

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

DAVIS CHEN

FILE NO. MUP-86-060(W)
APPLICATION NO. 8603460

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

Introduction

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 14, 1986.

Parties to the proceedings were: applicant-appellant by John Liu, co-owner, and by John Crull, Construction and Development Services; and the Director of the Department of Construction and Land Use by Clay Leming, 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. Applicant proposes to demolish a single family residential structure addressed as 1158 North 91st Street and construct on-site a 4-story, 17-unit apartment building. Seventeen off-street parking spaces are planned.

2. After its review of the proposal, DCLU issued a determination of non-significance (DNS) with conditions.

3. One of the four "Conditions of Approval After Issuance of a Building Permit" imposed restrictions on the use of certain construction-related equipment. Another condition required on-site parking for construction workers. Condition 4 reads as follows:

In addition to the landscaping requirement listed under "Prior to Final Occupancy"... below, the one large existing tree at the southeast corner of the property shall be retained and the root system shall not be disturbed during demolition and/or construction phase.

4. DCLU also imposed four "Conditions of Approval After Issuance of a Building Permit But Prior to Final Occupancy of the Building." According to the first of these conditions, "Landscaping including street trees and on the roof deck shall be provided per an approved plan..." The second condition requires the developer to erect and maintain a solid wood fence at least 6 ft. in height "for the full length (61 feet)" along the structure's west property line. Condition 3 requires that

The front yard landscaped area west of the front entrance to the west property line shall be bermed up from the front property line to just below the proposed windows.

5. The final category was headed "Conditions of Approval-Permanent." According to the first of these four conditions, applicant and/or owner(s) are to inform potential residents that there is only one parking space per unit. Secondly, applicant/-owner is required to provide a one month Metro transit pass for each unit. Third, building and parking lighting is to be "shielded and directed downward and away from adjoining residential developed properties." The fourth and final condition recited that "maintenance of the landscaping and fence shall be the responsibility of the owner(s)."

6. The one appeal filed against the DCLU decision was submitted by the developer/applicant who contested the requirement that the large tree at the southeast corner of property be retained. See Condition 4 of "Conditions of Approval After Issuance of a Building Permit," Hearing Examiner Finding 3, above.

7. The subject tree is an expansive Colorado Blue Spruce which extends some 30 ft. in height. Its trunk is located within applicant's proposed building area. Appellant submitted to the Hearing Examiner credible, uncontroverted information from a "Landscape Architect/Horticulturalist" that the tree is diseased; that a labor-intensive program to preserve the tree could possibly meet with some success; and that the tree is already entangled in overhead power lines. The horticulturalist's recommendation was "to cut the tree down and not prolong its misery." Appellant's Exhibit 2. Photos and applicant's testimony also indicate that the tree is diseased.

8. Prior to the public hearing, the DCLU representative was not aware that the tree was diseased. Subsequent to the revelation, the DCLU representative proffered that a best effort should be made to retain the tree so that the impacts of building height, bulk and scale could be mitigated. A second larger tree is near the southwest corner of applicant's lot. The DCLU representative conjectured that had he known that the southeast tree was diseased, he would have considered requiring preservation of the southwest tree.

9. The subject site is a Lowrise-3 zoned parcel located at the northwest corner of north 91st Street and Stone Avenue North. Except for RD 5000-zoned school district property directly east, across Stone Avenue North, the applicant's site is surrounded by other L-3 zoning.

10. The east adjacent school building fronts on North 90th. Applicant's site faces the school site's playground and its west vegetation. John Crull, applicant's representative from Construction and Development Services, projected that the school site will also be given a multi-family (Lowrise) classification, since no special zone for school properties appears likely.

11. As the DCLU Analysis and Decision points out, the subject site is part of an L-3 zone that is "developed with a mixture of single family residences, duplex, triplex and apartment uses." The DCLU Analysis and Decision also concluded as follows:

The proposed structure will be 72 feet wide and 61 feet in depth and 41 feet in height on the south side making it one of the largest structures in the block. In order to mitigate the appearance of height, bulk, and scale, the existing tree at the southeast corner of the subject property should be retained...These measures will reduce impact to non-significant level (sic).

12. A modern, 3-story apartment use is west adjacent to applicant's site (see Director's Exhibit 4, Photo #9). From Photo 6 of Director's Exhibit 4, it appears that nearby properties along Stone Avenue are developed with low to moderate scale properties. Exhibit 4 also shows a 3-story apartment located on the south side of North 92nd near Stone Avenue.

