

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

In the Matter of the Appeal of

MAY BOTTEN

MUP-90-095(P)
APPLICATION NO. 8907434

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

Introduction

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

This matter was heard before the undersigned Deputy Hearing Examiner on January 2, 1991. The record was held open until January 15, 1991 for reasons explained below in Finding No. 8.

Parties to the proceeding were: the appellant, May Botten by Stanley Kasperson, attorney-at-law; and the Director, Department of Construction and Land Use (Director) by Arthur Ward, land use specialist. The project applicant was not present, nor was the current owner of the property.

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 appeal.

Findings of Fact

1. The subject property is located at 2205 50th Avenue Southwest. The property includes Lots 4-7, Block 2, West Seattle Park as well as a portion of vacated S.W. Walker Street. The property is zoned Single Family 5000 (SF 5000).

2. The property is a rectangularly shaped lot of approximately 13,860 square feet. The property measures 138.6 feet from north to south and 100 feet from east to west. It is developed with one single family house.

3. On the south side of the lot is a 20-foot wide alley that runs from 50th Avenue S.W. to Sunset Avenue S.W.

4 The proposal is to short subdivide the subject site into two lots, Lot 1 with 5,000 square feet and Lot 2 with 8,860 square feet.

5. The portion of vacated S.W. Walker Street included in the subject parcel is described as follows: The south one fourth (20 ft.) of S.W. Walker Street vacated under V.O. (Vacation Ordinance) 83520; the north one half (20 ft.) of the south one half (40 ft.) of S.W. Walker Street vacated under V.O. 84431.

6. As a requirement of the latter vacation (V.O. 84431), the property owners at the time entered into and recorded a covenant stating, in pertinent part:

(3) That said vacated street area will at all times be incorporated with one or both of said adjacent properties as now established, and will not be segregated into a separate lot, either by itself or in conjunction with portion of either or both of said adjacent properties;

(4) That the number of structures designed for habitation and suitable or capable of being used as a dwelling place, as defined in the zoning and building codes of the City of Seattle, within the portion of the city block bounded by Sunset Avenue, 50th Avenue S.W., and the alley in Block 2, West Seattle Park Addition (Volume 13, page 177 of Plats), shall never exceed the number existing at the effective date of the ordinance vacating S.W. Walker Street; excepting therefrom Lots 1,2,and 3 of said Block 2.

(5) That this covenant shall run with the land and be binding upon the heirs, successors, and assigns of the parties hereto. . .

7. The Director's report approved the short subdivision, subject to several conditions. The first condition reads as follows:

The owner(s) and/or responsible party(s) shall:

1. Obtain a court ruling interpreting the terms of the covenant (in the vacation of South Walker Street V.O. 84431) as they may relate to segregation of the property and declaring the proposed Parcel 1 (Parcel A) to be a legally buildable site.

This condition was to be satisfied prior to the recording of the short plat.

8. At some date subsequent to the submittal of the application for this short plat to DCLU, the applicant, Donald G. Olson, sold the property to Mr. and Mrs. Dan Borracchini. As noted in the introduction to this decision, neither Mr. Olson nor the Borracchinis were represented at the hearing. Whether or not Mr. Olson conveyed his rights in the application to the Borracchinis is unknown. In light of the sale, and in light of the fact that neither Mr. Olson nor the Borracchinis were in attendance, the Examiner ruled that the record should remain open for 15 days and asked the DCLU representative to write to Mr. Olson and ask him if he wished to withdraw his application or to extend the right to do so to the Borracchinis. That letter was written on January 3, 1991, and was copied to the Borracchinis. As of January 18, 1991, DCLU had received no response to its letter

9. Appellant's principal argument at hearing was that DCLU's approval of the plat subject to the above-noted condition was improper and that DCLU should not approve any platting action until there has been court action resolving the validity of the covenant.

10. Pursuant to SMC 23.24.040, no short plat shall be approved unless all the following facts and conditions are found to exist:

1. Conformance to the applicable Land Use Policies and Land Use Code provisions;
2. Adequacy of access for vehicles, utilities, and fire protections, as provided in Section 23.54.010;
3. Adequacy of drainage, water supply and sanitary sewage
4. Whether the public use and interest are served by permitting the proposed division of land.

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 P2d 1005 (1981).

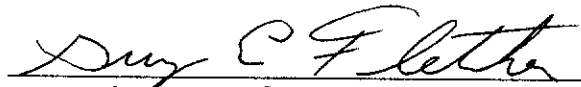
3. Under this standard of review, the decision of the Director can be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. Cougar Mt. Assoc.. v. King County, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

4. Without deciding what the proper course might be in other circumstances where property subject to a short plat application is also subject to a restrictive covenant, the Examiner concludes that this short plat application should not be approved. Two factors lead to that conclusion. The first is the fact that the covenant that appears to prohibit this short plat is one that was entered into in conjunction with a city action, the vacation of S.W. Walker Street. It is, therefore, of a somewhat different nature than other private covenants that the City would, properly, not attempt to enforce. The second factor is the transfer of ownership of the subject property and the fact that the new owner has taken no action to pursue this plat application. It does not serve the public use and interest to approve a short plat of property where the current owner has an uncertain interest in the action and where the approval is of no effect until a court action, as yet uninitiated, is resolved. In these circumstances, any approval of the requested short plat might well never be acted upon, but merely create uncertainty until such time as it expires. The better course, then, is to deny this application and to consider any future application only after issues involving the enforceability of the covenant are resolved.

Decision

The decision of the Director is REVERSED. The requested short plat is denied.

Entered this 28th day of January, 1991.


Guy E. Fletcher
Deputy 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 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 (15) 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, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.