

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

CAPITOL HILL COMMUNITY COUNCIL

S-79-003

from a ruling of the Superintendent
of Buildings

The appeal is DENIED and the decision of the
Superintendent AFFIRMED.

Introduction

The appellant, the Capitol Hill Community Council (CHCC), filed an appeal from a decision of the Superintendent of Buildings (Superintendent) granting a use permit for the construction of a proposed condominium (Somerset) located at the northeast corner of 13th Avenue East and East Republican Street.

The appellant exercised its right to appeal pursuant to Section 25.40 of the Zoning Ordinance (86300, as amended) and Section 19 of the SEPA Ordinance (105735, as amended).

Parties to the proceeding were: the CHCC, represented by Peter Eglick; the Superintendent, represented by assistant city attorney Ellen Peterson; and Somerset, represented by Peter Buck and Jerome O. Cohen.

This matter was heard before the Hearing Examiner on March 21, 26, 27 and 28, 1979.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The Mountain Pacific Development Company proposes to construct an eighteen-story condominium structure (Somerset House) containing 53 dwelling units. As a result of the environmental review process, the number of dwelling units has been reduced from 60 to 53 in order to increase the parking to dwelling unit ratio. This was accomplished by changing the size and configuration of units rather than reducing the height or bulk of the building. A two level parking facility would provide 67 on-site parking spaces for a ratio of 1.264 parking spaces per dwelling unit. The ground floor would be a potential site for two retail shops containing 500 square feet each.

2. The site contains approximately 18,000 square feet and is located at the northeast corner of 13th Avenue East and East Republican Street on Capitol Hill. Developed on the property are two older wooden frame buildings and a detached garage. The existing structures, which contain a total of 20 apartment units, are vacant and would be demolished if the project is approved.

3. A dense growth of trees and shrubs is located on the site, primarily in the largely undeveloped southern portion. Most of the existing vegetation would be removed and replaced under the proposed development plan.

4. The site is zoned Multiple Residence High Density Variable Height (RMV 200). The RMV zone extends generally from East John to East Mercer and from 13th Avenue East to

within one half block of 15th Avenue East.

5. The area adjacent to the project site is primarily developed with three-story multiple dwellings, many of which consist of converted former single-family dwellings. Directly to the north is an eleven-story 126-unit building (Capitol Park Tower) for low income elderly persons.

6. A final EIS was issued for Somerset on September 27, 1977. The CHCC filed an appeal challenging the adequacy of the EIS. In a decision entered on December 22, 1977, the EIS was found to be adequate by the Hearing Examiner.

7. On February 7 and March 28, 1978 the CHCC filed appeals challenging the issuance of a use permit for Somerset and alleging failure to comply with the substantive provisions of SEPA (Ordinance 105735, as amended). In a decision entered on May 23, 1978 the Hearing Examiner remanded the matter to the Superintendent so that due consideration as required by SEPA would be given to the adverse environmental impacts disclosed in the EIS, with specific reference to the following: land use, population, housing, parking, aesthetics, microclimate, shadows and cumulative effect.

8. Subsequent to the remand decision of the Hearing Examiner, a new Superintendent, William Justen, was appointed. The new Superintendent undertook the task of complying with the remand and in a written decision, dated January 10, 1979, stated his intention to issue a use permit for Somerset subject to conditions. The Superintendent's decision at page 10 states: "Although the proposal in its final form does not eliminate every adverse impact e.g. shadows, noise and air quality degradation resulting from construction activities and view blockage, it is my judgement that the merits of the proposal outweigh the adverse environmental impacts which cannot be mitigated". Fourteen conditions were imposed with the primary condition being a requirement that .25 off-street parking spaces per dwelling unit for guest parking be provided. The condition on guest parking is in addition to the one off-street parking space per dwelling unit required by the Zoning Ordinance.

9. On February 6, 1979, the Superintendent published an intention to issue a use permit for Somerset. On February 20, 1979, a timely appeal of the decision of the Superintendent was filed by the CHCC. The appeal sets forth numerous allegations which will be considered in the following paragraphs.

Parking

10. The EIS contains conflicting information on parking demand with regard to Somerset. The project proponent claimed that the parking demand would not exceed one vehicle per unit. In the final EIS at page 175a the Engineering Department commented that a standard of 1.5 to 2.0 spaces per dwelling unit would be a more realistic criterion to evaluate parking demand in the subject area.

