

## **FINDINGS AND DECISION OF THE HEARING EXAMINER FOR THE CITY OF KIRKLAND**

In the Matter of the Appeals of

File No. DRV12-00921

**Residents of Merrill Gardens and  
Dr. and Mrs. Brian Rohrback, Sandi Hart and  
Stan Christie**

From a Design Review Board decision

### **Introduction**

The Design Review Board issued a decision approving the design response conference application for the proposed Lake Street Place mixed-use project addressed as 112 and 150 Lake Street South. The decision was appealed by Residents of Merrill Gardens and by Dr. and Mrs. Brian Rohrback, Sandi Hart, and Stan Christie. The appeal hearing was held on April 4, 2013, before the Hearing Examiner, in City Council Chambers, Kirkland City Hall, 123 Fifth Avenue, Kirkland, WA. Appellants Residents of Merrill Gardens (Ellen Glauert and Barbara Flagg) were represented by Brent Carson, attorney at law; Appellants Dr. and Mrs. Brian Rohrback, Sandi Hart, and Stan Christie, were represented by Dr. Rohrback (a letter from Dr. Rohrback's counsel, J. Richard Aramburu, was also submitted by the appellants); the Department was represented by Jon Regala, Senior Planner, and by Oscar Rey, Assistant City Attorney; and the Applicant, Stuart McLeod, by Christopher Brain, attorney at law. The Examiner viewed the site on April 4, 2013.

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 composed of three parcels located at 112 and 150 Lake Street South. The property is zoned Central Business District 1B (CBD 1B) and is developed with the existing Hector's Restaurant and the Kirkland Waterfront Market. A parking lot occupies the third parcel.
2. Immediately north of the site is property which is also zoned CBD 1B which is developed with the Bank of America building, a five-story mixed use project, with a maximum height of 55 feet. The property to the east is zoned CBD 4, and is developed with the Portsmouth Condominiums, with a maximum height of 55.4 feet. To the south is an area zoned CBD 1B, which is currently used as a parking lot for the Chaffey Building, with a maximum height of 55 feet; and to the west is property zoned CBD 2, with a maximum height of 28 feet, and which is developed with a number of retail and restaurant uses.

3. The Merrill Gardens retirement housing is located east of the site. The Residents of Merrill Gardens Appellants, Ms. Flagg and Ms. Glauert, noted at hearing that they and other residents utilize the sidewalk adjacent to their building for walks, and have concerns about hazards posed by the existing traffic in the area.

4. The Portsmouth Condominiums are located east of the site, and were developed in 1996 and 1997. A public walkway located within a public easement on the Portsmouth site was created during development of that site, and is open to public use during daylight hours. The walkway is further described in Exhibit 8, a landscaping improvement agreement between the applicant and the Portsmouth Owners Association.

5. The current proposal, which is the subject of the January 24, 2013 Design Review Board (DRB) decision, is known as the Lake Street Place Mixed Use Development. The applicant proposes to construct a new mixed-use development on the three existing parcels. One parcel will include an expansion of Hector's restaurant, the second parcel will be the site of the Kirkland Waterfront Market building and new offices, and the third parcel will be the site of a new building with ground floor retail and restaurant space, four levels of enclosed parking, and additional office space on the top floor. The proposal is shown in Enclosure 3 to Ex. 1.

6. In 2008, the applicant received design review approval and City Council approval for a mixed use project at this site that would have been substantially larger than the proposal which was approved by the DRB's January 2013 decision. The applicant received a building permit and SEPA approval for the 2008 project. A comparison between the square footages of development proposed under the 2008 and the current proposal is shown at Enclosure 3 of the staff report. Enclosure 3 also includes renderings which compare the design and appearance of the two proposals, see, e.g., pages 65 and 67.

7. The Design Review Board held an initial Conceptual Design Conference on January 9, 2012, and held subsequent conferences on October 1, 2012, November 19, 2012, December 17, 2012, and January 14, 2013. The DRB considered the applicant's proposals at these conferences, took public comment, and provided recommendations to the applicant. During the DRB review process, several changes were made to the proposed design in response to the DRB's comments, including: the provision of a 10-foot upper story setback at the east property line; the parking garage was changed to be completely enclosed rather than open; rooftop parking was removed; landscaping was proposed to be provided to the neighboring public walkway; and ground floor retail/commercial was added.

