FINDINGS AND DECISION OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

RICHARD GORDON, et al.,

From a decision by the Director of the Department of Planning and Development

Hearing Examiner File: **MUP-13-001(W,DR)**

Department Reference: 3012582

Introduction

The Director, Department of Planning and Development issued a decision and the Appellants timely appealed.

The appeal hearing was held on February 22, 2013, following a public hearing on a contract rezone application for the property (the rezone recommendation has been issued separately this day). Parties represented at the proceeding were: the Appellants, Richard Gordon, et al, by Richard Gordon; the Director, Department of Planning and Development, by Colin Vasquez, Senior Land Use Planner; and the applicant, Aegis Living, by Jessica Clawson, attorney at law. The record was held open after the hearing for purposes of the Examiner's site visit on March 1, 2013. After the hearing, the Appellant filed additional materials, which the Applicant moved to strike. The decision below includes the Examiner's order on the request to add post-hearing materials to the record.

After due consideration of the evidence elicited during the hearing and the Examiner's inspection of the site, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The site is addressed as 223 West Galer Street and 225 West Galer Street. The site is located in the Queen Anne neighborhood, southeast of the intersection of Galer and 3rd Avenue West, and is approximately 12,800 square feet.

2. The site is designated Neighborhood Commercial 2 with a 30-foot height limit (NC2-30) and is located within the Upper Queen Anne Residential Urban Village. The site is currently developed with a one-story structure; the site formerly housed a commercial warehouse and office spaces.

3. The zoning near the site is NC2-30 to the north, Midrise (MR) to the east and southeast of the site, and Lowrise 3 (LR3) to the south and southwest.

4. Development in the vicinity of the site includes the Wimbledon multifamily structure to the west, a service garage and parking lot to the east, West Galer to the north, and residential structures to the south.

5. The applicants propose to rezone the site from NC2-30 to NC2-40, and to develop the site with a four-story assisted living facility that will contain 60 living units above 509 square feet of street level retail, and below-grade parking for 21 vehicles. The existing curbcuts on West Galer would be removed and the site would accessed by a 25-foot-wide driveway at the southeast corner of the site on 3rd Avenue West. Vehicles will access both the loading area and the parking area by means of this driveway.

Design Review

6. On September 8, 2011, DPD published a notice for the Early Design Guidance meeting of the Queen Anne/Magnolia Design Review Board scheduled for October 5, 2011. The notice stated that "The proposal is for a 3-story structure with 48 units of assisted living. Parking for 18 vehicles proposal [sic] below-grade."

7. At the meeting, the applicant presented three options. All three options were for four stories, provided the applicant received approval for a contract rezone to NC2-40. The Board heard public comment, considered the applicant's options, and identified the design guidelines, including Citywide and neighborhood design guidelines of highest priority for the project. The Board recommended that vehicle access not be taken from West Galer, instead recommending that it be taken from 3rd Avenue West.

8. On October 4, 2012, DPD published a notice of the Design Review Board's Recommendation meeting. The notice stated that "The proposal is for a four-story structure containing 60 assisted living units above 509 sq.ft. of street level retail and 10,000 cu. yds. of grading. Parking for 21 vehicles to be provided below grade. Existing structure to be demolished. Council approval of rezone required."

9. This notice also stated that: "The public may offer comments regarding the proposed design" and stated in a footnote: "Please note that public comment at the Recommendation meeting is limited to design considerations. If environmental review is triggered, comments related to environmental impacts (such as traffic, parking, noise, etc) may be sent to DPD following notice of that review."

10. At the Final Recommendation meeting on October 24, 2012, the Board took some public comment, but others were advised by the Board that their comments could not be taken because they pertained to the height of the building and the contract rezone. Some members of the public felt extremely frustrated and shut out of the process on account of not being able to present their objections to the Board. The three Board members present at this meeting voted to recommend approval of the design and the requested departures.

11. The applicant also met with the Land Use Review Committee (LURC) of the Queen Anne Community Council (QACC) on September 19, 2011, December 15, 2011, and February 13, 2012. The QACC's Board voted to support the proposal, and the QACC commented in support of the proposal at the rezone hearing.

DPD Review

12. DPD received the master use permit application for the project on June 15, 2012. DPD extended the public comment period for the project to August 15, 2012, and received a number of comments on the project.

13. DPD issued a Correction Notice to the applicant on September 7, 2012, regarding the transportation analysis submitted by the applicant's transportation consultant, Transpo. The Notice noted three corrections, including that the traffic data count summaries indicated that traffic was counted at the intersection of Galer Street and 3rd Avenue. The notice asked for confirmation that that data had actually been collected at the intersection adjacent to the project site, W. Galer Street and 3rd Avenue W., or for new counts from the correction location.