11. When Somerset was remanded for further consideration, the Superintendent requested the Engineering Department to perform a study of similar condominiums on Capitol Hill in order to clarify the parking ratio. Residents of the Highlander, the Lamplighter and the Shannon, all Capitol Hill condominiums, were surveyed by mail.

12. The parking survey was prepared and conducted by the Engineering Department. According to Department representatives they were under time and budgetary restraints which resulted in limitations in the manner in which the survey was designed and conducted. One hundred eighty nine forms were mailed out and 90 returned for a return ratio of 47.6%. The survey form was not pre-tested except among Engineering Department personnel. The forms were returned by mail anonymously so it was not possible to identify either respondents or non-

respondents in order to determine whether the two groups differed in any significant respect.

13. David Markly, who is employed by Transpo, the consultant firm that prepared the traffic study included in the Somerset EIS, was given an opportunity to review the survey form, recommend suggested changes and comment on the results. The CHCC was not given a similar opportunity.

14. Dr. Leonard Goodisman, a professor of research methodology in public administration at the School of Public Affairs, University of Washington, was called as a witness by the appellant. He testified that there were serious deficiencies in the parking survey and that the information obtained from the survey cannot be claimed to be derived from a random sample, or representative of any known population, the condominiums surveyed or any purportedly similar condominiums.

15. Based on the Engineering Department parking study and other data, the Superintendent determined that for tenant parking a ratio of one to one would be required and that for guest parking an additional .25 spaces must be provided. The Superintendent's decision at page 9 states: "Considering City policy as previously noted, the availability of transit in the vicinity of the Somerset House, visual observation, the fact that the original 20 units only provided two off-street parking spaces, and the fact that the Engineering Department's study indicated there was some margin for interpretation, it is my determination that the project should be required to provide most, but not all, parking needed by the tenants and their guests." The project developer proposes to meet the guest parking requirement by reducing the number of units from 60 to 53 and by providing 67 on-site parking spaces.

16. When significant new information becomes available or a proposal is changed, circulation and comment is required under the SEPA Guidelines. WAC 197-10-495 provides:

- (1) A lead agency shall prepare an amended or new draft EIS whenever it determines:
 - (a) That substantial changes have been made in the proposal, or significant new information concerning anticipated environmental impacts has become available subsequent to circulation of the initial draft EIS, and
 - (b) That circulation of a new draft EIS is necessary to provide further input and review on the proposal.

17. The appellant makes several allegations with regard to the Engineering Department's parking study. First, that the parking study contained significant new information that was generated in concert with the project proponents but not circulated for comment to other interested parties. Second, that the new information (the parking study) and the modification of the proposal (change in number of units and parking spaces) requires circulation and comment pursuant to WAC 197-10-495. Third, that the parking study was biased, misleading, inaccurate and inadequate as a basis for exercising discretion. Fourth, that the Superintendent failed to impose conditions that would effectively mitigate the adverse impacts and the conditions that were imposed were not enforceable.

Cumulative Impacts

18. The decision of the Superintendent at page 5 states: "There is no definitive evidence that the Somerset House will accelerate land use changes in the area; in fact, other projects have not been proposed for some time. (It is noted that potential developers may be postponing applications until the Somerset project is resolved). The Draft and Final EIS's point out the potential for the worst possible

case. At this time I cannot conclude that the Somerset House will be the impetus initiating land use changes and the potential cumulative impacts associated with such change on the elements of the environment mentioned above".

19. Section 2(b)(4) of the SEPA Policies (Ordinance 107678) provides that as a result of cumulative effects a project may be modified to lessen its demand for support services and facilities or its impact on natural systems.

20. The appellant alleges that the Superintendent failed to adequately consider the cumulative impacts of Somerset.

Compact Car Ratio

21. Section 23.21 of the Zoning Ordinance (86300, as amended) provides that no more than one third of the required parking spaces may be compact sized. With regard to Somerset, more than one third of the 67 spaces would be compact sized. It is the Superintendent's interpretation that when parking in addition to that required by the Zoning Ordinance is provided that the additional parking spaces may be compact in size provided that they are workable spaces that can actually be used. The appellant alleges that the interpretation of the Superintendent is incorrect and that additional spaces, even if imposed under SEPA, are required to meet Zoning Ordinance standards.

