

**CITY OF GIG HARBOR
RESOLUTION NO. 554**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO LAND USE AND ZONING, DENYING THE APPEAL OF STANLEY STEARNS/GIG HARBOR MARINA AND CONDITIONALLY APPROVING A CONDITIONAL USE PERMIT (CUP 99-05), APPLICANT ROBERT PHILPOTT, FOR A DELICATESSEN IN THE MARINE CONVENIENCE STORE LOCATED IN THE WATERFRONT MILLVILLE ZONING DISTRICT AT 3313 HARBORVIEW DRIVE, GIG HARBOR, WASHINGTON.

WHEREAS, Robert Philpott received conditional use approval for a site plan, shoreline substantial development permit and conditional use permit on November 24, 1999 (Resolution No. 507) to construct a fuel dock and develop the upland portion of the property at 3313 Harborview Drive in Gig Harbor (hereinafter the “Property”); and

WHEREAS, Robert Philpott subsequently applied for conditional use permit (CUP 99-05) to authorize a delicatessen as a conditional use within a marine convenience store on the Property; and

WHEREAS, a hearing was held on CUP 99-05 by the City of Gig Harbor Hearing Examiner on February 23, 2000; and

WHEREAS, the public hearing was continued to March 15, 2000, at the applicant’s request, to allow the applicant sufficient time to produce additional information; and

WHEREAS, the public hearing was reconvened on March 15, 2000, and the Hearing Examiner heard public testimony; and

WHEREAS, the hearing was held open administratively until close of business on April 3, 2000 and continued to close of business on April 6, 2000; and

WHEREAS, on, April 11, 2000, the Gig Harbor Hearing Examiner issued his written decision conditionally approving the application for the Conditional Use Permit; and

WHEREAS, Stanley Stearns submitted a timely and proper appeal of the decision on May 16, 2000; and

WHEREAS, on May 22, 2000, the City Council conducted a closed record hearing to consider the appeal filed by Stanley Stearns; and

WHEREAS, after hearing the oral argument and deliberating on the matters presented by the

appeal, the Council voted to deny the appeal and affirm the decision of the Hearing Examiner conditionally approving the CUP 99-05; Now, Therefore,

THE GIG HARBOR CITY COUNCIL, OF GIG HARBOR, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

FACTS

Appearance of Fairness. The Mayor, as chair of the closed record appeal, asked whether any member of the decisionmaking body had any appearance of fairness, conflict of interest or ex parte contacts to disclose. Hearing none, the Mayor asked whether any member of the public had any appearance of fairness or conflict interest challenges to make of any member of the decisionmaking body. There was no response.

Oral Argument. No testimony may be presented in a closed record appeal. Only oral argument was presented.

Facts.

The City Council incorporates by reference the facts set forth in the Staff Report dated March 9, 2000 (attached as Exhibit "A"), and the Hearing Examiner's Findings, Conclusions and Decision of April 11, 2000 (attached as Exhibit "B") for CUP 99-05.

FINDINGS AND CONCLUSIONS

Findings.

The applicant, Robert Philpott, applied for a conditional use permit to operate a delicatessen within a marine convenience store to be located at 3313 Harborview Drive.

The proposed delicatessen is the final phase of a multi-use marine facility that was approved by the City Council on November 24, 1997 (Resolution No. 507). That approval authorized construction of a dock that included a marine fueling facility, reconstruction of waterfront office and retail spaces, reconstruction of an upland retail building, and construction of a parking lot. The City Council notes that in Resolution No. 507, the Council imposed a number of conditions on the project, one of which provided that: "No transient moorage or public access shall be allowed on the fueling dock." (Condition No. 8, page 7.)

The Council's prior approval of the site plan and shoreline permit for this project expressly also required that "[a]ny future tenancy of all of the commercial/office buildings shall meet permitted or conditional use requirements of the zoning code, per section 17.48.020 and .030." Site Plan Condition of Approval No. 8, Resolution No. 507, November 24, 1997.

A delicatessen is specifically allowed in the Waterfront Millville zone as a conditional use.

The applicant has agreed that no alcoholic beverages will be sold or served the delicatessen or within the marine convenience store.

The delicatessen will operate "without a grille or deep-fat fryer" as required by GHMC 17.04.268, and will operate only between the hours of 7:00 a.m. to 7:00 p.m. as required by GHMC 17.48.035.

Following the March 15, 2000 public hearing, the Hearing Examiner issued his written decision on April 11, 2000, approving the conditional use permit for the proposed delicatessen. Only one condition was imposed. The Hearing Examiner imposed a seating limit of "18 seats and an appropriate number of accompanying tables," excluding the three perimeter benches requested by the City as a public amenity. The Examiner stated he believed that Staff report which correctly determined that no parking was required for moorage because transient moorage is not permitted. This maximum seating limit of 18 seats was used to calculate required parking for the delicatessen under GHMC 17.72.030(K): "one off-street parking space for every three seats based upon the maximum seating capacity as determined by the provisions of the Uniform Building Code." Applying this ratio, the delicatessen is required to provide six parking spaces for the maximum 18 seats.

