

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

In the Matter of the Appeal of

ALBERTINE CLAIRE TOMPKINS

FILE NO. MUP-90-014(W)
APPLICATION NO. 8903460

from a decision of the Director
of Construction and Land Use
on a master use permit
at 1805 12th Avenue West

Introduction

This appeal came on for hearing before Hearing Examiner Pro Tempore Gordon F. Crandall on April 18 and 20, 1990. Appellant Albertine Claire Tompkins (Tompkins) was represented by Barbara Ohnick. Respondent James Parks or Parks Development Company (Parks) was represented by Ross Radley. The Department of Construction and Land Use (DCLU) was represented by Arthur Lee.

Preliminary

The appeal was filed on February 28, 1990. On March 27, 1990, the parties were required to submit in writing a list of witnesses, the topic or topics to be addressed by each witness, the estimated time of presentation of each witness, the qualifications and experience of any experts, and a list of proposed exhibits. All parties complied substantially with the prehearing order.

On April 10, 1990, Parks filed a motion to exclude Kevin Sullivan as a witness, and to strike two letters from the list of exhibits proposed by Tompkins. Parks also moved for a ruling that the accuracy of a survey of the property was not a proper inquiry in a SEPA appeal. The Hearing Examiner ruled that the accuracy of the survey was not an issue in a SEPA appeal, and that while the two letters would be excluded, Sullivan would not be excluded as a witness.

On April 13, 1990, DCLU moved to quash subpoenas served upon Nancy Fox, DCLU Land Use Division Director and Bob McElhose, a zoning plans examiner, and to strike some seven issues raised by Tompkins as not within the scope of a SEPA appeal. During the hearing the Hearing Examiner quashed the subpoena to Ms. Fox pursuant to a representation by Mr. Lee that Ms. Fox had no personal knowledge of the subject application or the decision. The Hearing Examiner declined to quash the subpoena to Mr. McElhose, and he was called to testify. The Hearing Examiner decided to rule on each issue sought to be excluded as it was raised, rather than prior to the hearing.

After due consideration of the testimonial and documentary evidence and the argument submitted by the parties, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal. Unless other indicated, all section numbers refer to the Seattle Municipal Code.

Findings of Fact

1. The site is Lots 2 and 3, Block 2, Helsing Addition to the City of Seattle, commonly described 1805 12th Avenue West. The site is 99 ft. deep and 73.22 ft. wide along the west side of 12th Avenue West, and contains about 7,248.78 sq. ft. in area. The site is improved with a one-story duplex building with one parking space. On-street parking is limited, as 12th Avenue West is narrow and has no shoulders. There is a sidewalk on the west side only.

2. Lot 1 to the south is undeveloped and it abuts on

undeveloped West Blaine Street. To the west is an undeveloped greenbelt area. To the north is Tompkin's duplex. Across 12th Avenue West to the east is a three-story duplex building.

3. The site and all surrounding properties are zoned Multiple Residence, Low Density 1 (L-1), except the property at the northeast corner of the intersection of 12th Avenue West and West Blaine Street which is zoned single family, residential 5000 (SF 5000).

4. The site is designated as environmentally sensitive due to its documented history of slide activity. The proposal is therefore not categorically exempt from the threshold determination and EIS requirements of SEPA. 25.05.908. The elevation of the site ranges from 224 ft. city datum in the southeast corner to 190 ft. in the northwest corner, a net difference of 34 ft.

5. Parks proposes to construct a three-unit townhouse structure. The building will be from two to three stories in height with hip roofs, and will have a four-car open garage. Most of the site will be occupied by building and parking areas. What open space will remain will be landscaped.

6. Parks also proposes to construct a duplex building on Lot 1 adjoining the site. The duplex is being reviewed as a separate project, although the soils analysis for both projects was done by the same geotechnical engineer at the same time, and the cumulative effect of both projects together was considered.

7. Parks submitted a survey of the site which shows, among other things, that the Tompkins building is located just north of the site. Tompkins submitted a survey by another surveyor which shows that a deck attached to Tompkins building encroaches onto Lot 3 some .9 in.

