

BEFORE THE CITY OF SEATTLE
OFFICE OF HEARING EXAMINER

NEIGHBORS ENCOURAGING REASONABLE
DEVELOPMENT,

Appellant,

v.

DIRECTOR, SEATTLE DEPARTMENT OF
PLANNING AND DEVELOPMENT, and

RADIM BLAZEJ,

Respondents.

Hearing Examiner File No. MUP-14-006

(DPD Application No. 3013303)

**REPLY IN SUPPORT OF AMENDING
PREHEARING ORDER AND
RESPONSE TO APPLICANT'S DE
FACTO MOTION TO PROCEED
DESPITE SUPPLEMENTAL
INTERPRETATION
ACKNOWLEDGING PROJECT
NONCOMPLIANCE**

I. INTRODUCTION

DPD's failure to carefully check the project plans and to reject community concerns about them was a disservice to the community. Now that it has acknowledged that the plans were approved in error, its Decision must be withdrawn. If DPD, as appears the case, will not do so, then the Examiner should set a schedule for addressing that issue only before the more time and money is spent on the appeal over-all.

II. FACTUAL BACKGROUND

On February, 2014 the Applicant submitted to DPD its latest plans for this project. The February iteration plans called out FAR square footage well below the applicable Land

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1 Use Code FAR limit. Several months later, presumably after DPD review, the Director issued
2 a decision (over Garry Papers' signature) approving the project MUP. The Decision relied on
3 purported Design Review Board conclusions concerning what mitigation was appropriate and
4 declined to utilize the Director's SEPA authority to require further mitigation. The underlying
5 premise of the Director's Decision was that the project was fully compliant with the Land Use
6 Code and that in fact the purported Design Review "mitigation" went the extra mile despite
7 the fact that the project was already more-than-compliant with the Land Use Code.

8
9 Nonetheless, DPD's record was brimming with objections from Neighbors
10 Encouraging Responsible Development ("NERD") members questioning the Department's
11 review and its conduct of the Design Review process for the project. These objections
12 centered, *inter alia*, on the concern that the building overall was excessive for its location,
13 juxtaposition with SF zoning, and the community over-all. In response, DPD, through Mr.
14 Papers, instructed the Design Review Board and admonished NERD members and the
15 community at large that the project complied with the Land Use Code and was therefore not
16 subject to a reduction in floors or square footage.

17
18 DPD's May 15, 2014 decision gave no ground on the core issues raised by the
19 community. NERD therefore filed an appeal and a Request for Interpretation (RFI) on various
20 questions having to do with compliance with the Land Use Code. These filings were
21 expensive to prepare. In addition, DPD required a \$2500.00 advance payment on the Request
22 for Interpretation. These were filed and all fees paid on May 29, 2014.

23
24 The prehearing conference (PHC) on the appeals took place on June 17, 2014. This
25 allowed the Applicant and DPD an additional six weeks from the time of filing of the RFI and
26

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1 Appeal – and a total of four months since the February, 2014 plans were submitted to DPD --
2 to check their work and verify their key premises. It was with this background that NERD
3 counsel requested at the PHC's start that the PHC be continued until after DPD had issued its
4 Interpretation Decision. In making the request, NERD counsel explicitly cited NERD's
5 Interpretation issue asserting that the project was not Code compliant and in fact violated the
6 applicable FAR limit.

7
8 A PHC discussion ensued in which NERD counsel noted that the case "schedule
9 would flow from that Interpretation" while DPD's Mr. Mills dismissed NERD's issues
10 concerning Code noncompliance as just "arguments". He even suggested that DPD really
11 should not have to produce its Interpretation more than five days before the appeal hearing
12 because if he produced them sooner NERD counsel would just "prepare more complicated
13 arguments" against the project, as if DPD's interest was in defending the project rather than
14 reaching an appropriate decision under the Code.¹ NERD counsel continued to point out that
15 if there was noncompliance with the Code FAR limit, then the whole project goes away.
16 Applicant counsel Hill even appeared to agree that would save the parties some expense.

