

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

HEINZ WEHL

FILE NO. MUP-85-020(P,W)
APPLICATION NO. 8403290

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

Introduction

Appellant challenged short plat approval and an environmental declaration of non-significance for a proposal to subdivide a parcel addressed as 13540 42nd Avenue N.E.

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 May 14, 1985. The record remained open to May 20, 1985, for further comment.

Parties to the proceedings were: appellant, Heinz Wehl, pro se; Jim Martyn, project applicant, pro se; and the DCLU Director by Arthur Ward, land use specialist.

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

After due consideration of the public hearing and other evidence and subsequent to an inspection of the site and vicinity by the Hearing Examiner, the following shall constitute the Hearing Examiner Findings of Fact, Conclusions and Decision on this appeal.

Findings of Fact

1. Applicant proposes to divide a 21,082 sq. ft. area lot into a 10,000 sq. ft. Parcel A and a 11,082 sq. ft. Parcel B. Parcel B would be the more easterly of the two. The undivided lot is presently covered with shrubs, large trees and other moderate-heavy vegetation but is also developed with a delapidated single family structure located roughly near center lot. The structure is proposed for removal.

2. The subject site is located in the Single Family (SF) 9600 zone and is addressed as 13540 - 42nd Avenue N.E. The site abuts 42nd Avenue N.E. to the west and slopes down easterly to the Burke Gilman Trail. East adjacent to Burke Gilman is Riviera Place N.E., a narrow road that provides access to nearby Lake Washington waterfront homes. Riviera Place, which has also been called Edgewater Lane, intersects 42nd Place N.E., north of the subject site. In turn 42nd Place N.E. connects on its western extreme to 42nd Avenue N.E. some two lots north of the subject property.

3. Switchbacks, curves and other features detract from vehicle visibility. According to the DCLU annotation to the Environmental Checklist, Exhibit 11, the switchback abutting the subject property dictates that "care...be used in travel" along this portion. However, the annotation continues, "(D)ue to one additional residence and somewhat limited infill potential to lots served by this road no significant adverse impact is foreseen."

4. As proposed by applicant, the more westerly Parcel A would extend roughly 127 ft. east of 42nd Avenue N.E., to the vertical boundary line, and measure approximately 80 ft. north

and south. A 20 ft. wide road is located along the south border of Parcel A which extends from 42nd Avenue to within a short distance of the proposed eastern boundary. This access is shared by the south abutting properties, one of which is owned by appellant.

5. Parcel A is comparatively level. Proposed Parcel B has an average 25% declivity for its westerly 70 ft. The remaining easterly portion declines markedly to the east. There is, for example, a 50 ft. vertical drop over a 35 ft. horizontal distance beginning some 71 ft. east of 42nd Avenue.

6. On March 28, 1985, the DCLU Director issued a decision conditionally approving the proposed short subdivision. On the same date and in the same document the DCLU Director also determined that the proposal would not have a significant adverse impact upon the environment and issued a declaration of non-significance (DNS).

7. The first of the "Conditions of Approval Prior to Recording" states: "Record the soils report with the plat and show 'no building area' 25 ft. west of the top of the easterly steep slope." Other Conditions of Approval Prior to Recording specified that Director's Rule 7-84, requiring geotechnical design and supervision, be included in the recordation; and that (applicant)

Provide for a drainage easement from the Seattle Parks Department to allow drainage to the Burke Gilman culvert system unless another alternative is acceptable to the Department of Construction and Land Use.

DCLU also required that "...Prior to Issuance of Building Permits for Parcels A and B" "Geotechnical work...be in compliance with all requirements of Director's Ruling 7-84..."

8. DCLU's third "Condition of Approval Prior to Recording" reads:

Provide evidence of recording of the easement to the Heinz Wehl property for the easement and turnaround unless the Law Department and DCLU determine later that this is not necessary.

The easement and turnaround would be located on applicant's property.

9. Appellant, a south abutting property owner, submitted this challenge to the DCLU decisions. Framed by the appeal letter of record, the major concerns stated by appellant and witnesses were with the impact of new construction and residential activity on slope stability and traffic access/safety. Appellant specifically protested the DCLU's third Condition of Approval which suggested that the easement might not require recordation.

10. Applicant agreed in hearing to record the easement without regard to any Law or DCLU department recommendation. Also in hearing, DCLU explained to the apparent satisfaction of appellant that the referenced easement was to benefit appellant's property and would allow appellant's access to the turnaround. Appellant declined to further pursue this challenge.

11. Most of the remaining presentation against the proposal cited problems with 42nd Avenue N.E., the access street for the subject site. Appellant attributed one vicinity death directly to the inaccessibility of emergency vehicles to 42nd Avenue, which is described as having poor lighting, minor hole patching, and parking along the street but serving "probably in excess of 300 homes." Appellant's assessment of problem emergency vehicle

access was echoed by his wife, who also recalled that taxis refused to come to the area in winter.

12. Director's Exhibit 9, dated April 25, 1985, shows no reported accidents from January 1, 1979, through April 25, 1985, for the segment of "42nd Avenue N.E. between 41st Avenue N.E. and 42nd Place N.E." Director's Exhibit 12, a referral sheet, shows that the Seattle Fire Department lodged "no objections" to the proposal.

