

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

MAC PHERSON'S, INC., ET AL.

FILE NOS. MUP-87-034 and
MUP-87-035

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

APPLICATION NOS. 8603610 and
8603607

Introduction

Appellants challenge the decisions by the Director, Department of Construction and Land Use, to issue determinations of non-significance and to conditionally approve master use permit applications for proposed apartment buildings at 12002 Roosevelt Way N.E. and 12012 10th Place N.E.

The appellants 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 September 22, 1987. The record remained open until September 25, 1987, for additional documentary evidence and written argument.

Parties to the proceedings were: appellants, MacPhersons, Inc., and some 37 neighborhood residents, represented by Ross Radley, attorney at law; the applicant, Vito LaBellarte, by Stephen J. Crane, Crane, Stamper, Boese, Dunham & Drury; 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. The applicant made two master use permit applications for the proposed development of 30 apartment units in three buildings at 12002 Roosevelt Way N.E., and 45 units in three buildings at 12012 10th Place N.E. Mitigated determinations of non-significance (DNSs) were issued and the Director conditionally approved the applications.

2. The applicant had attempted to file one application for the proposal but was required by DCLU to treat it as two proposals because the site is divided by a public right of way. Two environmental checklists were prepared for the proposals. Separate notices were given, in the case of the notice of application on separate days. Two decisions were issued.

3. Appellants filed notices of appeal of the DNSs citing potential impacts from drainage, traffic, parking and water pollution. A later amendment challenged also the adequacy of the SEPA conditions imposed to mitigate those impacts.

4. The subject sites consist of one with about 240 ft. of frontage on the east side of Roosevelt Way N.E., north of N.E. 120th Street, with a depth of 120 ft., the "Roosevelt" site and one to its east located east of unopened 10th Place N.E. with about 180 ft. of frontage on that street and a depth of approximately 151 ft., the "10th Place" site.

5. The subject sites are zoned Lowrise 2 as is the property to the north, that south of the 10th Place site to N.E. 120th and that to the west. The area to the east is zoned SF 7200. The

area surrounding the subject sites is developed largely with single family houses with those immediately north in a condominium form of ownership.

6. N.E. 120th Street has a 60 ft. right of way and is open between Roosevelt and the 10th Place N.E. right of way where vegetation and a topographical break create a dead-end. Access to 120th east of 10th Place N.E. is gained from 12th Avenue N.E.

7. The Roosevelt site slopes down from west to east.

8. A drainage ditch or creek runs south along the eastern edge of the 10th Place site. The stream flows into a culvert under N.E. 120th Street and eventually into Thorton Creek.

9. The proposal for the Roosevelt site is to demolish the single family house that exists on the site and construct three new buildings containing 45 units over a first level parking garage. Access to the site would be from 10th Place N.E. via N.E. 120th Street. For the 45 units, 51 parking spaces are proposed.

10. The 10th Place N.E. proposal is to construct three structures with 30 units. Thirty surface parking spaces would be provided mid-site.

11. The proposal also includes improvement of N.E. 120th and opening 10th Place N.E. The streets would be hard-surfaced, and would have curbs on 10th Place and on the north side of N.E. 120th, sidewalks on the north side of N.E. 120th and west side of 10th Place N.E., storm drains and utilities. A cul-de-sac turn around would be added at the north end of 10th Place and a barrier at the east end of N.E. 120th Street.

12. The applicant includes in the proposal trenching of the stream bed and lining it with rocks.

13. The applicant's agent, Larry Mitchell, testified that he was unaware of the plans of the developer as to construction sequencing but assumed that there would be economies in developing the sites together.

14. The analyses and decisions of the Director identified adverse impacts from the two proposals including traffic, parking and drainage. A number of conditions were imposed to mitigate impacts. Two relate to appellants' concerns: improvement of N.E. 120th and 10th Place N.E. and drainage facilities are required to be provided to Engineering Department standards and the stream bed excavation and rock bank protection is to be completed.

15. The impacts of the two proposals were considered cumulatively by the Director.

16. Since the two proposals were handled under separate applications, notice of application was given separately. The Engineering Department did not request a traffic and parking analysis for what was seen as 32-unit, at that time, and 45-unit projects. A 77 unit project would have resulted in a review by the Engineering Department, according to the person responsible for determining which projects would be reviewed.

17. Ed Somers, the land use specialist, relied upon oral comments by persons in the Engineering Department that they were not concerned about the proposals' impact so he calculated traffic volume himself. He also visited the site and observed traffic and parking conditions.

