

SEP 12 1988

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

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In the Matter of the Appeal of

HOWARD DONG

FILE NO. MUP-88-050(W)  
APPLICATION NO. 8708088

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

Introduction

Agent Howard Dong appeals the decision of the Director, Department of Construction and Land Use, to impose certain conditions on a master use permit application for a 14-unit apartment proposed for 3026 Beacon Avenue S.

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 August 26, 1988.

Parties to the proceedings were: appellant, pro se; and the DCLU Director by Faith Lumsden, 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, and subsequent to the Hearing Examiner visit to the site and vicinity the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of fact

1. Applicant proposes to construct a four-story, 14-unit apartment building on an 8387 sq. ft. area parcel addressed as 3026 Beacon Avenue South. DCLU attached several mitigating conditions to approval of the proposal.

2. Applicant here challenges two of the DCLU conditions. The first requires dedication of a six foot deep strip of property along the west abutting 18th Avenue S. right-of-way. The second requires 12 ft. by 16 ft. "modulation on the northeast and southeast corners of the fourth floor" and that proposed fourth floor decks on the east side be removed.

3. The subject site consists of two through lots located between Beacon Avenue S. to the west and 18th Avenue S. to the east. The site is flat and is currently developed with a two-story single family residence. Applicant proposes to demolish this residence in order to construct the proposed apartment building on-site. Applicant has applied for a housing demolition license pursuant to the Housing Preservation Ordinance (No. A-PHO-87-260).

4. Applicant's proposed building will have a maximum building height of 42 ft., inclusive of the pitched roof (the plate height will approximate 37 ft. and the ridge height 42 ft.). Eight of the 14 on-site parking spaces proposed would be surface parking spaces along the east boundary. The remaining six spaces would be provided at the first level. All parking would be screened. The principal building's east facade would be located roughly 30 ft. from the east (18th Avenue side) lot line. The minimum setback required is 15 ft.

5. The original plans showed driveway access to 18th Avenue S. The present plans eliminate 18th Avenue access and propose access only from the Beacon Avenue arterial. The change was made pursuant to a DCLU recommendation. As a consequence of driveway re-siting, SED and DCLU resolved to waive the previously stated requirement for street improvements along the 18th Avenue length of the property. Also, the requirement that applicant dedicate 8 ft. of property along 18th was modified to the presently required 6 ft. According to the DCLU decision, pp. 5-6,

With 6 additional feet of right-of-way, it will be possible to widen the street to 30 feet. The sidewalk and planting strip area will be substandard (6' sidewalk with 1' between walk and property line), but adequate for expected use. SED and DCLU acknowledge that widening the street in front of the subject site will ultimately be the responsibility of the City.

The analysis explained that the 6 ft. would not be used immediately but would be held "in reserve."

6. At the time of the DCLU decision here appealed, applicant proposed a gate in the fence at the rear of the property for pedestrian access. In hearing, in some response to DCLU concerns with project traffic and parking impacts on 18th Avenue, the applicant agreed to restrict gate access to utility use, e.g. garbage removal by city workers. The building manager would, per applicant, ensure that the gate would be locked or opened only for specified, approved purposes.

7. With restricted opportunity to walk to or from 18th Avenue - parked vehicles, it is improbable that project residents or guests will park on 18th Avenue to access the project site.

8. Traffic, parking, and bulk and scale were among the long-term impacts presented as bases for the imposition of mitigating conditions by DCLU. Other long-term impacts included increased energy consumption; increased light and glare; increased noise levels; and increased stormwater runoff.

9. The subject project, based on Institute of Transportation Engineering data, is expected to generate approximately 6.1 vehicle trips per day per unit, or approximately 85 vehicle trips. Although distributed throughout the day, the Hearing Examiner finds that 10-12 percent will occur during morning and evening peak hours. The Hearing Examiner also finds in accord with the Seattle Engineering Department standard that the unit will generate the need for approximately 1.5 parking spaces per unit.

10. There is no data of record which indicates trip distribution, i.e. the percentage of vehicles expected to proceed north or south on Beacon or expected to proceed to the east to or through 18th Avenue S. The Hearing Examiner finds in accord with DCLU testimony, however, that most of the projected 85 daily trips will be on Beacon Avenue.

11. Applicant submitted the subject proposal to DCLU, completed, on December 3, 1987. This was prior to the December 4, 1987 effective date of new parking standards. The application was also submitted prior to the March 8, 1988 multi-family zoning regulations.

12. The applicant's proposed 14 off-street parking spaces comply with the ordinance requirements applicable to the December 3, 1987 submittal. Assuming the 1.5 parking space per unit demand, a spillover of seven spaces will remain to be accommodated.

13. Applicant submitted the results of a February 10, 1988 parking utilization study to DCLU. In accord with the undisputed information therein, the Hearing Examiner finds that within a 2.5 block area, 79 of 242 parking spaces were occupied for a 33 percent occupancy rate on that Wednesday evening at approximately

9:00 p.m.

