

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

In the Matter of the Appeals of

STEVE DURRANT

FILE NO. MUP-88-054(W)

and

STEVE BOLLIGER

FILE NO. MUP-88-056(W)

APPLICATION NO. 8708495

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

Introduction

Appellant Durrant is a neighborhood resident of proposal site 4403 Greenwood Avenue North. Appellant Bolliger is the developer-applicant.

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 28, 1988.

Parties to the proceedings were both appellants pro se; and the DCLU Director by Faith Lumsden, associate 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 subject property consists of a through lot addressed as 4403 Greenwood Avenue North. Applicant proposes to demolish the one-story single family structure located on-site and develop the 6000 sq. ft. area parcel with a nine-unit apartment building. Applicant appeals the conditions imposed by DCLU on the project on the following asserted bases:

1. incomplete disclosures of background information related to the proposal.
2. unwarranted restriction on potential future access from Palatine Avenue North.
3. adequate mitigation of bulk and scale impacts by compliance with interim (down-zoned) L-2 standards.
4. the SEPA decision's failure to recognize that the project application "includes design features that provide additional mitigating measures beyond compliance with L2 standards."

2. Project neighbors through Steve Durrant also appealed the DCLU decision. Appellant requested that an environmental impact statement be prepared, that the project be denied or that the project be more substantially mitigated.

3. The project site is located within the western edge of a large Lowrise 3 zone that extends several blocks east, north and south. The site has 60 ft. of frontage along east-abutting Greenwood Avenue North and 60 ft. of frontage along west-abutting Palatine Avenue North. This section of improved Greenwood Avenue is 25 ft. wide and allows parking on the west side.

4. The L-3 zoned development along Greenwood and east includes a mix of multifamily and some single family structures. North of the site is a new four-story, two building complex addressed as 4421 Greenwood Avenue North that has 29 units and 32 parking spaces. An older four-story apartment building is southeast of the site. This L-3 vicinity is the site for other new and proposed apartment buildings.

5. Palatine Avenue North, also paved to a 25 ft. width, is substantially below the crest of the subject site where the on-site structure proposed for demolition is located.

6. West and below the subject site are small, primarily single family homes with peaked roofs that front to Palatine. These c. 1900 structures are located within the Single Family 5000 (SF 5000) zone that extends beyond west parallel 1st, 2nd and Baker Avenue N.W.

7. Palatine and Greenwood Avenues are residential access streets. East of Greenwood is a section of North 43rd that is a collector arterial.

8. While Greenwood Avenue is improved with sidewalks, planting strips and curbs along both sides, the only improvement along Palatine is east side curbing. Parking is prohibited on the east side of Palatine.

9. Generally, area property slopes down to the south and west. Properties across Greenwood from the site include one and two-story single family homes that are consequently set at a slightly higher elevation than the subject site.

10. From Palatine east to Greenwood is a 32-36 ft. elevation change. From the Palatine curb to the project site's western lot line is an elevation change of 2-4 ft.

11. The steep, westerly-declining strip of land that includes the project site generally extends south of North 45th Street to North 42nd Street and is sandwiched between Palatine and Greenwood Avenues North. The structures built in this area are principally located on top of the ridge or hill, easterly, and do not extend (west) over the hill.

12. The single family homes along the west side of Palatine generally have an 18 ft. front setback. The homes with frontage along the east side of Palatine are primarily set forward, to Greenwood. However, the Bergmann's south adjacent home, at 4320 Palatine North, is on the east side of Palatine and has a 4 ft. setback to the Palatine lot line.

13. The Bergmann residence is accessed by a driveway and easement that partially transverse the southwest corner of the subject lot. The Bergmanns have planted and tended firs, birches and many other bushes and plantings in their area, including some in the Palatine right-of-way.

14. An existing southwesterly rockery stands between the Bergmann structure and the subject site. (There is also a rockery along the subject site's northeast and southeast property lines.) Appellant Durrant fears that the excavation for the proposed project could result in lateral pressure and damage to the rockery and to the Bergmann property. DCLU agrees that the rockery will need some added care: "Shoring may be required to protect existing rockeries on the north and south property lines..." Analysis and Decision, p.3. There is no evidence of record to confirm appellant Durrant's apprehension, however, that the actual construction will harm the rockery or the Bergmann

property.

