

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE
FOLLOWING RECONSIDERATION**

In the Matter of the Appeal of

CLAUDIA LUDWIG, et al.

from a development standard departure
decision issued by the Director, Department
of Neighborhoods

Hearing Examiner File:
MUP-13-009 (DD)

Department Reference:
3009292

Introduction

The Director of the Department of Neighborhoods issued a decision approving a development standard departure for a changing-image electronic reader board sign in a single-family zone. The Appellants¹ exercised the right to appeal the Director's decision pursuant to Chapter 23.79 Seattle Municipal Code.

The appeal hearing was held on July 31, 2013 before the Hearing Examiner (Examiner). The Appellants were represented by Claudia Ludwig, *pro se*; the Applicant, Madison Middle School PTSA and Seattle School District, and the Director of the Department of Neighborhoods (Director), were represented by Steve Sheppard, Senior Planning and Development Specialist, *pro se*. The record was held open until August 12, 2013, for receipt of a traffic engineer's declaration from the Department and a response from the Appellants, and for the Examiner's site visit, which occurred on August 4, 2013. The Department's declaration was filed on August 5, 2013, and was marked as Exhibit 27. The Appellants filed no response. The Examiner issued a decision on the appeal on August 14, 2013. The same day, the Examiner received a request for reconsideration from the Appellants stating that their representative had not responded to the traffic engineer's declaration because she had not been served with it. The Examiner granted the request for reconsideration, required the Department to immediately serve the Appellants with the declaration, and reopened the record for receipt of the Appellants' response, which was filed on August 21, 2013 and marked as Exhibit 28.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. Having considered the evidence in the record and inspected the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

¹ The Appellants include the following: Claudia and Adam Ludwig; Tori Smith and Frank Hart; Lara and Kelly Garrett; Holly and Cory Hughes; Barbara and Don Henson; and Lisa Weeks.

Site and Vicinity

1. Madison Middle School (the school) is a public middle school located at 3429 45th Avenue SW in the West Seattle neighborhood. The school campus is just under 8 acres in size and encompasses two full blocks. It abuts four non-arterial streets, all of which are fully improved: SW Hinds Street on the north, SW Spokane Street on the south, 45th Avenue SW on the east, and 47th Avenue SW on the west.
2. The school's three-story educational building, a designated landmark, fronts on 45th Avenue SW, which is wider than most residential access streets. South of the landmark, on the corner of 45th Avenue SW and SW Spokane Street, is a landscaped surface parking lot and student drop-off area. A detached gymnasium is set back from 45th Avenue SW behind (to the west of) the parking lot. The right-of-way adjacent to the landmark, 45th Avenue SW, has no street trees. Adjacent to the parking lot, the right of way includes several mature street trees, including three conifers.
3. The school campus and surrounding area are zoned Single Family 5000, and there are single family residences across the streets from the school on all sides. Schmitz Park and Schmitz Park Elementary School are located three blocks to the west, and West Seattle High School and Hiawatha Community Center are located three blocks to the northeast. Multifamily and commercial zoning and development are located along California Avenue SW, approximately two blocks to the east.
4. The surrounding neighborhood appears stable and shows pride of ownership. Residents who testified at the hearing emphasized their support for both the school and their neighborhood.

Proposal

5. Beginning in 2007, the school's Parent Teacher Student Association (PTSA) started looking for ways to increase communication between the school, parents and the community. It developed several new communication methods, but a subsequent survey of parents coming through the west parking lot to drop off students, found that many lacked awareness of school events.
6. The PTSA determined that a reader board sign would help improve communication with parents and build community by: 1) Providing updates on school activities and evening events; 2) informing neighbors of upcoming events that could result in parking issues; 3) announcing student, staff and school achievements throughout the year; 4) providing updates on past and future fundraising efforts; 5) displaying PTSA messages including requests for volunteer help, announcements of upcoming meeting times, and messages encouraging involvement in school events; and 6) providing a level of communication to many in the school community "who otherwise do not, or are not able to seek out information offered by other means." Exhibit 14 at 5-6.

7. The Seattle School District considers reader board signs an important communication tool for middle and high schools and notes that middle schools frequently need to provide several different messages per day. The School District has found that effective outreach to parents and the surrounding community creates more positive involvement and support for school activities and organizations.

8. The School District and the PTSA propose to install a single-face, changing-image, electronic reader board sign on the eastern-most façade of the school gymnasium facing the parking lot and student drop-off area. The sign would be approximately 30 square feet in size, with approximately 15 square feet devoted to messaging. It would be illuminated internally and located 12 feet 9 inches above the school walkway at the gymnasium's enclosed entry. The sign would be designed to display programmed messaging created remotely from a staff computer in the school office.

