

## FINDINGS AND DECISION.

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

FREMONT NEIGHBORHOOD COUNCIL

FILE NO. MUP-82-054 (W)  
APPLICATION NO. 82-0066

from a decision of the Director of  
the Department of Construction and  
Land Use on a master use permit  
application

#### Introduction

Applicant M.M. Laigo applied to the Seattle Department of Construction and Land Use for a master Use Permit (MUP) on February 22, 1982. The permit would allow construction of a five unit apartment building at 3935 Woodland Park Avenue North. Appellant instituted this appeal, claiming generally that the application was abandoned as that term is defined in Section 24.84.050(C), Ordinance 109438, Sections J(C) and that the SEPA declaration of non-significance was in error due to traffic and parking problems likely to be attributed to the project.

The appellant exercised its right to appeal pursuant to the Master Use Permit Ordinance, Chapter 24.84, Seattle Municipal Code.

Parties to the proceedings were: appellant, by and through Lee Sutterman, who was present at the hearing, and Peter Eglick, Esq., who also appeared for Appellant as to the abandonment issue and was excused from attending the hearing; the Department of Construction and Land Use (DCLU) by James Fearn, Esq., Assistant City Attorney and Evvian Willis, designer of the project, and on behalf of the applicant.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code, Title 24 (Ordinance 86300, as amended) unless otherwise indicated.

This matter was heard before the Hearing Examiner on September 15, 1982.

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

#### Findings of Fact

1. With regard to the action proposed in this application, a declaration of non-significance (DNS) has been prepared by the responsible official pursuant to the State Environmental Policy Act of 1971 (SEPA) and Ordinance 105735, as amended, Chapter 25.04, Seattle Municipal Code, and is part of the record.

2. The application herein was filed on February 22, 1982. At that time, the subject property was zoned RM 800. The proposed project conformed to the uses permitted within an RM 800 zone. At some later date, before the hearing in this case, the zoning was changed to SF 5000. The parties stipulated to these facts at the hearing and an earlier pre-hearing conference.

3. In order to construct the proposed five unit dwelling, it will be necessary to demolish an existing single family wood frame dwelling.

4. The proposed project will provide space for five automobiles on the subject property. Access for four of said spaces will be from an alley bordering the rear of the subject property and parallel to Woodland Park Avenue N. A fifth space will have access to the subject property by way of a curb cut on Woodlawn Park Avenue North.

5. Woodlawn Park Avenue North is a street dedicated to and maintained by the City of Seattle. In the vicinity of the subject property the street is 66 ft. wide and is not designated as an arterial way.

6. There are two cross streets immediately adjacent to the block on which the subject property is located; N. 40th Street and N. 39th Street. The Seattle Engineering Department has measured traffic flow on N. 40th and found 1,300 vehicles travel in both directions on that street in a twenty four hour period during a weekday; or, one vehicle every one minute and 5.8 seconds. No traffic flow data was presented as to N. 39th Street.

7. Two churches are located within one block of the proposed project. Each church has, according to appellant, 250 parishioners; each conducts services on Sunday mornings, typically between 9:00 a.m. and 12:00 p.m. and on certain weekday nights. In addition, church services are held with greater frequency during religious holiday periods which occur on an infrequent but ascertainable basis during the calendar year.

8. Parking along both sides of Woodlawn Park Avenue N. is permitted. Parking is prohibited on N. 40th Street.

9. Construction of the proposed project would eliminate one parking space due to the curbcut required on Woodlawn Park Avenue North. While the proposed project is designed to provide space for one auto per unit, it is likely that the project will attract more autos. Mr. Willis, designer of the project testified that the units are small and designed to provide low cost rental housing. Mr. Willis testified that he anticipates that college and university students will likely occupy many of the units. Mr. Cronkite, a witness for appellant, testified that he lives in the neighborhood and that many residents are students living in rental housing. The Examiner takes notice of the fact that the subject property is located close to Seattle Pacific University and the University of Washington. See Hearing Examiner Appeal Rules 1.26(d); ER 201(c)(f). Further, based upon the Examiner's general knowledge based upon endurance of almost seven years of higher education, students in a post-high school setting tend:

- (a) to save money by bunching up in rental housing;
- (b) to invite friends over to said housing;
- (c) to covet and finally, to acquire automobiles. Id.

10. There was no evidence as to hardship to a particular segment of the population which may be occasioned by the curbcut on Woodlawn Park Avenue North.

