

FINDINGS AND DECISION

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FOR THE HEARING EXAMINER FOR THE CITY OF SEATTLE

JUL 05 1984

In the Matter of the Appeal of

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BERGER, DEIBEL AND ANHALT

MUP-84-038 (W,P,V)  
APPLICATION NO. 83-549

from a decision of the Director  
of the Department of Construction  
and Land Use on a master use  
permit application

Introduction

Appellants, Mr. and Mrs. Geza Berger, Mr. and Mrs. William T. Deibel and Frederick Anhalt, appeal the decision of the Director, Department of Construction and Land Use, on a master use permit application for property at 6421 N.E. Windermere Road to issue a declaration of non-significance, conditionally approve a short subdivision, grant a variance and not to further condition the approval.

The appellants exercised their right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on June 18, 19 and 21, 1984.

Parties to the proceedings were: appellants represented by Glenn J. Amster, Hillis, Phillips, Cairncross, Clark and Martin; the Director represented by Ed Somers, land use specialist; and the applicant, Stuart S. Young, represented by Susan R. Agid, Cohen, Andrews, Keegan and Goeltz.

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 findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. A master use permit application was filed by the owners of property at 6421 N.E. Windermere Road to subdivide two parcels of land into seven lots and to allow for the future construction of an access roadway. A variance for bulkheads in excess of the maximum permitted height for the roadway was also requested.

2. The Director issued a declaration of non-significance (DNS) for the project pursuant to SEPA, approved the short subdivision subject to conditions and granted a variance subject to a 12 ft. height limitation. A Shoreline Substantial Development Permit was also granted.

3. Appellants filed an appeal of the decisions reviewable by the Office of Hearing Examiner on May 15, 1984.

4. The subject property comprises two waterfront lots, the Cahill and Hanson properties. The property is approximately 600 ft. deep and contains around 147,000 sq. ft. Two houses are located near N.E. Windermere Road.

5. The site is within an SF 9600 zone in Windermere. The area of the two lots is sufficient for up to 14 lots of the minimum size.

6. The eastern part of the subject property has a gentle to moderate slope to the east. A steep slope, a 75 ft. drop over 110-120 ft. horizontal, begins at about the halfway point with a final gradual slope to the water.

7. There is a switchback road on each of the two lots down the slope to the water. Though driveable the roads do not meet current standards for access.

8. The applicants applied for approval to divide the Cahill property into two lots and the Hanson property into five. A new access roadway with a switchback to serve three new waterfront lots was proposed.

9. An environmental checklist was submitted by the applicant and amended by the land use specialist. A preliminary soils report was required prior to the threshold determination. Probable impacts on soils, drainage patterns, vegetation, noise levels, light and glare, land use, population, housing, vehicular circulation and parking, and the sewer system were found. None was found to be significant however "(a) vegetation replacement plan would be necessary and must be implemented (sic) to mitigate adverse effects to soils." Exhibit 6, p.5.

10. The applicant's consulting engineers prepared a preliminary geotechnical study for the applicant's proposal. The study included the digging of 12 exploratory pits with depths ranging from 3 to 10.5 ft., observations, review of government publications, and information from four nearby test borings done by the City Engineering Department. The general opinion offered by the consultant is that "the subject property should be suitable for the proposed development." Exhibit 7, p.6. As to slope stability, the consultant's opinions included conclusions that the steepest part of the slope "is prone to on-going near surface soil creep;" "small scale distress" is more prevalent on the Cahill property than the Hanson property; the property north of the subject property shows indicia of a slide area landscape; and that based on what has occurred on-site "the steep slope would appear to be generally over-steep for the existing development," given its unsupported condition. Exhibit 7, pp.7,8.

11. The test pits depths were determined by equipment limitations. They showed the minimum depths of the fill but not the maximum in some cases.

12. After circulating the application for comment to interested departments and concluding that the easement roadway would meet the requirements for access and fire safety, Ed Somers, the land use specialist, concluded that "the proposal would create lots that would provide substantially less usable open space than the typical SF 9600 lot and would therefore change the development pattern and character of the area." Exhibit 1, p.2.