18. Days before the hearing in this appeal, after he became aware that the Engineering Department misunderstood the size of the proposal, Ed Somers asked the Engineering Department to do a review of traffic impacts. Mike Odom, an engineer in the plan review section, visited the site. He calculated from the ITE tables that the 75 units would generate 495 daily trip ends of which 38 would be in the a.m. peak hour and 45 in the p.m. peak hour. He concluded that these low volumes would not signifi-

cantly affect traffic operations.

19. From viewing the site, Mr. Odom concluded that vehicles parked on Roosevelt Way could restrict sight distances of drivers attempting to enter Roosevelt because of the steep grade of N.E. 120th. The bus stop on the north side of the intersection would provide adequate sight distance to the north. To the south, parking restrictions may be required to obtain an unobstructed distance of 300 ft.

20. Engineering Department records show that there has not been more than two reported accidents in any one year for five years at N.E. 125th and Roosevelt, one in five years on Roosevelt between N.E. 117th and N.E. 120th, none on Roosevelt between N.E. 120th and N.E. 122th, one on Roosevelt between N.E. 122nd and N.E. 123rd, and three at the Roosevelt and N.E. 123rd intersection. The Engineering Department regards an unsignalized intersection as having a high accident rate if there have been five or more accidents there in one year. No intersection nearby is a high accident intersection.

21. Appellants' witnesses report that a motorcyclist was killed entering Roosevelt at N.E. 118th recently. N.E. 118th is an incline. The accident happened in daylight.

22. Roosevelt Way has the capacity for the additional traffic volume which would be generated by the proposals.

23. The driveway for the 5-house condominium just north of the subject site slopes steeply down from Roosevelt, dropping some 30 ft. over 100 ft. On frosty or snowy days, residents cannot use the driveway and have to park on Roosevelt, according to Ron Rhinehart, an owner. He also reported that a fire truck was unable to traverse the driveway and had to send hoses over lawns from the east.

24. Ed Somers regards N.E. 120th as good access to Roosevelt. He finds it to be less steep than the condominium driveway to the north and it would be wider.

25. N.E. 120th Street has a 16.6 percent grade.

26. The proposed improvement of the N.E. 120th Street right of way consists of a 7 ft. wide planting strip next to the subject site, then a 5 ft. wide walkway, a 5.5 ft. planting strip, a curb, and a 25 ft. width for traffic and parking. The remainder of the right of way would be on the south side and unimproved except for drainage devices.

27. Ed Somers and the Engineering Department project a parking demand of 1.5 spaces per unit.

28. The proposal includes 1.08 parking spaces per unit.

29. The analysis and decision accepted the applicant's representation that there would be 48 spaces on-street for the use of residents and guests which, when combined with on-site parking yields 1.78 spaces per unit. At hearing, this was reduced by two spaces which had been included where a bus stop exists. The Engineering Department's standard for assessing on-street parking supply is 20 ft. per space. It was disclosed at hearing that 18 ft. per space had been used. Further, parking in the turnaround was counted. After adjustments to conform to Engineering Department standards, a new on-street count was made showing 34 spaces instead of 48. Combining the 81 on-site spaces with the 34 on-street spaces would result in a ratio of 1.53 spaces per unit. The on-street spaces would be fully available to the general public, however, those on 10th Place N.E. are likely to be used only by residents and guests of the proposed projects.

30. Appellants made no showing, except for Mr. Rhinehart's statements, as to utilization of on-street parking in the area.

31. Mr. Odom testified that a parking utilization survey would normally be required for a 77 unit development. However,

he found that "there will be sufficient on-street parking space available to accommodate parking demand." Ex. 19.

32. The proposed width of the travel and parking lanes of 10th Place N.E., 25 ft., will leave one lane for travel if cars are parked on both sides of the street. There are to be three driveways on the west side which will provide pullout opportunities when cars meet.

33. The Engineering Department is conducting a traffic study of the Northgate area which area includes the area around the subject sites. Ed Somers was not aware of the study.

34. The subject sites are recognized by DCLU to have drainage and soils problems. Therefore, soils and drainage reports were required. Both were studied by DCLU and the Engineering Department. The sloping Roosevelt site presents the problems of slope and fill. The relatively level 10th Place site has areas of peat and groundwater to contend with. Groundwater was encountered in one test pit at 3 ft. but the soils consultant acknowledged that groundwater levels change significantly due to factors such as rainfall.

35. The site now drains directly into the drainage ditch.

36. The drainage control ordinance will require a drainage mechanism to assure that runoff is controlled so that it does not leave the property faster than at present and that it would not drain onto other properties. The Director believes that compliance with the drainage ordinance will mitigate impacts and there will be no increase in drainage onto other properties.

37. The drainage plan has not been fully formulated, however, it would involve on-site detention and controlled release. Storm water runoff would be collected in catch basins leading to underground storage with controlled release to the drainage ditch from 10th Place site. From the Roosevelt site the release would be to a storm drain in N.E. 120th and then to the culvert under N.E. 120th.

