

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

2711 EAST MADISON STREET ASSOCIATES
from an interpretation of the
Director, Department of Construction
and Land Use

FILE NO. S-90-002
INTERPRETATION NO. 89-019

and

In the Matter of the Appeal of

2711 EAST MADISON STREET ASSOCIATES
from a decision of the Director
of the Department of Construction
and Land Use on a master use
permit application

FILE NO. MUP-89-081(W)
APPLICATION NO. 8806293

Introduction

Appellants challenge the interpretation (89-019) by the Director, Department of Construction and Land Use Code (DCLU) of the Land Use Code relating to a facility proposed by AIDS Housing of Washington at 2720 East Madison Street regarding whether the proposed uses are properly regulated as a day care center and a nursing home; whether those uses qualify the proposed structure as a "mixed use structure"; and whether the proposal, as interpreted, meets Code parking and open space requirements. Appellants also appeal the decision of the Director to grant a master use permit application.

The appellants exercised the right to appeal pursuant to the Seattle Municipal Code, Section 23.88.020, as amended and pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

Parties to the proceedings were: appellants 2711 East Madison Street Associates, represented by their attorney, Roger Leed; the applicant, AIDS Housing of Washington, represented by its attorneys, John Phillips and Kimberly Boyce; and the Director, Department of Construction and Land Use, represented by Andrew S. McKim, land use specialist and assistant city attorney Robert Tobin, Law Department.

The matter was heard before the Hearing Examiner on March 5, 6, 8, 12, 15, 1990. A site inspection by the Hearing Examiner occurred on March 10, 1990. The record remained open for post hearing memoranda and a copy of the DCLU file until March 20, 1990.

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

Findings of Fact

1. In response to a request from appellants, the Director, Department of Construction and Land Use, issued an interpretation of the Land Use Code wherein he decided:

The proposed residential facility and adult day facility are most appropriately regulated as a nursing home and a day care center, for the purposes of the

Seattle Land Use Code. The proposed structure qualifies as a mixed use structure, and the proposed uses are thus permitted outright under the applicable zoning. The development, as designed, meets applicable open space and parking requirements, except that two on-site loading and unloading spaces must be provided for the day care facility.

DCLU Interpretation No. 89-019. A timely appeal of this decision was filed.

2. The proposed facility at issue is sited at 2720 East Madison Street, at the northwest corner of East Madison Street and 28th Avenue East. This site, in the Madison Valley area of Seattle, is zoned Neighborhood Commercial-2, subject to a forty foot structure height limit (NC2/40'). An SF 5000 zone is immediately north and northwest of the site. Residences in this zone are topographically higher than the site and are separated by forty-five (45) ft. from the proposed facility and the common property line. From southwest to southeast of the site are L-3, L-2 and SF 5000 zones.

3. Land uses in the vicinity include specialty retail stores, offices, restaurants, apartments, a day care center for children and single family residences. Properties along East Madison Street, between 27th Avenue East and 32nd Avenue East are in the NC2/40' zone.

4. The property site is irregularly shaped and contains approximately two-thirds of an acre. It is relatively level, exhibiting a gentle slope from west to east of roughly three ft. (3') across the width of the property.

5. The single family residence formerly located on the western portion of the site has been recently demolished. The site currently serves as an informal parking lot. Seven (7) to fourteen (14) parked vehicles have been observed during weekday afternoons.

6. Applicant proposes to construct a three-story building approximately forty-three ft. (43') in height to the ridge of the pitched roof. The project building is to contain an adult day care center, administrative offices and a bank machine on the first floor. The second and third floor of the proposed three-story facility, according to the DCLU Interpretation, the Director's Report and on the basis of testimony from David H. Wright, design architect, are to be used as a nursing home for people with AIDS. These two (2) floors would contain eighteen (18) and seventeen (17) beds respectively. Exhibit 26.

7. The 35 bed nursing home will have approximately 25,519 sq. ft.; the adult day care center will have approximately 5,930 sq. ft. for an approximate building envelope of 31,449 sq. ft. The proposed building would present 180 ft. of facade at the rear, combining the north and northwest building will which join to form an oblique angle.

8. Project architect David Wright described the proposed project as having exterior finishes, colors, scale and proportions indicative of the residential and mixed use of the area. He further testified that the proposed facility was purposely designed to not be a powerful architectural statement. The expressed intent is for the building to be transitional and constructed of "warm" materials so as to be compatible with surrounding properties in the NC2/40' zone. The Hearing Examiner finds that this testimony accurately depicts the compatibility of this project with surrounding properties. See Exhibits 4, 11, 21 (backside), 24, 27 and 27.

