

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of the

DELRIDGE COMMUNITY ASSOCIATION

FILE NO. MUP-86-022(W/CU)
APPLICATION NO. 8402022

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

Introduction

The appellant challenged the conditional use and environmental approval for a Planned Residential Development (PRD) proposed for 4601 - 16th Avenue Southwest.

The appellant exercised the right to appeal pursuant to the Chapters 23.76 and 25.05, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on May 19, 1986. The record remained open to May 30, 1986, for submittals and reply.

Parties to the proceedings were: appellant by Vivian McLean; applicant by Don Bazemore and the Department of Construction and Land Use (DCLU) Director by Jay Laughlin.

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

Findings of Fact

1. Applicant Kurtis R. Mayer proposes a 76-unit Planned Residential Development (PRD) for a portion of a site addressed as 4601 16th Avenue Southwest. DCLU granted environmental, greenbelt preserve and administrative conditional use approval. Appellant challenged the conditional use and environmental components of the DCLU decision. Appellant also challenged violation of process by alleging improper notice of the decision and/or supplemental documentation by DCLU.

2. The history of this proposal is summarized in the DCLU Analysis and Decision of record, Exhibit 8. Applicant had previously proposed 101 units for the subject site. The adequacy of the environmental impact statement (EIS) on the project was challenged by appeal to the Hearing Examiner. In his decision entered October 25, 1979, then-Hearing Examiner Snell found the EIS to be adequate, but required preparation of a supplemental EIS on soils "prior to the issuance of any building/use permit for the proposal". See Exhibit 9A, Draft Supplemental EIS, Appendix A, W-79-029.

3. A Draft Supplemental EIS was issued on April 22, 1985, and a Final on September 30, 1985. The subject of these materials is the presently proposed, 76-unit PRD offering 32 condominium flats, 44 two-bedroom townhouse units and 108 parking spaces (1.42 per unit). The Supplemental EIS addressed soil, transportation and other issues.

4. The Final SEIS Distribution list includes the State Department of Game, the University of Washington, the Puget Sound Air Pollution Control Agency, and the City of Seattle Engineering Department. Some of the other recipients listed beginning at p. 110 are "Vivian McLean and Ann Owchar, Delridge Way Land Use Task Force" and "Mr.

and Mrs. Donald Marquardt".

5. On April 7, 1986, DCLU issued Notice of Decision as follows:

- SEPA - Adequacy of Supplemental Environmental Impact Statement
- SEPA - Analysis and Decision to conditionally grant the master use permit...
- Administrative Conditional Use - Analysis and Decision to conditionally grant a Planned Residential Development in a Single Family zone...
- Greenbelt Preserve - Analysis and Decision to conditionally grant a Greenbelt Preserve designation.

6. DCLU submitted post-hearing information that the Notice of Decision and Report were "sent April 4, 1986" to Vivian McLean, Ann Owchar, Mr. and Mrs. Donald Marquardt, Daily Journal of Commerce, Seattle Times, Seattle Post-Intelligencer, Real Estate, and to others.

7. On April 21, 1986, appellant, Delridge Community Association submitted a timely appeal "to the adequacy of the Supplemental EIS, the Analysis and Decision to Conditionally grant the MUP, and the Administrative Conditional Use."

8. The proposal site consists of 10.5 acres of undeveloped land zoned Single Family 7200. The site address is 4601 16th Avenue Southwest.

9. Located on the eastern edge of the West Seattle bluff, the site is some 1,900 ft. west of W. Marginal Way. Access would be via an existing road that connects 16th Avenue S.W. to W. Marginal Way. The asphalt surfaced, 12-20 ft. roadway is established as a legal roadway with a 60 ft. right-of-way.

10. The proposal site is wooded with deciduous tree growth and other vegetation. By the terms of the proposal, approximately 5.6 acres of the site's more northerly portion will be designated as a Greenbelt Preserve and therefore remain in a natural state.

11. Nearby W. Marginal Way is a major street used by local industrial traffic. It has no sidewalks. It is expected that development residents will access W. Marginal Way via Hudson Street. Appellant is concerned with the impact of Hudson traffic's merging with the 40 mile per hour Marginal Way traffic. Appellant did not challenge the SEIS projection that 600-610 vehicular trips per day would, on the average, be added to the traffic count.

12. A DCLU witness testified credibly that the anticipated morning peak of 49 vehicles per hour would be the largest volume of the day and that that amount is below any observed threshold level for signal warrants. The testimony was undisputed and the Hearing Examiner finds in accord therewith.

