

FINDINGS AND DECISION

FROM THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

DARIGOLD DAIRY

FILE NO. S-83-008
DCLU NO. 82-013

from an interpretation of the
Director, Department of Construction
and Land Use

Introduction

Darigold Dairy appeals an interpretation by the Director of the Department of Construction and Land Use (DCLU) concerning the required setback for use of property addressed as 4000-56 36th Avenue South.

The appellant exercised its right to appeal pursuant to the Seattle Municipal Code, Chapter 23.88.

This matter was heard before the Hearing Examiner on December 28, 1983.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

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

Findings of Fact

1. Consolidated Dairy Products purchased the Rainier Avenue dairy property in 1952. The company, commonly known by the trade name "Darigold", remodeled the plant in the 1960's to most of its current specifications.

2. The Rainier plant is located on the east side of Rainier Avenue South between S. Andover Street to the north and S. Dakota Street to the south. A company garage and related parking are located south, directly across Dakota Street. Thirty-sixth Avenue South is east of the Rainier plant.

3. The typical Darigold vehicle turns from Rainier Avenue at Dakota Street, proceeds north along 36th Avenue, and ultimately returns to Rainier Avenue via Andover Street.

4. The Darigold company considers its adjoining segment of 36th Avenue S. a "very dangerous area", undoubtedly because of the extent of commercial and neighborhood traffic. Previously, in order to limit access to this portion of 36th Avenue and to develop an enclosed company area, Darigold successfully petitioned the Seattle City Council to vacate the street segment. A resubmitted vacation petition is currently before the City Council, consideration of which is pending the resolution of certain issues raised in this appeal.

5. In addition to the property on the west side of 36th Avenue, Darigold owns most of the property east of 36th Avenue, between 36th Avenue and its east parallel Courtland Place S. The exceptions are Lots 11-13 and 16 and 17 of that "Block 7, Squire's Lakeside Addition". Both of those sites front on Courtland Place and are developed with occupied residences.

6. A fence separates the east and west portions of Block 7. The east portion is zoned Single Family (SF) 5000. The west portion was zoned Manufacturing (M) from single family in 1967. The principal plant property is also zoned M.

7. The west portion of Block 7, fronting on 36th Avenue, is in two uses. The southerly portion is for employee parking. The north half of the block front, hereinafter "the subject property", is legally described as "Lots 31-38, Block 7, Squire's Lakeside Addition" and is used to accommodate truck trailers, loaded or waiting to be loaded, that are destined for distribution facilities in locales such as Lynden, Yakima or Spokane, Washington. It is this use, dubbed parking/storage by the DCLU Director, that is the focus of this appeal.

8. Darigold's detachable 28-40 ft. trailers are moved to the plant for loading and then backed onto "the subject property". Sometimes a loaded trailer will remain there until approximately 10:00 a.m. the following morning when it is then released for distribution.

9. Since the loading shifts are not well defined, the activity can and often does occur "all hours of the night".

10. Loaded trailers awaiting release remain on the subject property for a typical weekday maximum of 12 hours. If a trailer is loaded on a weekend day, however, it may remain on the subject property until the following Monday morning. Electrical connections on site power the individual trailer refrigeration systems.

11. On April 24, 1972, a permit was issued authorizing Darigold to establish and maintain accessory parking on Lots 20-32 of Block 7. July 7, 1978, a permit was issued Darigold "to construct parking lot with fencing and screening for 32 spaces" on Lots 33-38 of Block 7. (Lots 31-38 of Block 7 are in issue.)

12. January 8, 1982, the Department of Construction and Land Use issued a Notice of Zoning Ordinance Violation to Darigold, citing Seattle Municipal Code Title 24. For corrective action the Notice required the company to

Discontinue illegal maintenance of a storage lot for delivery vehicles less than required minimum of 50 feet from a residential zone
OR obtain a permit to establish such use....

13. Darigold's request for an interpretation stated the issue as follows:

Assuming the vacation of 36th Avenue South unites Darigold's land into one parcel thereby making the truck parking accessory to the principal use of a dairy, does the parking overnight of delivery trucks within 50 feet of the neighboring R zone violate Section 24.52.050(a)?

Letter of September 15, 1983, to DCLU from counsel, Ross Radley.

14. In a letter to DCLU dated October 13, 1983, Darigold submitted some preliminary research results supportive of Darigold's "primary position" that "parking was not intended to be included within the word storage" as used in Section 24.52.050(A). The letter continued with Darigold's secondary position

...that the 50 foot and the 100 foot setbacks contained in...24.52.050(A) and 24.52.060(f) are intended to apply solely to principal uses...

