

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

In the Matter of the Appeal of

MARGARET SCHULTZ

FILE NO. MUP 90-096(P)
APPLICATION NO.8905217

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

INTRODUCTION

The applicants applied to the Department of Construction and Land Use (DCLU) for a Master Use Permit (MUP) to subdivide one parcel into two parcels of land. On January 22, 1990, DCLU conditionally granted the MUP application. Mr. Scott Espy filed a timely appeal on behalf of the Maple Leaf Community Council (MLCC). Prior to hearing DCLU withdrew its decision. The Hearing Examiner cancelled the hearing over the objection of the applicant.

On October 8, 1990, counsel for the MLCC advised counsel for the applicants that MLCC was no longer objecting to the approval of the short plat and would enter a Stipulation For and Order of Dismissal.

On October 25, 1990, DCLU reissued a decision identical to the one it previously issued. The Hearing Examiner determined that the publication of reissued MUP gives rise to an appeal opportunity. Ms Schultz filed a timely appeal on November 8, 1990.

The parties to the proceeding were: Sherrie Harris, representing the appellant; Richard Sanders, attorney for the applicants John Tardiff and Robert Wilson; and Mallie Anderson, representing the Director of DCLU.

This matter was heard before the undersigned Deputy Hearing Examiner on December 10, 1990. The record was initially left open until December 17, 1990 for the Examiner to conduct a site inspection. The time allowed for the site inspection was extended to January 4, 1991. The site inspection was conducted on January 3, 1991.

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, and after having visited the site, the

following shall constitute the findings of fact, conclusions and the decision of the Hearing Examiner on this appeal.

FINDINGS OF FACT

1. The subject property is located at 2317 NE 89th Street.
- 2 The property is zoned Single Family 5000 (SF5000). The property is bordered by Maple Leaf Creek to the east, single family residences to the east and south and multifamily development to the north and west.
3. The subject property is a rectangular shaped parcel. A house on the lot was recently demolished by permit. The applicants proposed to subdivide the northern portion of the parcel into two lots and have not included the southern most portion of the lot in their request for a subdivision.
4. The applicants have been advised by DCLU that the adjacent parcel which is held under common ownership, but not included in the current subdivision is not a legal building site. The short plat and the DCLU records will note that the third parcel is not a legal building site. The appellant is still concerned that the applicant may try to build on the lot in the future. DCLU's position is that the third lot is not at issue in this proceeding because DCLU does not have the authority to compel the applicant to include all of the commonly owned adjoining land in the short plat. The appellant has been given assurances by DCLU that the applicant will not develop the lot with a third house based on the recording on the short plat. that the parcel is not a legal building site.
5. The appellant contends that DCLU has departed from its customary practice of requiring the applicant to include all adjoining land in the subdivision request. Though DCLU acknowledges there is precedent for the appellant's position, they respond that each case is evaluated on its individual merit and in this case DCLU does not feel it has the authority to compel the property owner to include the third parcel.
6. Under the proposal lot A will have 5,024 square feet. Lot A will have direct vehicular access from 89th NE. Lot B will be 5,450.2 square feet. Lot B will need a 20 foot wide easement across lot A for vehicular access. DCLU includes the creek on the property in its calculation of the square footage of the lot.
7. As a part of the application review process, DCLU submitted the proposal to the Seattle Fire, Water and Engineering Departments and to City Light. The Water

Department recommended approval of the application based on the adequacy of water service to the parcels and the availability of a public fire hydrant. The Fire Department reported there was adequate emergency access to both parcels and the availability of a fire hydrant nearby. City Light concluded there would be adequate access to all utilities with a proposed easement. The Engineering Department determined that street improvements and sanitary sewer was available., but that the applicant should submit a drainage control plan before future development.

8. DCLU conditionally granted the request to subdivide the parcel. The conditions have not been appealed.

9. The two parcels will meet the minimum lot size requirements in the SF5000 zone. The parcels can be developed in conformance with the setbacks and lot coverage requirements.

10. The property is not located in an environmentally sensitive zone, but it may be included in the recently adopted Critically Sensitive Areas Ordinance. DCLU contends that the project is vested under the old ordinance. The appellant contends that the property bordering Maple Leaf Creek is environmentally sensitive. There is a history of flooding in the creek and instability due to underground tributaries. The appellant is requesting an environmental impact study with mitigation to protect the surrounding property during development. Protection to the surrounding property owners should include having the applicants post a bond to cover the cost of damage to the surrounding properties during the development process.

11. The appellant challenges the DCLU decision that the proposal meets the four conditions of Chapter 23.24. The appellant argues that the proposal is not in the best interest of the public and the surrounding property owners. Specifically, the appellant contends that the siting of the house on parcel B will negatively impact the streetscape of the neighborhood invade the surrounding property owners privacy in their back yards. Presently, the houses in the neighborhood are situated so that the yards are facing other yards. The future house on parcel A may be situated so that the front the house abuts the street and yard faces what will be the yard on parcel B. Regardless of where the house is situated on parcel B, the house will be facing one of the surrounding residence's yard. In addition to losing their privacy there is a potential for loss of solar access if the houses are two or three stories tall.

12. Consistent with their concern regarding loss of privacy and solar access due to the shadowing effect two or three story tall houses may have on surrounding property, the appellant is concerned that the potential size, bulk and

scale of the development on the site will be incompatible with existing residences. There are currently no two story single family residences in the area. There are however, several multistory, multifamily dwellings in the area.

