

FINAL DECISION OF THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

NISSEN/NISSEN ARCHITECT

FILE NO. MUP-87-079(W,P)  
APPLICATION NO. 8705493

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

Introduction

After a hearing on February 16, 1988, the undersigned hearing examiner affirmed the determination of non-significance and remanded the decision by the Director, Department of Construction and Land Use, to approve the short plat. The purpose of the remand was "for further evaluation of the soundness of the retaining wall along the southern boundary of the property and addition of any conditions necessary to assure that stability." The Hearing Examiner retained jurisdiction of the short plat appeal to consider any objections to the supplemental decision of the Director. A supplemental decision was issued June 6, 1988. Nissen/Nissen Architect, by Anna Nissen, filed objections on June 15, 1988. Responses were filed for the Director, Department of Construction and Land Use, by Malli Anderson, land use specialist, and for the proponent by G. Richard Hill, Foster Pepper & Shelfelman on June 24, 1988. A reply was filed by Nissen/Nissen Architect on June 29, 1988.

Based upon the record herein, the supplemental decision and attachments thereto, objection, responses and reply, the following are entered in this matter:

Additional Findings of Fact

1. A report was provided to the Director from Ratti Perbix and Clark, P.S., consulting engineers, after observing the retaining wall and reviewing the report of the geotechnical engineering study by Terra Associates, Inc., and the schematic drawings prepared by the architect. Recommendations were made for the construction phase. The structural engineers concluded that "the new construction should pose no potential hazard for the existing retaining wall" and that with the removal of soil from behind the wall, the lateral earth pressures will be reduced "increasing the already adequate factors of safety." (letter from Ratti Perbix and Clark, P.S.)

2. The Director was provided a letter from appellant's consultant, William E. Shannon, P.E., Shannon and Wilson, Inc., indicating that the appearance of stability does not justify a conclusion that there is an adequate factor of safety. He identified two stability problems requiring study: the stability of the wall against overturning and sliding across its base and the stability of the hillside against a landslide passing beneath the wall. He listed information needed to assess risk and engineering decisions that would need to be made.

3. Terra Associates, Inc., responded to William Shannon's letter concluding that the existing slope is stable and should be improved by the proposed construction.

4. In response to concern about lateral movement, the applicant has agreed to place rebar in the drilled piers below the level of the Nissen basement. Also, weep holes will be placed in the wall if agreement to allow drainage onto the Nissen property is obtained.

5. The Director imposed the following additional conditions and concluded the public interest would be served by the proposed division.

Conditions of Approval Prior to Issuance of  
the Building Permit

1. The owner(s) and developer(s) shall carry public liability insurance in the amount of \$1,000,000 and shall name the City of Seattle as additional insured. This insurance shall be carried during construction and up to 1 year following final occupancy.

2. Design development of the construction plans shall be under the review of a licensed civil engineer with geotechnical expertise who will implement the recommendations of the Terra Associates and the structural engineer's reports.

Conditions of Approval Prior to Grading Permit  
Issuance

3. Any modifications of the recommendations in the Terra Assoc. geotechnical report or structural engineer's report shall be approved by DCLU prior to issuance of the grading permit.

Conditions of Approval during Construction

4. The contractor shall be required to develop and implement a carefully planned earthwork program aimed at completing critical aspects of earthwork during the dry periods while limiting the potential adverse impacts of wet weather. Construction may also be done before June 1 or after September 15 at times determined by the geotechnical consultant to be of minimal hazard. Construction shall be done under the continuous supervision of a licensed civil engineer with geotechnical expertise.

5. Grading and construction of the foundation shall be monitored by the geotechnical engineer.

6. John Peterson, the geotechnical engineer for the Department of Construction and Land Use, reviewed the letters and the conditions imposed by the Director and concluded that the concerns had been satisfactorily addressed.

7. Appellant's objection, inter alia, is that the physical investigation of the wall deemed essential by appellant's expert has not been done.

