

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

LEONARD KASHNER and
NICOLE NASH

FILE NO. MUP-90-047(CU)
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APPLICATION NO. 8905939

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 at 5244 South Morgan. The subject property is in a single family zone (SF 7200).

Leonard Kashner and three other residents on South Morgan Street ("appellants") appealed the decision of the Director, Department of Construction and Land Use ("Director"), to conditionally approve a master use permit application for the establishment of a child care center for 42 children at an existing child care center in a single family residential zone.

Pooh Corner EduCare Center ("applicant/appellant"), operator of the child care center, also appealed the Director's decision as to Condition #9 of that decision. Condition #9 would limit the number of enrollees to a maximum of 30 children.

All appellants exercise 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 9, 1990. The Hearing Examiner visited the subject property on October 22, 1990 and the record on this matter was officially closed following that visit.

Parties to the proceedings were: appellant, Leonard Kashner, pro se; applicant/appellant Pooh Corner EduCare Center by spokesperson Heather Stout with Nicole Nash, Director of the Center; and the Director, Department of Construction and Land Use (DCLU), by Christina Van Valkenburgh, associate land use specialist.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

With regard to the Environmental Policy Act of 1971 (SEPA) and Chapter 25.05, Seattle Municipal Code, the action proposed in this subject application has been determined to be categorically exempt pursuant to the provisions of Chapter 197-11.

After due consideration of the evidence presented and as a result of the personal inspection of the subject property and the surrounding area by the Hearing Examiner, the following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The applicant/appellant, Pooh Corner EduCare Center, applied for a master use permit to establish the use for a child care center for 42 children (ages 6 to 12 years) within an existing single family residence at 5244 South Morgan Street.

2. A Master Use Permit for a child care center for 24 children was conditionally granted in 1982. That approval, as modified by the Hearing Examiner's October 5, 1982 decision, required that: parking be provided off-site (accomplished through a parking covenant with the nearby Shephardic Bikur Holim Synagogue); that the perimeter of the play area be equipped with a view-obscuring fence and landscaped so as to provide screening; and, no parking for drop-off or pick-up be allowed on South Morgan Street. (Exhibit 4).

3. The applicant/appellant has established use at the site for an "E-3 Daycare" with a maximum occupancy of 24 children. (Exhibit 15).

4. The neighborhood appellants assert that the conditions of the permit approved in 1982 have not been met, that the occupancy limit (24 children) has been exceeded, and that the maintenance and general performance of the Center has been inadequate. Appellants ask that the Hearing Examiner reverse the DCLU decision and deny the requested permit in order that a child care center not be allowed to operate at this location.

5. Credible testimony and evidence indicate the perimeter of the play area has a wire ("chainlink") fence and is planted with a few trees and bushes. The play equipment is clearly visible from the street and nearby residences.

6. Neighbors testified that the children generate substantial noise while they use the play area. In the instance of one neighbor who works nights, the noise has sometimes disturbed her attempts to sleep during daylight hours.

7. The Center has notified parents about the prohibition of drop-off and pick-up in South Morgan Street and purports to have a policy that would result in suspension and even expulsion for children whose parents persist in the prohibited

drop-off/pick-up practice. (Exhibit 13 includes 32 signatures of parents acknowledging their understanding of and commitment to this parking policy.)

8. Neighbors testified that children are frequently dropped-off and picked-up in the street in front of the facility. Neighbors also testified that children (some with parents, some by themselves) have been seen jay-walking diagonally across the street going to and from the off-site parking area. Concern was expressed about the children's safety while they cross the street and cross driveways along the sidewalk.

9. Some neighbors testified that they were supportive of child care centers generally, and had even supported this facility when it was smaller owner-occupied facility, but they complain that noise and traffic and maintenance problems (litter, etc.) would all increase with the granting of the requested enrollment. One witness remarked that given the amount of noise from the outdoor play area, there must be more than 24 children currently on premises.