15. Inclusive of the Palatine right-of-way and the single family setback, there is approximately 104 ft. 7 in. between the western wall of the proposed apartment building and the eastern (front) wall of the single family structure that faces the subject site from the west side of Palatine.

16. Applicant's specific proposal is to build a nine-unit apartment building with basement level parking for ten vehicles on-site. The proposal accords with the interim L-2 development standards under which this project is reviewed. The new building would primarily be sited atop the hill, toward Greenwood. Vehicle access would be from Greenwood to the basement level garage. Applicant proposes that a portion of the basement, floor 1 and floor 2 extend over the west hillside toward Palatine. The top floor does not extend beyond the crest of the hill.

17. The height of the structure on the Greenwood side would be 27-30 ft. The stair penthouse, "for fire department roof access," would extend to approximately 35 ft.

18. From the structure's west side, the structure will appear to be a four-story structure, inclusive of the basement (first) floor parking level. The structure would be positioned 18-28 ft. above Palatine Avenue and would be somewhat stepped back from the west slope. The setback from the west property line approximates 26 ft. 7 in.

19. The proposal calls for the eastern portion of the basement level to be below grade.

20. The proposed building would be noticeably larger than adjacent structures.

21. The proposal's landscape plan includes some retention, removal and supplementation of the heavy, existing Palatine-fronting vegetation. Some ivy-type greenery is being considered to obscure the first floor west wall. Applicant proposes three street trees for the existing Greenwood Avenue planting strip as well as ground cover and shrubs. The landscaping plan also calls for planting of new trees and shrubs in the west 25 ft. of the lot and in the unimproved 17 ft. right-of-way. Appellant Durrant challenges the landscape plan as inadequate, especially as it relates to screening the west facade of the structure. Durrant's witness did not evaluate the soils condition prior to her conclusion that more appropriate trees and vegetation were needed for the site.

22. The project's 10 parking spaces meet the Land Use Code requirement. Assuming the 1.5 parking spaces per unit are required (DCLU and Seattle Engineering Department standard), the apartment would produce an overflow of four spaces i.e. (nine units x 1.5 spaces = 14 spaces, less 10 provided on site).

23. Greenwood Avenue parking "appears to be at or over capacity, with a good deal of illegal parking taking place." DCLU Analysis, p.2. Parking shortages east of Greenwood are also severe. Appellant Durrant also testified that Palatine parking, a lot of which is illegal, was near capacity.

24. DCLU speculates and the Hearing Examiner finds that some overflow parking may occur to the west in response to the parking shortage along Greenwood Avenue and to the east. However, evening parking utilization along 1st N.W., directly west parallel to Palatine, has been in the 50-60 percent range.

25. Appellant submitted no parking study. Specifically, there is no verification of any parking shortage in the west area, particularly west of Palatine Avenue North. A 1986 DCLU study which included the area between North 42nd and North 45th on Greenwood, Palatine, the west side of Phinney and the east side of 1st N.W. revealed weeknight, post-10:00 p.m. parking utilization rates of 66, 69 and 67 percent.

26. The Hearing Examiner finds that the vicinity parking scenario can accommodate the anticipated overflow of four vehicles with minor difficulty.

27. Based on uncontroverted Institute of Transportation Engineers (ITE) figures, a nine-unit apartment is expected to generate some 55 trips per day, i.e. 6.1 vehicle trips per unit per day. The trips will be distributed throughout the day with 10-12 percent occurring during a.m. and p.m. peak hours. The Hearing Examiner finds that the impact to the vicinity street system capacity will be minor.

28. It is expected that project traffic will generally come off North 46th or North 43rd Streets. There is no evidence of record which indicates anticipated trip or parking distribution, particularly as it relates to Palatine.

29. The Hearing Examiner finds in accord with the undisputed report of Geotech Consultants pertaining to the site, Exhibit 21:

...The subsurface conditions were explored by four hand-dug test pits...Because of the existing structure and rockeries, access to the site with equipment was not possible...- Glacial till soils were found below a thin layer of topsoil in Test Pit 1...in Test Pits 2 and 3, located in the backyard area of the existing residence, approximately five feet of medium dense till soil was found...Test Pit 4 on the slope encountered native soils consisting of 1.5 feet of weathered glacial till overlying dense glacial till...