13. Appellant also asserted that the DCLU analysis had given insufficient consideration to the effect of the increased vehicular emissions. Appellant agrees with the FSEIS statement, p. 4, that the project site adjoins a portion of Seattle that has the most severe air quality problem "in terms of suspended particulates". The FSEIS projects that except for the period of construction the project impacts on air quality will be minimal.

14. Appellant's witness Hayes noted that the wind pattern directs particulates from two cement factories southwest of the site to the development. Since the tree growth is deciduous, she continued, there is a reduced protective barrier for a part of the year. During the foliage season, she projected that the increased CO emissions would be held in by the canopy-type effect of the foliage. Appellant's concerns in this regard were not quantified.

15. One DCLU condition for SEPA and conditional use approval

requires that:

9. During dry periods, the site shall be sprinkled during excavation and construction to suppress dust and other particulates.
10. Use of electric-powered equipment shall be required when feasible, in preference to gas, diesel or pneumatic machinery.

16. Appellant specifically contested the DCLU suggestion that the needs of the proposed development residents could be met by the Cooper Elementary School, a community business district, the Delridge Playfield and other subjects. In fact, the subject area is to a large degree isolated. It is approximately three driving miles from South Seattle Community College, described in the DCLU report as .5 miles south. Students are bussed to the elementary school. Testimony reflects that the nearest store is 1.3 miles and the nearest gas station 4.5 miles.

17. The Final SEIS notes that "there is no bus service on Marginal Way or anywhere reasonably accessible to the site", on p. 11; and that aside from the north portion of the site

...the only park within one mile (by road) of the site is undeveloped Puget Park,...usually very wet and the trails are in disrepair. The other nearby parks (as the crow flies) are primarily on the other side of Puget Ridge, with lengthy and unsafe access along busy roads...with no sidewalks. The distance to the nearest playground is fairly long for walking by young children and access by auto is indirect and lengthy.

FSEIS, p. 14.

18. The project site serves as a habitat for a variety of birds and small mammals such as mice, rabbits and raccoons. Adjacent to the west of the proposal site is a University of Washington research campus accessed only from its west. An active Great Blue Heron rookery is located approximately 75-175 ft. east of the site's eastern boundary and 700-1,000 ft. north of the southern boundary. This is the only known Great Blue Heron colony within the Seattle city limits. The Continental Van Lines operation, then W. Marginal Way, are directly east of the rookery.

19. The nearby rookery is composed of several nests that are built in selected trees' upper branches. The number of nests at this site is not defined. The DCLU report notes 14-15, while a February 25, 1986, correspondence from Pacific Lutheran University Associate Professor Martin states 13 nests. Dr. Martin's May 1986, reply to appellant's witness states that the colony was "much larger" when it was located a half-mile south, and that

After moving to its present location, the colony has always been rather small (8-12 active nests). It consisted of only 8 active nests in 1984, and is about that size in 1986.

The Hearing Examiner finds that the siting of the nests and the sensitivity of the birds to human encroachment prevent an accurate nest count.

20. Parties agree that the Great Blue Heron is a magnificent, sensitive bird that needs isolation, fairly tall trees for nesting, room to fly and protection from climbers, such as raccoons.

21. The proposed development will remove brush and trees approximately 200-250 ft. from the closest known nest. DCLU Analysis and Recommendation, p. 4. One of the DCLU "SEPA" conditions requires that "wooded areas within 200 ft. and under heron nesting trees" be protected. Another condition requires that "During Construction

1. The cutting of trees on the proposed site within a 300-foot radius of the Great Blue Heron rookery shall be allowed only during the period mid-November through mid-March, prior to the arrival of Great Blue Herons for nest building.
2. The cutting of trees on the proposed site outside the 300-foot radius described in Condition 3 shall not occur between April 1 to July 1.
4. A buffer zone of trees, approximately 200 ft. wide, shall be maintained between Great Blue Heron nesting areas and areas to be developed.
6. No construction shall occur between April 1 and July 1.

22. Prior to development occupancy, the DCLU decision requires that disturbed areas be "revegetated to reduce the visual and noise impacts of the project on the Great Blue Heron rookery". Also, an 8 ft. high fence is to be constructed between the rookery and the proposed development, with no construction between April 1 and July 1.

23. The "SEPA" conditions related to area fauna are also included as conditions of the PRD conditional use, as is the requirement that the PRD set 5.6 acres aside "to preserve in perpetuity native populations of vegetation and wildlife".

24. The adequacy of the conditions is a major bone of contention. Appellant's witness on this subject is Dr. Stephen Penland, State Game Department Urban Biologist. In Dr. Penland's view, the herons will abandon the colony if the "minimal" DCLU conditions are followed. The City's approval of the proposed land use change "would lead to the elimination of the last heron colony remaining within the city limits of Seattle", and, Penland opined, fail to protect and recognize this "sensitive and significant" natural resource.

