

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

MARIANNA THADEN

FILE NO. MUP-86-078(W)
APPLICATION NO. 8603668

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

Introduction

Applicant challenged three DCLU conditions imposed on a master use permit for construction of a 3-story, 24-unit apartment proposed for 3940 Wallingford Avenue North.

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

This matter was heard before the Hearing Examiner on February 25, 1987.

Parties to the proceedings were: applicant-appellant by Glenn J. Amster, of Hillis, Cairncross, Clark and Martin; and the Department of Construction and Land Use Director by Leslie Lloyd, 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 site is located at the southeast corner of Wallingford Avenue North and North 40th Street. The site is zoned NCl-30 (Neighborhood Commercial, 30 ft. height limit).

2. The subject NCl zone and the adjacent single-family zone allow height exceptions for pitched roofs and sloping sites so that some structures may reach 35 ft. in height.

3. The site, with 77.6 ft. of frontage on Wallingford North and 114 ft. of frontage along North 40th Street, has 8849 sq. ft. of area.

4. North 40th Street is an arterial which connects the Fremont and University District areas.

5. The site is presently developed with a circa 1940, one-story frame commercial building. The October 6, 1986, DCLU Analysis and Decision, Exhibit 6, states that the building contains one operating retail business and several vacant storefronts. As of the Hearing Examiner hearing, however, the structure housed no tenants. The site presently has no off-street parking.

6. The site is one of four corners of commercial zoning. Other uses in the intersection include a recording studio, dry cleaner, multi-family dwellings and single-family dwellings.

7. A 2-story, 5-unit apartment is south adjacent to the site, near the Wallingford Avenue frontage. To the southeast of the site is a 1-story garage. Directly east of the site is a single-story garage, then a single family dwelling which is located some 25-50 ft. from applicant's east property line.

8. All structures in the NCl zone are one or two stories in height. South, along Wallingford are 2-story single and multi-family structures. Along North 40th Street, the prevailing structure height is two stories.

9. Applicant proposes to demolish the subject site's present structure and construct a 3-story, 24-unit apartment building with basement parking for 24 vehicles. Access would be via Wallingford Avenue. Applicant considered rehabilitating the existing structure but determined that to be economically infeasible.

10. Applicant appealed the DCLU's imposition of three conditions. The challenged conditions would require applicant to

- Convert the first floor of the building to accommodate neighborhood-serving uses, and extend the facade of the structure northward to the street lot line
- Remove the eastern 25 feet of the third story and retain a pitched roof over the rest of the structure
- Retain the 24-space below grade parking garage.

11. No other appeal was submitted from the DCLU decision. The Wallingford Community Council was granted limited intervenor status by Hearing Examiner Order of February 18, 1987.

12. Proposed structure setbacks are roughly as follows:

west, from North 40th Street, 10 ft.
north, from Wallingford Avenue North, 6 ft.
south, 11 ft. 7 in.
east, 10 ft.

13. The proposed building would extend approximately extend 56 ft. from North 40th Street and 104 ft. in from Wallingford Avenue North. The overall height would approximate 34 ft. 11 in., which is within the height limit of the subject zone and the adjacent single family zone.

14. The building would have decks and facade modulation according to multi-family code standards. Also proposed is a gabled roofline.

15. The new building would be the tallest and widest building in the immediate area. According to the DCLU Analysis of "Bulk and Land Use Impacts" the proposed building's height and width together yield a sufficiently adverse bulk impact that mitigation is warranted. Accordingly, DCLU required that the proposal be modified to "remove excessive bulk from the eastern portion of the building, where it faces single homes across the rear lot line." Acknowledging that no setback is required for the zone, the DCLU representative explained that the (third-story) setback condition was imposed "to achieve a transition in scale."

16. DCLU also considered that

Within this NCl zone, the proposed development would usurp one fourth of the zone's commercial development potential and because the zone is so small in area, could jeopardize the viability of the remaining three fourths... While not considered a significant adverse environmental impact, this effect would be sufficiently adverse to warrant mitigation under the Neighborhood Commercial goals and

policies cited.

17. DCLU therefore required that the proposal include at ground level

...neighborhood-serving businesses which are preferred for the NCl zone, and for which the zone is intended to function. These uses are encouraged to abut the street edge, in order to provide continuous streetfronts... (emphasis added).

Per the DCLU representative, "neighborhood serving uses" include such items as dry cleaner, small scale restaurant (food service), and other retail uses. A recording studio, continued the representative, is not a "neighborhood serving use."

18. In requiring the commercial use of the site, DCLU utilized no economic feasibility or similar data to sustain its position that non-commercial use at the subject site would jeopardize other businesses at the subject intersection. The Hearing Examiner finds that DCLU relied on the "domino theory" that non-commercial use of the subject site could lead to the ultimate demise of commercial uses on the remaining three corners.

19. To date of the subject application, DCLU had imposed no requirement of commercial use inclusion in an NCl project.

20. The Hearing Examiner finds no policy or other basis in the record for requiring retention of underground parking.

21. Although noted that financial feasibility of the project was not in direct issue before the Hearing Examiner, there was contrasting testimony regarding the "commercial" nature of the 40th - Wallingford vicinity. Some 40th - Wallingford structures have been remodeled and are inhabited by local businesses. And, the subject intersection is a "business district." The stronger evidence is that N.E. 45th offers more attractive and feasible business siting due in part to greater pedestrian and vehicular traffic flow.

