

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

In the Matter of the Appeals of

**WILLIAM A GARRETT, et al,
RONALD GEBALLE, et al., and
MARINA SKUMANICH**

Hearing Examiner Files:

MUP-90-082(P)

MUP-90-083(P)

MUP-90-084(P)

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

APPLICATION NO. 8807329

Introduction

The appellants exercised their 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 January 16 and 17, 1991. Parties to the proceeding were: William Garrett, et al, by Allison Moss, attorney at law; Ronald Geballe by Jeffrey Eustis, attorney-at-law; Marina Skumanich, pro se; and the Director, Department of Construction and Land Use (DCLU) by Cheryl Waldman, senior land use specialist.

Notice of an adverse possession claim regarding the subject property was filed with the Office of Hearing Examiner on January 22, 1991, resulting in an order dated February 1, 1991, remanding the matter to the Department of Construction and Land Use. The DCLU response to the remand was received on May 28, 1991. By order dated June 7, 1991, the parties were given until June 24 to submit comments on the DCLU response.

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 8914 42nd Avenue Northeast. The property is zoned Single Family 7200 (SF 7200).

2. The property consists of a roughly rectangularly shaped lot of approximately 62,900 square feet. It is developed with a single family house and a detached studio/garage.
3. The site is heavily vegetated with tall trees and an understory of mosses, ferns and bushes. The topography slopes down generally from west to east and from south to north. The site is located near Maple Creek, which is located within a ravine.
4. Land Uses in the vicinity are single family residences. The topography of the site and the surrounding area is hilly, and the area is heavily wooded. Most lots in the area are larger than the 7,200 square foot minimum lot size required by the Land Use Code. Indeed, as demonstrated by Exhibits 8 and 9, if one excludes those lots that face onto N.E. 88th, the average lot size in the neighborhood exceeds 20,000 square feet.
5. Between N.E. 89th Street and N.E. 92nd Street, 42nd Avenue N.E. is a narrow, winding road. Adjacent to the subject property, this street right-of-way is 15 feet wide. This narrow width is the result of a street vacation adopted by the City Council in 1964 under Ordinance 92721. Between N.E. 88th and N.E. 89th, the right of way of 42nd Avenue N.E. is 40 feet wide.
6. Turning onto 42nd Avenue from N.E. 88th, one is immediately struck by the change to a remarkably secluded and rural feeling. The large, heavily wooded lots, and the topography of the ravine, create an atmosphere that gives little sense of being in the midst of a city.
7. Properties to the northwest and northeast of the subject site are designated as environmentally sensitive because of slide potential or steep slopes. The subject property is not designated as environmentally sensitive, but is located within an area proposed as a "natural areas overlay" in the Mayor's Recommended Open Space Policies (April, 1987).
8. Prior to the street vacation referred to above, the right of way of 42nd Avenue N.E. was 60 feet in width. The vacation of 45 feet of that right of way resulted in the applicant's property being augmented by approximately 12,800 square feet.
9. The petition for the vacation of 42nd Avenue N.E. was filed in February of 1963. As originally filed, the petition sought the vacation of all of the 42nd Avenue N.E. right-of-way in this area. The form routed to the various city departments for comments on the vacation noted that the purpose of the vacation was, "The petitioners desire to convert 42nd Avenue N.E. to a private road to prevent future development and improvement and to maintain the existing rural atmosphere."
10. In conjunction with their petition for the street vacation, the petitioners, who consisted of persons owning property along 42nd Avenue N.E., formed the Maple Creek Community Association. The Garretts, the applicants for this subdivision approval, were among the petitioners. Mr. Garrett was identified as one of the trustees

of this Association in the original articles of incorporation and his home at 8915 42nd Avenue N.E. was identified in those articles as the principal place of business of the association.

11. Because the City did not believe that it could condition the requested street vacation, the petitioners were advised that the vacation would not be processed until the petitioners entered into some form of "unilateral agreement" regarding the vacated property. Mr. Garrett testified that he understood that the vacation required some form of quid pro quo, including a revision to Article 18 of the Bylaws of the Association. Article 18 now reads:

Each member of the corporation owning portions of 42nd Avenue N.E., N.E. 90th Street, or N.E. 92nd Street, vacated by the City of Seattle during the year 1964, shall maintain the same substantially in a native state. Other uses may be permitted upon the unanimous vote of the Board of Trustees.

12. The first purpose of the Maple Creek Community Association, as noted in the original articles of incorporation, filed on October 25, 1963, was as follows:

To take over, own, manage, maintain and improve those portions of 42nd Avenue N.E. , N.E. 90th Street, N.E. 92nd Street and other streets in the general vicinity thereof, which have been or may hereafter be, vacated by the City of Seattle in favor of the members of this corporation.

This language was deleted in September, 1964, when the Articles were amended. The new primary purpose of the Association was:

To preserve the natural beauty and sylvan nature of the Maple Creek Community in the vicinity of 42nd Avenue N.E., N.E. 90th Street and N.E. 92nd Street, between N.E. 88th Street and 45th Avenue N.E. which distinguish it from the surrounding urbanized area.

13. By letter dated October 31, 1990, the Garrets withdrew from membership in the Maple Creek Community Association. This withdrawal postdated the issuance of the DCLU decision which was issued on September 20, 1990 and the filing of the Garrets' appeal, which was filed on October 1, 1990.

