

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

In the Matter of the Appeal of

File No. SEP07-00031

ARNI FREDRICKSON

from a SEPA determination issued by the
Director of the Planning and Community
Development Department

Introduction

The Director of the Planning and Community Development Department, acting as the Responsible Official under the State Environmental Policy Act, Chapter 43.21C RCW, issued a Mitigated Determination of Nonsignificance (MDNS) for a mixed use project referred to as the Waterbrook. The project includes 84 condominium units and approximately 12,000 square feet of office/retail space on the ground floor, with underground parking. The Appellant, Arni Fredrickson, appealed the MDNS.

The appeal hearing was held on July 22, 2008, before the Hearing Examiner (Examiner). The Appellant represented himself; the Applicant, Juanita Partners LLC, was represented by Chase C. Alvord, attorney-at-law; and the Director of the Department of Planning and Community Development (Department) was represented by Susan Greene, Project Planner. The Examiner visited the site on the day of the hearing.

After considering the evidence in the record and inspecting the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal:

Findings of Fact

1. The proposal site is addressed as 11810 and 11820 98th Avenue Northeast in the South Juanita neighborhood, and consists of three parcels with approximately 52,000 total square feet. It is zoned JBD (Juanita Business District) 2, which allows commercial and residential development, and is currently developed with three commercial structures.
2. The proposed development required Design Review under Chapter 142 of the Kirkland Zoning Code, as well as a building permit. The Design Review process included the opportunity for public comment.
3. The Design Review Board meetings and decision addressed issues of scale; access; open space and landscaping; building materials, color and detail; and compliance with zoning code standards, including permitted uses, setbacks, height, lot coverage, landscaping, parking, pedestrian connectivity, and the view corridor required by KZC

52.15 in exchange for a height increase of up to 13 feet. *See* Exhibits I, E and A, Attachment 3.

4. The Design Response Conference Staff Advisory Report addressed the Comprehensive Plan designation for the property, and discussed the vision for the Juanita Business District and Plan language which states that additional building height may be approved by the Design Review Board if views from the East Ridge are preserved. Exhibit I; Exhibit A, Attachment 5.

5. The project received Design Review approval on April 9, 2007. Exhibit A, Attachment 4. The Design Review Board Decision was not appealed.

6. On October 2, 2007, the Applicant submitted a building permit and SEPA checklist. Because more than nine units are proposed, SEPA review was required. Following the Applicant's agreement to mitigate a safety concern involving the location of a crosswalk on 98th Avenue, the Department issued the MDNS (Exhibit A, Attachment 2).

7. The Appellant, Arni Fredrickson, owns property located on the East Ridge, directly east of the project site. He makes several claims in his challenge to the MDNS: 1) the City did not comply with notice requirements for the design review process; 2) the view corridor mentioned in the Comprehensive Plan, and required by the zoning code in exchange for additional building height, has not been provided; 3) the Applicant's architect has mislead the City; and 4) the MDNS fails to consider the impacts associated with the project's use of an access easement shared by the Appellant, including impacts on the Appellant's use of the easement as a pedestrian pathway, emergency exit, and turn around. Exhibit A, Attachment 1.¹

8. Under KMC 24.02.105(h)(1), the Hearing Examiner is to consider all information and material "within the scope of the appeal submitted by persons entitled to participate in the appeal." Therefore the issues before the Hearing Examiner are limited to those stated in the Appellant's two appeal letters. In addition, KMC 24.02.105(i)(2) states SEPA's requirement that the Examiner accord substantial weight to Department's MDNS.

Conclusions

1. The issue of the City's compliance with notice requirements for the Design Review Process, culminating in the Design Review Board's decision in April of 2007, is not within the Examiner's jurisdiction under Chapter 24.02 KMC. This issue concerns procedures required by Chapter 142.35 for the Design Review process, not procedures related to the Department's SEPA determination.

¹ Issue 4 was filed as a separate appeal, and was originally entitled "Concurrency Appeal," but the word "Concurrency" was stricken and replaced with "Supplemental SEPA". Therefore, the Examiner reviews this issue under SEPA rather than under Chapter 25.23 KMC on concurrency.

