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FINDINGS AND DECISION

SEP 13 1990

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

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In the Matter of the Appeal of

DENNIS NYBACK

FILE NO. MUP-90-036(W,V)
APPLICATION NO. 8906402

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

Introduction

Dennis Nyback appeals the decision of the Director of the Department of Construction and Land Use (Director) to approve structural building overhangs for a project at 2401 Second Avenue.

Mr. Nyback's original notice of appeal, filed on May 11, 1990 sought to appeal the Director's Declaration of Nonsignificance (DNS) and the Director's decision to allow a variance in conjunction with the project, as well as the structural building overhang decision. A motion to dismiss the appeal was filed on July 2, 1990. On July 24, 1990, an order was entered dismissing the DNS appeal, but retaining the appeal from the variance and building overhang decisions.

The remaining matters were heard before the Deputy Hearing Examiner (Examiner) on August 20, 1990.

The parties to the proceedings were represented as follows: Dennis Nyback, pro se; the Department of Construction and Land Use (DCLU) by Corbitt Loch, and Intrawest by James Fearn, attorney, of the law offices of Tousley Brain.

At the close of the presentation of appellant's case, Intrawest renewed its motion to dismiss the entire appeal. This was denied. Intrawest then moved to have the appeal from the variance decision dismissed, citing appellant's failure to submit any testimony on that matter. That motion was granted. Thus, the only matter remaining is that of the structural building overhang.

After due consideration of the evidence and argument presented at the hearing, the following shall constitute the findings of fact, conclusions, and decision of the Examiner on this appeal.

Findings of Fact

1. The subject property is located at 2401 Second Avenue in the Denny Regrade, between Battery and Wall Streets.

2. The property is zoned Downtown Mixed Residential/Residential (DMR/R), with a height limit of 85 ft. for residential structures or residential portions of mixed use structures (23.49.008B).

3. A two-story structure, the Film Exchange Building, is currently located on the site. The project proposed under Master Use Permit application 8906402 calls for the demolition of that structure and its replacement by a seven-story mixed-use building containing 120 apartment units and 5,000 sq. ft. of retail. There would be two levels of underground parking for approximately 122 vehicles. The project includes a footbridge over the alley on the west side of the property to a proposed building at 2414 First Avenue. That building was approved under project 8905535, and is similar to the one proposed here, including the use of structural building overhangs.

4. Among the components included in the project application was a request to allow portions of the structure to overhang into adjacent street right-of-ways. This request was made in order to accommodate bays and balconies proposed for the north, south, and east sides of the building.

5. The proposed overhangs will create some additional interior floor area within the bays.

6. The structure projects into the street right-of-ways at eight points. The projections all extend three ft. into the right-of-way and each appears to be approximately 10 ft. in width.

7. Section 23.76.010C provides that approval of structural building overhangs is a Type II decision subject to appeal to the Hearing Examiner.

8. Section 23.76.022C(7) provides as follows:

The Director's decisions made on a Master Use Permit shall be given substantial weight, except for determinations on variances, conditional uses, and special exceptions, which shall be given no deference.

9. The Department representative testified that DCLU generally looks favorably on structural overhangs as a vehicle by which a building is modulated or otherwise given a visual interest that it would not otherwise have.

10. Chapter 45 of the Seattle Building Code contains regulations applicable to overhangs, though the Land Use Code itself apparently does not.

11. According to its report, DCLU analyzed the application in reference to three criteria:

1) The authorization of the structural building

overhang will not be materially detrimental to the public welfare or injurious to property in which it would be located.

- 2) The authorization of the structural building overhang is consistent with the spirit and purpose of the Land Use Code and Zoning Codes.
- 3) The conditions and concerns of the Engineering Department have been met.

12. The overhangs will require an annual street use permit from the Engineering Department and an indemnity agreement.

13. By a memorandum dated March 3, 1990, the Engineering Department gave consent to the overhangs provided that they conformed with Building Code requirements.

14. Appellant did not object to the application of these criteria. However, he argued the following:

- 1) Because the project is being built on a full half block, there is no reason to allow the project to encroach into street right-of-way.
- 2) That the overhangs created additional bulk and will cause additional shadows on adjoining properties.

15. There are other structures in the Belltown area with bays projecting into the street right-of-way.

Conclusions

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

2. The DCLU decision in this matter is to be accorded substantial weight.

3. Authorization of the overhangs will not be materially detrimental to the public welfare or to other properties in the vicinity. To the extent that any sense of additional bulk is created, it is partially mitigated by the modulation created by the bays and balconies. As to shadows, most of the shadows that will be created by the bays will fall onto the building itself.

4. In reference to its second criteria, DCLU concluded that the building overhangs comply with the spirit and purpose of the Land Use Code. As noted above, appellant responded to this by arguing that a project such as this one being developed on a half block should have no need of any city right-of-way. While this argument has some appeal, appellant failed to cite any adopted policy violated by the overhangs. Moreover, his argument was countered by DCLU's testimony regarding the additional modulation and visual interest provided by the overhangs, and by the testimony of the architect for the applicant regarding

consistency with other structures in the vicinity.


5. As reflected by the memo of March 3, 1990, the Engineering Department's concerns are satisfied by this proposal.

6. In short, the appellant did not establish either that DCLU applied inappropriate criteria in this case or that DCLU mis-applied those criteria which it utilized. In cases such as this where the DCLU decision is accorded substantial weight, the appellant must do more than cast doubt on the Department's decision, but bears the burden of showing that the Department was wrong. This the appellant did not do.

Decision

The decision of the Director is AFFIRMED.

Entered this 13th day of September, 1990.


Guy E. Fletcher
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW OF
HEARING EXAMINER FINAL DECISIONS ON MASTER USE PERMITS

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 party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.22(C)(12)(c).

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