

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

MADISON PARK COMMUNITY COUNCIL

FILE NO. W-80-006

from an environmental determination
of Department of Community Development

Introduction

The appellant exercised its right to appeal pursuant to Section 20 of the SEPA Ordinance (105735, as amended).

This matter was heard before the Hearing Examiner on June 4, 1980.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. This is an appeal to the Hearing Examiner of a Declaration of Non-Significance (DNS) prepared by the Department of Community Development (DCD) made with respect to a proposed townhouse development to be located at 2007-2011 - 42nd Avenue East, Seattle. Appellant is the Madison Park Community Council.

2. The appeal was timely filed and the hearing was held on June 4, 1980. The record remained open until June 18, 1980 for filing of post-hearing briefs by the parties.

3. Appellant is a not for profit unincorporated association comprised of individuals who live in the general vicinity in which the proposed townhouse development would be built. The purpose of the organization is to "ensure that adequate planning occurs and that decisions requiring zoning, land use, transportation...will protect and enhance over the short and long run the residential atmosphere, environment and integrity of the area." By way of a vote of its membership on February 20, 1980, the appellant adopted a position in opposition to any future townhouses on 42nd Avenue East without preparation of an Environmental Impact Statement (EIS). One of its members, Mr. Perthou, lives one block away from the proposed project and others, including witnesses Wettack and Lehman, live in close proximity to the project on the same street. They all claim that they will be injured should the project be completed. According to Wettack, the injury would be by way of a less pleasant living environment, an environment which is now and has been attractive to live in.

4. Madison Park is a primarily residential neighborhood located in the east central portion of the City of Seattle. As with any neighborhood, precise boundaries are not ascertainable. However, appellant describes the neighborhood as being bounded on the north by SR 520; on the west and south by Lake Washington Boulevard and Madrona Drive and on the east by the shores of Lake Washington.

5. A major vehicular artery, East Madison Street, runs diagonally through Madison Park in a south westerly-north easterly direction. At the eastern end of East Madison Street there exists a small commercial-business-service area. East Madison Street continues to and through the Seattle central business district (CBD) and ends at the state ferry terminal on Elliott Bay. In the

Madison Park neighborhood, East Madison Street carries substantial amounts of vehicular traffic, including public transit. The easterly reaches of the neighborhood consist of Washington Park, more commonly known as the Arboretum. This is a large expanse of forest and plantings. Through it runs a vehicular arterial in a roughly north south direction. However, the park is more than a greenbelt for streets; it serves to prevent east-west vehicular traffic from having access to Madison Park from adjacent neighborhoods to the west. Such traffic can most easily gain access to the Madison Park neighborhood only by way of East Madison Street. cf. City's Exhibits 6 and 7.

6. Zoning in the Madison Park area is primarily residential, RS 5000. The area generally north of East Madison Street is zoned RM. Immediately to the west of that zone is an RD 5000 zone bounded on the north by East McGilvra Street, on the east by the alley between 42nd and 43rd Avenues East; on the south by East Newton Street and on the west by the alley between 41st and 42nd Avenues East. To the west of that zone is a large RS 5000 zone. The property with which this appeal is concerned is located near the southwest corner of the RD 5000 zone, one lot away from the intersection of East Newton Street with 42nd Avenue East.

7. There are 61 lots in the RD 5000 zone in question. Much of the housing stock in that zone and in the eastern portion of the RS 5000 zone consists of former beach cottages or houseboats relocated to their current positions. These dwellings are generally small in bulk and area as photographs produced by all parties demonstrate. Fifty-one of the 61 lots in the RD 5000 zone and some of the lots in the eastern portion of the RS 5000 zone contain less than 5000 sq.ft., the minimum amount of lot size required for new construction.