9. Services to be provided in the skilled nursing or long term care residential upper floors of the proposed facility will include 24 hour skilled nursing care. This care will encompass

I.V. therapies, TPN (tube feeding) and respiratory therapies, hospice care, respite care for persons with AIDS whose caregiver may need a short rest from the responsibilities of care, and supervised living, including "ADL", assistance with activities of daily living. Exhibit 17. These services will be for any person needing 24-hour support when not requiring acute hospital care and for those who cannot be appropriately cared for at home. The facility will be licensed by the state as a nursing home. The facility will be operated and managed by the Sisters of Providence.

10. Four staff doctors will serve the residential facility. During the day there will be an administration and housekeeping staff of nine. Shift staff levels will include nurses, nurses aides, social workers and kitchen staff and according to the DCLU interpretation will range from six (6) to fourteen (14), depending on the time of day. The Director's Report and the DCLU interpretation state that there will be a maximum staff of twenty-three (23) between 7:00 a.m. and 3:00 p.m. The Hearing Examiner finds this staffing figure to be accurate as to total maximum staff during the day. Volunteer assistance is also anticipated. Applicant estimates a maximum of ten (10) volunteers a day.

11. The portion of the main floor proposed to be used as a state licensed adult day care facility is for people with AIDS. The facility will be open Monday through Friday from 8:00 a.m. until 6:00 p.m. It will serve a maximum of 35 people on any given day. Most would participate at least three (3) days a week.

12. All day care activities will take place either within the day care center or the protected ground level outdoor space of the proposed facility. Day care participants will not use or patronize neighborhood services. It is, however, anticipated that caregivers of day care participants, staff, and visitors of the nursing home residents will patronize the services of neighborhood businesses to some extent. Transportation will be provided to and from the center by vans which will not, as a general rule, be parked on-site. Applicant has stated that two (2) loading spaces will be provided.

13. The day care center participants will have a caregiver in their home, but would be persons who could benefit from the special services of this proposed use. The adult day care center is to provide health and medication monitoring; occupational and physical therapy; personal care; recreational and social activities; and counseling and emotional support groups to assist in maintaining independence at home and in the community and to delay if not prevent the need for 24 hour institutionalized care.

14. Day care participants will be dropped off in the morning and picked up at night by high occupancy vans sponsored by the facility with center hours of operation substantially similar to those of many day care centers for children. The van, to be parked off premises, will arrive and depart on a regular schedule. The same participants will typically use this facility each day. Care will be provided to a group of adults, rather than children, in other than a family setting for less than 24 hours a day. Meals and supervised programs will be provided. Participants will be fully supervised and will not leave the premises during the day or spend the night at the facility. In essence, participants will, not unlike day care children, require day time supervision although living with a care giver, partner, or other family member who cannot be available to give required day time supervision.

15. A staff of ten, including administrators, nurses, social workers, physical and occupational therapists and an activity coordinator will serve the day care center. There will be no volunteers for the day care center.

16. The day care center and the nursing home are intended to be operated as separate facilities with separate staff, dining

facilities and offices.

17. Approved plans show the first floor of the building having rooms at the western end designated for social work, activity director, volunteer coordinator, staff lounge, reception, bookkeeping, medical records, secretary and administration. Exhibit 26. Applicant has represented these areas as being for the exclusive use of the residential facility.

18. Areas at the eastern end of the floor designated as nap rooms, office, living rooms, meeting rooms, group room, dining room, physical and occupational therapy, I.V. and aerosol therapy, and medical storage, and the rooms just west of the lobby designated as adult day healthcare administration and conference rooms will be for the exclusive use of the day care facility. Exhibit 26.

19. Calculations on the approved plans show that 5,930 sq. ft. of floor area will be dedicated to the day care use. This figure is 18.9 percent of the structure's total gross floor area and 51.0 percent of the structure footprint.

20. About 66.9 percent of the street front facade will be occupied by the nonresidential use based on calculations from the approved plans. Entrance will be at sidewalk grade. The easterly slope of the grade from the entrance places virtually all of the frontage of the day care facility at or above sidewalk grade.

21. Meals for both facilities are to be prepared in the main floor kitchen. No meals will be prepared for off-site delivery through programs such as Meals-on-Wheels.

22. According to approved plans, 26 on-site parking spaces will be provided. These spaces will be behind the building, which will be set back approximately forty-five (45') from the rear property line, with one way access from 28th Avenue East and one way egress onto East Madison Street at the westerly end of the site. No loading or unloading spaces appeared on those plans.

23. The approved plans show glass-enclosed rooms on the second and third floors of the proposed structure labeled as "greenhouse" and "solarium". These areas, as well as second and third floor decks and two yards and the enclosed courtyard at ground level, are included in open space calculations on the plans. These calculations indicate that 4,993 sq. ft. of open space is required and that 5,139 sq. ft. is provided.