9. When illuminated, the proposed sign would produce a brightness level of .3 foot candles above ambient light conditions and would adjust automatically to changing ambient light levels. It would be designed to use only amber-colored LEDs. The sign would have no videographic capability, could not be converted to a video sign, and would have a pixel rate far below that required for video signs. The company supplying the sign would provide the school with a calendaring tool that would automatically delete outdated information from the sign.

10. The front property lines of the residences along 45th Avenue SW and SW Spokane Street that have sightlines to the eastern-most façade of the gymnasium are between approximately 200 feet and approximately 300 feet from that facade. Exhibit 24 at pages 1-5 shows that the amount of brightness (illuminance) that would be experienced at those distances from the sign would be between .011 foot candles and .005 foot candles.²

11. The interim principal at the school has experience with a reader board sign at a different school and expects to implement policies that regulate the content and timing of messages and emphasize the permitted hours of operation. To have the sign turned off if it is inadvertently left on past the allowed hours, neighborhood residents may call the school principal, or the School District's Facility Planner, who provided her contact number at the hearing.

12. Exhibit 18 includes photographs that show a driver's view of the proposed sign location from various places along 45th Avenue SW. Exhibits 1 and 18 include photographs that show views of the proposed sign location from front yards and residences along the east side of 45th Avenue SW.

13. A 30 square-foot reader board sign that was illuminated until 10 p.m. would be permitted in a single-family zone without a development standard departure. SMC

² Exhibit 24 notes that a 60W incandescent bulb with an intensity of 800 lumens has an illuminance of .6 foot candles at 10 feet.

23.55.020.D.7. One that allowed changing images would require a departure. SMC 23.55.020.B.

Development Standard Departure Review and Decision

14. To request a changing-image sign, the School District asked the City to initiate the development standard departure process. A Development Standard Advisory Committee (Committee) was convened pursuant to SMC 23.79.004 and .006, and met on June 25, 2012 to review the departure request, take public comment and questions, and make its recommendation. The Committee voted 5 to 3 to adopt a recommendation that the departure be approved. The Committee minority accepted the educational goal of better communication but questioned the effectiveness of a reader board in light of the board's location in the parking lot and the availability of other means of communication. The Committee majority concluded that the reader board would be an effective tool in addressing the school's overriding need for better communication with parents and the community, but recommended the following conditions be imposed to protect the surrounding residential neighborhood:

- frequency of change no more than once every 20 seconds;
- sign shall have no video capability, no flashing, i.e. sign that changes light intensity in a sudden transitory burst and no animation;
- the sign shall only project static text messages, no flashing, streaming, scrolling text allowed;
- additional imagery consisting of pictures, graphics, or video display is not allowed;
- there shall be no incorporation of advanced technology such as video imaging capacity or rapid animation;
- commercial advertising not be [sic] permitted on the sign;
- local community messages, public service announcements are permitted but shall not comprise no more than 10 percent of messaging time [sic];
- the sign shall be on a timer or otherwise off between 7:00 p.m. and 7:00 a.m. on weekdays and 5:00 p.m. and 9:00 a.m. on weekends; and
- the maximum signs [sic] size restricted to no more than 30 square feet.

Exhibit 14 at 6-7.

15. A planner from the Department of Planning and Development attended the Committee's meetings and reviewed its report and recommendation. The planner also reviewed the sign plans and other materials. The Department recommended approval of the departure as conditioned by the Committee.

16. Pursuant to SMC 23.79.010, the Director reviewed the Committee's report and recommendation, including the reported concerns of the Committee members who voted against the request, reviewed public comment on the request, and analyzed the departure request in accordance with the factors set forth in SMC 23.79.008.C.

17. The Director noted that a changing-image sign at a school was not necessarily part of the character of a single-family neighborhood and that there were no illuminated signs in the immediate vicinity of the school. However, the Director concluded that a programmable, multi-message, changing-image sign would provide greater efficiencies for the school and allow broader communication about upcoming events to students, parents, and the surrounding community. She concluded that the sign's potential impacts on the surrounding neighborhood could be sufficiently mitigated through imposing conditions on its use. Exhibit 15 at 6.

18. The Director approved the development standard departure subject to most, but not all of the conditions recommended by the Committee. *Id.*

Appeal

19. The Appellants allege that the development standard departure will negatively impact the character of the surrounding single-family neighborhood and will be distracting to drivers, cyclists and pedestrians, thereby creating safety concerns. They also allege that the need for the departure was not properly balanced with the departure's level of impact on the surrounding area.³

Applicable Law

20. SMC 23.79.008.C provides that departures are to be evaluated for consistency with the "general objectives and intent of the City's Land Use Code including" the Code's rezone evaluation criteria in Chapter 23.34 SMC "to ensure that the proposed facility is compatible with the character and use of its surroundings."

