

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

In the Matter of the Appeals of

DAVID MULLIS ET AL.

FILE NO. MUP-87-074(W)
MUP-88-005(DD,W)
APPLICATION NO. 8702237

from two decisions of the Director,
Department of Construction and
Land Use, concerning a master use
permit application

Introduction

On October 12, 1987, DCLU issued a determination of nonsignificance on the applicant's proposal to demolish four single family residences and one duplex and construct on site two 16-unit, three story apartment buildings to be addressed as 3628 Linden Avenue N. DCLU imposed landscaping, construction noise and other conditions on the permit.

Appellants in MUP-87-074(W) requested that the project be denied; or in the alternative that the project be scaled down and that further conditions be imposed, specifically the retention of a "150 year old maple tree abutting the project."

In a supplemental decision of January 4, 1988, DCLU approved applicant's requested design departure which would allow the project to provide less rear yard setback and southern building wall modulation than is ordinarily required. DCLU imposed conditions on the design departure "in order to properly protect the big maple tree in the front yard." In appeal MUP-88-005(DD), appellants requested denial of the permit; that an EIS be required; that additional mitigation measures be imposed; and other relief.

Both appeals were heard together on March 3, 1988. At said hearing the Hearing Examiner allowed the record to remain open to March 8, 1988 for post hearing submittals. By order of March 21, 1988, the Hearing Examiner approved appellant counsel's request of March 18, 1988 to respond by March 21, 1988 to applicant's closing submittal.

Representations during the proceedings were as follows: appellant group by Scott Blair, Esq.; applicant Charles Spaeth, pro se; and the DCLU Director by Meredith Getches, senior land use specialist.

For purposes of this decision all references are to the Seattle Municipal Code unless otherwise indicated.

After due consideration of the evidence of record, and subsequent to the Hearing Examiner visit to the site and environs, the Hearing Examiner enters the following Findings, Conclusions and Decisions.

Findings of Fact

1. The subject site is located north of N. 36th Street on the east side of Linden Avenue. The site has 180 ft. of frontage on Linden Avenue N. and extends 112 ft. to an east adjoining alley that is unimproved. The project address is 3628 Linden Avenue N.

2. Applicant proposes to redevelop the subject site with two 16-unit, three-story apartment buildings. These buildings would replace the present site development of four single family residences and one duplex. Basement parking for 50 cars is also proposed for a car: unit ratio of 1:1.56. Access is presently proposed via Linden Avenue.

3. Some appellant group members are of the opinion that the block front single family homes are of historical significance. At least one community resident disputes this assessment. The Examiner finds that while they represent c. 1908 construction, the houses offer no particular historical perspective.

4. The subject block front is developed with two duplexes, a six-unit apartment and low-scale, older single family structures. This development mix is similar to that of other vicinity blocks. Generally the vicinity homes are 20-25 ft. in height. The site is in the interior of a large Lowrise 3 (L-3) zone that is generally bounded by Neighborhood Commercial 3 or Commercial 1 zoning.

5. The east adjoining alleyway is approximately 32 ft. wide. East of the alley is government right-of-way property which extends to a nearby segment of Aurora Avenue North. Fremont Way N. and Bridge Way N. on and off ramps to Aurora Avenue N. are located generally north of the subject site from N. 39th Street. The north end of the referenced alley feeds into the Fremont Way on-ramp segment which is one way south. DCLU declined to require alley improvement as a condition. DCLU considers increased alley usage hazardous because of the topography and sharp connection with Fremont. The Hearing Examiner does not find the alley use to be especially hazardous. (DCLU did not review the possibility of having alley use one-way south.)

6. In addition to Aurora Avenue, direct access to downtown is via the Fremont Avenue N. - Fremont Bridge, approximately 1.5 blocks west of Linden Avenue.

7. The increased number of dwelling units (32) would lead to long term increases in human population and an attendant increase in lighting, noise, vehicular and other activity. Although there are some multi-family structures similar in size to the proposed structures, the proposal would mean an increase in bulk and scale for the site and immediate vicinity.

