

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

ATLANTIC RICHFIELD COMPANY

FILE NO. S-79-005

from a ruling of the Superintendent  
of Buildings

The appeal is GRANTED and the Findings and Decision  
of the Superintendent of Buildings are reversed.

#### Introduction

Atlantic Richfield Company, appellant, filed an appeal from the decision of the Superintendent of Buildings to deny a use permit for a mini-market at 4100-14 Brooklyn Avenue N.E.

The appellant exercised its right to appeal pursuant to Section 25.40, Ordinance 86300, as amended by Ordinance 104795.

Parties to the proceeding were: Atlantic Richfield Company represented by Robert A. Medved, Graham and Dunn, attorneys at law, and Joyce C. Kling, zoning administrator, representing the Superintendent of Buildings.

This matter was heard before the Hearing Examiner on April 9, 1979.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

#### Findings of Fact

1. The subject property is located at 4100-14 Brooklyn Avenue N.E.

2. A service station with two pump islands and structure in which automobiles are serviced or repaired has occupied the site since 1948. The structure was designed for use as a service station.

3. A parking lot with 35 spaces was established on the site by conditional use authorization sometime after 1948. Twenty spaces are located at the northern edge of the site and 15 at the southern edge.

4. The site is currently zoned Multiple Residence High Density (RMH 350) and has been since 1968 or 1969 when it was changed from a business or commercial zoning.

5. The use of the property and the building are nonconforming.

6. The appellant applied for a building-use permit to alter the existing service station and establish a mini-market.

7. The Superintendent published his denial of the permit on March 6, 1979.

8. The appellant filed its notice of appeal March 19, 1979.

9. The appellant's proposal involves eliminating repair and servicing of automobiles on the property and

removing the parking on the southern part of the lot. A grocery store for convenience foods and beverages would occupy the building. The pump islands would remain and gas would continue to be sold. The parking use would continue on the northern part of the property.

10. Noise, odors and fumes associated with maintenance and repair of automobiles would be eliminated by the proposed change.

11. Obstruction of the driveways providing ingress and egress from N.E. 41st, which now frequently occurs because of the southern parking, would be eliminated. This obstruction has made gasoline delivery by tank trucks difficult at times.

12. The nearest grocery store to the site is now approximately .3 miles away. Two busy streets intervene.

13. The automotive service station use is first permitted in the Neighborhood Business (BN) zone as a conditional use and in the Multiple Residence - Mixed Density (RM-MD) zone as a use permitted outright.

14. The grocery store use is permitted outright as an accessory use in the Multiple Residence High Density and Highest Density Variable Height (RMV 200) and (RMV 150) zones. It is first permitted outright as a principal use in the BN zone.

15. Section 5.34(c) provides:

Except as provided in Section 5.34(d) or (e), a nonconforming use in a nonconforming building or part may be changed only to a use permitted in a less intensive zone than said nonconforming use.

16. Section 5.34(e) provides, in part:

(A) nonconforming use in a nonconforming building, may be changed to a use permitted in a less intensive zone than the zone in which the nonconforming use would be conforming, or to another use which is listed and grouped in the same zone classification as an outright permitted use, provided such new use will be no more detrimental or injurious than the previous nonconforming use to other property in the same zone or vicinity.

17. The Superintendent maintains that a nonconforming use and building analysis is inappropriate in the instant case because only a part of the use, that within the building, would be discontinued. In the alternative if that analysis is deemed appropriate his contention is that the denial of the permit is correct because the new proposed use, in combination with those remaining, may not be less detrimental than the existing uses.

18. The appellant argues that Section 5.34(c) controls in that a part of the use would be changed to a use permitted outright in the RM-MD zone, which it maintains is less intensive than BN, as well as the RMV 150 and RMV 200 zones.

19. Further, appellant alleges, Section 5.34(e) would also allow the change since a grocery store is an outright permitted use in the BN zone where the service station is only a conditional use in that zone and the new use would be less or no more detrimental.

20. The Superintendent has taken the position in a previous case that the fact that a use requires conditional use authorization is a clear indication that it is considered more detrimental or injurious than one in the same classification but permitted outright.

### Conclusions

1. The Superintendent's decision that the ordinance provisions dealing with "Limitations on Non-conforming Uses" do not apply to the subject property and proposed change is in error. The service station is clearly a nonconforming use in the RMH 350 zone with a nonconforming building therefore it has achieved a special status under the ordinance scheme and merely to say that the proposed use is not allowed in the zone is not sufficient. Section 5.34 would apply to any change in the use.
2. The applicability of Section 5.34(a) was not an issue argued at hearing.
3. Sections 5.34(b) and (d) are not applicable.
4. Section 5.34(c) permits a change of the use to one permitted in a less intensive zone. The Superintendent would read that section as "...to one permitted outright in a less intensive zone." It should be noted that two paragraphs later the ordinance does refer to a change to a use permitted in a less intensive zone "as an outright permitted use" showing that when that limitation is intended the Council uses the necessary words. The Superintendent may not effectively amend the ordinance by adding a word where no construction is necessary to understand and apply a provision.
5. Less intensive zones can be determined, according to the definition section, 3.27, by referring to the test in Section 4.11. According to that list the RM-MD, RMV 150 and RMV 200, all zones allowing a grocery store in some form, are less intense. Therefore, a change of use from a service station to a grocery store would be permitted by Section 5.34(c).
6. Even if 5.34(c) were not applicable, 5.34(e) specifically provides for the change from one nonconforming use to another nonconforming use listed as permitted outright in the same zone classification as the first use so long as the new use will be no more detrimental than the first use. A grocery store is listed as permitted outright in the BN zone in which the service station use would be conforming. An outright permitted use is presumed to be less detrimental than one requiring conditional use authorization. Therefore, a change from a service station to a grocery store would be permitted.
7. The remaining issue is whether the change of but part of the service station use to a grocery use is to be treated differently from a total change under either 5.34(c) or (e). Subsection (c) refers to "a nonconforming use in a nonconforming building or part." The provision is ambiguous in that it is not clear whether "part" refers back to the use as well as the building. Where ambiguity exists the policy to be implemented by the provision must be ascertained and given effect. It is clear that the intent of these provisions is to balance the rights of the property owner with those of the conforming uses. This is achieved by allowing the use or any use deemed, by the scheme of the ordinance, to be less detrimental to continue. The allowance of a change of part of a nonconforming use to one closer to conformity would appear to be consistent with that purpose and intent. A check, under subsection (e), would be to evaluate the proposal to ascertain that the presumption that a use permitted outright is less detrimental than a conditional use is not rebutted by evidence that the combination of the new use and the remainder of the former use would be more detrimental.

8. In the instant case there was no showing that it would be more detrimental and the evidence indicated a strong likelihood of less detriment.

#### Decision

Either Section 5.34(c) or (e) is applicable and will permit the proposed change of use. Therefore, the decision of the Superintendent must be reversed and the appeal GRANTED.

Entered this 20<sup>th</sup> day of April 1979.

M. Margaret Klockars  
M. Margaret Klockars  
Deputy Hearing Examiner

#### Notice of Appeal

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 20 days of the date of this decision. Vance v. Seattle, 18 Wn. App. 418(1977).