

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

WILLIAM DIXON, ET AL

File No. S-80-038

from a determination of the Director,
Department of Construction and
Land Use

The appeal is DENIED and the Findings and Decision
of the Director of Construction and Land Use are
AFFIRMED.

Introduction

On July 23, 1980, the Director of the Department of Construction and Land Use (CLU) approved a permit authorizing a change of use of an abandoned church building to a private non-graded school, 2231-10th Avenue East. A letter of appeal with fee was received by the Hearing Examiner on July 31, 1980. Said letter and remittance were submitted by John E. Keegan and contained as well several signatures of interested persons, including that of William Dixon.

The appellant exercised his right to appeal pursuant to Section 25.40 of the Zoning Ordinance (86300, as amended).

Parties to the proceeding were John Keegan, appellant, attorney at law; the Director by Elizabeth Huneke, attorney at law; applicant by Mark Rowley, attorney at law.

The matter was heard before the Hearing Examiner on August 20, 1980 and on August 22, 1980. The hearing set for August 27 was stricken upon agreement of the parties.

For purposes of this decision, all section numbers, unless otherwise indicated, refer to the Zoning Ordinance (86300, as amended).

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

Findings of Fact

1. On January 16, 1976, Articles of Incorporation for the Bertschi School, a nonprofit corporation, were filed with the Washington State Secretary of State. Article 3 describes as a purpose:

(1) to establish, own, conduct, manage and maintain a school to instruct and train the individual child to improve or develop his or her capabilities and awareness, and to provide individual attention and the best teaching methods according to that child's ability and stage of development, all in an atmosphere of freedom and self-choice accompanied by the necessary guidelines of responsibility and self discipline.

Applicant Erickson testified that he and wife had found a rundown daycare at 2227 - 10th Avenue East and that their offer of purchase was accepted by the then-owner. Applicant described

the Bertschi grouping of children as operating by ability to age in order to yield a greater exchange between the older and younger students.

2. In February, 1980, applicant acquired the north adjacent property at 2231 - 10th Avenue East, which had been on the market for approximately three years. Applicant's intent was to expand the existing program to the former church building where he hopes to conduct approximately two additional classes.

3. The property subject of this hearing, at 2231 - 10th Avenue East, is found in a Multiple Residence Low Density (RM 800) Zone at the southwest corner of 10th Avenue and East Lynn Street. It is undisputed that in its unoccupied state the former church building was a site of vandalism and disrepair.

4. The 2231 building was once considered for status as a possible architectural landmark. A finding of April 25, 1980, by a Hearing Examiner in File No. X-80-038 was to the effect that the church is recorded as an urban asset by the Historic Seattle Authority in a Visual Inventory of Buildings and Urban Design Resources for Seattle.

5. A Final Declaration of Nonsignificance (DNS) was entered February 14, 1980, on applicant's proposal to rehabilitate the existing church building at 2231 - 10th Avenue East and convert it to professional office and private school classroom use, with the addition of a seven-space parking area on the side yard fronting on East Lynn Street. The DNS attached checklist showed potential environmental impacts in the areas of earth-ground surface displacement; surface water runoff; increase in existing noise level; alteration of present land use; generation of additional vehicular movement; and archeological/historical building alteration. The environmental checklist was prepared by applicant Erickson, signed January 24, 1980, and was reviewed by a representative of the designated Department of Community Development. The resulting DNS found that, "The increase in traffic movement would not place significant adverse impact on the surrounding circulation," and that the mentioned factors "are all minor environmental impacts; no significant adverse impacts on the environment are found."

6. Notice of the Final DNS was published February 20, 1980, address 2231 - 10th Avenue East. There was no appeal to the Hearing Examiner from this publication. On June 27, 1980, the Department determined that based on applicant's modification of the original application to eliminate professional offices decreased potential environmental impacts were anticipated and no further environmental determination was necessary. The modification approval was filed with the SEPA Information Center June 30, 1980, stated project address 2231 - 10th Avenue East.

7. On July 10, 1980, applicant submitted an application for a use permit for 2231 - 10th Avenue East to "alter existing building and change use from church to private nongraded school per plans."

