

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

VAL RUPEIKS

FILE NO. MUP-85-055(V)
APPLICATION NO. 8502339

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

Introduction

Val Rupeiks appeals the decision of the Director, Department of Construction and Land Use (DCLU), to deny a variance from the time nonconforming uses may be discontinued without losing their status for property at 9400 2nd Avenue S.W.

The appellant exercised the 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 11, 1985.

Parties to the proceedings were: appellant represented by Glenn Amster, Hillis, Cairncross, Clark and Martin, P.S.; and the Director, Department of Construction and Land Use, by Ed Somers, 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 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. Val Rupeiks applied for a variance which would allow the re-establishment of the nonconforming use of property at 9400 2nd Avenue S.W. as a sandpit or quarry. The Director denied the variance and this appeal followed.

2. The subject property is the site of a sand quarry which has been mined for some 70 years and has produced some ten million cubic yards of sand. The total quarry area covers some 45 acres, approximately 11 acres of which is within the City. The remainder is in unincorporated King County.

3. The site is within an SF 7200 zone which had been RS 7200 prior to the adoption of Title 23 of the Land Use Code.

4. A plan was formulated for restoration of the site and four special exceptions were obtained between 1974 and 1977 to begin taking out sand to execute the plan. The grading permits were obtained for specific amounts of sand reflecting the market demand at each time.

5. The quarry comprises two areas, the floor of the pit and a hump or peninsula in the middle which rises some 150 ft. from the floor. The hump is in a horseshoe shape. Slopes in the northwesterly portion have been reclaimed and therefore are moderate and vegetated. To the northeast of the hump, the floor has been converted to two uses, a Metro park and ride lot and a mini-warehouse facility. The main part of the peninsula has steep slopes, some nearly vertical with 12 to 15 ft. high sand walls, some where sloughing has occurred leaving a vertical standing portion. Vegetation is haphazard in this large area. The southwest portion of the site shows restored slopes but uneven floor. Along the south boundary are more fairly steep slopes with one knoll projection.

6. The restoration plan involves removing some one to 1.25 million cubic yards of sand which will move the face of the hump back some 200-300 ft. The slope would be replaced with a set of engineered slopes with a 10 ft. wide bench for every 25 ft. of vertical slope. The knoll on the south boundary would be removed and the floor evened out.
7. The site contains a high quality sand which can be used in construction as it comes from the ground. It is especially desirable because it is closer to City construction sites than other sources.
8. The last special exception for removal of sand within the City of Seattle portion of the site was issued in 1976. Mining activity in the County portion of the site has continued until at least 1984. The 1971 surface mining permit from the Board of Natural Resources was revised in 1980 and is currently effective. Exhibit 14. The quarry activity has been sporadic because sand is removed only to meet market demand.
9. With existing slope conditions only some 30 percent of the site could be developed. Because of the slopes' instability even use of the floor would be limited because of the need to site any development well back from the slope. This may make development of the site infeasible.
10. Regrading without sand removal could be permitted on a grading permit without a zoning variance. That would not be a viable alternative to stabilization and restoration. That approach would require backcutting about 100 ft. all along the top of the hump leaving a very small flat portion at the top and requiring that access come from the top through the residential streets. The slopes could be stabilized but future use would be greatly restricted.
11. The restoration of the site could lead to its development consistent with the zoning in effect at that time. The site is proposed for NC-2 designation under the Mayor's proposal. The potential development could be a business park if the NC-2 designation is adopted.
12. The restoration of the main hump area depends on approvals from both Seattle and King County. King County is considering an unclassified use permit. A determination of nonsignificance (DNS) has been issued for the proposal by the County as lead agency for SEPA review. The DNS has been appealed. The variance currently before the City was found by the Director to be exempt from SEPA.
13. The removal of sand within the City would take approximately two years.
14. Trucks carrying away the sand would move along Myers Way, an underused four lane arterial. Very little use would be made of S.W. Roxbury to the west.
15. The Seattle-King County Department of Public Health determined that the building of a proposed berm along the west side of the property would protect residents to the west from any sound resulting from the mining activity.
16. Special mats would be used to remove the sand from truck tires so that little would be deposited on the street.
17. In 1983, the joint venture formed to complete the reclamation and develop the property was placed in bankruptcy.

18. A petition to the City of Seattle for annexation of the site is being evaluated by the Department of Community Development. Preliminary analysis shows that the site's economic value to the city would be significantly higher if restored so development could take place.

Conclusions

1. The quarry use would not conform to the current zoning of the subject site and special exceptions are no longer available under the Land Use Code for that use. If, at the time of the rezoning to SF 7200 the use was legal and continuous or had not been discontinued for more than 12 months, the use would be nonconforming. "Nonconforming use" is defined as:

A use of land or structure which was lawful when established and which does not conform to the use regulations of the zone in which it is located. A use shall be considered established if it conformed to applicable zoning regulations at any time, or when it has commenced under permit, a permit for the use has been granted and has not expired, or a structure to be occupied by the use is substantially underway in accordance with Section 23.04.100.

