

BEFORE THE HEARING EXAMINER

JUL 23 1990

CITY OF SEATTLE

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In the Matter of the Appeal of

INLINE CONSTRUCTION, INC.

FILE NO. MUP-90-016(W)
APPLICATION NO. 8900281from a decision of the
Director of the Department
of Construction and Land
Use on a master use
permit applicationFINAL DECISION FOLLOWING
REMAND

This matter, concerning property located at 3435 California Avenue S.W., was remanded to the Director, Department of Construction and Land Use by the Hearing Examiner in the decision entered June 18, 1990, for the addition of specific written Findings and Conclusions to support the imposition of the Director's condition (Condition No. 1), to remove two units from the fifth floor and provide setback and roof gables in order to minimize the aesthetic impacts of height, bulk and scale on the adjoining single family residential zone.

The Hearing Examiner retained jurisdiction over this matter for the purpose of reviewing the Director's submittal.

On July 9, 1990, the Director issued a response to the remand.

Findings of Fact

1. Except as modified hereby, the Findings of June 18, 1990, are here restated and incorporated by reference.

2. The Director supplemented the DCLU decision with the following findings about the proposal's impacts:

- (a) The proposed structure would be 46.25 feet to the top of the pitched roof (41.25 feet to the top of the upper roof plate plus 5 feet for the pitched roof); the height is 11.25 feet greater than could be allowed in the adjacent single family zone and more than 20 feet greater than the existing development in the single family zone.
- (b) It is possible that the top one and one-half floors could be seen by a person standing in the rear yard of the single family zone across the alley from proposed buildings.
- (c) The apparent height of the proposed buildings is exaggerated to some degree by the topographic changes across the site.
- (d) The impact of the height of proposed building is compounded by its 60 ft. width, which is considerably larger than would be developed in the adjacent single family property.

3. In restating his conclusion that the proposed structure's increased bulk over the development potential in the adjacent single family zone is an adverse impact, the Director focuses on the upper one and one-half floors which exceed a 30 ft. height. The Director cites Section 25.05.660 in discussing the need to mitigate the impacts of the greater height, bulk and scale.

4. The mitigation of reducing the height of the facade facing the single family zone would decrease the height at the edge to that comparable to the height allowed in single family zones.

Conclusions

1. Except as modified hereby, the Conclusions of June 18, 1990, are here restated and incorporated by reference.

2. The specifics provided by the Director on remand are not new information, but a compilation and exposition of factors used by the Director in determining the condition and existent in the record at the time of the original decision by the Hearing Examiner.

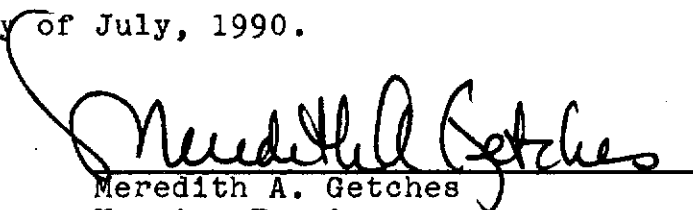
3. The Director's Condition No. 1 would mitigate aesthetic impacts to the single family zone by substantially reducing the apparent height and bulk of the proposed structure on the side of the structure which faces the single family zone. The required height reduction of the facade and the additional setback, removes the top story from the view of the adjacent single family zone and creates greater distance between the upper-most story and the single family zone.

4. The specifics provided by the Director support the imposition of Condition No. 1 and remedy the procedural concern that the various factors of the Director's analysis be articulated in writing.

Decision

As modified by the specifics provided by the Director in his July 9, 1990 response to remand, the Director's decision, the DNS with conditions, is AFFIRMED.

Entered this 23rd day of July, 1990.


Meredith A. Getches
Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, Washington 98104
Telephone: (206) 684-0521

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 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. 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.

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

INLINE CONSTRUCTION, INC.

FILE NO. MUP-90-016(W)
APPLICATION NO. 8900281

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

Introduction

This matter concerns property located at 3435 California Avenue S.W.

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 May 14, 1990.

Parties to the proceedings were: appellant/applicant Inline Construction, Inc., represented by attorneys John J. Juhl and David Halinen, Halinen & Associates; the Director, Department of Construction and Land Use (DCLU), represented by Susan Kunimatsu, land use specialist; and intervenors, Peggy and Jim Hodge represented by their attorney Brian Knox, Preston Thorgrimson et al.

