

RESOLUTION NO. 471

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO THE FINDINGS, CONCLUSIONS AND DECISION OF THE CITY COUNCIL ON THE APPLICATION FOR SITE PLAN REVIEW SPR 95-12 FOR GIG HARBOR MARINA INC. (ARABELLA'S LANDING).

WHEREAS, the City Council is required by law to make findings, conclusions and a final decision on Site Plan application SPR 95-12; and

WHEREAS, pursuant to Gig Harbor Municipal Code ("GHMC") Section 17.10.100(A)(2)(d), the Hearing Examiner makes a recommendation to the City Council on a site plan application, and the City Council makes the final decision; and

WHEREAS, pursuant to Gig Harbor Municipal Code 17.10.160, an applicant may appeal the Hearing Examiner's recommendation to the City Council;

WHEREAS, the City has received an appeal from the applicant (dated April 12, 1996), and the City Council shall also determine such appeal; now, therefore,

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

FINDINGS OF FACT

1. On November 13, 1996, applicant Gig Harbor Marina, Inc. submitted an application for site plan approval to the City in order to construct an office/retail building at 8215 Dorotich Street.
2. The applicant's property is located within the Waterfront Millville (WM) zoning designation.

3. On January 22, 1996, the Council adopted Ordinance No. 710, which amended the provisions in the Waterfront Millville zone, specifically GHMC Section 17.48.060. The pertinent amendment requires one waterfront and one water view opportunity per structure, in those situations where the applicant chooses the additional height option. In addition, GHMC Section 17.48.040 was revised in the same ordinance to limit the maximum gross floor area of structures to 3,500 square feet per lot.

4. The City is required to follow the procedures in Gig Harbor Municipal Code chapters 17.96 and 17.10 to review and approve site plan applications.

5. On February 9, 1996, the City determined that the site plan application was complete. No building permit was submitted for any of the structures depicted in the site plan.

6. **Staff Report.** The City staff prepared a report which described the project and the staff's recommendations on the project, dated March 20, 1996. In the staff report, the project described does not include one view opportunity for the structure, which is proposed to be approximately 24 feet in height. The proposed development includes a structure with 7,210 square feet of office/retail space, 520 square feet of restroom space, and 4,300 square feet of open public access. The Staff determined that: (1) the site plan application was not vested under the old codes because a fully complete building permit application had not been submitted with the site plan application prior to amendment of the City's codes in March of 1996; and (2) this project did not comply with GHMC Section 17.48.040 (exceeds maximum gross floor area) and GHMC Section 17.48.060 (exceeds height limit and provides only one water view opportunity per structure) and recommended denial.

7. **Hearing Examiner.** On March 20, 1996, the Gig Harbor Hearing Examiner conducted a public hearing on the site plan application. The Examiner's findings and

conclusions are dated April 5, 1995, and are specifically incorporated herein by this reference as if fully set forth.

8. **Appeal.** On April 12, 1996, the City received a timely appeal from the applicant.

The basis for the appeal was stated as: "the hearing examiner interpreted applicable provisions of the Gig Harbor Municipal Code incorrectly, and failed to apply that code properly to material facts."

9. **City Council.** On May 13, 1996, the City Council considered the Hearing Examiner's recommendation on this site plan application, as well as the applicant's appeal, during the Council's regular public meeting.

10. **Exhibits.** The following exhibits were received by the Council at the May 13, 1996 meeting:

A. Gig Harbor Community Development Department Staff Report on SPR-95-12, dated March 20, 1996;

B. Draft City of Gig Harbor Resolution;

C. Hearing Examiner's Findings Conclusions and Recommendation on Case No. SPR 95-12, dated April 5, 1996;

D. Copies of site plan entitled "Arabella's Landing," received by the City November 13, 1995;

E. Notice of Appeal of the Hearing Examiner Decision from Stanley D. Stearns, dated April 12, 1996.

11. **Proceedings at City Council Meeting.** The Mayor identified the application to be considered by the Council, and asked whether the Councilmembers had any ex parte communications or appearance of fairness issues to disclose. There was no response. The

Mayor then asked whether any member of the public wished to challenge any member of the Council on the grounds of appearance of fairness, and there was no response. The applicant/appellant was sworn to tell the truth in their testimony. The Mayor then informed the public that the Council's consideration of the application and appeal would be on the record before the hearing Examiner, and there would be no new testimony presented. The applicant/appellant, Stanley Stearns identified himself, and his attorney, John Groen, identified himself.

12. **Staff Presentation.** Planner Steve Osguthorpe briefly explained the proposal. He pointed out that unlike the applicant's previous applications to the City, this site plan did not include a yacht club, and therefore, there was no need for a variance from the parking requirements.

Mr. Osguthorpe noted that the Hearing Examiner recommended denial because the application did not conform to the City's codes, and because it was not vested under the previous code provisions, could not be reviewed for conformance with any other codes.