11. Except for Sunday mornings, a resident of the neighborhood can usually find parking within a block of his or her residence. There was no evidence that there is a statistically significant proportion of the population of the neighborhood which is disabled or handicapped or which would otherwise find such parking to be life threatening, debilitating or hazardous.

12. On Sunday mornings, it is likely that a resident who leaves the neighborhood with his or her car will have to park up to two blocks from his or her residence if returning before 12:30 p.m.

13. Mr. Farber, the environmental specialist of DCLU who recommended that a SEPA declaration of non-significance issue with respect to this application, personally inspected plans for the project and inspected the neighborhood during working hours on a weekday Mr. Farber found no problem with parking on his visit. Mr. Farber appears to the Examiner to have full use of normal visual sensory perception.

14. Counsel for appellant wrote a letter to DCLU dated June 17, 1982, regarding applicant's failure to post timely the required sign. Said letter is attached to appellant's memorandum in support of Motion for Summary Judgment. By way of letter dated July 19, 1982, Margaret Fleek, Director of DCLU's Land Use Division

responded to counsel's June 17, 1982, letter. Letter of July 14, 1982, is also attached to appellant's memorandum in support of Motion for Summary Judgment. Ms. Fleek stated, in part:

...our Department's consistent practice has been to not cancel applications immediately after the 30-day letter....Our letter of April 9th served as a warning to the applicant....

15. As to the issue of abandonment of the application, the parties prepared and timely filed cross motions for summary judgment. No testimony was presented at the hearing as to said motions.

16. It is undisputed that DCLU notified applicant by way of letter dated April 9, 1982, that public notice of the project had to be given by way of a large sign. A deadline of April 23, 1982, was established in said letter for posting the sign. The letter went on to state that failure to comply with that deadline would result in cancellation of the application. The sign was not posted until June 4, 1982.

17. DCLU claims that it:

....does not dispute appellant's contention that the permit should be deemed abandoned. The Department maintains, however, that its decision to continue processing the master use permit application is not reviewable by the Hearing Examiner...

Director's Memorandum on Motion for Summary Judgment and Cross Motion for Summary Judgment, at 2.

18. On the 3900 block of (east side) Woodlawn Park Avenue North there already exist a six unit apartment, a five unit apartments and a four unit apartment building.

#### Conclusions

1. The application was filed and initially processed in the regular course of business. Absent a colorable showing of fraud or collusion or similar intentional act for or on behalf of a City employee, the lack of signature and proof of payment of a required fee is not a material defect in the MUP application process.

2. The environmental checklist form as reviewed by the environmental specialist at DCLU states that the project will generate additional vehicular movement and that it will result in effects on existing parking or demand for new parking. The checklist form employed in this case complies with the requirements of WAC 197-10-050 and 197-10-365. Pursuant to WAC 197-10-340(1), a declaration of non-significance is to issue if "a proposal will not have a significant adverse impact on the quality of the environment...."

3. The decision of the Director in making a negative declaration under SEPA in a master use permit application context is to be given substantial weight. Hearing Examiner Appeal Rules 2.8, Section 23.76.36(B)(7), RCW 43.21C.090. While the hearing is de novo the appropriate standard of review is to determine whether the agency action is or was clearly erroneous. Sisley v. San Juan County, 99 Wn.2d 78, 84 (1977). Washington's Supreme Court instructed reviewing tribunals:

...to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision. The entire record is opened to judicial scrutiny and the court is required to consider the public policy and environmental values of SEPA as well.

While the language from Sisly, supra, provides one with some generalized advice it does not very precisely tell use what constitutes "significant adverse impact." Another part of the opinion in Sisley refines the dicta to some extent. If there is a reasonable probability that the project will have more than a moderate effect on the environment, an environmental impact statement (EIS) is required. Id at 89.

4. The increase in demand for on-street parking likely to be expected from the proposed project is minor. The project will likely regularly require space for up to four vehicles on city streets at any one time. One of those spaces will be due to the curbcut, the other three are reasonably attributable to tenants in excess of the number of units to be provided and guests. There was no showing that the neighborhood streets cannot absorb that number of vehicles with the exception, perhaps, of Sunday mornings. Even then, however, parking will be a minor inconvenience only to those who live in the neighborhood and try to obtain a parking place between 9:00 a.m. and 12:30 p.m. on Sundays.