Prior to hearing, Peggy and Jim Hodge, neighbors to the subject property, sought to intervene pursuant to Hearing Examiner Appeal Rule 1.5. The Hodges asserted that because they are adjacent neighbors to the proposed project the outcome of the hearing would substantially affect them, that the bulk and scale issue on appeal was of particular interest and effect, and that their interest was not coincident with that represented by DCLU. Appellant Inline Construction opposed the intervention stating inter alia, that the Hodges did not have an interest different from that represented by DCLU. The Director supported the motion to intervene and noted that if the Director's decision were overturned, DCLU would not pursue further review. Unless they intervened, the Hodges would not have standing for a subsequent review.

On May 7, 1990, after consideration of the motion to intervene and the responses made by the other parties to that motion, the Hearing Examiner granted the requested intervention of Peggy and Jim Hodge.

For the purpose 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. In January, 1989, the applicant who is also the appellant in the action, filed a master use permit application (Exhibit 8) to demolish two existing residential units and establish use for the future construction of a mixed-use building at 3435 California Avenue S.W. The proposal is described by the Director's Analysis and Decision as a five-story, mixed-use building with 2,768 sq. ft. of retail space at street level and a total of 22 apartments on the upper floors.

2. With regard to the action proposed in this application, the Director issued a determination of non-significance (DNS) with conditions pursuant to the Environmental Policy Act of 1971 (SEPA) and Chapter 25.05, Seattle Municipal Code.

3. There were three conditions included in the DNS. The appellant challenges Condition No.1 which states:

1. To minimize aesthetic impacts of height, bulk and scale on the adjoining single family zone, the owner(s) and/or responsible party(s) shall revise the building plans to remove the two units west of the courtyard from the fifth floor and provide a seven-foot setback and roof gables at the west end of the fourth floor, equivalent to that originally proposed on the fifth.

This condition is the only issue raised in this appeal.

4. Appellant challenges the Director's decision as not having complied with the procedural requirements of SEPA (RCW 43.21C.060 and SMC 25.05.660) in that appellant alleges the decision is not sufficiently specific in identifying the adverse impact(s) to be mitigated by Condition No. 1. Appellant cites Cougar Mt. Assocs. v. King County, 111 Wn. 2d 742, 765 P.2d 264 (1988) and Levine v. Jefferson County, 54 Wn. App. 88 (1989) in support of this argument.

5. Appellant also argues that the Director erred because this situation does not have "extraordinary circumstances" necessary to warrant mitigation of height, bulk and scale.

6. Further, appellant argues that the required change in the design of the building is unreasonable because the building would have to be redesigned in order to comply with Condition No. 1 and appellant believes this redesign would be tantamount to denying the project.

7. The proposal site is located on the west side of California Avenue S.W., between S.W. Hinds and S.W. Spokane Streets in a Neighborhood Commercial (NC1/40') zone which runs along both sides of California Avenue S.W. The site is approximately 8,775 sq. ft. (75 ft. wide and 117 ft. deep).

8. Included in the Neighborhood Commercial zone within a block of the site, is a large medical clinic, retail and service businesses, some single residences and small apartment buildings (up to ten units). The areas both east and west of the Neighborhood Commercial zone which flanks California Avenue S.W., are zoned and developed with single family residences.

9. The alley at the rear of the site is paved and has a 16 ft. right-of-way. The alley marks the edge between the Neighborhood Commercial zone, and the abutting single family (SF 5000) zone. The single family residences in this area are generally one- and two-story houses, with rear yards 30-to 50-ft. deep and garages accessing off the alley.

10. The site slopes to the west so that the proposed building would be five stories on the west side (the side that abuts the alley and faces the single family zone) and four-stories on the California Avenue S.W. side. Exhibit 4 provided by the appellant, indicates that the west side of the building which would face the single family residential zone would be approximately 60 ft. wide, with a height of 45 ft. (NC1/40' allows 40 ft., plus five feet for a sloping roof).

11. The building appears as one structure although testimony indicated that it would be built as two, connected with a common foundation and basement/parking level. The basement parking level would extend to the side lot lines.

12. The Director's decision and credible testimony and exhibits received during hearing, describe the design of the proposed structure as having a sloped multiple gabled roof, decks on the east and west sides, and finished with a combination of wood siding and stucco. (The stucco would be up to approximately 16 ft., with the wood siding on the 3rd, 4th, and 5th floors).

13. The facade of the building would be back about 14.5 ft. from the alley, with decks extending six feet into the setback. The fifth floor would be set back an additional seven feet.

14. The rear facades of the existing single family residences are, on average, about 45 ft. from the alley (Exhibits 2, 5, 17 and 18).