15. In the ensuing interpretation, November 16, 1983, DCLU observed that

Title 24 restricts the location of certain accessory uses. For example, storage areas accessory to parks (24.24.010), accessory collection stations (24.40.05), and accessory concrete mixing machinery and equipment (24.52.120B) are required to be specific distances from residential property. Accessory storage of delivery vehicles is not specifically regulated. Finding 16.

16. In the conclusions, DCLU argued that a "storage area for delivery vehicles" will impact neighboring residential property the same whether it is "the only use on a lot or it is accessory to another use on the lot". Therefore, the interpretation continued,

it can be argued that such storage should be set back from residential property regardless of whether it is a principal or accessory use.

17. DCLU also concluded that an interpretation requiring no location restriction on storage of delivery vehicles would be inconsistent with the stated purpose of the M zone "to minimize conflict with residential uses"; and further that

the most reasonable interpretation as it applies to the subject property is that the storage area for the refrigerated trailer trucks should be located 50 feet away from the eastern property line.

18. As to the 100 ft. setback, DCLU concluded that on-site refrigerated storage of dairy products or other uses could be considered intrinsic to the operation of the creamery, invoking the (100 ft.) setback restrictions of 24.52.060.

19. This appeal by Darigold followed.

Conclusions

1. The subject property is zoned manufacturing (M). Seattle Municipal Code Chapter 24.54 governs. Section 24.54.030, "Principal uses permitted outright - Designated", allows

A. CG uses permitted outright as specified and regulated in Chapter 24.52, unless modified in this chapter;

2. General Commercial (CG) zone "Principal uses permitted fifty feet from R Zone" (with required screening) include

A. Storage or sales yard for building material, contractor's equipment, delivery vehicles...

C. Storage of used machinery in operable condition...

By reference, these uses are permitted as M zone principal uses. Section 24.54.030.

3. Similarly, Sections 24.52.060(F) and 24.54.030 permit a creamery as a principal use in the M zone when the use is one hundred feet or more from "any lot in an R zone".

4. Title 24 does not specifically regulate accessory storage of delivery vehicles. Director's Finding of Fact 15. However, M zone accessory uses "permitted outright" include

A. Accessory uses customarily incidental to a principal use permitted outright in this chapter...Section 24.54.120.

Therefore, allowed M zone principal uses include a creamery, storage or sales yard for delivery vehicles and storage of operable used machinery. Accessory uses customarily incidental to these principal uses are also permitted in the M zone.

5. An initial inquiry then is whether the use of the subject property for the Darigold trailers is a "principal" or an "accessory" use. Principal use means the chief purpose for which land is "occupied or maintained". Section 24.08.220(1)(5). An accessory use is one

...incidental to a permitted principal use, provided that such use or structure shall be located on the same lot as the principal use or structure...(emphasis supplied). Section 24.08.220(6).

6. The interpretation at issue did not specify but clearly implied that uniting the parcel as by vacating 36th Avenue would convert current use of the subject property from principal to accessory use.

7. The Code does not specifically regulate accessory storage of delivery vehicles. DCLU nevertheless concluded that the "storage/parking" area must be at least 50 feet away from adjacent residential property unless considered intrinsic to the creamery operation in which case a 100 ft. setback would be required.

8. DCLU would urge that although the zoning ordinance does not specifically include a setback requirement for the subject M zoned accessory uses, one should be read in so that compliance with the M zone purpose to minimize conflicts with nearby residential uses might be accomplished. Such a position runs counter to the enunciated principles of statutory construction.

9. It is a generally accepted maxim that zoning ordinances are

...in derogation of the common-law right to use property so as to realize its highest utility and should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language. State ex rel. Standard Mining and Development Corporation v. the City of Auburn, 82 Wn.2d 321, 510 P.2d 647 (1973).

At the same time, this state's Supreme Court recognizes the general rule that

Zoning Ordinances should be liberally construed to accomplish their plain purpose and intent. Standard Mining, supra, at p. 326. Accord, Keller v. Bellingham, 20 Wn.App. 1, 578 P.2d 881 (1978), affirmed 92 Wn.2d 726, 600 P.2d 1276 (1979).

10. In Keller, supra, the question was whether certain improvements to a chlor-alkali plant amounted to an "enlargement", prohibited by the city zoning ordinance, or an "intensification", not mentioned in the zoning ordinance, of a nonconforming use. The court held that since some ordinances specifically prohibit intensifications of nonconforming uses, and the city's ordinance in question did not, the court was to assume the city

...did not intend to do so since zoning ordinances are in derogation of the common law and must be strictly construed in favor of the property owner. At p. 11.