30. Geotech recommended that the building foundations "extend through any fill and below the reddish brown topsoil layer."

31. Geotech found no groundwater in the admittedly shallow test pits.

32. One of the lowest elevations of the site is 220 ft. The elevation at the top of ridge is 252 ft. Test Pit 4 was at the 238 ft. elevation, downslope from the western edge of the proposed building.

33. Glacial till is a dense consolidated mixture of silt, sand and gravel that is considered as one of the most stable for construction.

34. Although there is some evidence of cracking in the Greenwood Avenue surface, the Hearing Examiner finds from the evidence presented that the subject property and slope are stable.

35. DCLU noted that anticipated short-term impacts from the proposal included "some potential for erosion during excavation and general site work." Anticipated long-term impacts include increased building bulk and scale, loss of mature vegetation, increased residential density, and increased traffic and parking demand. The long-term impacts will be of minor but adverse consequence.

36. Appellant Durrant offered that if the project was to be approved several additional mitigating conditions should be imposed, including: reduce building width on the Greenwood side by 10 ft. to accommodate 5 ft. plantings per side; restrict the building to the crest (allow no overhang of the bluff); eliminate the third floor and penthouse or create a gable roof; pull the second floor back 12 ft.; reduce the number of units from nine to six and offer parking for eight; prohibit construction damage, including any damage to the Bergmann's landscape improvements; and locate utilities outside the front setback. Regarding the last item, applicant is attempting to find an alternative

location for the dumpster that is presently sited for the northeast (Greenwood) section of the subject property. Durrant also challenged the ultimate modification of views that would result from project completion.

37. For ease of reference, DCLU's conditions on the project are stated below verbatim:

CONDITIONS

Prior to Master Use Permit Issuance

1. The owner(s) and/or responsible party(s) shall submit revised plans showing the second and third floors stepped back 12' from the currently proposed western walls. The pitched roof design shall be retained. A vegetative screen to hide the basement parking shall be retained or planted. (See Exhibit 23)

During Construction

2. In addition to the Noise Ordinance requirements, to reduce the noise impact of construction on nearby properties, the owner(s) and/or responsible party(s) shall limit construction to the hours between 7:30 a.m. and 6:00 p.m. on non-holiday weekdays.

Prior to Occupancy

3. To reduce the impact of added traffic in the single family zone, the owner(s) and/or responsible party(s) shall ensure that any doors from the parking garage to the Palatine side of the property shall be installed as exit only doors, with no admittance from the outside.
4. To reduce the impact of the building's bulk and scale, the owner(s) and/or responsible party(s) shall provide landscaping according to the plan approved by the Land Use Specialist. The owner(s) and/or responsible party(s) shall submit to the Construction Inspector an affidavit from a landscape professional that the landscaping is installed per plan.
5. The owner(s) and/or responsible party(s) shall direct and shield illumination of parking areas and building exteriors so that all lighting is contained on the property, and nearby properties or street traffic are not affected by light or glare.
6. To prevent vehicle lights from affecting adjacent properties, the owner(s) and/or responsible party(s) shall install light obscuring screening or fencing around all openings into the basement parking level.

Permanent for the Life of the Project

7. The owner(s) and/or responsible party(s) shall maintain all landscaping per approved plans.
8. The owner(s) and/or responsible party(s) shall direct illumination of parking areas or building exteriors so that all lighting

is contained on the property, and nearby properties or street traffic are not affected by light or glare. Required screening or fencing shall be maintained.

38. Regarding DCLU's Condition 3, above, DCLU indicated concerns with the pedestrian and vehicular traffic impacts to Palatine. In addition, DCLU projected that the vegetative screening could be preserved by prohibiting westerly stairs or access.

Conclusions

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

2. The Hearing Examiner shall, in these appeals, give the DCLU environmental determination "substantial weight," Seattle Municipal Code Section 23.76.022(C)(7), and it is the appellants' burden to show that the determination is "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. The first issue for analysis is whether the project, as conditioned by DCLU, requires preparation of an environmental impact statement (EIS). Again, it is appellant Durrant's burden to show that the failure to require an EIS was clearly erroneous. To meet that burden this appellant must show that the project will cause environmental impacts that are adverse, significant and probable. Seattle Municipal Code Section 25.05.360(A). That is, although a project may cause negative environmental impacts, those adverse impacts must be shown to be probable and significant. Seattle Municipal Code Section 25.05.782 defines "probable" as "likely or reasonably likely to occur." By definition, remote or speculative consequences are excluded. Also, a "significant" impact is an impact that has "a reasonable likelihood of more than a moderate adverse impact." Seattle Municipal Code Section 25.05.794.

