

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

In the Matter of the Appeal of

KEVIN WEARE

MUP-89-024(W)  
APPLICATION NO. 8900193

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

Introduction

Kevin Weare appeals the decision of the Director, Department of Construction and Land use, to impose paving and other conditions on a master use permit application for a project with a site address of 4735 Marginal Way S.W.

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 July 11, 1989. The record remained open to July 18, 1989 for supplemental information.

Parties to the proceedings were the property holder by appellant Kevin Weare of Construction and Development Services and the DCLU Director by Arthur Ward, senior 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 essential facts are not in dispute. Applicant is lessee of property addressed as 4735 Marginal Way S.W.

2. The property is in current use as an automobile towing and long-term storage yard. Approximately five vehicles trips per week are made into the storage yard.

3. Applicant proposes to formally establish the use for the record. DCLU imposed conditions on the permit pursuant to the State Environmental Policy Act (SEPA). Applicant here challenges those conditions.

4. The level site has 15,000 sq. ft. of lot area west of Marginal Way S.W. The site is zoned Industrial General.

5. The site is developed on its northerly 160 ft. with an auto storage yard area of 11,720 sq. ft. which includes a 526 sq. ft. office structure. The remaining southerly 40 ft. is used as a driveway to the storage yard from an existing 42 ft. curb cut to Marginal Way S.W.

6. A second curb cut of similar width is present at approximately mid-site. The Seattle Engineering Department (SED) has indicated that this more northerly curb cut is to be replaced with a curb and the more southerly driveway width reduced to 30 ft.

7. Because of its composition (clay and silts) and its steep slopes the site is designated as environmentally sensitive. However, no grading or similar action is anticipated by the

subject application.

8. The site is unpaved but covered with soil and crushed rock.

9. The silt and clay composition limits on-site drainage. Heavy vehicles tend to press crushed rock below the surface strata and force silt and clay layers to the surface where the materials can be tracked out to streets and driveways.

10. The adjacent segment of Marginal Way S.W. does not have sidewalks but offers landscaping, curbs and four lanes of traffic. Per Seattle Municipal Code Section 23.50.016, Marginal Way S.W. is a street designated on the Industrial Street Landscaping Map. New uses located on designated streets are to provide curbs, sidewalks and landscaping.

11. DCLU considers the application at issue as a new proposal and therefore attached street use conditions to the proposal.

12. The proposal site falls within the Seattle-Duwamish Non-attainment Area (SDNA) for airborne particulates. The Environmental Protection Agency requires SDNA compliance by January 1, 1991.

13. Mud and dirt tracking onto the streets along with road dust from vehicles contribute to the level of local particulates and diminishes air quality.

14. The Puget Sound Air Pollution Control Agency (PSAPCA) recommends paving of nonpaved driving surfaces within the SDNA.

15. DCLU initially imposed conditions as follows:

Conditions of Approval Prior to Master Use Permit Approval

1. The owner(s) and/or responsible party(s) shall revise the plans showing street improvements approved by the Seattle Engineering Department.
2. The owner(s) and/or responsible party(s) shall sign an affidavit that: (a) the entire storage areas and driveway of the subject property shall be surfaced with a minimum 2" thickness of asphalt over 6" of crushed rock prior to January 1, 1991. (A 5" thickness of cement concrete is an acceptable alternative in lieu of 2" thickness of asphalt concrete.); and (b) drainage improvements approved by the Seattle Engineering Department shall be provided prior to the January 1, 1991; or (c). If (a) and (b) above are not done, the use shall terminate immediately and the temporary occupancy approval shall be revoked by DCLU.

Conditions of Approval Prior to Final Inspection of a Temporary Occupancy Permit

3. The owner(s) and/or responsible partner(s) shall construct street improvements per the Master Use Permit Plan.

Conditions of Approval Prior to Issuance of a Permanent Certificate of Occupancy

4. The owner(s) and/or responsible party(s) shall prior to January 1, 1991: (a) pave all the storage and driveway areas with a minimum 2" of asphalt concrete over 6" of

crushed rock (a 5" thickness of cement concrete is an acceptable alternative in lieu of 2" thickness of asphalt concrete); and (b) drainage improvements approved by the Seattle Engineering Department shall be constructed at the owner(s) and/or responsible party(s) expense.