8. DCLU Director's Rule 2-87 establishes procedures and guidelines for securing permits for development in potential slide areas. DR 2-87 requires submission of a vicinity map, a topographic map, a geotechnical report, disclosures, declarations, covenants and waivers, detailed plans and specifications, including review by a geotechnical engineer, bonds, letters of credit and/or public liability insurance as described therein. To secure approval, the plans and specifications must be accompanied by a letter from the geotechnical engineer who prepared the report which states that in their judgment, the plans and specifications conform to the recommendations in the report and that the risk of damage to the proposed development or to adjacent properties from soil instability will be minimal. The letter must also state that the proposed development will not increase the potential for slide movement.

9. A geotechnical report for the proposed development was submitted on August 14, 1989, which contained the recommendations for the design of the proposed structure. The report concluded that the site could be developed in such a way that its stability could be increased, and that the risk of damage from future sliding would be minimal. By supplementary letter dated October 27, 1989, the engineer advised that its recommended methods of construction would also increase soil stability for the neighboring properties.

10. The essential recommendations for development of the site included construction of a trench subdrain across the site and lot 1 which would collect water. From the subdrain, water would be conveyed off-site by a tight line and emptied into the greenbelt area in West Blaine Street. They also recommended that the proposed structure bear on three or more continuous foundations, oriented perpendicular to the contours of the slope, each supported by at least six cast-in-place concrete piles at least 30 ft. in depth. The piles would be installed by auger-cast methods rather than by driving. Other recommendations for the construction are contained in the report.

11. A DNS with one condition was issued for the project on February 13, 1990. The condition limited construction to the hours of 7:30 a.m. to 6:00 p.m. on non-holiday weekdays.

Conclusions

1. This appeal of the Director's decision on a master use permit is authorized by 23.76.022. A DNS is a Type II decision appealable only to the Hearing Examiner. A decision to approve, condition or deny a project based upon SEPA policies is a Type III decision appealable to the Hearing Examiner and thereafter to the City Council. 23.76.006.

2. An appeal under the foregoing sections may be initiated by any person significantly affected by or interested in the permit. 23.76.022C2. Tompkins has standing to appeal the foregoing decision.

3. Appeals under 23.76.022 are considered de novo, and the Hearing Examiner may consider issues which relate to procedural compliance, compliance with substantive criteria, DNS's, adequacy of EIS's or failure to properly approve, condition, or deny a permit based upon disclosed adverse environmental impacts. 23.76.022C6.

4. The Director's decisions on SEPA issues are given substantial weight. 23.76.022C7.

Soils

5. The SEPA ordinance provides that any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impacts, subject to specified limitations. 25.25.660A. Mitigating must be based upon policies formally designated in 25.05.665, .670 and .675 for a basis for such authority.

The overview policy provides in part that where environmental concerns have been incorporated into city codes and regulations, it shall be presumed that such regulations are adequate to achieve sufficient mitigation, with certain exceptions. Where a project is located in an environmentally sensitive area, however, the presumption does not apply and the project may be conditioned or denied on the basis of adverse environmental impacts. 25.05.675D(2)(b).

6. Tompkins contends that the decision should be reversed because Parks failed to comply with the requirements of DR 2-87 in several respects. Specifically, appellant contends that the survey is inadequate for failing to show the approximate distance between structures, for failing to show lower floor and footing elevations of existing structures on and off the site, for showing incomplete information as to drainage facilities and for underground utilities and the like on and adjacent to the site. Tompkins also says that proposed contours of the project were not added to the survey by the architect or structural engineer.

DR 2-87 was adopted by the DCLU Director to implement the Seattle Building Code and the Seattle Drainage Code. It was not adopted to implement the SEPA Ordinance. The Hearing Examiner's jurisdiction on a SEPA appeal under 23.76.022 does not extend to compliance with other city codes, but is limited to the subjects stated in SMC 25.05.022. (See Conclusion 3). DCLU is required to make its threshold decision "based upon information reasonably sufficient to evaluate the environmental impacts of a proposal." 25.05.335. See also: 25.05.055B and 25.05.050C. Appellant has not sustained her burden of establishing that DCLU lacked sufficient information to make its threshold determination under SEPA.

7. The recommendations of the geotechnical engineer are adequate to deal with risks of soil subsidence to the project and to appellant's property to the north. The Hearing Examiner

concludes that with one exception, noted in Conclusion 15, no further mitigation than compliance with the recommendations in the geotechnical report should be required. The Director's failure to note a 1984 slide in connection with a development at 1910 12th Avenue West is not significant. The project site was treated as an area of serious slide potential in any event.