The Hearing Examiner's decision approving the conditional use permit for the delicatessen was appealed by Stanley Stearns/Gig Harbor Marina, Inc/Arabella's Landing Marina. The Stearns' appeal was based on five alleged errors in the Hearing Examiner's decision.

By letter dated May 16, 2000 from attorney Charles Klinge, Stanley Stearns informed the City that he would not present oral argument or written briefing in support of his appeal.

Conclusions.

The following conclusions of law support the City Council's decision to deny the appeal of this conditional use permit and affirm the Hearing Examiner's decision.

1. The Proposed Delicatessen is not a "Pizza Parlor:"

The record supports the Council's determination that the proposed delicatessen is not a restaurant. The delicatessen will have no interior seating or tables, all orders will be take-out, no restaurant meals will be served, and the hours of operation will be limited. The delicatessen as proposed meets all City definitions and requirements for a delicatessen. The City Council's decision to affirm the Hearing Examiner's decision is expressly based upon the applicant's agreement not to serve alcoholic beverages at the delicatessen.

2. The Hearing Examiner's Condition Related to Maximum Seating Is Proper.

The Hearing Examiner is expressly authorized to impose "special restrictions or conditions deemed necessary or desirable in furthering the intent of the ordinance

pertaining to the proposed development." GHMC 17.64.020(C). The Hearing Examiner properly imposed a maximum seating condition on the delicatessen to ensure full compliance with the parking requirements of the zoning code.

The City's previous decision to deny the neighbor's (Stearns/Arabella's) application for a conditional use permit for a private yacht club cannot be applied to the proposed delicatessen. In ruling on the Stearns/Arabella's private yacht club proposal in 1995, the City found that the Stearns/Arabella's site was not of an adequate size to accommodate parking required under the Zoning Code. In other words, the present situation is different from the prior lawsuit between Stearns and the City for the Arabella's Marina site because the Philpott application involves the Hearing Examiner's decision to impose a condition consistent with the Zoning Code, to address the parking problem. In the lawsuit between Stearns and the City, the court upheld the City's decision denying the application because no condition could be imposed on the application to address the parking problem that also would have been consistent with the Zoning Code.

3. The requested conditional use approval for the delicatessen is based on full compliance with parking code requirements for the proposed use. The proposed delicatessen will fully comply with the City of Gig Harbor's parking requirements.

The City and the Hearing Examiner Correctly Calculated Required Parking

The March 9, 2000 Staff Report correctly sets forth the City's calculation of parking required for all other uses on this site:

New retail (lower level of Harbor Peddler)	869.75 square feet
New office areas:	
lower level	418.00 square feet
upper level	522.50 square feet
Total:	1,810.25
(6 parking spaces based on one space per 300 square feet)	

Six parking spaces are required for these other uses on the site. The Harbor Peddler retail use is a pre-existing, nonconforming use under GHMC 17.68.070(G). This pre-existing use is exempt from the parking requirements because it will not be expanded.

Six parking spaces are required for the proposed delicatessen, based on a maximum seating limit of 18 seats. The total parking required for the delicatessen and other uses on the Property is equivalent to the capacity of the existing 12-space parking lot on the Philpott property. There is no evidence in the record to require that one of the 12 parking spaces on the site "must be marked in red as a fire lane."

4. The Hearing Examiner's Decision Was Correctly Based on Seating Capacity.

The zoning code requires that parking shall be required at the ratio of "one off-street parking space for every three seats based on the maximum seating capacity as determined by the provisions of the Uniform Building Code." This zoning code requirement was applied and met by requiring six parking spaces for the maximum seating capacity of 18 seats for the proposed delicatessen.

5. The Hearing Examiner Correctly Found No Violation of SEPA.

The record clearly shows that a SEPA checklist for this multi-use facility was submitted on October 13, 1995. The City issued a Determination of Non-Significance (DNS) on November 20, 1995. This SEPA determination was not appealed. The DNS clearly described "retail services" within the project description. The appellant submitted no information from which it could be concluded that CUP 99-05 would result in any new or different adverse environmental impacts that were not considered by City in the 1995 DNS.

DECISION

The Gig Harbor City Council hereby denies the appeal of Stanley Stearns/Gig Harbor Marina/Arabella's Marina, and affirms the decision of the Gig Harbor Hearing Examiner of April 11, 2000.

PASSED by the City Council of the City of Gig Harbor, Washington, and approved by its Mayor at a regular meeting of the Council held on this 12th day of June, 2000.

Gretchen A. Wilbert, Mayor

ATTEST:

Molly Towslee
City Clerk

Filed with City Clerk: 6/7/00
Passed by City Council: 6/12/00

APPROVED AS TO FORM:

Carol A. Morris, City Attorney

Pursuant to RCW 36.70B.130, the City is required to include the following statement in its Notice of Final Decision: Affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. The City shall send a copy of this decision to the Pierce County Assessor's Office.

Appeal of this Decision. This is the final decision of the City of Gig Harbor. In order to appeal this decision, a land use petition must be filed in superior court within twenty-one days after the date the City Council passes this Resolution, pursuant to RCW 36.70C.040 and chapter 36.70C RCW.