

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

DR. SANDRA PORTER, ET AL.

FILE NO. MUP-90-043(W)
APPLICATION NO. 8906041

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

Introduction

This matter concerns property located at 2448 N.W. 59th Street.

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 Deputy Hearing Examiner on September 13, 1990. The record was left open until September 21 to allow time for a site visit by the Examiner.

Parties to the proceedings were: the appellant, Dr. Sandra G. Porter, pro se; the Director, Department of Construction and Land Use (DCLU), represented by Faith Lumsden, senior land use specialist; and the project applicant, Charles Bush, pro se, accompanied by R.G. Satterwhite, project architect.

For the purpose 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, and after visiting the site, 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 is located at 2448 N.W. 59th Street, at the corner of N.W. 59th Street and 26th Avenue N.W. The site measures 100 feet by 100 feet, or 10,000 square feet.

2. The site is currently developed with two wood frame residences, both occupied as duplexes.

3. The site is zoned Lowrise 2 (L-2). L-2 zoning extends to the east on the north side of N.W. 59th Street and to the west

on the west side of 26th Avenue N.W. Properties on the south side of N.W. 59th, east of 26th N.W., are zoned L-3. Properties to the north of the site are zoned Lowrise Duplex Triplex (LDT).

4. Prior to 1988, the subject site was zoned L-3, as was the property to the north along N.W. 60th. In 1988, the site was rezoned to L-2 and the property to the north was rezoned to Single Family Attached (SFA). Building permit application for this project was made on October 5, 1989, so it is vested to the code provisions in existence on that date. With the code changes adopted later in 1989, L-2 development standards were modified and the designation of the area to the north was changed to LDT.

5. Surrounding development is a mix of single family residences and two, three, and four story apartments. Development along 24th Avenue N.W. is a mix of residential and commercial, with commercial uses intensifying to the south approaching N.W. Market Street.

6. The applicant proposes to demolish the existing structures on the site and construct a four-story, 11-unit apartment. Basement parking would be provided for 15 vehicles. The project is designed with a steeply pitched gabled roof accommodating loft or attic type spaces on the fourth floor. Access to the parking garage would be from 26th Avenue N.W. A stucco exterior treatment is proposed. Landscaping would be concentrated along the street sides of the site and in the northeast corner. Street trees would be provided on N.W. 59th and 26th N.W. The project is designed to be marketed as condominium units.

7. The proposed project would have a finished height of 35 feet to the ridge of the peaked roofs.

8. The proposed building would be about 60 feet square, thereby covering 36 percent of the lot area. It would be set back from the rear property line (LDT edge) by about 27 feet.

9. All eleven units are proposed to be two bedroom, two bath units. All units would have fireplaces.

10. Using a parking ratio of 1.5 parking spaces per unit, the project has a projected parking demand of 17 spaces. Fifteen on-site spaces are proposed, so the predicted spillover is two spaces.

11. The applicant's parking survey, conducted in accord with Seattle Engineering Department (SED) standards found 418 legal parking spaces in the area. That study, conducted during the winter, found a parking utilization of 221 spaces of 53 percent.

12. A DCLU field survey conducted at 10:00 p.m. on April 25, 1990, found a parking utilization of 56 percent.

13. A parking study conducted by the appellants found a parking utilization of 70-77 percent. This study was conducted in late August and early September and was taken earlier in the evening when the fields at the Ballard Playground were in use. Appellants noted that the playfields were in use for soccer or softball at least five nights a week from March to Thanksgiving.

14. The basic height limit is 25 feet in LDT zones and 30 feet in L-2 zones. In both zones, pitched roofs may extend up to 35 feet. (23.45.009).

15. Initial plans showed a metal roof on the structure. In response to neighborhood comments, the applicant has offered to use composition roofing on the outer, visible gables and to use a "hot mop" substance on the balance of the roof.

16. Initial plans also proposed stucco siding. DCLU conditioned the project to require wood siding. At hearing, the applicant requested that the condition be modified to allow wood or vinyl siding. By letter of September 20, 1990, the appellants objected to vinyl siding unless the building was made smaller. The applicant prefers stucco or vinyl siding because it requires less maintenance.

17. The structure is proposed to have balconies on all four sides. Appellants object to the balconies on the north side as intrusive of their privacy.

18. Section 25.05.675(A) sets forth the City's SEPA policy on air quality. Subsection 2 (c) provides:

Subsection to the Overview Policy set forth in SMC 25.05.665, if the decisionmaker makes a written finding that the applicable federal, state and/or regional regulations did not anticipate or are inadequate to address the particular impact(s) of the project, the decisionmaker may condition or deny the proposal to mitigate its adverse impacts.

19. This project is not located in a "nonattainment area" identified by the Puget Sound Air Pollution Control Agency. (PSAPCA).

20. The SEPA policy on parking (25.05.675(M)) provides that "parking impact mitigation for multi-family development may be required only where on-street parking is at capacity as defined by the Seattle Engineering Department or where the development itself would cause parking to reach capacity as so defined." The Engineering Department considers on-street parking to be "at capacity" when utilization reaches 85 percent.

21. There are two large cherry trees on the northeast corner of the property. Construction of the proposed project will

require their removal.

22. Except for the condition regarding wood siding discussed above, the applicant challenged none of DCLU's conditions.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76, Seattle Municipal Code.