25. The Great Blue Heron is considered one of the several "Species of Special Concern" by the Department of Game because of the bird's specific habitat requirements and sensitivity to human disturbance. However, The heron is not listed as rare or endangered. Some 15 percent of birds fall within the Special Concern category.

26. Although the Department of Game considers 600 ft. as a minimum buffer width, it views a 500 ft. setback as acceptable so long as concomitant modifications in the proposed building plan are made.

27. Noting the colony's long history of co-existence with "overwhelming" human disturbance, Dr. Martin is less concerned that the proposed development will doom the heron population. Dr. Martin testified to the existence of eight rookeries in Puget Sound, all of which appear to him as "healthy". Therefore, he continued, a loss of the Pigeon Point rookery would not mean elimination of the heron from the Puget Sound area, nor a loss of their regular visits to nearby Kellogg Island for feeding and roosting.

28. That the Pigeon Point rookery is within some 200 ft. of homes that are already constructed and occupied and directly west of the Allied Van Lines business suggest to Dr. Martin that a 200 ft. buffer will be adequate. In Dr. Penland's view, the birds' present tolerance levels are not determinative, and cumulative disturbance should be considered. Comments from Penland and Martin appear in the SEIS.

29. The Hearing Examiner cannot find from the evidence that proposed construction would or would not cause the demise or displacement of the rookery. The Hearing Examiner does find that to an undefined degree, the viability of the colony would be increased by an increased separation.

30. A 500 ft. buffer would reduce by approximately 50 percent the area available for construction and would require a reduction in the number of units. Alternatively, the same number of units could be offered in larger buildings that would be less compatible with single family development scheme. See p. 29, Figure 2, FSEIS.

31. Penland recommended no tree cutting on site between the first of February and the end of September and that construction activities be avoided during the March 1, to June 15, period. According to Penland, the breeding/courtship season begins in February. Martin's conclusion is that since Pigeon Point herons breed a month later than other area rookeries, the birds would not use the area prior to mid-late March or after June 15. Based on the greater specificity in Martin's testimony, the Hearing Examiner finds in accord with same.

32. Appellant had no specific challenge to the adequacy of the portion of the SEIS related to soils analysis. Appellant did, however, question whether "the city" properly addressed the potential liability for earthquake damage.

33. As to slides, the record shows that the site is "reasonably stable". Its condition will be enhanced by drainage improvements that will accompany development. Specific Dames and Moore geotechnical analyses and recommendations are included in the SEIS and as conditions of DCLU's SEPA approval, e.g. construction of an uphill interceptor drain; restriction of grading to the generally dry summer season; and siting of the structures approximately 50 ft. back from the top edge of the existing escarpment of the site's northern area proposed for development. Appellant challenges the use of the modifier "approximately" but presented no direct evidence that the condition should have been more constrictive. The development is also subject to Director's Rule 7-84 which addresses construction in potential slide areas, and to the City's Grading and Drainage Control provisions.

Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapters 25.05 and 23.76, Seattle Municipal Code.

2. By way of overview, Seattle Municipal Code Section 25.05.455(A) requires that a draft EIS be sent to the SEPA Public Information Center, to specified agencies and to any persons requesting a copy from the lead agency, and to others. The lead agency is "encouraged" to send notice of DEIS's availability or a copy of the DEIS to any person that has expressed an interest in the proposal. Seattle Municipal Code 25.05.455(B).

3. The Final EIS shall be sent to jurisdictional agencies, to the SEPA Public Information Center, to anyone requesting a copy, and to others. Seattle Municipal Code Section 25.05.460(A). The responsible official shall send the FEIS or notice of its availability to any individual DEIS commenter, or to an identified group. "Failure to notify any individual under this subsection shall not affect the legal validity of an agency's SEPA compliance." Seattle Municipal Code Section 25.05.460(B). EIS supplements are to be prepared in the same manner as draft and final EIS's. Seattle Municipal Code 25.05.620.

4. The Draft and Final Supplemental EIS Distribution Lists include the City of Seattle Fire Department, SEPA Public Information Center and other units, appellant's representative Vivian McLean, and appellant's witnesses Ann Owchar and Donald Marquardt. These named individuals also appear on the list of persons to whom notice of the DCLU decision was given. Therefore, appellant's general allegation of improper notice is unsubstantiated by the record. Nor was appellant's presentation prejudicial by the notices given.

5. As to adequacy of the Supplemental EIS, "the determination appealed from shall be accorded substantial weight" Seattle Municipal Code Section 25.05.680(A)(3). It is therefore appellant's burden to prove that the EIS provides less than a "reasonably thorough

discussion" of the probable environmental impacts. Cheney v. Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976).

