

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

In the Matter of the Appeal of

KERRY CHEW

FILE NO. MUP-90-019(CU)
APPLICATION NO. 8907719

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

INTRODUCTION

This matter was heard before the Hearing Examiner on May 22, 1990. Parties to the proceedings were: appellant Kerry Chew; applicant Jun Quan; and the Director Department of Construction and Land Use (DCLU) represented by Cristina Van Valkenburgh, land use specialist.

The appellant exercised the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

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 of law and decision of the Hearing Examiner on this appeal.

FINDINGS OF FACT

1. Applicant proposes to convert the interior portion of the first floor of an existing church building of the Chinese Baptist Church to a daycare center for 20 children. The address is 5801 Beacon Avenue South.

2. The proposal's exterior conversion is to eliminate two parking spaces in the adjacent parking lot and to construct a playground that is partly grass and partly pavement for use by the daycare center.

3. The subject property is located within a single family zone (SF5000) on Beacon Hill in the city.

4. Development in the immediate vicinity is primarily single family residences.

5. DCLU conditionally granted the administrative conditional use, imposing the following conditions:

a. Prior to issuance of the master use permit the owner or responsible party was required to revise plans to indicate a six-foot high solid fence around the proposed play area;

b. Prior to issuance of the certificate of occupancy, installation of a six-foot high solid fence around the proposed play area; and

c. For the life of the project:

(1) No organized out door activities before 9 a.m.;
and

(2) The number of children permitted in the play
area at any one time is limited to 12.

(Exhibit 5.)

6. By letter of March 12, 1990, Kerry Chew, on behalf of the Childcare Council of the Chinese Baptist Church, appealed the DCLU six-foot high solid fence condition precedent. The letter further agreed to comply with the conditions that pertained to limiting the time of play and number of children on the playground.

7. The playground area proposed by applicant is approximately rectangular in conformation, with a total area of approximately 175 square feet and a depth of approximately 35 feet by approximately 50 feet. (See Exhibit 2.)

8. The playground enclosure referred to in the DCLU decision is irregular in conformation. The solid wood fence would run along the west perimeter of the playground for 30 feet, then at a 45-degree angle along the northwest perimeter for 40 feet and then along the north perimeter of the playground for 20 feet. (Exhibit 7.)

9. The playground is on a slope running from the southeastern edge downhill to the northwestern perimeter. The playground is fully contained within the 145-space church parking lot, which extends beyond the playground on the west and north sides. The southern perimeter of the playground is bound by a 15-foot high rockery and a wooden fence above the rockery. The western perimeter of the playground abuts onto the church parking lot. From the western edge of the playground the church parking lot runs approximately 120 feet to the boundary of the site. There is a six-foot high fence on the western boundary of the site. The houses along the western boundary of the church parking lot are on a slope that drops about six to eight feet in the 120 feet from the playground to the houses. (Chew and Quan testimony.) The playground cannot be seen from the patio of the house adjacent to the western boundary of the church parking lot. (Quan testimony.) The northern perimeter of the playground also abuts onto the church parking lot. The parking lot runs approximately 180 feet to South Orcas Street, then across the street another 40 feet to the nearest residence.

10. The playground is currently fenced in a rectangular conformation at its northern and western perimeter by cyclone fencing that is four feet high. (Exhibit 2)

11. DCLU commonly requires a solid fence for daycare center playgrounds and required a fence in the instant situation because the fence is a "customary condition" precedent. (Van Valkenburgh testimony.)

12. The DCLU land use specialist did not observe or hear children on the playground at any time.

13. The DCLU land use specialist has not discussed the noise generated in a daycare center playground with a noise specialist.

14. The noise from 18 children and three teachers in the playground singing and shouting in unison between 10:30 and 12:00 on a Sunday was barely audible above the background noises. The observation was made from the northern boundary of the parking lot, 180 feet from the playground, by persons with normal hearing. (Chew and Tsuchiya testimony.)

15. Appellant offered evidence of sound meter readings which were taken simultaneously with the observations made in the above finding. However, the sound meter operator was not present for questioning on his expertise, qualifications or his ability to operate the sound meter used. In addition, the sound meter was not available. The offered evidence was not admitted.

16. The vicinity is subject to noise from jets every 5 to 10 minutes and also to freeway traffic noises. (Chew and Quan testimony.)

17. Vicinity residents, during the DCLU public comment period, submitted two letters and a petition with 41 signatures.

The signatories to the petition supported the proposal. The letters opposed the proposal, specifying their objections as pertaining to increased traffic and parking problems. DCLU also received a phone call from a vicinity resident who objected to an anticipated increase in the noise levels from the daycare center. The DCLU land use specialist could not recall the name of the caller or the specific objections of the caller. (Van Valkenburgh testimony.)

CONCLUSIONS

1. The Office of the Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.76, Seattle Municipal Code. As this is an administrative conditional use decision herein appealed, no substantial weight or other deference is accorded the underlying DCLU decision. Seattle Municipal Code Section 23.76.022C7.

2. A child care center may be permitted as a conditional use in a single family zone so long as the provisions of Seattle Municipal Code Section 23.44.022 are met.

3. Pursuant to Seattle Municipal Code Section 23.44.018C, the proposed conditional use must meet the criteria for establishing the specific conditional used and may not "...be materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located." Conditions may be imposed to mitigate adverse negative impacts and to provide protection to other properties in the zone or vicinity. SMC Section 23.44.018D.

4. The proposed conditional use, by virtue of its proposed number of children and intensity of use, is not a major institution as defined in SMC Section 23.44.022B.

5. The issue is whether there are negative noise impacts and whether SMC Section 23.44.022H would require mitigation of the noise impacts by a six-foot high fence. This fence would be in addition to the permanent conditions, which include hours of use and number of children permitted on the playground at any given time.

6. Prior to mitigation of noise impacts, the noise impacts must be identified and ascertained. If those noise impacts can be identified, then those impacts should be mitigated unless they are so materially detrimental to public welfare or injurious to property that the conditional use is not warranted.

7. In this instance, the noise impacts were never identified and ascertained by DCLU. The condition imposed by DCLU was based upon an assumption that the childcare center playground will generate unacceptable noise levels during operation hours. The credible evidence presented by appellant was that noise from 18 children on the playground was virtually indistinguishable from the background noise. The Hearing Examiner notes that the observation included 18 children, as opposed to the 12 children permitted under condition 3, and that the 18 children were shouting in unison.

8. There was no evidence presented that the use of the playground would be materially detrimental to the public welfare or injurious to property in the same zone or vicinity. It should also be noted that establishment of a new childcare center is a public benefit.

DECISION

The DCLU decision to grant the proposed administrative conditional use requested by applicant is affirmed. The DCLU conditions relating to time of use of the playground and number of children on the playground are affirmed. The DCLU condition

relating to construction of a six foot high solid fence is REVERSED.

Entered this 5th day of June, 1990.



Gail Fujita
Hearing Examiner Pro Tempore

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, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.