8. At its January 14 meeting, the DRB voted to approve the plan subject to several conditions, including the submittal of a complete SEPA application, parking calculations, and other plan details; the conditions included a statement that "Phasing the project will require a new Design Response Conference application." (The written DRB decision was issued on January 24, 2013.) Enclosure 3, p. 22, staff report.

9. The applicant has not yet applied for a building permit for the current proposal, nor has a SEPA application been submitted for the City's review. The Department at hearing noted that design review under the City's Code constitutes a free-standing process, and projects are not considered vested merely because they have received approval from the Design Review Board. Instead, the City can require any needed modifications to the design after the SEPA or building permit review, pursuant to KZC 142.50.

10. The applicant has separately applied for a Design Response Conference for "Phase I" of this proposal, involving the property located at 150 Lake Street.

11. KZC 142.35.3 states that the Design Review Board "shall review projects for consistency with" the design guidelines referenced.

12. The Design Guidelines for Pedestrian-Oriented Business Districts appear in Enclosure 4 of Ex. 1.

### **Conclusions**

1. The Hearing Examiner has jurisdiction over this appeal pursuant to KZC 142.40 and KZC 145.60. KZC 142.40.11 provides that unless substantial relevant information is presented which was not considered by the Design Review Board, the decision of the Board shall be accorded substantial weight. The Board's decision may be reversed or modified if the Hearing Examiner determines that a mistake has been made.

2. The appeal of the Residents of Merrill Gardens asserted that no residents of Merrill Gardens received notice of the project. The Department has argued that this issue is not one within the authority of the Board and therefore not an issue subject to appeal before the Examiner; the Department also presented evidence that the notice requirements of KZC 142.35.8, which require notice to property owners rather than residents, were met in this case. Thus, even if the issue were within the scope of an appeal allowed by the Code, the notice met the Code-required notice provisions.

3. The Residents' appeal identified several concerns regarding the project's potential traffic impacts and impacts on pedestrian safety. In particular, the Appellants are concerned about vehicles accessing the project and the potential for safety hazards to elderly and/or frail residents of Merrill Gardens; they are also concerned that the traffic generated by this project will affect access by emergency vehicles to Merrill Gardens.

4. The Department contends that the potential traffic impacts from the project are not within the scope of the DRB's review authority, and is a matter to be reviewed during the project's SEPA review, which has yet to occur. At the time of permit/SEPA review, impacts can be identified and mitigated, and if necessary, the design approval would be modified. The Appellants correctly point out that design can influence traffic circulation

patterns (e.g., the location of the garage access) and that the design guidelines call for the intrusive qualities of parking garages to be mitigated. And on the ground to a pedestrian, as Ms. Flagg noted, "it's all one thing."

5. Nevertheless, the City's design review process does not require the applicant to apply for a building permit or SEPA review prior to receiving design review approval. Instead, the Code anticipates that the design review process may move forward first, and that is what has occurred here. Thus, the fact that the DRB did not consider traffic impacts is not a basis for overturning its decision; the DRB is restricted to reviewing the proposed design in light of the applicable design guidelines.

6. The DRB did review the proposed design, including the proposed parking garage and pedestrian connections and spaces, for consistency with the design review guidelines, considering factors such as the garage's visibility from neighborhood properties, its upper level setbacks, massing, and other design issues. The DRB's decision was consistent with the applicable design guidelines.

7. The appeal filed by Dr. and Ms. Rohrback, Sandi Hart, and Stan Christie, identified a number of objections to the proposal's design, and objected to the DRB's decision to approve the project given its scale, and in the absence of parking calculations. The appeal also cited portions of the Comprehensive Plan that the Appellants asserted would be violated by the project.

8. The Appellants argued that there was no vantage point from where the architectural modifications (intended to moderate the scale and massing of the building) would be effective. The DRB did identify key vantage points and applied relevant guidelines, e.g., vertical and horizontal building modulation, architectural elements, etc., to address the project's scale and mass, and its decision was consistent with the applicable design guidelines. The relative scale of the project, compared with nearby development (e.g., building areas for Bank of America/101, Portsmouth, etc.), shows no errors on the DRB's part.

