

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

In the Matter of the Appeal of

AURORA MERCHANTS ASSOCIATION

FILE NO. S-87-013

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

Introduction

The Aurora Merchants Association appeals the interpretation by the Director, Department of Construction and Land Use, deciding that an establishment proposed for property at 10338-40 Aurora Avenue North is a performing arts theater.

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

Parties to the proceedings were: appellant, represented by David L. Friend, Franco, Asia, Bensussen & Coe; the Director represented by Andrew S. McKim, land use specialist; and the respondent, George Woodhead, by Wesley G. Hohlbein and Bruce Hori, Hohlbein & Associates.

This matter was heard before the Hearing Examiner on February 5, 1988.

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 decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The existing use of the building at 10338-40 Aurora Avenue North is as a tavern with 3,200 sq. ft. of floor space.

2. The Carneyville Corporation ("Corporation") proposes to establish a new use to be called "Dancing Bare" which would present burlesque-type acts with women dancing topless and would sell soft drinks to its patrons.

3. The Aurora Merchants Association requested an interpretation of the Land Use Code as applied to the proposed use. The Director decided in the formal interpretation that the use would be a "performing arts theater" and that the parking requirements for that use are met by the existing spaces. The Aurora Merchants Association appealed those decisions.

4. The building has one main floor and a basement. The main floor is leased by the Corporation from George Woodhead, president of the Corporation, except for a 9.5 ft. by 16.5 ft. corner area. The Corporation does not lease the basement from Mr. Woodhead.

5. The basement has outside access but has no direct connection to the main floor. About half of the basement floor is cement, the remaining dirt. Supporting members are scattered throughout the unfinished portion of the basement. One small room is finished. There is no heating source in the basement and lighting is minimal. The area has been used by workers for storage of materials and equipment and it appears some work during the remodeling of the main floor. Discarded office furniture and appliances are also stored there. Use for anything other than storage would require alteration and finishing.

6. The main floor has two raised stages, table seating for approximately 50 persons, a bar, game room (for videos), rest-

rooms, dressing room and back stage area. The seating area would cover 1,138 sq. ft.

7. Patrons would pay a cover charge to attend, estimated by Mr. Woodhead to be \$5 per person. Soft drinks would be sold in paper cups. There would be no food service but candy, and perhaps other snacks, would be available in vending machines. Regular staff would consist of a bartender and waitress. Entertainers, dancers and burlesque acts, would be booked and paid by the house.

8. Mr. Woodhead characterized the sale of soft drinks as an incidental source of income with the cover charge representing the substantial source. Given the small seating capacity the hearing examiner is skeptical of this testimony.

9. The Corporation has an operation called "Dancing Bear" in Tacoma. One sign at that facility refers to "Dancing Bare." While there are similarities between that operation and the proposed Aurora operation, the Tacoma operation is not intended to be a burlesque house. It offers topless "table" dancing and, according to the observation of Faye Garneau, strippers. At that facility the dancers acted as waitresses and actively promoted sales of the soft drinks.

10. The Director makes use determinations based on the description on plans and applications. If the use of property is in a way different from that described, the use becomes an enforcement issue.

Conclusions

1. The parties agree that if the basement must be included in gross floor area, the parking requirement would be higher than that proposed to be provided. The reference to "gross floor area" occurs in Section 23.54.015:

A. The minimum number of off-street parking spaces required for specific uses shall be based upon gross floor area, unless otherwise specified, as set forth in Chart A, except for uses located in downtown zones, which are regulated by Section 23.49.016, and in major institution zones, which are regulated by Section 23.48.018.

"Gross floor area" is defined as: "The number of square feet of total floor area bounded by the inside surface of the exterior wall of the structure as measured at the floor line." Section 23.84.014. Though the definition of "gross floor area" speaks of the total floor area of a structure, because parking requirements relate to "specific uses", the use of "gross floor area" in Section 23.54.015A must refer to that gross floor area assigned to the use in question.

2. The Director considered an application to establish one use, the burlesque theater. She was required to determine the parking requirement for that use. Appellant contends that the Director should have included the basement in floor area to calculate parking required for the basement and for proration of the exemption. Appellant attempted to show use of the basement. The record does not support the likelihood of such use. Further, no use has been formally proposed for the reserved corner so no parking requirement need be, or could be determined at this time. The Director did not err in establishing required parking based solely on the area proposed to be used.

3. In applying Section 23.54.015D, the exemption for the first 2,500 sq. ft. of gross floor area, the Director used 3,200 sq. ft., the area of the first floor as the total, and determined the theater's proportionate share of the exemption. That exemption section refers specifically to the gross floor area of the "structure" but modifies it with the words "containing nonresidential uses." For the purpose of calculating parking, the Director treated the basement as containing no use. As no use of the basement was shown, no error in this approach was shown.

However, if the basement is used eventually, no part of the 2,500 sq. ft. floor area exemption could be applied to that space as 100 percent of the exemption has been applied to the main floor.

4. The Director's conclusion that the proposed use is a "performing arts theater" under the Land Use Code classifications is correct. "Performing arts theater" means "a place of public assembly intended and expressly designed for the presentation of live performances of drama, dance and music." Section 23.84.030. A "place of public assembly" is "an entertainment use in which cultural, entertainment, athletic, or other events are provided for spectators either in or out of doors." Section 23.84.030. A facility with stages offering entertainment in the form of dance, music and other acts fits closely this definition. Other definitions of theater were offered by appellant however a legislative definition controls in construing the provisions in which the word appears. Seattle v. Sheppard, 93 Wn.2d 861 (1980).


5. The alternative classification urged by appellant is "restaurant", defined in the Land Use Code under "eating and drinking establishment." "Eating and drinking establishment" is "a retail sales and service use in which food and/or beverages are prepared and sold at retail for immediate consumption." Section 23.84.010. The code's definition of "restaurant" shows it to be an eating and drinking establishment which has certain characteristics which distinguish it from a fast food restaurant. While the proposed use has some characteristics of a restaurant, chiefly sale of soft drinks for immediate consumption, more of its characteristics relate to a public assembly or entertainment use, e.g., admission charge, stages, game room, disposable containers.

6. If the proposed use fits no classification precisely, the Director is to determine the most comparable and apply the parking requirements of that use classification. Section 23.54.015B. The record shows that if the proposed use is not a performing arts theater, that is the most comparable classification. Therefore, the Director did not err in her determination that the proposed use is a performing arts theater for purposes of the Land Use Code.

Decision

The Director's interpretation is affirmed.

Entered this 22nd day of February, 1988.


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.