

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

In the Matter of the Appeal of

UNIVERSITY CLUB AND GAINSBOROUGH
APARTMENTS

FILE NO. S-76-020

from a ruling of the Superintendent
of Buildings

The appeal is DENIED and the interpretation
of the Superintendent of Buildings is affirmed.

Introduction

The appellants, University Club and Gainsborough Apartments, filed an appeal from an interpretation of the Superintendent of Buildings concerning property located at 1122 Madison Street. The appellants exercised their right to appeal pursuant to Section 25.40 Ordinance 86300, as amended by Ordinance 104795.

This matter was heard before the Hearing Examiner on August 25, 1976.

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. McDonalds Restaurants, Inc. (hereinafter, permittee), filed an application for a building-use permit for a restaurant on July 14, 1976 with the Superintendent of Buildings (hereinafter, Superintendent). On July 27, 1976 the Superintendent published notice of a decision to approve the requested permit. The appellants filed an appeal with the Hearing Examiner on August 10, 1976 and amended said appeal on August 19, 1976. The appellants challenged the decision of the Superintendent claiming that the proposed restaurant will in fact be a drive-in restaurant and that it will not conduct its business wholly within an enclosed building.

2. The subject property is located at 1122 Madison Street in a Community Business (BC) Zone. This zone permits outright the development of a restaurant, pursuant to Sections 26.30.020 (a), 26.29.020 (a), and 26.28.020 (b), Seattle Code. A drive-in restaurant is permitted in this zone only as a conditional use, pursuant to Section 26.30.070 (h). A public hearing and approval of the Seattle Hearing Examiner are required before a conditional use can be authorized in this zone.

3. All businesses or service associated with a use in a BC Zone must be conducted wholly within an enclosed building, pursuant to Section 26.30.010 (a), Seattle Code.

4. A drive-in business is defined by Section 26.06.050, Seattle Code, as follows:

A business where a customer is permitted or encouraged, either by the design of physical facilities or by service and/or packaging procedures, to carry on business, in the off-street parking area accessory to the business, while seated in a motor vehicle.

5. The subject property is located on the northwest corner of the intersection of Madison Street and Minor Avenue. The proposed use will occupy most of an existing building on the property, although a portion of the north part of the structure will be removed. The remainder of the structure will be retained and remodeled both externally and internally. A rather elaborate interior design is contemplated in an effort to enhance the atmosphere for those who remain in the structure after purchasing their order.

6. The proposed use will provide prepared food to its customers which will be packaged and served in paper containers. The food will be generally served on a tray when it will be consumed within the building and if a person requests carry-out service, the food will be served in a paper bag to facilitate its removal from the premises. All customers wishing service must enter the structure and order from a counter at which the customers place their orders with the employees of the permittee. Customers then receive their orders and make payment at the same counter. Customers cannot place an order or otherwise receive service from outside of the structure, nor can they receive service at the seats within the building.

7. An accessory off-street parking area will be provided on the west side of the structure and will have a capacity of 28 to 32 vehicles. The permittee intends to provide the minimum amount of parking spaces as required by the zoning code. Although no customer service will be provided to persons in vehicles in the parking area, it is foreseeable that some persons may consume their orders within their vehicles, since the permittee will provide carry-out service upon request. The permittee projects that less than 1% of the customers will eat their meals in their vehicles while parked in the accessory parking area.

8. The permittee intends to provide an outdoor patio with seating to accommodate 24 persons which will be available to customers who desire to eat outdoors. It does not appear from the record that the Superintendent has specifically ruled on the acceptability of an outdoor patio in a BC Zone. The permittee has indicated that the patio will be provided only if it is authorized by the Superintendent as being permitted in this zone.

9. The subject property is located in the general vicinity of Seattle University as well as several hospitals and office buildings. The permittee projects that approximately 70% of the customers of the proposed use will walk to the site rather than drive. The permittee foresees that the use will attract most customers during the daytime, particularly during lunch, as opposed to the evening hours when the business generated is expected to lessen significantly.

10. The appellants own property which abut the north and west margins of the subject property.

Conclusions

1. The appellants have not met the burden of proof and have failed to establish that the proposed use is a drive-in restaurant, which would require conditional use approval before a permit could be issued, nor that the use will not be conducted wholly within an enclosed building. The aforementioned definition of a "drive-in business" in the zoning code is the controlling factor in determining the nature of the proposed use and it is clear that the use does not fall within this definition and consequently cannot properly be termed a drive-in restaurant. The permittee will conduct its business wholly within the restaurant structure with none occurring in the accessory off-street parking area. The fact that the restaurant will provide carry-out service or that an insignificant number of patrons will choose to eat their meals in their parked vehicles does not bring the use within the definition of a drive-in business.

2. The Superintendent does not have the discretion or authority to expand upon or liberally interpret provisions of the zoning code as is argued by the appellants. The doctrine that administrative authorities are properly concerned only with compliance of an ordinance and not questions of policy, which could invite discretion and potentially lead to violations of the equal protection of the laws, is well established in this state. State ex. rel. Ogden v. Bellevue 45 Wn.2d 492, 275 P.2d 899 (1954) and Eastlake Community Council v. Roanoke Assoc. Inc., 82 Wn.2d 475, 513 P.2d 36 (1973). It is within the authority only of the legislative body for the city to bring a use such as that proposed by the permittee within the definition of a drive-in business or to create a new category and regulate it accordingly. The Superintendent can only apply the zoning code as it is written and if the definitions or other provisions are too narrow, only the City Council can properly expand them through additional legislation.

3. The interpretation of the Superintendent is consistent with precedent established by case law in other jurisdictions, most of which involve situations where the courts do not have the benefit of a controlling ordinance definition. In addition to cases cited by the permittee which support the Superintendent's interpretation, the court in Burger King of St. Louis, Inc. v. Weisz 444 S.W.2d 517 (Mo. 1969) emphasized that the fact that a use is not a full-service restaurant does not render it a drive-in restaurant. In determining that a proposed "fast-food" restaurant was not a drive-in restaurant, the court considered a similar factual situation as is here the case. The court held that serving prepared food in paper containers from an inside counter with carry-out service provided did not amount to a drive-in operation. The court further noted that the restaurant had 70 inside seats for customers and 40 accessory parking stalls. The restaurant proposed here by the permittee is clearly more pedestrian oriented than other similar "fast-food" operations determined in other cases to be restaurants, and the permittee is obviously emphasizing the inside dining characteristics of the restaurant.

4. The fact that the proposed restaurant will provide carry-out service, will serve food in paper containers, and will have a small number of patrons who choose to eat their meals in their parked car does not amount to conducting the business outside of an enclosed building. Consequently, the proposed use does not violate Section 26.30.010 (a), Seattle Code, and is not a prohibited use in a BC Zone.

5. No inference should be made with regard to whether the proposed outdoor patio is in compliance with the requirements that a business or service in a BC Zone be operated wholly within an enclosed building. It not appearing that the Superintendent has included a determination on this matter within the interpretation which has been appealed, the Hearing Examiner will not assume the authority to render a decision on a subject which is within the scope of the Superintendent's authority. It is presumed that the permittee will comply with all applicable code provisions and if the outdoor patio is not permitted by the Superintendent, it will be excluded from the plans or a variance application filed.

Decision

The appeal is DENIED and the interpretation of the Superintendent of Buildings is affirmed.

Entered this 2ND day of September, 1976.

John L. Hendrickson
John L. Hendrickson
Deputy Hearing Examiner