22. SEPA Policies

Section 1(b) of the SEPA Policies (Ordinance 107678) provides as follows:

In assessing the environmental impacts of a proposal and in determining the need for conditioning or denial pursuant to Section 19 of Ordinance 105735, the city official or authorizing agency shall utilize SEPA, all policies, guidelines and regulations adopted pursuant to SEPA, and shall use other environmentally related policies adopted by the City Council in the form of resolutions, codes, ordinances, regulations or plans identified in Appendix A and on file in the SEPA Public Information Center, and federal, state, and regional environmental quality standards.

23. Section 10 provides that policies established in the SEPA Policies are intended to be supplemental to other adopted city policies protective of the environment and are not intended to repeal any such adopted policies.

24. The appellant alleges that the Superintendent incorrectly interpreted the limits of his discretion under SEPA in that the Superintendent considered the policies in the SEPA Policies Ordinance to be pre-emptive and to limit his discretion to condition or deny permits.

Conclusions

1. The standard of review to be applied by the Hearing Examiner to the decision of the Superintendent is different from the standard that applies to an appeal from a lower to a higher court. "The scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them."
Messer v. Board of Adjustment, 19 Wn.App. 780, 787 (1978).

2. The legislation establishing the use permit appeal, Ordinance 86300, as amended, provides that the determination of the Superintendent is to be considered prima facie correct. In other words, the Superintendent's decision stands unless

contradicted or overcome by other evidence. To overcome the presumption, the trier of fact must find from a fair preponderance of credible evidence that the findings and decision are incorrect. Allison v. Department of Labor and Industries, 66 Wn.2d 263, 401 P.2d 982 (1965). By contrast the courts apply a clearly erroneous test to an administrative decision on a building permit where the decision is based on SEPA. Polygon v. Seattle, 90 Wn.2d 59 (1978).

3. RCW 43.21C.060 provides that the policies and goals of SEPA are supplementary to those set forth in existing authorizations of all branches of government, including municipal corporations. This section further provides that any governmental action, not requiring a legislative decision, may be conditioned or denied only on the basis of specific adverse environmental impacts which are identified in the environmental documents and on adopted written policies.

4. Section 19 (1) of the SEPA Ordinance (105735, as amended) provides that the City shall exercise where appropriate, the authority to deny or reasonably condition any proposal so as to mitigate or prevent adverse environmental impacts. Under subsection 2 the conditioning of a proposal can only be based on adverse environmental impacts identified in the environmental documents. Under subsection 3 a proposal may be denied where significant adverse impacts identified in the environmental documents cannot be substantially mitigated or prevented by the imposition of reasonable conditions. Subsection 4 provides that after September 20, 1978, the conditioning or denial of a proposal must be based on written policies. The City's written policies were adopted in Ordinance 107678. The discretion and authority of the Superintendent to deny or condition a proposal has been limited by the adoption of Ordinance 107678 and therefore the situation is quite different from the one existing at the time of the remand.

5. The Superintendent is charged with the difficult responsibility of making the balancing judgment mandated by SEPA between the benefits to be gained by the proposed major action and its impacts upon the environment. Juanita Bay Valley Community v. Kirkland, 9 Wn.App. 73, 510 P.2d 1140 (1973). Section 19(3) of Ordinance 105735 also requires that the merits of a proposal be weighed against the adverse environmental impacts.

Parking

6. The issues raised with regard to the Engineering Department parking study form one of the main thrusts of the appellant's case. If the information in the parking study meets the tests outlined in WAC 197-10-495, then circulation of the information pursuant to the WAC Guidelines would be required. The first test under WAC 197-10-495 is whether substantial changes have been made in the proposal. In this case the only changes were a reduction in the number of dwelling units and an increase in the number of off-street parking spaces. The changes were in the nature of mitigating measures and would not increase the intensity of any environmental impacts. Given the nature of the changes there is no basis for finding that they were substantial.

7. The alternative to the first test in WAC 197-10-495 is whether the information on parking was significant with regard to anticipated environmental impacts. The EIS contains extensive information on the parking problem, some of which is conflicting. The remand of the Hearing Examiner specifically required consideration of parking impacts. In comparing the Engineering Department parking study with the information in the EIS, it is concluded that the new information was supplementary and not significant.

