

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

MICHAEL HAHN

FILE NO. MUP-84-001(CU)

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

ORDER GRANTING SUMMARY
JUDGMENT.

Appellant, Michael Hahn, by his attorney, John T. Rassier, Inslee, Best, Chapin and Doezie, P.S., filed appellant Hahn's Motion for Summary Dismissal of Specific Sections of Decision of Director of Department of Construction and Land Use and an Order Issuing an Administrative Conditional Use Permit and Appellant's Brief in Support of Motion Summary Judgment. The Director, William J. Justen, by Leslie A. Durkee, filed Director's Response to Appellant's Brief in Support of Motion for Summary Judgment.

Summary of Director's Decision

In the Director's decision denying an administrative conditional use to the applicant for a Burger King restaurant, the Director concluded that two Land Use Code requirements were not satisfied by the application:

Such uses shall be compatible with the character of existing structures in areas where a distinct and definite pattern or style has been established; Section 24.46.070(E) (4)

and

... the authorizing of such conditional use will not be materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located, and that the authorization of such conditional use will be consistent with the spirit and purpose of this subtitle. Section 24.74.010

In relation to Section 24.46.070(E) (4) the Director specifically found that the exterior of the structure to be occupied by Burger King "is compatible with the style of architecture of the area," but that the use "would not be compatible with the character of businesses located in Market buildings." Decision, p.5. With relation to Section 24.70.010 the Director found that material detriment to Market businesses is anticipated because the "fast food restaurant with its high volume and fast turnover would be in direct competition with the 'Market style' of food service.... Successful competition against the Market would contribute to diminishing its vitality as a unique, personalized shopping experience." He concluded from those findings that authorization of the conditional use "would not be consistent with the spirit and purpose of the Zoning Code since it would result in material detriment and injury to the neighboring properties and to the general character of the Market area." Decision, p.6.

Appellant's Contentions

For the purpose of the motions, appellant does not dispute any of the factual findings set forth by the Director. Appellant urges, however, that the findings of the Director require, as a matter of law, that the conditional use permit be granted. The four legal bases for the motion are:

1. The economic grounds used by the City in its denial of the appellant's conditional use permit would restrict competition, and as such, consist of illegal and unconstitutional bases upon which to render an administrative decision.
2. The City's unauthorized restriction of the subject property to uses which are compatible with the Pike Place Market district consisted of an illegal and improper zoning reclassification of the appellant's property.
3. Section 24.46.070(E) of the Zoning Ordinance is a "design requirement"; the City erred in its interpretation of this subsection by assuming that it conferred "additional use" limitations.
4. City erred as a matter of law in basing their denial of the appellant's conditional use permit upon characteristics of uses permitted outright in existing zoning.

Appellant's Brief, pp. 5,6.

Discussion

As to criterion 4 of Section 24.46.070(E), the decision concedes that there is no incompatibility with the style of architecture of the area but finds that the use would not be compatible with the character of the businesses in the Market. In response to appellant's argument that this provision is a "design requirement" rather than a "use" restriction, the Director argues that the language is plain and unambiguous; that the uses proposed, themselves, must be compatible with the structures in the area. The decision, however, compares the building to be used with other structures and the use with the "character" (or use) of other businesses. Since the Director did not compare the use with the character of the structures it appears that the Director did find some ambiguity in the wording. Attempts by the examiner to make judgments about the compatibility of uses and structures ended in absurdities or frustration, therefore it seems some construction of the provision is necessary to make it workable. Appellant urges that the ejusdem generis rule of statutory construction should be used, which the Director argues is inapplicable. A general rule of statutory construction when dealing with zoning ordinance provisions is that the provisions should be liberally construed to accomplish their intent but, unless the wording is clear, caution should be exercised to avoid the destruction of property rights. Standard Mining Development Corporation v. Auburn, 82 Wn.2d 321, 510 P.2d 647 (1973); PUD 1 of Pend Oreille County v. Seattle, 382 F.2d 666 (9th Cir. 1967).

