

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

**JOANNE AND PAUL MERRIMAN and
THE BHY KRACKE COALITION**

Hearing Examiner Files
MUP 90-093/094

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

Application No. 8806916

Introduction

The appellants exercised their right to appeal pursuant to Chapter 23.76, Seattle Municipal Code.

This matter was heard before the undersigned Deputy Hearing Examiner on March 19 - 21, 1991. The record was held open until March 27, 1991 for the submission of written closing arguments, and to allow time for a site visit by the Examiner.

The hearing on this matter was consolidated with the appeals of these same appellants from a Land Use Code Interpretation by the Director of the Department of Construction and Land Use. The Hearing Examiner Files for those appeals are S-91-001/002.

The parties to the proceeding were: appellant Bhy Kracke Coalition by Susan Diamondstone, attorney-at-law; appellants Paul and Joanne Merriman by J. Richard Aramburu, attorney-at-law; the project applicant, James Paul Jones by Terence Danysh, attorney-at-law; and the Director, Department of Construction and Land Use by Hermia Ip and Cheryl Waldman, land use specialists.

A prehearing motion was brought by the Director to dismiss any question of the project's vesting from this appeal. That motion was granted by the Examiner at the beginning of the hearing.

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 1231 5th Avenue North on Queen Anne Hill, directly north of the Bhy Kracke Park. Existing development on the site consists of two single family homes and tow accessory garages.
2. Most of the property is zoned Lowrise 3 (L-3), but the west 29 feet of the site is zoned Single Family 5000 (SF 5000). The site slopes downhill from west to east and from north to south, and is in an environmentally sensitive area due to its slope.
3. The subject site has street frontage on Fifth Avenue North. The site does not abut any alley right-of-way.
4. Immediately to the west of the subject site are two SF zoned properties, each developed with a single family home. Directly across Fifth are a number of single family homes, though those properties, like all the properties on the east side of Fifth, are zoned Lowrise 3. Properties to the north of the subject site are also zoned L-3, and are developed with apartments. Bhy Kracke Park, on the southern edge of the site, is zoned Single Family.
5. Under project #8806916, the applicant proposes to demolish the existing structures on the site and construct a 15-unit apartment structure with parking for 23 vehicles. The application, which included the application for a building permit, was submitted on July 26, 1989, and DCLU has determined that the project is subject to the Code provisions in effect on that date. The structure is terraced back from the park, with each level having a substantial deck. No portion of the new structure exceeds the height limits of the Code, as determined in the Examiner's decision on the Director's Interpretation (Files S-91-001/002). However, because of the way it moves up the slope, the structure has units on five different levels.
5. Ordinance 113858, adopting interim standards for multifamily zones, including Lowrise 3 zones, was adopted on March 8, 1989.
6. As it climbs Queen Anne Hill from Valley Street up to the subject site, Fifth Avenue North is quite steep. At Valley Street, the elevation of Fifth Avenue is 102 feet; at Highland Drive (four blocks to the north), its elevation is 232 feet. Other streets in the area are also steep. Highland Drive climbs from 232 feet to 292 feet in the one block between Fifth and Fourth Avenue North.
7. Approximately 25 feet south of the subject site, the Fifth Avenue roadway splits into two segments which will, for convenience, be referred to as upper Fifth and lower Fifth. Upper Fifth constitutes the westerly fork and lower Fifth the easterly. In between is an undeveloped median of approximately 20 feet in width. The roadway of

each fork is developed to a width of 18 feet. In addition, upper Fifth is developed with a sidewalk along its western edge, while lower Fifth is developed with a sidewalk along its eastern edge. The total width of the Fifth Avenue right-of-way in this area is 66 feet. The greatest topographic difference between the two forks is approximately eight feet.

8. Progressing north from the location of the fork, lower Fifth intersects with and terminates at Lee Street. Upper Fifth, meanwhile, terminates in the parking lot of the apartment at 1251 Fifth Avenue, which consists in part of a vacated portion of Lee Street. This parking lot serves as a dead end.

9. The existing apartments north of the subject site on Upper Fifth have a total of 40 units.

10. The proposed project is expected to generate 100 vehicle trips per day.

11. Parking in the area of this project is very limited. The applicants provided information indicating a utilization of on-street parking of approximately 77-80% in the evenings. The appellants submitted a study done on the evenings of March 11, 12, and 13 showing a parking utilization of roughly 90%. They also introduced parking studies done in conjunction with the project at 1250 Fifth Avenue North (project 8801905) to suggest that parking utilization was at capacity (defined as 85% utilization).