8. The proposed development would require demolition of three cottage-type dwellings. In their place a five-unit townhouse would be constructed. As now planned, the development meets applicable side and rear yard setback requirements. The review process for townhouses set forth in Section 11.11(c) of the Zoning Ordinance 86300, has not yet occurred. That portion of the Zoning Ordinance permits townhouse use in an RD zone.

9. Within the RD 5000 zone in question and on 42nd Avenue East there currently exist two completed townhouse developments. One of those developments is located at 2339-47 - 42nd Avenue East and contains 10 units. It replaced five dwellings. The other development is located at 2026-32 - 42nd Avenue East and contains seven units. It replaced four dwellings. This development has occurred only since 1975, although the townhouse provision of Ordinance 86300 have been in effect since 1969.

10. Appellant and/or its representatives previously requested that the RD 5000 zone be changed to RS 5000. An application for such a change was made with the City Council and withdrawn in 1977. Appellant is still intending to pursue that course of action. One of the four criteria for such change in zoning is that a minimum of 70% of the housing stock in the proposed zone be actual single family residences. According to the City's witness, about 18 of the 61 lots, or almost 30%, in the RD 5000 zone are presently devoted to other than single family dwellings.

11. It is clear that other contiguous lots in the Madison Park RD 5000 zone are owned by single owners. However, there is no evidence as to precisely how many such parcels exist along 42nd Avenue East.

12. The proponents' proposal for development is a sensitive one and appears to take into consideration the physical setting of the project. It is obviously the product of extensive effort and thought. The proposed development would not present a solid front comprising five units. Rather, each of the units, while

connected to the other, would be a different distance from the street. In addition, the height of the project would not be uniform. As an isolated structure, it is apparent that the design is a credit to the imagination and ingenuity of its architect, one of the project's proponents.

13. An environmental specialist of DCD reviewed the proponents' environmental checklist, City's Exhibit No. 2. The checklist employed is in a form prescribed by WAC 197-10-365. Appellants are primarily concerned with items 11, 12, 13, 18, 19 and 20 of that checklist - i.e., population, housing, transportation, aesthetics, recreation, historical - although they are also concerned with other proportions of the completed checklist. With the exceptions of points 12 and 13(a), the environmental specialist found that the project would have no environmental impact. In doing so, the specialist concurred with the preliminary evaluation made by the proponents. See City Exhibit No. 2. The specialist found, however, that the project would have an affect on housing, Item No. 12, City Exhibit No. 2. The proponent indicated that there would be no such impact on housing. With respect to the impact on housing found by the specialist, he noted "the project will result in the removal of three older dwelling units and replaced [sic] with five townhouses."

14. Positions of the parties with respect to population impact of the project are indicative of their differences with respect to the overall impact of the proposed project. The City's environmental specialist testified that the average city residence housed two persons while the average residence in Madison Park housed 2.2 persons. Thus, the specialist calculated that the proposed project would result in a net gain of 4.4 persons. The appellant used a different approach. It employed a bedroom analysis (testimony of Perthou). While the description of this technique is sinister and perhaps evocative of a misplaced right to privacy issue, the Hearing Examiner is relieved to report that it merely is a means of projecting population in a given area on the basis of residential bedrooms. This analysis requires one to determine the current and projected number of bedrooms in a given area. This produces a ratio which, in turn, is applied to the zone as a whole. This, as applied in this case, assumes total conversion of the RD 5000 zone into townhouse development (testimony of Perthou). This analysis leads to the conclusion that the population of the zone will triple. No evidence was presented by either side as to how many persons currently reside in existing townhouse developments, either in this zone or in the city as a whole. The Hearing Examiner cannot completely accept the analysis proffered by appellant because of its assumption of total conversion of the zone into townhouse development. However, as will be seen infra, the City's projection on population growth based solely on the effect of this one project is insufficient.