2. The Hearing Examiner must give "substantial weight" to the DCLU Director's decision. Section 23.76.022.C.7. The burden is on an appellant to overcome this weight by proving that the decision is "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. Under this standard of review, the decision of the Director can be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. Cougar Mt. Assoc. v. King County, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

4. The Director has authority pursuant to Section 25.05.660 to impose mitigating measures as conditions of approval, subject to certain limitation: 1) conditions must be based on policies, plans, rules or regulations designated in the Seattle Municipal Code as a basis for the exercise of substantive authority; 2) the conditions must be related to specific adverse environmental impacts clearly identified in an environmental document; 3) the conditions must be reasonable and capable of being accomplished; and 4) responsibility for mitigation must be proportional to the extent of the impact caused by the subject proposal. Section 25.05.660A.

5. The test of "reasonableness", as described by the Seattle City Council, is "whether the required mitigation bears a 'reasonable' relationship to or is 'reasonable' in proportion with the identified adverse impact." In re Appeals of Queen Anne Community Council et al., C.F. 293623 (1985).

6. None of the parking studies presented at hearing show on-street parking to be at capacity as defined by the Engineering Department, nor does it appear that this project and others currently proposed will put the area at capacity. Accordingly, under the terms of the parking policy, no mitigation of the project's parking impacts is appropriate. However, appellants' argument that the use of Ballard Playground should not be considered a sporadic activity was persuasive, and it seems to the Examiner that future parking studies in this area should measure parking utilization during the earlier part of the evening as well as utilization after 10:00 p.m. Appellants' parking study, while not demonstrating capacity use of the on-street parking, reveals a substantial overflow from the Playground.

7. The appellants asked that the number of fireplaces in the project be reduced. This cannot be done. Though the fireplaces may, on occasion, have an impact on the air quality of the immediate neighborhood, this is not a nonattainment area, and no evidence was presented as to why this neighborhood would be especially damaged by the units having fireplaces. As such, the overview policy (25.05.665) does not allow conditioning to reduce the number of fireplaces. This is not to suggest that concerns about chimney smoke are unwarranted. Wood stoves and fireplaces are increasingly recognized as a major source of air pollution. However, fireplaces are so common that it would not be reasonable to restrict the number of fireplaces on this one building through a SEPA condition. Rather, control of such pollution needs to be based on more broadly applicable legislation or regulations.

8. The appellants also asked that the height of the structure be reduced. Mitigation of structural bulk on zone edges is authorized under the City's SEPA policies, and is commonly imposed along the edges of Single Family Zones. Its appropriateness here, on the edge between L-2 zoned property and property zoned LDT, is less clear. While the basic height limits in LDT and L-2 differ, it is significant that both zones allow pitched roofs of 35 feet in height. Of perhaps greater significance is that the current Land Use Code specifically lowers the basic height limit in L-2 to 25 feet when it abuts a Single Family Zone, but makes no such provision for L-2 abutting LDT. This suggests that the Council believed that a structure built to the usual L-2 limits was compatible with an LDT zone.

9. Having said that, there are undoubtedly instances of L-2/LDT edges where cutting the height of a proposed project would be warranted. This, however, does not appear to be such a case. For one thing, while the rear setback requirement for this lot is 20 feet, the proposed building is set back 27.5 feet. For another, N.W. 59th in this vicinity has already been developed with a number of other apartments of similar bulk. Finally, the conditions imposed by DCLU in the form of fencing and landscaping provide some mitigation.

10. Modification of a structure's color and finish material is referenced in the Height, Bulk and Scale Policy as a means of mitigating a development's bulk impacts. Thus, there is specific policy authority for DCLU's condition requiring wood siding. The Department report states that siding would "help the structure blend with the surrounding, generally wood sided structures."

At hearing, the Department responded to the applicant's request to be allowed to use vinyl siding by stating it would not do so without the neighbor's consent. While that answer is pragmatic, it does not address the question of why wood siding does or does not offer better bulk mitigation than vinyl siding. The applicant's argument about vinyl siding having lower maintenance requirements also does not address this question. In light of that failure to show the Department's condition to be in

error, the condition requiring wood siding will be upheld (see Conclusion #2).

11. The City's SEPA policies provide no authority to address the fact that the project will cast shadows on other properties or restrict views from the properties.

12. Because this project provides substantial new landscaping, the Examiner does not believe he can require that the existing cherry trees on the property be saved. The applicant indicated that he would cooperate with efforts to have them saved and transplanted, and it is to be hoped that those efforts prove successful.

13. The final issue is that of limitations on the hours of construction. The Department imposed what it called its "normal" condition of limiting construction to between 7:30 a.m. and 6:00 p.m. on non-holiday weekdays. The appellants sought confirmation that "weekday" refers only to Monday-Friday. Appellants also sought to limit construction to between 8:00 a.m. and 5:00 p.m.. In support of this request, appellants cited the Hearing Examiner decision in MUP-88-031(W). The decision in that case was based on an appeal by the Central Ballard Community Council from the Department's decision on project 8705995, dated April 28, 1988.

The difficulty with the cited case is that it includes no discussion of the limitation on construction hours, but merely repeats the condition included in the Department's report. The Department report, in turn, includes no discussion of any special considerations in that case, but simply limits construction to between 8:00 and 5:00 p.m. The report contains no suggestion that the Department's usual limitation is 7:30 a.m. - 6:00 p.m.

Because the cited decision does, at the least, cast some doubt as to how standard the 7:30 a.m. - 6:00 p.m. limitation is, and because the site is surrounded by residential uses, hours of construction on this project should be limited to between 8:00 a.m. and 6:00 p.m.

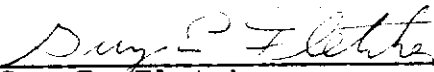
Decision

The decision of the Director is AFFIRMED as modified:

Condition Number 1 of the Department report is amended to read as follows:

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 8:00 a.m. and 6:00 p.m. on non-holiday weekdays (Monday-Friday).

Entered this 5th day of October, 1990.


Guy E. Fletcher
Deputy 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 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 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 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.