

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

In the Matter of the Appeal of
TINA STEAD

MUP-90-073(P)
APPLICATION NO. 9003421

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

Introduction

The appellant exercised her right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the undersigned Deputy Hearing Examiner on December 6, 1990. At hearing, it was announced that the record would be held open until December 18, 1990 to allow time for a site visit by the Examiner and for the submission of memoranda. Because of weather conditions, it was impossible for appellant's attorney to deliver his reply memorandum on December 18, and it was not received in the Hearing Examiner's office until December 20. The record therefore closed on December 20, 1990.

Parties to the proceeding were: the appellant, Tina Stead by Richard Aramburu, attorney-at-law; the Director, Department of Construction and Land Use (Director) by Jan Mulder, senior land use specialist; and the project applicants, John C. and Patricia Field, by Harold Chesnin, attorney at law.

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 Hearing Examiner, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on appeal.

Findings of Fact

1. The subject property is located at 6732 40th Avenue Southwest. The property is located within Tract 20 of Gatewood Acre Tracts and is zoned Single Family 5000 (SF 5000).

2. The property consists of a single rectangularly shaped lot of 11,054 square feet. The property measures 75.01 feet from north to south and 146.74 feet from east to west. It is developed with a single family house and a detached garage. The property abuts 40th Avenue S.W., and the existing vehicle access is from that street. The existing house measures roughly 30 feet square and is located on the northern portion of the site. The garage is located to the south of the house. Under the DCLU decision, this garage would be demolished.

3. The north half of the block on which this property is located is bisected by a platted, paved 20-foot wide alley. That alley terminates at the northern edge of the subject site. The properties to the north, which abut the alley, are part of the Gatewood Gardens plat. While, as indicated above, the subject site currently obtains its vehicular access off of 40th Avenue SW, there is no physical or legal barrier to the site using the alley for its access.

4. The six lots in this block to the north of the subject site are platted at 5900 square feet in size (50' x 118'). The three lots to the south of the site are considerably larger, between 9000 and 11,000 square feet in size. Along the 40th Avenue S.W. frontage of the block, the six northern lots average approximately 6100 square feet, while the four southern lots average approximately 8190 square feet.

5. The proposed action under consideration here is to subdivide the site into two parcels (a western parcel and an eastern parcel) of 5502 square feet each. Each lot would measure 75 feet by 73.37 feet. Parcel A, the western parcel, would abut 40th Avenue and would have its vehicular access off of that street. Parcel B would be to the east of Parcel A and would not abut the street, but would have its vehicular access off of the alley. Parcel B would also be served by a pedestrian access easement across Parcel A to the street.

6. Pursuant to SMC 23.24.040, no short plat shall be approved unless all the following facts and conditions are found to exist:

1. Conformance to the applicable Land Use Policies and Land Use Code provisions;
2. Adequacy of access for vehicles, utilities, and fire protections, as provided in Section 23.54.010;
3. Adequacy of drainage, water supply and sanitary sewage

4. Whether the public use and interest are served by permitting the proposed division of land.
7. Sections 23.44.016.A.1 and 2 read as follows:
 - A. Access
 1. Vehicular access to parking from an improved street, alley or easement is required.
 2. Access to parking is permitted through a required yard abutting a street only if the Director requires that one (1) of the following conditions exists:
 - a. There is no adjacent improved alley;
 - or
 - b. Existing topography does not permit alley access; or
 - c. A portion of the alley abuts a nonresidential zone; or
 - d. The alley is used for loading or unloading by an existing nonresidential use; or
 - e. Due to the relationship of the alley to the street system, use of the alley for parking access would create a significant safety hazard.
8. Section 23.54.010.C provides as follows:

Alleys. Alley access to parking shall be required according to the provisions of each zone. An alley shall be considered improved when it meets the following standards:

 1. Grading to both right-of-way lines;
 2. Standard pavement width and depth in accordance with rules as promulgated by the Director;
 3. Drainage and grading according to the provisions of the Seattle Municipal Code.
9. The Seattle Street Design Manual was adopted in 1985 pursuant to a joint Directors Rule, Seattle Engineering Department (SED) Director's Rule 85-02 and DCLU Director's Rule 10-85. Page 2 gives the following reason for the Manual's adoption:

The Land Use Code either lists general elements of street and alley improvement requirements or refers to "improved" streets or alleys as a prerequisite for development standards such as access to parking. In addition, Section 23.54.010C requires the Director of the Department of Construction and Land use to adopt standards for alley improvements by rule. The Street Design Manual provides the level of detail for all participants to understand the requirements.

