

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

FRANK AND BETTY FERREL

FILE NO. MUP-84-076(W)
APPLICATION NO. 8402234

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

Introduction

Frank and Betty Ferrel appeal the decision of the Director, Department of Construction and Land Use, to issue a declaration of non-significance with conditions for the grading of fill at 4509 - 52nd Avenue S.W.

The appellants exercised their right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on November 14, 1984. The record remained open for comments from applicant's soils consultant and for Art Ward's proposed modified conditions. Further argument was requested by the Hearing Examiner and submitted on December 14, 1984.

Parties to the proceedings were: appellants, represented by William Snell, attorney at law, Ron Bates, applicant, and the Director represented by Art Ward, associate land use specialist.

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. The applicant, Ron Bates, applied for a master use permit to grade 1,090 cubic yards of fill at 4509 - 52nd Avenue S.W. On September 17, 1984, the Director issued a declaration of non-significance (DNS) with conditions and imposed the same conditions on the permit. Appellants appeal these decisions.

2. The subject property comprises two lots totalling about 16,375 sq. ft. The site is very steep and, to prepare for construction of two single family residences, the applicant removed trees and had fill placed on the property. No grading permit had been obtained. A stop work order was issued and he was ordered to remove fill in the street right-of-way. An emergency order was issued requiring corrective measures for the unstable condition of the fill on the steep slope. Applicant applied for a grading permit and submitted an environmental checklist on May 10, 1984.

3. On July 17, 1984, applicant's soils consultant, Altinay and Associates, Inc., reported that slope stability had been achieved.

4. On July 23, 1984, Altinay and Associates, Inc., reported that part of lot 8, the lot closer to appellants' property, is in "loose condition." The report states that a retaining wall will

be built parallel to the lot's south line which "will protect the neighboring lot from any erosion (sic)." Exhibit 12.

5. The environmental checklist indicates that the proposal may result in "Unstable earth conditions or in change in geologic substructures," and will result in "Disruptions, displacements, compactions, or overcovering of the soil and "Change in topography or ground surface relief features," and "will increase wind or water erosion of soils." The explanation concludes "Due to professional supervision and conditions of approval of issued permits these impacts are expected to be minimal." The checklist was reviewed by Art Ward September 6, 1984.

6. Appellants' home is located north, immediately adjacent to the subject site and downslope. Appellants' driveway is on the north side of their house. A low rockery separates the driveway from the slope.

7. An addendum to the July 23, 1984, letter dated September 5, 1984, reads "following a visual inspection of new rockery, I determined that the hillside now is in stable condition. Altinay." Exhibit 12.

8. A brick retaining wall has been built which will tie into the foundation of the house. An "alpine rockery" has been placed on the slope between the retaining wall and appellants' low rockery. Those rocks are much larger than those in the established rockery.

9. GeoEngineers Incorporated, appellants' soils expert, reports that "they (the rocks) have been rather poorly placed, having not been set well into the slope nor packed with quarry spalls behind the large rocks to inhibit erosion of materials from behind the rockery area." Exhibit 4.

10. Between the time of removal of vegetation on the slope and the time of the hearing in this matter, appellants have experienced several incidents which have given them reason for continuing concern about the safety of their property and hazard to people on it. Rocks and large sections of the trees which had been stacked on the slope rolled down onto appellants' driveway. One piece of debris from the fill damaged a car on appellants' property. During spring rains, mud and water flowed over the rockery and troughs had to be dug to prevent the flow from reaching the house. On the most recent occasion, during a rainfall on November 1st and 2nd, mud flowed to the house and was stopped by plywood barricades put up by applicant's carpenters.

11. The Director concluded that the impacts of the proposed action would not be significant "due to the limited scope/duration of this project, professional monitoring of on site soil stabilization measures/improvements and the conditions noted below under authority of the Grading and Drainage Ordinance, Chapter 22.800 SMC Code." Those conditions are:

1. Provide ground cover and planting prior to Oct. 15, 1984 in accord with soils engineer recommendations on hillside south of the south lot line and abutting the Ferrel residence at 4534 53rd Avenue S.W. (after first obtaining approval from those property owners). The soils engineer is to indicate that this work has been done in accord with his recommendations and this slope is considered in stable condition.
2. Provide a Certificate of Deposit for \$1,000 to insure that this work will be done in

accord with 1 above unless already provided and given a written letter of acceptance by the soils engineer noted in 1 above - said deposit is to be provided within one week of this D.N.S.