³ The appeal also raised issues concerning the composition and objectivity of the Committee, which were dismissed on the Department's motion prior to hearing. SMC 23.79.012.D provides that appeals before the Examiner "shall be considered de novo" and that the Examiner's decision shall be "made upon the same basis as was required of the Director." SMC 23.79.010.A states that the Director's decision must be based on "an evaluation of the factors set forth in subsection C of Section 23.79.008" The factors set forth in SMC 23.79.008.C, quoted above, are those that the Committee is required to consider in reaching a recommendation. The composition and objectivity of the Committee are procedural issues and are not included in SMC 23.79.008.C as factors for consideration. Therefore, under SMC 23.79.012.D, the Examiner does not consider them either. Further, a fundamental rule of statutory construction states that where a legislative body has used certain language in one instance and different language in another, there is a difference in legislative intent. *Spain v. Employment Security Dept.*, 164 Wn. 2d 252, 259, 185 P.3d 1188 (2008); *United Parcel Service, Inc. v. Department of Revenue*, 102 Wn. 2d 355, 362, 687 P.2d 186 (1984). In another part of the Land Use Code, SMC 23.76.022 relating to administrative appeals of Type I and Type II master use permits, the City Council has expressly authorized the Examiner to consider procedure issues on appeal: "Appeals shall be considered de novo. The Hearing Examiner shall entertain issues cited in the appeal *that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76*" (Emphasis added.) Thus, when the City Council intended to confer jurisdiction on the Examiner to consider procedural issues on appeal, it did so expressly. The lack of such an express authorization in SMC 23.79.012 must be construed to foreclose the Examiner's consideration of procedural issues concerning the Advisory Committee process. Such issues must be directed to the Director outside the appeal process, or to court on appeal of the Examiner's decision.

21. The "general objectives and intent" of the Land Use Code are to "provide adequate light, air, access; conserve the natural environment and historic resources; maintain a compatible scale within an area; minimize traffic congestion and enhance the streetscape and pedestrian environment." SMC 23.02.020 (in part).

22. In reviewing a departure request, the Committee and Director are "to consider and balance the interrelationships among the following factors:"

a. Relationship to Surrounding Areas. The advisory committee shall evaluate the acceptable or necessary level of departure according to:

- (1) Appropriateness in relation to the character and scale of the surrounding area;
- (2) Presence of edges (significant setbacks, major arterials, topographic breaks, and similar features) which provide a transition in scale;
- (3) Location and design of structures to reduce the appearance of bulk;
- (4) Impacts on traffic, noise, circulation and parking in the area; and
- (5) Impacts on housing and open space. More flexibility in the development standards may be allowed if the impacts on the surrounding community are anticipated to be negligible or are reduced by mitigation; whereas, a minimal amount or no departure from development standards may be allowed if the anticipated impacts are significant and cannot be satisfactorily mitigated.

b. Need for Departure. The physical requirements of the specific proposal and the project's relationship to educational needs shall be balanced with the level of impacts on the surrounding area. Greater departure may be allowed for special facilities, such as a gymnasium, which are unique and/or an integral and necessary part of the educational process; whereas, a lesser or no departure may be granted for a facility which can be accommodated within the established development standards.

SMC 23.79.008.C.1. *See* SMC 23.79.010.A.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.79.012. The Examiner is to reach a decision on the evidence "upon the same basis as was required of the Director." SMC 23.79.012.D.

2. The Hearing Examiner must give "substantial weight" to the Director's decision. SMC 23.79.012.D. Accordingly, the party appealing it has the burden of proving that the decision is "clearly erroneous". *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005

(1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Examiner is left with a definite and firm conviction that a mistake has been made. *Cougar Mt. Assoc. v. King County*, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

3. The rezone evaluation criteria in Chapter 23.34 SMC that are potentially applicable to a departure request would be the criteria related to applicable neighborhood plans, set forth in SMC 23.34.008.D, and the height limit criteria specified in SMC 23.34.009. Neither applies in this case, however, as the school is located outside the boundaries of any adopted neighborhood plan, and the requested departure does not relate to height limits.

4. The Appellants state that they are concerned that the proposed sign will "distract drivers, cyclists, and pedestrians causing safety concern." Revised Appeal at 3. In support of their concern they presented a two-page document addressing potential federal action "necessary to address operational and legal issues relating to State regulation of commercial electronic variable message signs under the Highway Beautification Act of 1965" (Exhibit 26), a letter from the President of "Scenic America," citing a 2006 study on the impact of driver inattention on the risk of accidents (Exhibit 3), and an article from Crosscut Media on the "billboard lobby" and digital billboards that typically change or flash every eight seconds (Exhibit 4). However, they presented no evidence of any objective basis for traffic safety concerns about *this* sign in *this* location in *this* neighborhood.