24. Landscaping and open space will include a private fenced courtyard at the facility's southeast facade. This courtyard will serve as the protected ground level outdoor space for the adult day care center participants. There will also be a public seating area at the southwest corner of the site in addition to the upper level decks and glass enclosed rooms.

25. Perimeter plantings around the northern edge of the parking lot will also be part of the landscaping. Six (6) trees plus over twenty (20) evergreen shrubs will be planted in a five (5) to eight (8) ft. border to provide a visual buffer. Three (3) large trees located on the northwest property line will be retained and will screen a portion of the parking lot and building from adjacent residences. Exhibit 26. A six ft. (6') high fence is to be erected along the northwest property line. A severe cut in slope and the topography will cause this fence to be thirteen to fourteen ft. (13-14') above the parking lot grade thus making it virtually impossible for the northwest SF zone residents to directly view parked vehicles.

26. Along East Madison at least six (6) street trees will be placed in the planting strip. At a minimum, another five (5) trees will border the proposed facility along its 28th Avenue side. Additional trees and shrubs will border the entry drive into the parking lot. Exhibit 26.

27. The proposed AIDS nursing home facility will not provide all of the services or uses generally associated with a nursing home. There will be no on-site laundry, pharmacies or maintenance.

28. Security is one of the services to be provided. Applicable day care regulations require a protected environment, similar to that provided for elderly and Alzheimer nursing home residents. Betsy Lieberman, Executive Director, AIDS Housing of Washington, testified that these security measures are mostly intended to protect the residents from exposure to harm resulting from wandering the neighborhood.

29. Robert Wildenhaus, Administrator, the DePaul and Mount St. Vincent, a 210 bed skilled nursing center and 111 unit apartment complex, further testified that the security measures to be implemented will protect nursing home patients and day care participants who suffer from AIDS dementia. These measures, a number of which have been proven effective in facilities for Alzheimer's patients, include alarm systems on doors and windows to alert staff of patients/participants attempting to leave the facility; electronic bracelets on wanderers, and keeping nursing home AIDS dementia residents on the top floor of the facility.

30. A receptionist will be on duty at the proposed facility from 8:00 a.m. to 9:00 p.m. That staff person will have to admit people through a locked door into either the day care center or into the elevator to the nursing home and will have clear visibility of both entrances. There will be a no visitor policy for the day care center.

31. Nursing home residents will each be required to develop a guest list. Only those on the list will be allowed to visit. Violation of visitation rules will result in revocation of visitation privileges. The rules include refusing visitation by persons under the influence of alcohol or drugs. Admission as a resident of such persons will be denied.

32. There will be a pastoral care component in the proposed facility. According to Betsy Lieberman, this will consist of a quiet room similar to a chapel. No public religious services will be held or performed in this room. Its primary purpose is to provide a place of quiet meditation. Approved plans show that room to be of a modest size not conducive to a pastoral function larger than that intended.

33. Dr. Robert Wood, Associate Professor, University of Washington and Director, AIDS Control Program, Seattle-King County Public Health Department, testified for applicants regarding the risks to a community surrounding an AIDS long term care facility. According to Dr. Wood, the HIV virus is very difficult to transmit. There are only three known methods of transmission; exchange of body fluids in sexual intercourse; exposure to infected blood products through transfusion or intravenous drug use; and interutero transmission from an infected mother to a fetus.

34. Healthcare providers have the highest risk of infection from blood product exposure, primarily through needle pricks or blood splash. Dementia AIDS patients would pose a greater risk to the community at large by living outside of a facility such as proposed here than would be posed by residence in this facility. Risk of community exposure by virtue of the existence of the proposed facility is very remote.

35. There is a critical need to ensure control of risks of exposure by adequate disposal of human wastes and other by products. Evidence presented establishes that medically accepted methods of controlling wastes exist and would serve to reduce the potential of accidental community exposure.

36. All blood products and other bodily fluids will be disposed of according to Providence Hospital guidelines. Used needles, other sharp instruments and medical supplies will be

secured in puncture-proof containers according to State, Federal and County Health Department regulations in secured rooms specially designed for that purpose. These items will be transported by courier service to Providence Hospital for treatment and/or disposal.

37. Used sheets, towels and other linens will also be held in special secured utility rooms and transported to the Hospital for washing and sterilization.

38. The loading space for the trucks which will transport these wastes is approximately twenty ft. (20') from the secured rooms. According to the project design architect, the secured wastes could be directly loaded in the transport vehicles by parking them in the driving lane next to the secured rooms. Otherwise, these wastes will have to be manually transported twenty ft. across the lot to be loaded onto the courier vehicles.

39. All activities in both facilities will take place within the proposed facility and/or enclosed outdoor day care area. All residents and day care participants will be closely supervised at all times.

