

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

MARY NILSSEN and
ERNEST AND CHERYL SUE WILSON

FILE NO. MUP-86-011(W)
FILE NO. MUP-86-012(W)
APPLICATION NO. 8506045

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

Introduction

Appellants appeal the decisions of the Director, Department of Construction and Land Use, to issue a determination of nonsignificance and her failure to impose additional mitigating conditions on the master use permit for an apartment project proposed for 2760 N.W. 85th Street.

The appellants exercised the 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 April 17, 1986.

Parties to the proceeding were: appellants Mary Nilssen, pro se, and Ernest and Cheryl Sue Wilson by Ernest Wilson, pro se; the Director by Malli Anderson, land use specialist; and the applicants, Donn and Allan Bodine by Melvin F. Buol, Keller, Rohrbach, Waldo, Hiscock, Butterworth and Fardal, attorney at law.

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. Applicants applied for a master use permit to construct a 22 unit apartment building at 2760 N.W. 85th Street. The Director of the Department of Construction and Land Use (Director) issued a determination of nonsignificance (DNS) and imposed certain conditions on the permit. Appellants filed these appeals challenging those decisions.

2. The subject site is in a small Neighborhood Business (BN) zone and occupies the northeast corner of the intersection of N.W. 85th Street with 28th Avenue N.W. The site is vacant and has been unused for many years except for a newspaper shack, fireworks sales and unauthorized parking. Long ago the property had been used as a service station.

3. Immediately north, across an alley, and east of the subject site, the property is zoned SF 7200. Single family residences occupy the lots to the north and a duplex is located on the property adjoining the subject property to the east.

4. The BN zone extends to the northwest corner of the intersection and on the south side of N.W. 85th east of 28th Avenue N.W. A small grocery store is located on the south side of 85th directly across from the subject site. Other small shops and an eight unit apartment building to the west of the subject site are also within the BN zone.

5. The applicants propose a 22 unit, four story building covering 7,227 sq. ft. of the 14,700 sq. ft. lot. The development would include 22 parking spaces with access from 28th Avenue N.W. via the alley on the north boundary of the property. The building is to have pitched roofs and is designed to appear to be two buildings with two separate entryways. Units are to average 800 sq. ft. in floor area with none as large as 1,200 sq. ft.
6. Landscaping required by the Code, 1,452 sq. ft. of planting area and 17 trees, according to Exhibit 9, is proposed to be provided. Exhibit 16 shows a total of 32 trees to be provided.
7. Building height, by Title 24 methods of measurement, is shown as 35 ft. From finished grade to the peak of the roof, the building would measure 43 ft., using an exception for pitched roofs.
8. The building is proposed to be set back 20 ft. from N.W. 85th and 11 ft. from 28th Avenue N.W. on the southern half of the lot.
9. Existing curbcuts on N.W. 85th would be removed making more on-street parking possible.
10. The alley right-of-way on the north side of the property is 12 ft. wide and runs the length of this unusually long block. It is used by many of the properties for access to parking.
11. Northwest 85th Street is classified as a minor arterial, according to Exhibit 14, and carried some 9,000 vehicles per day in 1982. The street right-of-way is 60 ft. wide. Parking is permitted on each side, however, motorists use the street as though it has four lanes for travel. There are curbs and sidewalks on both sides of N.W. 85th.
12. The 28th Avenue N.W. right-of-way is 40.5 ft. It has no sidewalks, curbs or drainage facility. Property lines are at the edge of the lanes for travel leaving little or no space for parking in this block.
13. Bus lines run south on 28th N.W., with a bus stop directly across from the subject property, and east and west on N.W. 85th Street.
14. The Engineering Department's records show that there have been six reported accidents at the intersection of N.W. 85th with 28th N.W. during the period January 1, 1980 to April 4, 1986.
15. Northwest 85th goes over the crest of a hill approximately 225 ft. east of the intersection of N.W. 85th with 28th N.W.
16. Northwest 85th Street provides direct access to Golden Gardens Park and the Shilshole Bay Marina.
17. There has been no traffic count made on 28th N.W. That street is used as one route to access Blue Ridge and North Beach.
18. Structures in the area surrounding the subject property are generally one to two stories in height. The exception to this pattern is the three, 3-story single family houses on the north side of the alley which abuts the subject property.
19. The proposed structure departs substantially from the prevailing scale in the area. Buildings of similar height, but smaller in bulk shown in Exhibits 17 and 18, are outside of the area affected.