6. Appellant disagrees with much of the detail and synopsis contained in the DCLU Analysis and Decision. And there is some basis for disharmony. However, as a challenge to the EIS the appellant's case falls short of the mark. The Supplemental EIS provides a reasonably thorough discussion of the impact of soils, and in fact contains the results of undisputed geotechnical investigation by Dames and Moore which describes slide history, surface and sub-surface features and slope stability. Appendix B, Draft SEIS. Recommendations from the analysis are included in the DCLU decision. In this case the questions raised about setbacks, earthquake potential and other specifics are insufficient in and of themselves to challenge the adequacy of the integrated document. The EIS also adequately discloses the relative isolation of the site; the impact of the proposed project on the vegetation and wildlife; and the effect on air quality and traffic. See for abbreviated illustration FSEIS, p. 17. Appellant cites no authority for the suggestion that the EIS should address liability for earthquake damage. Cf. Seattle Municipal Code Section 25.05.402.

7. Among other items, appellant requests that the project be conditioned to require a 500 foot setback-buffer from the rookery. Conditions imposed under SEPA as mitigation measures must be based on

policies plans, rules, or regulations formally designated in Section 25.05.902 as a basis for the exercise of substantive authority... and shall be related to specific, adverse environmental impacts...

Seattle Municipal Code Section 25.05.660(A)(1)(2).

8. Appellant has pointed to no policy per Seattle Municipal Code 25.05.902 in support of its requested conditions. And the Hearing Examiner overview of the policies reveals no specific basis for mitigation measures requested. Further, the evidence fails to prove that the requested mitigation measure is "reasonable and capable of being accomplished." A 500 foot setback would reduce the area available for construction by approximately 50 per cent and require a reduction in the number of units. Alternatively, larger buildings would be required which would be less in scale with the surrounding single family development. Nor can the Hearing Examiner find from the conflicting evidence before him that the measures imposed by DCLU are in fact insufficient to mitigate the impact on the colony. Therefore, the proposal may not be denied pursuant to SEPA. Seattle Municipal Code 25.05.660 (A)(6).

9. The next issue concerns whether DCLU erroneously approved the administrative conditional use for the PRD. PRD's are permitted as a conditional use in single family zones pursuant to Seattle Municipal Code Section 23.44.024. The subject site is 10.5 acres, well in excess of the minimum of two acres required. Seattle Municipal Code Section 23.44.24(A). By preserving 5.6 acres in perpetuity as a greenbelt, the PRD "preserves or enhances" natural features. Seattle Municipal Code Section 23.44.024(B)(1). The minimum 1:1 parking ratio for the 76 units proposed will be exceeded by the 111 parking spaces proposed for residents and visitors. Seattle Municipal Code Section 23.44.024(H).

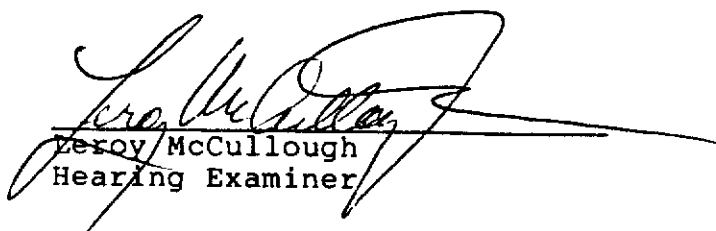
10. The more general provisions for an administrative conditional use include the specific requirement that the use not prove "materially detrimental to the public welfare or injurious to the property in the zone or vicinity in which the property is located." Seattle Municipal Code Section 23.44.018. With the extensive conditions imposed, there will be no "material detriment" to the public welfare by this proposed project. Sufficient on-site parking will be offered, as will be drainage and other improvements to the site. Street improvements are required prior to issuance of a building permit. A pedestrian walkway is also required. The record fails to support a conclusion that this relatively isolated area will be ma-

terially and detrimentally impacted by emissions of the additional automotive traffic, or by the juxtaposition of this new traffic with the existing flow of W. Marginal Way. The record also fails to adequately demonstrate that the proposal, as conditioned, will prove materially harmful or fatal to the nearby rookery, or to the soil stability of the area.

Decision

The Department of Construction and Land Use decision is AFFIRMED.

Entered this 16th day of June, 1986.


Leroy McCullough
Hearing Examiner

Concerning Further Review

Pursuant to Seattle Municipal Code Section 25.05.680(B), 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. 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 25.05.680(B), 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 Section 25.05.680(B) appeal.

If no appeal is taken pursuant to Section 25.05.680(B), 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. 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 fifteen days of the date of this decision. Section 25.05.680(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 written 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.