40. Seattle-King County Public Health Department (SKCPHD) has indicated that applicable ordinances are in place to regulate procedures for storage and disposal of all infected by-products. SKCPHD will administer and enforce provisions of the City ordinance relating to generation, storage, treatment, transportation and disposal of infectious wastes.

41. A traffic and parking analysis was prepared for the proposal by the Transpo Group, a transportation consultant, and reviewed and approved by the Seattle Engineering Department (SED). Exhibit 31. This study provides background analysis and documentation of existing conditions, level of services analysis, site adjacent existing accident history and a detailed account of parking supply demand in the vicinity. It is the basis of the DCLU review of these impacts.

42. The street system of the site area includes the intersection of two major arterials at the project location, East Madison Street and Martin Luther King Jr. Way. East Madison Street is a two-lane arterial running northeast/southwest. Martin Luther King Jr. Way is a two lane north/south arterial which terminates at East Madison Street. The extension of Martin Luther King Jr. Way is a residential Street (28th Avenue East). Thus, the majority of Martin Luther King Jr. Way traffic turns onto/off of East Madison Street. Exhibit 31.

43. On-street parking exists on almost all surrounding streets. One of the few isolated exceptions is 28th Avenue East, a street adjacent to the site. Parking is not available on the southbound approach due to the narrow roadway between the project site and the existing traffic island at the arterial intersection. There are various parking limitations and restrictions on East Madison Street between 27th and 29th Avenues East. In this vicinity parking is limited to one (1) hour between 7:00 a.m. and 6:00 p.m. weekdays. Parking on East Madison Street in front of the site is limited due to the METRO bus route #11 bus stop. Exhibit 31.

44. The transportation consultant surveyed the parking supply and utilization within an 800 ft. radius of the project site, according to SED guidelines for parking studies. SED observation has been that most persons will not park much further than 800 ft. from their destination. DCLU reduced this radius somewhat to account for topography and parking limitations, resulting in 364 spaces.

45. The surveyed on-street parking availability during time periods, corresponding with the peak time of project parking demand (mid-day between 2:30 p.m. and 3:30 p.m.; and evening between 6:30 p.m. and 7:30 p.m.) during the week and weekends, determined 34-51 percent parking space utilization. DCLU

testified, and appellants did not establish to the contrary, that 85 percent utilization is an acceptable level of parking.

46. Applicant, DCLU and applicant's traffic consultant estimated project peak parking demand to be thirty-five (35) parking spaces.

47. Appellants' traffic consultant, Mr. Brown, projected a much higher demand for on-site parking. He computed this demand to be more than forty (40) spaces. Evidence presented by applicant at the hearing indicated approximately twenty (20) visitors a day. In addition, an average volunteer staff of ten persons would also potentially impact on-site parking. Exhibit 33. This potential parking demand was not considered when parking code requirements and resulting spillover were calculated. Exhibit 28.

48. Appellants' traffic and parking expert was unable to calculate with acceptable precision the likely on-site parking demand. Assuming volunteer staff and visitors will cause a demand in excess of forty spaces, the Hearing Examiner finds that on-site parking demand will be forty-one (41) spaces. As presently designed, on-site parking would thus result in a spillover of fifteen (15) vehicles onto surrounding streets.

49. Spillover would be reduced to nine spaces if shift staffing were reduced by having one-third of staff change shifts at 2:30 p.m., another third at 3:00 p.m. and the remaining third at 3:30 p.m. Visitation hours could also be staggered to avoid peak use hours. Since the adult day care center participants will not be permitted visitors, there is no day care visitation impact with regard to parking demand.

50. The Transpo Group analysis prepared by Larry Toedtli, transportation engineer, describes the traffic signal at this intersection as being a two-phase signal. SED records indicate the signal as being four-phase (two (2) traffic with two (2) overlaps). No signal timing parameters were documented in these records. Nonetheless, SED found the Transpo Group's traffic findings to be consistent with their observations.

51. Christopher Brown, Christopher Brown and Associates, the traffic and parking consultant for appellants', stated that reliance upon an inaccurate signal phasing undermines an analysis of the traffic level of service (LOS). However, the Hearing Examiner finds that Mr. Toedtli properly and correctly characterized the signal phasing for purposes of LOS analysis. The red/green two-phase signal constitutes the primary operation of this traffic signal. The third phase being a "dummy" phase, has no intersection function impact. The fourth phase is a pedestrian activated green/walk light which will operate only long enough to allow a pedestrian to cross the street. This was confirmed during a site inspection by the Hearing Examiner in the midst of these proceedings.