9. The appeal also objected to the lack of building setbacks and upper story setbacks on the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> floors of the Main Street building. However, no building setbacks are required by Code. The upper story setbacks provided (at the 5<sup>th</sup> and 6<sup>th</sup> floors along the Main Street side) meet Code requirements, and an additional 10-foot upper story setback is provided along the public pedestrian walkway. The DRB did not act inconsistently with the design guidelines by approving the project with these setbacks.

10. The appeal raised concerns about whether adequate parking was being required. The design guidelines do not require that a particular amount of parking be required, since the Code, and possibly the City's SEPA review, will determine the amount and location of parking to be provided. The DRB was not required to consider the adequacy of parking to serve the project.

11. The appeal contended that the proposed landscaping should not have been approved, because the planters would excessively reduce the access way and the wall treatments could only be appreciated from a distance. However, the planters would retain walkway widths of between 7 and 11 feet, which would satisfy the width requirements for the walkway. The proposed landscaping was considered by the DRB in relationship to the applicable design guidelines, including mitigation of blank wall space, and its decision was consistent with those guidelines.

12. The appeal identified other concerns related to precedent, views, and other issues, but the evidence does not show that the DRB decision was incorrect as to any of these matters. The appeal also argued that the decision was not consistent with the Comprehensive Plan. Even if a DRB decision concerning non-residential projects (i.e., those not subject to KZC 142.35.3.c) were to be compared with the Comprehensive Plan, the project here was shown to comply with the development standards that implement the Plan, and to comply with the applicable design guidelines. The Plan policies cited do not show that the DRB decision was in error.

13. At hearing, the Appellants submitted a letter from their attorney which argued that the DRB decision violated SEPA because it was made without SEPA review. The letter also requested that in light of 2008 and 2009 approvals, the current proposal, as well as the "Phase I" proposal now before the DRB, the Examiner determine the status of the 2008 and 2009 project applications, and continue the current proceeding pending the outcome of the DRB review (and any appeals of that review) of Phase I. The issue of whether the DRB decision violated SEPA was not raised in the initial appeal letter, and is outside the scope of the appeal; KZC 142.40.7; it cannot be considered in this appeal. But even if this issue could be considered, it is not clear from this record that the Hearing Examiner would have authority under KZC 142.40 to reverse the DRB decision because of the lack of SEPA review, or to conduct a review of previous or subsequent design review applications.

14. The evidence does not show that the DRB's decision was in error. It should therefore be affirmed.

### **Decision**

The Design Review Board's decision is AFFIRMED.

Entered this 10th day of April, 2013.

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Anne Watanabe  
Hearing Examiner

The following exhibits were entered into the record on this matter:

- Exhibit 1: Staff report dated March 26, 2013, together with Enclosures 1-10.
- Exhibit 2: Department power point presentation
- Exhibit 3: Appellant Rohrback power point presentation
- Exhibit 4: Letter dated April 4, 2013, from J. Richard Aramburu, attorney at law (submitted by Appellants Rohrback, Hart and Christie)
- Exhibit 5: Restrictive covenant dated August 4, 1995 (Applicant)
- Exhibits 6 and 7: Applicant's photos of site
- Exhibit 8: Landscaping Improvement Agreement dated February 7, 2013 (Applicant)
- Exhibit 9: April 2008 Appeal of March 2008 DRB decision (Applicant)

Parties of Record:

Department of Planning and Community Development

Applicant Rick Chesmore with Chesmore/Buck Architecture, by Christopher Brain, attorney at law

Appellant Residents of Merrill Gardens (Ellen Glauert and Barbara Flagg), by Brent Carson, attorney at law

Appellant Dr. and Mrs. Brian Rohrback, Sandi Hart and Stan Christie, and J. Richard Aramburu, attorney at law

### **Concerning Further Review**

KZC 142.40.1.b provides that the judicial review procedures and provisions in KZC 145.110 apply. KZC 145.110 provides that *"The action of the City in granting or denying an application under this chapter may be reviewed pursuant to the standards set forth in RCW 36.70C.130 in the King County Superior Court. The land use petition must be filed within 21 calendar days of the issuance of the final land use decision by the City. For more information on the judicial review process for land use decisions, see Chapter 36.70C RCW."*