

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

CONCERNED BLANCHET NEIGHBORS

from a decision by the Director,
Department of Planning and
Development on a Master Use Permit

Hearing Examiner File:
MUP-13-007(CU,V)

Department Reference:
3012520

**ORDER ON MOTION FOR
SUMMARY JUDGMENT**

The Director of the Department of Planning and Development (Director) issued a decision approving an application by Bishop Blanchet High School (Blanchet) to install four 70-foot-tall light poles and a new field broadcast system at the school's athletic field. The proposal required a variance to allow the field light poles to exceed the maximum height limit in a single-family zone, and an administrative conditional use (ACU) permit to allow the field lighting and modify conditions imposed under a prior ACU. Concerned Blanchet Neighbors (Appellant) appealed the decision and filed a motion for summary judgment on its challenge to the Director's variance decision. The motion was fully briefed by all parties.

Background

Blanchet is a private high school located at 8200 Wallingford Avenue North. The subject property is nearly two city blocks in size and is bordered by North 85th Street on the north, North 82nd Street on the south, Wallingford Avenue North on the west, and Meridian Avenue North on the east. The property and surrounding area are zoned Single-Family Residential 5000, with some multifamily zoning to the southwest. The neighborhood is developed primarily with one-and two-story mid-century residences. Private school facilities are permitted as a conditional use within single-family residential zones. SMC 23.44.022.A.

Blanchet offers its students a program of numerous athletic activities, which are heavily subscribed. On the northeast corner of the property, adjacent to the school building is a regulation, multi-sport, artificial turf athletic field with bleachers on both sides and a field broadcast system. *See* Declaration of G Richard Hill, Exhibit E at 7. The field is unlighted and is used during the day for physical education classes, and afterschool for sports practices and games. Blanchet rents lighted fields for team practices and games after dark. Renting fields has become increasingly difficult due to cost, travel distance, and competition for the fields.

On November 1, 2011, Blanchet submitted a master use permit application for the variance and ACU at issue. On May 16, 2012, Blanchet submitted an application for a building permit for the light poles. Declaration of G. Richard Hill, Exhibit L; Declaration of David S. Mann, Exhibit 2. The Director issued a decision approving the variance and administrative conditional use on April 25, 2013.

Standard of Review

Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice (HERs) states that for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." The moving party must demonstrate the absence of a factual dispute, and all facts and reasonable inferences must be considered "in a light most favorable to the nonmoving party." *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.2d 446 (2001)(citations omitted).

Variance – Height Limits

At the time Blanchet filed its building permit application, SMC 23.40.020.A read as follows:

Variations may be sought from the provisions of Subtitle III, Divisions 2 and 3 of this Land Use Code, except for the establishment of a use that is otherwise not permitted in the zone in which it is proposed, for a structure height in excess of that shown on the Official Land Use Map, from the provisions of Section 23.55.014A, or from the provisions of Chapters 23.52 and 23.58A. Applications for prohibited variances shall not be accepted for filing.

In October of 2012, this Code section was amended by Ordinance 123963 to read as follows:

Variations may be sought from the provisions of Subtitle III, Divisions 2, 3 and 4 of this Land Use Code, except for the establishment of a use that is otherwise not permitted in the zone in which it is proposed, for a structure height in excess of that shown on the Official Land Use Map *or in excess of a height limit established in this Land Use Code*, from the provisions of Section 23.55.014A, or from the provisions of Chapters 23.52 and 23.58A. Applications for prohibited variances shall not be accepted for filing.

Emphasis added.

The height limit for structures in single-family zones is 30 feet. SMC 23.44.012. The Director's variance decision allows Blanchet's light standards to exceed that height. The Appellant seeks summary judgment on its claim that this height variance is prohibited by SMC 23.40.020.A as amended by Ordinance 123963 in October of 2012. However, under SMC 23.76.026, Blanchet's building permit application, filed in May of 2012, vested to the language of SMC 23.40.020.A as it existed at that time, which did not prohibit height variances. The operative language on vesting is as follows:

A. Master Use Permit components other than subdivisions and short subdivisions. Except as otherwise provided in this Section 23.76.026 or otherwise required by law, applications for Master Use Permit components other than subdivisions and short subdivisions shall be considered vested under the Land Use Code and other land-use control ordinances in effect on the date:

....

