

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

MADRONA 2000 COMMITTEE

FILE NO. MUP-88-045(W)
APPLICATION NO. 8800349

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 addressed as 1430 - 34th Avenue.

This matter came on for public hearing before the undersigned on September 6, 1988.

By Findings, Conclusions and Decision entered September 21, 1988, the Hearing Examiner modified the subject DCLU decision and remanded the application to DCLU

for further mitigation consistent with preservation of the district character and maintenance of a 'pedestrian-friendly' environment.

The September 21, 1988 decision requested that DCLU mail or deliver its supplemental decision to party representatives. The decision further stated that either party would have seven business days from the DCLU mailing date to specify objections.

DCLU indicates that it mailed its supplemental decision on October 25, 1988; however, as no affidavit was prepared, DCLU reissued the decision on November 18, 1988 and provided an affidavit to that effect.

The Hearing Examiner received no objection to the DCLU supplemental decision from applicant. Subsequent to the November 18, 1988 mailing, appellant submitted a reply and objection to the "insufficiency" of that DCLU decision.

Findings of Fact

1. Except as noted hereby, the Findings of Fact entered herein September 21, 1988 are adopted and incorporated herein by reference. Finding 18, p.2. is corrected to begin "Concerning the west wall and fence..."

Conclusions

1. Except as modified herein, the Conclusions entered September 21, 1988 are adopted and incorporated herein by reference. Conclusion 16, p.5, is corrected to read that "Appellant has adequately shown that the mitigation measures are inadequate."

2. No public hearing is required to address the DCLU Supplemental Decision and appellant's reply thereto.

3. The initial DCLU decision on this application requires

brick columns on the building wall and western fence; and grill work in the openings of the west garage door facade, with vertical members spaced every 4-8 inches.

4. After remand, DCLU added a condition for an "awning,

bench and community kiosk/bulletin board to be located on 34th Avenue." Appellant objected, in principal sum, by requesting reduced bulk and scale; reduced density; and increased setbacks. Appellant also suggested design measures to include building to the front (34th Avenue) setback; fenestration minimums; and recessed entries that would "preserve the character of the commercial district."

5. The local commercial buildings are, as noted in the Hearing Examiner decision of September 21, 1988, "generally set to the sidewalk" with "recessed entries and large windows to the street beneath relites or transoms." All of the commercial buildings do not meet this pattern.

6. The question of whether a proposed residential building in a commercial zone should be built to the lot line was addressed by the City Council in In re Thaden, MUP-86-078, C.F. 295562:

Given the four-corner character of this business district and the determination above that there is no SEPA authority to impose ground-level commercial uses in this case, it would be inappropriate to require extension of the facade to the street lot line. The elimination of this requirement would facilitate the introduction of substantial, additional mature landscaping to soften the impacts of this structure...(emphasis supplied)

7. During the Thaden decision, the City Council had before it the Neighborhood Commercial Area Land Use Policies of Seattle Municipal Section 23.16.020(III) et seq.

8. In the instant case, there is no SEPA authority to require ground level commercial uses. It would therefore appear inconsistent to require the siting of a non-commercial building to the lot line to mirror what is a general commercial siting pattern. In re Thaden, supra.

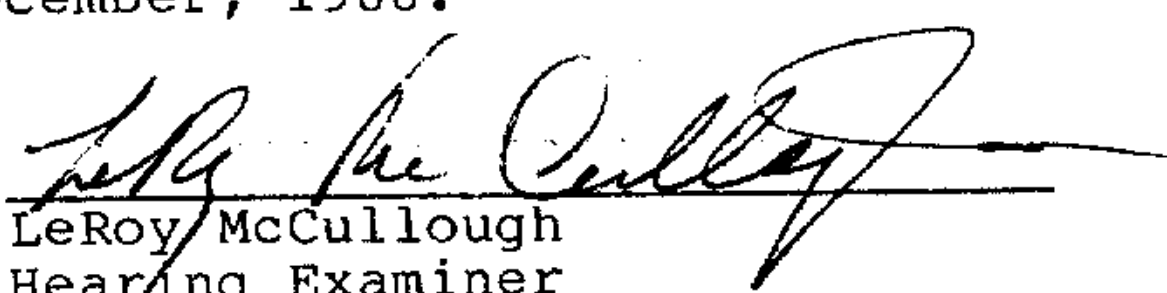
9. The landscaping, brick columns, grill work, kiosk and bench will combine to provide an effect which will "soften the impact of the structure" and thereby aid the "transition in scale and use..." Seattle Municipal Code Section 23.16.020(I)(B)(9). There is some variety in commercial area building fenestration and setback patterns. Accordingly there is insufficient photographic or other evidence of record that would support further redesign of the subject building in an effort to "preserve the distinctive character" of the neighborhood and its business district. Cf. Seattle Municipal Code Section 23.16.020(I)-(B)(12).

10. Although other, more compatible designs could better enhance the environment and facilitate a transition, the question for the Hearing Examiner is whether such other designs may be required pursuant to SEPA. The Hearing Examiner concludes that, in this connection, the "substantial weight" that must be accorded the DCLU decision has not been overcome, Cf. Seattle Municipal Code Section 23.76.022(C)(7); that the DCLU (revised) decision has not been proved to be "clearly erroneous," Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981); and that the Hearing Examiner may therefore order no further modification to the structure.

Decision

The DCLU determination is AFFIRMED.

Entered this 16th day of December, 1988.


LeRoy McCullough
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, 400 Yesler Building, 5th Floor, 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.

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Introduction

The appellant exercised 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 September 6, 1988. Pursuant to considered motions and responses addressing the identity of parties, and the similarity and relativity of issues, the Hearing Examiner limited the hearing to issues of bulk and scale and other visual impacts and to the environmental impact of single purpose residential use on the environment.

Parties to the proceedings were: appellant by Martin Liebowitz, pro se; applicant by Michael A. Utt Esq.; and the Director of the Department of Construction and Land Use by Cheryl Waldman, 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 elicited during the public hearing, and subsequent to a visual inspection of the subject 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. In this application, applicant proposes to demolish an existing service station structure to accommodate construction on-site of a 24-unit apartment building at 1430 - 34th Avenue. The application to build a mixed commercial-residential use facility on site was previously ruled upon by this Hearing Examiner in MUP-87-081(W), DCLU Application No. 8701803. That file is incorporated into this record per stipulation of the parties.

2. The subject site is located at the southeast corner of 34th Avenue and East Pike Street. The site is included within a distinct Neighborhood Commercial (NC1/30') zone generally north of East Spring Street along 34th Avenue past East Union Street to the southern boundary of East Pike Street. The commercial zone also extends along East Union Street to 33rd Avenue and 1/2 block east of 34th Avenue.

3. This commercial zone is bounded on the north, east and west by Single Family 5000 zoning. Lowrise 2 zoning is south, to East Spring Street.

4. The subject commercial or business district dates to the 1920's. It has enjoyed periods of health and vitality but experienced a slump in the late 1960's. The district continues to emerge from that slump and presently is healthy and in no state of decline.

5. The proposal site constitutes approximately seven percent of the commercially zoned property in the Madrona district.

6. The proposal site has 100 ft. of frontage along 34th Avenue and 100 ft. of frontage to East Pike Street. East adjacent to the site is a 10 ft.-wide alley with crushed gravel

surface. The single family homes east of the alley front away from the subject site to 35th Avenue with the exception of a single story dwelling that fronts to East Pike Street.

7. The Al Larkins Park is directly north, across East Pike, of the site. The Carolyn Downs Medical Clinic is south adjacent to the site. Across 34th Avenue, west of the site, is an auto repair shop.

8. South of the Carolyn Downs Clinic and beyond East Union are a barber shop, hat shop, cafe, pharmacy and other low-scale commercial uses. The buildings are generally set to the sidewalk and have recessed entries and large windows to the street beneath relites or transoms. See Exhibit 3 (Photos). The connected stores are marked by vertical brick columns and brick layers from the window bottoms to the sidewalk.

9. In an effort to enhance architectural compatibility of the project, DCLU required "the owner(s) and/or responsible party(s)" to "...submit revised plans showing brick columns on the building wall and western fence..."

10. There are several churches, a school/playground and other similar uses in the vicinity. The Madrona residential development is primarily single family. Although there are some apartments at 32nd and East Union there are relatively few multi family dwellings in Madrona.

11. Parallel on-street parking is permitted along 34th Avenue, a two-lane collector arterial that provides primary vicinity access. East Pike Street is a 25 ft.-wide roadway that also has parking along both sides of the street. Metro transit service is available along 34th and East Union.

12. The subject site has been vacant for approximately two years. During this time, the site has been the subject of various applications and designs by applicant.

13. Generally, the community strongly opposes the project. Many residents believe that the proposal will do irreparable harm to the emerging vitality of the small commercial area. Specifically, neighbors object to the proposal as a "ruination" or potential "death blow" to the district.

14. As noted above, the proposal is to construct a 24-unit apartment building on site. No commercial use of the site is proposed. Parking for 28 vehicles would be located on the first floor with access to East Pike Street.

15. The building's east facade will step back between 10 and 38 ft. from the east abutting alley. Six parking spaces to be set back 10 ft. from the east property line will be screened by a 6 ft. high fence.

16. Applicant proposes two residential units and the accessory garage for the 34th Avenue street level. While the garage portion will be set back 5 ft. from the front property line, the residential portion will be set back 10 ft. and screened by a 6 ft.-high fence. Above the first level, the building setback will be 5 ft. in line with the garage setback. The setback areas would be landscaped.

17. Two second and third floor balconies would extend to a point near the west lot line. There would also be second and third floor balconies overhanging the north setback.

18. Concerning to the west wall and fence, DCLU imposed conditions designed to reflect the "characteristics of existing structures in the business district..."

...The columns on the west and north facades should be faced in brick. The screening fence in front of the residential units should have brick columns to extend the theme on the street facade. The opening above the garage wall should be lined with metal grillwork with vertical members spaced every 4-8 inches to give the appearance of a transom...

DCLU Analysis and Decision, pp. 9-10.

Conclusions

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

2. Seattle Municipal Code Section 23.76.022(C)(7) provides the "standard of review" for these appeals, i.e. the Hearing Examiner shall give substantial weight to the DCLU Director's decision. By case law, it therefore falls to appellant to show that the DCLU decision was "clearly erroneous." Brown v. Tacoma, 30 Wn. App 762, 637 P.2d 1005 (1981).

3. There are two principal issues for the Hearing Examiner to resolve in this appeal. The first is whether DCLU should have required an environmental impact statement (EIS) for the project. In order to require an EIS, the decisionmaker must be persuaded that the project will cause a probable significant adverse environmental impact. Seattle Municipal Code Section 25.05.360. If an EIS is required and if it identifies probable significant adverse impacts denial of the project is possible upon a showing that "reasonable mitigation measures are insufficient to mitigate the identified impact." Seattle Municipal Code Section 25.05.660(A)(6).

4. The second issue is whether DCLU properly conditioned the proposal based on disclosed impacts that are adverse, but not significantly adverse. Seattle Municipal Code Section 25.05.660(A).

5. Not before the Hearing Examiner are such questions as: whether the project is a good idea; whether another proposal, e.g. with commercial use, is a better use of the land; whether the code should have been changed to preclude projects such as the subject proposal.

6. As noted in the Introduction, the identity of parties and issues with MUP-87-081(W) limits the Hearing Examiner consideration in this cause to items of (a) visual/bulk and scale impacts and (b) the impact of single purpose residential use. This is because in MUP-87-081(W), these appellants urged an EIS or further conditioning based on inter alia, shadow impacts on the north adjacent park, traffic and (daytime) parking impacts. The MUP-87-081 proposal was for 26 residential units and ground level commercial space. The present proposal, for 24 units and no commercial space, presents less impacts on bulk and scale; daytime parking; and on other elements. The Hearing Examiner therefore reaffirms his decision against relitigation of the issues by the same party. Cf. McDaniels v. Carlson, 108 Wn. 2d 299, 738 P.2d 254 (1987).

7. Appellants failed to show that the present proposal will have a probable significant adverse impact on the environment. The project site is near residential uses and is at the edge of a commercial zone. It is separated from adjoining uses by East Pike Street, 34th Avenue, and an alley. Residential zoning and uses are east and north, beyond the Al Larkins Park. The proposal site is only seven percent of the commercially zoned land. Under these circumstances and in this context, the impact from the proposed single purpose residential is adverse, but not significantly so. The Seattle Municipal Code defines a "significant" impact as one with a reasonable likelihood of more than a moderate adverse impact on the quality of the environment. Further, "(S)ignificance involves context and intensity..." Seattle Municipal Code Section 25.05.794(A)(B). Therefore, considering all of the anticipated impacts, no EIS is required.

8. Specific, clearly identified adverse environmental impacts that are not "significant" may serve as a basis for the application of mitigating conditions to nonexempt proposals. Seattle Municipal Code Section 25.05.660(A). The mitigation measures must be based on Seattle Municipal Code Section 25.05.902 - designated "policies, plans, rules or regulations," and must be "reasonable and capable of being accomplished." Seattle Municipal Code Section 25.05.660(A)(1)-(3). The Code continues that the

Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal...

Seattle Municipal Code Section 25.05.660(A)(4).

9. DCLU declined to require that the project include commercial uses. DCLU's decision on that point rested on the department's consideration of the Neighborhood Commercial goals and policies and on the Council decision of In re Thaden, C.F. 295562 (1987). Appellant urges that Thaden is inapposite to the present case.

10. The Thaden case, MUP-86-078(W), involved an application to construct a 3-story, 24-unit apartment (single purpose residential) on an NC-1/30' - zoned corner lot addressed as 3940 Wallingford Avenue North. The proposal site was one of four corner sites that comprised a commercially-zoned intersection. The Council decision acknowledged that the Neighborhood Commercial Area Land Use Policies were explicitly incorporated into SEPA and that those policies provided sufficient basis

for concluding that neighborhood - serving businesses are preferred uses in NC1 zones and single purpose residential uses, while permitted, are not preferred

C.F. 295562, p.1.

The Council decision also acknowledged specific Neighborhood Commercial Policies found at Seattle Municipal Code Sections "23.16.020 (III)(B)(1)(2) - 23.16.020(V)(B)(1)."

11. In reversing the DCLU requirement for some commercial use of the site, which requirement was affirmed by the Hearing Examiner, the Council stated as follows:

...it is clear that when Council's majority decided not to enact a general limitation on ground-level residential as part of the NCA code, it concluded that some single purpose residential development in an NC1 zone would normally be permitted. The SEPA policy preference for ground level commercial may only come into play under extraordinary circumstances such as when single-purpose residential development would seriously threaten the neighborhood-serving commercial character of the district...

Thaden, supra, Conclusion 2.

12. Appellant urges that the difference in area between the Fremont business district and the Madrona district make Thaden inapplicable to the present case. The Hearing Examiner disagrees. The Thaden pronouncements are direct. The case addressed single purpose residential use of one of three corner sites zoned for commercial use. Inferentially, the Council determined that this 25 percent residential use did not "seriously threaten the neighborhood commercial character of the district."

13. In the present case the business district is emerging and is not unstable. The record reflects thriving restaurant, hair care and other businesses. The site, at the edge of the commercial district, represents seven percent of the commercially zoned area in the district. It must be acknowledged that 24 occupied residential units could support the business efforts extant. Therefore, the Hearing Examiner cannot conclude that this proposal would "seriously threaten the neighborhood-serving commercial character of the district" such that commercial use may be required of the site. Again, whether or not commercial use is a "good idea" is not the issue before the Hearing Examiner.

14. The final issue is that of bulk and scale (appearance) of the proposed structure. No further mitigation is warranted relative to the east facade (from the alley) where the building

will step back from the east lot line. Nor is further mitigation required for the south or north facades.

15. DCLU recognized, however, and the Hearing Examiner agrees, that conditions are warranted for the west (34th Avenue) wall and fence. In addition to landscaping, DCLU required brick columns and grillwork, to promote the aesthetic "'distinctive character' of the district." Analysis and Decision, pp. 9-10.

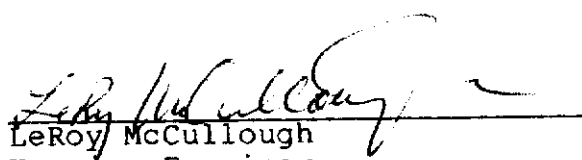
16. Appellant has adequately shown that the mitigation measures are adequate. Included in the Neighborhood Commercial area policies and goals are the stated desires to promote the pedestrian character of the neighborhood commercial area, Seattle Municipal Code Section 23.16.020(I)(A)(11); encourage landscaping and quality design in the development of commercial areas in order to create a "pedestrian-friendly" streetscape, (I)(B)(7); provide for a transition in use and scale "between residential and commercial areas....," (I)(B)(9); "preserve the distinctive character of different neighborhoods and their business districts, (I)(B)(12).

17. As presently proposed, the garage facade will be 5 ft. from the front lot line and the residential portion 10 ft. Overhanging floors and balconies are also proposed. Even with landscaping, these features offer a minimal commercial to residential transition and do little to preserve the character of the commercial district which offers large windows and buildings to the front lot line with recessed entries, transoms and other pedestrian-friendly features. The application should therefore be remanded to DCLU for further mitigation consistent with preservation of the district character and maintenance of a "pedestrian-friendly" environment.

Decision

The DCLU decision is modified. This application is remanded in accord with Conclusion 17 above. In all other respects the DCLU decision is affirmed.

Entered this 21st day of September, 1988.


LeRoy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

DCLU shall issue a supplemental decision on this project and mail or deliver same to the party representatives of record. DCLU shall also mail the decision and affidavit of service or mailing to the Hearing Examiner. Either party will have seven (7) business days from the DCLU decision mailing date to specify written objections. The Hearing Examiner will review any such objections and determine whether further public hearing is required. If none is required, the Hearing Examiner will issue a decision within fifteen (15) days of the close of the comment period.