14. The original proposal submitted to DCLU was to subdivide the property into four lots. That proposal was amended while the application was pending before DCLU to provide for division of the site into eight lots. It was this latter proposal that was considered by DCLU and discussed at the hearing.

15. The DCLU decision approved division of the site, but imposed a total of twenty conditions. The first of these conditions contained the following language: "Revise the application in a manner which excludes the area of the vacated portion of 42nd Avenue N.E. and recalculate the lot areas for each resulting parcel." The effect of this condition was to allow the creation of only six sites. The Department justified this condition on the basis that the vacation of 42nd Avenue N.E. was approved in order to preserve the rural character of the area, and that it was therefore improper to allow land obtained through the vacation to count as lot area that would allow an increased number of lots. If the roughly 12,800 square feet of land obtained through the vacation are subtracted from the parcel size, there is only enough land to create six lots of 7200 square feet or more.

16. Three appeals were filed against the DCLU decision. The first, filed by the applicants (the Garretts), challenged only the first condition, arguing that DCLU was wrong to delete the property gained through the vacation and thus to limit the subdivision to six lots. The second, filed by neighbors of the subject site (Geballe, et al.), argues that protection of the neighborhood character demanded that no more than four lots be created from the subject site. The third, filed by a property owner some distance from the subject site, argued against the subdivision on the basis that the trees and open space that characterize the site should be protected from development.

17. At the hearing, the applicant submitted a revised site plan that divided the site into only seven parcels.

18. As noted in the introduction, shortly after the close of the hearing, the Office of Hearing Examiner was put on notice that an adverse possession claim had been filed claiming ownership to a portion of the subject parcel. For that reason, the Hearing Examiner remanded this matter to DCLU. Subsequently, the applicants submitted a new application that excluded the property subject to the adverse possession action. This new application called for division of the property into seven sites. After considering this new application, DCLU indicated its intent to abide by its earlier decision and to continue to maintain that the site should not be divided into more than six sites.

19. Under the revised application, the seven lots created would range in size from 7,588 square feet (Parcel "E") and 11,000 square feet (Parcel "F"). The lots would be served by an easement roadway that would lead from the southeast corner of the property (where it abuts the 40-foot wide portion of 42nd Avenue) into the middle of the site. All the new parcel would be served by this easement with the exception of Parcel "A", which would be served by an existing driveway approximately 150 feet north of N.E. 89th.

20. 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.

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 Wpn. Pap. 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 Wpn. 2d 742, 747, 765 P.2d 264 (1988).
4. In regard to the appeal filed by the Garretts, the principal issue was the propriety of DCLU's reliance on the history of the street vacation in its analysis of the public use and interest component of the short plat criteria. Counsel for the Garretts argues strongly that it was inappropriate for DCLU to look to that history, that the vacation ordinance has to be seen as standing on its own, and that the ordinance made no reference to the preservation of the area. While the Examiner understands the Garretts' viewpoint, he is unwilling to state that the consideration of the vacation history constituted error on the part of the Department, especially given the direct involvement of the Garretts in gaining city approval for that vacation. Moreover, given the fact the street vacations must serve a "public use", it difficult to see how it can be deemed "error" for DCLU to investigate the public use served by the 42nd Avenue vacation and to have the results of that investigation affect its decision making.
5. In regard to the other short plat criteria, the first calls for analysis of the application's conformance to the applicable Land Use Policies and Land use Code. To the extent that all of the parcels proposed under the revised application meet minimum lot size and have sufficient room to satisfy applicable setbacks, the application can be seen as generally complying with the requirements of this criteria. The appellant neighbors, by however, argue that preservation of neighborhood character is provided

for in the Land Use policies, and that on this basis the application should be revised to create no more than a total of four lots.

While the Examiner is sympathetic to the desire to protect this unique neighborhood, the appellant neighbors' argument creates a number of problems. First, in its reference to neighborhood character, the policies state that their purpose 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*" [emphasis added]. One cannot simply ignore the highlighted portion of the policy language. The policy intent to protect streetscape may provide a stronger basis for restricting this short plat, but even then one must consider that most of the new lots will have no street frontage, that the applicant has accepted a condition banning all construction in the vacated portion of 42nd Avenue N.E., and that DCLU's restrictions on the use of the vacated portion of 42nd Avenue, already limit the short plat to only six lots. In short, the Examiner is unable to state that DCLU was in error in allowing the creation of six lots.

6. The next short plat criterion requires adequacy of access for vehicles, utilities, and fire protection. In its closing statement, the appellant neighbors argued that the provisions for access were inadequate. This argument was largely based on the fact that the access roadway as then proposed crossed over property that was subject to an adverse possession claim. The roadway proposed with the revised application appears to avoid that concern. The Examiner concludes that DCLU was correct in finding compliance with this criterion.

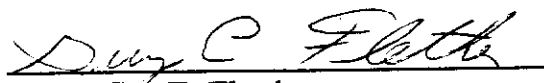
7. The third criterion, that of adequacy of drainage, water supply, and sewage disposal, was not subject to appeal. DCLU found that the application, as conditioned, satisfied this criterion, and the Examiner accepts that conclusion.

8. In short, the Examiner believes that the short plat application, as conditioned by DCLU, should be approved.

Decision

The decision of the Director is AFFIRMED.

Entered this 8th day of July, 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.