14. After DCLU restricted the study area to exclude, inter alia, spaces across Beacon Avenue S., the utilization rate approximated 29 percent. With the anticipated seven car overflow, the original rate would increase from 33 to 36 percent and the modified area rate would increase from 29 to 34 percent.

15. DCLU accepted the data as representative of local parking conditions even though the survey covered one evening instead of the two or more evenings typically used. The Hearing Examiner also finds that the parking utilization rates stated above are representative of the vicinity parking conditions.

16. Applicant did not challenge the DCLU following condition:

Permanent for the Life of the Project

10. To minimize traffic and parking impacts on the surrounding community the owner(s) and/or responsible party(s) shall include all charges for on-site parking in the sale price or rental fee and each unit shall be assigned a parking space. No additional parking fees shall be charged.

DCLU imposed this condition "to reduce the impact on 18th and on the adjacent single family zone."

17. The subject property is within a strip of Lowrise 3 (L-3) - zoned properties that front to Beacon Avenue South, a minor arterial with parking along both sides. Development in this L-3 zone includes one and two story duplex and single family structures. Approximately 200 ft. north of the site is a Neighborhood Commercial 2/40' zone that extends north of S. Stevens Street. An NC 1/40' zone begins approximately 300 ft. south of the site.

18. Directly east of the site, across 18th Avenue S., is a Single Family 5000-zoned area that is primarily developed with one-story single family residences. There is no significant topographical or other break between 18th Avenue S. and the subject site. Houses on 18th are generally sited close to their front lot lines. Photos of record show some tall, canopy-type trees of the evergreen and deciduous variety.

19. The 18th Avenue S. right-of-way is 40 ft. The Street Design Manual standard right-of-way for a single family zone is 50 ft.; for an L-3 zone, 60-66 ft. The 18th Avenue S. pavement width is 22 ft. The Street Design Manual calls for a 32 ft.-wide pavement for the L-3 zone and a 25 ft.-wide pavement for the single family zone. Where, as here, the street is between zones, DCLU typically requires the greater width.

20. Eighteenth Ave. S. is a residential access street. There is one lane of traffic when cars are parked on both sides of 18th Avenue S.

21. No demolition construction or other short-term impacts were presented as a basis for the imposition of any conditions.

22. According to applicant, the condition requiring modulation would deprive the owner of a second bedroom apartment. Applicant also bristled at the fact that the mitigation measure was not codified.

23. Neither the Hearing Examiner nor DCLU received any public comment in opposition to or in favor of the proposal.

### Conclusions

1. The Hearing Examiner has jurisdiction of this appeal

pursuant to Chapter 23.76, Seattle Municipal Code.

2. The Hearing Examiner must give "substantial weight" to the DCLU decision on this environmental matter. Seattle Municipal Code Section 23.76.022(C)(7). To overcome this deference, the appellant must show that the Department of Construction and Land Use is "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. In this appeal, appellant challenges the mitigation imposed by DCLU. A review of the mitigation parameters follows.

4. Mitigation measures must be based on policies, plans, rules or regulations designated in Seattle Municipal Code Section 25.05.902. Section 25.05.660(A)(1). The measures must be "related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal." Section 25.05.660(A)(2). The measures must be "reasonable and capable of being accomplished." Seattle Municipal Code Section 25.05.660(A)(3). The City Council has determined in this context that "reasonable" means reasonable in consideration of the adverse impact sought to be mitigated. In Re Appeals of Queen Anne Community Council et al., C.F. 293623 (1985). In addition, while voluntary mitigation is permitted

...mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal (emphasis supplied).

Seattle Municipal Code Section 25.05.660(A)(4).

5. Based on the above-cited provisions, the requirement of a 6 ft. dedication along 18th Avenue S. cannot be sustained. This is not to suggest that the power of eminent domain, as opposed to SEPA authority, cannot be exercised to acquire said property.

6. While it is true that the 18th Avenue right-of-way and pavement width are less than standard, there is no specific, identified adverse impact to 18th Avenue from the proposal that would support the mitigation imposed. Driveway access is to Beacon Avenue. Most of the project traffic will use Beacon Avenue S. There is no traffic distribution data of record which suggests that project traffic will adversely impact 18th Avenue S. Reasonable access and flow will not be inhibited by the proposal. Seattle Municipal Code Section 25.05.902(D)(1)(c).

7. The project will offer 14 on-site parking spaces. Beacon Avenue and vicinity can easily accommodate the projected seven-car parking spillover since the evening parking utilization is from 29-36 percent. The site is roughly midblock. By condition here imposed, the east gate will be for utility use only. Therefore, it is highly improbable that project residents or guests will wish or need to circumvent the block face to access 18th Avenue S. parking. In addition, DCLU has imposed another, noncontested condition which limits parking fees and which tends to encourage residents to use on-site parking provided.

