

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

In the Matter of the Appeal of

VILLA NEIGHBORS AND ADAM BRUCKNER

FILE NO. S-83-001

from an interpretation of the Director,
Department of Construction and Land Use

Introduction

Appellants, Villa Neighbors and Adam Bruckner, appeal an interpretation by the Director of the Department of Construction and Land Use (Director) entitled "In the Matter of the Use of Property between N.E. 50th and 47th Streets and 45th Avenue East and Lake Washington", the Sacred Heart Villa site.

This matter was heard before the Hearing Examiner on May 4, 1983.

The appellants exercised their right to appeal pursuant to the Seattle Municipal Code, Chapter 23.88. A section numbers in the decision refer to the Seattle Municipal Code.

Parties to the proceedings were: appellants, by their attorney, William N. Snell, Haggard, Tousley and Brain; the Director by Gordon Crandall, assistant City Attorney; Washington Retirement Parks, a non-profit corporation, by John E. Phillips and Sarah Mack, Hillis, Phillips, Cairncross, Clark and Martin, P.S.

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. At the request of the attorney for appellant Villa Neighbors, the Director issued his interpretation of the zoning code regarding a proposed planned unit development (PUD) for the property located between N.E. 50th and N.E. 47th Street and east of 49th Avenue East to Lake Washington. The Code provisions interpreted are those which were in effect at the time of the publication of the draft environmental impact statement pursuant to Section 23.04.10(D)(3).

2. Appellants appeal the interpretation that the uses and bulk proposed by Washington Retirement Parks (WRP) for the PUD at that site are permitted.

3. The site comprises 19 acres and is zoned RS 9600 and RS 5000.

4. The PUD is designed to be a residential development for the elderly with 250 self-contained living units with kitchenettes clustered on the site, none located closer than 100 ft. from adjoining residential properties, 40 intermediate care units without kitchenettes, 60 beds for nursing care and a central facility with dining room and other support facilities.

5. The Director determined that the 250 self-contained living units, 40 intermediate care units and some of the nursing beds fit the code definition of "home for the retired"; that the nursing beds for permanent nursing care are "nursing and convalescent home"; that those uses are permitted under the PUD provisions of the code; and that the height and number of residents limitations do not apply.

6. Section 24.66.060 provides for residential planned unit developments:

A residential planned unit development may be permitted in any zone not otherwise prohibiting dwelling units, when restricted to the following uses and conditions:

A. Dwelling units and all principal uses permitted in the zone in which the project is located;

B. Residential uses first allowed in RM 800 and RMH Zones, in an RS or RD Zone only when located at least one hundred feet from any other lot in such residence zone so as to minimize the impact on adjacent residential properties, or when topographic or other natural barriers sufficiently separate the development, or when the uses within that portion of the development which adjoins or faces premises in a RS or RD Zone are the same as those permitted in such RS or RD Zone;
...

D. Those conditional uses which are not otherwise prohibited in the zone in which the development is located;
....

7. The general purpose of the PUD provision is stated at Section 24.66.040:

A. The intent of this provision is to allow, on relatively large tracts, flexibility in grouping, placement, size and use of buildings which will insure a better development than would otherwise result from the application of bulk and use regulations of the zone in which the tract is located.

B. A planned unit development may be authorized even though the use, location and bulk of the buildings and open space do not conform in all respects with the regulations of the zone in which the tract is located, provided that such development meets all requirements of Sections 24.66.050 through 24.66.090.

8. The scheme of the zoning code is such that the classifications increase in intensity from RS 9600 as the least intensive zone and progressing to RS 7200, RS 5000, RD 7200, RD 5000, RM 1600, RM 800, and finally RMH 350 which is the most intensive relevant zone designation.

9. Section 24.08.090(5) defines "home for the retired" as:

...an establishment operated for the purpose of providing domiciliary care for a group of persons who by reason of age are unable to provide such care for themselves and who are not in need of medical or nursing treatment except in the case of temporary illness.