12. There are a number of differences between the parking surveys done by the applicant and by the appellants. One difference is that the applicant's study did not include parking on Taylor in its calculations. This is significant because Taylor between Prospect and Lee Streets generated some of the highest parking utilization rates shown on the appellant's survey. Another difference is that the applicant's study was done earlier in the evening. A final, and perhaps crucial difference, is that the numbers used by the two parties for parking supply along different segments of the various streets are somewhat at odds. The appellants derived their numbers for parking supply from the study done by TDA (a professional traffic consultant) for the project at 1250 Fifth. The applicant did a new study, and arrived at some different numbers. The applicant's survey was not done by a professional traffic consultant, though Stephen Lovell, who is a professional traffic engineer, testified that the study generally conformed with SED guidelines.

13. The Council decision reached in regard to the project at 1250 Fifth Avenue (C.F. 297127) found that parking within the study area for that project was near capacity and specifically allowed a spillover sufficient to bring the on-street parking to capacity. Conclusion #4 of that decision includes the following language:

We have defined capacity as 85% of the average supply of 145 spaces, or 123 spaces. We impose a condition reducing the number of units to 37. With 37 units, the projected parking demand generated by the

project, using .4 spaces per unit (a rough average of the figures debated in the record), the spillover is 6 spaces. This will leave overall projected demand, including this project, at 123 spaces for the neighborhood, or exactly at capacity.

It should be noted that the project at 1250 Fifth required a conditional use permit as well as SEPA review. Thus, the Council was not limited to the SEPA policies in its conditioning of the project. It should also be noted that the project, which is designed to house the low-income elderly, has only recently been completed and is not yet occupied. Thus, the parking surveys submitted in this case do not reflect any impact that project might have.

14. The project would provide 17 parking spaces in a lower garage under the southern portion of the building, and an additional 6 spaces in another underground garage under the northern portion of the building. In providing 23 parking spaces for 15 units, the project is providing parking at a ratio of 1.53 parking spaces per unit. On a city-wide basis, the Seattle Engineering Department calculates that each multifamily unit generates a need for 1.5 parking spaces.

15. At hearing, the applicant indicated that the plans for the project could be revised to provide an additional parking space in front of the building that would be usable by guests or persons making deliveries to the building. The applicant also indicated that the system governing the door to the upper garage could be configured in a way that would allow entry into that garage by nonresidents.

16. As noted above, the property slopes downward to the east and to the south. The four corners of the property have the following elevations:

SE corner	269 feet
SW corner	302 feet
NE corner	278 feet
NW corner	322 feet

17. Existing development on the site includes a number of retaining walls. One runs east-west, approximately in the middle of the property, and is proposed to be removed. Another retaining wall runs along the western boundary of the property. A third retaining wall runs parallel to this wall on the northern portion of the property. These latter two walls are to remain.

18. The construction of the proposed apartment building would require the excavation of approximately 1,860 cubic yards of earth. Because of concerns about the stability of the retaining walls on the site, the plan is to provide shoring along the western side of the site. Two caissons are to be drilled along the base of the more easterly of the north-south retaining walls in order to provide additional support for that wall.

19. Only two borings were made on the site by the applicant's soil consultant. Both borings were in the middle of the property, where the land is relatively flat. The borings found sand and sandy silt. No borings or other explorations were made of the soils on the slope along the western portion of the property, which is extremely steep, rising 15 vertically feet in the course of 22 feet horizontally.

20. Mr. Gadberry, who has owned one of the properties above the subject site for more than 30 years, believes that the steep slope is composed of clay. He bases this belief on what he observed when the slope was dug into in the course of installation of his retaining wall. Mr. Gadberry also testified that he had witnessed water coming out of the slope and onto Fifth Avenue.

21. The applicant's soils engineer has submitted a minimum risk statement in accordance with Directors Rule 2-87.

22. As noted above, residential units will be provided in 5 different levels. All these levels will be visible from Bhy Kracke Park. All five levels will be visible from the east also. Although the structure is consistent with the Code height requirements, because of the grade of the property, the top of the elevator penthouse will be 51 feet above the level of Fifth Avenue.