8. In light of the foregoing, the condition imposed is not "reasonable." Victoria Apartments, supra. The condition also fails to relate to any "specific, adverse environmental impact clearly identified in an environmental document on the proposal." Seattle Municipal Code Section 25.05.660(A). The condition requiring dedication of an 6 ft. deep strip of property along the entire eastern frontage is therefore deleted.

9. For similar reasons, the Hearing Examiner concludes that the condition requiring fourth floor modulation should be modified. In relation to the impact sought to be mitigated, the 12x16 ft. excision is not "reasonable." Cf. Victoria Apartments, supra; Seattle Municipal Code Section 25.05.660(A)(3).

10. DCLU cited the City Council decision of In Re Crown Hill Interested Neighbors - Urban Planning as the basis for the condi-

tion. In Re CHIN-UP, MUP-87-054(W) C.F. 296101 (March, 1988). The CHIN-UP case has some similarities to the present case. Both sites are within L-3 zones, both sites front to an arterial, both sites abut single family zoning, and both sites are generally flat.

11. In explaining the decision to protect neighboring rear yard privacy; and to require reduction in height of the building along the side fronting the single family zoning the Council decision noted that

The juxtaposition of L-3 scale development is not consistent with the multi-family policies which generally call for a buffer of topography or lower scale multi-family between L-3 and single family. While L-3 has in many cases been zoned adjacent to single family, particularly along arterial strips such as N.W. 85th, SEPA mitigations may be appropriate to reduce the impacts of disproportionate scale at the zone edge (emphasis supplied)...

C.F. 296101, supra.

12. The Hearing Examiner would first note from the above that there is no rule which requires bulk and height mitigation merely because of the juxtaposition of L-3 and single family zoning. Where DCLU and the Hearing Examiner required first floor commercial use in a mixed use building, the Council remarked:

In this case, DCLU's decision to prevent the residential-only development of one corner of a four-corner NCL district would in effect create a general policy preventing such development in four-corner NCL districts city-wide. If the Council had intended this, it could have approved such a blanket provision.

In Re Thaden, MUP-86-078(W), C.F. 295562 (1987).

13. By inference, mitigation is not automatically required in this case. The CHIN-UP language indicates that "generally," special buffering is called for; and that SEPA mitigations "may" (or may not) be appropriate."

14. Secondly, there are factual distinctions between CHIN-UP and the present case. In CHIN UP, the southern L-3 boundary was adjacent to SF 5000 zoning without any intervening street. In the present case, the subject site is separated from the SF 5000 zone by a residential street. In CHIN-UP the desire was stated to protect rear yard privacy. In the present case, no rear yard privacy is at issue. The Hearing Examiner also notes the absence of public comment on this proposal.

15. In the present case, the building setback to the east property line is approximately 30 ft. Beyond this setback is a 40 ft. right-of-way, 18th Avenue S., paved to 22 ft. in width. It is beyond this street that the single family homes are sited. This is distinguished from the 20-24 ft. rear yard/setback offered in CHIN-UP.

16. With the substituted condition, *infra*, the impact of height and bulk appears sufficiently mitigated by the distance and intervening right-of-way. In further consideration of the distance, this record presents no specific, clearly identified adverse impact of the project's height bulk and scale on the adjoining single family zone. Cf. Seattle Municipal Code Section 25.05.660(A)(2). Applicant may, however, voluntarily act to reduce the bulk and scale suggested by the DCLU decision.

17. The DCLU decision is accordingly modified as follows:

applicant shall present for DCLU review and approval the following:

- plans showing that residents and guests

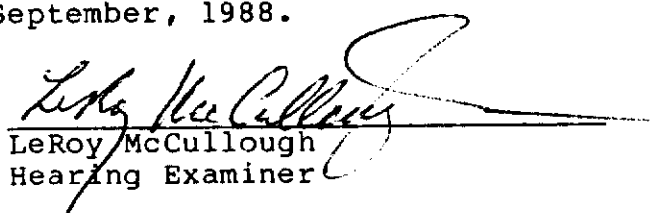
will be restricted from using the rear (east) gate (fire or other emergencies excepted).

- plans showing site landscaping that includes tall, canopy-variety trees, preferably evergreen, that will grow to screen the building's east facade.

#### Decision

The DCLU decision is MODIFIED in accord with Conclusion 17, above.

Entered this 12<sup>th</sup> day of September, 1988.

  
LeRoy McCullough  
Hearing Examiner

#### Concerning Further Review

Pursuant to Seattle Municipal Code Section 23.76.024, 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, 5th Floor Municipal Building, 684-8322. 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 23.76.024, 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 City Council appeal.

If no appeal is taken to the City Council, 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. 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. See Chapter 43.21C, RCW and Chapter 25.05, Seattle Municipal Code.

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 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.