

FINDINGS AND DECISION  
OF THE CITY OF SEATTLE HEARING EXAMINER

In the Matter of the Appeal of

ALAN G. MULKEY

FILE NO. MUP-90-049(W)  
APPLICATION NO. 8907642

from a Decision by the Director,  
Department of Construction and  
Land Use

Introduction

Alan G. Mulkey appeals a Declaration of Non-Significance with conditions made by the Director of the Department of Construction and Land Use in connection with proposed development at 3705 California Avenue S.W.

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

The matter was heard before the Deputy Hearing Examiner (Examiner) on August 27, 1990. The record was held open until September 4, 1990 to allow for a site visit by the Examiner.

Parties to the proceeding were: the appellant, Alan G. Mulkey, pro se; the project applicant, Golden Stream Limited, represented by David Lau; and the Department of Construction and Land Use (DCLU) by John Doan, Senior Land Use Specialist.

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

After due consideration of the evidence and argument presented at the hearing, and subsequent to a visual inspection of the site and vicinity, the following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The subject property is located at 3705 California Avenue S.W. The property is legally described as the south half of Lot 3 and all of Lot 4, except the south 70 ft., Block 1, Sparkman and McLeans 2nd Addition to West Seattle.

2. The parcel has 108 ft. of frontage along the west side of California Avenue S.W. and is 117 ft. deep, for an area of 12,700 square feet.

3. At the time of project application and of building permit application, the property was zoned Neighborhood Commercial One with a 40 ft. height limit (NC1/40'). By interim ordinance adopted February 21, 1990, the site is now zoned Lowrise 3/Residential Commercial (L3/RC). However, by virtue of the date of building permit application, the project is vested to the NC zoning (23.76.026).

4. The site is currently developed with a single story fourplex located on the westerly portion of the lot. The lots directly to the north and south of the subject site are also developed with single story multi-family residential buildings. The lot to the south is the subject of Master Use Permit application 9000870 under which the existing building (a fourplex) would be replaced with a 15-unit apartment. The lot to the north is for sale, but is not currently subject to a development application.

5. Besides the three existing apartments referred to above, the other existing uses on this block are an auto supply store to the south at the corner of Charlestown and California and a church to the north at the corner of Spokane and California.

6. California Avenue at this location is a minor arterial served by one bus route.

7. A 16-foot wide, fully paved alley runs behind (along the west side) of the subject property. The alley extends the full length of the block, from Charlestown to Spokane.

8. The property across the alley to the west is all zoned Single Family 5000 (SF 5000).

9. The proposal is to construct a four-story, mixed-use building with 5,500 sq. ft. of commercial space at the first level and a total of 27 apartments occupying the west side of the first level and the three upper floors. The structure would cover 9,123 sq. ft. of lot area and be 38 ft. in height, excluding elevator and stair penthouses. The east (street-front) facade would be on the property line, with ten-foot south side, 3.67-foot north side, and 17.5-foot rear setbacks. As modified by the plans submitted to DCLU on March 7, 1990, the fourth floor would be set back an additional 19 ft. from the west (rear) building face. Thirty-four parking spaces are proposed in an enclosed basement garage accessible from the alley via a 22-foot wide driveway ramp. The garage level is three to four feet below the existing alley grade at the entrance. The proposed structure would have a flat roof and be finished in stucco with aluminum windows. The south side yard and the rear yard would be landscaped with pine and maple trees, flowering shrubs, and ground cover. The roof deck at the fourth floor setback would also be landscaped for use as open space.

10. The proposed structure has a width of 89.6 ft. and a depth of 93.6 ft., with lot coverage of approximately 75 percent.

11. Evidence was presented at the hearing indicating that prior to the development of the existing structure on the site in 1942, the site was used as a neighborhood dump site for assorted trash, kitchen waste and yard waste.

12. The DCLU report indicates that there will be noise impacts associated with construction of the project and imposes a mitigating condition. This aspect of the Department's decision was not challenged.

13. The residential portion of the project is expected to generate an average of 165 vehicle trips per weekday, including 18 trips per hour during the evening rush hour. If one assumes that the commercial space will be occupied by a retail business, it would be anticipated to generate an average

of 224 trips per day, including 26 afternoon peak hour trips. Estimated total project traffic would be 389 daily and 44 peak hour trips.

14. With the exception of one lot at the north edge of the block which faces onto Spokane, all the lots abutting the west side of the alley behind the property face onto 44th Avenue Southwest, access their parking off the alley, and are developed with single family homes.

15. Access to the on-site parking is proposed from the alley which is paved to commercial zone standards and is wide enough to accommodate two-way traffic. Connecting streets are fully developed and of sufficient capacity to handle the projected increased traffic without substantially increasing congestion or hazards. Existing alley and street intersections are of standard configuration with moderate grades and generally good sight lines. The appellant noted that the intersection of Spokane and California can be hazardous. There is no light at the intersection, and cars parked along California north of Spokane can block the views of drivers eastbound on Spokane, such that they cannot see southbound vehicles without entering the intersection. The appellant did not present any evidence of accident history at this location.