3. All other recommendations by the soils engineers in reports 7/21/84 and 7/28/84 are to be met and a letter from the engineer is to be provided this department indicating all the recommendations have been met.

12. Ground cover has not been planted.

13. Applicant deposited two checks for \$500 each with DCLU on November 6, 1984.

14. Altinay and Associates, Inc., filed a letter with the Office of Hearing Examiner on November 30, 1984, stating that the drainage at the site "is being controlled and the site is in a safe condition."

15. Appellants propose seven additional conditions to mitigate soils and drainage impacts of the proposed action. The conditions would require that runoff from impervious surfaces be "tight-lined" into the storm drainage system; that the slopes be planted with vegetation; that the rockery be rebuilt and a gutter be added; that soils and material from the site which have been deposited on appellants' property be removed; that temporary erosion control measures be taken to prevent damage to appellants' property; that cracks in the retaining walls be repaired; and that applicant post a \$5,000 surety bond.

16. The measures taken to control erosion as of November 1 were insufficient to protect the adjacent property.

17. Art Ward acknowledged that the supervision by the soils consultant had not provided the protection expected. He suggested alternative or additional conditions that would be appropriate to the situation. Those are:

1. The soils engineer shall direct and monitor temporary erosion and drainage measures prior to the establishment of permanent erosion/drainage measures, so as not to cause erosion or drainage damage to property below. This needs to be done forthwith.
2. Permanent erosion/drainage control measures shall be provided and the soils engineer shall indicate that these improvements have been provided so as not to cause erosion or drainage damage to property below.
3. The soils engineer shall verify that the "alpine rockery" located between the garden wall on the property located at 4526 53rd Avenue S.W. and the Ferrel residence is considered in stable condition based upon its placement and the erosion protection that has been provided on this slope.

Conclusions

1. Appellants have raised two issues: whether the Director

was in error in issuing the DNS, i.e. will the probable environmental impacts have more than a moderate effect on the environment, and, if not, whether additional conditions are required to mitigate the impacts that will occur. On review, the hearing examiner is to give substantial weight to the appealed decision. Section 23.76.36.7.


2. The facts before the hearing examiner do not show that the Director's assessment of the degree of impact on slope stability and drainage was incorrect. Therefore, the appeal fails in its challenge to the issuance of the DNS.

3. As to the need for conditions the experience of the Ferrels is clear evidence. The conditions imposed by the Director failed, either in that they were insufficient or that they were not complied with in a timely way. Conditions may be imposed based on policies pursuant to SEPA. The SEPA policy for drainage is found in Section 25.05.902(6). Subsection b provides that the policies enumerated apply until a comprehensive drainage control ordinance is adopted. Ordinance 108080, adopted in 1979, is the drainage control ordinance so Section 25.05.902(6) can no longer be the basis of conditions. The Drainage Control Ordinance is not listed in Appendix A as a SEPA policy so the Director has no SEPA authority to impose conditions. The conditions, as stated in the decision, were imposed pursuant to the Grading Ordinance. The Hearing Examiner's review jurisdiction covers only the part of the decision made pursuant to SEPA. Therefore, while additional conditions were shown to be necessary they may be imposed only by the Director pursuant to his permit authority.

Decision

The decision of the Director is affirmed.

Entered this 21st day of December, 1984.


M. Margaret Klockars
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW

Pursuant to Section 25.05.680(2), Seattle Municipal Code, a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fourteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council should be consulted regarding their appeal procedure.

If an appeal is taken pursuant to Section 25.05.680(2), the time for filing a request for judicial review of the underlying governmental action and/or other SEPA issues is stayed until the City Council renders a final decision on this Section 25.05.680(2) appeal.

If no appeal is taken pursuant to Section 25.05.680(2), the decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review of the decision on the underlying governmental action must be filed in King County Superior Court within fourteen days of the date of this Hearing Examiner

decision. Seattle Municipal Code Section 23.76.36.(B)(11); Akada v. Park 12-01 Corporation, 37 Wn. App. 221 (1984); JCR 73. Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington, 98104, within fourteen days of the date of this decision. Section 25.05.680(3)(d).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost of preparing a verbatim written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on taped transcript of testimony and evidence to be reviewed. Parties are encouraged to designate only those portions of the testimony necessary to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review.