condition impacting Admiral's House, as with landscaping, it could have tailored the condition to avoid unnecessary impacts. No mitigation was imposed which exacerbates or creates new impacts.

There was no error by the Department in not requiring further mitigation to protect the Admiral's House. This conclusion is based on the measures the Project took to minimize impacts, location outside the landmark protection boundary, and that no measures imposed through the ECA CUP exacerbate or create impacts.

**5. UJV Height.** Seattle Parks and Recreation is not a party to this proceeding and imposing a condition requiring fill to be placed on its property is not feasible. This does not preclude the parties from independently exploring this, but given the hurdles present it was not a Department error to not require fill placement at UJV.

**6. Removal of North Side Exterior Stair Access.** No code or policy was identified preventing or discouraging private park access. It was not an error by the Department to not include a condition prohibiting the placement of stairs to improve park access.

**7. Further Review.** The Department should have considered whether the landscaping it required as mitigation would create unnecessary visual impacts by growing beyond the intended four-six feet along the site boundary with UJV where the 24 Amelanchier Alnifolias are shown on the landscaping plan. Such a review would require greater specificity on the selected plant type and maximum allowed heights in the MUP or landscape plan, or possibly in both documents. As part of this review, planned fencing including height and degree of transparency should have been considered with the landscape plan so the Project could be reviewed as a whole.

## DECISION

The Department's ECA CUP Decision is **UPHELD** in part and **REVERSED** in part, with direction to the Department to further consider the MUP as it relates to landscaping consistent with this Decision, including Conclusion 7. The parties should coordinate as feasible to resolve these issues.

Entered October 19, 2021.

        /s/Susan Drummond          
Susan Drummond, Deputy Hearing Examiner

### **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 decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision 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 a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear pay for preparing a verbatim transcript of the hearing. Instructions for transcript preparation 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.

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Finding and Decision** to each person listed below, or on the attached mailing list, in the matters of **MAGNOLIA COMMUNITY COUNCIL AND OTHERS**, Hearing Examiner Files: **MUP-21-016 (ECA, CU)** in the manner indicated.

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Dated: October 19, 2021

/s/ Galen Edlund-Cho  
Galen Edlund-Cho  
Legal Assistant