

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

In the Matter of the Appeal of

SILVERADO PROPERTIES

FILE NO. MUP-88-023(W)
APPLICATION NO. 8708514

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

Introduction

Appellant challenges the imposition of a condition of approval pursuant to SEPA on its master use permit for a mixed use building at 4462 Fremont Avenue North.

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 September 14, 1988. The record was left open for intervenor to submit records pertaining to improvements on North 46th Street and closed September 28, 1988.

Parties to the proceedings were: appellant, represented by its attorney, Michael Utt; the Director, Department of Construction and Land Use, represented by Faith Lumsden, land use specialist; and intervenor/appellant, Fremont Neighborhood Council represented by Toby Thaler.

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. Silverado Properties applied for a master use permit to construct a mixed use building at 4462 Fremont Avenue North. The Director, Department of Construction and Land Use, issued a determination of nonsignificance (DNS) and imposed conditions to mitigate various environmental impacts. The applicant filed an appeal of conditions which required dedication and improvement of the street.

2. The proposal is for a building with 30 dwelling units, 3,700 sq. ft. of commercial space and 40 parking spaces. All vehicular access is to be from North 45th Street.

3. An environmental checklist was prepared for the proposal. The checklist projects generation of 377 vehicular trip ends per day for the 30 dwelling units, 2,454 sq. ft. of retail use and 1,262 sq. ft. of restaurant use.

4. No traffic study of the impacts of the proposed project on the surrounding area was prepared.

5. The analysis and decision of the Director (Exhibit 9) includes in the list of long term impacts from the proposal "increased traffic" and "increased parking demand." It states that the proposal will add traffic to Fremont and North 45th and defines as a problem high accident rates to which the substandard width of the streets contribute.

6. The Fremont Avenue North right-of-way is 60 ft. wide.

7. The right-of-way of North 45th Street between Fremont Avenue North and Linden Avenue North is 30 ft. wide. The pavement width is 18 ft. Sidewalks are 4 ft. wide and the planting strips, 2 ft. wide. North 45th, west of Fremont Avenue North, appears to be 60 ft. wide. Because of its greater width it is offset with North 45th on the east side of Fremont. North 45th Street ends at North Phinney Way which serves as an on-ramp connecting North 46th to Aurora Avenue North.

8. North 46th Street was established as the main arterial after a number of years of negotiations between the community and the Engineering Department. The purpose of the widening of the street and other improvements, as understood by the community groups involved, was to channel traffic heading for Aurora onto North 46th and curtail traffic using neighborhood streets as shortcuts to Aurora. It was understood by intervenor's witnesses that this improvement would remove any reason to have other streets widened and, in fact, might result in a program of local access for the other neighborhood streets.

9. Two conditions of approval imposed by the Director address street dedication and improvement:

1. The owner(s) and/or responsible party(s) shall dedicate 12 feet of right-of-way along the property's N. 45th Street frontage and shall submit concept street improvement plans approved by the Seattle Engineering Department or the Board of Public Works as appropriate.

2. The owner(s) and/or appropriate party(s) shall submit for approval by the Land Use Specialist a redesign of the project allowing for the right of way dedication and street improvements. The redesign shall incorporate as much of the current design as possible, including a mix of commercial and residential uses, gables, setbacks, and open space. The redesign shall include a landscaping plan meeting Code requirements and SEPA guidelines.

10. The standard street for this zone, according to the Seattle Street Design Manual, is improved with 32 ft. of pavement, curbs, sidewalks 5 ft. wide and, planting strips.

11. The Engineering Department granted an exemption to appellant from its original requirement of a 20 ft. dedication. The new requirement is for a 12 ft. dedication and a 25 ft. pavement width.

12. The applicant offered to the Department of Construction and Land Use to move the building back 12 ft. from North 45th to preserve the option of widening the street at a later time. A second alternative suggested by the applicant would be to shift access for residents of the project to Fremont Avenue North leaving only the commercial access on North 45th.