If the purpose of requiring conditional use authorization for fast food restaurants in the BM zone is to control the physical effects of the use not associated with other types of restaurants, such as higher vehicular volume and greater movement, a great potential for litter and attention-getting architectural design, the appellant's reading of the provision would carry out that intent. Where there is uncertainty about the meaning of a provision, the section should be read in context with the rest of the code. Alderwood Water District v. Pope and Talbot, Inc., 62 Wn.2d 319 (1963). Given the wide range of other uses permitted outright in the zone, some of which are listed in Appellant's Response to the Brief Filed by the City of Seattle, control of undesirable impacts peculiarly associated with fast food enterprises must be the purpose. The Director has not offered any other.

The Director's decision, to require that the use be compatible with other uses or "character" of uses, creates a new restriction on the use where such intent is not clear from the language used in the provision. Therefore, the provision should be read to impose a design compatibility requirement which the Director has found to be met in this case.

One further difficulty with the Director's analysis is that he has defined the "area" as the Market which he has found has a distinct character of use. Since the site is not in the Market the area to be considered should be broader than the Market. The decision calls into question whether the fast food restaurant use would be incompatible with the character of the broader area's uses.

As to the Director's consideration of the more general conditional use criteria in Section 24.74.010, the Director, in his brief, p.2, acknowledges that zoning laws cannot be used to restrict economic competition or to favor existing uses over proposed new uses. The Director urges, however, that the competition, which was the basis of his conclusion that there would be material detriment and injury, is not economic, though it may have an anti-competitive effect, but a conflict between incompatible uses, i.e., his decision is an attempt to protect the historic qualities of the area.

The decision does speak of direct competition with the Market style of food service, but it then refers to "successful" competition diminishing the Market's vitality as a unique, personalized shopping experience. It is unlikely that the term "successful" would be used to describe the outcome of the conflict between uses predicted by the Director when he has stated his purpose of protecting Market qualities. Therefore, the only reasonable inference is that it is economic competition that is being discussed. The Director's explanation of his decision in his brief appears to be a belated ~~attempt to offer a legally permissible basis for his decision.~~ The words used in the decision, however, ~~cannot be read in a manner~~ to avoid the conclusion that economic competition with Market businesses is the detriment and injury considered by the Director. The denial of the permit on that basis is unlawful.

The Director has cited the Goals and Objectives of the Pike Place Urban Renewal Project, Pike Place Market Urban Renewal Plan, as one source of expression of the City Council's intent to require that areas outside the Historic District be compatible with the District itself. Section 24.74.010, however, refers to consistency with the spirit and purpose of "this subtitle," Zoning Regulations, and does not permit the Director to search through policies, plans and ordinances which may have a relationship to the property or Market but which are not a part of the subtitle. If the Council intends to impose those restrictions on property not within the District it may amend the Land Use Code accordingly.

It should be noted, given the broad interest in this matter, that the Director was required to consider only the application before him, for a fast food restaurant. And likewise, the Office of the Hearing Examiner may review only that decision. While there may be other potential uses which are more or less desirable, the only issue which may be considered is whether the applicant is legally entitled to a conditional use.

Having considered all the facts and reasonable inferences from them in the decision in favor of the Director, only one conclusion can be reached, that the Director, had he correctly construed Section 24.48.070 and had not considered the effects of

economic competition, should have granted the conditional use permit. Where there is no genuine issue as to a material fact there is no reason why the matter should not be handled summarily. Asarco v. Air Quality Coalition, 92 Wn.2d 685 (1979). The other grounds asserted by appellant need not be considered. Summary judgment should be granted.

Because various potential conditions were mentioned in the decision which appear to have been necessary to the factual conclusions regarding impacts reached by the Director and the decision reached did not necessitate a clear statement as to appropriate conditions to be attached to the permit, the matter should be remanded to the Director for that purpose.

Order

Summary judgment is hereby granted; the conditional use permit is hereby approved subject to conditions mentioned in the Director's decision and determined by the Director to be necessary and reasonable. This decision will be final seven days after the filing of the conditions unless appellant files objection to the conditions within that time in which case the decision will be final after resolution of those objections.

Entered this 9th day of February, 1984

M. Margaret Klockars
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Deputy Hearing Examiner