14. Transpo submitted a Transportation memorandum to DPD on November 26, 2012, which included traffic counts obtained at West Galer Street and 3rd Avenue West.

15. Transpo's parking utilization study examined the existing on-street parking within 800-feet walking distance of the site. CAM 117, which applies to parking waiver for an accessory dwelling unit, references the use of a 400-foot walking distance radius for surveys. However, for other kinds of proposals, DPD generally recommends use of an 800-foot walking distance radius. In this case, DPD transportation planner John Shaw reviewed the traffic and parking studies and the driveway access and maneuvers proposed, and concluded that the methodologies utilized were acceptable, and that no significant impacts would arise on account of the project.

16. DPD issued its decision on January 7, 2013, which included a Determination of Non-significance (DNS) and design review approval with the requested development standard departures. DPD also issued on this date its recommendation of conditional approval for the proposed rezone of the property from NC2-30 to NC2-40.

17. The appeal was filed on January 22, 2013. A prehearing conference was held with the parties on January 30, 2013, and a prehearing order was issued on January 30, 2013.

18. The appeal raised the following objections to the decision: (1) the decision violated Guideline B.1 of the design review guidelines regarding height, bulk and scale; (2) the DPD notice for the initial (early) design review meeting incorrectly identified the project as a three-story, rather than a four-story building; (3) DPD and the Board failed to incorporate neighborhood consensus as the applicable guidelines; (4) the Design Review Board did not allow public comments on the height, mass, and scale of the building as being contract rezone issues; the SEPA decision was in error because (a) the traffic study was performed at the wrong intersection; (b) the parking study was not consistent with the City's guidelines; (c) the description of the zoning in the checklist is inaccurate; and (d) views across the site will be altered if the height is increased to 40 feet with 15 feet of rooftop equipment.

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 23.76.022. The Code directs the Examiner to accord "substantial weight" to the Director's SEPA and design review decisions. This is a deferential standard of review, and a party appealing the Director's decision bears the burden of proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn.App 762, 637 P.2d 1005 (1981). A decision is clearly erroneous if the Hearing Examiner is left with a definite and firm conviction that a mistake has been made; *Moss v. Bellingham*, *109 Wn. App 6, 13, 31 P.3d 703 (2001)* (citations omitted).

2. The appeal hearing ended on February 22, 2013, and the Hearing Examiner noted that the record was being held open to allow the Examiner's viewing of the site. On February 26, 2013, the Appellant filed a request and emailed the Examiner asking to submit additional information. The Applicant opposed the request based on Hearing Examiner Rule 2.21 and moved to strike the communications. DPD emailed the Examiner with a response but since this response was not filed or served, it has not been considered.

3. The Appellants offered additional information to rebut the Applicant's and DPD's testimony regarding the frequency of transit service at the site, and the availability of the design packet online prior to the EDG meeting. But the respondents' testimony was in response to the issues raised by the Appellants and the additional rebuttal information offered by Appellants was available to them prior to the hearing. The Appellants have not shown good cause for why the information could not with due diligence have been discovered and offered earlier at hearing. (It should be noted that similar information regarding bus schedules was submitted in comment letters that were in the DPD project file, and those comments are in the record for both this appeal and the contract rezone application)

SEPA appeal

4. The Appellants argue that the SEPA decision is in error because the traffic study was performed at the wrong intersection. However, the evidence shows that DPD noticed that the initial traffic study appeared to identify the wrong intersection. DPD therefore asked for and received a transportation analysis dated November 26, 2012, which included traffic studies examining traffic volumes at 3rd Avenue West and West Galer Street. This was the relevant intersection for purpose of the traffic study and no other errors with the study have been shown. DPD did not err in relying on the traffic information submitted by the applicant.

5. The Appellants also argue that the parking study was not consistent with the City's guidelines, specifically CAM 117, which refers to a 400-foot walking distance study radius. CAM 117 on its face applies to requests for parking waivers for accessory dwelling units (ADU); it is not required to be used by applicants for other projects. DPD's evidence showed that it normally recommends that applicants use an 800-foot walking distance study radius for other types of projects. There was no other evidence to show that use of the 800-foot walking distance study area was unreasonable for this site. No clear error has been shown in the parking study, or in the DNS on account of the parking study submitted by the applicant.

6. The appeal claimed that the zoning was incorrectly described in the SEPA checklist. The checklist at page 11, item 8.e states that "the site is zoned NC2-30" which is correct. The Appellants have pointed out that the checklist erroneously states that property to the north is "single family residential, zoned NC2-30" (it is NC2-30). But there is no evidence in the record which leads to the conclusion that DPD was somehow mistaken or misled about the zoning at the site or the adjacent zoning when it issued its SEPA decision; no error has been shown in this regard.

