

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

BAILEY ANDERSON ET AL.

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

FILE NO. MUP-89-062(W)  
APPLICATION NO. 8903519

APR 11 1990

SEPA  
PUBLIC INFORMATION CENTER

and

In the Matter of the Appeal of

BAILEY ANDERSON ET AL.

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

FILE NO. S-90-001  
INTERPRETATION NO. 89-013

Introduction

These consolidated appeals of a master use permit decision and a code interpretation came on for hearing before Hearing Examiner Pro Tempore Gordon F. Crandall on March 27, 1990. Appellants Bailey Anderson, Betty Anderson, Alan Hartwell, Gary and Ann Smith, husband and wife, and Ed and Mayo Ochiltree, husband and wife were represented by Jeffrey M. Eustis. Respondent Coastal Building Corporation, William Mangan, general manager, was represented by Ross Radley. The Department of Construction and Land Use (DCLU) was represented by Jan Mulder on master use permit appeal and Andrew S. McKim as to the code interpretation.

Witnesses were sworn and testimony was presented. Exhibits were submitted. All parties presented final argument. After due consideration of the testimony and documentary evidence and the arguments submitted by the parties the Hearing Examiner makes the following findings of fact, conclusions and decisions on these appeals. Unless otherwise indicated, all section numbers refer to the Seattle Municipal Code (SMC).

Findings of Fact

1. The subject property is Lot 13, Block 2, Admiral Way Addition, commonly described as 5707 S.W. Admiral Way, in West Seattle. Lot 13 is a through lot 100 ft. in depth, with 56.51 ft. of frontage on S.W. Admiral Way and 39.32 ft. of frontage on S.W. Winthrop Street.

2. The lot slopes from south to north with a difference in elevation of 26 ft. According to the applicant's consulting soils engineer, soil exposures in the area of Lot 13 are indicative of glaciolacustrine silts and clays, with an upper covering of slopewash, beneath which will be found the competent parent soil formation. The engineer has made no borings or test pits on the site and described the site from published information, notes in his files and from an examination of soils exposed in the vicinity of the project.

3. The site is zoned SF 5000, and contains about 4,791 sq. ft. of area. Property to the south and east is zoned for larger lots (SF 7200) and property to the west is zoned for lowrise multifamily development (L-3).

4. Southwest Admiral Way is designated as a minor arterial street by SMC 11.18.010.

5. Admiral Way Addition was platted in 1920. In 1926, Lot 14, containing 4,200 sq. ft., was acquired by J.F. and Marguerite

Eckhart (Eckhart). Eckhart constructed a residence on Lot 14, with a one-car garage below the house accessed from 57th Avenue S.W.

6. The chimney of the house on Lot 14 encroaches onto Lot 13 by less than one inch, according to a recent survey. The light wells for two basement windows also encroach a few inches onto Lot 13.

7. In 1950, Eckhart constructed a one-car garage on Lot 13, accessory to the residence on Lot 14. Access to the garage is from S.W. Admiral Way. To exit from the garage, a vehicle must back onto S.W. Admiral Way.

8. Lots 13 and 14 were held in separate ownerships between 1939 and 1948, when they were again joined in common ownership. In 1989, the lots were again divided and are now held in separate ownerships.

9. Minimum lot area for lots in the SF 5000 zone is 5000 sq. ft. Exceptions to such minimum are set forth in SMC 23.44.010B. A vacant lot platted prior to 1957 may be developed as a separate building site if it is not developed with all or part of a principal structure and no portion of the lot is needed to meet the least restrictive requirements for lot area, lot coverage, setback or yards in effect for principal structure on a contiguous lot, either at the time of construction of the principal structure, at the time of subsequent additions or currently when the vacant lot is proposed for development. SMC 23.44.010B(3)(c). If any portion of the vacant lot has been used to meet the parking requirements in effect for a principal structure on a contiguous lot, such parking requirement can and shall be legally met on the contiguous lot.

10. The garage on Lot 13 conforms to current zoning requirements, except that portion of SMC 23.54.030D(1)(b) which prohibits a driveway which requires a vehicle to back onto an arterial.

11. The garage on Lot 14 conforms to current zoning requirements except that the driveway exceeds the maximum grade curvature of SMC 23.54.030D(3). The grade on the south side of the driveway is 36 percent. The grade on the north side is 20 percent. The Land Use Code provides for a maximum grade of 10 percent in the first 20 ft. of a driveway. SMC 23.54.030D(1)(b)(2). A compact car could use the garage, but a larger car could use it only with great difficulty, due to the extreme grade of the driveway immediately adjacent to the sidewalk. The garage has not been used as a parking place for at least 32 years.

