

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

AU GAVROCHE

FILE NO. M-86-001

from a decision by the Market
Historical Commission

Introduction

Appellant appeals the decision of the Market Historical Commission (Commission) to deny a certificate of approval to expand existing use approval to sell croissant sandwiches, stuffed brioche, steamed eggs, salads and soup.

The appellant exercised the right to appeal pursuant to Chapter 25.24, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on July 16, 1986.

Parties to the proceedings were: appellant Au Gavroche by G. Richard Hill, Foster, Pepper and Riviera, and the Market Historical Commission by Ken MacInnes, chairperson.

After due consideration of the evidence elicited during the public hearing, the following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. Au Gavroche is a French pastry shop owned and operated by Cathy Benedict located in the Pike Place Market Historical District (Market).

2. The shop opened in 1981 and was located in the middle of the Sanitary Market Building off the main Market street. In 1984 Ms. Benedict moved the shop to the Post Alley Building in an area at the back of the building.

3. Ms. Benedict is a French pastry chef by training.

4. The Commission first approved the sale of pastries and later, after initial denial, allowed the sale of breads. In 1984 the Commission gave use approval to the wholesaling of bakery items plus the sale of Italian drinks and dessert wines and coffee bar/table seating. An interim approval, apparently given in 1983, added ice creams.

5. The use approval given in May, 1984, provided:

To approve wholesaling of present bakery items with addition of some Italian bakery products and pastries, Italian drinks and dessert wines, and table seating/coffee bar.

Exhibit 8.

6. The use approval given in 1984 for the new location provided:

To approve move from Sanitary Market to Post Alley Market with approve (sic) to sell French bakery products including bread, croissants, rolls or other sweet or savory pastry items with fillings or toppings; espresso coffee and related drinks and glace and sorbet.

Exhibit 9.

7. In 1986, Au Gavroche proposed a change of use and made application to add to the items for sale steamed eggs, croissant sandwiches, baguette sandwiches, stuffed brioche, cold salads, pate', cheese and fruit plate and a soup, gazpacho in the summer and French onion in the winter.

8. The Commission denied the application on the basis that it "does not conform to guidelines, page 6" and that the request "was not consistent with the character of a bakery specializing in the sale of French and Italian bakery items." Exhibit 12.

9. Ms. Benedict requested the expansion because of an increase in competition and a drop in her sales. Three shops, Stewart Brothers Coffee, Philadelphia's and Cafe Dilettante, have been approved by the Commission, and are located in close proximity to Au Gavroche. Two of the three competitors sell pastries and bakery items and two of the three sell lunch items.

10. Ms. Benedict finds that customers who are attracted to the shop by the lunch items also buy pastry or bread items.

11. The owner elected to move to the current location to attain some control over the building's climate which affects preparation of her food items.

12. The pedestrian traffic flow is much less at the shop's current location than at its original location.

13. The Commission chairman represented that the Commission's opinion is that Au Gavroche is not in competition with the Philadelphia's because it is classified as a restaurant or with Stewart Brothers because it is a different kind of specialty shop, i.e., specializing in coffee.

14. The Commission has denied the application of many shops to expand their use to the sale of sandwiches to attract the lunch trade.

15. Appellant has already added soup, salads, eggs, sandwiches and stuffed brioche to its offerings, without approval.

16. Shop sales are 60% wholesale and 40% retail. Of the retail sales 60% is bakery and pastries, 20% beverages and 20% lunch items. Of the lunch items, one half are items for which prior approval clearly has been given.

17. The salads, soup and sandwich items are displayed in the bottom part of one case. Pastries, breads and other approved items are displayed in the remaining cases.

18. All lunch items include bakery products prepared by Au Gavroche such as bread with the soup and salads.

19. Ms. Benedict has lived, studied and worked in France approximately five years. She has observed the sale of soups, sandwiches and salads in French bakeries and believes the sale of such items is in character with a French pastry shop. As examples of well known bakeries or pastry shops selling such items, she cited Fauchon and Lenotre.

20. Ms. Benedict's understanding of the meaning of the term "savory" in her use approval is that it refers to salty or not sweet fillings, etc. She includes cheese tartlets, herb cream cheese fillings, tomato, lettuce and ham as "savory" items.

21. The chairman of the Commission saw a very narrow definition of "savory", thinking of breads with herbs and spices. He represented that that was the view of the Commission at the time of the approval.

22. "Savory" means:

1. pleasing to the taste or smell; appetizing
2. pleasant, agreeable, attractive, etc.
3. morally acceptable; respectable
4. salty or piquant; not sweet (a savory relish)....

Webster's New World Dictionary, Second College Addition (1978).

23. The Commission's view is that it must assure the specialty identity of shops in the Market to maintain the character of the Market.

24. Because of her training, Ms. Benedict intends that pastries and bakery items be the focus of the shop.

25. On July 29, 1986, at approximately 3:30 p.m., the examiner visited the shop, per agreement of the parties. At that time at least 95% of the display space was devoted to pastry and other approved items.

Conclusions

1. The Hearing Examiner has jurisdiction over this matter and these parties pursuant to Section 25.24.080, Seattle Municipal Code.

2. Appellant contends that the Commission 1) does not have the authority to regulate the product line of the bakery; 2) has failed to meet its burden to justify its decision that the products are not consistent with character of a French bakery; 3) has already approved the sale of savory items; and 4) has ignored its guidelines which allow adjustment to changing Market conditions.

3. Appellant observes that the title of Section 6, Ordinance 100475, Exhibit 13, "Approval of Changes to Buildings, Structures and Other Visible Elements within the Historical District," addresses physical changes only, as does most of the text following. However, within Section 6 are several references to use. Moreover, within Section 1 of the ordinance, the purpose section, is a reference to Market uses.

