

## FINDINGS AND DECISION

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

In the Matter of the Appeal of

DAVID E. JARRELL

FILE NO. MUP-89-028(W)  
APPLICATION NO. 8806406

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

#### Introduction

Agent David Jarrell appeals the decision of the Director, Department of Construction and Land Use, to impose certain conditions on a master use permit application for a mixed use building proposed for 6525 California Avenue S.W.

The appellant 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 July 13, 1989.

Parties to the proceedings were the appellant, pro se; and the DCLU Director by Faith Lumsden, land use specialist.

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. Applicant proposes to construct a four-story mixed use building on property addressed as 6525 California Avenue S.W. DCLU imposed as a condition that the fourth floor of the proposed structure be set back 20 ft. from the west facade. In pursuing this appeal, applicant challenged the mitigation as "arbitrary, subjective, unnecessary, and inconsistent with other DCLU decisions."

2. The proposal site consists of approximately 2.5 lots that are 150 ft. deep. The property is located directly south of the California Avenue - Fauntleroy Way - S.W. Morgan Street junction. S.W. Holly Street is several lots south of the proposal site.

3. The subject site is a 17,514 sq. ft. rectangular parcel. It has roughly 116 ft. of frontage to the east adjacent California Avenue S.W. right-of-way.

4. A paved 16 ft. - wide alley abuts the property to the west. The alley runs parallel to California Avenue S.W. Most of the houses to the west are sited closer to west parallel 44th Avenue S.W. than to the rear abutting alley. Three of these neighboring lots are owned by project applicant.

5. The site is generally level. There is a gentle downward slope of the topography west of California Avenue S.W.

6. The site is within the Neighborhood Commercial 3 (NC/3) zone that extends for approximately 1 block along the east and west sides of California Avenue S.W. A Lowrise zone commences along California S.W. approximately 1 lot south of S.W. Holly Street.

7. As noted above, an alley abuts the subject property to the west. West of the alley is a large Single Family 5000 (SF 5000) zone. The west adjacent lots are generally 130 ft. deep and by development pattern are oriented west to parallel 44th S.W.
8. The subject site is currently developed with three small single family residences, accessory structures and a bill-board. Applicant proposes demolition of these to accommodate the new structure.
9. The proposed four-story building would house 33 apartment units and offer approximately 5937 sq. ft. of retail space along California S.W. at the street/ground floor level. The alley would serve as access route for the 41 parking spaces to be provided at ground level.
10. The first floor level of the building would cover 100 percent of the site. Walls would be approximately 12 ft. high.
11. Applicant proposes to have the second, third and fourth floors set back approximately 24 ft. from the west (rear) property line and 6 ft. from the front. At issue is DCLU's first condition "Prior to Issuance of Master Use Permit:"
  1. The owner(s) and/or responsible party(s) shall submit revised plans showing the fourth floor of the structure set back 20 feet from the proposed west facade.
12. From the alley, the proposed structure will present a 12 ft. high facade. At 24 ft. from the alley the structure height increases to approximately 40 ft. 10 in. to the top of the roofline and 35 ft. to the plate line.
13. The west facade would be approximately 33 ft. wide.
14. The vicinity has a mix of uses nearby. The Olsen's Drug Store building is north adjacent with a height of approximately 15 ft. The 20 ft. high Thriftway Store building is directly east of the site, across California Avenue S.W. A three-story, 26-unit apartment is south adjacent. This structure has a west setback to accommodate court yard-style (year) parking and is approximately 125-130 ft. wide.
15. A two-story garage structure is located directly west and across the alley from the proposal site and close to the alleyway. Across the alley from the south adjacent three-story structure is another garage that is close to the alley.
16. Within the larger area are several buildings of varying designs and dimensions. A circular eight-story multi-family structure is near the northeast corner of Fauntleroy Way and California Avenue. Two four-story buildings of approximately 30 ft. width are located south of the subject site. Several multi-story projects are under construction along the east side of California S.W. See photo Exhibits 1 and 5.
17. The project meets the zoning code requirements for open space, setbacks and other standards.
18. There is no opposition of record to the proposal from neighbors or vicinity residents. One property owner testified that in his opinion the proffered setback was adequate and more generous than those presently provided. This property owner lives directly west of the project site.
19. Applicant also submitted letters in support of the project (and its proposed setback) from a resident of 7705 - 45th S.W. and from the West Seattle Chamber of Commerce:

...The building appears to fit well into the character of the existing neighborhood and is well within the limits prescribed by current

codes and zoning ordinances...

Exhibit 11.

### Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.76, Seattle Municipal Code.