12. The applicant proposes to construct a three story single family residence on Lot 13 approximately 34.5 ft. in height with a two-car garage accessed from S.W. Winthrop Street. The existing garage on the lot would be removed. The peak of the roof will be 12.4 ft. higher than the chimney on the Anderson house to the west.

13. Lot 13 is in an environmentally sensitive area and for this reason a single family residential proposal is not categorically exempt from the procedural and substantive requirements of SEPA. SMC 25.05.908.

14. According to applicant's soils engineering consultant, a single family residence can safely be constructed on the site if his recommendations for protecting the site are followed. In his opinion the proposed development can be accomplished "with minimal risk of instability on the site or adjacent properties". Exhibit 4.

15. According to the appellants, the site is "spongy", concrete slabs on neighboring properties often crack and buckle, the lawn of a neighbor to the west (Anderson) sank so much and so often that it was replaced with a concrete block patio, water

seeps from the site across the sidewalk on S.W. Admiral Way, there is evidence of separation of foundations from footings, windows in a day light basement are cracking from settling of the house, and a retaining wall on Lot 14 is tilting. They conclude that construction of residence on Lot 13 should not go forward without onsite testing of the soil, and that until then, the risk of damage to them cannot be evaluated. They urge that at a minimum a surety bond be provided.

### Conclusions

1. The appeal of the Director's decision on the master use permit is authorized by SMC 23.76.022. A decision to approve, condition or deny a project based upon SEPA policies is a type III decision appealable to the Hearing Examiner, and thereafter to the City Council. SMC 23.76.006.

2. The appeal from the interpretation is authorized by SMC 23.88.020E. This section requires that the interpretation appeal be consolidated with the Director's decision on the project, and that a single hearing be held. The Hearing Examiner's decision on the interpretation is final, however, and is not subject to appeal to the City Council.

3. Appeals under the foregoing sections may be initiated by anyone significantly affected by or interested in the permit or interpretation. SMC 23.76.022(C)(2); 23.88.020E(1). All appellants have standing to appeal the foregoing decisions.

4. Appeals under both sections are considered de novo. Under SMC 23.76.022 (the MUP appeal) the examiner may consider issues which relate to procedural compliance, compliance with substantive criteria, DNS's, adequacy of any EIS, or failure to properly approve, condition or deny a permit based upon disclosed adverse environmental impacts. Under SMC 23.88.020E, the examiner shall evaluate the interpretation upon the same basis as was required of the Director. Under both appeals, the Director's decision is given substantial weight, and the burden of establishing the contrary is on the appellant.

### Height, Bulk and Scale

5. A proposal which is not exempt may be conditioned under SEPA to mitigate adverse adverse environmental impacts, based upon policies, plans, rules or regulations formerly designated in the SEPA ordinance as a basis for the exercise of such substantive authority. SMC 25.05.660A.

6. The SEPA policies state that the height, bulk and scale of a development project should be reasonably compatible with the general character of development anticipated by the adopted land use policies for the area in which it is located. These policies authorize mitigation of the adverse impacts of substantially incompatible height, bulk and scale subject, however, to the Overview Policy of 25.05.665.

7. The Overview Policy states in part that:

#### D. Relation to City Codes.

Many environmental concerns have been incorporated in the city's codes and development regulations. Where city regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation subject to the limitations set forth in subparagraphs D-1 through D-7 below. Unless otherwise specified in the policies for specific elements of the environment (SMC 25.05.675), denial or mitigation of a project based on adverse environmental impacts shall be permitted only under the following circumstances:

1. No city code on regulation has been adopted for the purpose of mitigating the environmental impact in question; or

\* \* \*

3. The project site presents unusual circumstances such as substantially different size or shape, topography, or inadequate infrastructure which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable city code or zoning; or

4. The development proposal presents unusual features, such as unforeseen design, new technology, or a use not identified in the applicable city code, which would result in adverse environmental impacts which substantially exceed those anticipated by the applicable city code or zoning;

\* \* \*

8. The Land Use Code specifically deals with the permitted height and bulk of single family residences. SMC 23.44.008-014. None of the circumstances of 25.05.665D apply to the proposal. The Hearing Examiner concludes that mitigation of height, bulk or scale under SEPA is impermissible.

