

BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

In the Matter of the Appeal of

YAAKOV MEDRASH, d/b/a SABRA,
MEDITERRANEAN FOOD

FILE NO. M-79-003
M-79-004 ✓

from decisions of the Pike
Place Market Historical Commission

The appellant, Yaakov Medrash, d/b/a Sabra, Medeterranean Food, filed appeals from the issuance of Certificates of Approval for the use of 1906-08 Post Alley as a soup and sandwich restaurant and for the sale of sandwiches as additional uses at 1918 Pike Place.

The appellant exercised his right to appeal pursuant to Section 6 of Ordinance 100475, as amended. References to ordinance in the body of this decision refer to Ordinance 100475, as amended.

This matter was heard before the Hearing Examiner on May 31, 1979.

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. John Padget filed an application with the Pike Place Market Historical Commission, hereinafter Commission, for a Certificate of Approval to permit use of the location at 1906-08 Post Alley as a soup and sandwich restaurant.

2. The application was considered at the Commission's meeting April 11, 1979, and a decision was made to approve the application. A Certificate of Approval was issued April 16, 1979.

3. The agenda for the April 11, 1979, meeting was mailed approximately one week in advance of the meeting to persons on a mailing list comprised of the Commission members, City Council, Mayor, media, City staff persons, Pike Place Merchants Association, and others who had expressed an interest in receiving mailings. The latter category included some merchants.

4. The appellant was not on the mailing list at the time notice of the agenda for April 11, 1979, was mailed.

5. The minutes of the April 11, 1979, meeting show that the Commission determined that the proposed use would not directly compete with any existing enterprise in terms of menu emphasis and that it would be consistent with Guidelines' criteria.

6. Gary Prisk, d/b/a The Chocolate Factory, filed an application with the Commission for a Certificate of Approval to permit the sale of sandwiches as an additional use at his 1918 Pike Place location.

7. The application was considered at the Commission's April 25, 1979, meeting. A Certificate of Approval was issued May 7, 1979, apparently based upon the applicant's need to expand his menu for the success of his business. The Certificate refers to the minutes of the Commission meeting for the basis of the approval. The minutes reflect a discussion of the economics of the applicant's business. They also show the refusal to discuss the potential for economic impact on other businesses.

8. Appellant attended the April 25, 1979, meeting and spoke in opposition to the application. The extent to which he was allowed to testify as to potential economic effect on his business is not clear from the minutes. The Commission did not consider any such evidence adduced, however.

9. The appellant filed an appeal of the issuance of the Certificates of Approval May 3, 1979. He urged that the Padget decision be reversed for failure to accord due process by failing to notify nearby merchants who could be affected and for failing to weigh the economic effect of a proposed use on other businesses in the Market. He requested reversal of the Prisk decision on the basis of the Commission's failure to consider economic impact on his and other existing businesses.

10. The appellant's business is located in the back portion of the Soames-Dunn Building. The Certificate of Approval for his Sabra, Mediterranean Foods, allows the sale of Mediterranean foods. Appellant's menu offers five different pita bread sandwiches and various juices.

11. Other businesses in the building selling food for immediate consumption are as follows: Scandia, Saigon restaurant, a barbeque, Emmett Watson's Oyster Bar, and the Chocolate Factory. Food which can be used to assemble sandwiches is sold at the Bavarian Meats and at a Mexican shop. The soup and sandwich restaurant approved by the subject certificate would be located in the alley approximately 50 ft. away.

12. Appellant describes his business as only fair. He has invested approximately \$35,000 in his business.

Conclusions

1. The Guidelines, which have been promulgated by the Commission, allow for exercise of judgment by the Commission as to what applications to approve or deny "in order to achieve distribution, quantity, and mix of uses, and to provide the variety of shopping opportunities essential to the character and economic success of the market." Exercising that judgment may of necessity involve the weighing of a particular use's effect on other uses since the mix of uses could be altered by the loss of an existing use due to new competition. Lessened diversity and failed businesses also could foreseeably affect the economic success of the market.