22. It is undisputed that single-purpose housing is permitted outright in the NCl zone.

Conclusions

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

2. The Hearing Examiner is required to give "substantial weight" to the DCLU Director's environmental determination, Seattle Municipal Code Section 23.76.022(C)(7). Appellant must therefore show DCLU's "clear error" in order to prevail. Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. Regarding the below-grade parking requirement, the environmental impacts expected to be mitigated by the condition are not "clearly identified," Seattle Municipal Code Section 25.05.660(A)(2). Further, there is no policy or other basis for the condition as is required by Seattle Municipal Code Section 25.05.660(A)(1). The condition is deleted.

4. DCLU also required that applicant "remove the eastern 25 ft. of the third story...", ostensibly to ease the transition between the subject site's development and that of the east adjacent lot.

The east adjacent lot is developed with a single family dwelling that is 35-50 ft. from the subject site. And, residential use is proposed for the subject site.

5. The DCLU Analysis and Decision identifies structures along North 40th, to the east of the applicant's site, as primarily 2-stories in height. The structures within the NCl zone are either one-or two-story. Two-story buildings are south, along Wallingford Avenue. Applicant's building would stand at 34 ft. 11 in. in height. The DCLU document also characterized the proposed building as the "tallest and widest in the immediate area." The Hearing Examiner concludes that the mitigation measure relates to a specific, adverse impact on bulk and scale that is "clearly identified" in the DCLU environmental documentation. Seattle Municipal Code Section 25.05.660(A)(2).

6. Mitigation measures shall also be based on policies or other items "formally designated in Section 25.05.902..." Per the City Council's ruling on remand, C.F. 294841, the proper question is "whether the applicable zoning...provides sufficient transition in bulk and scale between the (Neighborhood Business...) zone or whether additional mitigation under SEPA is appropriate. In Re Wilson, MUP-86-011, MUP-86-012, Application No. 8506045.

7. In the Wilson case the Council specified that the NC Areas Policies could be relied upon as a policy basis to restrict the bulk and scale of a single purpose residential structure located in a commercial zone. Specifically cited was "goal I(B9)" which "provides for a transition in scale...between residential and commercial areas."

8. Given the Council reading of Goal B 9, permitting mitigation between adjoining residential uses; and given the prevailing low-scale of the commercial and single family zones, the Hearing Examiner concludes that the record failed to show that DCLU's condition, relating to the third story, was "clearly erroneous." The condition would in fact facilitate a transition between the uses. More significantly, it would offer a reduced building scale that would be more compatible with surrounding vicinity development. In this connection the mitigation measure is reasonable and appropriate. Seattle Municipal Code Section 25.05.660A(3),(A)(4).

9. The last DCLU condition appealed requires commercial uses at ground level and encourages extension of the facade to the street lot line. Regarding a policy basis for mitigating "adverse use impacts," the Neighborhood Commercial Areas Policies Goals and the Housing Policy appear to present a unique tension or conflict.

10. The Commerical Areas Housing Policy Intent specifically states that single-purpose housing in NCl zones is "permitted outright." Seattle Municipal Code Section 23.16.020(IV)(D)(1). Appellant urges that this specific policy militates against DCLU reliance on several other policy statements, such as those found at Seattle Municipal Code Section 23.16.020(I)

(A)(1) Maintain business districts which conform in size and scale to the communities they serve

(A)(7) Preserve and improve existing commercial areas...

(A)(8) Encourage residential development in combination with new business structures in existing business districts

(B)(2) Preserve the neighborhood-serving

character of small neighborhood-oriented business districts...

(B)(12) Preserve the distinctive character of different neighborhoods and their business districts.

11. The introductory statement of Seattle Municipal Code Chapter 23.16.020(I) Goals includes the observation that

Strong healthy neighborhoods enhance the liveability of Seattle ... Strong, healthy business districts which are compatible with their neighborhoods reinforce that sense of belonging while providing essential goods, services and livelihoods for residents of the city.

12. The subject site is located within a business district, and is zoned for commercial use. Should the site be developed strictly residential, it precludes the use of the site for business or mixed-use activity. It is unfortunate that DCLU provided no objective indicia of the impact; however, that shortcoming does not require a reversal of the condition imposed. The evidence sufficiently indicates that the unmitigated impact on the business node would be adverse.

13. The Hearing Examiner has determined per the evidence that the N.E. 45th street area presents as more feasible economically for business siting. However, this fact does not suggest that the existing 40th-Wallingford business area should not be "maintained", (A)(1); or "preserved and improved," (A)(2), by conditions imposed. Secondly, economic feasibility of the project is not a S.E.P.A. consideration pursuant to Chapter 25.05, Seattle Municipal Code. Given the burden of persuasion in this matter, the Hearing Examiner concludes that the Commercial Areas Goals and Policies, as part of Appendix A, Chapter 25.05, Seattle Municipal Code, provide a policy basis for the DCLU mitigation of the use impact.

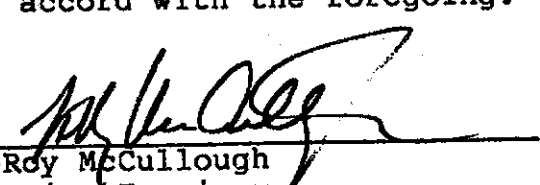
14. The Hearing Examiner further concludes that the mitigation measure imposed adequately relates to the specific impact and is reasonable as it relates to that impact. Again, financial feasibility is not in issue. The City Council stated at p.3 of In Re Queen Anne Community Council et al. that

If a condition is imposed which is reasonably related to an adverse impact, and that condition alone or in conjunction with others makes the project infeasible, the applicant is free not to go forward with the project.

CF. 293623, MUP 82-080-85(W).

Decision

The DCLU Decision is MODIFIED in accord with the foregoing.


Leroy McCullough
Hearing Examiner

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 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 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.