10. Section 24.08.150(A) defines "nursing or convalescent home" as:

...an establishment which provides full-time convalescent or chronic care or both for three or more individuals who are not related by blood

or marriage to the operator and who, by reason of chronic illness or infirmity, are unable to care for themselves. No care for the acutely ill, or surgical or obstetrical services, shall be provided in such a home; a hospital or sanitarium shall not be construed to be included in this definition.

11. "Building or part, residential" means a building or building part containing solely one or more dwelling units or a building or building part occupied or intended to be occupied in whole for sleeping or living purposes, including hospitals, sanitariums and similar uses, but not including motels or hotels. Section 24.08.030(12).
12. "Use" means the purpose for which land or a building is designed, arranged or intended, or for which it is occupied or maintained, let or leased." Section 24.08.220(1).
13. "Use or structure, conditional" means uses permitted in this subtitle as principal or accessory uses when authorized by the Director, the Hearing Examiner upon appeal, or by the Council and subject to specified conditions. Section 24.08.220(7).
14. "Use or structure, accessory" means a use or structure incidental to a permitted principal use, provided that such use or structure shall be located on the same lot as the principal use or structure, except when permitted elsewhere as specifically set forth in this subtitle. Section 24.08.220(6).
15. A dwelling unit is:

...a room or rooms located within a building, designed, arranged, occupied or intended to be occupied by not more than one family and permitted roomers or boarders, as living accommodations independent from any other family. The existence of a food preparation area within such room or rooms shall be evidence of the existence of a dwelling unit. Section 24.08.050(11).
16. "'Dwelling, multiple' means a building or portion thereof containing three or more dwelling units." Section 24.08.050(7).
17. Section 24.16.040, listing uses permitted as conditional uses in the RS 9600 zone, provides:

D. Homes for the retired, subject to the following conditions:

...
 2. No lot so used shall be less than fifteen thousand square feet in area plus one thousand square feet additional for each resident person over fifteen in number,
 3. Such homes shall be occupied by no more than twenty persons,
 4. No structure so used shall be located closer than thirty feet from any other lot in an RS or RD zone,
 5. No structure so used shall be more than one story in height;...

18. Section 24.24.040, providing for uses permitted as principal conditional uses in the RD 7200 zone, includes:

D. Homes for the retired and nursing or convalescent homes accommodating more than 20 persons in residence or patients at one time, subject to the following conditions:

...
2. No lot so used shall be less than forty thousand square feet in area,

3. No structure so used shall be greater than two stories in height where the lot is less than four acres in area,

4. All principal buildings shall be located fifty feet or more from any lot in an RS or RD Zone;...

19. In the RM 800 zone, principal uses permitted outright if buildings are at least 15 ft. from an R zone include:

E. Homes for the retired, subject to the following conditions:

...
2. No lot so used shall be less than ten thousand square feet in area,

3. All principal buildings shall be located fifteen feet or more from any other lot in an R zone,

4. No more than twenty persons shall be in residence at one time.

Section 24.30.030.

20. Lot area per unit in a residential PUD is addressed in Section 24.66.060(F) which provides:

The lot area per dwelling unit, or per unit of floor area in structures governed by floor area ratio, may be reduced by not more than twenty percent of that otherwise required in the zone, provided, however, that when the planned unit development consists predominantly of uses specified in subsection B, the lot area shall be as otherwise required in the zone; except that for a planned unit development on a site qualifying under Section 24.66.050.A.2, the density measured by dwelling units or by floor area ratio may be up to one hundred twenty-five percent of that otherwise permitted in the RMV Zone and up to one hundred and seventy-five percent of that otherwise permitted in the BC Zone.

