

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

NORTHEAST 45TH STREET CONCERNED
NEIGHBORS

FILE NO. MUP-88-024(DD)(W)
APPLICATION NO. 8500218

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

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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, and from a declaration of non-significance under SEPA.

This matter was heard before the Hearing Examiner on June 8, 1988.

Parties to the proceedings were: appellant by Peter J. Eglick; applicant by Glenn Amster; and the Director, Department of Construction and Land Use by Patrick Doherty, associate 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, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The subject of this hearing has to do with a design departure for a proposed 13-unit apartment building to be constructed at 4017 N.E. 45th Street. The design departure would allow access to parking from the alley instead of from the street. A neighborhood group, Northeast 45th Street Concerned Citizens, filed an appeal from the decision of the Director approving the design departure.

2. The proposed development has not been without controversy in other respects. In 1985 appellant filed an appeal of a decision of the Director regarding a SEPA declaration of non-significance and the Director's failure to condition the project, as it was then proposed, to mitigate certain environmental impacts. See MUP Files 85-071, 072(W). The Hearing Examiner remanded the matter to the Director. Among other things, the Director was to consider imposition of conditions so as to reduce the perceived bulk of the project consistent with the topography of the subject property. The Director issued a revised decision in April, 1986 imposing a condition requiring a roofline step-down of at least six (6) vertical feet. The Hearing Examiner approved the action of the Director in June, 1986. The appellant then sought review by the City Council. The Council determined that design departure for alley access should have been considered by the Director at the time the SEPA issues were considered. Thus, Council remanded the case back to the Department to process the design departure, to provide notice of the design departure and to make a revised environmental analysis.

3. The public comment period on the design departure ended on March 14, 1988. On March 24, 1988 the Director approved the design departure to allow alley access and a DNS with conditions. The notice of decision invited any interested persons to seek interpretation of "the proper application of the zoning or land use code...." The deadline for request for interpretations was

stated to be April 8, 1988.

4. Appellant filed a request for interpretation which was assigned File No. 88-012. As stated by the Department in its notice of request for interpretation, appellant asked whether the project was vested under the Land Use Code before 1988 or whether vesting occurred later because of an alleged incomplete application. Written comments were solicited by the notice of request for interpretation with a dateline of May 6, 1988.

5. Appellant timely filed a notice of appeal of the grant of design departure.

6. On May 31, 1988 counsel for appellants wrote employees of the Department to learn the fate of the request for interpretation. A response, dated the same day but received June 6, 1988, stated that the Department could not give the requested interpretation because the request was not timely; as the request should have been filed by October, 1985. Further, the Director's letter stated that the building permit application was completed when it was filed in April, 1985.

7. Appellant, in the this hearing, claims that the refusal to provide an interpretation was, in effect, an interpretation. Appellant also claimed at the hearing and in correspondence to the Hearing Examiner before the hearing that appeal of the request for interpretation should be considered with the design departure hearing. At the hearing, the Hearing Examiner orally denied the motion for consolidation based upon lack of authority to compel the Director to make an interpretation and because the refusal of the Director to issue an interpretation was not an appealable interpretation. The hearing on the merits of the design departure then followed.

8. The subject property is a 10,000 sq. ft. parcel located on the south side of N.E. 45th Street in the Laurelhurst neighborhood of the City of Seattle. The property is within an L-3 zone which extends to the east one more lot where it abuts an SF 5000 zone and to the west several lots where it meets a BC zone. The L-3 zone extends north, across N.E. 45th Street approximately two blocks. The southern portion of the L-3 zone extends along the alley which abuts the subject property. Immediately to the south of the alley is an SF 5000 zone. The property abutting the alley to the south comprises the campus of the Battelle Memorial Institute, a private "think tank" facility. That part of the Battelle property which is closest to the subject property is used for parking.

9. Across N.E. 45th Street from the subject property is the Laurelon Terrace Apartment Complex. On N.E. 45th to the west and on the south side of the street is a building owned by Battelle Institute with apartments and offices. To the northeast of the property is Children's Orthopedic Hospital.

10. Single family residences located on N.E. 45th and to the west of the subject property and on the same side of the street gain vehicular access by way of the alley to the south.

11. As initially planned the project would have 15 apartment units. Because of the change in roofline elevation after the initial remand of this case to the Director, the number of apartment units has been reduced to 13.

12. The alley which serves the subject property is unimproved. It originates at 40th Avenue N.E., about 150 ft. to the west. Fortieth N.E. is not a through street at this location; at its intersection with N.E. 45th to the north, it continues only a half block south to the Battelle Institute property where it ends.

13. Alley access to parking would be the design standard were it not for the fact that the L-3 zone in which the subject property is located abuts an SF 5000 zone to the south. See Seattle Municipal Code (SMC) Section 23.45.046B.1; B.2.c.

14. If street access is required a new curb cut would be required on N.E. 45th.

15. Northeast 45th loses elevation from its intersection with Sand Point Way N.E. to the west to the location along the street where the subject property is located. To the east of the subject property the street again gains elevation.

16. The other houses located on the same block as the subject property have vehicle access only from the alley.

17. On-street parking in both directions on N.E. 45th is allowed in the vicinity.

18. Because of the elevation gain and loss along the course on N.E. 45th the traffic flow from an additional curb cut could impede the flow of traffic more than use of 40th N.E. as the alley outlet would. Appellant presented no testimony or evidence that it would be preferable for vehicle access from the project to be from the street.

