

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

In the Matter of the Appeal of

DALE DURRAN, ET AL.,

FILE NO. MUP-89-050(P,W)  
APPLICATION NO. 8900715

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

Introduction

Appellants Dale Durran, et al., appeal the decision of the Director of the Department of Construction and Land Use (Director): (1) to conditionally grant a short subdivision of two existing parcels into three parcels of land for future construction of three single family residences; and (2) to issue a determination of non-significance (DNS) with conditions for the project to be located on property at 13021 A, B and C 42nd Avenue N.E. They claim the Director should have required a different access road for the subdivision and that he did not adequately mitigate adverse traffic, parking, and noise impacts of the project.

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

This matter was heard before the undersigned Hearing Examiner Pro Tempore on October 25, 1989, and the record was kept open through October 26, 1989, to allow for a site inspection by the Hearing Examiner.

Parties to the proceedings were: Appellants Dale Durran, et al., appearing pro se and assisted by Lin Butler; the Director, represented by Malli Anderson, Land Use Specialist; and the Applicant, John Eng, appearing pro se.

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 applicant applied for a master use permit to subdivide two parcels of land into three parcels in an environmentally sensitive area and to establish use for future construction of three single family residences, one on each parcel. DCLU conditionally granted that application and issued a DNS with conditions (Exhibit 13). This appeal by affected neighbors followed.

2. Applicant's property is located within a Single Family 9600 zone at 13021 42nd Avenue N.E. It is a rectangular tract with a total of 31,126 square feet located on a fairly steep east-facing hillside above 42nd Avenue N.E. The present two parcels within this property were created previously by Short Plat 77-208. Applicant proposes to divide these parcels into three rectangular parcels: Parcel A, the north parcel, would have 10,374 square feet; Parcel B, the middle parcel, would have 10,378 square feet; Parcel C, the south parcel, would have 10,374 square feet of lot area. The homes would be placed on the eastern flatter areas of the parcels. Single family development surrounds the proposal to the north, east and south.

3. Applicant's property is accessed solely from a permanent access easement off of 42nd Avenue N.E., entering the tract at its northeast corner. He proposes to extend this easement southerly through the eastern ends of each of the parcels. The easement would provide the only access to the homes which will be built on the three parcels.

4. Appellants are four neighbors. They live on the properties to the north and northeast of applicant's property. The access easement for the project runs between their properties before it deadends at applicant's property. It serves as the sole access for three of appellants (Butler, Lee and Maloney) and an occasional access for the fourth (Durran).

5. Appellants do not object to subdivision of the property per se, or to planned construction of single family residences thereon. But they do oppose the short plat because of the planned use of the access easement. They claim:

A. That the existing easement is inadequate to accommodate the increased traffic to be generated by the three new homes because it is too narrow and not safe for proper passage of cars, trucks, or emergency-type vehicles and because it is not safe in winter due to heavy ice which forms on the paved surface;

B. That only Parcel A of the short plat would have a legal right to use the easement; that any extension of the easement to Parcels B and C by applicant would be a breach of their ownership interests and rights under existing deeds and easement documents;

C. That the project would create adverse noise, traffic and parking impacts which require mitigation under SEPA;

D. That N.E. 130th Street is the most suitable access for the proposal and should be required.

6. The easement in question is 20' wide, but is presently paved to only 14 feet wide. It is moderately steep as it runs westerly from 42nd N.E. approximately 180 feet. Then it turns in a 90 degree angle at the Lee and Butler properties, after which it runs south over fairly level terrain past the Butler property about 40 feet before deadending near the applicant's property. At one point along its route west, a concrete retaining wall for steps to the Maloney residence and a fence for the Durran home are each about 2 feet from the pavement on opposite sides. Additionally, a rockery on the Butler property presently extends into the easement where it turns south. That rockery may need to be removed or relocated when the pavement is widened for the project. A substantial amount of storm water runoff from the hillside behind the Butler and Lee properties runs down onto the easement. In a severe winter, heavy ice forms there causing access to be difficult and dangerous.

7. The paved portion of the easement is presently of substandard width and configuration under City requirements. To correct this, the Director has required that the applicant widen the paved area to 16 feet and provide a turnaround as a condition of approval of the short plat. In addition, he has required that a drainage control plan and single detention system with controlled release to a ditch/culvert system be developed for the three lots and the easement in order to correct the existing drainage problem, to collect and rechannel the surface runoff water from the easement, and to otherwise ameliorate any increased surface water problems due to increased impermeable surfaces from the planned construction.

8. Northeast 130th Street has been proposed by appellants as the better access for this project. They claim this street or a portion of it should be opened for access because it would be

the widest, shortest, straightest and most direct route to the property. They claim such access would be in the public interest because it could also provide future access to two other interior properties uphill and to the south which are as yet undeveloped, and that use of this alternate route would alleviate the traffic and parking impacts from use of the narrower private roadway.