An additional issue was raised by the applicant who contends that four and one half lots are involved in the application. The hearing examiner found that if there are four and one half lots, and four structures, then the structures must meet the setback requirements on each lot. Finally, because the application was submitted prior to the City's adoption of new permit processing procedures in March, 1996, and review was initiated under the City's processing procedures in effect in February of 1996, these procedures were followed throughout the review and appeal process.

13. **Appellant's Testimony.** Mr. Groen presented testimony for the applicant. He identified two legal issues to be determined by the City Council: (1) vesting; and (2) lot definition.

Mr. Groen did not agree with the hearing examiner's decision that this project is not vested. He stated that a developer receives a vested right to have an application evaluated under the zoning designations in place when a building permit application is submitted. According to Mr. Groen, vesting is also allowed in other situations.

He argued that the West Main case was applicable to this situation. Specifically, Mr. Groen claimed that Gig Harbor Municipal Code Section 17.48.050 does not allow an applicant to obtain a building permit, and the applicant cannot control the ability to vest at a certain time. He stated his belief that this particular section would not allow an applicant to become vested with a building permit application until the applicant goes through the site plan process. Therefore, he felt that the City's procedure is similar to West Main.

According to Mr. Groen, the Erickson case is different because the City of Seattle had a specific ordinance which provided how to become vested. An applicant could apply for a building permit as part of other applications. Further, the City of Seattle never precluded filing for a building permit application.

Mr. Groen noted that before the City Council's consideration of this application this evening, the City Council had considered another application, which were reviewed under the regulations in effect at the time the application was submitted. He asked the Council for the same treatment that everyone else is receiving.

With regard to the lots, he argued that the application is in compliance with the code requirements. He felt that the application of the square footage limitation was an illegal "spot

zone" and unconstitutional. Mr. Groen further argued that the view and access requirements are a clear violation of constitutional law, citing Nolan v. California Coastal Commission and Dolan v. Tigard. He felt that the City was imposing the view and access requirements on this application as a condition of development, and therefore similar to the facts in Nolan and Dolan.

14. **Councilmembers' Questions.** Councilmember Markovich asked Mr. Groen whether he thought that the building permit would vest upon completion of application, and not upon issuance. He further asked why Mr. Stearns did not apply for a building permit at the time he applied for a site plan. Mr. Groen responded that it would not be accepted.

Councilmember Markovich pointed out to Mr. Groen that the applications considered by the Council before this site plan application this evening were reviewed by the City under the codes in effect at the time that the applications were received because they submitted a building permit application at the same time. (These were the application of Fisher for Rush Construction, SPR 95-05, and the application Philpot SDP 95-06.) Mr. Groen stated that he was "not worried about what [the Council] is doing with some other project."

Councilmember Markovich asked the City Attorney for her interpretation of the City's code provisions. The City Attorney read GHMC Section 17.96.020 into the record. She explained that this section does not prohibit a person from applying for a building permit at the same time that the person submits an application for a site plan. According to the City Attorney, there is absolutely no prohibition on the submission of a building permit at the same time as a site plan in the City's code. This is also the fatal defect in Mr. Groen's comparison with the City's procedures and the City of Bellevue's in West Main. State law allows the City to adopt its own vesting doctrine, and the City has done so in GHMC Section 15.06.050.

Councilmember Picinich asked Mr. Groen about his statement mentioning "targeted park property," and asked him to further explain. Mr. Groen stated that the record speaks for itself, the situation is one where the zoning is changed to prevent particular projects, i.e., this particular project. Mr. Groen argued that the City used the legislative process to accomplish an administrative result, and this is improper.

The City Attorney pointed out that Tom Oldfield represented Mr. Stearns and appeared before the Council at the time the City was considering the amendments to the code, and Mr. Oldfield made his comments at that time. She pointed out that the ordinance was appealable, but no appeal was made. Mr. Groen stated that the facial claim was an uphill battle, and so this appeal was made "as applied."

The City Attorney pointed out to the City Council that GHMC Section 15.06.050, which is the City's vesting ordinance, relates to building permits only. Steve Osguthorpe, planner, requested that the City Council make its decision subject to the staff's preparation of a new resolution, and that the City Council not adopt the draft resolution contained in the Council packet.

FINDINGS AND CONCLUSIONS

15. **Site Plan Approval Criteria.** The Hearing Examiner's recommendation to the City Council on a site plan application must demonstrate:

- a. Compatibility with the City's comprehensive plan;
- b. Compatibility with the surrounding buildings' occupancy and use factors; and
- c. All relevant statutory codes, regulations, ordinances and compliance with same.

GHMC Section 17.96.030. The Examiner recommended denial of the site plan because it did not meet the requirements in (b) and (c) above. (Examiner's recommendation of April 5, 1996, p. 10-11.)

16. Relevant Legal Authority Cited by the Parties.

GHMC Section 17.48.050 Site Plans. Before a building permit will be issued in a WM zone, the site plan review process specified in Chapter 17.96 GHMC shall be followed. . . .

GHMC Section 17.96.020 Applicability. A. Site plan review and approval shall be required prior to issuance of a building permit when provided under this chapter. . . .

GHMC Section 15.06.050. . . .