8. Applicant proposes to have a north building and a south building. To facilitate preservation of a big leaf maple tree located at the front of the site, applicant subsequently proposed to relocate the south building farther eastward (toward the alley) such that a 25 ft. front setback would result. The originally proposed 11 ft. rear setback would be decreased to one ft. The rear facade modulation would not meet that required for a facade closer than 15 ft. to the rear property line. Applicant accordingly applied for design departure approval.

9. The revised proposal would decrease the distance of the residential units from Aurora Avenue, but would otherwise have similar human population, lighting and noise impacts.

10. Applicant made other revisions from the original proposal prior to the design departure application. They include a reduction in the number of units (48) to the present 32; and an increase in the unit: parking stall ratio (formerly 1:1, presently 1:1.56). Applicant also altered the originally proposed flat roof to the present peaked roof design. Applicant made these revisions essentially in response to the community concerns. The design departure application was also in response to community concern, particularly with the big leaf maple tree.

11. Some community members would like the tree preserved and, simultaneously, for the alley to remain as is. This would reduce the building footprint. Some project opponents presumed that approval of applicant's design departure would mean that applicant's building would be closer to the alley and that obstruction of the alley would certainly result.

12. In fact, applicant is applying for a vacation of a portion of the east adjacent alley, i.e. a strip 10 ft. wide along the southerly 90 ft. of the subject site. Although there is a west embankment along the alley, the remaining 22 ft. would

have a minor impact on present or future use of the alley.

13. At the generally accepted standard of 1.5 vehicles per unit, the revised proposal would be able to accomodate practically all of the parking demand of 48 spaces (32 units x 1.5 = 48.0)

14. The on-site parking layout is for double-parking such that it is possible that residents would rather park off-site than risk being blocked in by another resident vehicle. No parking is allowed on the east side of Linden.

15. There are no nearby proposals which would, in conjunction with the subject proposal, cause substantial deterioration of the existing traffic or parking pattern. Appellant group considered in its cumulative effect deliberation an 8-unit apartment north of the Fremont at 39th and Linden, within the SED standard 800 ft. range; and an 80-unit project near N. 34th Street, several blocks south of the project.

16. As noted above, the appellant group challenged DCLU's failure in the first decision to require retention of the big leaf maple. The subject tree is some 65 ft. tall and some 41.5 inches in diameter. The branches spread on the average 30 ft. from the trunk in north, south and west directions. Retention of the tree could be, per the DCLU analyst, supported by the city policies favoring retention of vegetation. DCLU concluded that requiring such a retention would not be reasonable in light of the attendant loss of 3-5 units that would be expected.

17. Assuming the lowrise trip generation factor of 6.1 trips per day per unit, the 32 unit proposal would be expected to generate some 195 vehicle trips per day. There is no evidence that the vicinity traffic pattern is unable to absorb same.

18. As conditions to the Design Departure approval DCLU required the following:

Conditions (see original decision for conditions not related to the Design Departure)

1. In order to properly protect the big leaf maple tree in the front yard, the owner(s) and/or responsible party(s) shall implement the following steps in the order shown:
 - (a) Competent arborist is to prune the tree to compensate for root loss anticipated, remove dead and dying branches, and cable and brace if needed, prior to any site work.
 - (b) Competent arborist is to fence off area beneath crown canopy on the west, to the concrete steps on the north and south, and to the foundation of the existing house prior to demolition of the house. No construction activities or vehicles are to be permitted within this fenced area at any time.
 - (c) Once the house east of the tree has been removed, the protective fencing is to be extended as necessary to provide no less than 20 ft. of protected area from the centerline of the tree both to the north and south and at least 14 ft. from the centerline of the tree to the east. No construction or vehicular activity is permitted within the fenced area at any time.
 - (d) As excavation and/or other construction activity occurs on the site, a competent arborist is to inspect and cut exposed roots as necessary, and recut (to a 45 degree downward angle) roots over 2 ins. in diameter. These roots are to be covered with moist soil as soon as possible.
 - (e) Post construction activities (i.e., landscaping,

etc.) should be kept to a minimum around the base of the tree and should not change the grade around the tree.

(f) the arborist supervising these protective measures shall provide to DCLU a statement at the completion of construction that evidences that the steps indicated in steps (a) through (e) have been implemented.

2. The owner(s) and/or responsible party(s) shall provide deep watering to the roots of the big leap maple during summer months and time of drought during the three year following construction.