15. Several persons who live in the area, appearing on behalf of the intervenors, testified that they believe the proposal would have adverse impacts by reducing light, causing shadow, reducing privacy and sense of openness in their backyards. None complained about the architectural style of the proposal, but praised the DCLU condition as helpful in creating distance and lowering the height of the topmost level. Some would prefer greater modification of the proposal in order to make it smaller and/or create more distance between it and their homes. Having their backyards exposed to the view of the proposal's upper floors, appeared to be of particular concern.

16. Some landscaping is proposed but no claim was made that it would be effective in mitigating the perceived impacts of height, bulk and scale in the single family zone. Several large trees and garages on the adjacent properties could partially block some views of the proposal from the single family zone.

17. Appellant asserts that the part of the structure which would be removed by the Director's condition would not be visible from the single family zone.

18. At hearing the appellant/applicant suggested an alternate revision of the building's design which would remove one unit from the fifth floor and set that part of the building back an additional 7 ft. A parking space in the rear yard, one of two in the design as it was considered by DCLU, was also proposed to be removed and in the area landscaped in place of the parking removed.

19. Appellant presented testimony that the design for the proposal would have to be reworked substantially to accommodate the Director's required mitigation. Some concern was expressed that the design approach to seismic engineering might have to be reconsidered. It was not indicated whether the appellant/applicant's revision suggested during hearing (see Finding 18) would require redesign of the service engineering.

20. Additional time required for the City to review the reworked/revised design necessitated by Director's Condition No. 1 was estimated by appellant's architect to be on the order of 9 months. The life of the finished project was estimated by the same witness at approximately 50 years.

21. The proposal would be three to four stories taller and have greater lot coverage than adjacent development in both the commercial and neighboring single family zones.

22. During the review of the MUP application (see Exhibit 12), DCLU indicated to the applicant there was a need to reduce "the apparent bulk of the building facing the single family zone" and that there was concern regarding the "bulk and scale relationships between the two zones." The applicant responded that with the proposed design, the distance to the property line, the placement of the existing garage and the fence, that "the impact of our bld'g (sic) is decreased".

23. The Director's representative stated that the sloping

topography of this site established a condition which distinguishes it from other sites.

24. Reasonable minds may disagree as to how much mitigation is necessary in order to reduce the impacts associated with height, bulk and scale and to provide a reasonable transition. The appellant/applicant proffered an alternative at hearing that was less severe than DCLU's Condition No.1. Intervenor's stated DCLU's condition "would help" but suggested more could be done to further reduce the size of the proposal.

25. The City Council determined in its review of a project located in an NC1/30' zone, that the 30 foot height allowed would be an appropriate transition to the adjacent single family zone. In re Marianna Thaden, (C.F. 295562, File No. MUP-86-078). Council made a similar determination with respect to the L2 zone's 30-foot height limit providing an appropriate transition height to a single family zone in the 160 Lee Street case. (File No. MUP-85-053(W)), C.F. 294378, 294392)). See Exhibit 13.

26. Exhibits illustrating sight lines from the single family zone indicate the portion of the proposed building that DCLU would remove could be visible and possibly dominant the views from the rear yards of some of the single family neighbors. With that portion of the building removed as per DCLU's condition, none of the fifth floor of the building would be visible. Because Condition No. 1 would set the fifth floor farther back from the alley and decrease the height of the fourth floor, it also appears that the backyards of the single family neighbors would not be visible to the residents of the proposed structure.

Conclusions

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

2. The Hearing Examiner must give "substantial weight" to the DCLU Director's decision. Section 23.76.022.C.7. The burden is on an appellant to overcome this weight by proving that the decision is "clearly erroneous". Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. Under this standard of review, the decision of the Director could be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. Cougar Mt. Assoc. v. King County, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

4. The Director has authority pursuant to Section 25.05.660 to impose mitigating measures as conditions of approval, subject to certain limitation: 1) conditions must be based on policies, plans, rules or regulations designated in the Seattle Municipal Code as a basis for the exercise of substantive authority; 2) the conditions must be related to specific adverse environmental impacts clearly identified in an environmental document; 3) the conditions must be reasonable and capable of being accomplished; and 4) responsibility for mitigation must be proportional to the extent of the impact caused by the subject proposal. Section 25.05.660A.

5. The test of "reasonableness", as described by the Seattle City Council, is "whether the required mitigation bears a 'reasonable' relationship to or is 'reasonable' in proportion with the identified adverse impact." In re Appeals of Queen Anne Community Council et al., C.F. 293623 (1985).

6. There is in SMC 25.05.665.G a policy basis for the Director's exercise of substantive SEPA authority with regard to impacts related to height, bulk and scale. Permissible mitigating measures include, among others, limitation to height and modifying bulk. It is the City's policy that the height, bulk and scale of development projects be generally consistent with the adopted land use policies and should provide for a reasonable transition between areas of less intensive zoning and

more intensive zoning.