Additional Conclusions

1. Appellant, relying on its expert, contends that the information before the Director is still insufficient to judge whether the slope stability is adequate so that the Director erred in concluding that the proposed short subdivision would serve the public interest. The remand was intended to assure that the stability issue was carefully scrutinized.

2. Where expert opinions differ, the Director must choose which to rely upon. The record shows that she was satisfied with the evaluation by the proponent's experts and their responses to appellant's experts concerns and on the basis of the information from the experts imposed a series of conditions. The burden is upon appellant to prove that the Director's reliance on this information and, hence, her decision is clearly erroneous. A showing that appellant's expert believes more information is essential does not meet that burden. The Director's decision, then, must be affirmed.

Decision

The decision of the Director to conditionally approve the short subdivision is affirmed.

Entered this 8th day of July, 1988.

M. Margaret Klockars  
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Deputy Hearing Examiner

CONCERNING FURTHER REVIEW OF  
HEARING EXAMINER FINAL DECISIONS ON MASTER USE PERMITS

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 party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.22(C)(12)(c).

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 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, Seattle, Washington 98104, (206) 684-0521.

## FINDINGS AND DECISION

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

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APPLICATION NO. 8705493

#### Introduction

Nissen/Nissen Architect appeals the decision of the Director, Department of Construction and Land Use, to issue a determination of non-significance and conditionally approve a short plat for property at 1206 Second Avenue North.

The appellant exercised the 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 February 8, 1988. Written arguments were accepted until February 16, 1988.

Parties to the proceedings were: appellant by Anna Nissen, the Director, Department of Construction and Land Use by Malli Anderson, land use specialist, and the proponent by G. Richard Hill, Foster Pepper & Shefelman.

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. A master use permit application was filed to subdivide a two-lot parcel into three lots. Because the parcel is in an area designated as environmentally sensitive, the application was subject to environmental review. The Director issued a determination of non-significance ("DNS") and conditionally granted the short plat. This appeal followed.

2. The subject property is zoned SF 5000 and has frontage on Second Avenue N.W. on the southeast slope of Queen Anne. It is developed with a single-family residence which would be demolished under the proposal. Retaining walls near the south and east property lines support the slope. The property abuts upon an alley on the east side but is separated from it by the retaining wall.

3. The applicant proposes to divide the 126 ft. by 119.70 ft. parcel into three lots, each with 42 ft. of frontage on Second Avenue North.

4. The seller of the parcel is retaining a view easement which would be about 50 ft. wide on the eastern, or rear, portion of each lot.

5. Four large cedar trees grow near the west side of the subject property.

6. Appellant's property is the lot south of and abutting the subject parcel. Appellant's property is developed with a single-family residence and accessory swimming pool. Appellant's lot is at a lower elevation than the subject property.

7. The Director decided that there would be no probable significant adverse impacts on the environment from the proposed division of the two lots into three and the construction of three single-family houses. She also determined that the requirements for approval of the short plat are met in that the proposal conforms to the Land Use Code and Single Family Residential Area Policies, there would be adequate access for vehicles, utilities and fire protection, the water supply and sewage disposal systems are adequate and a drainage control plan would be required, and that the public use and interest would be served by the short plat. The land use specialist acknowledged at hearing that the reference to "affordable" housing was in error as the likely development would be more expensive than "affordable."

8. Appellant offered three alternative configurations for short platting and developing the property. Each is intended to hold construction back from the retaining wall. One alternative has two lots with east-west orientation and access to each from the street. One has two lots with north-south orientation and access via an easement. The third has three lots with north-south orientation and access via an easement. Appellant assigns error to the Director's failure to require the applicant to utilize one of these alternatives. Appellant further objects to the "phased" environmental review, and failure to require a full soils report prior to a decision on the master use permit application.