13. Somers revised the proposed plat to provide for an easement roadway down the center of the parcel with an L turn at the top of the steep slope along the eastern edge of Lot C with a turn-around on Lot C. This easement would serve the three waterfront lots.

14. Engineering drawings for the proposed roadway were required by Somers before the threshold determination. Drawings of the reconfigured roadway are required as a condition of approval.

15. The application for short subdivision was approved with conditions which included reconfiguration of the easement road and lots as shown by Somers' plan, a complete soils report prior to any development of the site and soils reports with building permit applications for the new lots. No conditions were imposed to require that the recommendations in soils reports be followed or that construction of the roadway be done under the supervision of a soils engineer.

16. A new plat map, soils study or revised elevation for the roadway were not required by Somers prior to the Director's decision.

17. City experts were asked to look at the revised road configuration in relation to the preliminary soils report. According to Somers, they advised him that the revised road would have less impact than that proposed would have.

18. The reconfigured roadway would disturb less of the slope than the proposed roadway.

19. Somers understands that solid waste utility trucks could gain access by a roadway with the amended configuration. If the configuration applied for was used, residents would have to take cans to a site above the turns.

20. The location of future houses on the lots are outside the City's control unless reports show a part of the lot to be unbuildable, according to Somers.

21. Individual driveways or stairs would be built down the steep slope from the easement driveway if houses are to be on the lower, flatter portion of the lot.

22. Walter Bicket, engineering geologist, indicates that if proper construction techniques are used, construction of the roadway will provide increased lateral support for the hillside.

23. Ralph Boirom, a civil engineer with expertise in soil mechanics, reviewed the soils report, observed the property, finds the proper methods of analysis were used and agrees that the site is essentially stable and the soils are adequate to support the access road and lots proposed.

24. John Norman, a civil engineer with expertise in hydraulics, explained that it is technically feasible to build on the steep hillside but not practical.

25. James Chiarelli, a licensed architect with 40 years experience, offered his opinion that there is inadequate information available for determination as to the adequacy of building sites. He would require various experts to review and evaluate elevations, water conditions, required structural support, etc.

26. Railroad ties provide the support for the sports court at the top of the slope on the northerly neighboring property. A rockery supports the swimming pool area. Some creep has occurred in that area.

27. A drainage facility will be required for which a shorelines substantial development permit will be necessary. There may be an outfall into Lake Washington.

28. Ed Somers testified that the Shorelines Master Program regulations were considered only as to conformance of the proposal with the required setback from the shoreline.

29. Houses constructed on the proposed lots should not obstruct any view now available from existing houses.

30. The subject property is not within a designated greenbelt.

31. Most of the mature trees are on the steep slope and along the Berger property line on the site's north side.

32. If houses on the waterfront lots are placed near the road on the slope, many of the large trees will have to be removed.

33. Ed Somers assumes that a vegetation retention plan will be included in the soils report.

34. Somers visited the site three times and did not observe any bald eagle or osprey nesting areas.

35. E.L. Minard, Jr., who lives 3 or 4 lots north of the subject parcel on a 1.14 acre lot, has kept a record of sightings of various wildlife. He has had about 10 sightings of bald eagles since December and one of an osprey, both endangered species. Other birds and wildlife abound.

36. Properties to the south of the subject property have topography similiar to that of the subject site.

37. None of the 15-18 lots to the south of the subject property have been subdivided. A number of subdivisions of waterfront lots have occurred to the north of the subject property.

38. Properties within the old Windermere subdivision are subject to a deed resstriction prohibiting further division until approximately 1990. Those lots are south of the subject property.

39. The following factors make up the unique character of Windermere, its direct relationship to Lake Washington, the development pattern with its transition from very large lots along the waterfront to smaller, but still large, lots as one moves away and the existence of abundant natural vegetation.

40. Linda Stalzer, a planning consultant, finds that the proposed short plat would substantially change the area in terms of the density and amount of natural vegetation.

41. Jack Lynch, a land use planning consultant, opines that the proposed lots and use are similar to and consistent with development to the north of the site.

42. From N.E. Windermere Road, the development on subdivided lots is not visible. Only roadways from the street are seen.