This case was decided against a backdrop of a policy against continuing nonconforming uses.

11. In the instant case, there is no disagreement that the cited zoning ordinance locationally proscribes certain accessory uses. Delivery vehicle storage is not among the uses so proscribed. The code sections containing the subject 50 and 100 ft. setbacks are specifically labeled as relating to principal uses. If then, the Darigold use of the subject property is an accessory use, the setback restrictions of Chapter 24.52 cannot apply. The prohibitions of a zoning ordinance should not be extended by implication beyond the scope of clear legislative intent. Standard Mining v. Auburn, supra. And, since the legislature specifically restricted certain accessory uses but did not do so concerning delivery vehicles, the Hearing Examiner must

assume it did not intend to do so since zoning ordinances...must be strictly construed in favor of the property owner. Keller, supra.

Even where impacts of restricted and non-restricted uses may be similar, nonspecified uses may not be prohibited. Cf. Keller, supra; 3 Anderson, American Law of Zoning, 16.03. (It is also interesting to note that start-up, ingress, egress and other typical "parking" impacts could be more disruptive than "storage". Therefore, a legislated distinction in the setback requirements of the two would not be unreasonable.)

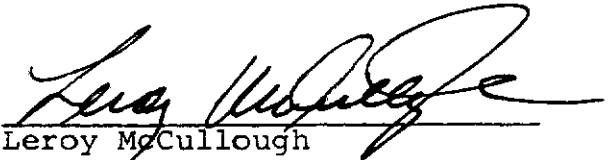
12. The problems of statutory construction aside, DCLU's rather curious posture is that Section 24.52.050 prohibitions against "storage" of delivery vehicles in the M zone should be imposed, although DCLU declined - in the hearing and in the interpretation - to answer whether on-site "storage" of delivery vehicles exists. Were the provisions of Section 24.52 applicable to the use DCLU would be the proper party to initially address the essential question of whether "storage" of delivery vehicles is present on the subject property. DCLU would also be obligated to further analyze when and how "refrigerated storage" becomes "incidental" to the creamery operation such that the setback restrictions of 24.52.060 should apply.

13. In summation, assuming vacation of 36th unites the parcel, the use of the subject property would be an accessory use and not subject to the principal use setbacks of Chapter 24.52. Accessory or other setback requirements are within the parameter of the legislature (City Council). If principal use restrictions were applicable, DCLU would be the appropriate entity to initially address whether "storage", Section 24.52.050, was present and whether "creamery" use, Section 24.52.060 was in existence. As the landscaping requirements to be imposed by DCLU were not at issue in the interpretation, that subject should be addressed by DCLU as well, and the Examiner should in this appeal refrain from a decision thereon. Chapter 23.88.

Decision

The Director's interpretation regarding the applicability of the setback provisions of Section 24.52.050 and 24.52.060 is REVERSED.

Entered this 11th day of January, 1984.


Leroy McCullough
Hearing Examiner

Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App 418 (1977); JCR 73 (1981). Should an appeal be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court.

BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

In the Matter of the Appeal of

DARIGOLD, INC.

FILE NO. S-83-008

from an interpretation of the
Director, Department of Con-
struction and Land Use

ORDER OF SUMMARY JUDGMENT

1. Except as modified by the stipulations and other items of this record, including the provisions of this order, the Hearing Examiner Findings of Fact from S-83-008 (DCLU Number 82-013) are incorporated herein by reference.

2. In S-83-008, truck trailer use of the north half of Block 7, Squire's Lakeside Addition, was in issue. This property was separated from the main plant to the west by 36th Avenue South. Since the Hearing Examiner decision on S-83-008, 36th Avenue South has been vacated.

3. In the present case the use of the southerly portion of Block 7, Lots 20-30, is in issue.

4. Darigold Inc., has replaced employee parking use of Lots 20-30 with parking space for 64 trucks, 32 spaces per row. Trucks parked in these spaces are proximate to vertical power sources which assist in keeping truck contents refrigerated.

5. In general, the subject trucks are used daily. On weekends the trucks may remain unused on site for a period, per DCLU's stipulation, of up to 48 hours.

6. DCLU's position is that when these trucks are in non-use and located on Lots 20-30 the trucks are "in storage." That department's Interpretation of July 17, 1986, accordingly concluded that "any truck parking on lots 20-30 should be viewed as principal use storage and therefore subject to the restrictions" of Seattle Municipal Code Section 24.52.050. See paragraph 2, Interpretation "Decision".