10. The impact of traffic associated with the Center was contested. DCLU, using Institute of Traffic Engineers standard trip generation rates, estimated that with the proposed capacity of 42 children and a 15 member staff, there would be approximately 498 trips per day. The Center estimated approximately 250 trips per day. The Center's estimate was based upon a survey of parents and staff currently associated with the Center and reflects the effects of carpooling and transit ridership indicated in the response to the survey. (Exhibit 14).

11. Ms. Nash, the Director of the Center, testified that the current enrollment is 44, but since September 1989, the actual occupancy at any one time has been limited to 30 children. She further indicated that in the past, the Center functioned for a long time with an enrollment of 42 children. The Center holds a Washington State Department of Social and Health Services license for a child care center with an enrollment of up to 42 children.

12. Section 23.44.022 of the Land Use Code provides that a child care center (defined as facility for 13 or more children) can be permitted as an "institution" in a single family zone under the administrative conditional use provisions of the code, if it meets the criteria of SMC 23.44.022 and it is determined that it would not be materially detrimental to the public welfare or injurious to property in the vicinity. (SMC 23.44.018).

13. The conditions that a use must meet in order to be permitted include:

Development Standards - Must meet the development standards (height limit, yards, etc.) of a single family residence. The Center meets these standards.

Dispersion - Be at least 600 ft. away from any other legally established institution. DCLU determined that because this facility is not a new use and it is not expanding the boundaries of the sites, this criterion is not applicable. This determination was not disputed.

Demolition of residential structures - Not applicable.

Reuse of residential structures - Institutions must meet yard requirements; Center is consistent with required yard standards.

Reduce noise and odor impacts - Noise and odor impacts are to be reduced. No odor impacts are expected. DCLU found noise from the play area to be a problem and the Department's approval included several conditions aimed at reducing noise impacts.

Conditions 1, 5, and 10 of the DCLU decision require the addition and maintenance of a solid wood fence around the perimeter of the play area. To increase the distance between the play area and nearby residences, Conditions 2 and 3 require the new fence to be set back a minimum of 15 feet from the neighboring property line on the east and a minimum of 10 feet from the front property line. Condition 8 provides that no more than 12 children are permitted to be in the play area at any one time. The play area is not to be used before 9:00 a.m. While children are in the play area supervision is required. Play is prohibited in the unfenced backyard and along the driveway.

Landscape - Require landscaping to integrate the institution with adjacent areas. DCLU Conditions 4, 5 and 10 require the addition and maintenance of a five ft. wide landscaped area around the outside of the perimeter fence.

Light and Glare - No change proposed. No indication of problems.

Bulk and Siting - No change proposed. No indication of problems.

Parking and Loading - Spaces are to be required in accordance with the code but can be modified on a case-by-case basis. Condition 7 requires signs identifying parking spaces available for the Center's use to be placed on the parking spaces in the off-site parking area. Consistent with the 1982

Hearing Examiner decision, DCLU's Condition 11 prohibits loading and unloading in South Morgan Street. (Loading space for two vans operated by the Center is to be provided behind the structure.)

Transportation Plan - Not applicable.

14. To be permitted, a conditional use must also meet the general provisions of SMC 23.44.018. That section provides that the use must not be a material detriment to the public welfare or injurious to property in the vicinity and allows for the imposition of conditions to mitigate adverse impacts.

15. DCLU determined that this proposal had the potential for being detrimental because of the increased traffic and the concentration of children in this neighborhood. The increase in the number of children from the currently permitted 24, to the requested 42, was found by DCLU to be relatively substantial and would have unacceptable impacts related to increased traffic and noise. To mitigate the anticipated impacts and to avoid potential detriment, DCLU conditioned its approval on a limitation of enrollment to 30 children (Condition 9), in addition to the requirements for perimeter fence, landscaping, and other conditions referred to above. The limitation on enrollment would reduce the number vehicle trips estimated by DCLU by 133 trips (approximately 27 percent; from 498 to 365).

16. DCLU determined that with implementation of the conditions, the impacts of the Center could be substantially mitigated so as not to be a material detriment, and could be permitted.