8. The requested permit was issued without condition by the Director July 23, 1980. The permit showed an occupant load of 134; that a DNS threshold determination had been made; and that an environmental checklist had been filed. The Daily Journal of Commerce published notice of July 24, 1980, listing as one of the appealable actions the Department's granting applicant permission to "alter bldg. and change use from church to school," address 2221-35 -10th Avenue East. No other church appears within the address but the subject 2231 - 10th Avenue East.

9. A letter and remittance of appeal from the change of use and SEPA determination was received from John Keegan by the Office of the Hearing Examiner July 31, 1980.

10. The appeal from the February, 1980 DNS and June 30, 1980 modification thereof were dismissed as untimely August 8, 1980. This order was affirmed after oral presentation August 20, 1980 (see File No. W-80-014). The issue of the use permit as it pertained to SEPA was jurisdictionally retained.

11. Some appellant witnesses contested the admissability and advisability of a school use in the subject area. Other concerns included those with noise, affected property values, increased traffic and parking concerns as well as enrollment figures for the entire Bertschi operation. A continuing suggestion was made that the property would be better suited for residential use.

12. As a result, however, of the DNS appeal determined to be untimely issues for consideration were to fall within the categories of land use, architectural/historical significance, or increased vehicular traffic and attendant consequences.

13. The Department representative testified that 10th Avenue is a heavily travelled arterial with 14,200 cars per average weekday. Assuming a maximum of 60 students for the school the representative projected 30 car trips for unloading students and 30 for reloading, or an additional 60 per day, which figure could be accomodated by 10th Avenue traffic flow. It was assumed that the remaining children would arrive and depart by alternate means.

14. The Department representative did not consider the use at 2227-10th Avenue or the number of traffic turns to East Lynn Street in the analysis. However, the representative did testify that he was aware of the parking at 2227 and as well of the number of cars going to that address which he assumed to be a day nursery.

15. There are five offstreet parking spaces at the adjacent 2227 address which are accessed by entrance and exit driveways.

16. Lynn Street is a collector street congested by onstreet parking on its north and south sides. Parking is also restricted by hours on the east and west sides of 10th Avenue East. Applicant is contemplating an offstreet parking area to be located at the north of the 2231 building, i.e. at Lynn Street.

17. No traffic counts were done of Lynn Street.

18. Applicant's Exhibit No. 3 includes a chart or graph of a 10th Avenue traffic count based on that from the City of Seattle Engineering Department. The graph was the work of witness Warburton who is an environmental engineer and holds a bachelor of science degree in civil engineering. However, the referenced traffic count did not include University of Washington or other traffic based on educational institutions not in full session during the July 18 traffic count. That graph would show, however, that southbound traffic peaks between 8 and 9 a.m. and that northbound traffic peaks between 4:30 and 5:30 p.m.

19. The projected total student enrollment for the 1980-81 session is 84, with 57 full day students and with the 27 half day students scheduled to leave at 11:30 a.m. From the student addresses it was generally determined that 53

students would be originating from north Capitol Hill, two from south Capitol Hill, nine from Madrona, eight from Madison Park, seven from the University, four from Queen Anne, three from Crown Hill, three from Northgate, two from the Fremont area, two from the West Seattle area and one from the Lake City area. While the projected 1980-81 maximum occupancy level for any one time is 84 the enrollment for the school year is projected to be 116 or 120, per applicant witness Warburton or Erickson, respectively.

20. For the 1979-80 school year the 65 students' transportation breakdown was as follows: individual, 10; carpool, 49; Metro, 1; walking, 5. The projected breakdown for 1980-81 is as follows: individual, 15; carpool, 57; Metro, 3; walk, 9. There is a projected increase from 26 to 34 student transportation cars from the 1979-80 to 1980-81 school year. The number of staff is expected to increase from five to seven and their cars from three to five. These figures supplied by applicant witness Warburton were secured by informal conversations and sightings by school staff. Carpool figures are based on three students per car. Six families have two children enrolled in the school.

