

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

MEHMET OCAK

FILE NO. MUP-83-065(V)
APPLICATION NO. 83-407

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

Introduction

Mehmet Ocak, appellant, appeals the decision of the Director, Department of Construction and Land Use, to deny a variance for property at 2605 California Avenue S.W.

The appellant exercised his right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on October 14 and 27, 1983.

Parties to the proceedings were: appellant, represented by his attorney, Kirby Wright, and the Director represented by Diane Althaus.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

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. Appellant filed an application for a master use permit to allow an existing restaurant at 2605 California Avenue S.W. to serve alcoholic beverages. The Director determined that a variance from code would be required because the restaurant was too close to a school. The Director denied the variance.
2. The restaurant is located near the intersection of California Avenue S.W. with S.W. Admiral Way in a BC zone.
3. Lafayette Elementary School is located approximately 130 ft. south of the subject site on the same block.
4. Section 24.44.050 requires a minimum separation of 500 ft. between a restaurant serving alcoholic beverages and a school.
5. In the next block north are several taverns and a restaurant with lounge, all greater than 500 ft. away. A Safeway store and a delicatessen, within 500 ft., and a 7-11 store which may be further than 500 ft., sell packaged beer and wine.
6. The land use code does not impose a separation from schools requirement for establishments selling packaged beer and wine.
7. No similar variances were shown to have been granted in the zone or vicinity.
8. There is nothing to offset the proximity of the site to the school such as an intervening arterial or topographical break.

9. The principal of the school sent a letter to the State Liquor Control Board saying that the school does not object to a license where liquor is consumed on the premises but does object to package sales for off-premise consumption.

10. Appellant would agree to a condition permitting sale only after 4:00 p.m.

11. Appellant's business is suffering from inability to offer wine with meals.

Conclusions

1. A variance can be granted only if all the code's criteria for variance are satisfied. Section 23.40.20 C. With limited hours of liquor sales it appears that there would be no detriment to the public welfare and no injury to other properties and that the purpose of the code provision would be satisfied. Further, the code provision causes appellant hardship. Three of the five conditions are, therefore, satisfied.

2. Appellant has made no showing of an unusual condition, not created by the applicant, because of which strict application of the separation requirement deprives the property of rights enjoyed by other properties in the same zone or vicinity. Section 23.40.20C(1). Because the subject property has no different condition from any other property within 500 ft., to confer a variance from the distance requirement because of its proximity to the school would either confer special privilege or establish precedent for every other property within 500 ft. which someone wanted to convert to a restaurant use and provide wine or beer with meals.

3. Appellant argues that the code clearly discriminates against certain uses in allowing access to the "market," by which he means beer and wine sales market. It does.


4. Appellant also suggests that the City code provision is constitutionally infirm because of state preemption. As a quasi-judicial administrative agency, the Office of the Hearing Examiner is without authority to determine the constitutionality of the ordinance provision. Bare v. Gorton, 84 Wn.2d 380, 382 (1974).

5. That appellant is at a competitive disadvantage with restaurants that can provide wine and beer with meals is recognized. The code provisions apply, however, unless a variance is shown to be warranted based on the stated criteria.

Decision

The variance is denied.

Entered this 7th day of November, 1983.


M. Margaret Klockars
Deputy Hearing Examiner

Concerning Further Review

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any request for court review must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App. 418 (1977); JCR 73 (1981). Should such request be filed, instructions 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.