23. According to page 13 of the project plans (Exhibit 6), the roofs of the various levels are at the elevations listed below. For purposes of clarification, it should be noted that the lowest level with residential units is designated on the plans as the basement. Thus, the plans describe the building as a four floor apartment over a basement and a cellar. DCLU describes the project as a five story apartment with basement parking. Using the floor designations used by the applicant on the plans, the roof elevations are as follows:

Cellar	279.25 feet
Basement	288.35 "
First Floor	296.95 "
Second Floor	305.55 "
Third Floor	313.15 "
Fourth Floor	322.75 "
Roof parapet	324.75 "
Stair Tower	326.25 "

24. As noted above, all five residential levels of the proposed building will be visible from Bhy Kracke Park. In addition, the full depth of the structure will be visible from the park. Some mitigation of this effect is achieved by the structure being terraced away from the Park and by the fact that there will be landscaping both between the building and the Park and along the edges of the terraces that will drape over the terraces.

25. The primary views from Bhy Kracke Park are to the east towards Lake Union, Capitol Hill, and the Cascades, and to the south, towards Downtown and Mount Rainier. While DCLU found that the proposed apartment would not affect those views, some of the photographs submitted by the appellants show that views to the northeast will be affected from various parts of the Park.

26. Under the applicable density standards, this site could be developed with one unit for every 700 square feet. The site has 13,871 square feet, which could allow 19 units.

27. The Code parking requirement for this project is 19.33 stalls.

28. Section 25.05.660.A discusses mitigation under SEPA. Among other things, subsection (2) provides that "Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal." Subsection (3) provides that "Mitigation measures shall be reasonable and capable of being accomplished." Subsection (4) notes that "Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal. Voluntary additional mitigation may occur."

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76, SMC.

2. The Hearing Examiner must give "substantial weight" to the DCLU Director's decision. Section 23.88.020.E.1. 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 (1988).

4. The principal concerns regarding this project broke into five principal areas: traffic; parking; soils; height bulk and scale; and view protection.

Traffic

5. There can be no question but what the street system in this part of Queen Anne creates difficulties for vehicular traffic. Many streets are steep or of substandard

width. Upper Fifth, at the location of the project, is reasonably level, but is narrow and dead-ends about 100 feet north of the subject site. While it is a virtual truism that adding any additional cars to a bad traffic situation may tend to make that situation worse, the evidence submitted does not lead to the conclusion that the addition of the these 15 units will substantially impact the existing situation. There are two reasons for this. One, the addition of 100 vehicle trips is not a large addition to the traffic using the street system in the area, including that using Upper Fifth. Two, while Upper Fifth is unusually narrow, the site for this project is only just north of the fork dividing Fifth Avenue.. Any car either leaving or entering the project will travel along upper Fifth for only 25 feet. The rest of that vehicle's trip will be on Fifth south of the fork, where the street exists as a single roadway.

Parking

6. Whatever parking study one accepts, parking is unquestionably tight in the immediate vicinity of the project. While the parking situation does, as testified to by Mr. Lovell, get better as one goes to the west on Highland into the single family area, the fact is that Highland is extremely steep, and is likely to discourage persons associated with this project from attempting to park in the single family area.

7. Given that the parking situation is not good, the question then becomes one of what, if anything, can be done. The DCLU analysis stopped with its finding that the project provided 1.5 parking spaces per unit, the conclusion apparently being that, by providing 1.5 spaces, the project fully satisfied its parking demand.

There are at least two problems with DCLU's action in this regard. First, while the parking ratio of 1.5 parking spaces per units has taken on almost mystical significance in regard to parking studies in the City, there room for doubt as to how accurate a projection it creates for a project of this type in this location. The second problem is that even if one assumes that 1.5 is a good number, and that the number makes allowance for visitors to the apartment, if visitors and delivery persons have no access to the off-street parking provided by a project, then those persons will not be accommodated by the project parking and will have to seek their parking on the street.

8. Appellant argues that appropriate mitigation would consist of either reducing the number of units in the project (as was done to the project at 1250 Fifth) or increasing the parking ratio applicable to the project. Unfortunately, this too poses some problems. For one, limitations on density are not allowed to mitigate parking impacts, whether as project-related impacts or as cumulative impacts (see 25.05.675.M.2.c.v and 25.05.670.C). For a second, the Examiner is unaware of any multifamily project where the City Council has required a parking ratio of greater than 1.5. Finally, parking ratios aren't the entire issue; as discussed in the above paragraph, if visitors and delivery people cannot gain access to the project parking, no amount of parking will remove their need to park on the street.