2. While the Commission is given a great deal of discretion in its assessment of a proposed use's conformance with the purpose of ordinance it should be required to consider all relevant evidence presented in a timely manner to it bearing on the application under consideration. Economic impact on a particular business may be relevant if it is reasonably foreseeable that it would result in loss of diversity or other important characteristics of the market. Limits as to permitted menu items in Certificates of Approval create an artificial situation where additions or other changes to meet new competition are more difficult to make than outside the market. Since these limits exist, a new use may have critical consequences so consideration of these relationships may be necessary for informed and rational decision making.

3. As suggested above, the restrictions defining uses or items for sale create a condition where new Certificates of Approval or denial may greatly affect other uses, either because of proximity or similarity. For adequate consideration by the Commission, information regarding effects needs to be presented. Additionally, the affected businesses should be given a reasonable opportunity to be heard. Neither the ordinance nor the Guidelines states who is entitled to notice or what form or when notice is to be given. The

scheme of the appeal provision in the Ordinance underscores the importance of the Commission's hearing and decision. That section provides that "(a)ny party of interest appearing before the Commission at a public hearing on an application for a Certificate of Approval may appeal" (emphasis added). It also provides for a very limited review of the Commission's decision. A violation of procedure of the terms of the ordinance or guidelines is the only basis for reversal or modification.

4. Procedural due process requires that persons who have rights that might be affected have an opportunity to be heard. The right to be present presumes reasonable and adequate notice. In determining what kind of notice is adequate, regard can be given to the special conditions of the Market but because of the limited right of appeal the assurance of actual notice must be fairly high.

5. The staff person indicated that he relied on his mailing list, which included the Merchants Association, and the Market grapevine to give notice of hearing agenda items. The record shows that was not sufficient to give actual notice. While the requirements of actual notice would create an undue burden on the City, notice reasonably calculated to provide actual notice could be given at minimal administrative expense because of the clear definition of the Market's boundaries. Posting of the notice in one or more prominent locations which have been made known to all merchants could serve the function. Mailing to the Merchant's Association may provide adequate notice if all merchants automatically belong to the association and have ready access to materials the association receives. Since the record does not show that this is the case or that the Commission can assure that the agenda is readily available to all through the association, other notice mechanisms would need to be devised.

6. Since the appellant did not receive actual notice of the April 11 hearing and the evidence adduced is not sufficient to conclude that the notice was given in a way which had a reasonable assurance of reaching those persons who might be affected, a new hearing must be held as to the application of John Padget for a Certificate of Approval for the 1906-08 Post Alley location after adequate notice.

7. Because the effect of new uses on existing uses may be considered as it contributes to a change in the mix of uses or economic success of the market pursuant to the Guidelines, the appellant and any others similarly affected must be given an opportunity to present evidence of the consequences of approval of the application. The excerpts contained in the minutes of the April 25 meeting do not show that appellant was given that opportunity so a new hearing is also required for the application of Gary Prisk for a Certificate of Approval for the 1918 Pike Place location.

8. Neither the appellant's contention that the Commission should require the development authority to present evidence of economic impact nor the Commission's that the Commission does not need to consider economics because the authority makes that consideration in its leasing function is adopted. First, there is nothing in the ordinance nor in the record showing that the Commission has the authority to require that evidence from the development authority. As to the Commission's position, the interests represented by the development authority may not necessarily be the same as the merchants' or the Commission's. A situation can reasonably be hypothesized where more rental income could be obtained from one larger restaurant than three small ones so the authority would choose to lease to the larger even though that choice might result in the failure of the smaller ones. The Commission would need to be aware of that potential to exercise its judgment to preserve the Market's mix of uses

and to assure that the Commission has the information necessary to make those decisions, so the merchants must be allowed to present it.

9. The Commission has the authority to promulgate rules, regulations and guidelines and has acted under that authority to adopt the Guidelines. Additional Guidelines provisions or rules could serve to clarify what evidence the Commission will consider in its efforts to carry out its duty to preserve the qualities of the Market.

Decision

Based upon the foregoing conclusions the appeals are granted, the decisions to issue Certificates of Approval are reversed and the matter is remanded for further action consistent with this decision.

Entered this 18th day of June 1979.

M. Margaret Klockars
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Deputy Hearing Examiner