38. A drainage study by applicant's consultants, Summit Technology, concluded that there would be "no possibility of flooding adjacent to the ditch during a 25-year storm." Exhibit 7. The study looked at the 24 inch culvert under N.E. 120th and concluded that the water from a 25 year storm would go through the ditch without going over the bank and flooding N.E. 120th. Water has been observed over the culvert, however the bank is higher than the culvert and the road higher than the bank.

39. Neighboring property owners have had to clear sediment and debris from the ditch annually or semiannually.

40. The new rock to be added by the applicant is expected to help prevent erosion and sedimentation.

41. The catch basins on site would have sumps which would catch sediment and not release it into the ditch thereby helping to reduce the sedimentation in the ditch.

42. Surrounding properties have varying degrees of drainage and soils problems. Gary Loh-Lee Low's property, immediately east of the 10th Place site, had 5 ft. of standing water in the week of the hearing and has suffered substantial damage to his house in the form of the foundation sinking and walls separating from the foundation. Others have periodic flooding of basements, garages, driveways. Some just have standing water in the backyard and others have no problems. The 5-home condominium has a 7,000 gallon cistern with controlled release which overflowed recently when a pine cone blocked the outflow.

43. There was no competent evidence adduced to show that the proposals would have any adverse effect on the existing drainage condition in the area.

44. Neighbors expressed concern about and objections to the

nature and size of the proposed development in an area which is chiefly single family. These were not issues cited in the appeal letters so are not to be considered. The analyses and decisions of the Director considered bulk and scale. She found that the plans had been revised since the original application to reduce the height of the buildings along the south and east lot lines facing single family development and that the resulting height provides a sensitive increase. Landscaping, setbacks and fences are also planned to help with the transition.

45. No specific allegation of error was made regarding the Director's decision to impose mitigating conditions.

Conclusions

1. The Hearing Examiner has jurisdiction over this subject matter and these parties pursuant to Section 23.76.022.

2. Appellants cite as error DCLU's decision to conduct separate environmental reviews and to issue separate environmental documents for the proposals, relying on Section 25.05.060(C)(2) which provides

Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection E.) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

a. Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or

b. Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

3. While it appears the proposal was initially intended to be a single course of action, the record does not show that one cannot proceed unless the other is implemented at the same time or that each is a part which depends on the total proposal as its justification or for its implementation. Therefore, the section does not require evaluation in one environmental document. Further, the evaluation done by DCLU was of the total proposal, or the two proposals cumulatively.

4. The record does show that the Engineering Department was misled as to the scope of the project by the separate notices. However, the post-decision evaluation done by the Engineering Department of the two proposals did not uncover any significant impacts so the result would not have been different.

5. Appellants have not shown that the Director's decision would or should have been different had the traffic data been provided in a more timely manner. They do object to the lack of opportunity to comment on the data. The threshold determination process provides for general public comment during the comment period but does not assure opportunity to comment on all data and studies submitted. Further, no request was made at hearing for additional time to study and comment upon Mr. Odom's report.

6. If the Director determines there will be no probable significant adverse environmental impacts as a result of a proposal, she is to issue a DNS. Section 25.05.340. Here, that was her determination. That decision is to be given substantial weight by the Hearing Examiner on appeal. Section 23.76.022. The burden is then on appellants to show that decision to be clearly erroneous. Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

7. Appellants contend that a more careful analysis of traffic impacts, existing parking utilization and supply, and drainage problems would or could disclose significant impacts. Appellants' burden requires a showing that there are probable significant impacts that would have been identified had a more careful analysis been done. This showing was not made. Instead, the evidence showed that the traffic volume was too low to cause significant impacts. There was no evidence that use of the street for parking by a possible 32 cars would constitute a significant impact because of existing utilization. Appellants showed significant drainage problems on surrounding properties but there was no competent evidence showing that the proposals would contribute to these problems. All competent evidence was to the effect that the situation would be, at worst, unchanged.

8. No relief in the form of additional conditions was requested. Again, appellants would have had to show that it was clearly erroneous for the Director to fail to impose additional conditions. No unmitigated impact was shown for which the Director has substantive authority to impose mitigating measures as conditions. Therefore, that decision should be affirmed.

Decision

The decisions of the Director are Affirmed.

Entered this 6th day of October.

M. Margaret Klockars
M. Margaret Klockars
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW

Had a claim of error of failure to impose mitigating measures as conditions been pursued at hearing, according to Seattle Municipal Code Section 25.05.680(C), a party to the hearing before the Hearing Examiner could 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 would have to 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 for 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.