

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

In the Matter of the Appeal of

ROBERT POTTENGER, DBA the
ROSE BUSH

FILE NO. M-80-006

from a decision of the Pike Place
Market Historical Commission

Introduction

The appellant appeals the decision of the Pike Place Market Historical Commission to deny an application for approval concerning use of space in the Economy Market Arcade, 93 Pike Street.

The appellant exercised his right to appeal pursuant to Section 6 of Ordinance 100475, as amended. All reference to section numbers will be to Ordinance 100475, as amended, unless otherwise indicated.

Parties to the proceeding were: appellant, the Rose Bush represented by Robert Pottenger and the Commission by Coordinator John Turnbull.

The matter was heard before the Hearing Examiner on November 13, 1980. The record was extended to December 1, 1980 upon agreement by the parties.

After due consideration of the evidence elicited during the public hearing, and a view of the subject site the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. Appellants, Robert and Gerri Pottenger own and operate the Rose Bush shop located in the Economy Market Arcade, 93 Pike Street, Seattle.
2. The applicants have been in the subject business for approximately three years.
3. At its meeting of October 10, 1979, the Commission voted to approve a change of use from the temporary day table space in the Economy Arcade to permanent shop space, justified on the grounds of changing demands and needs.
4. October 15, 1979, the Commission issued a Certificate of Approval for applicant Pike Place Market, PDA for 93 Pike Street--Economy Arcade Day Table Section, approving the change of use of this area from retail spaces reserved for farmers and crafts people and rented on a daily basis to shop space for permanent merchants.
5. On November 1, 1979, the appellants leased 210 sq. ft. of Economy Arcade retail shop space for use as the Rose Bush Shop.
6. At its meeting of November 28, 1979, the Commission approved the concept of replacing the Economy Arcade farmers tables with new display structures of a common profile; maximum height of 3 ft. 6 in.; an overhang over the existing gutter,

and allowing cuts or breaks in the tableline limited to those necessary for tenant access. See Commission Exhibit 6. No formal action regarding standard finishes or treatment was taken although the minutes reflect that the Commission members were unanimous in the opinion that "to maintain consistency of design a standard finish treatment, would be necessary, probably without any unpainted wood surfaces." Concerning the applicants, the Commission approved temporary tables on the Economy Arcade for the Rose Bush to be removed by "January 15, 1979 (sic), by which time only display tables meeting the standard design would be permitted."

7. On December 14, 1979, based on the meeting presentation of November 28, 1979, the Commission issued a Certificate of Approval to applicants Robert and Gerri Pottenger, DBA the Rose Bush, 93 Pike Street, Economy Arcade involving the temporary location of display tables as a replacement for the farmers tables to expire on January 31, 1980 by which time the permanent tables matching a standard design format would be permitted. The Certificate of Approval acknowledged the temporary permission to facilitate a rapid setup for the Christmas selling season but provided that:

In the interest of maintaining the linear design and low display structures of the economy arcade the Commission would require that any permanent replacement for the day tables be built with a standard design for the front 12". The finishes and facing materials approved in this design will be selected in January. No cuts in the table line are permitted except to provide merchant access to the rear of the space.

8. By letter of January 22, 1980, Commission Coordinator Turnbull advised the appellants that "(at) the ... end of last year the Commission decided that your display table design would become a standard for the rest of the Arcade ... (however) ... that decision to change the standard design will have to be made soon, probably in the next few weeks." The letter suggested that it would be in the appellants' best interest to forbear requesting final design review until "early February at the latest." The minutes of the February 13 Commission meeting reflected that the Commission had basically adopted the proposed design of the Pottengers for display and left unresolved the matter of details and colors. The minutes continue that in January the Pottengers erected a table following the "approved design plan" which table proved less than satisfactory and which lead to a meeting of February 6, 1980 with the Director of PDA to "reevaluate the guidelines that have been adopted." A resulting draft was distributed but since they were draft only and had not been advertised for formal adoption, no action was taken and no testimony was accepted at this meeting of February 13.