17
18 The upshot of the PHC was a Prehearing Order ("PHO") setting July 11 as the outside
19 due date for the DPD Interpretation. DPD took all the time it was allowed. On July 11, 2014,
20 five months after Applicant's February submission of plans, about two months after the date
21 of the DPD Director's Decision, and over 5 weeks after NERD submitted its Notice of Appeal
22 and RFI, DPD issued its Interpretation rejecting each of NERD's requested Interpretations,
23 including several on the grounds that DPD did not have to address them all as part of the
24

25 ¹ Mr. Mills repeated that he'd "seen nothing but argument on FAR" belittling an issue that DPD could have
26 readily checked on its own even before the PHC.

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1 Interpretation process, a rote outcome that presumably did not require much time for DPD to
2 reach.

3 With regard to FAR, the July 11 Interpretation acknowledged that the Applicant had
4 understated FAR square footage, so much so that DPD now acknowledged it bumped right up
5 against the Code FAR limit for the project. The July 11 Interpretation went through an
6 elaborate explanation for how FAR is calculated in “explaining” that the project was
7 compliant. Appellant counsel, consultants, and clients then commenced intensive review and
8 preparation for pursuing appeal of the Interpretation, with a significant cost in time and
9 expense particularly on the FAR question. NERD also noted and began preparations for the
10 deposition of William Mills, who signed the Interpretation for the Director.
11

12 Then, as previously described, after business hours on July 17, 2014, effectively one
13 week after the deadline for the DPD Interpretation set by the Examiner, DPD issued by e mail
14 a “Supplemental Interpretation” grudgingly acknowledging that the project was in fact
15 noncompliant with the Code FAR limit. No explanation was given for this about face and how
16 it came about, how long DPD had known that NERD’s concerns were in fact well-founded,
17 and whether in fact the DRB had been notified that the project overall consisted of at least a
18 half story more worth of FAR chargeable square feet than had been acknowledged.²
19

20 NERD counsel quickly raised this turn of events with the Examiner, requesting that
21 the remaining PHO dates be suspended and that no further deadlines be imposed until
22 dispositive motions concerning the project had been heard and resolved. DPD has not
23

24
25 ² The Applicant’s Response states that “Subsequently, DPD elected to conduct additional review” but does not
26 disclose how it knows that such an “election” occurred or its circumstances.



1 responded to this request at all, apparently unwilling to take responsibility for its prior
2 handling and withdraw the Director's decision, leaving the question for the Examiner.

3 III. ARGUMENT

4 It is disappointing that DPD has chosen to stand pat in the face of information
5 suggesting that a key premise for review and approval of the project was incorrect.

6 The Applicant's initial response to NERD's request was that NERD was attempting to
7 initiate a procedurally improper amendment to the PHO. There was no acknowledgement that
8 DPD had already amended the PHO on a self-service basis.

9
10 Subsequently, the Applicant submitted a formal Response characterizing NERD's
11 request for suspension of the PHO in light of recent events as a request for a "continuance".
12 The Applicant Response makes light of the FAR turn of events to the point of
13 mischaracterization, going so far as to suggest that NERD "has not identified any specific
14 objections to the Project FAR." In fact, this issue was specifically raised by NERD counsel at
15 the PHC, the objection that the FAR was in excess of the allowable limit was explicitly noted,
16 and it was explained that the Code compliance issues including in particular the FAR
17 exceedance issue had implications for the entire appeal, both Interpretation and MUP alike.
18 This was discussed at several times throughout the June 17, 2014 PHC ³ including in this
19 exchange:
20

21
22 Hearing Examiner: Is there any benefit in getting the interpretation on FAR first?

23 Mr. Eglick: I think so and I'm willing to hear what Rich has to say, but I think so
24 because if for some reason DPD decides that it's not compliant, I think

25 ³ The Examiner may wish to review the recording in advance of the upcoming July 23, 2014 conference call
26 among the parties.

1 the whole matter goes away. It has to, because what was approved and
2 what the Design Review Board had in front of it wasn't Code
compliant.

3 Under the Code, the violation of an FAR limit is no small matter or "slight
4 discrepancy" contrary to what the Response suggests. The Land Use Code allows no leeway
5 and flatly, explicitly prohibits development standard departures for Floor Area Ratios. SMC
6 23.41.012 B 14.