9. After consideration of the various factors, the Examiner will not require a reduction in units or an increase in the parking ratio in this case, if for no other reason than the fact that based on existing data it is impossible to conclude that DCLU was in error to decide that the project provides adequate parking. However, some provision for persons visiting the site is needed. Thus, the project should be conditioned to provide that at least three of the spaces in the upper garage shall not be reserved spaces but shall be available on a first come, first served basis.

Soils

10. As suggested in the findings, this site is located on the side of a steep slope. The steepest part of the slope, the westernmost portion, will not be built upon. This does not, however, remove all concern, as the stability of that westernmost portion is crucial to the safety both of the residents of the project and of the homes at the top of the slope. The Examiner is generally satisfied that the applicant's geotechnical engineer has proposed measures that should ensure that stability, but believes that some exploration of the soils on the upper slope should be conducted to confirm the nature of the soils making up that slope. Mechanical borings of the western slope are, apparently, infeasible due to the steepness of the slope, but hand borings should be conducted to confirm Mr. Finley's assumptions about the soil types. Particular attention should be paid to the soils along the base of the upper retaining wall, which Mr. Gadberry testified consisted of clays.

Height, Bulk and Scale

11. In terms of height, bulk, and scale, the principal impacts of this project are to properties to the south and east. From the south, from within Bhy Kracke Park, the project will appear as a five story building, albeit as one that is stepping back away from the park. From the east, one will see five stories on top of a partially exposed basement. Moreover, the tallest portion of the structure, the stair and elevator tower, is proposed to be set back only five feet from the street.

12. The Overview policy (25.05.665) generally does not allow additional mitigation if a particular impact is already subject to regulation intended to mitigate such impacts. However, subsection D.3 provides that mitigation is allowed when, "the project site presents unusual circumstance such as substantially different site size or shape, topography, or inadequate infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable City code or zoning."

The above subsection describes the case here. While the structure satisfies applicable Code regulations on height and bulk, the topography of the site allows the construction of a larger building than would generally be envisioned. Even under the Lowrise 3 provisions in existence prior to the adoption of the interim standards, one would not normally have anticipated a five story building in a zone with a 35 foot height limit. A

five story building is even less to be expected under the interim standards with their 30 foot basic height limit.

13. Given the scale of some of the other buildings in the area, this appearance of height and bulk might be acceptable did this project not abut a park. Whether or not the fact that the park is zoned single family can properly be said to create an edge, the fact is that the scale of the proposed project in relation to the undeveloped park is jarring. While it is true, and is again acknowledged, that the stepping back of the structure will reduce the perception of bulk, the fact remains that the project, as proposed, creates a five story building overlooking a single family zoned park. Reduction of the project's height by the equivalent of one story would aid not only in reducing the appearance of bulk, but in creating a building that more closely resemble what was anticipated by the interim zoning regulations.

View Impacts

14. The City's SEPA policies provide only limited protection of views. However, among the views they do protect are the views of Lake Union and the Cascades from various public places, including Bhy Kracke Park. Exhibits 27 and 28 indicate that the project, as proposed, would block views from the park to the northeast and would hinder or obstruct protected views from various parts of the park. Enforcement of this policy provides a separate basis for calling for the reduction in height of the proposed structure. Conditions may be required of projects to reduce adverse impacts on designated views, "whether or not the project meets the overview policy . . .". 25.05.675.P.2.a.ii. Exhibit 28 and the Examiner's own visit to the site lead him to the conclusion that reduction of the structure by one story would help alleviate view impacts, especially from the middle level of the park.

Decision


The decision of the Director is AFFIRMED with the addition of the following three conditions:

(1) At least three parking spaces in the upper garage will not be reserved for particular units, but will be available on a first come first served basis. The door system shall be such as to allow access into the garage by visitors.

(2) The applicant shall have its geotechnical engineer take at least two hand borings on the slope to the west of the proposed structure in order to verify the nature of the soils on the slope. These findings shall be reported to the Quality Control section of DCLU, along with the opinion of the engineer as to whether the findings merit any changes in his original report and recommendation. The submission of this information must occur prior to the issuance of any building permits for construction on the property.

(3) No portion of the main roof of the structure shall exceed 314 feet in height. Elevator and mechanical penthouses and equipment may exceed this limit as permitted by the Land Use Code.

Entered this 5th day of April, 1991.


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 with the King County Superior Court within fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.022(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, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521. 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.