

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

LEWIS C. LARSON

FILE NO. MUP-90-071(W)

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

APPLICATION NO. 9002698

Introduction

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 December 4, 1990. A site inspection was conducted on December 12, 1990.

Parties to the proceedings were: Lewis Larson, appellant, pro se; and Martin Fricko, land use specialist, for the Director, Department of Construction and Land Use.

No correspondence or testimony was received in opposition to the application.

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 and as a result of the personal inspection of the subject property and surrounding area by the Examiner, the following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The appellant applied for a Master Use Permit (MUP) to demolish an existing single family residence and to construct a single family residence in an environmentally sensitive area. DCLU issued a determination of nonsignificance (DNS) and imposed a condition that no excavation on the site can be initiated during the period between October 1 and April 30 of any given year. The appellant is appealing the imposition of that condition.

2. The subject property is a rectangle parcel of approximately 5,000 sq. ft. The property is located in an area zoned Single Family 5000 (SF 5000).

3. The subject property is in an area designated environmentally sensitive due to the steep topography, potentially unstable soils, and drainage problems. The site

topography slopes downhill at approximately 40 percent. Information in DCLU files also indicate that there have been landslides in the area.

4. In connection with this MUP application, the appellant was required to submit a statement from a geotechnical engineer that the construction drawings for the site conform to the recommendations in the preliminary soils report and that construction on the site would only pose a minimal risk of slope instability.

5. The geotechnical engineer's report, with the result of the soil analysis and with recommendations for reducing soil instability during construction were submitted in a report dated April 12, 1990. (See Exhibit 3).

6. The geotechnical engineer's report of the soil analysis states that the the subsurface soil consists of loose silty gravel extending 3.5 to 7 ft. in depth. The top soil is of loose to medium density. The subsurface soil is weathered glacial till extending for depths of 6 to 7 ft. and then very dense glacial till to the 8 to 24 ft. depths. The geotechnical engineer's soil analysis was based on two borings; one to 8.5 ft. in depth and the other to 24 ft. below existing grades.

7. The geotechnical engineer concluded that the greatest potential slope instability would occur during the excavation of the basement and/or foundation but the risk could be minimized by proper design and construction practices. The geotechnical engineer reported that silty soils on the site would require special attention under wet site conditions and that special considerations would have to be made if construction were to proceed during periods of wet weather or wet site conditions.

8. The geotechnical engineer recommended an extensive list of site preparation standards beginning with a recommendation that the contractor implement a temporary erosion and sedimentation control plan to be approved by DCLU. The engineer also set forth specifics for pre-construction site preparation, restrictions on on-site movement during the construction process, and requirements regarding structural fill, grading and other earthwork, and construction. The geotechnical engineer's report did not explicitly recommend against wet weather or wet site condition construction, but imposed sufficient conditions to indicate concerns for soil instability if all of the recommendations were not followed.

9. In conjunction with DCLU analysis and decision, the City's soils expert reviewed the geotechnical engineer's report and the DCLU environmentally sensitive area maps. On the basis of that information, DCLU imposed a condition, restricting excavation during the wet season.

10. In connection with his appeal, the appellant submitted statement from the geotechnical engineer dated August 20, 1990. The engineer reiterated the conclusion of his report, that with proper design and construction practices, the glacial soils are not subject to instability during the wet seasons of the year. The engineer further stated that protective construction practices such as diverting surface water from upslope properties

away from the property or covering the slope with visqueen or other impervious cover during excavation and construction would minimize soil instability and are common practices in the Seattle area.

Conclusions

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

2. The Director's decision on SEPA determinations must be given substantial weight. SMC 23.76.022(c)(7). The burden on the appellant to prove that the Director's decision was in error.

3. The appellant has offered sufficient evidence to establish that the Director's decision to limit construction to the dry season only was in error. The geotechnical engineer's report, and response to the DCLU decision are very cautious on the issue of potential soil instability but does not recommend against wet weather construction. DCLU has reached a contrary conclusion but has not explained why it did not adopt the geotechnical engineer's analysis. DCLU does not have the burden of proof, but it does have the responsibility of explaining its decision. DCLU has not offered any other evidence to rebut the geotechnical engineer's conclusions or offered a reason to cast doubt on the geotechnical engineer's credibility. Consequently, the undersigned has only the applicant's geotechnical engineer's conclusions as the reliable and credible evidence regarding a minimal risk of soil instability during construction on the subject property if proper design and construction practices are followed.

4. In its decision, DCLU cited SMC 25.05.675(D), as authority for imposing mitigating measures such as limiting the time and duration for construction on property. However, it appears that the provisions of SMC 25.05.665 are more applicable to the matters at issue in this proceeding. This section provides that it is the City's policy to protect life and property loss or damage by landslides during property development or redevelopment and thus the decisionmaker may condition or deny projects to mitigate impacts related to earth movement or earth instability consistent with the overview policy set forth in SMC 25.05.665. The decisionmaker is afforded wide latitude in imposing mitigating measures to control an adverse impact of the project.

Decision

1. The DCLU condition that excavation on the site shall be limited to the dry season and that no excavation shall be initiated during the period between October 1 through April 30, of any given year is REVERSED.

2. The appellant can begin excavation between October 1 and April 30, of any given year subject to the following conditions:

A. The appellant shall submit a satisfactory temporary erosion and sedimentation control plan to be approved by DCLU based on the recommendations of the geotechnical engineer's report of April 12, 1990 and August 20, 1990.

B. The appellant shall be required to retain the geotechnical engineer who prepared the initial report (Exhibit 3), and/or a geotechnical engineer of comparable qualifications, to submit the three following certifications to DCLU:

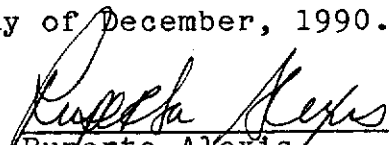
1. In the first report certification the geotechnical engineer shall certify that the appellant/contractor or other responsible party has complied with the preconstruction site preparation recommendations in the geotechnical engineers report;

2. The second certification that the contractor is properly implementing the erosion and sedimentation control recommendations shall be submitted to DCLU immediately before the foundation work is initiated; and

3. The third certification, to be submitted one week after the completion of the foundation work, shall certify a continuing assurance that the contractor is properly implementing the erosion and sedimentation control measure during the course of the construction.

3. The conditions stated herein are intended to supplement, not supersede, any conditions DCLU may impose in accordance with Director's Rules 2-87.

Entered this 21st day of December, 1990.


Ruperta Alexis
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.