4. A review of this record shows that no EIS is required. Concerning the "earth" environmental element, there is some short term potential for excavation and general site work erosion. This is not a significant impact. The suggestion to the record is that the site excavation will destabilize the slope and or adjacent rockery and property. The evidence is that the proposed construction will primarily and fundamentally be atop the slope. Test pit borings show glacial till underlay. Glacial till is considered a stable surface for construction. No water was found in the test pit bored areas. Therefore, notwithstanding a crack in Greenwood Avenue and generalized concerns with lateral pressure and soils stability, the appellant failed to show that the anticipated adverse impact was any more than "remote or speculative."

5. Applicant proposes a landscaping plan that will call for specific tree and other vegetative plantings. While the species may be at variance with those extant or with those desired by neighbors, no significant adverse impact is expected from this development component.

6. Considering the other issues in brief, the density would increase, but housing opportunities within the city would also be increased. The street system, flow or parking, will be insignificantly affected by the addition of the 55 trips over the course of a day and by the anticipated four car parking spillover. The use and bulk of the proposed building, in the context of this built, urban environment that includes large and medium-sized multifamily structures, reflect no more than a moderate impact on the quality of the environment.

7. Therefore, review of the environmental elements, separately and combined, fail to show that an EIS is required.

8. Environmental impacts that are not significant may nevertheless be used as bases for mitigation pursuant to Chapter

25.05, Seattle Municipal Code. The adverse impacts must be specific and clearly identified. The mitigation of those impacts must be based on specific policies or regulations formally designated for consideration by Seattle Municipal Code Section 25.05.902. Seattle Municipal Code Section 25.05.660(A)(2). The mitigation of the impacts must also be "reasonable" in terms of the adverse impact sought to be addressed. The City Council has addressed the application of "reasonable" to SEPA procedure.

The test of reasonableness should be limited to whether the required mitigation bears a "reasonable" relationship to or is "reasonably" in proportion with the identified adverse impact...

In Re the Appeals of the Queen Anne Community Council et al., (Victoria Apartments), C.F. No. 293623 (1985).

9. Among other items, applicant specifically challenged DCLU's third condition which requires that "any doors from the parking garage to the Palatine side of the property...be installed as exit only doors..." DCLU's posture is that the condition will serve "to reduce the impact of added traffic in the single family zone."

10. The condition is not reasonable and should be stricken. The Land Use Code, Single Family Residential Areas Policies and Multifamily Land Use Policies are included within the designations of Seattle Municipal Code Section 25.05.902. They provide ample support for the general theory that single family areas, particularly edges, should be protected from incompatible uses and impacts.

11. However, Seattle Municipal Code Section 25.05.660(A)(2) requires that mitigation measures be "related to specific adverse environmental impacts clearly identified in an environmental document..." Further, Seattle Municipal Code Section 20.05.660(A)(4) is specific that the

(r)esponsibility for implementing mitigating measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal.

12. A strikingly similar issue was presented in MUP-88-046, 47(W) concerning a Greenwood-Palatine through lot addressed as 4217 Greenwood Avenue North. The "exit-only" condition was stricken as a result of an inadequate showing of an adverse (traffic-related) impact. The decision further noted, inter alia, the absence of a city policy which prohibits the spillover of multifamily parking onto single family streets. Citing In Re Palatine Single Family Association, C.F. 295347, p.3.

13. In the present case, this Hearing Examiner is compelled to reach the same conclusion. Vehicular access to the project garage will be from Greenwood as opposed to Palatine. Some 55 trips per day are anticipated inclusive of morning and afternoon travel peaks. No evidence of record indicates the degree of use by these 55 vehicular trips of Palatine. In fact, the record shows that most traffic will use North 46th and North 46th Streets. The parking spillover is expected to be four vehicles. Although the Greenwood and east parking availability is constricted, the evidence shows that there is parking available along Palatine and west. Evening parking utilization along Palatine and west has ranged from 60-67 percent. Added to this is the extreme topographical separation between Palatine and the rear of the proposed building which does not invite pedestrian access to the site from west. The laudable premise of Condition 3 is without a legal SEPA basis. "Reasonable access and flow" will not be impacted by the proposal.