43. Houses have not been built on the steep slope which leaves a band of vegetation between the waterfront and houses along N.E. Windermere Road.

44. The median lot size in Windermere is 13,000 sq. ft.

45. The smallest of the new lots would be approximately 12,200 sq. ft.

46. Some lots, west of N.E. Windermere way are as small as 9,600 sq. ft. Lots on the waterside of N.E. Windermere, in the immediate area, are similar in size to the undivided subject properties.

47. One waterfront lot some 6-8 lots to the north measures 95.6 by 120 ft.

48. DCLU received around 100 comments from the public on the application.

49. Section 23.44.14 (D)(10) permits 6 ft. high or lower

bulkheads in required yards as exceptions to the yard requirements. The Director granted a variance from the height limit with the condition that no retaining walls exceed 12 ft. in height.

50. No variances have been granted from bulkhead height limits for roads in the area.

51. No access roadway could be constructed for the lots proposed without variance from the 6 ft. height limit on bulkheads in required yards. The maximum permissible slope is 20% so in order to remain within that limit on this property, cuts and fills are required which need retaining walls exceeding 6 ft.

52. A turnaround could be created between proposed lots A and B without any bulkhead exceeding 6 ft. Only two additional lots could be created with that configuration.

53. There is an 8-10 ft. rockery retaining wall existing on proposed Lot B. Many retaining walls higher than 6 ft. exist in the area supporting roadways, alleys, etc.

54. It is unlikely that any bulkhead constructed for the roadway will be visible from other properties.

55. One cut as deep as 15 ft. and fill as much as 10 ft. will be needed for the reconfigured road. A bulkhead of 12 ft. would be needed for the cut.

#### Conclusions

1. Appellants have raised issues of procedural irregularities in the short plat process, inadequacy of the information on which the threshold determination was based, compliance with the substantive criteria for the short plat decision and proper conditioning or the denial of approval under SEPA authority as well as the variance. On all but the variance question, the Director's determinations are to be given substantial weight. Section 23.76.36.B(7). When a decision is to be given substantial weight, the standard of review is that of "clearly erroneous." Brown v. Tacoma, 30 Wn.App 762, 764, 637 P.2d 1005 (1981).

2. Appellants complain that the decision reached, based on the reconfigured road and division, deprived the public of notice and opportunity to comment. Further, they contend that a plat with survey data for the reconfiguration, new engineering drawings, etc., must have been filed. There is no suggestion that the procedures for notice and input followed were incorrect up to the point of the decision had it not been reconfigured. Section 23.24.50, "(i)f the Director determines that the requirements of this section are met, or may be met upon compliance with specified conditions..." gives the Director discretion to impose conditions necessary for approval. A redesign of the entire proposal may be near the outer limit of that discretion but is not prohibited. Further, there is no provision requiring public input beyond that already invited, which is available for the Director's use in fashioning conditions, beyond the opportunity for appeal. The section allows the Director to require the later submittal of required documents. The procedure followed was permissible.

3. Appellants contend that greater information on slope stability, especially with the changed road, and on wildlife was necessary to make a proper threshold determination. Appellants' expert, an architect, testified that he would want more information to determine the adequacy of the building sites. Applicant's witnesses, all with special soils expertise testified

the information was sufficient as did Ed Somers. To rely on the preliminary report was therefore not clear error. More could have been done to check out reports of eagles, but since no evidence of the importance of the site to eagles or osprey was offered, the result was not shown to be clearly erroneous.

4. The issues as to the short plat decision and the exercise of substantive SEPA authority pursuant to Section 25.04.190 will be considered together since the decisions do not distinguish between them. Section 23.24.40 sets forth the criteria the Director must use in determining whether to grant, condition or deny a short plat. They are:

1. Conformance to the applicable Land Use Policies and Zoning Code or Land Use Code provisions;
2. Adequacy of access for vehicles, utilities, and fire protection as provided in Section 23.54.10;
3. Adequacy of drainage, water supply and sanitary sewage disposal;
4. Whether the public use and interests are served by permitting the proposed division of land.