19. Vehicle access to the subject property necessarily means a driveway across the front yard of the proposed project, a feature which would inconsistent with existing development on the same block. The driveway would cut through the grade-line and would, at its intersection with the street, give the perception of greater elevation of the project at that point. A front driveway would consume approximately 225 sq. ft. of the 1,400 sq. ft. front open space.

20. As a general matter good urban design should encourage vehicle access from alleys as opposed to streets, according to an expert witness testifying on behalf of appellant.

21. Appellant's evidence establishes that use of rear yards is greater than front yards along N.E. 45th and the vicinity of this subject property. This is because of the noise and volume of traffic on the street makes rear yard use preferable.

22. It is proposed that the alley access to the project contain a turnaround to be constructed to standards of the Seattle Engineering Department (SED). That portion of the alley abutting the subject property will be improved to SED standards. This turnaround, appellant contends, will consume a significant amount of the project's rear open space. Appellant's Exhibits 5A and 5B demonstrate that the full turnaround could consume as much as 1,074 sq. ft. the rear open space.

23. The turnaround is necessary for emergency and fire vehicles.

24. Even with the turnaround in the rear yard, the project's open space will meet open space requirements.

25. By way of letter dated June 15, 1988, counsel for the project developer requested an opportunity to reopen the record in this case to allow the Hearing Examiner to consider certain correspondence generated in 1985 by counsel for appellant and the Department and SED with respect to the alley.

Conclusions

1. The motion by the project developer to reopen the case is denied.

2. The motion by appellant to continue the hearing on the design departure so as to allow consolidation of an appeal of the department's denial of the request for interpretation is denied. The denial by the DCLU of the request for interpretation is not an interpretation by the department of the zoning or land use code. Therefore, the Hearing Examiner has no jurisdiction under Seattle Municipal Code Section 23.88.020.E.1.

3. The Director's decision to allow the design departure at

issue in this case must be given substantial weight by the Hearing Examiner. The appellant bears the burden of proof showing that the department's action was in error. See Seattle Municipal Code Section 23.76.022C.3.7.

4. In order for the department to allow a design departure it must be convinced that the departure will "result in a better development than would be [otherwise] allowed...." SMC Section 23.40.010.

5. Appellant claims that there is no development standard from which the department may allow a design departure under the provisions of SMC Section 23.40.010.B. Appellant contends, instead, that access to parking is not the same as "design" and the "location" of parking as those terms are specified at SMC Section 23.40.010.B.5. In support of this, appellant has observed that "access" to parking is specifically dealt with at SMC Section 23.45.046.B and that design aspects of parking are likewise codified at SMC Section 23.54.030. However, SMC Section 23.54.030 is stated to relate to parking space standards in the section title. Further, it deals with such things as standards for design of driveway access to parking. See SMC Section 23.54.030.D. Thus, the Hearing Examiner is convinced that under appellant's own arguments the term "design...of parking" as found at SMC Section 23.40.010.B.5 should be construed to include access to parking. Therefore, it is appropriate to consider whether a design departure is justified under the criteria set forth at Seattle Municipal Code Section 23.40.010.A.

6. Having determined that a design departure may be permitted for the alley access sought in this case, it is necessary to determine whether one of the reasons which authorizes a design departure in Seattle Municipal Code Section 23.40.010.A is applicable. The Department's analysis fails to state which of the nine reasons for design departure applies. The Hearing Examiner is convinced, however, that the reasons stated at Seattle Municipal Code Section 23.40.010.A.5 and .7 apply: use of techniques other than modulation to reduce appearance of bulk and preservation of a desirable siting pattern in the area. The former follows from elimination of the need to have a driveway intersect grade elevation and the latter follows from the front yard uniformity which will result if a new curb cut and attendant traffic across front open space is eliminated. By requiring vehicle access to be by way of the alley which in turn allows access to N.E. 45th by way of 40th N.E., the proposed project would be consistent with the other residences found on the subject project and would further allow the front open spaces of the subject property and adjoining properties more closely to resemble each other in function and appearance.

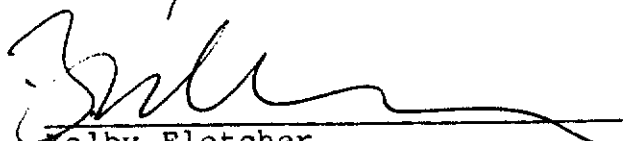
7. The Hearing Examiner is not convinced, in face of the evidence brought forth by the appellant, that the decision of the Director is wrong and therefore that decision will stand.

8. The decision of the Director with respect to the DNS was not directly challenged by appellant at the hearing. That decision of the Director will, therefore, stand subject to the conditions previously stated by the Director as modified and approved by the Hearing Examiner in Files MUP-85-071(W) and MUP-85-072(W) having to do with Application 8500218.

Decision

The decision of the Director is AFFIRMED.

Entered this 21st day of June, 1988.


Kelby Fletcher
Hearing Examiner Pro Tempore

CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 25.05.680(C), 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 decision is filed with the SEPA Public Information Center the same day that the decision is signed by the Examiner. The SEPA Public Information Center telephone number is 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 25.05.680(C), 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(C) appeal.

If no appeal is taken pursuant to Section 25.05.680(C), 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(D)(4).

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 for 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.