9. Except for end lots, the lots on the facing block fronts are oriented in an east-west direction. The Director found that the proposed lots would conform to the platting pattern on Second North. Appellant pointed out lots in the area which are oriented in the north-south direction but the Director's conclusion is correct as to the immediate area.

10. The proposed east-west orientation would show less bulk along Second Avenue North than the north-south orientation which would place the length of the house along the street. Appellant points out that with the east-west orientation the greatest bulk would face Highland Drive, however, the southernmost lot would be separated from Highland by appellant's house.

11. The Director found that retaining frontage on the street for each lot is preferred over access by easement by the Fire Department and the Single Family Residential Area Policies.

12. The land use specialist expects the addition of two houses to increase traffic by 20 trips per day. This assumption was uncontroverted.

13. According to the land use specialist, the applicant has agreed to provide two off-street parking spaces for each residence.

14. Parking is permitted only on the west side of Second Avenue North, contrary to the statement in the Director's analysis and decision.

15. Second Avenue North ends at Highland Drive with a retaining wall. The street turns right to form the upper half of Highland Drive. There is no parking on either side of the turn. Because the street affords a view of the City, cars stop in the street to observe the view.

16. Parking surveys done for the review of the conversion of Queen Anne High School, for an apartment building at 160 Lee and the new Hay School show expected on-street parking utilization rate at the time of those surveys to have been no greater than 65 percent in the general area. The areas surveyed for those projects did not include the subject block. A more recent survey done by Anna Nissen to update the Hay survey and expand the area to include the subject block showed utilization of the streets in the area bounded by Galer, Warren, Highland and Third Avenue North at capacity. Utilization of Second Avenue North, Lee and the upper half of Highland, the streets most accessible to the

subject site, is currently between 63 and 79 percent, according to her data.

17. There are 11 parking spaces, according to appellant's survey, on the one side of the block of Second Avenue North between Lee and Highland. On Tuesday and Thursday nights of her survey from 5 to 10 of those spaces were filled but on only one night of the eight nights surveyed was there fewer than two vacant spaces.

18. The Director's report found that the construction of two more houses on the block would not substantially decrease the parking supply. Appellant's evidence did not show that the potential overflow parking from two additional houses could not be accommodated on-street.

19. The land use specialist did not know the specific location of curb cuts for vehicular access to the three lots at the time of environmental review.

20. The geotechnical engineer for the Department of Construction and Land Use decided that a full soils report would not be required for this proposal because of his view that the site is not actually environmentally sensitive. The environmentally sensitive designation was based on the assumption of an uncontrolled slope and the map did not show the existence of the retaining walls. So, instead of a full soils report, verification was required of the soundness of the retaining wall and engineering data/design for any new construction which would impact the existing retaining walls. Though not clear, it appears that the September 24, 1987, report is acceptable to him as verification of the soundness of the retaining walls. The actual conditions imposed on the approval of the short plat include requirements that during construction the recommendations in the September 24, 1987, geotechnical report by Terra Associates, Inc., be implemented as required by the building plans examiner and that there be compliance with the technical engineering requirements of Director's Rule 2-87 as required by the building plans examiner.

21. The Director's report appears to adopt the conclusion of the applicant's soils consultants that the soils are now stable and will support three single-family residences if the consultant's recommendations are followed. The recommendations include drilled pier or pile foundations extending below a 1:1 slope projected up from the bottom of the existing retaining wall for any new construction within 10 ft. of the retaining wall. The intent is to avoid placing any new pressure on the retaining walls.

22. The concrete retaining wall on the south side of the subject property was constructed in 1910. It is located about 8 ft. from the basement wall of appellant's house. Fill has been placed on the southern portion of the lot and slopes up from the top of the retaining wall.

23. A basement was included in appellant's house when it was constructed in 1947. The basement is 7 ft. deep and probably goes below the base of the retaining wall. Appellant's consulting engineer, William Shannon, sees the basement as "marginally stable". He acknowledges that the construction of the Nissen basement would have reduced the stability of the retaining wall.