10. At page 47, the Street Design Manual Provides as follows:

Cul-de-sacs are required at all street and alley dead-ends. The cul-de-sac should be large enough so that a fire or garbage truck can turn around. Exhibit IX illustrates two cul-de-sacs approved by SED. Exhibit X illustrates two alley turnarounds approved by SED.

11. At page 30, the Manual reads as follows:

No alley improvement will be required if:

1. The alley is unimproved but is in common usage by existing residences, and;
2. Is more than 60% developed along the alley, and;
3. The proposed development is not more than four (4) units.

12. The proposed subdivision was reviewed and approved by the Seattle Engineering Department, the Seattle Fire Department, and DCLU. None of those Departments required a turnaround at the end of the alley as a condition for their approval.

13. Paragraphs A and B of section 23.88.020 read as follows:

A. A decision by the Director as to the meaning, application or intent of any provision of the Title 23, Land Use Code, or Title 24, Zoning and Subdivisions, as it relates to a specific piece of property is known as an "interpretation". An interpretation may be requested in writing by any person or may be initiated by the Director.

B. When public notice is required for a project, a request for an interpretation concerning the project shall be made before the expiration of any applicable appeal period. Notice of the Director's decision as required by SMC 23.76.020 shall include notice of the deadline for requesting Code interpretations. When public notice is not required for a project, a request for an interpretation concerning that project may be made any time, provided that issued permits shall not be affected by subsequent Code interpretations.

13. The notice of decision for this project included notice of the deadline for requesting an interpretation.

14. No interpretation was requested in this case.

15. The residential area policies for the City of Seattle are found at chapter 23.16 SMC. The stated purpose of those policies is "to preserve and maintain the physical character of single family residential areas in a way that encourages rehabilitation and provides housing opportunities throughout the city for all residents." SMC 23.16.002.

16. In terms of bulk and siting, the policies set forth the following intent:

Zoning Code bulk and siting regulations shall recognize and preserve the streetscape character of individual clusters of housing units in City neighborhoods. The Citywide pattern of open spaces between single family residential structures in single family residential areas shall be maintained by requiring minimum side and rear yard setbacks. . .The height and front setbacks of existing adjacent single family residences shall be used to determine bulk and siting patterns for future construction.

17. Appellant, as well as pointing to the purpose of Seattle's residential policies (see Finding 15) points to four other statements within the policies as providing a basis for denial:

1. ". . . the types and activities associated with single family residential living shall be regulated primarily by performance standards and city ordinances protecting privacy, health, safety and rights of neighbors."

2. "Zoning code bulk and siting regulations shall recognize and preserve the streetscape character of individual clusters of housing units in city neighborhoods."

3. "The city-wide pattern of open spaces between single family residential structures and single family residential areas shall be maintained by requiring minimum side and rear yard setbacks."

4. "The height and front yard setbacks of existing adjacent single family residences shall be used to determine bulk and siting patterns for future construction. Minimum rear yard setbacks shall be no less than 7.6 meters (25 feet)

The first of those policy statements is from Implementation Guideline 2 of the Single Family Residential Use Policy.

The remaining three represent portions of the intent statement of the bulk and siting policies (see Finding 16).

18. Section 23.12.030 provides as follows:

The land use policies or Comprehensive Plan component, as applicable, shall be considered in making all discretionary land use decisions in residential zones regulated under Title 23 and in all other zones where reliance on the land use policies is specifically made a criterion in the decisions. They shall also be considered by the Director in the promulgation of rules, decisions upon request for an interpretation and the determination of what constitutes a similar use where authorized.