16. Section 23.47.032 regulates parking location and access in NC zones. Paragraphs D1 and D2 of that section provide as follows:

1. Access of off-street parking may be from a street or alley when the lot abuts a platted alley improved to the standards of Section 23.54.010C.
2. Access to off-street parking shall be from a street when, due to the relationship of an alley to the street system, use of the alley for parking access would create a significant safety hazard as determined by the Director.

17. Pursuant to Section 23.54.018, alley access to parking is generally required in lowrise zones. However, street access is required in Lowrise 3 Zones when "apartments are proposed across the alley from a Single Family or Lowrise Duplex/Triplex Zone."

18. The Neighborhood Commercial policies provide as follows:

Location of access to off-street parking should consider impacts on traffic and pedestrian circulation and compatibility with surrounding uses.

They go on to provide:

In order to preserve on-street parking capacity, reduce pedestrian/auto conflicts, and minimize excessive curbcuts which both reduce the number of on-site parking spaces and detract from the commercial character of an area, the width and number of curbcuts shall generally be limited. (Section 23.16.020, p. 23-74.25 SMC).

19. Using the 1.5 cars per unit average, the parking demand of the 27 units is projected to be 41 spaces, 7 more than provided.

20. Peak residential parking demand occurs after 9:00 p.m. on weekday evenings. Although residential parking demand is somewhat reduced during daytime hours, combined demand from the residential and commercial portions of this project may exceed the supply proposed. ITE data show peak parking demand rates of 3.2 spaces per 1000 square ft. of retail area, for an estimated demand of 18 spaces for this project's commercial space. Peak parking demand for businesses occurs between 9:00 a.m. and 4:00 p.m. on weekdays. However, according to Urban Land Institute (ULI) studies, up to 85 percent (35) of the residents' cars and 82 percent (15) of the employees' and customers' cars could be expected to be on-site during the early evening, creating a demand for as many as 50 spaces. On-street spillover parking of 16 spaces could occur.

21. A parking study prepared in late 1987 for a project at 3911 California Avenue S.W. determined that there was nine percent (9%) utilization of on-street parking on California between Andover and Charlestown (the block south of the one on which this project is located). In connection with this application, DCLU observed a moderate level of on-street parking in the commercial zone during business hours and low utilization at night.

22. There are other proposed projects in the vicinity. Three future multi-family projects totaling 57 units and 70 parking spaces are within or overlap the walking distance radius of this site. When combined with this proposal, a cumulative demand for approximately 23 on-street parking spaces could result.

23. The Land Use Code provides for shared parking for different categories of uses (23.54.020G). Utilizing the shared parking provisions, the applicant computed a code parking requirement for this project of 33 spaces. As noted earlier, the project is designed with 34 spaces.

24. The City Council has determined in its review of a project located in an NC1/30' zone, that the 30 foot height allowed would be an appropriate height transition to the adjacent single family zone. In re Marianna Thaden, (CF.. 295562, File No. MUP-86-078). Council made a similar determination with respect to the L2 zone's 30-foot height limit providing an appropriate transition height to a single family zone in the 160 Lee Street case. (File No. MUP-85-053(W), CF. 294378, 294392).

25. DCLU required a fourth floor setback which reflects a formula that has been used by the Department in some edge cases such as this one, where the zone edge runs between rear property lines. Under the formula, the Department first determines what the envelope of a structure built to SF zoning standards on the subject site could be (assuming the basic 30 ft. height limit). It then envisions a person standing in the required rear yard of the property behind the site looking at this structure and projects a line from this person's eye level to the top of the structure. The Department then argues that any portion of the actual proposed project that exceeds 30 ft. should be setback so that it falls below the projected line. Thus, in theory, the person in the single family yard, when looking at the project, should be unaware of any portion of the structure that exceeds 30 ft.

26. Appellant agreed in concept with DCLU's setback methodology, but argued that because most of the houses on 44th Avenue have backyards in excess of that required by Code, the hypothetical person in the DCLU test should be seen as standing back further from the rear property line. This has the effect of flattening out the projected line-of-sight, and would require the fourth floor to be setback a total of 37 ft. from the rear facade, 18 ft. more than required by DCLU.

27. Appellant also argued that the project should be divided into two structures in order to reduce the appearance of bulk.

28. Revised plans submitted to DCLU on March 7, 1990 show the landscaping required by Condition 3 of the Department decision. Those plans show a row of two inch caliper incense or lowland cedar trees along the rear property line, planted at eight-foot centers, added to the original landscaping scheme.

### 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 P.2d 1005 (1981).

3. Under this standard of review, the decision of the Director could 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. The Director has authority pursuant to Section 25.05.660 to impose mitigating measures as conditions of approval, subject to certain limitation: 1) conditions must be based on policies, plans, rules or regulations designated in the Seattle Municipal Code as a basis for the exercise of substantive authority; 2) the conditions must be related to specific adverse environmental impacts clearly identified in an environmental document; 3) the conditions must be reasonable and capable of being accomplished; and 4) responsibility for mitigation must be proportional to the extent of the impact caused by the subject proposal. Section 25.05.660A.