8. Since the information in the parking study does not meet the requirements of subparagraph 1(a) of WAC 197-10-495 circulation is not legally required. This is not to say that it would not have been advisable from a policy

point of view to provide for circulation or at a minimum input from the CHCC in light of the role that the traffic consultant for the developer was permitted to play. However, the procedure adopted by the Superintendent does not appear to be violative of any legal principles since informal contacts between the developer and employees of the Superintendent are not prohibited. Polygon v. Seattle, supra.

9. The Engineering Department parking study does not meet the highest scientific standards for reliable survey data. The attorney for Somerset concedes this and the Superintendent acknowledged this in his written decision where he notes that there is "some margin for interpretation."

10. The appellant's position seems to be that the determination of parking demand is an exact science which can result in an unchallengeable parking ratio. The record indicates that parking demand is based on a number of variables which will change over time and that all a responsible official can do is make a reasonable determination based on the available data and take into consideration the reliability of the data. In this case the data showed that the parking ratios range from 1 to 1 and from 1.5 or 2.0 to 1. The Superintendent chose to require 1.25 which falls somewhat in between the high and low ratios. The appellant has failed to show that the imposition of this mitigating condition was not reasonable.

11. The record also does not show that the Engineering Department parking study formed the sole basis for the formulation of the parking ratio eventually imposed by the Superintendent. The Superintendent's written decision notes that several factors in addition to the parking study formed the basis of his final determination on a parking ratio.

12. With regard to the allegations that the conditions imposed by the Superintendent would not be effective and were unenforceable, the appellant has failed to produce any substantial evidence to support the allegations.

Cumulative Impacts

13. The record in this case shows that no other substantial or highrise projects have been proposed for the Somerset project area and there is no substantial evidence to indicate that approval of Somerset will result in accelerated land use change. The appellant failed to show that the Superintendent did not follow the SEPA Policies which require that an analysis of cumulative impacts should be directed toward the effect of the project on support services, facilities and natural systems.

14. The appellant has not shown that the Superintendent's determination to permit a higher ratio of compact car spaces was unreasonable. Since the spaces in question are required as a result of a discretionary decision under SEPA and not as a result of a Zoning Ordinance requirement this determination appears to be reasonable in light of changes in patterns of auto ownership that show an increased usage of compact cars. The provision for additional workable off-street parking spaces should be encouraged since it will mitigate the on-street parking shortage.

15. Allegations were raised concerning the substandard size of certain parking stalls and the extension of capillary barriers beyond the property lines. No substantial evidence was presented to support these allegations.

SEPA Policies

16. The issue of the relationship between the specific policies contained in the SEPA Policies Ordinance (107678) and those which are included in the list of policies in Appendix A is complex. However, the foregoing issue does not need to be resolved since the appellant has not shown

with any specificity that matters covered in Appendix A were not addressed by the Superintendent or that the Superintendent did not comply with the SEPA Policies Ordinance.

Summary

17. The Superintendent has determined that the merits of the Somerset project outweigh the adverse environmental impacts that cannot be mitigated. It is acknowledged that all adverse impacts are not eliminated. With reference to what the Superintendent considered to be the primary adverse impact (parking), a mitigating condition is imposed.


18. The record shows that the Superintendent has complied with the remand decision of the Hearing Examiner in light of the SEPA Policies Ordinance, which was adopted subsequent to the remand.

19. The appellant has failed to show from a fair preponderance of credible evidence that the findings and decision of the Superintendent are incorrect. The appellant has raised issues criticizing the Superintendent for the degree or lack of mitigation of adverse environmental impacts. However, there has been no showing that the Superintendent's determination was unreasonable given the nature of the impacts and the written policies governing the mitigation of such impacts.

Decision

The appeal is DENIED and the decision of the Superintendent AFFIRMED.

Entered this 18~~th~~ day of May 1979.


William N. Snell
Hearing Examiner

Notice of Right to Appeal

Pursuant to Section 20A of the SEPA Ordinance (105735, as amended) a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth (15th) day after the date the decision appealed from is filed with the SEPA Public Information Center. The appeal must be filed with the City Clerk. Rules have been adopted by the City Council governing the appeal procedure and should be reviewed prior to filing an appeal.

The City Council will review only issues relating to compliance with Section 19, Ordinance 105735, as amended. Section 19 relates to substantive authority to condition or deny a proposal on environmental grounds.