Conclusions

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

2. The Hearing Examiner is to give no deference to the DCLU's Director's decision on conditional use appeals. 23.76.022.C.7.

3. A child care center for a maximum of 24 children has been established and the continuation of that use is not an issue before the Hearing Examiner.

4. The provisions of Section 23.44.018 control the determination of whether or not the requested use (i.e., a child care center for 42 children) can be permitted.

5. The maximum enrollment allowed by the City permit (i.e., 24 children), is currently being exceeded, and has been exceeded in the past, up to as many as 42 to 44 children enrolled at any one time.

6. The existence of a Department of Social and Health Services license allowing an enrollment of 42 children, does not allow the Center to operate with an enrollment larger than that established by City permit (i.e., 24). The state license does not substitute for, or in any way mandate, the size of the facility which the City may allow consistent with the provisions of the Seattle Land Use Code.

7. The impacts of traffic, traffic noise, and noise from children in the play area that have historically been experienced, prior to September 1989, are the impacts of an enrollment approximately equivalent to that being requested (42 children), rather than the 24 child maximum enrollment currently allowed by City permit. The impacts of the higher level of enrollment have resulted in disruption in the neighborhood (auto/pedestrian safety conflicts, vehicle noise, disturbance of the neighbors peaceful enjoyment of their property).

8. The historic impacts of the child care center at this location might have been held to more acceptable levels had the operators of the center not substantially exceeded the enrollment of 24 children established by the prior permit and failed to fulfill the conditions attached to that permit.

9. The conditions included in the DCLU decision address the impacts of concern, are reasonable in their scope, and, if properly implemented, should effectively reduce the impacts of a child care center in this location.

10. Given the applicant's record of noncompliance with permit conditions, the timing of the DCLU conditions should be modified to better ensure timely and adequate compliance prior to the issuance of the master use permit.

11. The Hearing Examiner is persuaded that the Center, with a maximum enrollment of 30 children, can become a good neighbor and minimize its disruptive impact in this neighborhood to an acceptable degree if the conditions of this permit are fully and faithfully implemented as modified below.

Decision

The decision by the Director of the Department of Construction and Land Use to conditionally grant the administrative conditional use is AFFIRMED as modified herein by the following:

MODIFY CONDITIONS 5, 6, AND 7 AS FOLLOWS:

Implementation of DCLU Condition 5, 6, and 7 (installation of a 6 ft. high solid wooden fence, perimeter landscaping, and signs identifying parking spaces) shall be required to be completed to the satisfaction of the Land Use Review Section prior to the issuance of the master use permit.

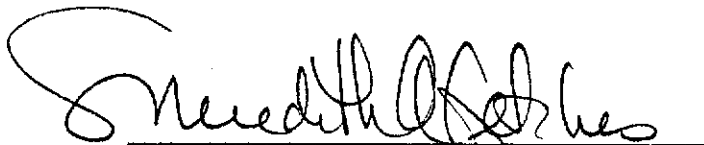
To help ensure the success of the planting plan, Condition 7 shall be further modified to allow the installation of any plants which require mild weather planting conditions to be delayed until Spring of 1991 with the approval of the Land Use Review Section, but the installation of all landscaping, per the approved landscape plan required by Condition 4, shall be completed no later than May 1, 1991.

ADD THE FOLLOWING CONDITION:

Prior to the issuance of the master use permit, the owner(s) and/or responsible party(s) shall submit to the Land Use Specialist proof that all residential neighbors with addresses on the 5200 block of South Morgan Street have been provided with:

- ° an accurate copy of the DCLU conditions of decision as modified by this Hearing Examiner's decision;
- ° the name and phone number of the responsible individual associated with the Center to be contacted if there are questions or problems; and,
- ° the appropriate DCLU phone number to report problems with condition compliance.

Entered this 31st day of October, 1990.



Meredith A. Getches)

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 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 the King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.022.C.12.c.

If the Superior Court orders 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.