9. The appellants were in constant communication with the Commission concerning the nonexistent, then draft guidelines, and their retroactive or prospective application status.

10. A response dated March 4, 1980 indicated that while the Commission could not arbitrarily ask the applicants to change the design to conform with the new policy that was not in effect at the time of the first approval, the guidelines would impact color and finish.

11. The proposed guidelines were dated March 12, 1980 and did reflect in point 4 that all permanent casework facing the arcade was to be finished in the same color and materials, i.e., all wood, and painted a uniform color.

12. At its meeting of April 2, 1980 the Commission considered the proposed March 12, 1980 guidelines. In response to a question from a merchant of the choice of the color green a Commission member replied that that color was selected for appearance continuity. The motion to approve the guidelines for design changes on the Economy Arcade as presented and revised at that meeting carried. The newly approved guidelines were then considered in the design approval of the Snippet Company, an adjacent business neighbor of the Rose Bush. Then on April 7, 1980 guidelines as approved April 2, were issued, reflecting that all permanent casework facing the arcade must be painted the uniform color of green.

13. By letter of May 20, 1980 Commission Coordinator Turnbull advised the appellants of the new guideline requirements for finishing materials and color.

14. By letter dated May 29, 1980 the Commission Coordinator advised all merchants on the Economy Arcade of the new guidelines and their expected conformance therewith; and further that beginning June 5, 1980 the Commission would notify the inspection division of the Building Department of all nonconforming designs and request from the Building Department compliance orders.

15. Appellant issued several letters of protest, primarily against the guidelines' applicability to the appellant. Further written correspondences of code violations were dated July 31, 1980 and September 29, 1980.

16. On September 16th the appellant submitted a letter to the Commission re teak wood for the front and mahogany for the shelve tops of the display cabinet, the cabinets to be finished with an oil based stain. At the Commission meeting of September 24 the appellant was officially denied his request for the first time.

17. The guidelines referenced have not been filed with the City Comptroller. There was no published notice in the Daily Journal of Commerce of consideration of the guidelines.

Conclusions

1. Ordinance No. 100475 is the basic applicable ordinance. Section 5 of that ordinance provides that the Commission shall adopt rules and regulations for its own government, not inconsistent with the provisions "of this or any other ordinance of the City of Seattle."

2. Ordinance 102228, as amended, the Administrative Procedure Act for the City of Seattle defines an agency as "... any City board, commission, committee ... when acting in accordance or pursuant to authorization by ordinance or charter to make rules, hear appeals or adjudicate contested cases."

2. A rule is defined as any agency "order, directive or regulation of future effect, including amendment or repeal of a prior rule, which applies generally and which, if violated, subjects a person to a penalty or administrative sanction, including, but not limited to, an order, directive, or regulation which affects:

2. Any qualification or standards for the issuance, suspension or revocation of licenses. A license is defined to include the whole or part of any "agency permit, certificate, approval, registration or any form of permission required by law, including agency rule, to engage in any activity...." Section 2(d).

3. The City Administrative Procedure Act requires that prior to the adoption, amendment or appeal of any rule an agency shall give notice thereof; provide an opportunity to present data, views or arguments in regard to the proposed action; and file certified copies with the City Comptroller of the Agency rules, "which rules shall become effective on the date of filing." Ordinance 102228, as amended by Ordinance 107903, Sections 3, 5.

4. The subject guidelines are inconsistent with the requirements of the Administrative Code. The Commission Ordinance language does not suggest its exemptions from the Administrative Code; accordingly, the guidelines which have not been published or filed are declared invalid and the appellant may continue to operate until the provisions of the code have been complied with.

5. The 1979 Guidelines reference to preferred painted and unfinished wood have been considered and are determined not to specifically address this case. Guidelines, Section II(e)(1979).

Decision

The appeal is GRANTED consistent with this opinion.

Entered this 1 day of December, 1980.



Leroy McCullough
Hearing Examiner