3. The owner(s) and/or responsible party(s) shall care for the tree (i.e., inspect and spray for insects and diseases, trim and prune as needed.)

19. Appellant group's evidence suggested that applicant be required to to the following:

3. Inspect the direction, size, and quantity of root growth beneath and beyond the concrete steps as the steps are removed...

4. When the steps are removed, extend the protective fencing to the south to at least a 30 foot radius from the tree trunk; ideally, extend the protective fence to the property line on the south...

20. The existing structure lies east of the maple tree some 14 ft. In DCLU's opinion, the house foundation constrains the roots so that no additional protection of the root structure eastward appears presently necessary.

21. Per Applicant's parking study, the weeknight post - 9:00 p.m. parking utilization was less than 65 percent for the area within 800 ft. of the subject site. The Hearing Examiner finds that on-street parking is in short supply on the subject Linden block but is generally available within 800 ft. of the site.

Conclusions

I

Design Departure MUP-88-005

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.76, Seattle Municipal Code.

2. To recount, the application for a design departure would allow the rear (east) setback of the more southerly building to be reduced to 1 ft. and would permit less modulation than is ordinarily required for that facade. Siting the building farther east would facilitate retention of the big leaf maple tree located in the front yard of the site.

3. Seattle Municipal Code Section 23.40.010 provides that a design departure may be permitted in multi-family zones "for design solutions which result in a better development than would be allowed under the development standards of the applicable zone." A design departure may be permitted to improve the "quality and quantity of landscaped open space;" to reduce the appearance of bulk by means other than modulation; and to preserve a desirable existing architectural and siting pattern in an area." Seattle Municipal Code Sections 23.40.010(A)(2)(5)(7). A design departure may be sought from front, rear and side setback development standards and from modulation development standards. Section 23.40.010(B)(3)(4).

4. The DCLU Director's decision on a design departure application is a "Type II" land use decision which is appealable to the Hearing Examiner. Seattle Municipal Code Section 23.76.006(C)(5). The Hearing Examiner is required to give substantial weight to the Director's decision on a design departure application. Seattle Municipal Code Section 23.76.022(C)(7). This means that to prevail appellants have the burden of showing "clear error" with respect to the environmental impacts and with respect to the design departure.

5. In this case, the Director's approval of the design departure was appropriate. Resiting the building farther east, to the alleyway, would facilitate retention of the big leaf maple tree. Due to its size and spread, this tree could improve the quality of the front landscape, Seattle Municipal Code Section 23.40.010(A)(2), and could serve as an alternate means to reduce the appearance of bulk. Seattle Municipal Code Section 23.40.010(A)(5). The tree's location establishes a front setback which would assist in preserving the area's siting pattern. Cf. Section 23.40.010(A)(7).

6. Appellant group failed to demonstrate any significant adverse impact on the alleyway from the design departure variant of the proposal. Without design departure the re-sited building would come to within 1 ft. of the alley. Beyond the alley is the vacant land, then the Aurora Avenue corridor. Alley traffic flow would not be impacted to any special degree. The applicant's request to vacate a portion of the alleyway in no way alters this conclusion. Applicant's request would be to vacate and use 10 ft. of the alleyway's 32 ft. width for a distance of some 90 ft., and would leave some 22 ft. of maneuverable distance.

7. For similar reasons, the Hearing Examiner concludes that appellant group has failed to demonstrate that any probable significant adverse impact would result from the proposal. Therefore, the determination of nonsignificance (DNS) must be affirmed, Seattle Municipal Code Section 25.05.340, and no environmental impact statement is required.

8. Another inquiry on the design departure concerns the adequacy of the conditions imposed on the permit. Appellant group and DCLU both recommend conditions aimed at protecting the maple tree from the danger of construction activity. The key dispute is with the degree of protective fencing that should be required east of the tree. The Hearing Examiner concludes that the DCLU conditions are adequate.

9. DCLU condition (1)(C) provides that the degree of required protective fencing should await removal of the house. Once that house is removed, the protective fencing "is to be extended as necessary" to at least "14 ft. from the centerline of the tree to the east (emphasis added)." Therefore, the degree of protective fencing required is contingent on what removal of the structure reveals concerning the tree's root structure. The decision to allow the design departure as conditioned by DCLU is therefore affirmed.