15. In support of his analysis of the environmental impact of the project in general and of the population impact in particular, the City's environmental specialist testified that he could foresee no more than one or two townhouse developments within the RD 5000 zone within the next five years. While this opinion is to be accorded substantial weight, the evidence is clear that there is a trend toward townhouse type development in this zone. This is due to the adjoining RM 800 zone to the east; the past development of townhouses within the zone; the fact that certain contiguous parcels in the zone are under single ownership and the desirability of the Madison Park community as a place to live in terms of its physical setting, proximity to the CBD, isolation and quality of public transit. This trend will require further demolition of existing dwelling units in the RD 5000 zone and it will increase the population density of that zone by an appreciable degree.

16. The trend of development found in the preceding paragraph obviously affects factors other than population. The environmental specialist testified that the project would have an effect on housing. However he believed the effect was nominal because of the small increase in population he attributed to the proposed project. The specialist also testified that a substantial reduction of dwelling units would be, of itself, a significant adverse environmental impact in an urban area.

17. Beyond the projected increase of the population density in the RD 5000 zone due to this project and others reasonably to be anticipated, it is also clear that the nature of the project will change the aesthetics of the zone. While the design, by itself, is pleasing, in the context of the small cottage-type structures which predominate in the zone it is not unreasonable to view the bulk and height of the proposal as less than pleasing. That was the testimony of witnesses Lehman, Clancy and Wettack at the hearing. The Hearing Examiner acknowledges that such an evaluation by witnesses is necessarily subjective. However, the testimony and demeanor of the witnesses are convincing that they sincerely held their beliefs.

Conclusions

1. Appellant has standing to challenge the DNS issued by DCD. Here, certain of appellant's members testified that they would be harmed by the proposed project and the likely trend of similar development it would foster. See SAVE v. Bothell, 89 Wn. 2d. 862, 867 (1978); see also Warth v. Seldin, 422 U.S. 490 (1975).

2. In reviewing a DNS, the reviewing authority uses the clearly erroneous standard. Sisley v. San Juan County, 89 Wn. 2d. 78, 84 (1977). As a standard of review of administrative action, it is "extremely broad." Id. Our state courts have recognized that because of the broad policy considerations of SEPA, the more pervasive review required by the clearly erroneous standard is to be preferred over the arbitrary and capricious standard in examining negative threshold determinations. See Norway Hill v. King County Council, 87 Wn.2d. 267, 272-75 (1976). In applying the clearly erroneous standard, the Hearing Examiner "is expected to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision." Sisley, supra at 84. Clear error is found if the reviewer can firmly say that a mistake has been committed. Ancheta v. Daly, 77 Wn. 2d. 255, 159-60 (1969).

3. The courts of this state also instruct that in applying the clearly erroneous standard to review of a DNS, "[t]he entire record is open to judicial scrutiny and the court is required to consider public policy and environmental values of SEPA as well." Sisley v. San Juan County, supra at 84. There is no reason to believe that a different standard should apply with respect to a review by Hearing Examiner as opposed to a superior court.

4. The public policy which is embodied in SEPA is not cloaked in mystery. Rather, it is plainly set forth in the statute itself. RCW 43.21C.010 states in part:

"The purposes of this chapter are:

- (1) to declare a state policy which will encourage productive and enjoyable harmony between man and his environment;
- (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere;
- (3) and stimulate the health and welfare of man;

RCW 43.21C.020 amplifies further these policies:

The legislature, recognizing that man depends upon his biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment; and recognizing further the profound impact of man's activity on the inter-relations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Washington...to use all practical means and measures... to:

- (a) foster and promote the general welfare;
- (b) to create and maintain conditions under which man and nature can exist in productive harmony; and
- (c) fulfill the social and economic and other requirements of present and future generations of Washington citizens.

* * *

The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. (Emphasis added.)

5. Regulations adopted by the State Council on Environmental Policy provide guidelines for SEPA and are found at Chapter 197-10 of the Washington Administrative Code (WAC). Threshold determination criteria are found at WAC 197-10-360. These regulations acknowledge that it is not possible to define in a cogent manner when a government action will significantly affect the environment. See also Norway Hill v. King County Council, supra, at 277-78.