Ownership

8. Tompkins contends that DCLU has no jurisdiction to consider an application made by or on behalf of James Parks because the owner of the land is Parks Place Development, Inc., a corporation. The Land Use Code requires that applications for master use permits shall be made by the property owner, lessee, contract purchaser, or by a city agency or by an authorized agency thereof. Issues of Land Use Code compliance are beyond the scope of an appeal under 23.76.022. See Conclusion 3. The true identity of the owner of the property is of no moment in this context, as the identity of a land use permit applicant is immaterial to the decision. See: Clark v. Sunset Hills Memorial Park, Inc., 45 Wn 2d 180, 190, 273 P.2d 645 (1954).

Separate Project

9. Tompkins contends that the application for the site (Lots 2 and 3) was not considered as a project separate from the project on Lot 1, which she contends has misled the public. The Hearing Examiner concludes that the project has been evaluated as a separate project, even though some of the fact-finding and analysis has been of both projects together. The project on Lot 1 will be the subject of a separate environmental decision which will be subject to appeal. The analysis for each project must consider the cumulative effect of the two projects together under SMC 25.05.670, cumulative effects policy. Tompkins does not contend that she was herself misled.

Survey

10. Tompkins contends the decision should be reversed because it is based upon an incorrect survey. The errors claimed in the approved survey are small, and the environmental effects of the project are unaffected even if Tompkins' survey is correct. The Hearing Examiner's prehearing decision to exclude the survey errors as an issue is confirmed.

Birds

11. The evidence established at that birds other than the robins and starlings noted in the environmental checklist frequent the site. There was evidence that some birds, (eagles, hawks, herons, owls) actually nest on the site. The proposal will not have a significant adverse effect upon bird life in the vicinity, however, as there is ample habitat for such animal life, in the adjacent greenbelt which is three blocks wide and exists in a wild state.

Easement

12. The Director's failure to require an easement for the drainage facilities at this stage is beyond the scope of an environmental appeal. See Conclusion 3. In any event, the property over which the drainage facility will cross is owned by Parks, and an easement declaration may be required prior to permit approval.

View

13. Tompkins view will be affected by the project. SEPA policies protect only public views. Private views are protected only through height and bulk controls and other zoning regulations and the authority to mitigate adverse view effects through project specific review is expressly denied. 25.05.675P(1)(f).

Shadows

14. Similarly, the Land Use Code attempts to protect private property from undue shadow impacts through height, bulk and setback controls, but authority to mitigate adverse shading impacts through project specific review is expressly denied. 25.05.675Q(1)(d).

Demolition

15. Risks of damage to neighboring property from demolition of the existing duplex are governed by the Building Code, which provides:

Sec. 2903(a) general. Excavation or fills for buildings or structures shall be so constructed or protected that they do not endanger life or property.

* * *

Existing footings or foundations which may be affected by any excavation shall be underpinned adequately or otherwise protected against settlement and shall be protected against lateral movement.

Normally, this provision is adequate under the overview policy. In a sensitive area, additional conditions may be imposed to mitigate the risk of environmental consequences. The geotechnical report is silent as to demolition of the foundation of the existing structure. It does, however, make recommendations as to excavations, wet weather earthwork and fill materials. Removal of the foundation in this potential slide area should be monitored by the geotechnical engineer.

The Hearing Examiner concludes that the recommendations of the geotechnical engineer are sufficient, and that if demolition of the foundation is monitored, additional mitigation to protect the Tompkins house such as insurance or bonding is not indicated.

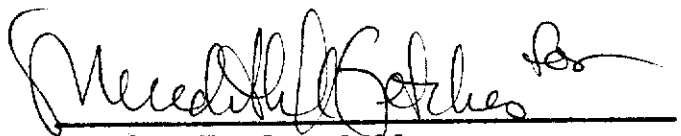
DNS

16. A declaration of nonsignificance (DNS) should be issued for a project when it is determined that the project will not have a significant effect upon the quality of the environment, using the procedures of 25.05.300 et Seq. The evidence submitted does not persuade the Hearing Examiner that the Director's DNS was in error.

Conclusion

The decision of the Director modified to require continuous monitoring by the geotechnical engineer when the foundation of the existing duplex is removed. In all other respects the Director's decision is AFFIRMED.

Entered this 7th day of May, 1990.


Gordon F. Crandall
Hearing Examiner Pro Tempore

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 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 23.76.022(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, Room 1320 Alaska Building, 618 Second Avenue, 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 encourage 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.