

FINDINGS AND DECISION

MAR 11 1991

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE
PUBLIC INFORMATION CENTER

In the Matter of the Appeal of

G. DAVID HOY

H.E. FILE NO. MUP-90-092(W)
DCLU APPLICATION NO. 8900281from a decision of the Director of the
Department of Construction and
Land Use on a master use permitCITY OF SEATTLE
DEPT. OF CONSTRUCTION & LAND USE

MAR 11 1991

IntroductionAPPROVED BY _____
LAND USE DIVISION

This matter concerns property located at 3717 California Avenue S.W.

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 26, 1990, and the record left open to enable the Hearing Examiner to visit the site.

Parties to the proceedings were: appellant/applicant G. David Hoy; the Director, Department of Construction and Land Use (DCLU), represented by Faith Lumsden.

During the hearing, Alan Mulkey, representing a neighborhood group, sought to intervene pursuant to Hearing Examiner Appeal Rule 1.5. The Director supported the request to intervene and the appellant/applicant opposed it. Rule 1.5 requires that intervention requests be made at least five days prior to hearing, the Hearing Examiner denied Mr. Mulkey's request as too late to be considered.

The Hearing Examiner's decision of January 22, 1991, remanded the Director's decision to DCLU for consideration of information received during the hearing. The Director responded in a memorandum dated March 1, 1991.

For the purpose of this decision, all section numbers refer to the Seattle Municipal Code (SMC) unless otherwise indicated.

Findings of Fact

1. The applicant, who is also the appellant in this action, applied for a master use permit to demolish an existing four-unit apartment building and construct a mixed-use building

Decision (Exhibit 2) as a four-story, mixed-use building with 2,475 sq. ft. of retail space on the first floor, 15 apartments on the upper floors, and parking for 19 vehicles in a basement garage.

2. With regard to the action proposed in this application, the Director issued a determination of non-significance (DNS) with conditions, pursuant to the State Environmental Policy Act of 1971 (SEPA) and Chapter 25.05, Seattle Municipal Code.

3. There were seven conditions included in the DNS. The appellant challenges Condition #2 and Condition #3, which state as follows:

2. To minimize potential adverse traffic impacts, the development plans shall be revised to provide primary vehicular access from California Avenue S.W. rather than the alley as proposed.

3. To minimize potential adverse impacts relating to height, bulk and scale, the building height shall not exceed a line which is 26 degrees above the horizontal, beginning at a point six feet above grade 25 feet west of the centerline of the adjacent alley. This line shall be provided on the building permit plans. In addition, four incense cedars of four-inch caliper to be planted in the rear yard area shall be indicated on the landscape plan(s).

The other conditions of the Director's decision were not appealed.

4. At the time the project and building permit applications were filed (February 9, 1990), the site was zoned Neighborhood Commercial One with a 40-foot height limit (NC1/40'). On February 21, 1990, the City Council adopted an interim zoning ordinance which applies a Lowrise 3/Residential Commercial (L3/RC) zone to this property and other property flanking California Avenue S.W. in the immediate area. By virtue of the applications having been filed prior to the passage of the interim ordinance, this project is vested to the NC1/40' zoning (SMC 23.76.026).

5. The site is currently developed with a one-story, four-unit apartment building. To the north, are two more one-story, four-unit apartment buildings. The two lots directly to the north, currently developed with one of the fourplex buildings, are subject to a proposal (MUP application 8907642, 3705 California Avenue S.W.) that would replace the existing development with a four-story, mixed-use building with 27 residential units and 5,500 sq. ft. of commercial space.

6. Other uses on the block are an auto supply store to the south, which has its parking lot immediately adjacent to the subject property, and to the north, a church at the corner of

California Avenue S.W. and S.W. Spokane Street.

7. California Avenue S.W. is a minor arterial in this area and is served by one bus route.

8. The alley at the rear of the site is fully paved and has a 16-foot wide right-of-way. The alley marks the edge between zones (single family to the west of the alley and neighborhood commercial to the east when this proposal was submitted).

9. The property on the west side of the alley is zoned for and developed in single family residences (Single Family 5000; SF 5000). The single family residences in this area are generally one- and two-story houses, with rear yards 30- to 50-ft. deep, and garages accessed from the alley.