52. Finding no significance with respect to the phasing of the traffic signal, the estimated project related generation of 295 trips on an average weekday will most likely be LOS C. Without project generated traffic, the LOS at the intersection of the two (2) major arterials is forecast to remain at LOS B/C in 1990. Thus, the proposal will not significantly affect traffic operations of the surrounding street system.

53. Appellants contend there will be a natural reluctance on the part of people to live or shop near the highest concentration of AIDS cases in the state. According to appellant Knudsen, a material, adverse impact on parking would result from this concentration. As a consequence, business volume would decline, causing building deterioration which would lead to physical blight.

54. The public comment ended on August 15, 1989. Numerous successful retail establishments in the area have, by way of written statements, demonstrated strong support for the proposed

project. Among those retail service providers are City People Garden Store, Exquisite Desserts, Fran's, the New York Deli and Pete's Fish.

55. Both DCLU and the Hearing Examiner continued to receive letters on this application following the public comment period and during the course of the hearing. Letters from Gerald Frank and petitions from over one hundred (100) vicinity residents opposed this project. Appellant member Molly Andrews-Smith expressed concerns regarding the hearing process. Amundson Construction Company; State Representative Cal Anderson; the Harrison-Denny Community Council; Barbara Miller, the New York Deli (a second time); and the City People's Garden Store (a second letter) expressed support for the proposed project.

Conclusions

1. The Hearing Examiner has jurisdiction over these parties and these subject matters pursuant to Section 23.88.020E and Chapter 23.76, Seattle Municipal Code. Uses permitted outright are type I decisions and are not subject to appeal. A determination of nonsignificance (DNS) is a type II decision appealable to the Hearing Examiner and a decision to approve, condition or deny a project based upon SEPA policies (Seattle Municipal Code Section 25.05.660) is a type III decision appealable to the Hearing Examiner and may be further appealed to the City Council. SMC Section 23.76.006; 23.76.022.

2. Appeals under SMC Section 23.76.022 shall be considered de novo and the Hearing Examiner may consider issues which relate to procedural compliance, compliance with substantive criteria, a DNS or failure to properly approve, condition or deny a permit based upon disclosed adverse environmental impacts. SMC 23.76.022C.6.

3. Appeals of interpretations shall be considered de novo and the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director. Section 23.88.020E.5. The Director's interpretation is to be given substantial weight and the burden is on the appellant to establish the contrary.

4. The Hearing Examiner is required to also accord substantial weight to the decision of the Director with respect to a master use permit decision and a threshold environmental determination. The burden of establishing to the contrary is on the appealing parties. Seattle Municipal Code Section 23.76.022 and Seattle Municipal Code Section 25.05.680A.3. The standard of review is "clearly erroneous" meaning that the Hearing Examiner must have a definite and firm conviction that a mistake has been made in order to overturn the Director's determination or reverse his decision. Hayden v. Port Townsend, 93 Wn. 2d 870, 613 P.2d 1164 (1980); Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

Interpretation

5. The first issue to be resolved is whether the proposed uses have the status of a nursing home and a day care center. Section 23.84.032 provides in relevant part that a "special residence" means, inter alia, a nursing home. Nursing home is defined as:

a special residence, licensed by the state, which provides full-time convalescent and/or chronic care for individuals who, by reason of chronic illness or infirmity, are unable to care for themselves. No care for the acutely ill or surgical or obstetrical services shall be provided in such a residence. This definition excludes hospitals or sanitariums.

6. The proposed nursing home use of a portion of the project meets the Land Use Code definition of nursing home. It has

received a Certificate of Need from the state, is licensed as a nursing home by the state and will provide long-term, full-time residential care for chronically ill people unable to care for themselves. As described, this use will not provide care for the acutely ill or surgical or obstetrical services. Contrary to assertions by appellants, it is not a hospital or a sanitarium. Those institutions encompass facilities and services of an obstetrical, medical or surgical nature. Seattle Municipal Code Section 23.84.018.

7. Day care facilities are not among the uses defined as residential uses at Seattle Municipal Code Section 23.84.032. Day care center is defined in relevant part in the "institution" section of the Land Use Code as:

an institution which regularly provides care to a group of children in other than a family setting for less than twenty-four hours a day, whether for compensation or not....

Children day care centers are permitted in NC2 zones. Seattle Municipal Code Section 23.97.004, Chart A.

8. Neither the Land Use Code (SMC Title 23) nor the Zoning Code (SMC Title 24, largely superceded) specifically addresses or defines adult day care facilities. If a use is not identified in Title 23 or Title 24, the Director may determine that a proposed use is substantially similar to other uses permitted in the respective zones and should also be permitted. Seattle Municipal Code Section 23.42.010. While not identical to any use defined or regulated in the Land Use or Zoning Codes, the proposed adult day care use is markedly similar in function, impact and nature to a day care center for children. Being of similar impact in nature to a day care center for children, the proposed adult day care use should be regulated according as a permitted use under the Land Use Code.