7
8 There is therefore no question that the project here must be changed. The Response
9 suggests that the changes will be easy and inconsequential, and assures with unintended irony
10 that "The architect expects to submit them to DPD promptly. It is understood DPD would also
11 intend to review them promptly." Response at 2. Subsequently, the Applicant speaks for the
12 City (which filed no Response) and assures that "Under Applicant's proposal, NERD will
13 have a full two weeks to review the slightly revised plans as approved by DPD. We
14 understand that DPD will be able to review the revised plans by August 1." Response at 3.

15
16 This proposal of course assumes that DPD at the Applicant's behest should -- or can --
17 swap out one set of plans for another and pretend that they were the ones on which the DRB
18 acted and the Director issued his decision. However, that is a critical threshold issue. If DPD
19 and the Applicant intend to proceed on that basis, then the first order of business should be
20 discovery about and resolution of that dispositive threshold issue before more time and money
21 are spent on the assumption that a plenary hearing will have to occur.

22
23 One can understand why the Applicant would want DPD to look at the revised plans
24 quickly -- and not closely -- and rush them out. However, the import of the schedule proposed
25 by the Applicant would be that NERD would see the plans on which further proceedings
26

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1 would be based two months after the Notice of Appeal and RFI was filed -- rather than at least
2 several months before as is typical when a project goes through DRB and Director review.
3 This of course highlights the inappropriateness of the course which DPD has apparently now
4 set by default. It further highlights the need for a schedule that allows ample time for NERD
5 review after the revised plans are approved -- again assuming that there is a lawful means for
6 DPD and the Applicant to "approve" and substitute new plans after an appeal has been filed
7 and has been underway for two months.

8
9 While the Applicant may complain about lost time, it is after all the Applicant and
10 DPD who are responsible for the loss. NERD counsel noted at the start of the PHC that DPD
11 had already delayed on the Interpretation, identifying particularly the FAR issue, and asking
12 for a schedule that would bring that issue to the fore quickly with a minimum of expense to all
13 concerned. In addition, NERD counsel informally cautioned Applicant counsel and Mr. Mills
14 both before and after the PHC that the FAR should be checked because it appeared to be
15 noncompliant.

16
17 NERD therefore opposes as inappropriate the schedule proposed by the Applicant.
18 NERD respectfully requests that the Examiner, working from the August 1, 2014 date which
19 the Applicant (somehow) knows will be the date of DPD approval of revised plans, set a
20 dispositive motion schedule as follows: NERD's's Motion due September 8, Responses due
21 September 22, 2014, NERD Reply (if any) due September 29, with an Examiner decision
22 deadline and subsequent deadlines (e.g. lists, etc.) leading up to a hearing set at the
23 Examiner's discretion and depending on the outcome of NERD's dispositive motions.
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25
26

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1 During the pendency of the over-all schedule, NERD would pursue discovery, including
2 concerning the revised plans. ⁴

3 IV. CONCLUSION

4 For all the reasons discussed above, the current schedule should be stricken and the
5 schedule proposed by Appellant NERD adopted.

6
7 Dated this 22nd day of July, 2014

8
9 EGLICK KIKER WHITED PLLC

10
11
12 By  _____

13 Peter J. Egllick, WSBA #8809
14 Attorney for Appellant
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25 ⁴ It is respectfully noted that in proposing this schedule NERD is not waiving or abandoning any argument
26 concerning the impropriety of an appeal proceeding based on application plans prepared months after the DRB
and Director rendered a decision based on different plans.

CERTIFICATE OF SERVICE

I, Fred Schmidt, an employee of Eglick Kiker Whited PLLC, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On July 22, 2014, I caused to be delivered, a true and correct copy of the foregoing document by e-mail to the following individuals:

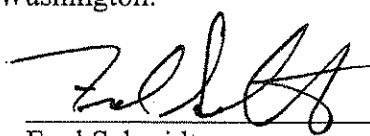
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 22, 2014 at Seattle, Washington.



Fred Schmidt