21. The school opens generally at 7:45 a.m. and approximately seven cars unload their passengers prior to 8 o'clock a.m. Classes begin at 9 a.m. and the peak unloading period is roughly from 8:45 a.m. to 9:15 a.m. The majority of the children are picked up at approximately 3:30 p.m. and the remaining children before the 5:30 p.m. closing time. See Applicant's Exhibit No. 3.

22. Parent conferences are by appointment. There is no specific directive from the school to schedule them at times other than the peak periods of loading-unloading.

23. One of applicant's proposals to mitigate any potential increased traffic consequences was for parents to be requested to voluntarily comply with a traffic plan to minimize the use of East Lynn Street. The basic plan would be for 10th Avenue north bound traffic to turn left (west) at East Boston Street, proceed west to Harvard Avenue East, proceed north to Miller Street, proceed east to 10th Avenue East, turn right on 10th Avenue East and return south to the loading zone in front of the the 2227 address or to the bus stop directly in front of the 2231 address.

24. A host of letters and signatures were presented both praising and denouncing the project.

Conclusions

1. The burden of proof is on the appellant. Section 25.44 of the Zoning Ordinance provides that the ruling or interpretation of the "Superintendent" shall be regarded as prima facie correct and the burden of establishing the contrary shall be upon the appellant, and provided further that appeals from findings, conclusions and decisions made pursuant to the Environmental Policy Act shall be based upon the records of the Superintendent plus such additional testimony or evidence as may be offered. The Hearing Examiner shall summarily dismiss an appeal without hearing which is determined to be without merit on its face, frivolous, or brought merely to secure a delay." Superintendent of Buildings Appeals Rule 2.9 provides that the decision appealed from will be considered prima facie correct.

2. Threshold determinations may be challenged by an appeal to the Hearing Examiner commenced by the following of a notice of appeal with the Office of the Hearing Examiner

no later than the 15th day following the filing of the decision in the SEPA Public Information Center. Ordinance 105735, Section 20 (as amended).

3. Although not a separate basis for appeal, Section 19 of Ordinance 105735 provides that the City and its departments have the authority to deny or reasonably condition any proposal so as to mitigate or prevent adverse environmental impacts. Section 19, Paragraph 1. Any proposal may be reasonably conditioned on environmental grounds only on the basis of the adverse environmental impacts on the elements of the environment defined in WAC 197-10-444 or Section 15 of this Ordinance and identified in the environmental documents prepared pursuant to SEPA. (Emphasis added.) Ordinance No. 105735, Section 19(2). A proposal may be denied under Section 19 where significant adverse impacts have been identified in the environmental documents prepared pursuant to SEPA which cannot be substantially mitigated or prevented by the imposition of reasonable conditions. Section 19(3).

4. The elements of the environment defined in WAC 197-10-444 are the elements of the environmental checklist.

5. Hearing Examiner Environmental Rule 3.2 also provides that a threshold determination is appealable. Rule 3.3 provides a compliance with Section 19 of the City SEPA Ordinance is not a basis for a separate appeal but may be raised as an issue in an appeal, for example, of a decision to issue or deny a use permit.

6. Some other appropriate appeal rules provide that the Examiner shall summarily dismiss an appeal without hearing when it is determined to be without merit (Rule 1.4); any interested person who has not filed an appeal may be permitted to intervene by filing at least five days before the hearing a written motion to intervene (Rule 1.5); it is within the discretion of the Examiner to permit oral or written statements or both to be entered into the record by persons who are not parties (Rule 1.6); a party is defined as any person who files an appeal, the City department making the decision and the person who files an application for a permit which is the subject of the appeal (Rule 1.7); each party shall have the right of due notice, cross examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing (Rule 1.20); notice of hearings from appeals from the Superintendent (Director) must be given no less than seven days before the hearing (Rule 2.8); the decision appealed from the Superintendent (Director) will be considered prima facie correct (Rule 2.9).