106.3.1 Application. A. A valid and fully complete building permit application for a structure that is permitted under the zoning or other land use control ordinance in effect on the date of the application shall be considered under Title 15 of the Gig Harbor Municipal Code in effect at the time of application and the zoning or other land use control ordinances in effect on the date of application. . . .

GHMC Section 17.48.070. Height. A. Structures shall not exceed 16 feet in height. Additional height increase of up to eight feet maximum may be permitted for each structure if one additional waterview and one access opportunity are provided per structure per lot and the following criteria are met: . . .

Quote from West Main Assocs. v. Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986):

The Washington [vesting] doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop.

106 Wn.2d at 51.

[T]he City of Bellevue added two sections to its building code by enacting ordinance No. 3359. The ordinance prohibited the filing of a building permit application for any proposed project in

Bellevue until all of the following procedures are complete: (1) administrative design review approval; (2) site plan review approval; (3) administrative conditional use approval; (4) modification of landscaping approval; (5) design review approval by the planning commission; (6) passage by the city council of any necessary ordinance approving a conditional use, shoreline conditional use, planned unit development or planned residential development; (7) approval by the board of adjustment of a variance or shoreline variance; and (8) issuance of a shorelines substantial development permit. The ordinance specifically provided that if any appeal were taken with respect to the first four of these approvals, no building permit application would be accepted until the appeal was finally resolved. The ordinance also provided that the filing of applications for any of these preliminary approvals would not vest rights; development rights would be vested only as of the time a building permit application was filed.

106 Wn.2d at 49.

The vesting rule of the Bellevue ordinance does not meet the due process standards of the Fourteenth Amendment. . . . The City denies a developer the ability to vest rights until after a series of permits is obtained. The ordinance thus is unduly oppressive upon individuals. . . . The City delays the vesting point until well after a developer first applies for City approval of a project, and reserves for itself the almost unfettered ability to change its ordinances in response to a developer's proposals. . . .

106 Wn.2d at 53.

Quotes from Erickson & Associates v. McLellan, 123 Wn.2d 864 (1994).

Under the City['s] ordinance, . . . a development project vests (1) when a developer submits a complete building permit application, or (2) when the City earlier issues a master use permit without a building permit application.

123 Wn.2d at 866.

Under [Seattle's ordinance] the vesting point for a MUP application is controllable by a developer, and, in all instances, vesting occurs no later than the building permit application stage. At any point in the MUP review process a developer can file a complete building permit application. The developer's rights then

vest and the City must process the proposed project under the then existing land use and construction ordinances.

123 Wn.2d at 870.

17. **Motion by City Council.** Councilmember Markovich moved for the passage of a resolution No. 471, which adopts the findings, conclusions and recommendations of the Hearing Examiner's of April 5, 1996, denying SPR 95-12, with the provision that a resolution incorporating the City Council's decision be brought back to the City Council for approval at the next City Council meeting. This motion was seconded by Councilmember Platt.

18. **Council Discussion.** Councilmember Markovich stated that there obviously is a serious difference of opinion as to the legal issue as to vesting. However, he noted that the City Attorney's interpretation of this issue was consistent with his own. Notably, no building permit application was submitted at the same time as the site plan application, and as a consequence, there could be no vesting.

The other issue is whether or not there is an "intentional spot zone" to prevent Mr. Stearns from enjoying the fruits of his own property ownership. Councilmember Markovich stated that he never intended that to occur, and he reminded the Council that they reviewed the problem of bulk and size of buildings, and that those particular issues were of serious concern to the Council in preserving the character of the Gig Harbor community. He further stated that the Council chose to deal with these issues through limiting square footage, and that this method was employed not only in the Waterfront Millville zone, but also in other areas and other zones in Gig Harbor. This method was even used to limit the size of buildings in the City's commercial area to those significantly smaller than what currently exists in the commercial areas. In

Councilmember Markovich's opinion, this was done in order to prevent a structure which was out of character, large in bulk and size, in Gig Harbor.

Furthermore, none of this was done intentionally against Mr. Stearns or his project, and Councilmember Markovich complimented him on the existing marina. The problem was simply that a building permit application was not submitted, and Councilmember Markovich described the situation with regard to the applications previously considered by the Council, in which the Council was required to acknowledge the applicant's vested status.

Councilmember Ekberg agreed with Councilmember Markovich, and further stated that he would accept the recommendation of the City Attorney and staff on the legal issues. Councilmember Picinich noted that the application did not conform to the code requirements for the view access opportunities, and that the square footage of the proposed structure also did not conform to code.

DECISION

The City Council renders the following decision on application SPR 95-12: Denied.

RESOLVED by the City Council this ____ day of _____, 1996.

APPROVED:

MAYOR, GRETCHEN WILBERT

ATTEST/AUTHENTICATED:

CITY ADMINISTRATOR, MARK HOPPEN

APPROVED AS TO FORM;
OFFICE OF THE CITY ATTORNEY:

BY: _____

FILED WITH THE CITY CLERK: 5/23/96
PASSED BY THE CITY COUNCIL: 5/28/96
RESOLUTION NO. 471