#### Soil Conditions

9. Section 2903 of the Building Code provides in part as follows:

Sec. 2903 (a) General. Excavation or fills for buildings or structures shall be so constructed or protected that they do not endanger life or property.

\* \* \*

(b) Protection of Adjoining Property. When the owner of any lot shall raise or lower the level of such lot by a fill or excavation, he/she shall at his/her own expense protect all adjoining property from encroachment by such fill or excavation, or from danger of collapse due to such excavation either by the erection of a retaining wall or by sloping the sides of such fill or excavation entirely within the confines of said lot in a manner found safe by the building official.

10. Director's Rule 2-87 establishes procedures and guidelines for securing permits for development in potential slide areas. The rule requires that prior the issuance of a permit a geotechnical report acceptable to the Director will be submitted, which indicates that the plans and specifications conform to the recommendations in the report, that the risk of damage to the proposed development or to adjacent properties from soil instability will be "minimal," and that the proposed development will not increase the potential for soil movement. The report shall be supported by field observations which shall include appropriate explorations, such as boring and test pits and an analysis of soil characteristics.

11. No on-site borings, tests or other exploration has been made. The report is therefore inadequate for permit purposes. The report is adequate, however, for SEPA analysis, which requires only information "reasonably sufficient to evaluate the environmental impact of a proposal". SMC 25.05.335. The

Director's conclusion that compliance with the recommendations of the soils engineer would adequately mitigate potential impacts relating the erosion and mass movement of soil should not be disturbed. The Director will have an additional opportunity to mitigate potential soil impacts prior to issuance of a construction permit, after the required field observations have been made and submitted.

#### Legal Building Site

12. SMC 23.44.010B permits development of a substandard, vacant, platted lot as a separate building site even though in common ownership with a contiguous lot, if no portion of the lot is required to meet the least restrictive lot area, lot coverage, setback or yard requirement in effect at any time. The encroachment by less than one inch of a chimney of the house on Lot 14 is de minimus, and so long as the owner of Lot 13 does not complain, the Director was entitled to ignore it. The same conclusion applies to the light wells for that residence.

13. Lot 13 is needed as a side yard for Lot 14, since a setback of at least 3 ft. has been required at all times. Current code provisions permit a side yard to be satisfied by easement on the adjacent lot. SMC 23.44.014D. The Director's conclusion that Lot 13 is not needed to satisfy yard or setback requirement of Lot 14 if an easement is provided should not be disturbed.

14. SMC 23.44.010B3(c) provides that if any portion of the lot to be developed has been used to meet the parking requirement in effect for a principal structure on a contiguous lot, the lot may be developed if the parking requirement is "legally met on the contiguous lot." The garage on Lot 14 does not satisfy the current land use code in that its driveway exceeds slope maximums and is essentially unuseable except for a vehicle with a short wheelbase. Construction in 1950 of the garage on Lot 13 provided the residence on Lot 14 with a parking space which conformed with city code requirements in all respects except as to backing out onto an arterial. When this garage was constructed, or at least when the 1957 code was adopted which contained the current driveway slope maximums, the garage became the required parking space for Lot 14 and the nonconforming garage on Lot 14 was abandoned. An owner cannot abandon a nonconforming use and later reestablish it. 6 Rohan, Zoning and Land Use Controls, Section 41.03[6][b]. Any parking space proposed to replace the garage on Lot 13 in order to make Lot 13 a legal building site must conform to the requirements of the current code.

15. The conclusion of the previous paragraph is supported by SMC 23.40.004, which provides:


Legally established parking spaces or loading areas existing on or after July 24, 1957, that became required as accessory to a principal use on or after July 24, 1957, may not be eliminated unless at least an equal number of spaces serving the use for which they are required and meeting the requirements of this code are provided."

The parking space on Lot 13 was legally established as accessory to the residence on Lot 14 by permit and is required parking for that residence.

Decision

The decision of the Director on the interpretation that Lot 13 is a legal building site is REVERSED. The decision of the Director on the master use permit is AFFIRMED, except as to the legal building site conclusion contained therein, which is REVERSED.

Entered this 11<sup>th</sup> day of April, 1990.

  
Gordon Crandall  
Hearing Examiner Pro Tempore

CONCERNING FURTHER REVIEW  
File No. MUP-89-062(W)

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.

CONCERNING FURTHER REVIEW  
File No. S-90-001

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 fourteen 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, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104.