6. The regulation at WAC 197-10-360(2) also recognizes that while the environmental checklist prescribed therein and prepared in this case is exhaustive of specific environmental concerns to be considered, the responses are not weighted. This is because

[D]epending upon the nature of the impact and location of the proposal, a single affirmative answer could indicate a significant adverse impact....The same project may have a significant adverse impact in one location, but not in another location." Id.

7. Rather than define what a significant impact is, the courts in this state instead say that the EIS provisions of SEPA are triggered "whenever more than a moderate effect on the quality of the environment is a reasonable probability." Norway Hill v. King County Council, supra at 278 (emphasis added).

8. In this case, the Hearing Examiner is convinced that DCD made a mistake in not taking into account the reasonably foreseeable trend of development in the RD 5000 zone located in Madison Park. That mistake clearly affects items 11, 12, 13, 14 and 18 of the environmental checklist prepared by DCD. The Hearing Examiner believes that the trend of development in this zone is away from single family residences - which now comprise about 70% of the lots in the zone - to larger units of housing, such as townhouse developments. It is clear that this project will heighten that trend. Under SEPA, such a trend and its expected

heightening by projects subject to SEPA is cognizable by the lead agency. Polygon Corporation v. Seattle, 90 Wn.2d. 59, 70 (1978).

9. It is found that the design of the project, by itself, is sensitive and meritorious, supra. However, when placed into a neighborhood of predominantly smaller dwelling units, the aesthetic effect is considerable. This is a proper consideration in making a DNS. See Polygon Corporation v. Seattle, supra, at 70. That the zone qualifies for townhouse use, Ordinance 86300, Section 11.11(c) does not remove the project from analysis under an EIS. See Norway Hill v. King County Council, supra, at 270.

10. Respondent City notes that a project including four or fewer dwelling units is categorically exempt from SEPA. It argues that because the proposal herein involves only five units, one can infer that the impact, if any, must be deemed miniscule and in no event, more than moderate. While the argument is appealing, and tends to carry with it the force of logic at first blush, the experience under the policy of SEPA dictate that such extensions be given no weight. In this regard it must be noted that regulations describing categorical exemptions cannot themselves evade the requirements of SEPA. See Downtown Traffic Planning Association v. Royer, 26 Wn. Wash. App. 156, 164-65 (May, 1980). With this caveat in mind it is not possible to allow the appealing logic of this argument of the City to permit non-compliance with the requirements of SEPA.

11. Because of the reasonable trend of development to be anticipated by construction of this project, and because of the cumulative effects of this project reasonably to be anticipated thereby, the Hearing Examiner is convinced that the overall impact of this project would have more than a moderate impact upon the environment within the RD 5000 zone of the Madison Park. Therefore, Respondent's determination is reversed and the file is remanded for reconsideration of the significance of the following factors consistent with this opinion and authorities cited therein:

(a) Population

(b) Housing, particularly the relation between this project and the trend of foreseeable development in the zone and the effect of such development on creation of an RS zone in the RD 5000 zone in question.

(c) Transportation

(d) Public services, particularly sub parts (c), (d), and (f) of Item 14 of the Respondent's environmental checklist.

(e) Aesthetics

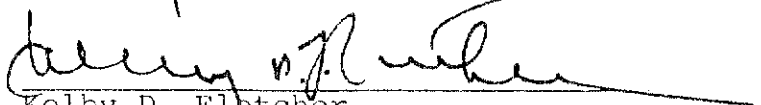
(f) Recreation

Following such reconsideration, appellant may move for further proceedings before the hearing examiner.

Decision

The appeal is GRANTED and the determination of the Department of Community Development is REVERSED and REMANDED.

Entered this 1ST day of July 1980.


Kelby D. Fletcher
Hearing Examiner Pro Tempore