9. A mixed use structure is one which contains residential and nonresidential uses meeting specific standards in the Land Use Code. Seattle Municipal Code Section 23.47.008A. Mixed use structures sixty-five ft. (65') in height or lower shall have an area equal to at least ten percent (10%) of the gross floor area of the structure or fifty percent (50%) of the structure's footprint, whichever is greater, in nonresidential use other than principal use parking, mini-warehouses and warehouses. Seattle Municipal Code Section 23.97.008B.

10. The proposed facility is under the above stated height limit and contains a residential (nursing home) and nonresidential (adult day care center) use. The calculated 5,930 sq. ft. of institutional adult day care center floor area is eighteen percent (18%) of the structure's total gross area and fifty-one percent (51%) of the structure's footprint. Thus, day care use is a qualifying nonresidential use for purposes of the mixed use standards of Seattle Municipal Code Section 23.47.008.

11. When, as here, a mixed use structure fronts on more than one (1) street and abuts a noncommercially zoned lot, the nonresidential use shall occupy a maximum of sixty percent (60%) of a mixed use structure's street level street front facade. A minimum of fifty one percent (51%) of a mixed use structure's street front facade containing nonresidential use shall be at or above grade. Seattle Municipal Code Section 23.47.008E.

12. According to calculations on the approved plans, the established adult day care use will occupy approximately 66.9 percent of the street front facade with the entrance at sidewalk grade. Virtually the entire front of the day care facility will be at or above grade. Thus, the proposed facility qualifies as a mixed use structure in this regard and as such is permitted outright in the NC2/40' zone.

13. Open space in the amount of twenty percent (20%) of the structure's gross floor area in residential use is required in

mixed use structures. Seattle Municipal Code Section 23.47.024A. The required open space may be provided in the form of balconies, decks, solarium, greenhouses or roof gardens. Seattle Municipal Code Section 23.47.024B.

14. The approved plans depict glass-enclosed rooms on the upper floors of the project denoted as "greenhouse" and "solarium". These terms are not defined in the Land Use Code. "Solar greenhouse" is defined as "a solar collector which is a structure or portion of a structure utilizing glass or similar glazing material to collect direct sunlight for space heating purposes." Seattle Municipal Code Section 23.84.036. Webster's New World Dictionary, Second College Edition (1978) defines "greenhouse" as "a building made of glass, in which the temperature and humidity can be regulated for the cultivation of delicate or out of season plants." Similarly, Webster's Ninth New Collegiate Dictionary (1984) defines "greenhouse" as "a glass enclosure used for the cultivation or protection of tender plants." This latter dictionary defines "solarium" as "a glass-enclosed porch or room; also: a room (as in a hospital) used especially for sunbathing or therapeutic exposure to light. "See also Webster's New World Dictionary, Second Edition (1978).

15. The glass-enclosed rooms depicted on the plans meet the above definitions. Those, areas, as well as the upper floor decks, the two yards and the enclosed ground level courtyard may be included for purposes of open space calculations. According to those calculations 4,973 sq. ft. of open space is required in order to equal twenty percent (20%) of the residential use gross floor area and 5,137 sq. ft. as provided. Thus, the minimum amount needed is exceeded.

16. As pertinent herein, Seattle Municipal Code Section 23.54.015 (Required Parking) provides:

In the case of a use not specifically mentioned on Chart A, the requirements for off-street parking shall be determined by the Director. The Director's determination shall be based on the requirements for the most comparable uses.

Chart A does not list parking requirements for adult day care facilities. The parking requirement for day care centers is one space for each ten (10) children or one (1) space for each staff member, whichever is greater, plus one loading and unloading space for each twenty (20) children. Seattle Municipal Code Section 23.54.015.

17. The Director has determined that the children's day care center parking requirements are comparable for purposes of calculating the number of parking spaces needed by an adult day care center. It is concluded that the Director has chosen the most comparable use for this determination. Therefore, the parking requirements for the adult day care center shall be the greater of one (1) space for each ten (10) participants (i.e. 35/10, or three (3) spaces) or one per staff member (ten (10) spaces.) Since ten (10) spaces is the greater figure, that figure shall be the day care center parking requirement.

18. It has been determined that the maximum nursing home staff on duty at any one time will be twenty-three (23) persons. Applicants have not disputed this figure. The maximum number of off-street parking spaces required for a nursing home are as follows:

one (1) space for each two (2) doctors=
4/2 or 2.0 spaces

one (1) additional space for each three (3)
staff=
23/3 or 7.7 spaces

one (1) space for each six (6) beds=

35/6 or 5.8 spaces

Total 15.5 spaces

Seattle Municipal Code Section 23.54.015 Chart A. Fractions up to .5 are to be disregarded; Seattle Municipal Code Section 23.86.002B. Thus, fifteen (15) spaces are required.