7. The Appellants claimed that views across the site would be altered if the structure's height were increased. But the Appellants did not present evidence sufficient to show any significant impacts on SEPA-protected views.

8. Although the Appellants strenuously objected to the proposed height of the building, they did not present evidence showing that the environmental impacts of the additional height or the project would be significant. No clear error was shown as to the Director's SEPA decision.

Design Review appeal

9. The Appellants argue that the design review decision violated Design Guideline B.1 regarding height, bulk and scale. The Board's direction and the applicant's response regarding this guideline do not show that the design violates that guideline. The building mass was broken up by stepping the structure back and modulating the facade with bay windows and variation in materials, and the building was set back from the street. The Appellants argued that a lower, smaller building would be better, but did not present evidence specific to show how Guideline B.1 had been ignored or violated by the decision.

10. The Appellants also argued that the design review decision was in error, because the September 8, 2011 notice of the October 5, 2011 EDG meeting described the proposal as a three-story, rather than a four-story, structure. DPD noted at hearing that the EDG packet materials showing a four-story structure were in the DPD online files for the public to review, but that does not correct the error in the notice. The question is whether this error voids the Design Review Board's recommendation and DPD's decision. Although the Appellants argue that the error violates "due process," they have cited no applicable Codes or law that would support their position.

11. Nevertheless, the effect of the incorrect public notice should be examined to see whether it led to an erroneous decision. The purpose of the public comments to the Board at the EDG meeting is to implement SMC 23.41.014C.1, which directs the Board to *"incorporate any community consensus regarding design"* to the extent reasonable, into the Board's identification of guideline priorities. If the notice had correctly identified the project as a four-story structure, it could presumably have resulted in greater attendance from people who would have wanted to voice their objections to a four-story structure. But objections to height limits are not the "community consensus" on design that the Board is to consider at the EDG meeting. The Appellants did not offer persuasive evidence that the Board at its EDG meeting chose the wrong

guidelines or omitted correct guidelines; Appellants instead disagree with the Board's conclusions that the project satisfies the identified guidelines. Furthermore, over a year elapsed between the time of the EDG and the Board's Final Recommendation meetings on the project, and Appellants have not shown that the EDG notice deprived the public of an opportunity to attend the Board's second meeting. On this record, it has not been shown that the design review decision was in error on account of the EDG notice.

12. The Appellants argue that decision is in error because DPD and the Board failed to incorporate neighborhood consensus concerning the applicable guidelines. The Appellants point to language in SMC 23.41.C.1 and appear to argue that this language forbids the Board from recommending approval of a project unless community consensus on the project is achieved.

13. But the Code does not require this. As noted above, the Board is to incorporate into the guideline priorities "*any community consensus regarding design, to the extent the consensus is consistent with the design guidelines and reasonable in light of the facts of the proposed development*" (emphasis added); SMC 23.41.014.C.1 Here, the evidence showed that many neighbors objected to the proposed rezone to change the height of the building, although even on this point, it is not clear there was community consensus on proposed height, in light of the LURC and QACC recommendations. But even if there were a community consensus against allowing the proposed height increase, that would not be a consensus "regarding design." The Board is required to incorporate consensus regarding the design of the building, such as its modulation, setbacks, materials and other design elements, respect for adjacent sites, etc., and the Board did so. Further, it would not be reasonable for the Board to recommend a height limit based on community consensus, since the Board and DPD lack authority to establish a different height limit than that established by the City Council or existing Codes. No error was shown in the Board's handling of community consensus on the project's design.

14. Finally, the Appellants argue that the decision was in error because the public was prevented from commenting on the height, mass, and scale of the building at the Design Review Board meetings. There is some dispute about the comments allowed at the meetings, and it appears that at least initially, the Board allowed people to talk about their objections to the 40-foot height limit. The Board apparently attempted to respond to some height-related comments by recommending design elements such as setbacks and modulation to address impacts associated with the building's height, mass and scale. However, at some point the Board refused to take more comments concerning the proposed height increase, causing many neighbors to feel disrespected, and angry that they could not speak about their greatest concern, the rezone to allow four stories. Again, the Appellants argue this failure to let people address the contract rezone was a fatal error. But as frustrating as that experience may have been for the neighbors, the Board does not set height limits, and the Appellants do not cite any Code or law that requires the Board to take public comments on matters outside of the Board's authority. No clear error in DPD's decision has been shown on account of the public meetings.

15. DPD's decision was not shown to be clearly erroneous, and should therefore be affirmed.

Decision

The Director's decision is hereby **AFFIRMED.**

Entered this 13th day of March, 2013.

Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner concerning the appeal of the Director's environmental and decision review decisions is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the Hearing Examiner's decision must be commenced within twenty-one (21) days of the date the City Council decision on the Type IV decision is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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