10. The appellant/applicant proposes to construct a four-story, mixed-use building with 2,475 sq. ft. of commercial space at the first floor. A total of fifteen residential units (12 one-bedroom units and 3 two-bedroom units) would occupy the upper three floors. The structure would cover 4,950 sq. ft. of the total lot area (8,197 sq. ft.), and would be 45 ft. in height to the ridgeline of the pitched roof. Nineteen parking spaces would be provided in an enclosed basement garage accessed from the alley via a 10-foot wide driveway ramp. Two parking spaces, earmarked for the commercial use and provided at grade at the rear of the building, would also be accessed from the alley. The commercial space would be partially sunken with a landscaped courtyard between its entrance and the street. (Pedestrian entrance to the residential units would be separate; located on the south side of the building.) Landscaping is also proposed along the north and south property lines (5 ft. and 10 ft wide respectively). A total of 2,093 sq. ft. of the site would be landscaped (comprising 57% of the required open space).

11. The building as proposed would have a width (north to south dimension) of 55 ft. and a depth (east to west dimension) of 90 ft.

12. DCLU estimated that the residential portion of the project was anticipated to generate an average of approximately 100 vehicle trips per weekday, with 10 trips per hour occurring in the p.m. peak period (4:00 p.m. to 6:30 p.m.). Approximately 120 trips per day, with 12 peak hour trips, are expected to occur relative to the commercial space. The mixed-use project (MUP 8907642; 3705 California Avenue S.W.) proposed immediately to the north is anticipated to generate 389 daily trips, including 44 peak-hour trips. Combined, DCLU expected that the two projects would generate 609 weekday trips, with 66 trips occurring in the p.m. peak. Subtracting out the existing residential units currently occupying the two sites, the net increase in daily trips would be 556. DCLU considered this to be the cumulative increase in traffic impacting the alley and the single family properties along the alley.

13. On appeal, the Hearing Examiner added a condition to the neighboring project at 3705 California Avenue S.W., requiring access from the street rather than from the alley. The Examiner added this condition after concluding that the several hundred vehicle trips associated with the project would be a substantial impact on the alley shared by the single family zone residents. The Director cites this decision (Hearing Examiner File No. MUP-90-049) and uses it as a basis for requiring street access for the subject proposal.

14. If the Hearing Examiner's decision regarding the project to the north (MUP 8907642; Hearing Examiner File No. MUP-90-049) is affirmed by the City Council, the approximately 389 daily trips associated with that project would not be using the alley as is anticipated by the cumulative analysis presented in the Director's Analysis and Decision.

15. The demand for parking from the residential part of the subject proposal is expected to be somewhat greater than the number of spaces provided. (Demand is estimated at 23; 19 spaces provided.) The overflow parking demand is estimated at four spaces.

16. The Director's decision anticipates that "almost all" the residential trips would use the alley (page 5; Exhibit 2) because it provides access to the parking spaces in the basement. The trips associated with the predicted overflow parking were not deducted from the number of trips expected to impact the alley.

17. In assessing the impact of increased traffic using the alley, the Director believed that impacts associated with the commercial space would also affect the alley.

"Many of the trips generated by the retail portion of the project may also use the alley. This suggests that the alley would experience a substantial increase in vehicular trips. This increase in trips is likely to adversely impact the nearby Single Family properties." (Exhibit 2, Page 5).

The Director's analysis assumes of the 120 trips associated with "the retail portion of the project" would be added to the traffic on the alley (Exhibit 2, Page 4).

18. At hearing, the appellant/applicant clarified that the basement parking would not be available for parking for the commercial space, but that the two parking spaces at grade at the rear of the building and accessed via the alley would be assigned to the commercial space. The Director's decision does not account for these two parking spaces and the number of trips associated with these spaces was not indicated.

19. The church at the north end of the block and the auto parts store at the south end of the block access some of their parking spaces from the alley.

