

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

WEST SEATTLE CHRISTIAN CHURCH

FILE NO. MUP-83-010  
APPLICATION NO. 82-275

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

#### Introduction

The appellant exercised the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code. The matter was heard before the Hearing Examiner with Application No. 82-274 on June 2, 1983. Pursuant to the parties' agreement, the record remained open for posthearing submittals, the last of which was received in the Office of Hearing Examiner July 8, 1983, at which time the record was closed.

Parties to the proceedings were: appellant by Edward L. Mueller, Carney, Stephenson, Badley, Smith and Mueller, P.S.; the Director of the Department of Construction and Land Use (Director) by Rosemary Horwood.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated. As the subject application was made prior to the effective date of Title 23, Title 24 provisions apply.

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. The subject property is located at the southwest corner of S.W. Genessee Street and 41st Avenue S.W. The property is commonly known as 4401 41st Avenue S.W., or as 4401-25 41st Avenue S.W. The site is legally described as lots 1 through 11, Block 45, Boston Co. Plat.

2. The West Seattle Christian Church, oriented to 42nd Avenue S.W., is directly west and beyond an unimproved alley of the subject site. Pursuant to Title 24, the church is zoned multiple residence (RD 5000), while the subject site is at the southwest edge of a large single-family residence high density (RS 5000) zone.

3. A church school is located on lots 8 and 9, on the southerly portion of the subject property. The building was constructed pursuant to a 1980 permit. The plans of record show eight 9' x 20' parking spaces to be located north of the proposed classroom building. Director's Exhibit 9.

4. Immediately north of the school building is an open area extending generally to the fence. This area is used for a playground for weekday school attendees and as accessory parking for the West Seattle Christian Church and surrounding development.

5. The subject site is generally bounded by a 4' high wire fence along its east (41st Avenue S.W.) boundary and its north (S.W. Genessee Street) boundary. Both access gates are to 41st Avenue S.W. The more northerly of the gates is wide enough for pedestrians only.

6. Appellant disagrees with the Director's contention that the fence is within two feet of the S.W. Genesee Street right-of-way. Appellant conceded that the fence may be into the 41st Avenue S.W. right-of-way.

7. A Lutheran high school is located across S.W. Genesee Street. Northeast of the subject site is a vacant lot used as a play area for the high school.

8. The proposal at issue is for the provision of 60 parking spaces to be provided on-site, including two handicapped stalls. It was undisputed that the legal requirement for the church, based on the number of seats, is 18 spaces.

9. The Director granted administrative conditional use relief for accessory parking on a lot other than the lot of the principal use on several conditions, including relocating of the north and east fences to the property line; establishing a 20-foot front (north) yard setback; screening and landscaping. Appellant did not contest the Director's third enumerated condition that the parking spaces be striped. The Director denied variance relief to allow "for parking in the required front and side yards abutting the street" and "to waive required screening for accessory parking lot."

10. Section 24.64.040(5) generally provides that no parking space shall be located in a required front yard or in a required side yard. Section 24.20.090 requires a 20-foot minimum front yard and a general 5-foot side yard minimum for the subject RS 5000 zone. Section 24.62.120(C), side yard requirements for special conditions, provides that in the case of a reversed corner lot, "...the width of the side yard on the street side of such ... lot shall be...in an R Zone, not less than ten feet."

11. Appellant did not contest the designation of the north portion of the lot as the front yard, nor the designation of the east yard as the side yard. However, appellant vigorously opposed the conditions attached to the conditional use approval and further requested reversal of the variance relief denial. Applicant proposes no front or side yard setback.

12. Compliance with a 20-foot front setback could result in the loss of approximately 10 parking spaces. The number of lost spaces could be reduced, however, by restriping for smaller cars, which the appellant derides as an impractical solution to the problem of the larger passenger car. The reduction in the number of spaces would not impair the compliance with the number of parking spaces required by Code.

13. Several comment letters expressed the view that if there must be a "parking lot" in the neighborhood, it should be screened and adequate setbacks should be provided in order that the residential character might be maintained.

