

## FINDINGS AND DECISION

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

In the Matter of the Appeal of

BAYSHORE ASSOCIATES

FILE NO. S-87-009

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

#### Introduction

Bayshore Associates challenges the interpretation of the Land Use Code by the Director, Department of Construction and Land Use, as it applies to property at 2522 Boyer Avenue East.

The appellant exercised the right to appeal pursuant to the Seattle Municipal Code, Section 23.88.020, as amended.

Parties to the proceedings were: Bayshore Associates by its attorneys, Cable, Langenbach, Henry, Edmunds & Kinerk, Colleen Kinerk and John G. Bauer; and the Director, Department of Construction and Land Use, by Guy Fletcher, senior land use specialist.

This matter was heard before the Hearing Examiner on December 8, 1987.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code, unless otherwise indicated.

The parties entered into a stipulation as to the following facts which facts the Hearing Examiner hereby adopts.

#### Findings of Fact

1. Historically the property has had two principal uses, namely, a private boat club and a multi-family residential complex.

2. The moorage has historically and continuously been used by non-residents both before and after the condominium conversion in 1979.

3. The charter documents for the Moorage Division provide a method for governing the private boat club and for controlling and resolving any problems that may arise regarding use of the moorage by residents and non-residents.

4. The parking study submitted by the developer confirms that no parking problem exists as a result of the fact that there are two principal uses on the same site, and the City has no record of recent complaints about parking problems with respect to the site.

5. To the extent the applicable municipal code provisions require additional off-street parking, the City has the power and discretion to waive the requirement of additional parking for the project.

6. The City, through Katy Chaney, issued a letter to the developer dated September 24, 1986 stating that the boat club use could be "established for the record; "that the developer has attempted to comply with the City's instructions in said letter; that the developer has expended a significant sum for attorneys fees, engineering costs and other expenses in following the City's position as set forth in the letter; and that the City subsequently changed its position pursuant to its interpretation letter dated August 27, 1987.

### Conclusions

1. The issue presented is whether the boat club can be established for the record as an existing use permitted outright or whether it must obtain administrative conditional use approval. Appellant puts forth four bases for rejection of the interpretation by the Director: the boat club should be established for the record as a legal use under the 1957 Zoning Ordinance; the boat club should be established for the record as an existing yacht club permitted outright pursuant to the Shoreline Master Program; the City should be estopped from changing its earlier position that the use could be established for the record; and the parking requirements should be waived.

2. Under the 1957 Zoning Ordinance, a private club could be permitted as a conditional use if its principal building was located twenty feet or more from any other R-zoned lot. Section 12.23, Ordinance 86300. The use now can be established as a legal, nonconforming use, if it was

lawful when established and...does not now conform to the use regulations of the zone in which it is located. A use shall be considered established if it conformed to applicable zoning regulations at any time....

Section 23.84.026. Since the applicable regulations at that time included the requirement of conditional use approval, the use cannot be considered "established" as a legal, nonconforming use under the 1957 ordinance. The Director's interpretation is correct.

3. Now the regulations permit yacht clubs outright in the applicable shoreline environment. Section 24.60.765. Since the subject yacht club was operating with both resident and nonresident members on the effective date of the Shoreline Master Program (Chapter 24.60), appellant contends that it is now permitted outright and can be established on that basis for the record. Section 24.60.765 provides:

A. Buildings and facilities for yacht, boat and beach clubs which are limited to pleasure boat, pleasure yachting and swimming activities and not selling alcoholic beverages to the public, together with moorage and other accessory uses customarily incidental thereto, are permitted in the US, US/LU, US/CW and UD environments, as a special use in the CM and UR environments where permitted by the underlying zoning. Existing yacht clubs are permitted outright in all environments except CN. Membership in yacht and boat clubs in the US/CW environment must be open to the general public. Yacht and boat clubs providing moorage are also subject to the following requirements....

The Director's interpretation relies upon the statement in Section 24.60.420B that "(s)horeline uses are permitted by this chapter only when also permitted by the underlying zoning." The current underlying zoning is Lowrise 3. Chapter 23.45, Seattle Municipal Code, allows outright institutions meeting all development standards in that zone. The boat club would not meet the development standards because it lacks the required on-site parking. While waiver of parking is possible under the Shoreline Master Program, there is no provision for waiver in the underlying zoning. Administrative conditional use would be required by the underlying zoning.

4. Since the text of Section 24.60.765 refers to the underlying zoning specifically for special uses in the CM and UR environments and not for new uses in the other environments or existing yacht clubs, that provision may be read to modify the

general rule that uses are permitted only when also permitted by the underlying zoning.

5. Appellant urges that the Shoreline Master Program provides for a situation where the shoreline provisions allow a use outright and something more is required in the underlying zoning through Section 24.60.285, Seattle Municipal Code, which states:

The Shoreline District shall be superimposed upon and modify the existing zoning classifications in the Shoreline District. The regulations of this chapter are supplemental to regulations of the subtitle and Title 23 otherwise applicable to the property in existing zones, which shall continue to apply; provided that in case of irreconcilable conflict, the provisions of this chapter shall apply. (emphasis added)

The Director has found no irreconcilable conflict but a dual requirement that both the shoreline regulations and zoning regulations must be met and can be through the acquisition of the conditional use approval. The requirements can be reconciled by the Director's interpretation that the use is permitted outright subject to meeting the underlying zoning requirement, i.e., conditional use authorization, and does not need a shoreline conditional use or other special permit. Since there is this alternative reading and the Hearing Examiner is required to give substantial weight to the interpretation by the Director, Section 23.88.020E.5, the Director's position must be accepted.

6. The use of the term "permitted" in the general rule presents a possible ambiguity as to whether permitted "outright" or permitted in any form, such as by conditional use, is intended. The Director has addressed that ambiguity through Superintendent's Ruling 11-80 which states that if discretionary approval would have been required for establishment of the use then that approval must have been given.


7. Appellant asks that the Hearing Examiner resort to equity to establish the boat club use for the record. The Office of Hearing Examiner was created by the City Council and, as an administrative tribunal, has only those powers expressly conferred on it and by necessary implication. State v. Pierce, 11 Wn.App 577, 533 P.2d 1201 (1974). It has no equity powers and, therefore, cannot excuse the application of the law. Moreover, equitable relief is not commonly granted where the public interest is involved such as in enforcement of zoning. See Eastlake Community Council v. Roanoke Reef Assoc., Inc., 82 Wn.2d 475, 513 P.2d 36 (1973). Damages would be the remedy, if appropriate.

8. The Director is given authority to waive or modify the requirements for required parking spaces for principal uses in the Shoreline District. Section 24.60.615. Since it appears the Director has not acted on a request for waiver, there is no decision on such a waiver for Hearing Examiner to review.

#### Decision

The appeal is denied.

Entered this 23rd day of December, 1987.

  
M. Margaret Klockars  
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW

The decision of the Hearing Examiner in this case is the final administrative determination by the City, 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 must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within fifteen days of the date of this decision. Should such a request 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. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104.