2. The Appellant's issues concerning the view corridor provided by the project are also not properly considered in an appeal of the MDNS at issue here. These issues relate to the City's application of a zoning code section, KZC 52.15, and were addressed through the Design Review Process. The Comprehensive Plan language on preserving views from East Ridge when allowing additional height in the JBD 2 zone was also considered during Design Review. The Design Review Board's decision was not appealed, as allowed under KZC 142.40, and it cannot be collaterally challenged through a SEPA appeal filed more than a year after the Design Review Board's decision was issued. *See also*, RCW 43.21C.240.

3. Whether or not the Applicant's architect mislead the City is not an issue within the scope of SEPA, which addresses review of *environmental* impacts. *See* WAC-197-11-444, adopted by reference in KMC 24.02.065. Consequently, it is not within the Examiner's jurisdiction in an appeal of an MDNS.

4. The Appellant cites negative impacts that he believes will result from the project's use of a shared access easement from 98th Avenue Northeast. The Applicant asserts that the Appellant has no legal right to use the areas Appellant claims for emergency access and turn-around purposes. There is no evidence in the record on the parties' respective rights to use the private easement and, in any event, the Examiner has no jurisdiction to adjudicate that issue. It is a private legal matter that can be resolved in a different forum.

5. There is no evidence in the record that the access easement is designated as a pedestrian pathway or has any other designation that would prohibit its proposed use as access to the project. Further, as noted in the staff report, a safety issue with an existing crosswalk across 98th Avenue Northeast to the subject property was identified during SEPA review, and the Applicant was required to move the crosswalk 50 feet to the north to eliminate a possible safety hazard for cars and pedestrians. With the Applicant's agreement to this measure, the MDNS was issued. Although the Appellant addressed the feasibility of the new location for the crosswalk at hearing, this issue was not raised in the appeal letters and thus, under KMC 24.02.105(h)(1), cannot be considered by the Examiner.

6. In addition to requiring that the crosswalk be relocated, the City has requested that the Applicant provide a new turn around area on the property, which would be installed within the fire access area, and a loading zone will be created along 98th Avenue Northeast. The City's Fire Department has approved the access for the proposal and has required an access area at the east end of the structure. On this record, the Appellant has not shown that the MDNS was clearly erroneous, and it should therefore be affirmed.

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Decision

The Mitigated Determination of Nonsignificance issued by the Department is **AFFIRMED**.

Entered this 25th day of July, 2008.

Sue A. Tanner
Hearing Examiner

Exhibits

The following exhibits were entered into the record:

- Exhibit A Department's Advisory Report with seven attachments
- Exhibit B Email comment letter from Duane Hansen to Kirkland Council, dated July 22, 2008 with attachment "Vivian's SEPA letter"
- Exhibit C Appellant's "SEPA Verbal Appeal" dated 7/22/08
- Exhibit D Public Notice documents
- Exhibit E KZC §52.15
- Exhibit F Note "From the desk of Stacy Clauson," Planning & Community Development with yellow highlighting
- Exhibit G Letter from Rob Jammerman, Development Engineering Manager to Arni Fredrickson, dated July 9, 2008
- Exhibit H Letter from Arni and Elaine Fredrickson to City of Kirkland, dated 6/23/08 with nine attachments
- Exhibit I Department of Planning and Community Development Design Response Conference Staff Analysis in File DRC07-00002, dated March 12, 2007
- Exhibit J Applicant's Brief in Response to Appeal dated July 22, 2008

PARTIES OF RECORD:

Appellant: Arni Fredrickson, 11804 98th Avenue Northeast, Apt. E, Kirkland, WA 98034
Duane Hansen, email address – duaneh@pcf.com

Nazanin Kimiai, 11656 98th Avenue Northeast, Kirkland, WA 98033

Applicant: Juanita Partners LLC, PO Box 1797, Bellevue, WA 98009

Applicant's Architect: William Walker, PO Box 1492, Edmonds, WA 98020

Applicant's Attorney: Chase C. Alvord, 1700 Seventh Avenue, Suite 2200, Seattle, WA 98101

Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

Concerning Further Review

KMC 24.02.110 states that: "Judicial review of SEPA determinations are by RCW 43.21C.075 required to be heard only at the time of judicial review of the underlying action, i.e., approval or disapproval of the proposal for which SEPA review is required. For rules on perfecting and timing of the SEPA determination and judicial review, see RCW 43.21C.075 and WAC 197-11-680(4). The notice required by WAC 197-11-680(5) shall be appended to the permit or "notice of appeal at the time of final city action."