9. Northeast 130th Street is a platted 60 foot wide unopened street running due west and sharply uphill from 42nd N.E. between the property lines of two developed properties below the project. It then continues uphill past the south property line of applicant's property. The unopened street is presently filled with large evergreen trees, deciduous trees and other vegetation. Portions of it near the intersection with 42nd N.E. have been paved with driveways to the homes facing 42nd Avenue N.E.

10. For N.E. 130th Street to be used as access for the project, the trees would have to be removed and the terrain would have to be graded, paved and otherwise improved to meet City requirements relating to streets. Because of the steep nature of the public right-of-way, a plans review analyst from the Seattle Engineering Department (SED) determined it was best not to do extra grading which could undermine stability of the hillside, especially since there was an existing access to the project site.

11. All parties agree that the applicant did not cause the present drainage and water problems on the easement. These problems are due to runoff from the steep hillside and inadequate drainage and channeling provided during construction of the Butler and Lee residences. Applicant's use of his property and the easement will not aggravate these problems. Instead, the conditions imposed on the project should alleviate them.

12. Even with the drainage problems corrected and runoff water channeled away from the road, ice could still form on the existing easement, just as it could on any improved proposed alternative route of N.E. 130th during cold winters. Both roads could be dangerous or impassable with icy conditions.

13. A drainage and water detention and control plan would be required for development of the subject property, regardless of the access used or the number of parcels into which the property is divided.

14. The plans review analyst from the Seattle Engineering Department estimated that costs to open and improve N.E. 130th Street would be greater than costs to improve the existing easement.

15. A soils analysis and report for the project was prepared by professional soils engineers. (Exhibit 10). Their conclusions, in summary, were that the core of the site was stable and would remain so with adequate precautions during earthwork and drainage phases of the project; and that if their recommendations were followed, development could occur with minimal risk of instability on the site or to adjacent properties.

16. The Seattle Fire Department has approved the easement as adequate access for fire protection and emergency vehicles.

17. The Seattle Engineering Department has approved the easement as adequate vehicular access to the site with the proposed improvements to be made.

18. City Light has reviewed the short plat and will require an easement to provide power to the site.

19. A sanitary sewer is available for connection in 42nd Avenue N.E. Only two houses are allowed per side sewer. Therefore, two side sewers will be required for the development.

20. The Water Department has issued a water availability certificate for the project. That certificate indicates that water service is available on N.E. 130th for Parcels B and C. The watermain size there, however, is substandard and will require a "no protest" agreement for temporary use until future water system improvements are installed. Water service for Parcel A is available in an easement. Standard hydrants are available on 42nd N.E. to serve the properties.

21. Neighborhood guests often use the end of the private road for parking their vehicles. With use of the road for access for the project, guest parking would have to be on 42nd Avenue N.E. There is adequate on-street capacity on that avenue for such parking.

22. Each of applicant's houses will have two car garages and space for two more cars.

23. The Institute of Transportation Engineers (ITE) Manual cited in the Director's report estimates that single family residences generate approximately 10 vehicle trips per day. Future houses on the two existing lots could generate 20 trips per day. Short platting to add an additional lot could add another ten vehicle trips per day. The additional traffic was deemed by SED to present a minimal impact.

24. It is undisputed that applicant owns an undivided one-third interest in the road in common with appellants Butler and Lee, with each having easement rights for ingress and egress. Appellants Maloney and Durran have easements for ingress and egress on the road.

25. Applicant has no objection to the conditions that DCLU would require upon approval of the short plat application. Included among those are the drainage and paving requirements, observance of the precautions and recommendations of the soils report, recording and easement requirements, and the requirement that construction of the homes comply with the Land Use Code provisions for single family residences.

#### Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Section 23.76.

2. Seattle Municipal Code Section 23.76.022C.7 provides that the Director's determinations on short plats and environmental matters shall be given substantial weight. The burden of proof is on appellants to show that the decisions appealed were clearly erroneous. Brown v. Tacoma, 30 Wn.App. 762 (1981). Appellants have not met this burden.

3. A determination of nonsignificance is appropriate under SEPA if the responsible official reviewing a proposal determines there will be no probable significant adverse environmental impacts from the proposal. Section 25.05.340A. Significant means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." Section 25.05.794.A.

4. Appellants have not established that the proposal will have a significant adverse environmental impact. The proposed short plat and future single family development will have no more than a minimal adverse environmental impact on parking, traffic and noise. The development will provide more guest parking space than is available on the existing easement. Any additional parking needs can be accommodated on the public streets. The additional traffic to be generated by the project is not excessive or of such a volume as to affect the stability, safety or character of the easement, connecting City streets, or surrounding residential areas. Any vehicular noise from the traffic increase associated with the development would be within acceptable levels. In sum, the evidence of record fails to show that further mitigation of these impacts beyond that imposed by the Director is required or warranted under SEPA. Other impacts

disclosed in the Director's environmental determination were not appealed and are not at issue here.