7. Darigold appealed the July 17, 1986 interpretation to the Hearing Examiner. The matter was set for public hearing and came on for a prehearing conference on Tuesday, August 26, 1986. The parties stipulated that appellant's motion to dismiss should be treated as a summary judgment motion and that the same could be argued and disposed of at the prehearing conference.

8. By stipulation and order of the prehearing conference on this matter, paragraph 3 of the Interpretation "Decision" is stricken.

9. Darigold argues that since 36th Avenue has been vacated, the Hearing Examiner decision in S-83-008 indicates that the complained-of truck use is "accessory" to the principal use of the plant and that therefore no setback from the (east) zone line is required.

10. DCLU agrees that if the use is accessory, there is no Code requirement for a setback. However, DCLU argues, there can be and in fact are two principal uses of this site notwithstanding the street vacation: (a) storage of the subject trucks and (b) "the operation of the creamery itself."

CONCLUSIONS

1. By stipulation of record and order from the prehearing conference on this cause, Decision paragraph 3 of the July 17, 1986, DCLU interpretation is stricken.

2. Both parties stipulated that the appellant's motion to dismiss should be treated as one for summary judgment. The Hearing Examiner issues the following conclusions and this Order pursuant to that stipulation.

3. In Seven Gables v. MGM/UA Entertainment, 106 Wn. 2d 1, 13 (1986) the Washington State Supreme Court state that the summary judgment process is..."to avoid a useless trial when there is no genuine issue of any material fact..." The Court continued:

Therefore, the adverse party must set forth specific facts showing that there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them.

4. There is no genuine issue of material fact in this case. Both parties agree that the company trucks are generally used daily and are left unutilized on Lots 20-30 for periods of less than 48 hours. Both parties also agree that if the use is accessory, no setback is required pursuant to Title 24.

5. Therefore, the issue for Hearing Examiner resolution is whether under the provisions of Title 24 the trucks' usage of Lots 20-30 constitutes is a principal/storage use and whether a setback is required.

6. DCLU cites Seattle Municipal Code Section 24.52.050 as the operative section in this dispute. Applicable to the present M zoned site, the Section is entitled "Principal uses permitted fifty feet (50') from R Zone" and provides as follows:

Uses permitted when fifty feet (50') or more from any lot in an R Zone are... A. Storage or sales yard for building material, contractor equipment, delivery vehicles, retail lumber, feed and/or fuel...

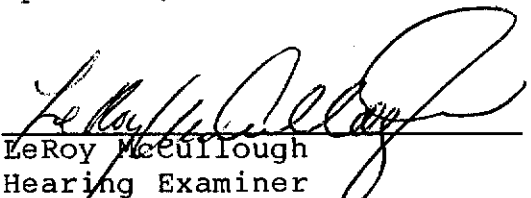
7. In order for DCLU to prevail it must be concluded that the truck usage of Lots 20-30 is a principal use and secondarily that the truck use constitutes "storage or sales yard for...delivery vehicles."

8. There is no support in the code or common law for the position that the subject trucks' nonuse and siting on Lots 20-30 constitutes "storage... for delivery vehicles." Cf. State ex rel. Standard Mining and Development Corporation v. the City of Auburn, 82 Wn. 2d 321, 510 P.2d 647 (1973); State v. Larson Transfer and Storage, 246 NW 2d 176 (1976); Mergenthaler v. State, 293 A. 2d 287 (1972). The trucks are ordinarily in daily use. They are left at the subject location neither for "later" use, nor for "safekeeping." (Cf. Websters New Collegiate Dictionary, 1973). A County Ordinance permitted parking but no storage of vehicles. After a review of cases from other jurisdictions the Court deduced that "parking connotes transience, while storage denotes a certain degree of permanency." To the particular case, the Court stated that "parking has in it the element of an automobile at least ready for use." St. Louis County v. Pfitzner, 657 S.W. 2d 262, 264 (1983).

9. Further, the Hearing Examiner concludes as a matter of law that the subject truck usage of Lots 20-30 does not constitute a principal use. That use is accessory, i.e. "incidental" to the main plant operation. See Conclusion 5 and remainder of Hearing Examiner decision, S-83-009, and citations therein.

10. Summary judgment for the appellant is therefore appropriate. The hearing date of September 5, 1986 in this matter is hereby stricken.

Entered this 2nd day of September, 1986.


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