13. The applicants raised several procedural challenges to the jurisdiction of the Examiner's office to conduct this appeal and to the appellant's pro se representation. The appellant contends that because the DCLU reissued decision is identical to the first decision issued in January 22, 1990, the appeal period expired with the appeal period for the January decision. Therefore, the appellant's appeal in November 1990 is untimely filed. In addition, the applicant argues that the appeal should be dismissed because the MLCC entered into a stipulated dismissal of its appeal with the applicant. Finally, the applicant argues that the Examiner should not allow a representative who is not a lawyer to represent the appellant in the appellant's absence.

14. There was no evidence submitted to establish that the appellant is a member of the MLCC and or that the MLCC was acting on her behalf when it entered into the stipulated dismissal.

15. The administrative rules of the Hearing Examiner's Office do not require parties to be represented by lawyers in public hearings.

16. DCLU received several letters opposing the project prior to issuing the first decision in January 1990. Two of the letters were from the appellant herein, two letters were submitted by the appellant's representative, and one letter from Scott Espy on behalf of the MLCC.

CONCLUSIONS

1. The Hearing Examiner has jurisdiction in this matter pursuant to Chapter 23.76 SMC.

2. The Director's decision on a short plat is entitled to substantial weight. Under this standard of review, decisions of the Director can be overcome only when the reviewer is left with the definite and firm conviction that a mistake has been made. Cougar Mt. Association v. King County, 111 Wn. 2d 742, 765 P.2d 264 (1988).

3. The procedural issues raised by the applicants must be resolved before the merit of the appeal can be addressed. The undersigned Examiner does not agree with the applicant's contentions that any one of the challenges raised by the applicants are grounds for dismissal of the action. When

DCLU withdrew the decision of January 22, 1990. there was no decision for the appellant to appeal. The only decision that was ripe for appeal was the October 25, 1990 decision. Regardless of whether the re-issued decision was identical to the first withdrawn decision, the re-issued decision has replaced the old decision and can be appealed pursuant to SMC 23.76.022. Ms Schultz is an interested and or aggrieved party and initiate an appeal. There is no evidence to establish that Ms Shultz was a member of the MLCC or that the MLCC's withdrawal of its appeal affected Ms Schultz' right to file an individual appeal. Finally, the appellant is not required to choose a lawyer to represent her regardless of whether she is able to make a personal appearance at the hearing. Based on the above, the undersigned Examiner concludes that the Hearing Examiner's Office has jurisdiction to adjudicate the merits of this appeal.

4. The appellant has raised several meritorious issues which are beyond the allowable scope of an appeal on short plat MUP application. The first issue of considerable concern to the appellant is the status of the southern parcel of the applicant's land which was not included in the short plat application. The undersigned agrees with the DCLU position that DCLU does not have the authority to compel the applicant to include the remaining parcel into the subdivision parcels. The only assurance which can be given to the appellant and the surrounding property owners is that the DCLU has ruled that the remaining parcel is not a legal building site and that a notice to that effect will be placed on the short plat and in DCLU's records. With respect to the environmental impact concerns raised by the appellant, the issues are also beyond the scope of this proceeding. Short plat requests are not subject to SEPA review. SMC 25.05.800 (F)(1). The appellant's concerns regarding the possible environmental impacts must be raised in other portions of the development review process.

5. The criteria for approval of short plat request in SMC 23.24.040 are:

1. Conformance to the applicable Land Use policies and Zoning Code or Land Use Code Provisions.
2. Adequacy of access for vehicles, utilities, and fire protection as provided in 23.54.010.
3. Adequacy of drainage, water supply, and sanitary sewage disposal.

4. Whether the public use and interest are served by permitting the proposed division of land.

6. The proposed project satisfies the first criterion for short plat approval. The two lots will meet all code requirements and are sufficient in size to meet all required yard setback requirements and lot coverage requirements.

7. There is apparently no dispute between the appellant and DCLU on the second criterion. The Fire Department and City Light have confirmed that there is adequate access for emergency vehicles and the availability of access to electrical utilities. The required easement is a condition of approval of the short plat.

8. The Engineering Department has confirmed the existence of an adequate water supply and sanitary sewage disposal. The applicants are required to submit a drainage control plan for each lot prior to development on the lot. The submission of the drainage control plan has been included as one the conditions for granting the short plat.

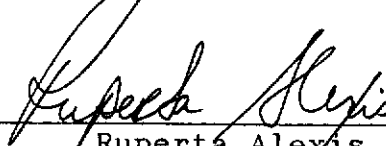
9. The fourth criterion is more problematic and requires more consideration. The appellant is correct in her contention that the house on parcel B will alter the established pattern in the neighborhood of yard facing other yards of the surrounding properties. The house on parcel B will be anomaly because the house will be facing the yard of one of the surrounding residences. But the negative impact of the siting on parcel B is obviated by the fact that parcel B will be behind the house on parcel A and will not affect the streetscape of the block when viewed from the street. Aesthetically, the streetscape will remain the same when viewed from 89th Street .

The siting of the house on parcel B will compromise the neighbor's right to privacy in their backyards. However, it may be unrealistic for an urban neighbor to have an expectation of total privacy in their yards or other open spaces surrounding their property. The city's land use policies do support the need for a homeowner's right to privacy and for protection of the streetscape character of the neighborhood. However, the policies are not sufficiently clear to form the basis for denying this short plat application. There are other mitigations such as fences and shrubbery that will enhance the appellant's privacy in her outdoor space. Finally, the proposed development for the site will have to comply with the code's development standards for size, bulk and scale. Limitations on proposed developments cannot be imposed at this stage of the development process because those issues go beyond the scope of the inquiry regarding the division of the land.

DECISION

The Director's decision is AFFIRMED. The application to subdivide the parcel is granted subject to the conditions stated in the Director's decision.

Entered this 11th day of January, 1991.



Ruperta Alexis
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 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.