Appellants contend that the proposal fails to conform to Land Use Policies and does not serve the public use and interests. Appellants urge, it appears, that if application of short plat criteria permits approval, additional conditions should be imposed to mitigate its impacts on the environment.

5. The Single Family Residential Areas Policies apply since the subject property is within a single family zone. Section 23.16.02 provides, in part:

The purpose of these policies is to preserve and maintain the physical character of Single Family Residential Areas in a way that encourages rehabilitation and provides housing opportunities throughout the City for all residents.

Appellants urge that the proposed division is inconsistent with preservation and maintenance of the physical character of the area and the applicant and Director urge that the proposal would provide more waterfront housing opportunities. The Director's resolution of this issue was not shown to be clearly erroneous.

6. Section 24.60.005 states that the purpose of the Shorelines Master Program Regulations is to implement the Shorelines Management Act and goals and policies of Resolution 25173 to:

- (A) preserve, enhance and increase views of the water and access to the water, (B) encourage water-dependent uses, and (C) provide for maximum public use and enjoyment of the shorelines of the City.

While consistency with this purpose was not considered by Ed Somers, appellants did not show that the proposal would be inconsistent.

7. Appellants attempted to prove that the Director erred in concluding that the public use and interests would be served by the subdivision by showing evidence that the proposal would threaten the stability of the slope and change the neighborhood

character. The Director correctly determined that with proper construction the stability of the slope would not be endangered and, in fact, would be enhanced.

8. There is sufficient evidence on alteration of the character of the neighborhood to conclude either, depending on how the neighborhood or character is defined. A strictly physical consideration would lead to the conclusion that the reduction of lot size in the area of two lots toward the end of an area with one to two acre lots where the change would not even be visible from the street would not be a significant change in character. On the other hand, to the extent character is an attribute or perception about a neighborhood the reaction of the community to the proposal shows that there would be some change.

9. Is this changed character legally cognizable as part of the public interest? In Kenart and Associates v. Skagit County, 37 Wn.App. 295 (1984), the court was concerned that it could not tell, based on the findings entered, whether the body deciding a PUD proposal may have denied it because of community displeasure rather than for the reasons stated. In dictum, the court said, however, that: "(a)ny finding that existing rural lifestyles might be disrupted by the proposed use is insufficient to support denial of the plat in view of a comprehensive plan which authorizes the population density requested by the developer." Kenart, supra, at p.302. Here, where the area is sufficient for 14 lots, though probably not possible because of access problems, it is unlikely that the change of character, which is minor at most, without other effects would support a conclusion that the proposal would not serve the public interest and, therefore, should be denied. Again, appellants have not shown the Director erred.

10. To assure slope stability the Director imposed a series of conditions. Appellants showed that while a complete soils investigation and report is to be submitted to DCLU prior to any development and soils reports are to accompany building permit applications, there is no condition requiring that the recommendations of these reports be followed or that the road construction be done under the supervision of a licensed engineer with special expertise in soils. Given the existing slope conditions and extent of disruption necessary for the road, this is error.

11. Though the Director has no authority to dictate the location of houses under his decision and it is possible that new houses will be built on the steep slope since the access road reaches only the top of the slope, the fact that houses have not been built on the slope on other properties is not sufficient basis for prohibiting such development.

12. The Director also has authority to impose reasonable conditions to mitigate impacts disclosed in the environmental checklist and DNS where policies have been adopted to guide him. Somers stated in the checklist that a vegetation retention plan is required as a mitigation measure but failed to impose such a condition. The City has adopted a policy in Section 25.04.530 which allows the Director to require reservation of existing vegetation or new landscaping. It is error not to impose a condition requiring a plan for approval and implementation when the DNS recognizes the necessity of such plan. No other conditions were shown to be appropriate.

13. The variance from the height limit for bulkheads (retaining walls) may be granted only if all the factors listed in Section 23.40.20 exist. No deference is to be given the Director's decision on a variance on appeal of that decision. Section 23.76.36.B(7).