4. Appellant urges that "use" is to be given the Land Use Code meaning, "the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased," Section 23.84.040, Seattle Municipal Code, which it contends has a broader reference to, e.g., retail sales, restaurants, warehouse, etc. The Commission correctly observes that the language of the Pike Place Market Historical District Ordinance is the result of the peoples' initiative and therefore words cannot be presumed to have the same definition as those used by the City Council in its adoption of legislation.

5. The ordinance requires that the Commission adopt guidelines for the guidance of property owners and that it follow those guidelines in its decision making. the Commission promulgated the Pike Place Market Historical Guidelines which guidelines specifically address the interpretation of use in "Guidelines for the Interpretation of Use in Zoning Criteria." The definition of "change of use" is given at I.D.1. as "(t)he addition or deletion of any product, activity or method of service not specifically authorized in the Certificate of Approval." Exhibit 1, p. 4. Since the ordinance intends to regulate use, gives authority to the Commission to adopt guidelines for that regulation and the Guidelines include product line in the definition of use, the Commission has authority to consider the product line of the shop.

6. Section 6, Ordinance 100475, which establishes the requirement of a certificate of approval for any change of use, directs that the Commission "make no recommendations or require-

ments except for the purpose of preventing developments inconsistent with the criteria of this chapter." Exhibit 13. Appellant argues that since there is no criterion for product lines in the ordinance, the application cannot be inconsistent with the criteria of the ordinance. The stated criteria, Section 4, which include the purposes, include several references to "use" which, as interpreted by the Commission through its Guidelines, include product line. The Commission, therefore, could find that the proposed use would be inconsistent with the criteria of the ordinance.

7. The Commission's April, 1984, certificate of approval which included "...and other sweet or savory pastry items with fillings or toppings" cannot be read as narrowly as the Commission representative suggests. Neither the Guidelines nor ordinance provides a definition of "savory". The testimony of Mr. MacInnes, as one of twelve Commission members, regarding Commission intent can be given little weight. When no specific meaning can be found in the legislation or Guidelines the ordinary meaning should be given a term. The dictionary's sense Nos. 1, 2 or 4 could be applied but since sense 1 and 2 would presumably be equally applicable to sweet items, "savory", in the certificate of approval, must mean "salty or piquant; not sweet." Therefore, the Commission has already approved the sale of pastry items with "not sweet" fillings or toppings. Given the language of the approval, however, soups and salads, even with a pastry item on the side, would not have been included.

8. Appellant contends that the Guidelines themselves require approval of the application. The introduction to the Guidelines provide that the Guidelines:

...are to help preserve and improve the District, and are designed to be sensitive to its unique characteristics. The guidelines are to be interpreted liberally; they should not prevent spontaneous development nor force uneconomic uses or changes. The guidelines should stimulate harmonious and orderly development, while allowing gradual adjustment to varying and changing Market activities.

Exhibit 1, p. 1. While it is certainly appropriate for the Commission to look to the statement of the purpose of the Guidelines when applying the guidelines themselves, individual guidelines, or their application in individual cases, may be at variance with the purpose statement in order to preserve or improve the Market as a whole. Even if the Commission's decision must be wholly consistent in the individual case with the statement of purpose for the Guidelines, there has been no showing that the bakery uses are uneconomic and, in fact, Ms. Benedict testified that pastry and bakery items will always be the focus of the shop. The purpose to allow "gradual adjustments to varying and changing market activities," again, does not require approval of a specific change but requires a broad view of the Market. Therefore that purpose statement does not require approval of appellant's application.

9. The Commission found the application for the addition to the product line would not be "...consistent with the character of the business...", that of a "bakery specializing in the sale of French and Italian bakery items." Appellant urges that the Commission erred in that the addition to the product line would not be inconsistent with the character of a French bakery or pastry shop. The Guidelines define "character of a business" as:

The composite identification of a business according to the principle (sic) products or service offered for sale; the manner of sale, distribution and manufacture (if on premises) and any specific definitions or limitations

explicitly noted in the use approval.

Exhibit 1, p.4.

10. The record shows that the principal products, as measured by percentage of sales, case space or the intention of the owner, would continue to be bakery products and the manner of sale, etc., would remain unchanged, satisfying two of the components of unchanged character. The Commission, however, did not approve a French bakery or pastry shop in its prior approvals but defined the product line. The use approval, therefore, was specifically limited, and the Commission could deny the expanded product line based on the third part of the definition of character.

11. The Hearing Examiner may reverse or modify only on a finding that:

A. Such action of the Commission violates the terms of this chapter or rules, regulations or guidelines adopted pursuant to the authority of this chapter, or;

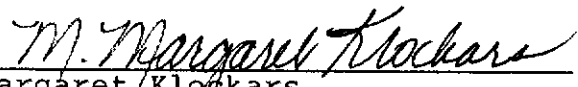
B. Such action of the Commission is based upon a recommendation made in violation of the procedures set forth in this chapter or procedures established by rules, regulations or guidelines adopted pursuant to the authority of this chapter and such procedural violation operates unfairly against the applicant.

Section 25.24.080, Seattle Municipal Code. The examiner must conclude that the Commission has not violated the terms of the Guidelines.

Decision

The decision of the Market Historical Commission is modified to the extent that the decision had the effect of denying approval of the sale of savory pastry items with fillings or toppings which had previously been approved. The remainder of the decision is affirmed.

Entered this 30th day of July, 1986.


Margaret Klockars
Deputy Hearing Examiner

Concerning Further Review

The decision of the Hearing Examiner in this case is the final administrative determination by the City, and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within fourteen days of the date of this decision. Should such request be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104.