20. The Director identified the following environmental impacts associated with the proposal: earth disruption, increase in particulate levels in the air during construction and increase in carbon monoxide in the long term; increase in noise levels; new land use; increased lighting; and increase in vehicular movement and parking demand. A DNS was issued based on the limited degree or temporary nature of the impacts.

21. The Director imposed conditions to mitigate some of the environmental impacts including landscaping, closure of curb cuts and street and alley improvements as required by the Engineering Department in their December 2, 1985, letter.

22. The Engineering Department required the following street improvements: a dedication of 9.5 ft. for street purposes to be added to the 28th Avenue N.W. right-of way; the construction of a sidewalk, curb and gutter along 28th N.W. and paving of the area between the curb and existing pavement edge; paving of the alley adjacent to the subject property; and an increase of the storm water detention system if required because of the sidewalk and alley improvements.

23. Appellant Wilson proposes additional conditions including: widening the alley to 16 ft., paving the full length of the alley; dedication of additional width for street purposes to allow parking in the right-of-way; redesign of the project to satisfy setback requirements from new property line; redesign the structure to step down the lot reflecting the 8-10 ft. drop in elevation; scale down the building to three stories to reduce the mass of the building.

24. The proposal may generate 75 to 100 vehicle trips per day, according to the environmental checklist, Exhibit 12.

25. The Engineering Department reported to the Director it anticipates that the proposal would not generate enough traffic to interfere with local circulation and would not increase accident rates.

26. The Engineering Department expects that the proposed building would generate demand for parking that would exceed on-site supply by seven spaces.

27. The applicant conducted an on-street parking survey of the area within a 300 ft. radius of the front doors of the proposed building on three dates at different times of day. Donn Bodine determined that there are, or could be, 78 parking spaces within that area if people would use N.W. 85th Street parking, and that the vacancy rates for the three times were 78 percent, 74 percent and 76 percent.

28. Customers of the grocery store across N.W. 85th Street from the site regularly use the subject site for parking. With development of the site those cars will be parking on the street.

29. The existing zoning in the area provides the potential for further apartment development to the west along N.W. 85th.

30. The Neighborhood Commercial Areas Policies were in effect on the date of the issuance of the DNS.

Conclusions

1. A DNS is to be issued if the Director determines that there will be no probable significant adverse environmental impacts from a proposal. Section 25.05.340A. A "significant" adverse impact has been determined to be one that has "more than a moderate effect on the quality of the environment". Norway Hill v. King County Council, 87 Wn.2d 267, 278, 552 P.2d 674 (1976).

2. The Director's determinations in this case are to be given substantial weight by the Hearing Examiner. Section 23.76.022C(7). To overcome that weight appellants must prove that the decisions are clearly erroneous. Brown v. Tacoma, 30 Wn.App. 762, 627 P.2d 1005 (1981).

3. Appellants presented evidence in support of their argument that the proposal's impact on traffic circulation and parking demand and its bulk and scale present significant impacts, given the existing conditions of the streets and neighborhood character. The examiner concludes that the addition of 100 vehicle trips and demand for seven parking spaces is not of sufficient magnitude to cause more than a moderate degradation of the environment. Further, one building of the size proposed, even if out of scale and character with the neighborhood, does not cause more than a moderate adverse impact. That impact should have been identified, however, in the DNS.

4. Appellants' chief contention is that the Director should have used her substantive authority pursuant to Section 25.05.660 to further condition the project to mitigate the impacts from traffic generation, parking demand and the bulk and scale of the building. Street and alley improvements and reductions of the size of the building are proposed as means to mitigate the impacts.

5. The Director's authority to condition the project is subject to certain limitations. The conditions are to be based on policies designated in Section 25.05.902 as bases for exercising her authority. Section 25.05.660A(1). The conditions must be related to environmental impacts identified in the environmental document. Section 25.05.660A(2). The conditions are to be reasonable and capable of being accomplished, Section 25.05.660A(3), and the applicants can be required to implement mitigating measures only to the extent the adverse impacts can be attributed to the proposal. Section 23.76.660A(4).