13. The paved portion of Linden Avenue North is 25 ft. wide. Parking is permitted on both sides leaving one lane for travel. None of the several recent multifamily projects on Linden have been required to provide more width or street improvements. One at 4115 Linden was required to utilize the 16 ft. wide alley for access to parking.

14. A parking study submitted to the Department of Construction and Land Use by the applicant showed average utilization of on-street parking in the area, which included streets on both sides of Fremont, to be 53 percent. A study done for a project on Linden which surveyed streets only the east side of Fremont showed a higher utilization of 71 percent and with projected spillover from other projects, 79-86 percent.

15. The Director's decision projects a peak demand of the project for 45 parking spaces which would occur in the late

evening for the residential portion of the project. The code requires 35 spaces for this use. The decision assumes that the demand generated by the commercial uses will be equal to the code requirement of three or four spaces. The spillover parking in the late evening may amount to five cars. If a restaurant use is established with evening hours there could be a much greater spillover.

16. If motorists find the parking in the project full, they may use North 45th as they circle through the neighborhood looking for parking.

17. For circulation between Fremont Avenue North and the access driveway to the project there needs to be two lanes for traffic (9 ft. wide is acceptable) and good sight distance. The only way to achieve the two lanes without widening the street would be to eliminate the parking along the building. Between two and four parking spaces would be lost if that parking were to be eliminated.

18. To enter the proposed project by the driveway as currently designed would require a vehicle to swing into the northern half of the street to make the 90 degree turn. A wider street would assure that there is sufficient turning radius to turn into the subject site without swinging over into the oncoming lane. Setting the building back an additional 12 ft. from the street would also allow for a redesign to provide an adequate turning radius without entering the other lane.

19. The Engineering Department project analyst, Neil Watts, who lives a few blocks from the subject site, observed that North 45th is used as a residential access street to the apartments on Linden Avenue North, as a "cut-through" to North 46th and for residents along North 45th to get to Fremont.

20. Because of its width, North 45th is a very low speed roadway.

21. The average daily vehicle traffic on North 45th Street is estimated by Chris Brown, traffic engineer retained by appellant, to be less than 300 vehicles with a peak hour at less than 30 vehicles. He based the average daily traffic estimate on his 30-45 minute observation during which he saw no cars use the street.

22. In the past six years, there have been only three reported accidents at the intersection of North 45th and Fremont involving cars on the east leg of North 45th. One accident in those six years was reported on North 45th, other than the intersection, and involved a parked car. The incidence of accidents is low. At the intersection of Linden Avenue North and North 45th, at the other end of the block and away from the required street widening, there have been 15 recorded accidents in six years.

23. Chris Brown opined that widening one part of one block does nothing to alleviate hazards which contribute to accidents. Neil Watts testified that widening would work to reduce the likelihood of accidents.

24. Chris Brown showed that good street design requires that North 45th be as narrow as possible as one means of inhibiting its use for access to Aurora.

25. The community representatives, business and residential, testifying at the hearing voiced concern that the widening of North 45th will invite motorists to turn onto that street increasing the traffic on the street.

26. Both traffic experts indicated that only the stranger to the area would be misled by the new width so any increase should be minor.

27. The discontinuous curb face which will be created when

one part of the street is widened and the other remains narrow would make parking awkward at the location of the transition.

28. A multifamily project at 717 North 45th, adjacent to the subject site, constructed last year was not required to widen the street. The existing building on that site is 8.5 ft. from the north property line so it would not be possible to add 12 ft. to the width of the whole block until that structure is gone. The land use specialist testified that the decision on the application for 717 North 45th Street should have required street dedication and improvement.

29. The setbacks of the structures on the south side of North 45th going east from the subject site are 8.5 ft., 3.5 ft. and 16 ft. 8 in. and east of Linden Street, 9 ft. 3 in., 9 ft. 11 in. and 7 ft. 6 in.

30. Jim Potter, an owner of Silverado and active developer, testified that the redevelopment of the lots to the east is not likely to occur in the foreseeable future because in each case the lots are very small or the structures on the lots are in good condition.

31. Mr. Potter estimates that the cost of street improvements required by the condition would be \$25,000 to \$40,000 and the value of the land to be dedicated is \$25,000.