Section 23.84.26"N". The Director treated the use as nonconforming, despite the expiration of the last special exception which was issued for 12 months. She found the use to be discontinued because there has been no mining on the City portion of the site for over 12 months. The variance has been required from Section 23.44.80A.2 because of the period of discontinuance.

2. A variance may be granted from a provision of the Land Use Code if all the factors and conditions of Section 23.40.20.C are present. There is no question that the property is unusual for property in the City. The provisions of the Land Use Code which now preclude the mining operation place limitations on the development potential of the site not experienced by other properties which do not have unstable slopes left when the mining and restoration was left incomplete. The type of use makes the 12 month limitation or period of disuse unrealistic and also deprives the property of certain privileges. The quarry is large so the mining operation occurs only in a section at a time. Also, the nature of the operation is to mine to meet market demand, which has been sporadic. Other properties in the zone and vicinity have uses not subject to these continuity problems.

3. The variance may not go beyond the minimum necessary for relief nor constitute a grant of special privilege. Section 23.40.20.C.2. The variance requested is to extend the period during which the operation could be quiescent without losing the nonconforming use status of the property. Given the continuous, be it sporadic, nature of the whole quarry operation, the period of the extension is the minimum necessary for relief. The variance would not confer special privilege because the property is unique within the City.

4. The variance would allow the completion of the mining and restoration plan to ready the site for development and in that way benefit the public welfare. Concerns about noise seem unwarranted if the earth berm is constructed given the Health Department response and if the hours of operation are limited. Truck traffic would affect non-residential, lightly used roadways. Use of devices to remove sand from the truck tires can be required. While slopes would be moved closer to residential areas, the slopes would be stable and present no hazard to those areas. Revegetation could be a requirement of the approval.

5. The literal interpretation and strict application of the Land Use code does present undue hardship in this case. With the lapse in the operation on the City portion, the strict application of the Code prohibits the restoration of the site to make it fully developable. The part of the site which now could be safely developed is so small that financial feasibility of development is questioned.

6. Finally, the variance must be consistent with the spirit and purpose of the Land Use Code and adopted Land Use Policies. Section 23.40.20.C.5. The variance would conflict with a strict reading of the Single Family Residential Area Policies because the quarry use is no longer provided for in single family zones. The stated purpose of those policies is, in part, to preserve the physical character of single family areas in a way that encourages rehabilitation and provides housing opportunities. Section 23.16.02. The area, though now zoned SF 7200, has not been in residential use for the past 70 years and, because of topography, is quite removed. The effect of the restoration, however, would be to make the area suitable for development, which under the current zoning would be residential. The variance then would have the effect desired by the policies, to provide further opportunities for housing.

7. The Director's representative urged that the variance be turned down and a rezone be required because of the magnitude of the operation. According to the representative, the mining portion of the restoration would first be permitted under General Industrial (IG) zoning. The mining use would be temporary and the site adjoins a single family area so a second rezone from IG would be desirable to permit the kind of development appropriate for the area. The impacts of the operation for which the variance is required, traffic, noise, dirt on roadways, were shown to be controllable and not affecting other development. The "magnitude" of the operation, by itself, would not dictate a denial of the variance.

8. The variance from the 12 month limitation on cessation of the use should be granted subject to certain conditions to control impacts. The Director has either determined or assumed that the use was legally nonconforming. If the use was legally nonconforming, the variance would extend that status. The Hearing Examiner understands that grading permits would still be required and be subject to SEPA review and conditioning.

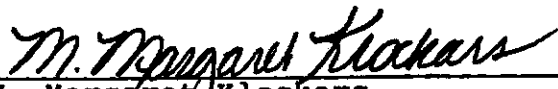
Decision

The variance to extend the period during which the quarry use can be "discontinued" without loss of any non-conforming status is granted subject to the following conditions:

1. That the mining and restoration of the site within the City limits be completed with 24 months of the issuance of the first grading permit issued by the City;
2. That the hours of mining activity on the site and hauling from the site be limited to from 9:00 a.m. to 4:00 p.m.;
3. That the 15 ft. high barrier along the western side of the site within City limits described to the Seattle-King County Department of Public Health be erected; and

4. That all mining and quarry restoration be consistent with King County's mining and quarry restoration standards as well as City grading permit conditions.

Entered this 25th day of October, 1985.


M. Margaret Klockars
Deputy Hearing Examiner

Concerning Further Review

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 must be filed in King County Superior Court within fourteen days of the date of this decision. Seattle Municipal Code Section 23.76.36(B)(11).

If the Superior Court orders a review of the decision the person seeking the review must arrange for and bear the cost of preparing a verbatim 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.