6. The Director imposed a condition requiring that the applicant provide such street and alley improvements as required by the Engineering Department in its December 2, 1986 (sic), letter. Those improvements include part of appellants' request but not widening of the alley to 16 ft., paving its entire length or widening of 28th N.W. to the extent requested. Appellants failed to show, however, that it was clearly erroneous not to require those additional measures. While all were shown to be desirable, they were not shown to relate to the level of impacts expected.

7. The record does not show the Director erred in failing to require more parking where the overflow is predicted to be seven cars, four new spaces will be created by closing the existing curb cuts and the parking survey showed a high on-street vacancy rate.

8. The scale of the proposed building was shown to be much greater than that which now makes up the neighborhood. The design elements included by the applicant, pitched roof and modulation, are mitigating measures in themselves, however, the perceived mass is still likely to be out of scale with the rest of the neighborhood. The Director's representative stated that the condition imposed by the Director which requires landscaping was to mitigate the bulk and scale differential, however, the examiner concludes the landscaping required under that condition is not likely to reduce the appearance of the mass greatly. If the dedication of 9.5 ft. for street purposes requires reduction in the size of the structure, that condition will accomplish the desired mitigation. Further mitigation can be required only if there are policies providing the basis for such mitigation. Since the property is located in the BN zone, the Neighborhood Commercial Area Policies apply and may be used as the basis for SEPA mitigation. Resolution 27341.

9. The Neighborhood Commercial Area Policies (Policies) specifically address the size of nonresidential uses in commercial areas but not the size of residential uses. Various of the goals of the Seattle 2000 report and other general goals incorporated into the Policies are cited by appellants as bases for conditioning this project. Those listed by appellants which may, arguably, relate to scale are:

- A. 1. Maintain business districts which conform in size and scale to the communities they serve;
- B. 7. Encourage landscaping and quality design in the development of commercial areas in order to create a "pedestrian-friendly" streetscape;
- 9. Provide for a transition in scale and use between residential and commercial areas, buffering residential areas from the impacts of heavier commercial uses, wherever possible.
- 12. Preserve the distinctive character of different neighborhoods and their business districts;...

pp. 16.20.04, 16.20.05.

10. These and the other goals set out in the Policies represent the purpose to be effectuated by the more specific policy intent statements. Since none of the policy intent statements provides for restricting the scale of residential structures within commercial zones, with the exception of single purpose residential buildings over 85 ft. in height, there does not appear to be authority within the Policies to require reduction in scale below that otherwise permitted by the Code.

11. Since appellants, have not proved that the Director's determinations were clearly erroneous, those determinations should be affirmed.

Decision

The determinations by the Director are affirmed.

Entered this 28th day of April, 1986.


M. Margaret Klockars
Deputy Hearing Examiner

Concerning Further Review

Pursuant to Seattle Municipal Code Section 25.05.680(C), a party to the hearing before the Hearing Examiner may file an appeal with the City Council no later than the fifteenth day after the date of the decision appealed from is filed with the SEPA Public Information Center. The appeal statement must be filed with the City Clerk on the first floor of the Municipal Building. The City Council's review on appeal shall be limited to the issue of compliance with Section 25.05.660. The City Council Land Use Committee should be consulted regarding further appeal specifics.

If an appeal is taken pursuant to Section 25.05.680(C), the time for filing a request 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 Section 25.05.680(C) appeal.

If no appeal is taken pursuant to Section 25.05.680(C), 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. Any request for judicial review of the decision on the underlying governmental action must be filed in King County Superior Court within fifteen days of the date of this Hearing Examiner decision. Seattle Municipal Code Section 23.76.22(C)(12)(c). Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review within 30 days after the date of this decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 400 Seattle Municipal Building, Seattle, Washington 98104, within fifteen days of the date of this decision. Section 25.05.680(D)(4).

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 written transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. As an alternative to the written transcript, RCW 43.21C.075(6)(b) provides that a tape may be used for court review. If a taped transcript is to be reviewed by the court the record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review.