7. The appeal from the February, 1980 DNS and June, 1980 modification was dismissed as untimely August 8, 1980, and affirmed after oral argument August 20, 1980. Accordingly a 20 day notice SEPA requirement was not applicable. Rule 3.7. See File No. W-80-014. Section 20, Ordinance 105735 (as amended).

8. Applicant sought both prior to, during and after the hearing to challenge the sufficiency of the examination upon which the February DNS and the subsequent June modification were based. The challenged threshold DNS determinations would have been proper subjects for general review pursuant to Section 20 to Ordinance 105735, particularly with regard to traffic patterns, noise, and property values. However, inasmuch as the appeal therefrom was not timely, the scope of review is limited by Examiner rule and applicable ordinance to the issues of land use, historical/archeological considerations, additional traffic and noise attendant thereto. (Ordinance 105735, Section 19, Paragraph 2.) The issue of a

15 ft. setback, for example, is not among those issues; nor is the issue of whether a more popular, i.e. residential use should issue.

9. The Final DNS acknowledged a substantial increase in vehicular movement but determined that the increase in traffic movement would not place significant adverse impacts on surrounding circulation and further determined that no significant adverse impacts on the environment were found. The Zoning Ordinance allows nongraded school as an outright permitted use in the RM 800 Zone. Section 12.11(d). Therefore this proposal may not be denied inasmuch as no "significant adverse impacts have been identified in the environmental documents prepared pursuant to SEPA..."

10. We are therefore left with a question of reasonable conditions on environmental grounds for the use. Several have been suggested by appellant and appellant's witnesses both in hearing and in written representations to the Examiner. Although recognizing the 2231 use as an adjunct to the use at 2227, the Examiner declines to condition the 2231-10th Avenue use by limiting the total enrollment for the three suggested addresses. The subject change of use and application concern the church building property; no testimony was presented to the contrary. Were this decision to attempt jurisdiction over the other two addresses, due process issues would in no way be abated.

11. The Examiner also declines to condition the use by prohibiting a parking lot at 2231-10th Avenue. Offstreet parking is required absent a variance. Any use as a parking lot would be required to meet Departmental approval. This approval should rest in considerable part on the traffic concerns of 10th, Lynn and other surrounding streets.

12. Building occupancy levels should be in compliance with the code whether for 2231 or the adjacent property. Any zoning violations are to be enforced by the Superintendent, now Director of Construction and Land Use. Zoning Ordinance Section 25.1. If, therefore, the 2227 address violates the permit or code, direct action should be taken by CLU, not by the Hearing Examiner in a related decision. Thus, the enforced code occupational limit of 2227 serves as control of occupancy population.

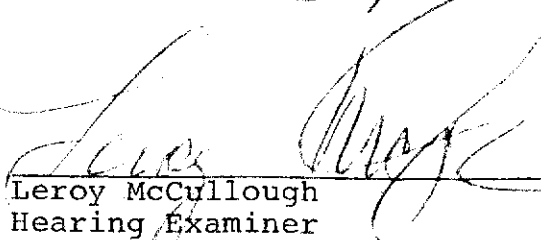
13. It was not shown that the modification from the combined school-office use to school use only exacerbated the environmental concerns; concerns were expressed regarding the "cavalier" assumption that there would be a lesser impact but no affirmative showing was made that office use would have decreased the complained of impacts.

14. The arterial traffic counts have been considered as have the projected increase in staff and student traffic. We conclude that the burden of proving that the use should either be denied or conditioned has not been met.

Decision

The appeal is DENIED and the findings and decision of the Director of Construction and Land Use are AFFIRMED.

Entered this 30 day of September, 1980.


Leroy McCullough
Hearing Examiner

Notice of Right to Appeal

Pursuant to Section 20A of the SEPA Ordinance (105735, as amended) a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth (15th) day after the date the decision appealed from is filed with the SEPA Public Information Center. The appeal must be filed with the City Clerk. Rules have been adopted by the City Council governing the appeal procedure and should be reviewed prior to filing an appeal.

The City Council will only review issues relating to compliance with Section 19, Ordinance 105735, as amended. Section 19 relates to substantive authority to condition or deny a proposal on environmental grounds.