Permanent Conditions for Life of the Use

5. To minimize airborne dust from the proposed use, the owner(s) and/or responsible party(s) shall maintain the vehicle storage area and driveway with a minimum of 2" thickness of asphalt or 5" thickness of cement concrete over a minimum of 6" thickness or crushed rock.

16. Applicant then appealed the conditions. Applicant particularly challenged the requirement for sidewalk improvement since "there exists not one foot of sidewalk on either side of Marginal Way S.W. for a distance of over two miles!" Applicant also appealed the requirement that the yard be asphalted "because the dragging of wrecked vehicles on this type of surface will tear it up." Appeal letter and Exhibit 1.

17. In hearing, appellant further asserted that cement, although sturdier, would be more expensive. DCLU agreed that plans, material, drainage and other construction would approximate \$10 - \$15,000 in project costs.

18. Also in hearing, DCLU deleted as SEPA conditions items 1 and 3 (above) since they were Engineering Department requirements.

19. Alternatives to asphalt or concrete surfacing are less reliable. They include such methods as regular distribution of fresh gravel; spreading of calcium chloride or spreading of other dust retardants or suppressants such as polypropylene substances.

20. The Hearing Examiner continued the record to permit the parties to contact PSAPCA on the feasibility and function of alternatives to the requirement of asphalt or concrete surfacing.

21. Of record is appellant's July 18, 1989 summary of the PSAPCA response:

Mr. Pade indicated that gravel will work, but that it is a problem of maintenance...

Appellant's letter continues that

Mr. Arthur Ward and I then agreed that if the driveway portion were paved (the area of most concern) and the interior portion of the storage yard maintained properly with a gravel surface, then all of our objectives would be met.

We have agreed to pave the driveway area and develop a maintenance plan by the imposed deadline contained in the Director's decision...

Conclusions

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

2. The Director's environmental determinations are accorded substantial weight. Seattle Municipal Code Section 23.76.022C.7. Appellant has the burden of showing that the DCLU decision, inclusive of conditions, is clearly erroneous.

3. The Hearing Examiner here accepts DCLU's in hearing decision to delete "Seattle Engineering Department. - based" conditions 1 and 3. Those conditions are stricken from SEPA review.

4. Regarding paving and/or gravel surface maintenance, Seattle Municipal Code Section 25.05.675A provides in particularly relevant part that...

e. The Puget Sound Air Pollution Control Agency is responsible for monitoring air quality in the Seattle area, setting standards and regulating development to achieve regional air quality goals.

f. Federal, state and regional regulations and programs cannot always anticipate or adequately mitigate adverse air quality impacts.

2. Policies.

a. It is the City's policy to minimize or prevent adverse air quality impacts.

b. For any project proposal which has a substantial adverse effect on air quality, the decisionmaker shall, in consultation with appropriate agencies with expertise, assess the probable effect of the impact and the need for mitigating measures. "Nonattainment Areas" identified by the Puget Sound Air Pollution Control Agency shall be given special consideration. (emphasis supplied).

5. In effect, appellant challenged whether DCLU's conditions were reasonable. Indeed, mitigating measures must be "reasonable" in terms of addressing the impact and must be capable of being accomplished. Seattle Municipal Code Section 25.05.660A.

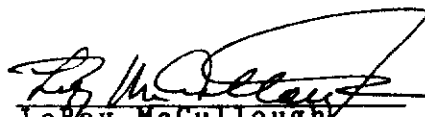
6. The Hearing Examiner concludes that a SEPA policy basis is presented for mitigating conditions, Seattle Municipal Code Sections 25.05.660, 25.05.675A. The Hearing Examiner further concludes that the conditions as modified herein are reasonable and capable of being accomplished.

7. It is therefore ordered that the DCLU decision as modified is affirmed. Conditions 1 and 3 are deleted. Conditions 2, 4 and 5 are modified to delete the storage area from the minimum requirement of 2 in. thickness of asphalt over 6 in. of crushed rock. The conditions are further modified to require development and implementation of a maintenance plan for gravel surfacing of the storage area. The plan shall be approved in advance by DCLU and a representative of PSAPCA and shall be attached to the master use permit file of this application. In all other respects, the DCLU decision is affirmed.

Decision

As modified, the DCLU decision is AFFIRMED.

Entered this 24<sup>th</sup> day of July, 1989.

  
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, 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.