19. The total parking requiring for these two uses is twenty-five (25) spaces. Since the proposal will provide twenty-six (26) spaces, this requirement will be more than met. The estimated ten (10) volunteers daily are not factored into this parking space equation. The mere fact that they are volunteers does not suffice to preclude them when determining parking requirements. In essence, they are unpaid staff, serving without compensation. See Webster's New World Dictionary, Second College Edition (1978). As such, additional parking shall be required as follows:

one (1) space for each three volunteer staff= 10-3 or 3.3 spaces.

Thus, three (3) additional spaces for a total of twenty-eight (28) spaces shall be required. Seattle Municipal Code Section 23.54.015 Chart A and 23.86.022B.

20. For day care centers, one loading and unloading space is required for each twenty (20) children. Seattle Municipal Code Section 23.54.015 Chart A. Therefore, given the comparable nature of the uses, the adult day care center must also meet this requirement. Under this standard, the proposed day care shall have two such spaces.

SEPA

21. The responsible official, on review of the proposed action, the environmental checklist and other information, shall determine whether the proposal is "likely to have a probable significant adverse environmental impact." Seattle Municipal Code Section 25.05.450A.1,2.

22. An environmental impact is "significant" if there is a reasonable likelihood of more than a moderate adverse impact on environmental quality. Seattle Municipal Code Section 25.05.794; Norway Hill v. King County Council, 87 Wn. 2d 267, 278, 552 P.2d 674 (1976). "Probable" means likely or reasonably likely to occur. Seattle Municipal Code Section 25.05.782.

23. If it is determined that there will be no probable significant adverse impacts from a proposal, a determination of nonsignificance (DNS) shall issue. Seattle Municipal Code Section 25.05.340A.

24. Where the responsible official determines that there are probable significant adverse environmental impacts, such impacts are to be mitigated pursuant to SMC 25.05.350 before a DNS shall issue. If a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS shall be prepared. Seattle Municipal Code Section 25.05.350B.

25. The policies and goals set forth in SEPA are intended to ensure that necessary environmental analyses have been made with respect to a specific proposal and that reasonable alternatives are required or implemented to mitigate identified adverse effects of proposed actions on the environment. Seattle Municipal Code Section 25.05.030. SEPA is not intended to be used as a means to defeat a proposed project simply because that project is unpopular. Parkridge v. Seattle, 89 Wn. 2d 454, 466, 573 P.2d 359 (1978).

A. Economic and Public Health Impacts

26. Adverse economic impacts from a proposal which are in the nature of profits and personal income and wages are not

within the 'zone of interest' entitled to consideration, protection or regulation under SEPA. Methods of financing are also not required to be discussed or considered as an element of environmental review either in an EIS or at the threshold level. Seattle Municipal Code Section 25.05.4480; see also Seattle Municipal Code Section 25.05.960; Concerned Olympia Residents for the Environment v. Olympia, 33 Wn. App. 677, 682, 657 P.2d 790 (1983); SEAPC v. Cammack II Orchards, 49 Wn. App. 609, 744 P.2d 1101 (1987); West 514, Inc. v. County of Spokane, 53 Wn. App. 838, 770 P.2d 1065 (1989).

27. Concern that this project, because of its unique nature, will likely cause serious adverse economic impacts on the built environment of the NC2/40' business district is remote and speculative at best. The concern appears to rest upon a perception that the presence within the district at this site of AIDS victims and that of persons living with AIDS would result in off-site activities which might cause public hazards to business customers. The clearly stated premise for that concern was that "the project will be required to service an AIDS population that contains a significant element of intravenous drug users." See appellants' Closing Memorandum at p. 7. The Hearing Examiner concludes that the fear that intravenous drug users would pose a threat, economic or otherwise, to the community is unfounded.

28. The testimony of Dr. Robert Wood, a leading regional expert on AIDS, establishes the present percentage of I.V. drug users with AIDS as approximately 5 percent with a possible increase in that population of up to 8 percent by 1995. The Hearing Examiner therefore concludes that it is not likely that there will be a future increase of the I.V. drug user AIDS population to an extent which would pose a threat to the economy or public safety of the surrounding vicinity.

29. Moreover, it is not very likely that active I.V. drug users with AIDS would become project residents as they would find the facility's restrictions to be too controlling of their self destructive behavior. Even if they were to become residents, their chronic and serious condition would render them too ill to be able to have contact with the outside community.