Conclusions

1. Appellants contend that: (1) a home for the retired cannot be included in a PUD in an RS zone because a) it is a use not first allowed in the RM 800 and RMH zones, b) with greater than 20 residents it cannot be allowed as a conditional use and c) it is not a residential use; (2) a nursing home cannot be included in a PUD in an RS zone because a) it is a use not first allowed in the RM 800 and RMH zone and/or b) it is not a "residential use"; (3) that if the uses are allowed they are multiple dwellings subject to the requirements applying to multiple residential units; (4) that nursing care beds for residents are not incidental; (5) that the

use classification would improperly change with a changing number of beds; (5) that the dining, recreational, infirmary and administration facilities are not accessory; (6) that if the use is permitted the lot area for the home for the retired is that of the underlying zone (9,600 or 5,000 sq. ft. less 20 percent); (7) that the lot area requirement for the nursing home use is the dwelling unit standard of the underlying zone; and (8) that if the use is allowed the structures in the home for the retired should be limited to one story.

2. A strict reading of Section 24.66.060 and other pertinent sections would support appellants' argument that since a home for the retired for not more than 20 residents is first conditionally permitted in the RS 9600 zone and first conditionally permitted for more than 20 residents in the RD 7200 zone it does not qualify as "first allowed" in the RM 800 and RMH zones under Section 24.66.060(B). Appellants contend that the same argument applies to nursing homes, i.e., that since a nursing home is first permitted as a conditional use in the RD 7200 zone it does not qualify under subsection B as "first allowed" in the RM 800 and RMH zones.

3. The strict reading urged by appellants would, however, render the reference to the RMH zone meaningless as there are no residential uses which are permitted in any form for the first time in the RMH zone. Therefore, the provision must be considered to be ambiguous as to the type of permission, outright or conditional. Further, that reading would result in uses permitted conditionally in the zone and other zones of slightly more intensity being prohibited and uses only first permitted in any form in the more intensive of the residential zones being permitted in the PUD. That result would be anomalous.

4. Appellants urge that the standard rules of construction require giving full meaning to the word "first". An overriding rule articulated many times by our courts is that in construing an ambiguous provision the statute should be construed as a whole to avoid unlikely consequences. Even when there is express but inept language the purpose of the legislation should control the construction. Alderwood Water District v. Pope and Talbot, Inc., 62 Wn.2d 319 (1963). The interpretation of the "first allowed" language urged by appellants would lead to illogical consequences. As concluded by the Director, Subsection B must be read "residential uses first allowed outright in RM 800 and RMH zones," to give meaning to the reference to RMH and to carry out the intent of the PUD provision and the scheme of the zoning code.

5. The Director's decision that the home for the retired is permitted rests upon Section 24.66.060(D), which allows conditional uses not otherwise prohibited in the zone. Appellants maintain the proposed use does not qualify as it exceeds 20 residents, reading the use permitted to be a twenty-or-fewer-person home for the retired. The Director regards the use as a home for the retired which may be permitted in the zone subject to certain conditions including the twenty resident limitation. The definition of "use" and "conditional use" and the remainder of Section 24.66.060 seem to support the Director's interpretation of this subsection. That section provides the uses that are permitted and then the conditions, e.g., density, lot coverage, height, etc., that apply to those uses. The Director's interpretation of subsection D again better carries out the intention of providing flexibility than appellants. Appellants have not succeeded in overcoming the substantial weight given the Director's interpretation of this provision.

6. Appellants assert that neither a home for the retired or a nursing home is a "residential" use qualifying for inclusion under Section 24.66.060(B). The Court in State ex. rel Meany Hotel v. Seattle, 66 Wn.2d 329 (1965), considered that contention and concluded that a home for the retired falls within the Code's definition of a "residential building or part" and is therefore residential.

7. The definition of residential buildings or parts also includes hospitals, sanitariums and similar uses. As a nursing home, as defined by the Code, is similar to a hospital or sanitarium, as defined by the Code, it should be concluded that the nursing home use is also residential.