24. The proponent's soils consultants viewed the retaining walls and observed some cracking and a slight horizontal bow but concluded that the walls are in reasonably good condition. The consultants saw no evidence of any water problem in the soil or indication of leakage through the crack in the retaining wall.

25. Mr. Shannon, who has extensive geotechnical expertise, testified on behalf of appellant. He reviewed the soils report supplied by the proponent and testified that the report does not confirm the soundness of the retaining wall nor provides engineering or design data so a further soils report is needed. He

feels that further investigation needs to be done to be sure that the proposed platting is reasonable. In his opinion the soundness of the wall can be determined only by both structural and geotechnical analysis. He did a preliminary stability analysis based on the information available to him and concluded that even if the fill above the retaining wall is removed, the current factor of safety for the Nissen basement would be unchanged. However, he stated that if the fill level is reduced to below the top of the wall, stability for the basement would be improved.

26. Some ten or more feet of fill is expected to be removed from above the retaining wall. The proponent's soils consultants believe that this would reduce the pressure on the retaining wall.

27. Mr. Shannon agreed with the other soils experts that drilled pier foundations for the houses would keep the load of the houses from affecting the stability of the retaining wall if the piers go below the base of the retaining wall. He stated that they would not affect lateral forces so the stability of the retaining wall would not be improved.

28. There is no evidence of any movement of the slope or that the soils are susceptible to such movement. In fact, the soil conditions are favorable for development.

29. Cracking in the retaining wall and the slight horizontal bow in the retaining wall are not necessarily indications of structural distress. However, appellant's consultant believes further investigation is appropriate, in part because of the existence of those conditions.

30. Mr. Shannon's opinion that the overall stability of the slope should be evaluated at this stage is based on his concern that both the future buyers and the Nissens be satisfied about the stability of the retaining wall.

31. The threshold determination completed is the only environmental review for the proposal, which includes short platting and development of three houses. The land use specialist testified that the proposal is not being treated as a phased proposal under SEPA. Further detail will be required regarding soils and the retaining wall prior to construction.

32. The Queen Anne Community Council Land Use Review Committee reviewed the proposal. Its chairperson testified that the committee concluded that unusual benefits would accrue to the owner in that many lots are 60 ft. wide while there would be "significant, unusual consequences" to the top of the hill. She did not elaborate on what those consequences would be.

#### Conclusions

1. Short plats and the construction or location of four or fewer dwelling units are two categories of actions categorically exempt from the SEPA threshold determination process unless they are in an environmentally sensitive area. Then only construction involving one residence would be categorically exempt. Sections 25.05.800 and 25.05.908. Since the subject property is within an environmentally sensitive area designated in the overlays, the proposal for this property is to be treated "no differently than other proposals under this chapter...." Section 25.05.908D. The City's engineer's opinion that the site was erroneously included in the environmentally sensitive area is not sufficient to remove it from the application of SEPA.

2. A DNS is to be issued by the Director if she determines there will be no probable significant adverse environmental impacts from the proposal. Section 25.05.340. The determination by the Director is to be given substantial weight. Section 23.76.022.C.7. "Significant" means a "reasonable likelihood of more than a moderate adverse impact on environmental quality." Section 25.05.794. "Probable" means that the impact is "likely or reasonably likely to occur...." Section 25.05.782. Appel-

lant's evidence does not show the probability of an adverse impact on soils stability from the short plat or construction of two more houses. Appellant's evidence does not show the significance of any of the other impacts alleged such as parking, traffic or bulk and scale. Therefore, the Director's decision to issue a DNS was not shown to be erroneous should be affirmed.