2. The Hearing Examiner must give "substantial weight" to the DCLU decision on this environmental matter. Seattle Municipal Code Section 23.76.022C.7. To overcome this deference, the appellant must show that the DCLU decision is "clearly erroneous." Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

3. In this appeal, appellant challenges the mitigation imposed by DCLU. Mitigation measures must be based on policies, plans, rules or regulations designated in Seattle Municipal Code Section 25.05.902. Section 25.05.660A.1. The measures must be "related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal." Section 25.05.660A.2. The measures must be "reasonable and capable of being accomplished." Seattle Municipal Code Section 25.05.660A.3. The City Council has determined in this context that "reasonable" means reasonable in consideration of the adverse impact sought to be mitigated. In re Appeals of Queen Anne Community Council et al., C.F. 293623 (1985).

4. In addition, while voluntary mitigation is permitted

...mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal.

Seattle Municipal Code Section 25.05.660A.4.

5. The present case presents in classic form the challenge in establishing the degree of appropriate mitigation. Should, for example, the impact be examined from the view of a 6 ft. tall individual standing at the common lot line with a view to the property? Or, should the height, bulk and scale impact be assessed from the neighboring structure's living or dining room view? There are several possible variations on the theme.

6. From the provisions of Chapter 25.05, Seattle Municipal Code, supra, and from Council precedent, however, it can be deduced that the condition here challenged is inappropriate and should be stricken.

7. Applicant is proposing a building which will have more height and width than the single family - zoned properties to the west. However, several mitigating factors are already present.

8. The first one is distance. Applicant is proposing a rear setback from the west lot line. West of that lot line is a 16 ft. paved alley. West of the alley are lots that are 130 ft. deep and that by development are oriented away from the proposal. The Hearing Examiner concludes that proposed building height and bulk are mitigated by this minimum 40 ft. distance.

9. The City Council recognized distance as a factor in In re Thaden. There a garage and a 25 - 50 ft. distance was presented between a proposed commercial site and a single family residence. DCLU and the Hearing Examiner considered this residence in imposing mitigation that was ultimately stricken by the City Council. In re Thaden, MUP 86-078, C.F. 295562 (1987).

10. Further, there is the issue of frontage. Unlike the case of In re Muir, MUP 88-046, 047 C.F. 296682 (1989), the proposed structure will neither face nor aesthetically dominate less - intensive zoning and development. Rather, the proposed structure will face NC3 - zoned property to the east that is developed with a grocery market. North is a drug store and a

three-story apartment that is approximately 130 ft. wide is south adjacent. The proposed structure will not have the same kind of immediate, obtrusive presence on the west single family development as was addressed in In re Muir, supra. From the alley, the development will be substantially compatible in bulk and scale with present development.

11. A third consideration is topography. The generally level topography (coupled with the distance) would not exacerbate visual imposition of the structure on the single family zone to the west.

12. Resolution of the issue is further aided by evaluation of policies. Goal I(B)(9) of the Neighborhood Commercial Policies provides general SEPA Authority to facilitate a transition in scale between residential and commercial areas. In re Wilson, MUP-86-012(W), C.F. 294841 (1986). However,

...it is clear that, when it enacted the NCA Policies and Code, the Council intended that the 30-foot height be the appropriate transitional height on the edge of a single family zone even where the prevailing heights in the single family zone are less than 30 feet...

In re Thaden, supra.

13. Further, the City Council has cautioned that

...land use policies do not automatically support mitigation because a transition in size is expected from one zone to a more intensive zone...

In re Muir, supra

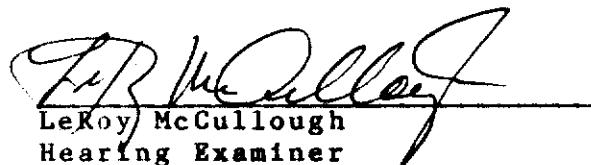
Therefore, blanket mitigation provisions and rules should be applied with due deliberation. Cf. In re Thaden, supra, Council Conclusion 3.

14. Finally, the Hearing Examiner notes that there is a distinction between the DCLU opinion and that of the community regarding compatibility of height, bulk and scale. The Hearing Examiner should and does consider community expression in these de novo reviews of the propriety of SEPA mitigation measures.

#### Decision

The DCLU decision on the challenged condition reversed.

Entered this 25<sup>th</sup> day July, 1989.

  
LeRoy McCullough  
Hearing Examiner

#### CONCERNING FURTHER REVIEW

Pursuant to Seattle Municipal Code Section 23.76.024, 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, 5th Floor Municipal Building, 684-8322. 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 23.76.024, 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 City Council appeal.

If no appeal is taken to the City Council, 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. 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. See Chapter 43.21C, RCW and Chapter 25.05, Seattle Municipal Code.

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 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, Room 1320 Alaska Building, 618 Second Avenue, 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.