5. The criteria for granting, denying or conditioning a short plat are located in Section 23.24.040:

- Conformance to applicable land use policies and Zoning Code or Land Use Code provisions;
- Adequacy of access for vehicles, utilities and fire protection as provided in Section 23.54.010;
- Adequacy of drainage, water supply and sanitary sewer disposal; and
- Whether the public use and interests are served by permitting the proposed division of land.

6. The proposed short plat meets the first and fourth criteria of Section 23.24.040. The applicant is required by the Director to comply with the Land Use Code for construction of his single family residences. He has agreed to all the conditions imposed on that short plat, including those on drainage, easements, grading, construction, and other conditions related to land use codes and policies. His property is zoned for single family residences. The proposed lot sizes of the parcels of the subdivision exceed the minimum lot area for the zone. Construction of the single family homes on those parcels can be done safely, is in keeping with the residential character and development of the area, and provides further housing opportunities for the community. In sum, the proposal conforms to land use policies and codes and serves the public use and interest. Appellants have not established that the Director's judgment on these matters was clearly erroneous.

7. The proposed short plat, as conditioned, also meets the second and third criteria of Section 23.24.040. With a turnaround, pavement widened to 16 feet, and the drainage improvements required, the existing access easement will meet the adequacy of access requirements of Sections 23.54.010 for vehicles, fire protection, and utilities. These improvements should also improve the safety problems complained of by appellants relating to heavy ice formation on the road and narrowness of the easement. With the drainage improvements and detention plan required, drainage will be adequate for the site. Although the adequacy of water supply and sewage disposal were not issues in this appeal, it appears that these too are available on nearby streets. Lastly, the City departments responsible for review of the adequacy of access, drainage, water supply and sanitary service have approved the proposed plans submitted with the short plat application with the conditions noted. Those conditions have been incorporated in the Director's decision. Appellants have not established that the Director's determination on these matters was clearly erroneous.

8. Appellants urge the opening of N.E. 130th Street for access to the subdivision and development. Appellants' evidence in support of this position is not persuasive. Northeast 130th Street, if opened, would probably be a shorter and straighter route to the proposed subdivision. It might even provide access at some future time if uphill property to the south there were developed. However, development of that property is speculative. From the evidence presented and the site visit made, the Hearing Examiner concludes that use of the street as access to the subdivision in question is not a reasonable alternative at this time. Opening the street or a portion of it would result in destruction of many large evergreen and deciduous trees, as well as other vegetation presently existing in the public right-of-way. Additionally, because of the street's steep slope, use of that street would require substantial grading which could undermine the stability of the hillside and thereby endanger the downhill residences and properties. Furthermore, there is no

assurance or evidence that use of that street would provide a safer access than the one proposed. The site visit made by the Hearing Examiner in conjunction with the evidence at hearing leads to an opposite conclusion. Appellants have failed to establish that use of this street for access is feasible, reasonable or would be in the public interest. They have not shown that the Director's judgment and decision in this matter was clearly erroneous.

9. Using N.E. 130th Street will also have an impact on neighboring property owners not present at the hearing. The right-of-way for N.E. 130th Street extends straight west and uphill between developed property on 42nd N.E. Those properties are presently using a portion of it as driveways to their residences. Portions of it also appear to be used for side and back yards for those homes. Opening the street for access would disturb those present improvements and uses.

10. Appellants presented considerable evidence and argument at the hearing regarding the legal rights and interests of the parties to the existing easement, as well as legal rights to have such easement extended to the subdivided property. Unfortunately, these are not matters over which the Hearing Examiner has jurisdiction; nor are these criteria for decisions on short plats or in environmental decisions. Therefore, the Hearing Examiner takes no position on these issues.

11. Based on the foregoing, the Hearing Examiner concludes that the appellants have not carried their burden of proof in this case and therefore, the decision of the Director must be affirmed.

#### Decision

The DCLU environmental determination and the decision to conditionally approve the short plat are affirmed.

Entered this 13<sup>th</sup> day of November, 1989.

  
Dona Cloud  
Hearing Examiner Pro Tempore

#### CONCERNING FURTHER REVIEW OF HEARING EXAMINER DECISION ON THE SHORT PLAT

The decision of the Hearing Examiner on the short plat approval 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 party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.022(C)(12)(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 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, (206) 684-0521.

#### CONCERNING FURTHER REVIEW ON SEPA CONDITIONS IMPOSED ON MASTER USE PERMIT

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 23.76.022(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.