3. Appellant seeks a condition requiring one of the alternatives that are acceptable to her as either a condition imposed pursuant to SEPA to mitigate environmental impacts or as a condition of the short plat itself, presumably to satisfy the public use and interest. The Director is authorized to impose conditions pursuant to SEPA to mitigate adverse environmental impacts which have been identified in the environmental documents, which are based on policies formally designated as bases for the exercise of substantive authority, which are reasonable and capable of being accomplished and which are directly related in degree to the impact directly attributable to the proposal. Section 25.05.660.

4. Appellant's alternatives are designed to avoid increased stress on the retaining wall by keeping development away from the retaining wall, to reduce demand for on-street parking, to minimize the appearance of bulk from Highland Drive and to retain the cedar trees. Further conditioning on the basis of concern for soils stability under SEPA would not be appropriate because the environmental documents do not identify instability and the appellant's case raised the question but did not prove existing instability and the evidence did not show that the addition of two houses would increase instability as long as the recommended foundation methods are followed so imposing conditions on the development to improve existing conditions would not be reasonable; imposing responsibility for improving the situation would violate the requirement that responsibility be imposed only to the extent attributable to the adverse impacts of the proposal; and appellant has not identified a SEPA policy providing authority to impose further conditions pursuant to SEPA.

As to parking, the probable impact is too minor to require mitigating conditions and such conditions are not supported by the SEPA policies. Requiring a different configuration for the short plat to preserve the trees is not supported by the SEPA landscaping policy which is designed to mitigate other adverse environmental impacts. Finally, bulk and scale concerns are best addressed by the proposed configuration which presents the lesser mass to the street on which the lots directly front, rather than to the street from which the development would be separated. No further conditions were shown by appellant to be appropriate under SEPA.

5. Section 23.24.040 sets forth the criteria for approval of a short plat. Conditions may be imposed to assure that the proposal satisfies those criteria. Appellant has not challenged the conformance of the proposal to the Land Use Code or policies, the adequacy of access for vehicles, utilities and fire protection or the adequacy of drainage, water supply and sanitary sewage disposal. The other criterion is whether the public use and interests are served by permitting the proposed division of land. Appellant's contention seems to be that the interest would better be served either by allowing only two lots or one of the three lot configurations that places any development some distance from the south retaining wall. Since the appellant has not proved that division of the parcel into three lots and development of two additional single-family houses would affect the stability of the slope appellant has not overcome the substantial weight to be accorded the Director's decision, Section 23.76.022.C.7, that the public interest would be served by the proposed configuration.

Appellant also contends that the Director does not have adequate information to determine whether the public use and interest would be served without further analysis of the soundness of the retaining wall. Since the stability issue raised by the evidence is that of the existing condition, the



question becomes whether it is in the public interest to allow any division of the lot which would lead to development of housing which could place the new residents and development at risk. The evidence, in the form of the opinion of Mr. Shannon, shows that the Director needed additional information to make that judgment about the existing retaining wall and whether new development would be endangered. The matter, then, should be remanded to the Director for determination of the stability or structural integrity of the existing retaining wall and any imposition of conditions needed to assure that stability.

6. No error in the procedure used for the SEPA evaluation was shown by appellant. SEPA contemplates that the threshold determination be done for a proposal at the "earliest possible point in the planning and decision making process". Section 25.05.055. The determination was based on the total proposal including eventual development of two additional houses.

#### Decision

The determination of non-significance is affirmed. The decision to approve the short plat is remanded to the Director for further evaluation of the soundness of the retaining wall along the southern boundary of the property and addition of any conditions necessary to assure that stability. The Director shall issue a supplementary decision with her determination as to the integrity of the wall and the imposition of any conditions and shall serve that decision on the parties to this action. Objections to the that supplemental decision shall be filed with the Hearing Examiner within ten days of the issuance of the decision. The Hearing Examiner will then issue a final decision which will be based on the record to date, the supplemental decision and any objections filed.

Entered this 2nd day of March, 1988.

M. Margaret Klockars  
M. Margaret Klockars  
Deputy Hearing Examiner