32. The decision states that even if the driveway is moved to Fremont, traffic and parking will impact North 45th so widening will be required under SEPA.

33. The Engineering Department traffic witness testified that if the driveway access to all parking is moved to Fremont Avenue there would not be enough additional traffic on North 45th to justify requiring its widening as mitigation pursuant to SEPA.

34. If on-street parking is removed to avoid widening of the street, appellant is willing to increase the on-site parking to offset that loss. That parking would not be available to those who now use it, however.

Conclusions

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

2. The Director has authority to impose conditions requiring measures to mitigate impacts which impacts have been specifically identified in the environmental documents, which measures are based on policies designated as bases for substantive authority in Section 25.05.902, which measures are reasonable and capable of being accomplished, when responsibility for implementation of the measure is proportional to the impact attributable to the proposal and where other code requirements would not mitigate the impact. Section 25.05.660.

3. The adverse impacts identified in the documents are from increased traffic on North 45th and increased parking demand. With the potential for more than doubling traffic on North 45th, two lanes are viewed by the Department as necessary to avoid increasing the risk of accidents. This view was not shown to be erroneous. If parking is removed to create the second lane, the loss of those spaces would cause the parking situation to deteriorate. The addition of on-site spaces to replace those eliminated to make two lanes would only partially offset that loss since they would be available only to residents and patrons of the project.

4. Appellant contends that without a traffic study on which to base identification of a traffic impact, the Director does not have an adequate basis on which to impose the mitigating conditions. The record shows that the Director relied upon the advice and expertise of the Engineering Department staff. Though appellant's expert disagreed with the Engineering Department as

to the effect on hazards of widening one part of the street, it is not clear error for the Director to rely on her own expert's advice. The SEPA policy on traffic and parking, Section 25.05.902D, authorizes the Director to require deeding of street right-of-way and other improvements to assure reasonable access and flow.

5. Appellant argues that the conditions requiring dedication and improvement of the street are unreasonable given the alternatives and the cost involved. The test of "reasonableness" has been described by the City Council as "whether the required mitigation bears a 'reasonable' relationship to or is 'reasonably' in proportion with the identified adverse impact." In re Queen Anne Community Council, et al., C.F. 293623 (1985). Appellant has not shown that requiring that the markedly substandard street be widened does not bear a reasonable relationship to impacts of the project given the probable doubling of the traffic volume on the street at this location.

6. Appellant refers to the Director's rejection of the alternative of providing access via Fremont Avenue. There is nothing in the record that shows this was formally offered by appellant. The decision recognizes that change in design is an option that the appellant had but states that the impacts on the street would still support its widening. The record does not support that conclusion. The conditions requiring dedication and improvement would be unreasonable, i.e., not in proportion to the identified impact, if the only impacts on the street were from cars which could not be accommodated on-site circulating through the neighborhood.

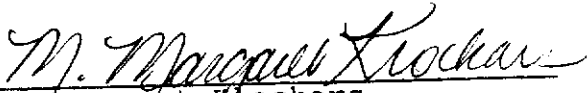
7. The fourth requirement or limitation under Section 25.05.660, that responsibility for implementation of the measure be imposed only to the extent attributable to the adverse impacts of the proposal, is another form of proportionality test. Again, if the effect of project itself is to more than double the traffic, the requirement to bring the street closer to the standard for the length of the project has not been shown to be out of proportion to the impact.

8. The final consideration is whether other requirements will mitigate a significant impact. Section 25.05.660A.5. This does not apply since the impact has not been determined to be significant. It is recognized by all parties that the Engineering Department's requirement for street improvements is separate and apart from the conditions imposed as mitigating measures pursuant to SEPA.

Decision

For the the project as proposed, the decision of the Director, Department of Construction and Land Use, is affirmed.

Entered this 11th day of October, 1988.


M. Margaret Klockars
Deputy 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 decision is filed with the SEPA Public Information Center the same day that the decision is signed by the Examiner. The SEPA Public Information Center telephone number is 684-8322. 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 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.