30. While there is genuine concern regarding the potential adverse impacts of infectious wastes from the proposal, the evidence presented is sufficient to establish that the critical need for adequate disposal of such wastes will be monitored. Moreover, the City has recently adopted an ordinance specifically for regulation of the management of infectious wastes. Chapter 21.43, Seattle Municipal Code. The appropriate health officials, pursuant to the authority of this chapter, would enforce and administer all of its provisions relating to the generation, storage, treatment, transportation and disposal of infectious wastes.

31. Public concerns for safety are legitimate factor to be considered by the Hearing Examiner, but only if those concerns are rationally based. Here, the Hearing Examiner concludes that the expressed premises for those concerns, i.e. that the AIDS population to be serviced "contains a significant element of intravenous drug users" or risk of exposure from infectious wastes, are based on a misperception of the risk of transmission posed to the public at large and, therefore, lack a rational basis.

B. Height, Bulk and Scale

32. SEPA provides that it is the policy of the City that the height, bulk and scale of development projects should be reasonably compatible with the general character of development anticipated by the Land Use Code Policies adopted for the area in which they are located and to provide for a reasonable transition between areas of less intensive and more intensive zoning. Seattle Municipal Code Section 25.05.675G.2. The proposed project is compatible with the existing and anticipated height, bulk and scale of the surrounding vicinity. No conditions on

height, bulk and scale are necessary.

C. Traffic Impacts

33. This project will only minimally impact the nearby major arterial intersection of East Madison Street and Martin Luther King Jr. Way. Both applicant and appellants determined the 295 trips estimated to be generated by this project as causing LOS C at this intersection. Without this project, LOS is forecast as LOS B/C. The slight increase in traffic as a result of this project will have no significant impact on the surrounding street grid; therefore no SEPA mitigation is required.

D. Parking

34. The Director, on the basis of the appealed interpretation, determined that the Land Use Code requires this project to have twenty-five (25) spaces. Applicant proposes to provide twenty-six (26) spaces. However, the Hearing Examiner has determined that the Director's interpretation shall be modified to require three (3) additional spaces for a total of twenty-eight (28) spaces. Additional parking may be required under SEPA when the development proposal presents unusual features which would result in adverse environmental impacts substantially exceeding those anticipated by the Land Use Code. Seattle Municipal Code Section 25.05.660D.

35. The proposal has been calculated by the Director and applicant as having a peak parking demand of thirty-five (35) spaces. The Hearing Examiner concludes that volunteer staff and visitors will increase on-site parking demand to forty-one (41) spaces. On the basis of the Director's interpretation, as modified by the Hearing Examiner, there will be a spillover of thirteen (13) vehicles onto surrounding streets.

36. In light of the misapprehension and fear of risk of exposure with which this unique facility is viewed by its surrounding neighbors, it presents unusual features which would result in adverse environmental impacts which substantially exceeds those anticipated by the Land Use Code. Therefore, spillover parking should be reduced to no more than nine (9) spaces. This reduction in spillover can be achieved by having one-third of staff change shifts at 2:30 p.m., another third at 3:00 p.m. and the remaining third at 3:30 p.m.; by staggering visitation hours so as to avoid peak use hours; or by any other means meeting the approval of DCLU.

37. In addition, the loading space for transport of medical wastes by courier service to Providence Hospital for treatment and/or disposal shall be sited next to the special secured rooms in which they are temporarily stored prior to transport. This will further reduce the potential for risk of exposure to the public.

38. There is a lack of existing resources in the City and the surrounding area to meet the critical need for services of people suffering from AIDS. People living with AIDS require special services in a specially designed environment where they can live their final days and meet death with dignity. Neither irrational fears nor remote and speculative consequences should be barriers to compassionate and humane treatment of persons suffering the debilitating and almost always fatal effects of this tragic disease. Prejudice, aversion or misapprehension should be firmly resisted as the basis for the unfounded belief that persons afflicted with AIDS pose a health risk to others. To do otherwise is inhumane isolation of the chronically ill.

Conditions

1. Applicant shall provide a total of twenty-eight (28) parking spaces on-site.

2. Applicant shall reduce spillover parking to no more than nine (9) vehicle spaces. This reduction shall be achieved by


having one-third of staff change shifts at 2:30 p.m., another third at 3:00 p.m. and the remaining third at 3:30 p.m.; by staggering visitation hours so as to avoid peak use hours; or by any means meeting the approval of the Director.

3. Applicant shall locate the loading space for courier service vehicles used to transport medical wastes next to the special secured rooms in which those wastes are temporarily stored while awaiting transport.

Decision

The interpretation of the Director is affirmed except as modified to require three (3) additional parking spaces for a total of twenty-eight (28) spaces. The decision to grant the master use permit and to issue a declaration of nonsignificance is affirmed as conditioned.

Entered this 6th day of April, 1990.


Stan Taylor
Acting 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 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.

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.