

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

CAPITOL HILL COMMUNITY COUNCIL

FILE NO. W-78-003
S-78-009

from an environmental determination
and use permit ruling of the Superintendent of Buildings

This matter is remanded to the Superintendent for further consideration and review as outlined in the text of the decision.

Introduction

The appellants, the Capitol Hill Community Council, filed an appeal from the final action (issuance of use permit) of the Superintendent of Buildings (Superintendent) with respect to the State Environmental Policy Act (SEPA) and Ordinance 105735, with regard to a proposed condominium (Somerset) to be located at the northeast corner of 13th Avenue E. and E. Republican Street. This appeal was filed on February 7, 1978.

On March 28, 1978, an appeal was also filed by the same appellants from the issuance of a use permit for the Somerset project. Both appeals were consolidated by the Hearing Examiner and heard at the same time. The environmental appeal was filed pursuant to Ordinance 105735 and the use permit appeal pursuant to Ordinance 86300, as amended.

Parties to the proceeding were: the appellants, represented by Robert Heller and Temmie Brier, the permittee, represented by Peter Buck and Jerry Cohen, and the Superintendent, represented by Ellen Peterson.

The matter was heard before the Hearing Examiner on April 12, 13, 14, and 17, 1978.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. Mountain Pacific Development Company has proposed to construct an 18-story condominium structure (Somerset) containing 60 dwelling units and a two-level parking facility for 60 vehicles. The ground floor would be a potential site for two retail shops containing 500 square feet each. The site is located at the northeast corner of 13th Avenue E. and E. Republican Street on Capitol Hill. Volunteer Park is located several blocks to the north.

2. The site contains approximately 18,000 square feet and is developed with two older wooden frame buildings and a detached garage. Until recently the 20 apartments have been utilized as rental units. The existing structures would be demolished.

3. An extensive amount of trees and vegetation is located on the site, especially in the southern portion which is largely undeveloped. Most of the existing vegetation

would be removed and replaced under the proposed development plans.

4. The site is zoned Multiple Residence High Density Variable Height (RMV 200). The RMV 200 zone extends generally from E. John to E. Mercer and 13th Avenue E. to within one half block of 15th Avenue E.

5. The area adjacent to the project site is primarily developed with multiple dwellings, many of which consist of converted former single-family dwellings and 3-story apartment buildings. Directly to the north is an 11-story, 126-unit building, Capitol Park Tower, for low income elderly persons.

6. A Final EIS was issued on the proposed project on September 27, 1977. The Capitol Hill Community Council filed an appeal challenging the adequacy of the EIS. In a decision entered on December 22, 1977, the EIS was found by the Hearing Examiner to be adequate.

ENVIRONMENTAL APPEAL

Land Use

7. The appellants allege that the Superintendent failed to adequately evaluate and weigh the impacts of proposed land use changes in light of the Somerset project. The Final EIS at page 59 states:

Apparent economic success of this land use change could be expected to accelerate land use change in the area, by making investment in new high-rise construction more attractive, possibly raising assessments on existing property, generating speculative sales, or inducing single-family dwelling residents to leave the area.

In addition the Final EIS, Section VIII, Adverse Environmental Impacts Which Cannot be Mitigated, at page 89 states:

The success of this project could induce further development of the RMV 200 district, a ten-block area south and east of this site. Cumulative effects upon traffic, noise, population and removal of low-rental housing could be significant.

A review of the Superintendent's testimony shows that it was his understanding that if the project met the zoning and building code requirements then no further evaluation or judgment on his part was necessary. In response to a question on whether or not Somerset would affect land use in the area the Superintendent stated:

If it's permitted in the area then the people in the community knew that type of structure could be constructed in the area. It's no surprise to anyone.... You asked what effect it has or what it's going to look like. It's already predetermined in the ordinance that certain types of structures can in fact be permitted to be built in that particular neighborhood. There's been no zoning change. The people of the community should know exactly what is permitted in that particular neighborhood. If they wanted something different from that, then they should have changed the zoning at some point in time. (Tape 13, track 3, 2nd run of counter, 033)

In response to a question about the density impacts of the project the Superintendent responded: "Whatever the zone permits, the density would obviously be increased by that amount. ...Whether or not Somerset is built is immaterial, the zone permits it." (Tape 13, track 2, 120)

The Superintendent in his written decision on Somerset (appellants' exhibit 2) refers to land use with reference to the number of potential sites and the increase in population but no analysis is included to indicate his evaluation of the data.