7. Policy B9 of the Land Use Policies for Neighborhood Commercial Areas provides general SEPA authority to restrict the bulk and scale where the code does not provide for a transition in scale.

8. The project would be considerably larger than other structures in the area which are generally low-scale. The topography (sloping from east to west) would place the proposal upslope from the single family area, exaggerating the differences in height, bulk and scale between the two zones, and distinguishing the site and proposal from others on similarly zoned edges. This combination of factors was relied upon by DCLU in determining that the code permitted height, bulk and scale could result in a building here that does not provide a reasonable transition between the Neighborhood Commercial Area and the adjacent single family zone. In this circumstance, the moderately sloping topography creates a situation where the proposal would appear to be taller than the 45 ft. zone maximum when viewed from the single family side of the "edge" and would expose the backyards of the nearby single family homes to the views of those on the upper stories of the proposal.

9. DCLU's condition would both decrease the height of the proposal on the west side of the site and set the uppermost level back, away from the single family edge. By creating greater distance and decreasing the height, the condition would significantly reduce or eliminate the loss of privacy testified to by neighboring residents and the building would be an intermediate step (approximately 30-32 ft. tall nearest to the single family homes, and approximately 40 ft. tall at the highest point of the roof where it would be about 80 ft. from the single family homes).

10. Given the City Council's interpretations of its intent regarding the appropriate "transition" between lesser and more intense zones in its review of other "edge" circumstances, the Director's condition (see Conclusion No. 9) would be consistent with the use SEPA to provide mitigation to reduce impacts of disproportionate height, bulk and scale at zone edges and achieve a reasonable transition between zones.

11. The DCLU file and testimony of the Director's representative during hearing provide sufficient evidence to conclude that the Director was not clearly erroneous in requiring this condition. After reviewing the entire record of decision in light of the public policy underlying both SEPA and the Neighborhood Commercial Areas Land Use Policies, including City Council's interpretations, the Hearing Examiner is not left with the firm and definite conviction that a mistake has been made.

12. The Director's condition bears a reasonable relationship to the adverse aesthetic impacts in that the required mitigation would eliminate the impact associated with the disproportionate height, bulk and scale at this zone edge. Insufficient evidence was presented at hearing to support appellant's assertion that the condition would be unreasonable because it could undermine the approach to seismic engineering and require that the project be totally redesigned. Given the concern DCLU expressed regarding the bulk of the building during its review of the MUP application, including a request that the design be modified, the appellant must be found to have assumed some risk in proceeding with detailed structural drawings prior to the completion of the environmental and land use review.

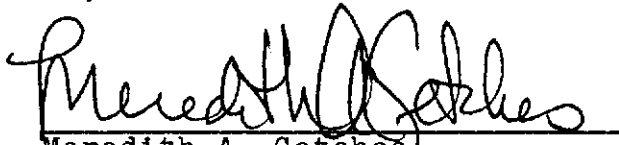
13. The Director did fail to satisfy the procedural requirements of Section 25.05.660A.2 in that the adverse impact(s) were not clearly identified in the environmental document. The DNS states the Director's conclusion but does not articulate the bases for that conclusion. When a reviewer examines the entire file and the exhibits and testimony of the hearing, the factors considered by the Director are revealed. However, the SEPA procedural requirement is for specificity, in writing, in an

environmental document. One should not have to piece together the factors of relative/disproportionate height, bulk and scale, distance between existing homes and the proposed structure, and the manner in which the topography exaggerates the proposal's size (making it appear almost 50 ft. tall from the single family side of the site), to understand the impact. The DNS should specifically describe the impacts sought to be mitigated by the condition and how the condition accomplishes the desired mitigation. The Director's decision should include findings as to the "substantial problems of transition in scale", not addressed by the code, that have caused him to determine that this mitigation is necessary. Section 25.05.665D.

Decision

The Director's decision is REMANDED for the addition of sufficiently specific findings and conclusions to support the imposition of Condition No. 1 in satisfaction of the procedural requirements of SMC 25.05.660. This addition shall be submitted to the Hearing Examiner, with copies to the appellant/applicant and other parties of record, not later than 5:00 p.m. on July 9, 1990. The Hearing Examiner retains jurisdiction over this matter for the purpose of reviewing the Director's addition. The Hearing Examiner will issue a final decision no later than 15 days following receipt of the Director's addition or July 24, 1990, whichever occurs first.

Entered this 18th day of June, 1990.


Meredith A. Getches
Hearing Examiner