5. The Examiner is convinced that the increased number of vehicles likely to be attributed to the project is not of a magnitude which warrants more complete examination and discussion in an EIS. Nor is the Examiner of the ideal a mistake was made. To the contrary, the DCLU environmental specialist clearly recognized that some increase in traffic and parking could be expected. There is no harm to the policies enunciated in RCW 43.21C by the DNS issued in this case.

6. The issue of abandonment of the application is troubling. The City does not dispute that the permit was abandoned by applicant's failure to proceed in a timely fashion of the notice from DCLU. Rather, the City claims the Examiner has no authority to examiner applicant's apparent abandonment of the project. The City argues, in effect, that the Examiner's jurisdiction is limited rather than general under Section 23.76.30. Appellant argues, however, that Section 23.76.36(B)(6) provides authority for the Examiner to consider procedural irregularities leading up to the issue of a DNS. Appellant claims that the abandonment of the application was germane to the DNS because a new application, under the SF 5000 zoning would apparently require greater scrutiny than under RM 800 zoning.

7. Both parties moved for Summary Judgement. The Hearing Examiner Appeal Rules envision a motion practice, see id. at 1.23. However, no standards for summary judgment are provided. That being so, the Examiner will adopt the standards set out in CR 56. No factual issue exists as to this part of the appeal and sufficient facts are established to allow decision on the legal issues raised.

8. The authority of the Hearing Examiner is limited by ordinance. The Examiner is not in the position of an arbitrator and may not use discretion to determine the limits of his or her jurisdiction.

9. Whether or not applicant abandoned its permit within the meaning of Section 24.84.050(C) is a question which is governed by the Master Use Permit Ordinance requirements. Jurisdiction of the Examiner in the MUP process is defined in Section 23.76.30. Assuming that the Examiner has jurisdiction under that section, a justiciable appeal exists. That being so, the Examiner "shall entertain issues cited in the appeal which relate to procedural irregularities,...", Section 23.76.36(B)(6). If an appeal is not properly justiciable, it, in essence, does not exist and the Examiner may not "entertain issues", in Section 23.76.36(B)(6), pertaining to a purported appeal.

Perhaps another way to explain this is that Section 23.76.030 sets out the substantive issues, i.e., discretionary decisions, which may be reviewed on appeal while Section 23.76.36(B)(6) sets forth the extent to which the Examiner may inquire as to each such issue. The second sentence of Section 23.76.36(B)(6) is really nothing more than a clarification of the first sentence which states that MUP appeals "shall be considered de novo." Thus, Section 23.76.36(B)(6) is not a grant of jurisdiction, as is Section 23.76.030. Should it be construed as a grant of jurisdiction, it would render meaningless Section 23.76.030. In view of the explicit wording of Section 23.76.030, such as a result is to be avoided. While it may be true that an Examiner may have more extensive jurisdiction under the SEPA ordinance with respect to alleged procedural decisions made by the agency, that does not allow co-extensive jurisdiction to exist with respect to the MUP process, even if that process also involves the separate SEPA process. The two are distinct. Further, the MUP ordinance was enacted after the SEPA ordinance. One must presume that the more limited jurisdiction with respect to MUP was a deliberate command of the legislative and executive branches to distinguish it from the arguably broader jurisdictional grant under the SEPA ordinance.

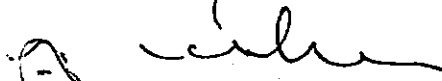
The legislative branch of the City government created the Office of Hearing Examiner with the consent of the Executive under their powers derived from City Charter and state law. They have chosen to limit the jurisdiction of the Examiner. Whether they knew of the result which could arise in a case such as this or whether such a result is wise is irrelevant. That this result may appear to be inconsistent with the purpose of providing public notice of a MUP application is not lost on the Examiner. However, this is not a wrong without a remedy. The duty of the Director is to oversee public notice is mandatory and is enforceable in the form of mandamus. The motion of the City is therefore granted and the motion of appellant is denied.

10. The appeal which purports to raise the issue of abandonment is dismissed for want of jurisdiction. In all other respects, the decision of the Director is affirmed.

#### Decision

The appeal which purports to raise the issue of abandonment is DISMISSED for want of jurisdiction. The decision of the Director is AFFIRMED.

Entered this 20<sup>TH</sup> day of September, 1982.



Kelby Fletcher  
Hearing Examiner Pro Tempore

#### Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App 418 (1977); JCR 73 (1981). Should an appeal be filed, instruction for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court.