8. Appellants suggest that the proposed uses should be considered multiple dwellings as buildings would contain more than one dwelling unit which would bring into play the density and use requirements applying to multiple residential units. In determining whether the individual units are "dwelling units" the Director may consider the purpose of the accommodation. While there is to be a food preparation area, the units are to be for individuals or couples, and they could be used independently, the definition does allow the determination made by the Director that the units are not dwelling units and the buildings are not multiple dwellings.

9. Some of the beds provided for nursing care of persons who are already residents of the retirement units are classified as accessory uses to or part of the home for the retired by the Director. Appellants challenge that determination on the basis that the changing numbers of residents in that category would permit a shifting and changing use classification. To the contrary, the use classification is fixed though the number of beds is yet to be ascertained. They also contend that the number of beds involved, which has not been determined at this time but fewer than 60, is too great to be "incidental" to the retirement home. "Incidental", as defined in Websters New World Dictionary, Second College Addition (1976), is

- 1a. happening as a result of or in connection with something more important; casual. 1b. likely to happen, as a result or a concomitant.
- 2. secondary or minor, but usually associated.

The facility with fewer than 60 beds and for people already resident at the facility would be secondary to the retirement home use and connected to it, therefore the determination by the Director that it would be an accessory use is not unreasonable.

10. In support of their contention that dining, recreational, infirmary and administration facilities are not accessory or incidental, appellants argue, but present no evidence, to the effect that similar uses are available in the vicinity. The Code does not require that accessory uses be otherwise unavailable, so the Director's determination was not in error.

11. Appellants challenge the determination that the lot area required per resident is one thousand square feet. Section 24.66.060(F) requires that the lot area for uses qualifying for the PUD under subsection B provide lot area as otherwise required in the zone. As concluded earlier, the uses qualify under subsection B bringing into play the area requirement under Sections 24.16.060(D)(2) and 24.20.030(A) as determined by the Director. Lot area of one thousand square feet per residence of the home for the retired is correct.

12. Since a nursing home use is not provided for in the RS 9600 and 5000 zones, the Director could not look to those as required by Section 24.66.060(F) to determine required area. In the zones where nursing homes are permitted, the area requirements are the same as those for homes for the retired. The Director, therefore, concluded the same lot area as required for the home for the retired in the RS 9600 and 5000 zones should be required for the nursing home located in a PUD in those zones. Where the ordinance is ambiguous, as here, "...it is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme." Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441, 448 (1975). The interpretation is logical, it carries out the general statutory scheme so it is not erroneous.

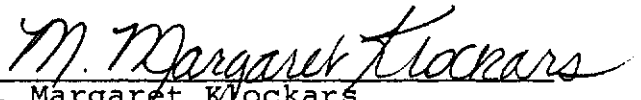
13. Appellants urge that Section 24.16.040(D) which limits the height of a home for the retired to one story in the RS 9600 zone applies to that use in a PUD in that zone. That height restriction is not a requirement of Sections 24.66.050-.090. Except for the requirements of those sections, the PUD may vary from the regulations of the zones in which it is located, according to Section 24.66.040, is approved.

14. A statement made by our state Supreme Court in Meany Hotel v. Seattle, supra, at 331, could have been written about this case. "Fundamentally, this dispute arises from a difference of focus and emphasis. Each party enters the legalistic maze of the zoning ordinance at different places, follows different routes, and arrives at a different enclosure". In reviewing the Director's interpretation the code requires that the hearing examiner give substantial weight to the path through the labyrinth chosen by the Director. Section 23.88.20(E)(4). Though appellants have chosen a plausible alternative route, they have not overcome the weight of the Director's decision. The interpretation must be affirmed.

Decision

The interpretation of the Director is AFFIRMED.

Entered this 18th day of May, 1983.


M. Margaret Klockars
Deputy Hearing Examiner

Notice of Right to 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 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App 418 (1977); JCR 73 (1981). Should an appeal be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court.