20. The alley is fully improved and wide enough to accommodate two-way traffic.
21. With the exception of two single family zoned properties at the north and south ends of the alley which face S.W. Spokane and S.W. Charleston respectively, all the single family lots abutting the alley behind the subject property face onto 44th Avenue.
22. The Director imposed Condition #2, requiring access for the residential parking spaces to be from California Avenue S.W. rather than from the alley as proposed, as a way to mitigate the adverse impacts that could affect the single family area due to the increased traffic expected to use the alley. The Director cites Section 25.05.675.R as providing authority to impose this condition.
23. Section 23.47.032 regulates parking location and access in NC zones and provides that access to off-street parking may be from a street or alley. Where alley access would create significant safety hazard, access must be from the street.
24. Parking on-site is not required for the amount of commercial space proposed. The appellant/applicant included the two at-grade parking spaces at the rear of the building in an attempt to help make the commercial space more attractive to potential commercial tenant(s) who would want on-site parking for their own use.
25. Although alley access is generally allowed in lowrise zones (Section 23.45.018), street access is required in Lowrise 3 when "apartments are proposed across the alley from a Single Family or Lowrise Duplex/Triplex Zone."
26. The Neighborhood Commercial policies provide that the location of off-street parking consider impacts to traffic and pedestrian circulation and compatibility with surrounding uses. Street access is generally discouraged by minimizing curbcuts so that on-street parking capacity and pedestrian circulation are not adversely affected. Section 23.16.020.
27. The Director recognized and attempted to balance the conflicting policy directions of the code that look to protect single family zones by disallowing alley access to apartment projects sharing an alley with a single family zone, and to encourage pedestrian circulation and avoid traffic disruptions in neighborhood commercial zones by favoring alley access to off-street parking.
28. To accommodate the Director's condition requiring street access for the basement parking rather than alley access, the appellant/applicant would have to redesign the basement and first floor of the project, and possibly be required to redesign the structural elements of the building. The ramp driveway, with appropriate sight triangles, would have to be located at the front of the building, requiring a change in the approach to landscaping and possibly compromising the provision of the minimum amount of

commercial space that is required to be included in this project. Redesign could also interfere with the viability of the commercial space by altering the appearance of the front of the building, adding a curbcut, potentially changing pedestrian access, and requiring a different approach to landscaping the area between the building and the street.

29. The proposed building, 45 ft. in total height and 55 ft. wide, would be noticeably taller and bulkier than the nearby single family residences. The proposal takes full advantage of NC1 allowable commercial height limit (which is 10 ft. taller than the maximum allowable height for a single family structure.)

30. Citing Section 25.05.675.G. as the policy basis, the Director requires (in Condition #3) that the third and fourth floors of the west side (rear) of the building, be stepped back in order to reduce the impact of its height, bulk and scale on the neighboring single zone across the alley. The reduction in the building is intended to "ensure a reasonable transition between the NC1 and the SF 5000 properties" (Page 7, Exhibit 2).

31. The setback required for the upper floors reflects a formula that has been used by the Director in some "edge" situations such as this one, where the zone edge runs between the rear property lines. Under this formula, DCLU first determines what the envelope of a structure built to single family zoning standards on the subject site would be. It then envisions a person standing in the required rear yard of the property behind the site looking at this hypothetical structure, and projects a line from this person's eye level to the top of the structure (Exhibit 4.). The Director argues that portions of the proposed project which extend outside of the line should be removed so that the proposed structure would have a perceived impact comparable to that which could occur with single family development. The upper floors will still be somewhat visible to the neighbors in the single family zone.

32. The Director sets "eye level" at six feet. The line, 26 degrees above horizontal referred to in Condition #3, results from this placement at the rear yard setback. If this point were set lower, it would result in more of the proposed structure extending outside the line.

33. There is in SMC 25.05.675.G a policy basis for the Director's exercise of substantive SEPA authority with regard to impacts related to height, bulk and scale. Mitigating measures include, among others, limitation to height and modifying bulk. Policy B9 of the Land Use Policies for Neighborhood Commercial Areas provides general SEPA authority to restrict the bulk and scale where the code does not provide for a transition in scale.

34. The appellant/applicant argues that the Director is imposing unreasonable design changes because his plans are already complete; his project is vested to NC1 standards

and should be allowed to develop to the limits of the zoning code. The appellant also argues that DCLU has improperly used the standards of the interim zoning to modify his project.

35. The inclusion of commercial space required by the code is not favored by either the appellant/applicant or the neighborhood representative.

36. The addition of four trees of four-inch caliper required by the Director's Condition#3 may not be effective in mitigating the perceived impacts of height, bulk and scale because there is only approximately two feet of space for planting between the property line and the wall of the proposed basement.