Population and Housing

8. It is the contention of the appellants that the Superintendent failed to consider and weigh the impact of the project on the housing market in the area and the potential acceleration of the displacement of low and moderate income housing stock.

In the Final EIS at pages 7 and 10 it is noted that construction of the project will have a long term cumulative effect of accelerating the conversion of the area to higher housing densities and the displacement of residents from the low-rental units.

In addition the Final EIS at page 89, Section VIII Adverse Environmental Impacts Which Cannot be Mitigated, discloses that one of the cumulative effects of the project is the removal of low-rental housing and a change in the socio-economic composition of the neighborhood.

In his Somerset decision (appellants' exhibit 2) the Superintendent does not consider the housing and displacement issue even though all other items in Section VIII on adverse impacts which cannot be mitigated were considered.

At one point in his testimony the Superintendent in response to a question on the cumulative impact of the project stated:

We realize that perhaps there will be some low-rental removal...low rental housing removed out of the area, but there is nothing in the code to preclude that... that says that should not happen. (Tape 13, track 3, 2nd run of counter, 340)

Parking

9. The appellants allege that the Superintendent did not adequately consider the data available on parking and that his conclusion was based on questionable data.

The Somerset project proposes to provide one off-street parking space for each unit. The Superintendent in this decision (appellants exhibit 2) with regard to parking states at page 4: "It is possible that automobile ownership may initially exceed one car per unit. At the city-wide average for condominiums, (1.2 per dwelling unit) there would be a shortage of twelve spaces..."

Finding of Fact No. 15, of the decision of the Hearing Examiner on the adequacy of the EIS, with regard to the car per unit ratio, found as follows:

The traffic consultant stated that a survey of local conditions was made although this was primarily based on condominiums in Bellevue and the survey itself was never introduced into the record to provide a means of verification.

Although Mr. Markly, the consultant, acknowledges that automobile ownership increases with family income he stated that his analysis was based on the assumption that the residents of Somerset would reflect the socio-economic characteristics of the area. The record shows that the Somerset House is termed a luxury condominium and that the area in which it is located has a high percentage of low income persons.

Based on the foregoing finding the Hearing Examiner concluded (Conclusion No. 7) that the data base and methodology used by the traffic consultant to arrive at the ratio of one vehicle per dwelling unit was questionable.

In the Final EIS at page 175a the Engineering Department after reviewing the traffic analysis stated: "The Highway Research Board parking space standard of 1.5 to 2.0 spaces per dwelling unit is a more realistic criterion in this area of high-density development."

The Superintendent in his written decision and oral testimony stated that he based his decision on City policies to discourage automobile ownership and to encourage public transit. The Superintendent was unable to cite any written policies to support his contention.

Aesthetics

10. The appellants allege that the Superintendent considered himself constrained to approve the project if it complied with the zoning and building ordinances and consequently did not adequately assess the aesthetic impacts of the project. The visual and aesthetic impacts of the project are discussed on pages 61 through 69 of the Final EIS.

In his oral testimony the Superintendent acknowledged that the EIS indicated that the project would be out of scale and in conflict with neighborhood character. However, his testimony shows that it was his understanding that he was limited to an evaluation of whether or not the structure complied with the building and zoning codes.

The Superintendent in his decision (appellants' exhibit 3) to deny the Polygon project at 200-10 W. Olympic Place cited view blockage as the most significant adverse impact.

11. With regard to the general issue of the Superintendent's authority, he testified on cross examination that it was the responsibility of the Superintendent to review the environmental impacts of each project before issuing a permit. (Tape 13, track 2, 560).

