

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

GENE HABA

FILE NO. MUP-89-049(W)
APPLICATION NO. 8902475

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

Introduction

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 October 17, 1989.

Parties to the proceedings were: appellant-applicant, Gene Haba, pro se; and representing the DCLU Director, Art Ward, 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 essential facts are undisputed. The subject property is located at 4909 S.W. Othello Street. Applicant-appellant proposes to construct a single family residence on site which is in an environmentally sensitive area. DCLU imposed several conditions on the permit. Applicant-appellant challenges the conditions which (a) limit construction hours and (b) which require the erection and maintenance of a silt fence for erosion control.

2. The subject property is within the single family 5000 zone.

3. The proposed site is located 250-325 ft. north of Lincoln Park. It measures approximately 75-78 ft. in width and is 126-147 ft. deep for a lot area of 10,311 sq. ft.

4. The site slopes down to the west an average of 50 percent. Due to soils instability and steep slope the site has been designated as environmentally sensitive.

5. With the exception of the upper 30-40 ft. of the site, which has been cleared for the proposed development hereinafter described, the site is heavily vegetated with deciduous trees and native undergrowth.

6. Specifically, applicant-appellant proposes to build a three-story single family residence and two-car garage in the easterly 1/3 of the site. Applicant proposes to retain downslope vegetation.

7. The site is one of the four lots approved by short subdivision #8406363 (recorded November 14, 1988). All future development, per the short plat requirements, is to be done under specific direction and supervision of a geotechnical consultant consistent with DCLU Director's Rule 2-87.

8. The construction must also meet the recommendations of the geotechnical engineer regarding the Building Code and the Drainage Ordinance.

9. The Neil Twelker soils report of January 7, 1989, prepared for the proposal, concludes that the proposal offers a minimal risk of slope instability to the site or to adjacent properties.

10. DCLU imposed the requirement for a downslope silt fence "to prevent encroachment of construction activities/materials to the vegetation proposed..." p.4, DCLU Analysis and Report.

11. Applicant-appellant objects to the requirement of a silt fence even though the additional costs, if any, would be minimal because:

- (a) applicant-appellant, an experienced builder, believes that more efficient methods are available to attain the same objective;
- (b) applicant-appellant also is of the opinion that the DCLU required silt fence would cause unnecessary damage to the borders of the ground cover vegetation it is intended to protect; and
- (c) applicant-appellant believes that his proposed erosion control measures would cause minimum damage to the downslope groundcover vegetation.

12. Recognizing that loud construction-related noise could adversely impact nearby residences, DCLU imposed a condition to the effect that

the owner(s) and/or responsible party(s) will be required to limit construction activity to nonholiday weekdays between the hours of 7:30 a.m. and 6:00 p.m.

13. Applicant-appellant objected to this condition. He stated, the limits will proscribe his building time, delay the completion and therefore cost him more money. In addition, applicant-appellant noted that the neighbor to the north and east at 4828 S. W. LeDroit was under no similar constraint.

14. Evidence elicited from DCLU at the hearing revealed that the property sited at 4828 S.W. LeDroit is not in an environmentally sensitive zone and thus the permit for work thereon was not subject to SEPA requirements or conditions. Exhibit 3.

15. DCLU clarified on the record and the Hearing Examiner so finds that the imposed condition covers noise generated by construction machinery. Grading, tool placement or similar activities not disruptive to the quiet enjoyment by residential owners of their property are not included within the DCLU prohibition.

Conclusions

1. The Office of Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.76, Seattle Municipal Code. As this action involves a Master Use Permit application to construct a single family residence in an environmentally sensitive area it is subject to a SEPA environmental determination. Seattle Municipal Code Section 25.05. As required in RCW 43.21C.095, the SEPA rules are given substantial deference in the interpretation of SEPA. Seattle Municipal Code Section 25.05.010.

2. A determination of nonsignificance (DNS) is not required

if the responsible official determines that a proposal will not have a probable significant adverse environmental impact. Seattle Municipal Code Section 25.05.340. The initial disclosure of the environmental impacts from this project determined short term adverse environmental impacts associated with construction to include: (a) potential slope instability; (b) storm water runoff from impervious surfaces; (c) parking; (d) traffic; (e) lowered air quality; and (f) noise. These impacts will not be significant due to the limited scope and duration of construction. Therefore, a DNS is not required.

3. Increased noise can be anticipated during construction related activities utilizing loud equipment. Such noise could adversely impact nearby residences, especially during early morning or evening hours and on weekends. DCLU has determined that the Seattle Noise Ordinance, Seattle Municipal Code Section 25.08, which limits noise levels and hours of construction in or adjacent to residential zones, does not adequately mitigate adverse construction impacts associated with this project. This determination must be given substantial weight. Seattle Municipal Code Section 23.76.036(B)(7). The Hearing Examiner has authority to overturn such a determination only where it is shown to be "clearly erroneous". That showing has not been made here.

4. The DCLU report determined that no substantial erosion would occur because proposed construction would be located on the more moderately sloping portion of the lot with existing vegetation to be retained downhill from the building footprint area. DCLU in assessing erosion impacts from the construction process may require erosion control measures downslope and close to the building footprint area. SEPA ordinance, Seattle Municipal Code Section 25.05.675(B)(2)(a).

5. Construction related activities and parking have been determined by DCLU to not be expected to have a substantial impact on traffic and parking. Nor is air quality expected to be substantially impacted. The evidence elicited at the hearing does not contradict those determinations.

6. DCLU has also determined that no long term impacts of an adverse nature is to be anticipated because of stormwater runoff from impervious surfaces. Nor does DCLU anticipate long-term substantial or adverse environmental impacts associated with parking due to abundant curb side parking. Such impacts are also not anticipated with respect to increased traffic and noise due to their minor nature. These determinations were not contested by applicant-appellant and will be accorded the substantial weight to which they are entitled on review.

7. DCLU has authority to specify mitigation measures in its DNS. Seattle Municipal Code Section 25.05.350E. With respect to conditions to be enforced during construction, DCLU, in order to reduce the noise impact of that construction on nearby residential properties, has limited construction to the hours of 7:30 a.m. to 6:00 p.m. on non-holiday weekdays. The hearing examiner concludes that these hours are reasonable and do not cause undue hardship to applicant-appellant during the construction process. The purpose in setting these hours of construction is to minimize the adverse impact of loud or noisy heavy construction equipment on nearby residences. DCLU does not intend for these construction time periods to apply to construction related activities which neither utilize such construction related equipment nor cause loud or noisy impacts which are disruptive to the nearby residential owners' quiet enjoyment of their property.

8. Consistent with the authority granted by Seattle Municipal Code Section 25.05.350E, DCLU may also require that applicant-appellant provide protection from the building footprint by requiring erosion control measures such as a silt fence or other appropriate control measures as approved by DCLU. Therefore, subject to DCLU approval, applicant-appellant may utilize other appropriate erosion control measures.

Decision

The Director's determination is AFFIRMED.

Entered this 1st day of November, 1989.



Stan Taylor
Deputy 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 issued 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, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104, 684-0521. 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.