37. Upon remand from the Hearing Examiner, the Director considered the information revealed at hearing (i.e., that an average of approximately 91 vehicle trips per day impacting the alley rather than 220 which had been anticipated in the Director's decision, and that the potential cumulative context may not include the 389 trips per day anticipated from the proposal on the neighboring property). The Director reiterated concern regarding this proposal's vehicle trips and indicated that a "worst case" view of the cumulative context necessitated the assumption that the condition removing the neighboring project's 389 trips from the alley, might not withstand scrutiny by the City Council and thus some of those trips impacting the alley.

Conclusions

1. The Hearing Examiner has jurisdiction of 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. Ap. 762, 637 P. 2d 1005 (1981).

3. Under the required standard of review, decisions of the Director can be overcome only when the reviewer is left with the definite and firm conviction that a mistake has been made. Cougar Mt. Assocs. 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 25.05.660.A.

5. The test of "reasonableness", as described by the 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. The Director has not used the standards of the interim zoning to affect the mitigation intended here. Further, vesting to ordinances effective at the time of permit application does not remove a project from the purview of environmental review. The Director may condition vested projects consistent with the authority granted by Chapter 25.05 of the Seattle Municipal Code, even if that results in projects different from those which would otherwise be allowed by the zoning standards to which the project is vested.

7. In requiring that the building be stepped back on the upper floors, away from the single family edge, the Director properly relies upon SEPA policy which establishes that the height, bulk and scale of development projects are to provide for a reasonable transition between areas of less intensive zoning and more intensive zoning.

8. Defining the appropriate application of the concept "reasonable transition" is difficult and reasonable minds may differ as to how much mitigation is warranted. The formula used by the Director to determine whether and how the building should be modified in order to provide a reasonable transition, is a valid approach in this circumstance, producing a reasonable mitigation, in proportion to the impact. While the formula may not be suitable for use in all cases, in this situation it should result in an appropriate mitigation by decreasing the structure's size relative to how that size is perceived in the single family zone across the alley.

9. The Director was incorrect in projecting that the vehicle trips associated with the commercial space would impact the alley. This assumption was based upon the belief that the basement parking would be used by customers and/or employees connected with the commercial use(s). Without commercial traffic, the number of daily trips associated with this project would be approximately 91 (which does not subtract existing trips) rather than the 220 trips indicated in the Director's Analysis and Decision.

10. The Director's reliance on the Hearing Examiner's conditioning of the neighboring project at 3705 California Avenue S.W. is confusing. That conditioning was apparently considered valid and appropriate so it was cited and used in the subject decision. Yet if the Hearing Examiner's decision is upheld by the City Council as valid and appropriate, the 389 daily vehicle trips associated with that project would not impact the alley, making the cumulative analysis contained in the subject decision significantly inaccurate.

11. The subject proposal is approximately half the size of the project proposed immediately to the north at 3705 California Avenue S.W., both in the number of residential units and the amount of commercial space proposed. Without the 389 trips generated by the project at 3705 California S.W., the 91 trips associated with the subject project would represent the increased traffic to impact the alley (See Conclusion #10). This is less than one-fifth the 550 trips indicated in the Director's Analysis and Decision.

12. On remand, the Director reasserted Condition #2 that requires that the access to basement parking be provided from the street side of the property, rather than from the alley as proposed by the applicant/appellant. Despite the clarification and new information that was provided during the hearing that there would be an average 91 daily trips, not 220 initially estimated, the Director finds the total redesign of the project and disruption of the commercial frontage, a reasonable mitigation.

13. The impact expected from this proposal is a relatively small and the effects on the proposal to comply with Condition #2 is comparatively large. For mitigation to be appropriate and reasonable, it must be clearly linked to the nature and degree of impact. Here the mitigation is disproportionate to the impact attributable to this proposal. The mitigation appropriate and reasonable for the neighboring project which is twice as large and has many times the number of vehicle trips, is not reasonable when applied to this project. A mitigation measure validly applied in one instance, is not necessarily valid in another. Even if the former is adjacent to the latter.

14. During the hearing the appellant/applicant stated that he would like to have this project considered for a variance in order to remove the requirement for commercial space. The elimination of the requirement for use is arguably not something susceptible to the variance process and, in any event, is not within the purview of this appeal.

Decision

The Director's decision is AFFIRMED as modified below:

Condition #2 is eliminated.

Entered this 14th day of March, 1991.


Meredith A. Getches
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 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, 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.