14. Appellant's predecessor in interest to the property, a Roman Catholic Church, had used the subject site for playground and parking use since approximately 1964. Substantially based thereon, appellant argued that rights have vested to continue the use and that variance and other approval should accordingly issue. Applicant further urges that the 1980 subject application for parking spaces was associated with the new building; and that the "Building" Department raised no issue at the time of application concerning location of the fence or the use of the lot as a combination playground for the church and school.

15. Appellant also took the position relative to this and companion application number 82-274 that the DCLU master use permit (MUP) requirement came as a result of a now-settled dispute concerning another church property; and that the "City" must have known of the predecessor's use of the lot as evidenced by curb cuts, drainage systems and other indicia of City involvement; and that screening is unnecessary and will in fact hamper the safety of the children and of the vicinity.

16. Appellant finally urges that, to the extent that the existing fences encroach the streets' rights-of-way, Engineering Department street use approval could have addressed those concerns but for DCLU's calculated interference.

#### Conclusions

1. Although the record reflects some negative comments with respect to the location of the "parking area" in the residential zone, no opponent submitted any appeal from the DCLU administrative conditional use authorization. Therefore, the only issues before the Examiner are those raised by the appellant, West Seattle Christian Church.

2. As to authorization of the administrative conditional use, the Director is required to consider adjacent uses and is empowered to impose conditions and requirements

...with respect to location, installation, construction, maintenance and operation and extent of open spaces as may be deemed necessary for the protection of other properties in the zone or vicinity and the public interest. Section 24.74.010.

3. Section 24.74.030, Variances, allows variances from the provision of the zoning code which are not contrary to the public interest where unique or unusual property conditions would deprive the property of comparative rights and privileges if variance relief is denied. The variance should not be materially detrimental to the public welfare nor injurious to the vicinity property or improvement. (See also Section 23.40.20.)

4. The Hearing Examiner concludes that the variance relief was properly denied. No unusual or unique property conditions are shown which deprive the property owner of comparable development. Variance relief may not be based on unusual historical, i.e., personal circumstances. Even though other church areas may be without screening or similar setbacks, the public welfare would be harmed by approval of this variance request in that future applications would be precedentially affected.

5. Further, both as to the variance relief and to the conditions imposed by the Director's administrative conditional use approval, the more general welfare of the residentially-zoned area would be enhanced by adherence to the setback and screening requirements which would provide specific aesthetic benefits to the streetscape.

6. The subject site remains in use as a parking lot even though its week daytime use is as a play area. Section 24.64.110 states that paved recreation space may be used for parking on the condition that

- A. Such parking areas be subject to all locational and development provisions of this chapter. (emphasis added.)

The Examiner, therefore, cannot agree with the inference that if the parking area is used as a play area screening should not be required. Such a conclusion would clearly conflict with the stated legislative intent, such as embodied in Section 24.64.110.

7. Much has been stated in both cases concerning what appellant urges are its vested rights to continue to use the property as a nonconforming use. It should be noted that the decision on the subject application concerns whether the variance and administrative conditional use criteria are satisfied. And that, in general, legislatures and the courts favor the limitation and eventual termination of nonconforming uses, 1 Anderson, American Law of Zoning, Section 6.06, even though some are accorded legal protection. In order to come within that protection, the use should be one which

lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area in which it is situated... Anderson, Section 6.01.

9. It would appear that the record insufficiently establishes the legality of the alleged pre-existing, more intensive use. As to the burden of proof, Anderson's treatise is instructive:

As a nonconforming use is inconsistent with the land-use pattern established by the zoning regulations...a nonconforming user must prove that his (sic) use existed prior to enactment of the restrictive ordinance. The burden of proof is upon the person asserting the right to maintain a nonconforming use, and a denial of such right will be sustained where the evidence in support or prior use is insufficient or contradictory. Anderson, Section 6.09.

10. In conclusion, the screening, setback and landscaping requirements are affirmed. However, the condition relating to the relocation of the east fence, vis-a-vis the street right-of-way, bears an insufficient nexus to the issue before the Examiner and is deleted.

#### Decision

The Director's decision is AFFIRMED as modified herein.

Entered this 21<sup>st</sup> day of July, 1983.

  
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.