13. Several witnesses testified and the Examiner finds that the local Burke Gilman-Riviera Place segment have experienced periodic land covering (slides). When appellant's lot was bulldozed "approximately 23 years ago" prior to construction, a result was land covering of portions of Burke Gilman Trail and Riviera Place. Another slide occurred in approximately 1982 which buried a portion of the Burke Gilman Trail and the driveway at 13048 Riviera Place. The record contains no explanation of why slides observed by neighbors were not recorded on City records such as the City Engineer Department Topographic Map, Exhibit 6.

14. The DCLU decision/analysis references a report by TCW Consulting Engineers, Exhibit 8. The report indicates that three test boring sites or test pits preceded their analysis of the soil condition. The report declared observing no landslide signs at the site during the exploration and no indications of landslide at the site. The report also indicated that the more easterly structure would be located "near the dividing line... supported on...augered piers," and that excavation of Parcel B would be "limited to areas where the removal of existing soils is absolutely necessary." The report concluded with specific grading, shoring, foundation, drainage and other recommendations and with an assessment that if the engineer's recommendations were followed, "minimal" risk of instability on the site would be presented. No technical or other evidence to the contrary was presented.

Conclusions

1. The Hearing Examiner has jurisdiction of this proceeding pursuant to Chapter 23.76, Seattle Municipal Code.

2. Seattle Municipal Code Section 23.76.36(B)(7) requires that the Hearing Examiner give "substantial weight" to the DCLU Director's short subdivision and environmental determinations. Accordingly, to reverse the DCLU Director's decision here appealed, the appellant must show that the DCLU decision was clearly erroneous.

3. The issue relating to the recording of the easement to benefit appellant's property was effectively resolved to appellant's satisfaction in hearing. The record should nevertheless formally reflect applicant's agreement to record the easement notwithstanding any DCLU or Law Department determination as to whether the recording is required. Therefore, the third "Condition of Approval Prior to Recording" is modified and shall read as follows:

Provide evidence of a recording of the easement to the Heinz Wehl property for the easement and turnaround.

4. As to the Chapter 23.24 criteria for short subdivision approval, appellant has not challenged the proposal's conformance with the applicable Land Use Policies and SF 9600 Code provisions, nor with any specificity the adequacy of drainage, water supply or sewage disposal. To the degree that these matters were raised in prior communications to DCLU, drainage by easement from the Seattle Parks Department or a DCLU approved alternative is required as a Condition of Approval Prior to Recording. As to water, no challenge was raised to DCLU's representation that the

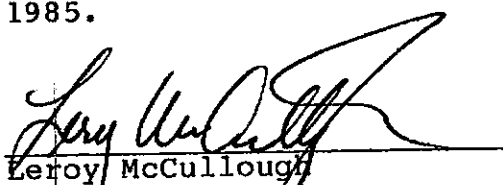
Seattle Fire and Water Departments indicate an adequate supply. In point of reference, Exhibit 12 shows that the Seattle Fire Department had no objection to the proposal. Remaining at issue by virtue of the appeal letter is the question of whether the public use and interests are served and whether, in light of soil conditions, adequate access for vehicles, utilities, and fire protection will be presented.

5. Appellant and witnesses showed a pattern of vicinity slide and erosion activity to Riviera Place that is more extensive than DCLU City maps would indicate. The only slide identified by causation, however, occurred some 23 years ago at the clearing of appellant's lot. The present proposal is restricted to geotechnical supervision (Director's Rule 7-84), the consulting engineer's specific recommendations, and a building area setback from Parcel B's steep slope. The Consulting Engineer's conclusion of "minimal" site instability was questioned, but uncontroverted by any specific evidence. Thus, giving substantial weight to the environmental and short subdivision decisions, the Hearing Examiner cannot conclude that the Director's decisions regarding the proposed activity were "clearly erroneous". That is, the record does not show that proposed building or traffic activity will so impact the street system that denial of the short plat is appropriate, Chapter 25.05, 23.24, Seattle Municipal Code, or that an environmental impact statement pursuant to the State Environmental Policy Act should be required. The Examiner would note particularly that one additional (net) structure is proposed. Since the new structure would be one of some 300 served by 42nd Avenue N.E., the impact will not be significantly adverse.

Decision

1. The DCLU decision approving the short subdivision is affirmed as modified herein. The DNS is affirmed.

Entered this 3rd day of June, 1985.


Leroy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

Pursuant to Section 25.05.680(2), Seattle Municipal Code, a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fourteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The City Council's review on appeal shall be limited to the exercise of the City's substantive authority to condition or deny the proposal under SEPA as authorized by Section 25.05.660. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council should be consulted regarding their appeal procedure.

If an appeal is taken pursuant to Section 25.05.680(2), the time for filing a request for judicial review of the underlying governmental action and/or other SEPA issues is stayed until the City Council renders a final decision on this Section 25.05.680(2) appeal.

If no appeal is taken pursuant to Section 25.05.680(2), the decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review of the decision on the underlying governmental action must be filed in King County Superior Court within fourteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.36.(B)(11).

Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington 98104, within fourteen days of the date of this decision. Section 25.05.680(3)(d).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost of preparing a verbatim written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review.