Microclimate, Shadow Impacts & Goals

12. The appellants allege that the Superintendent failed to impose any mitigating conditions on wind impacts. The Final EIS at p. 9 states that: "Peak wind velocities and turbulence may adversely effect persons, especially the elderly, using the entry and court area of Capitol Park Tower." Housing for low income elderly is provided at the Capitol Park Tower. The Final EIS at page 49 identifies several possible mitigating measures. The decision of the Superintendent does not contain any condition specifically mitigating this factor.

The appellants allege that the Superintendent's evaluation of the shadow impacts did not show an objective weighing of the information available in the EIS. The Final EIS at page 49 contains an analysis of the shadow impacts. Shadow

effects are identified as an adverse environmental impact that cannot be mitigated. See Final EIS, page 89, and decision of the Superintendent, page 3, (appellants' exhibit 2).

In his decision on the Polygon project (appellants' exhibit 3 at page 7) the Superintendent cited as one basis for his denial conflict of the project with City goals to protect residents from loss of sunlight due to building height. Loss of sunlight is also cited as a basis for denial of a permit in the Oden project at 5th Avenue West and West Roy (appellants' exhibit 4 at page 2).

USE PERMIT APPEAL

13. The appellants allege that the plans submitted by the project developer do not conform to the requirements of the zoning ordinance (86300, as amended) and that the use permit should therefore be revoked. The appellants state several grounds for alleged errors in the plans and they will be considered in Findings of Fact No. 14 through 16.

14. The appellants allege that the parking spaces identified as numbers 29 and 30 on the lower parking level are one inch narrower than required by the zoning code. Section 26.46.020(d) (23.21(d)) provides: "In cases where the strict application of this Ordinance would unreasonably limit full utilization of a site for parking, the Superintendent may authorize a reduction of up to three (3) percent of any minimum dimension required in this Section 23.21, except where such reduction would substantially restrict ease of travel or maneuverability of vehicles using the parking facility." The Superintendent states that there was a sufficient basis to apply the 3% reduction and that the stalls are in compliance.

15. The appellants state that the six compact stalls, which are identified as numbers 9 through 14, do not meet the minimum aisle or unit width requirements. Plate 1 of the zoning ordinance does not specify a minimum unit width for compact cars. The Superintendent took the minimum aisle width for compacts (22 feet) and added the depth of the compact stall (16 feet) to arrive at a minimum unit width for a compact bay of 38 feet. The plans show that 38 feet 10 inches will be provided.

16. It is the contention of the appellants that the project does not meet the requirements of Section 26.26.005 (13A.0) of the zoning ordinance, which provides that the distance from the center line of the street to the required yard of the lot upon which building is to be located must be at least 35 feet. The required front yard in the RMV 200 zone is 10 feet. The Superintendent established a front lot line 5 feet 6 inches into the property. From this line to the siting of the building a front yard of 10 feet exists. Therefore from this line to the center line of the street is the required 35 feet. A front yard of 15 feet 6 inches is assured and if at some future time the street were widened to 70 feet, the lot would still have the required 10 foot front yard.

Conclusions

1. The standard of review to be applied by the Hearing Examiner to the Superintendent's decision must be determined. The standard of review which applies to an appeal from lower to higher courts does not apply here. "The scope and nature of an administrative appeal or review must be determined by

the provisions of the statutes and ordinances which authorize them" Messer v. Board of Adjustment, 19 Wn. App. 780, 787 (1978).

2. Both the SEPA ordinance (105735) and use permit appeal ordinance (86300, as amended) provide that the determination of the Superintendent is to be considered prima facie correct. In other words the Superintendent's decision stands unless contradicted or overcome by other evidence. To overcome the presumption, the trier of fact must find from a fair preponderance of credible evidence that the findings and decision are incorrect. Allison v. Department of Labor and Industries, 66 Wn.2d 263, 401 P.2d 982 (1965).