3. A valid and fully complete building permit application is filed, as determined under Section 106 of the Seattle Building Code ... if it is filed prior to the date established in subsections 23.76.026.A.1 or A.2.

SMC 23.76.026.A.3 (in part). Subsections 23.76.026.A.1 and A.2 refer to the dates of the Director's decision or, if that decision may be appealed to the Hearing Examiner, the date notice of the decision is published.

The Appellant argues that there was no vesting prior to the date of the Director's decision because Blanchet's building permit application was not "valid and fully complete" as required by SMC 23.76.026.A.3. The Appellant claims that the application failed to meet Subsection 106.5 of the Building Code, which defines the requirements for a complete application. Subsection 106.5.9 requires that an application "[s]ubstantially conform with the Land Use Code, critical areas regulations and building code regulations in effect on the date the application is submitted." The Appellant maintains that because Blanchet's application proposed construction of 70-foot-tall light poles in a zone with a 30-foot height limit, the application did not "substantially conform with the Land Use Code" and should have been denied. Under this reasoning, no application for a variance from a land use development standard could ever vest through filing a building permit application. However, if the City Council had intended such a result, they could have expressly excepted variance applications from the general vesting rules of SMC 23.76.026 as they did subdivisions and short subdivisions. The Council did not do so, and the Examiner will not read such an exception into the Code. Because the Code did not prohibit a height variance for the light poles, the motion for summary judgment on this issue is **DENIED**.

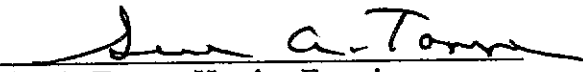
Variance – "Unusual Conditions Applicable to the Subject Property"

SMC 23.40.020.C includes five detailed criteria, all of which must be met for a variance application to be approved. The Appellant seeks summary judgment on its claim that the variance granted to Blanchet does not meet the first variance criterion, which requires that "[b]ecause of unusual conditions *applicable to the subject property, including size, shape, topography, location or surroundings, which were not created by the owner or applicant*, the strict application of this Land Use Code would deprive the property of rights and privileges enjoyed by other properties in the same zone or vicinity". SMC 23.40.020.C.1 (emphasis added). The Appellant asserts that the undisputed facts show that there are no unusual conditions concerning Blanchet's location or surroundings that were not created by the Applicant.

The Director concluded that Blanchet, as a high school within a single family zone, has "operational and development requirements that are unique to its [institutional] needs and not similar to the single family structures or uses in the same zone or vicinity." Director's Analysis and Decision at 3. And Blanchet asserts that "a high school use differs from the surrounding single-family homes. The size of the site is considerably larger. And the uses on the site differ. The institutional use is clearly unusual as compared with the surrounding neighborhood." Applicant Response to Appellant's Motion for Summary Judgment at 10.

The inquiry under the first variance criterion is not whether there are unusual conditions applicable to the *use* established on the property, but whether there are unusual conditions "applicable to the *subject property*" itself. See SMC 23.40.020.C.1. While it is true that Blanchet was constructed within a residential zone, and is surrounded by single-family residences, these facts are not unusual conditions *applicable to the subject property* and, in any event, they were created by Blanchet. The large size of the property relative to the surrounding single-family lots does qualify as an unusual condition applicable to property. However this condition was also created by Blanchet and further, has no bearing on Blanchet's variance request. There has been no showing of unusual conditions applicable to the subject property, and not created by Blanchet, that would cause the requirements of the Land Use Code to deprive the property of rights and privileges enjoyed by other properties in the same zone or vicinity. There is no genuine issue as to any material fact, and the Appellant is entitled to judgment as a matter of law on its claim that the variance does not meet the requirements of SMC 23.40.020.C.1. In light of the foregoing, it is not necessary to address the Appellant's remaining arguments in support of the motion. The Director's decision approving the variance is **REVERSED**. The hearing scheduled in this matter for August 12, and August 13, 2013 is **CANCELLED**.

Entered this 17th day of July, 2013.


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