14. The property must have an unusual condition, not created by the applicant, because of which the height limit would deprive the property of rights and privileges enjoyed by other properties. The first issue is whether the slope condition is "unusual" where it is shared to some degree by all the properties in the area. The Director considers "unusual" in relation to a "standard" lot, according to Somers. Appellants point to Office of Hearing Examiner decisions where the conclusion seems to be that if the subject lot shares the condition with neighboring properties it is not unusual. The hearing examiner conclusions included consideration of the rights and privileges enjoyed by the neighboring properties along with the similar property condition, e.g., others have similar slopes and single car garages where a double car garage is desired or most others have the same size lot where the issue is a variance for division creating subsized lots. So the cases cited by appellants did not decide this issue.

15. Legislative history shows that the former Zoning Code variance provision, Section 24.74.030(A), repealed in 1982 with the adoption of the new Land Use Code, used the language "unique conditions applicable to the subject property." The language of the new provision corresponds with the old language with a few exceptions, one of which is that it refers to "unusual conditions applicable to the subject property." Where changes are made in the wording of legislation, a change in legislative purpose must be presumed. In re Bale, 63 Wn.2d 83, 385 P.2d 545 (1963). Therefore, it appears that a variance may now be allowed even though the condition is not singular or extremely rare but only uncommon. Here, the steep slope is unusual.

16. Even where the condition is unusual, the provision requires a comparison to rights and privileges enjoyed by other properties in the zone or vicinity. That comparison must disregard any deed restrictions as they constitute private agreements as to restrictions on rights to use the property. Without those deed restrictions all of the large properties would have the right to divide into lots of 9,600 sq. ft. subject to code and environmental considerations. Some properties to the north have already taken advantage of that right. Here the subject property would be denied the right to subdivide which others may do, or have done, without variance.

17. Though the testimony, as stated, was that 12 ft. is the maximum height needed, where one of the criteria is that the variance not go beyond the minimum necessary for relief, the explanation of the need showed that a 12 ft. bulkhead is likely to be needed and is the highest needed. Twelve feet then is the minimum necessary for relief. A variance would not confer special privilege as there are other bulkheads as high in the vicinity.

18. The variance would not be materially detrimental to the public welfare or injurious to property in the vicinity as the bulkheads are not likely to be visible from other properties and are expected to provide improved lateral support for the hillside.

19. If the short subdivision is otherwise warranted, which the Director has determined and which determination was not proved to be error, denial of this variance would cause undue hardship.

20. The variance itself would not be inconsistent with the spirit and purpose of the Land Use Code and Single Family Residential Areas Policies.




### Decision

The Director's decisions to issue a DNS and variance are affirmed; the Director's decision to conditionally approve the short subdivision is hereby modified by the addition of the following conditions:

- (1) All grading, structural improvements, drainage and retaining walls or bulkheads, whether temporary or permanent, are to be according to the design and under the supervision of a Washington State licensed civil engineer with expertise in soils engineering. Such engineer shall be present during such work and shall certify that the work has been done in accord with the engineer's recommendations.
- (2) A tree removal/retention plan shall be submitted by the applicant, be approved prior to the commencement of removal of any vegetation for construction, and shall be adhered to.

Entered this 5th day of July, 1984.

  
M. Margaret Klockars  
Deputy Hearing Examiner

### CONCERNING FURTHER REVIEW

Except as indicated below, the decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. 2 AM.JUR 2d., Admin. Law 2d s 524. Any request for judicial review of the decision must be filed in King County Superior Court within fourteen days of the date of this decision. (Seattle Municipal Code 23.76.36 (B) (11); Akada vs. Park 12-01 Corporation, 37 Wn. App. 221 (1984); JCR 73.

Pursuant to Section 25.04.210, Seattle Municipal Code, regarding substantive authority to condition or deny pursuant to SEPA, a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the 14th 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 on the 1st floor of the Municipal Building. The City Council should be consulted regarding their appeal procedure. If such an appeal is filed, the time for judicial review of the underlying governmental action and/or other SEPA issues is stayed until the City Council renders a final decision on this appeal.

If the Superior court orders a review of the decision, the person seeking review must arrange for and bear the cost of preparing a verbatim typewritten transcript of the hearing, but will be reimbursed if successful in court. Instructions for preparation of the transcript are available in the office of the Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104.