14. Further, related to parking, Resolution 27708 amended Policy 8 of the Multifamily Land Use Policies. The Resolution

states that required parking ratios

shall be established in the Land Use Code. No additional mitigation of parking impacts shall be required under SEPA review or any other administrative procedure...

15. The density from nine units is not an impact in and of itself. The fact that an addition to the population is anticipated provides no basis for conditioning the proposal because of pedestrian traffic or because of auto-related impacts, including parking.

16. Concerning views, there is no SEPA basis to condition the project to protect the private views.

It was not the Council's intent that the multifamily policy permitting consideration of private views for the purpose of mapping should override the prior decision of the Council to limit SEPA protection to certain public views...

In Re Oden, C.F. 293557 (1985). It is possible for the City official to require, pursuant to SEPA, height, bulk or other changes to preserve the views from public places "identified in Appendix B," e.g. Woodland Park, Gasworks Park, of mountains, skyline, water and greenery. The City official may also "assess the extent of obstruction of views of historic landmarks." Seattle Municipal Code Section 25.05.902(G). In the present case no protected views are in issue. Therefore, the Hearing Examiner is without SEPA authority to order redesign or reconfiguration of the project to respond to private view concerns.

17. Regarding landscaping, DCLU has required presentation and maintenance of approved plans "to reduce the impact of the building's bulk and scale." Given the extreme horizontal-vertical difference between Palatine single family homes and the proposal footprint, the following minor modification is needed to the DCLU decision. The DCLU-approved plan shall include a requirement of evergreen trees which at maturity will substantially screen level one of the proposed structure. The Plan shall also provide for interim vegetative screening of the west level one. The more particularized conditions requested by appellant Durrant, while of interest, were not shown to be within the ambit of reasonable, direct mitigation measures called for in Seattle Municipal Code Section 25.05.660(A).

18. The bulk and scale of the proposed L-3 zoned building are substantially buffered by a 25 ft. - wide street, its 60 ft. wide right-of-way, steep topography and intervening vegetation, inclusive of evergreen trees. As one proceeds westerly from the single family zone at Palatine, the height of the slope increases such that the visibility of the building mass will be attenuated by the slope and height differences. Although a single-family/-multifamily edge condition is presented, those topographical factors distinguish this case from those of 160 Lee Street, C.F. 294378, 29432, MUP-88-049-053, where there was minimal separation between the multifamily and single family zones. (25 ft. of Lee Street's 60 ft. right-of-way was paved.)

19. Because of the unusual property circumstances, it was not clear error not to require elimination of the third floor or substitute the roof design.

20. Nor was it clear error to require a stepped-back profile from the west property line. Although the project is technically within L-2 specifications; and although the site is diagonally separated from single family zoned, smaller properties downslope on Palatine, the proposed building mass will be a prominent feature of the hilltop and cliff. The landscape condition will mitigate the visual impact of the proposed building's first level. The DCLU imposed condition 1 will "reasonably" mitigate the height, bulk and scale impacts of the remaining floors. The


condition essentially requires that the second and third floors be stepped-back 12 ft. from the western walls currently proposed to extend beyond the westerly crest of the site. This will represent a more appropriate transition between the single and multi-family zoned areas. Cf. In re Oden, supra.

21. Regarding drainage issues, the project will be required to comply with the adopted city's Grading and Drainage ordinance. The SEPA policy on drainage was to control only "until a comprehensive drainage control ordinance is adopted..." Seattle Municipal Code Section 25.05.902(F)(2).

Decision

As modified herein, the DCLU decision is AFFIRMED.

Entered this 13th day of October, 1988.


LeRoy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 23.76.024, 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, 5th Floor Municipal Building, 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 23.76.024, 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 City Council appeal.

If no appeal is taken pursuant to the City Council, 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. 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. See Chapter 43.21C, RCW and Chapter 25.05, Seattle Municipal Code.

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.