5. The Applicant and Department presented a declaration from a City traffic engineer who reviewed: 1) traffic volumes and collision data for the non-arterial streets near the school (*see* exhibits 19 and 20); 2) a plan showing the location of the proposed sign relative to residences, nearby vegetation, and the adjacent streets; and 3) documents describing the sign's dimensions and operating conditions. The engineer observed that the traffic volumes and collision data were unremarkable, and he was aware of no safety issues even with electronic reader board signs located close to the street at other schools. In the engineer's professional judgment, the proposed sign would be located well back from the street and would not be distracting to drivers or present a foreseeable traffic safety issue. Exhibit 27.

6. The Appellants argue in their response to the traffic engineer's declaration that the sign will be visible to drivers on SW Spokane Street and 45th Avenue SW and thus, will be distracting to drivers. Having been to the site, the Examiner is aware of the relative locations of the streets, trees and proposed sign. The sign will be located well back from 45th Street SW, but it will be visible to drivers. However, the fact that drivers will be able to see the sign does not mean that it will be distracting to them, as an electronic reader board sign near the street might be. The totality of the evidence in the record does not support a conclusion that the sign will present a traffic safety issue.

7. The Appellants claim that the proposed sign will cause light and glare impacts. They state that "[w]e do not want to look at electric signs from our properties, at all" and that

they “should not have to” do so in a residential neighborhood. However, a 30-square-foot illuminated sign that remained on until 10:00 p.m. every day would be permitted on the site without a departure. Further, the Appellants' residences are located between 200 and 300 feet away from the proposed sign location, across a landscaped parking lot and an unusually wide non-arterial street with mature street trees and residential landscaping in some locations. *See, e.g.,* Exhibit 24 at 5. The evidence in the record shows that light and glare impacts to those residences would be minimal.

8. The Appellants argue that the sign will reduce property values in the surrounding area. They produced letters from real estate agents estimating the potential reduction in value that could be attributable to a residence being located across from an electronic sign. Exhibit 5. However the realtors were not available for cross examination, and there is nothing in the record to indicate what information they had about the proposed sign or the restrictions on its method and time of operation. In other words, the bases for their conclusions are unclear and untested.

9. The Appellants assert that the sign will significantly impact the character of the surrounding neighborhood and disrupt the residential aesthetic. The neighborhood does have a residential character, but the question of whether the proposed sign will negatively impact neighborhood character appears to be a matter of opinion. An architect who lives in the neighborhood and is familiar with the nature of the proposed sign and restrictions on its operation testified that in his opinion, the sign will not be out of character for a school in a residential area.

10. The Appellants have not shown that the impacts of the proposed sign, with the conditions recommended by the Committee, would so far exceed the impacts of a sign that could be permitted outright that the proposal would be inappropriate “in relation to the character and scale of the surrounding area.” SMC 23.79.008.C.1.a.

11. Finally, the Appellants claim that the need for the departure was not properly balanced with the level of impacts on the surrounding area. They argue that there is no real need for the proposed sign because there are many other methods of communication available, and there is no guarantee that the sign will be equally or more successful than the school's present communication methods in reaching target audiences. However, the record shows that the school is already using other communication methods and that they are not reaching some audiences, including the surrounding community and many of the parents who drop students off in the west parking lot. The proposed sign is designed to reach those audiences in addition to providing a tool for building community within the school. Ironically, the Appellants contend that very few people who walk, cycle, or drive by the sign, or even into the parking lot, will notice its messages, but they provided no evidence in support of this contention.

12. The Director's decision approving the departure was not shown to be clearly erroneous. However, to mitigate the potential impacts of the proposed sign, the Director's decision should be modified to include all conditions recommended by the Committee plus a further reduction in hours of operation.


Decision

The Director's decision approving the development standard departure is **MODIFIED** to revise the conditions of approval to read as follows:

For the Life of the Project:

1. In accordance with SMC 23.55.020.D.7, the sign shall not exceed 30 square feet in area.
2. The hours of operation are restricted to the following: 7:00 a.m. to 7:00 p.m. on weekdays and 10:00 a.m. to 4:00 p.m. on weekends and school holidays and breaks.
3. The sign shall project only static text messages; no flashing, streaming or scrolling text is allowed, and additional imagery, such as pictures, graphics, video display, or animation, is not allowed.
4. Static text messages may cycle no more frequently than once every 20 seconds.
5. Local community messages and public service announcements shall not comprise more than 10 percent of the messaging time.
6. The sign shall have no video capability, and there shall be no incorporation of technology such as video imaging capacity, rapid animation, or flashing (i.e., a sign that changes light intensity in a second transitory burst).

Entered this 27th day of August, 2013.


Sue A. Tanner
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 in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is

issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration 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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