II

MUP-87-074(W)

10. Appellant group's primary challenge was to the DCLU Director's decision of October 12, 1987 which addressed construction of the two 16-unit buildings without preservation of the big leaf maple tree. Appellant group urged the Hearing Examiner to deny the permit; require an EIS; impose mitigating conditions; and/or to provide other relief.

11. The Director's determination must be accorded substantial weight, Seattle Municipal Code Section 23.76.022(C)(7), and is it appellant-group's burden to establish a contrary position.

12. The appellant-group failed to meet the burden of showing that the DNS was clearly erroneous. The Hearing Examiner was not

persuaded that the impacts of the proposal on the environment would be "significant." For that reason the DNS is affirmed.

13. Although the proposal would offer a bulk, scale and architecture that would vary from the majority of that extant, it must be noted that the site is an urban site within an L-3 zone that is developed with a mix of single family and multi-family uses. The site is on the "edge" of no other zone.

14. The applicant proposes 50 parking spaces for 32 units. Even if the spaces are "stacked," appellant group demonstrated no significant adverse impact on vicinity parking. The appellant-group failed to show that the 1.5 auto:unit ratio was in error or should be dismissed. Utilizing the ratio, no spillover parking should result from the proposal. The Hearing Examiner is persuaded that there is a pronounced parking demand for the subject block front, some of which is attributable to the fact that parking is allowed only on one side of this block front. Nevertheless, the surrounding streets offer on-street parking that could be used in the unlikely event of development-caused spillover parking.

15. The record is devoid of evidence which suggests that the subject project will have more than a moderate effect on the local infrastructure, inclusive of the street system, singly or in conjunction with other nearby projects.

16. Due to the maple tree's vintage, stature and charm, any elimination of the tree can be considered as an adverse impact on the vicinity. An EIS is required, however, only if the adverse impact is significant. Such is not the case. No EIS is required; and the project may not be denied on environmental grounds.

17. The final question is whether DCLU imposed adequate conditions pursuant to its SEPA authority. Seattle Municipal Code Section 25.05.660. Mitigation measures must be based on items formally denoted as bases for the exercise of SEPA substantive authority. Mitigation measures must be "reasonable and capable of being accomplished." Seattle Municipal Code Section 25.05.660(A)(3).

18. The SEPA Landscaping Policy provides that the "City official...may require existing vegetation to be retained (emphasis added). Seattle Municipal Code 25.05.902(E). It is not required that the maple tree be retained even though it is "existing vegetation." In fact, DCLU declined to require retention of the maple tree but required other landscaping to reduce the impact of building scale. Given the probable extent of the tree's root structure, retention of the tree would restrict several development options. Given further that the proposed height, bulk and scale impacts are not shown to be significant or adverse, it would be unreasonable to require that the tree be retained. This is particularly so where other landscaping conditions can effect a similar beneficial purpose.

19. Nor can the Hearing Examiner impose a requirement for alley (vs Linden Avenue) access. While it may be more desirable to have vehicle ingress and egress away from the street, the record fails to show that a condition requiring alley access would address a "specific adverse environmental impact...clearly identified" Seattle Municipal Code Section 25.05.660(A)(2). (That parking is limited to one side of Linden suggests enhanced visibility for existing vehicles.) Further, requiring alley access could, if traffic were allowed to proceed north in the alley, cause problems at the point where the alley breaks into the Aurora on-ramp. In light of the insubstantial impact shown to Linden by the egress-ingress proposed, it would not be reasonable to require applicant to use and improve the alley as a condition to the permit. Section 25.05.660(A)(3).

I

MUP-88-005(DD) (W)

The DCLU decision is Affirmed.

II

MUP-87-074(W)

The DCLU decision is Affirmed.

Entered this 28th day of March, 1988.


LeRdy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

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

If an appeal is taken pursuant to Section 25.05.680(C), 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(C) appeal.

If no appeal is taken pursuant to Section 25.05.680(C), 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 fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.22(C)(12)(c). 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 fifteen days of the date of this decision. Section 25.05.680(D)(4).

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 for 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 the taped transcript of testimony and evidence to be reviewed. Parties are encouraged 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.