13. DCLU annotations were made to the Environmental Checklist, Exhibit 6. Under the category of "Plants" DCLU indicated that the corner tree is to be saved "to reduce bulk," at p. 5. Under "Land and Shoreline Use", question 1 asks for descriptions of any proposed measures "to ensure the proposal is compatible with existing and project (sic) land uses and plans..." Applicant replied "No". The DCLU annotation to this reply states "Compliance with development standard & landscaping-one existing tree." Exhibit 6, p.8.

14. Under the checklist element of "Aesthetics" DCLU observed that some nearby residences might experience view impairment. For "proposed measures to reduce or control aesthetic impacts", DCLU inserted: "save tree on S.E. corner add landscaping, street trees, landscaping on roof deck." Exhibit 6, p. 9. Hearing Examiner review of the Checklist reveals no other stated impacts of the proposed structure on the environment.

15. Applicant argued that the DCLU condition, requiring retention of the southeast tree, is unprecedented. The Hearing Examiner finds that DCLU has required retention of trees and other vegetation to mitigate impacts of height, bulk and scale. The Hearing Examiner is aware of no case where DCLU has required retention of diseased or decaying vegetation.

Conclusions

1. The Hearing Examiner has jurisdiction of this matter pursuant to Chapters 23.76 and 25.05, Seattle Municipal Code.

2. The Hearing Examiner is required to give "substantial weight" to the DCLU Director's environmental determination. Seattle Municipal Code Section 23.76.022(C)(7). Consequently, it is appellant's burden to show the DNS, as conditioned, to be clearly erroneous. Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. The State Environmental Policy Act, (SEPA), applied by the City of Seattle, permits conditioning of projects to mitigate specific, adverse environmental impacts that are "clearly identified in an environmental document on the proposal." Seattle Municipal Code Section 25.05.660(A)(2).

4. Mitigation measures shall be "reasonable and capable of being accomplished," Seattle Municipal Code Section 25.05.660(A)(3), and "shall be based on policies, plans or regulations "formally designated in 25.05.902 as a basis for the exercise of substantive authority..." Seattle Municipal Code Section 25.05.660(A)(1).

5. Seattle Municipal Code Section 25.05.902 is entitled "Agency SEPA Policies." The policy listed at Seattle Municipal Code Section 25.05.902(5) is entitled "Landscaping." The Code states clearly that landscaping may be required to buffer incompatible land uses, Seattle Municipal Code Section 25.05.902(5)(b)(i); and further that "the city official... may require existing vegetation to be retained." Seattle Municipal Code Section 25.05.902(5)(vi). It is this latter phrase that DCLU referenced in explaining the condition here at issue.

6. As noted above, mitigating conditions must have a Seattle Municipal Code Section 25.05.902 policy basis. The conditions must also be reasonable. Requiring applicant to retain a diseased tree is not reasonable. The unrefuted evidence is that a maintenance program for the tree would likely meet with

only limited success.

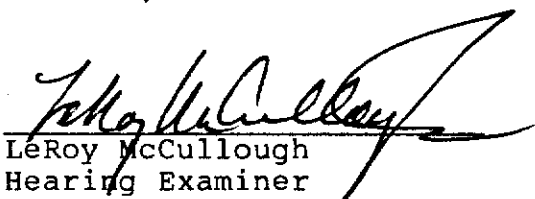
7. Further, DCLU has failed to specify in the environmental document which adverse environmental impacts the retained tree is to mitigate. The Environmental Checklist and decision references are general statements describing the proposed building's scale, height and bulk. However, there is no support in the record for the suggestion that the building proposed for this L-3 zoned lot would adversely impact the environment. There is no single family zoning nearby, and the RD 5000 site to the east is developed with a playfield and school. Thus, appellant adequately distinguished this circumstance from one that requires a transition in scale. Cf. In re Oden Investment and Kinnear Park Condominium Association, C.F. 293557, Hearing Examiner File Nos. MUP-86-057(W), 058(W) (July 1985). Other three-story apartments are nearby, including one west adjacent. Front yard berming, landscaping and other conditions remain as conditions which will serve to improve the aesthetic presentation of the structure.

8. The condition therefore cannot be required and is deleted. Applicant is encouraged to consider DCLU's concerns in its landscape/vegetation plan.

Decision

The DCLU condition, requiring retention of the tree at the southeast corner of the lot, is deleted.

Entered this 22nd day of October, 1986.


LeRoy McCullough
Hearing Examiner

Concerning Further Review

Pursuant to Seattle Municipal Code Section 25.05.680(C), a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to Section 25.05.680(C), 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(C) appeal.

If no appeal is taken pursuant to Section 25.05.680(C), 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 fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.22(C)(12)(c). 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 fifteen days of the

date of this decision. Section 25.05.680(D)(4).

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.