3. RCW 43.21C.060 provides that the policies and goals of SEPA are supplementary to those set forth in existing authorizations of all branches of government, including municipal corporations. This section further provides that any governmental action, not requiring a legislative decision, may be conditioned or denied only on the basis of specific adverse environmental impacts which are identified in the environmental documents and stated in writing by the responsible official.

4. Section 19 of Ordinance 105735 provides that: "Under SEPA, the City and Departments have, and shall exercise where appropriate, the authority to deny or reasonably condition any proposal so as to mitigate or prevent adverse environmental impacts."

5. The Superintendent is charged with the difficult responsibility of making the balancing judgment mandated by SEPA between the benefits to be gained by the proposed major action and its impacts upon the environment. Juanita Bay Valley Community Association v. Kirkland, 9 Wn.App. 73, 510 P.2d 1140 (1973). In a recent environmental decision, involving a 13-story condominium in the Queen Anne area of the city, the Supreme Court stated: "We hold that SEPA confers on the City, acting through its superintendent of buildings, the discretion to deny a building permit application on the basis of adverse environmental impacts disclosed by an EIS." The Polygon Corporation v. The City of Seattle, 89 Wn.2d ___, decided May 18, 1978. The Court identified the most significant environmental impacts at page 12 as follows:

The building would have blocked views from properties to the north, northeast and northwest of the site as well as from the viewpoint at Kerry Park. Such blockage would have had a potentially adverse effect on the value of the properties involved. The building would have been totally out of scale with other structures in the neighborhood. Non-visual impacts would also have resulted from the construction of the project. The building would have blocked sunlight and cast a shadow over surrounding properties. Traffic and noise would have been increased.

In addition the Court in the Polygon case pointed out that a project's potential for creating pressure to alter surrounding land use may be properly evaluated in environmental decisions.

6. The appellants have brought forward sufficient evidence to contradict and overcome the prima facie correctness of the Superintendent's determination. In reviewing the basis upon which the Superintendent arrived at his decision there must be a clear showing that he understood the degree of discretion that is vested in his office by SEPA. The law

is clear that the Superintendent has the authority to condition or deny a permit based on adverse environmental impacts disclosed in the EIS. Taken as a whole the record in this case leaves one with the strong impression that the Superintendent reviewed this project only on the basis of whether or not it complied with the building and zoning codes. The Superintendent's testimony repeatedly reflects his understanding that adverse environmental impacts disclosed in the EIS were not matters that could form the basis for conditioning or denying a permit. Although the Superintendent made some statements that would indicate an understanding of SEPA, a preponderance of the credible evidence shows that he did not give due consideration to the adverse environmental impacts disclosed in the EIS.

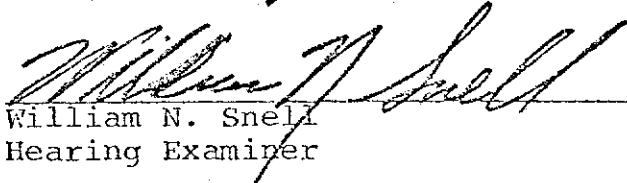
7. As indicated in the EIS the Somerset project would accelerate the displacement of low and moderate income housing stock in the area and create pressure to alter the surrounding land uses. Views from surrounding properties would be blocked and nearby properties would suffer a loss of sunlight and be subject to increased wind turbulence. The building would be out of scale with other structures in the neighborhood. Additional pressure would be placed on the existing shortage of off-street parking spaces. All of these factors require a thorough and careful analysis. The record does not show that the Superintendent gave due consideration to these impacts.

8. With regard to the issues raised in the use permit appeal, the appellants have failed to show that the interpretation of the Superintendent was unreasonable or not supported by the facts.

Decision

This matter is remanded to the Superintendent so that due consideration, as required by SEPA, will be given to the adverse environmental impacts disclosed in the EIS with specific reference to the following: land use, population, housing, parking, aesthetics, microclimate, shadows and cumulative effect. The issues raised in the use permit appeal are dismissed but no use permit may issue until the environmental review is completed.

Entered this 23rd day of May, 1978.


William N. Snell
Hearing Examiner

Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination.