

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

GEORGE E. BOLLINGER

FILE NO. MUP-85-001(P,W)  
APPLICATION NO. 8402660

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

#### Introduction

Appellant, a neighbor to the proposed development site of 3272 N.E. 100th Street, filed a substantive and procedural challenge to the DCLU Director's approval of the proposed short subdivision and declaration of non-significance for the proposal.

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 March 6, 1985. Project applicant's appeal from DCLU imposed conditions was also scheduled for hearing date of March 6, 1985. That appeal, Hearing Examiner File No. MUP-85-002, has been continued and is under separate adjudication.

Parties to the proceedings were: appellant George E. Bollinger, pro se; project applicant John Baumann; pro se; and the Seattle School District, property owner, by Marie Kirk, attorney at law. Land use specialist Arthur Ward appeared on behalf of the DCLU Director.

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

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 this appeal.

#### Findings of Fact

1. This matter involves property addressed as 3272 N.E. 100th Street. The subject property is located north of N.E. 100th Street and west of 35th Avenue N.E.

2. The subject property is part of the former Maple Leaf Elementary School property. In 1983, the Seattle School Board of Directors decided to sell the subject site as property "no longer required for school purposes." Exhibit 3, RCW 28A.58.045.

3. The School Board then caused the following public notice of an August 17, 1983, hearing to appear in the August 9 and August 16, 1983, editions of the Seattle Post-Intelligencer:

...The Seattle School Board will conduct a public hearing to receive comment on an administrative recommendation to sell the west half of the district owned former Maple Leaf Elementary School site at 3212 Northeast 100th Street for a minimum price of \$324,000 for residential development...

Exhibit 4.

4. The August 17 and other public sessions were held from August 1983 through the early part of 1984.

5. In January, 1984, the advertisement announced that undeveloped land was for sale:

...located on the eastern side of the Maple Leaf School site... The property is available NOW for the development of single family homes (emphasis in original).

The announcement gave the legal description as "lots 9, 10, 11, Block 7, Fisher's Highway Garden Tracts Number 2 as platted, records of King County, Washington;" and noted the minimum acceptable bid as \$324,000 for the 121,815 sq. ft. (2.8 acres) site. Exhibit 6.

6. On March 29, 1984, Baumann, project applicant, signed the District's Standard Offer Form to purchase the advertised property in two segments "as proposed in attachment A and attachment B." The Standard Offer Form bears a signature of Robert L. Nelson, then and present Seattle School District Superintendent.

7. Earnest Money Agreement "A" notes that payment to the seller is conditioned upon the buyer's securing of a lot line adjustment, and further that "the closing of this sale shall correspond to the Purchaser having obtained a Short Plat for 9 lots." Agreement "A" refers to designated Parcel B, which abuts 35th Avenue N.E.

8. Earnest Money Agreement "B", referring to the more westerly Lot 9 "and the west 25 ft. of Lot 10 and 11" (Parcel A) provided that the agreement was to close within 10 days of purchaser's receiving preliminary short plat approval for 7 lots, "to be applied for within 5 days of recording of Short Plat in Agreement 'A'."

9. By the agreement, the purchaser was to secure the lot line adjustment to allow Parcel B's west 25 ft. segment to be added to Parcel A.

10. After adjustment to the lot boundary, Parcel B would contain 71,022 sq. ft., and would consist of the bulk of Lots 10 and 11. Parcel A, to be divisible into seven lots, would contain 50,797 sq. ft.

11. Thus, as of March 29, 1984, the recognized intent was for Baumann to first short plat Parcel B and shortly afterwards undertake to short plat Parcel A (testimony of Baumann).

12. DCLU approved the lot boundary adjustment (LBA) December 21, 1984, conditioned on applicant's providing curbs, sidewalks and other amenities more typically associated with full subdivisions. The DCLU analyst testified that this was done in recognition of the potential for succeeding development of Parcel A. Applicant recorded the LBA approval on January 8, 1985, #850108775.

13. On June 4, 1984, proponent Baumann submitted the Master Use Permit application and the proposal Environmental Checklist, Exhibit 2, to DCLU. Under the "Background" section of the checklist, item F., Baumann described the proposal as one to subdivide a 71,022 sq. ft. parcel (Parcel B) into 9 buildable lots, all with a minimum lot area of 7200 sq. ft. Background item "J" inquired into plans for "further activity related to or connected with" the subject proposal. Baumann responded with a question mark.

14. In light of the March 29 agreement to subdivide Parcels B and then A, Baumann was asked to explain the response given to item J. Baumann testified and the Hearing Examiner finds that Baumann had reservations about the mechanics and limitations on subdividing to the total number of lots (16) in question. The maximum number of lots that can be created by short subdivision is nine.

15. The DCLU annotation to checklist item "J" struck the question mark and inserted that yes, there were plans for 9 single family homes. The DCLU note continued that:

The abutting Parcel A of the LBA may be divided at some time in the future although the applicant indicates he has not made a final decision in this aspect.

The date given for the DCLU review of the checklist is November 11, 1984.

16. The Master Use Permit application form of June 4, 1984, indicates the following relevant master use components: "lot boundary adjustment; short plat; and SEPA review." The application also lists John Baumann as "owner/lessee;" Tom T. Kido as contact person; and the master use permit No. of 8402660.

17. The Boundary Line Adjustment application of record also lists a John Baumann where the application calls for "Parcel B Owner's Name". No signature appears on the line for "Parcel A Owner's Name."

18. On August 12, 1984, an "early project notice large sign" was posted on or near the subject property indicating application 8402660, address 3272 N.E. 100th Street; and a proposal to subdivide an "existing" parcel into nine parcels. Exhibit 1.

19. On August 17, 1984, a DCLU representative posted, per affidavit, "not less than four (4) placards in conspicuous public places within three hundred (300) feet of the area concerned..." Exhibit 8, for the application No. 8402660.

20. On September 10, 1984, DCLU requested Baumann to state his intentions with respect to Parcel A because that Parcel "appeared likely" for future subdivision. DCLU specifically inquired whether Baumann intended further subdivisions within five years since that "would require a (full) subdivision application..." and the total number of lots would exceed the 9 maximum lots permissible under the short subdivision process.

21. Baumann responded by letter dated October 3, 1984, stating:

I do not own Parcel A and only have an option on it... With this many uncertainties even if I did buy Parcel A, I do not know what would be done with it.

22. On October 17, 1984, Baumann wrote to the School District in relevant part that:

...When we entered into our Earnest Money Agreement for the Maple Leaf property, it was my intent to short plat Parcel B as stated. Since then some question has come up as to whether I personally can short plat Parcel B due to a legal technicality...

Page 2 of the letter refers to Parcel B as having 7 lots; the Examiner therefore finds that the Parcel B referred to in the letter is Hearing Examiner designated Parcel A. The letter also requested an extension of the closing date.

23. The District responded by letter dated October 19, 1984, indicating that Parcel "A" was valued at 9 lots x \$20,250 for a total minimum value of \$182,250. The letter also conditionally

agreed to the extension. Exhibit 10. (cf. parcels' designation from Examiner's designation.)

24. In a general letter "To Whom It May Concern" dated November 8, 1984, Baumann noted prior discussions with the School District and his conclusion that he had the option to purchase and keep Parcel "B", sell it "or whatever..." A file copy of this letter bears the stamp and "OK" signature of Michael C. Carroll, School District General Manager, property systems, (November 13, 1984).

25. DCLU approved the LBA on December 21, 1984.

26. On January 14, 1985, after a score of communications between appellant, applicant, the School District and DCLU, DCLU conditionally granted the short subdivision for the 9 lots and issued an environmental declaration of non-significance.

27. George Bollinger, appellant herein, is a neighbor to the proposal site, and an experienced builder. His testimony and several correspondences to DCLU of record complain that the large sign erroneously described as "existing" the parcel to be subdivided into 9 lots, "erroneously" because the lot boundary adjustment was not granted by DCLU until December 21, 1984. Bollinger also alleges that the sign was misleading in that the second parcel (to be divided into 7 lots) was not included in the total number, nor illustrated; and that the diagram itself did not show proper dimensions of the (contiguous) parcels.

28. Appellant pursued this appeal, principally reiterating the complaints to DCLU referred to in Finding 27, above. Appellant stated general confidence in the hearing in the DCLU analyst's conclusion with respect to compliance with the access, drainage, and other short subdivision criteria, but alleged that he (and others) were misled by the complained-of circumstances. Appellant suggested that the checklist was improperly completed and evaluated in that the review was of a 9-lot instead of a 16-lot proposal. Appellant cited no specific procedural or environmental harm, but conjectured that a greater response to the proposal was a virtual certainty if the case were remanded and the proper procedures followed.

29. Applicant's appeal of the conditions imposed by the DCLU decision remains for adjudication under separate Hearing Examiner File Number MUP-85-002.

### Conclusions

1. A Master Use Permit is required for short subdivisions, lot boundary adjustments; determinations pursuant to the State Environmental Policy Act (SEPA); and other listed department approvals. Seattle Municipal Code 23.76.06.

2. Listed in Section 23.76.30 are the discretionary decisions made on a Master Use Permit that are subject to appeal to the Hearing Examiner. They include: a determination that an EIS is not required; short plats; granting, conditioning or denying a Master Use Permit pursuant to Seattle Municipal Code SEPA Policies and the policies for implementation of SEPA guidelines. Although lot boundary adjustments are included within the Master Use Permit system, decisions thereon are not appealable to the Hearing Examiner.

3. Such Master Use Permit appeals that do come before the Examiner are to be considered de novo, and the Hearing Examiner:

...Shall entertain issues cited in the appeals which relate to procedural irregularities, compliance with substantive criteria, the adequacy of the environmental documentation upon which the decision was made, or failure to

properly condition or deny a permit based on disclosed environmental impacts.

Seattle Municipal Code Section 23.76.36(B)(6). Thus, having appealed from the DCLU Director's DNS and short plat decisions, appellant was entitled to raise and the Hearing Examiner required to consider the adequacy of the checklist upon which the DCLU decision was made as well as the issue of whether the project sign or other indicia were false and misleading and the ramifications of same.

4. On appeals to the Hearing Examiner the Director's environmental determinations and decisions on short subdivisions "shall be given substantial weight." Seattle Municipal Code Section 23.76.36(B)(7). Courts have interpreted the expression "substantial weight" to mean that the challengers to the decision accorded that weight must show clear error.

5. Section 23.76.10(A) provides that:

"(a)nyone seeking one or more approvals identified in Section 23.76.06 shall file a Master Use Permit application on a form provided by the (DCLU) Director." (emphasis supplied).

6. Section 23.76.10(C) provides that:

An application for a Master Use Permit shall be made by or on behalf of the property owner, lessee, contract purchaser, or authorized agent of the property owner (emphasis supplied).

7. Applicant Baumann qualifies as one "seeking one or more approvals identified in Section 23.76.06". Baumann also was qualified, per Section 23.76.10(C), to apply for Master Use Permit approval "on behalf of" the property owner. Section 23.76.10(C) also provides that a contract purchaser may apply for a Master Use Permit. Thus, it was not shown that applicant's listing in the Master Use Permit application as "owner/lessee" was improper.

8. The next procedural issue relates to the project large sign. Seattle Municipal Code 23.76.14(C)(1) requires the Director to provide notice of a short plat application by posting "four placards...on or near the site" and by general mailed release. The record adequately reflects that four placards were so placed. Section 23.76.14(D) notes that when a project is subject to environmental review early project notice is to be provided via a general mailed release. Additionally, applicant is to post a large sign on the site. Appellant challenges the accuracy of the large signage that was installed.

9. As a technical matter, the large sign reference to Parcel B as "existing" and subject to division into 9 lots was in error since the signage occurred prior to the lot line's formal adjustment of 25 ft. Prior to December 1984, the master use permit application was to subdivide a proposed parcel into nine lots. The succeeding inquiry is whether the error requires a remand or corrected notice. The Examiner concludes that it does not.

10. The large sign showed the correct application number and property address, and appellant is an experienced builder. The Code does not require lot boundary adjustment notice on the large sign. No Code provision was cited requiring that specific language distinguish a proposed vs. an existing parcel. Nevertheless, for purposes of further discussion, the Examiner will assume the distinction to be a specific notice requirement.

11. Where notices are challenged in zoning cases, the underlying basis for waiver of noncompliance with specific notice requirements has been the absence of prejudice to the parties

entitled to notice. See 38 ALR 3d 167 and cases cited. The record reflects no prejudice to appellant who was afforded sufficient newspaper, DCLU and other information to understand the nature of the proposal ownership, process and proceedings. Cf. North State Tel. Co., Inc. v. Alaska Utilities Commission, 522 P.2d 711 (1974). The Hearing Examiner further concludes that the notice was in "substantial compliance" with the terms of the ordinance. See also Dept. of Ecology v. Adsit, 103 Wn.2d 698 (1985); In re Saltis, 94 Wn.2d 889 (1980). Therefore, no remand is required. This conclusion should not be interpreted to suggest Hearing Examiner approval of any less than DCLU's maximum effort for proper and effective notice.

12. The third item relates to applicant's response to the environmental checklist Item "J." Applicant inserted a question mark in response to the question, found in the section labelled "Background", whether applicant, as distinguished from property owner, had plans for further activity related to the "existing proposal." As of the June 4, submittal date applicant still had some designs on subdividing Parcels "A" and "B."

13. Assuming for the record that applicant was in error in his response to item J, does the error sustain the relief requested by appellant? The Examiner concludes in the negative. The information item "J" was specific background information. After reviewing the applicant's response to item "J," the DCLU analyst struck the question mark and specifically noted that "abutting Parcel A... may be divided at some time in the future..." DCLU annotations continued through the more substantive categories relating to impacts on earth, air, water, population, transportation/circulation, recreation and others. The DNS issued after completion of the annotated checklist. WAC 197-11-315,330. The Examiner cannot agree with the suggestion that Baumann's response to item J, singly or in conjunction with the other procedural errors charged, deprived appellant of "sufficient notice and information to understand the proceeding."

14. Finally, the appellant's challenges have not overcome the substantial weight accorded the Director's environmental and short subdivision determinations. Chapter 23.76.36(B)(7). In point of fact, appellant practically deferred to the DCLU analyst' judgment on the short plat issue. Appellant presented no evidence which would support the Examiner's reversal of the DNS. Appellant did suggest that more public response could have resulted from the stricter compliance with procedures. However, appellant did not prove that such compliance would have altered the DCLU conclusion; or that a 9 or 16 lot proposal would have a probable, significant adverse environmental impact. WAC 197-11-784; WAC 197-11-330(1)(b).

#### Decision

The DCLU Director's decision is affirmed.

Entered this 20th day of March, 1985.

  
Leroy McCullough  
Hearing Examiner

#### CONCERNING FURTHER REVIEW

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 must be filed in King County Superior Court within fourteen days of the date of this decision. Seattle Municipal Code Section 23.76.36(B)(11).

Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c).

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 fourteen days of the date of this decision. Seattle Municipal Code Section 25.05.680(3)(d).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost for preparing a verbatim written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available in the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104. In the alternative, RCW 43.21C.075(6)(b) provides that a tape may be used for the 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 designate only those portions of the testimony necessary 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 taped transcript relating to issues on review.