5. The test of "reasonableness", as described by the Seattle City Council, is "whether the required mitigation bears a 'reasonable' relationship to or is 'reasonable' in proportion with the identified adverse impact." In re Appeals of Queen Anne Community Council et al., CF.. 293623 (1985).

6. Addressing first the question of height, bulk, and scale, no additional setback of the fourth floor should be required. While the appellant was correct to argue that a general test or formula utilized by DCLU may not be sufficient in all cases, the formula provides reasonable mitigation in this case. To utilize the alternative test proposed by the appellant would have the anomalous result of requiring greater mitigation of structures well removed from single family homes than from those nearby. This is illustrated by appellant's own exhibit (Exhibit #5). If the house on the right side of the exhibit were an additional ten feet from the alley (or, for that matter,

if the proposed structure were ten feet further from the alley), the notch in the fourth floor would have to be increased substantially in order for that floor to remain invisible to the person standing at the back of his/her home.

7. The Director also acted reasonably in not requiring that the proposal be broken into two structures as requested by the appellant. The impact of such a requirement would be to reduce the number of units while also requiring a second elevator. This substantial cost to the applicant is not warranted by the comparatively minor effect it would have on reducing the project's appearance of bulk. During his site inspection, the Examiner visited the project at 2735 California as requested by the appellant, but remains unconvinced that splitting of this project is warranted.

8. While the splitting of the building and the provision of an additional setting back of the fourth floor goes beyond the amount of mitigation that can reasonably be required in this case, a modification to the landscaping proposed on the March 7, 1990, plan set is necessary if the structure is to be screened in a way that provides meaningful mitigation of the structure's bulk. The scheme proposed by the appellant (a screen planted on top of the landscaping berm consisting of arbor vitae "Emerald Green", eight feet tall on three foot centers, backed by a row of 15 foot tall incense cedars on eight foot centers) is appealing, but to require that specific plan is more prescriptive than is necessary. However, the applicant already proposes a row of incense cedars, the only difference being that the applicant proposes smaller plants. The larger plants requested by the appellant should be required. This building will be a large addition to the neighborhood, and the adjoining residents should not have to wait for years for the landscaping to begin to act as a buffer.

9. At hearing, the applicant agreed to conduct a soils test to confirm that no toxic materials are present on-site as a result of the property's prior use as a dumpsite. The requirement to conduct this test is added to the conditions.

10. The project will result in increased parking demand. However, on-street parking in the area of the project is not at capacity, and there was no evidence that this project will place it at capacity. Accordingly, the SEPA policies do not provide a basis for requiring mitigation of this project's parking impacts.

11. The issue of access to parking is the remaining matter. Here matters are made more interesting by the contrast between the NC1 and the L3 provisions. If the project had been applied for after the rezone to L3, it would be required to take its access from the street. Because it is vested to NC1, the zoning allows alley access. Indeed, despite the fact that the alley is used for access to houses in a Single Family zone, the NC1 policies, reflecting their concern for pedestrian friendly environments, would favor the use of the alley for access to parking.

12. Nonetheless, the project should not be allowed to use the alley for access to parking. First, it should be observed that the NC code provisions relating to access are merely permissive - it allows alley access, but does not require it. Second, while the NC policies may point to allowing alley access, the City's policies regulating the protection of residential areas point in the other direction. The Traffic and Transportation policy

(25.05.675R) notes that "Excessive traffic can adversely affect the stability, safety, and character of Seattle Communities." The addition of this project's vehicle trips to this alley, which is already impacted by the church and the auto parts store, would adversely affect the single family properties which also rely on the alley. This impact can be substantially mitigated by requiring access off of the street.

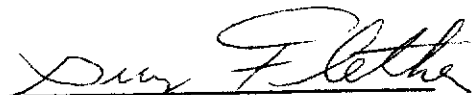
### Decision

The Director's decision is AFFIRMED as modified below.

The following three conditions are added.

- (1) Prior to building permit issuance, applicant shall conduct soils tests on the property to test for contamination. Results of the test will be submitted to DCLJ. If contaminated soils are discovered, they should be removed in accord with applicable regulations.
- (2) The incense cedars shown on the March 7, 1990 plans shall be at least 4-inch caliper at the time of planting.
- (3) Access to parking shall be removed from the alley and moved to California Avenue.

Entered this 19<sup>th</sup> day of September, 1990.

  
Guy Fletcher  
Deputy Hearing Examiner

### CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 23.76.024, a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center, 5th Floor Municipal Building, 684-8322. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to Section 23.76.024, the time for filing a request for judicial review of the underlying governmental action and/or other SEPA issues is stayed until the City Council renders a final decision on this City Council appeal.

If no appeal is taken to the City Council, 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 request for judicial review of the decision on the underlying

governmental action must be filed in King County Superior Court within fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.22.(C)(12)(c). Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington 98104, within fifteen days of the date of this decision. See Chapter 43.21C, RCW and Chapter 25.05, Seattle Municipal Code.

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. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review.