19. The lots proposed under the subject application satisfy the minimum lot size requirements of the Land Use Code.

20. The north side yard of the existing residence on the site is unaffected by the subdivision. The rear yard is altered. The Code requires a rear yard of 25 feet or 20 percent of lot depth, whichever is less. Twenty percent of 73.37 feet, the depth of proposed Parcel A, is 14.67 feet. As submitted, the application provides a rear yard for Parcel A of 14.21 to 14.65 feet.

21. The creation of one lot behind another, with Parcel B having no frontage on the street, would result in a situation unusual in this neighborhood. There is only one other lot in the area that has no street frontage.

22. The construction of a house on the proposed Parcel B would have an adverse impact on the privacy of the residents of adjoining lots, especially the lots to the south and east of the parcel. Any house constructed on that lot may also seriously affect, even eliminate, views from the property to the east.

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 P2d 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 (1983).

4. Appellant argued that the application was contrary to the City's land use policies and that it should therefore be denied as failing to satisfy the first short plat criteria, "conformance to applicable Land Use Policies and Land Use Code provisions." Because this criterion is specifically called out in the Seattle short plat criteria, appellant sought to distinguish the situation in this case from that in Carlson v. Town of Beaux Arts Village, 41 Wn App 402, 704 P2d 663 (1985). In that case, the Court of Appeals rejected the town's attempt to deny a shortplat that satisfied all applicable ordinances on the basis of the plat's alleged inconsistency with the town's comprehensive plan and with the general welfare.

In claiming that the subject short subdivision violates this first criterion, appellant also sets forth a different question than was addressed in the 1988 Hearing Examiner case, In the Matter of the Appeal of Teofilo Ramos, MUP-88-003(P). That case involved the attempted denial by DCLU of an application creating an irregularly shaped lot on the basis that it violated the public use and interest criterion of the short plat ordinance.

5. In asserting that even general policies could be used to deny the project, appellant relies on the language of the recent Court of Appeals decision in Victoria Tower Partnership v. City of Seattle, 59 Wn App 592 (1990).

6. The Examiner believes that the language of the Seattle statute provides a basis for distinguishing this case from the Beaux Arts case. The Seattle Code expressly requires consistency with the Land Use Policies as well as with the Land Use Code, and that requirement cannot be read out of existence. Having said that, the policy basis which exists here is not so clear and specific so as to allow for denial of this application. However, the plain concern of the policies for streetscape character and patterns of open spaces is sufficient to justify conditioning of the subject application, especially where that conditioning does not affect the development potential of the site.

The idea of "streetscape character" involves a number of aspects. The first is simply aesthetic -- what one sees when driving down the street. However, that concept can also relate to the question of the placement of houses and the effect they have on one another. The application in this case unnecessarily creates what is, for this neighborhood, an anomaly, one lot behind another lot. Because this would result in a house overlooking the back yards of adjoining residences, and because it would result in a house being built substantially further to the east

that is common for houses on 40th Avenue SW, this plan would result in impacts on neighborhood privacy and views as well as altering the development pattern of the neighborhood.

A better solution would be to have the lots divided along a line running east-west instead of north-south. In other words, to have a north lot and a south lot, not an east lot and a west lot. Under this plan, both lots created by this subdivision would abut 40th Avenue SW. No interior lot needing an access easement to the street would be created.

If the existing house is to be retained, the east-west line would have to be drawn so as to allow the existing house to meet side yard requirements. However, there appears to be no reason why this could not be done, especially given the Code's provision for side yard easements (23.44.014.D.2) Both lots should have approximately the same square footages as those proposed under the application, though their shapes will be different. With street frontage of between 35 and 40 feet, the parcels would be somewhat narrower than is standard in the neighborhood, but would be sufficiently wide to allow development that conforms to the general style of the neighborhood. Again assuming that the applicant chooses to retain the existing house, the difference created by this change would be that the one new house to be built on the site would be to the south of the existing house instead of behind it.

This change, while continuing to allow the applicant to have two lots, eliminates the problems caused by creation of an interior lot and is more consistent with the Land Use Policies' call for preservation of streetscape character and preservation of the pattern of open spaces. Privacy concerns are lessened, views better protected, and a major element of the physical character of the neighborhood (i.e., the platting pattern) is preserved. Accordingly, the DCLU decision should be modified to provide for this change.

7. Appellant also argued that the proposal fails to provide adequate access for the lot to be served by the alley. This raises a number of issues.

8. First, to the extent that appellant raises the question of compliance with the access standards of the Land Use Code, there is a question in the Examiner's mind as to whether this issue needed to be raised as an interpretation. However, as the Department failed to argue this point, it is necessary to proceed on to the merits of the argument.

9. Appellant quoted from that portion of the Street Design Manual that provides the general standards for a deadend street or alley. However, appellant's argument failed to account for those portions of the Manual relating to automatic exemptions. On the basis of the exemption

referred to in Finding 11, it is plain that the proposal meets the requirements of the Street Design Manual.

It is worth noting that the application results in no net increase in the number of lots abutting the alley. This is significant both from both a code and an impact based analysis. From the point of view of a code analysis, if the alley is, indeed, not "developed" for purposes of the Code, the fact that the same number of lots will continue to be served by the lot would mean that there is no increase in the level of nonconformity. As a general rule, the nonconformity provisions of the Land Use Code allow modifications to nonconforming uses and structures where there is no increase in the level of nonconformity. Similarly, from the point of view of an impact analysis, if the subdivision creates no increase in the number of lots using the alley, there is no basis for requiring modifications to it. To the extent that the existing residence does not take access off of the alley, and the subdivision results in some change if one of the new lots does take its access off of the alley, the impact of the added traffic will be minimal.

10. Given the approval of the application by SED and the Fire Department, there is insufficient basis for finding that the "access for vehicles, utility and fire protection as provided in Section 23.54.010" is not adequate. While the appellant offered some testimony on this issue, it was insufficient to overcome the presumption in favor of the Director's decision.

11. Those conditions imposed by DCLU, which required the paving of the alley, were plainly based on a mistake regarding the nature of the existing alley and should be modified or stricken accordingly.

12. In short, the decision of the Director should, as modified, be upheld. Approval of this subdivision may, through the creation of additional density, have some adverse impacts on the neighborhood. However, as conditioned and modified here, it will result in lots that conform to the Code and policies and which will basically conform to the standard of the neighborhood.

Decision

The decision of the Director is AFFIRMED as modified below:

The short plat shall be modified so that the line dividing the existing site into two new parcels is drawn parallel to the north property line of the site. If the dividing line needs to be adjusted slightly along its course in order to provide a

legal side yard for the existing house, that is permitted.

The conditions imposed by DCLU are modified to read as follows:

1. Have final recording documents prepared by or under the supervision of a Washington State licensed land surveyor. Each lot, parcel or tract created by the short subdivision shall be surveyed in the field and all property corners set in conformance with appropriate State statutes. The property corners set shall be identified on the plat. In addition, the width of the paved surface of 40th Avenue SW and all utility mains (water, sewer, storm drains) and hydrants must also be shown, including the existing side sewer of record.

2. All existing and proposed easements must be shown on the short plat map, with the recording number of the easement, if already recorded. A copy of all new easements must be submitted for recording.

3. The following language must be included on the face of the plat: "Prior to sale, purchase, or other transfer of Parcels A or B, the existing garage shall be legally demolished.

4. Add the conditions of approval that will apply to the short plat after recording on the face of the plat or on a separate page. If the conditions are on a separate page, insert on the face of the plat, "For conditions of approval after recording, see page ____ of ____." If necessary renumber the pages.

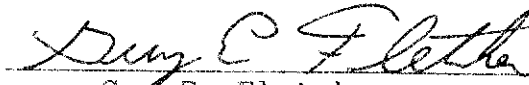
5. Submit the recording fee and final recording forms for approval.

Conditions of Approval Upon Application for Construction Permits

6. The owner(s) and/or responsible party(s) shall attach a copy of the recorded short plat to the construction permit plans.

7. (Deleted)

Entered this 4th day of January, 1991.



Guy E. Fletcher
Deputy Hearing Examiner

Concerning Further Review of
Hearing Examiner Final Decisions on Master Use Permits

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 party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen (15) calendar days of the date of this decision. Seattle Municipal Code Section 23.76.22.C.12.c.

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, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.