July 27, 2009

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **A08F0018**

JOAN HEITING
Fee Appeal

Locations: 4442—158th Avenue SE, Bellevue
16404— SE Newport Way, Issaquah

Appellant: **Joan Heiting**
Cougar Mountain Montessori
4442—158th Avenue Southeast
Bellevue, Washington 98006
Telephone: (425) 747-5029

King County: Department of Development and Environmental Services (DDES)
represented by **Mark Bergam** and Steve Bottheim
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 296-7270 and (206) 296-7144
Facsimile: (206) 296-7225 and (206) 296-7055

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing opened:	January 27, 2009
Hearing closed:	January 27, 2009

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. This matter is the appeal of DDES project permit review fees associated with two properties and two pre-application meetings for structural development permits, one on April 23, 2008 and one on July 16, 2008.

2. The Appellant, Joan Heiting, operates the Cougar Mountain Montessori School located at 4442 158th Avenue Northeast in the unincorporated Bellevue area.

3. A DDES code enforcement action found certain unpermitted remodeling activity ("remodeling without a permit") on the school site. In response, Appellant Heiting (as the pending applicant) and DDES engaged in a pre-application meeting (pre-ap meeting file no. A08PM118) on April 23, 2008 in anticipation of an Already Built Construction (ABC) permit application for the work on the existing school building. DDES staff time was expended in preparation for the meeting, during the meeting, and in follow-up. It was discovered shortly before or during the April meeting that the development required a conditional use permit and that structural setbacks were an issue. It therefore became evident at the April meeting that the scope of issues needing to be addressed was larger and more fundamental than anticipated; given the necessity of a conditional use permit, the issue of which had not been fully explored, and likely necessity of a setback variance, it was decided that the matter should be continued to a second pre-application meeting to allow more preparation.

4. The DDES staff-time hourly charges billed for the April pre-application meeting and associated lead-up preparation and follow-up amounted to $1,715.00 for 12.25 hours.[1] Included in such charges associated with the April meeting were 1.25 hours for geological review, 2.5 hours for project management, 3.0 hours for site plan review and 1.0 hour for traffic review, for a subtotal of 7.75 hours (amounting to $1,085.00). The remainder of the billed time was for building plans examination and zoning review.

5. A second pre-application meeting was held on July 16, 2008 (pre-ap meeting file no. A08PM125). The Appellant had filed plan sets, a site plan and other documents for the July meeting, and DDES had prepared for further review discussions of the existing school site. However, early in the July meeting the Appellant and her several consultants present (architect, engineer, planner and attorney) unveiled a new proposal for a school development at a different location, at 16404 SE Newport Way in the unincorporated Issaquah area. DDES responded to the new proposal by stating that it had not prepared for a new proposal, but only for the prior one on the original site (the one discussed at the April meeting), and therefore it was not fully prepared to engage in a pre-application meeting in an efficient manner. DDES staff inquired as to whether the Appellant would like to reschedule the meeting "to allow staff to familiarize themselves with this new proposal." However, the Appellant indicated a desire to proceed with the meeting and asked DDES to "provide as much information as [it] could," so the meeting continued. There ensued discussion of several topics, including technical matters in the topical areas of geology, steep slopes and drainage. And much of the discussion centered on the zoning issues, the feasibility of obtaining a required conditional use permit and the need of a setback

[1] DDES charges an hourly rate of $140.00 per hour for each of the personnel involved.

variance. One of the outcomes of the meeting was an indication by DDES that DDES approval of a conditional use permit for the school was highly unlikely, at either location.[2]

6. DDES billed hourly charges totaling $3,325.00 for the July meeting and preparation and follow-up. Billed time included charges for fire system review, geological review, project management, land use (zoning) review, site plan review, and traffic review.

7. Appellant Heiting filed a fee waiver request with DDES, claiming that the April meeting was held erroneously given the late-discovered fact that a conditional use permit was required and that another meeting would be necessary, and claiming that the July meeting was in vain given DDES's position, derived in that meeting, that conditional use permit approval was highly unlikely.

8. In response to the fee waiver requests, DDES waived the 7.75 hours of technical staff time ($1,085.00) out of the total 12.25 hours of the April meeting, allowing them to be considered duplicative given that the 7.75 hours were charged for technical staff time at the April meeting and technical staff time was expended in somewhat similar review topically in the July meeting.

9. In response to DDES's limited waiver of charged staff hours, Appellant Heiting filed an appeal to the Hearing Examiner. The appeal makes the following claims, which are gleaned from the Appellant's narrative letter of December 12, 2008:

   A. "Double billing" was incurred due to a change in staff personnel between the meetings, with particular reference to a change of the primary zoning/land use staffperson from Nancy Goree at the April meeting to Hilary Schaefer at the July one. The Appellant states that it should be DDES's responsibility to pay for new staff to familiarize themselves with a project review and that the Appellant should not be charged for it. However, in her appeal the Appellant makes no specific claim of the number of hours encompassed by this asserted "double billing," and gives no indication of the dates and times it occurred. Neither was any such information brought forth during the hearing in the documentary evidence and oral testimony.[3]

   B. Another zoning/land use staffperson attending (Chad Tibbitts) spent some time during the July meeting searching for Nancy Goree, who was not present and who was desired by the Appellant to attend, and for Brenda Wood, the assigned code enforcement officer. The appeal states that Ms. Goree's "absence was an error and we should be credited." No specific credit amount is requested, nor an indication of what particular aspect of the billing the credit would compensate. Neither is there any showing of the length of time taken by the searches or, indeed, that such time was actually billed.

   C. The Appellant also derides the charge of hours for technical personnel to discuss geology, slopes and drainage at the July meeting, not only because "all of that had been dealt with at the April meeting," but also because such technical matters should have been relegated to secondary discussion, if any, if the conditional use permit and variance were not going to be feasible. (As noted above, DDES waived the technical staff time charged for the April meeting.)

[2] At hearing, Appellant Heiting acknowledged that DDES didn't state that a conditional use permit is impossible, but that it is highly unlikely.

[3] It should be noted here that the burden of proof in fee appeal matters rests on the project applicant. The applicant must show "that the particular billing or fee was unreasonable or inconsistent with [the development fee] title." [KCC 27.50.080]

D. It is contended by Appellant Heiting that "nothing was accomplished" at the July meeting. "To be billed…for the privilege of being told there was literally no way to proceed is ludicrous."

E. The Appellant requests waiver of the entirety of the billing for the April meeting and also of the entirety for the July meeting (stated by the Appellant as $2,961.00 versus the billed amount of $3,325.00, with the discrepancy not discernible from the record). There is no breakdown of the waiver request specific to the particular aspects of her specific claims. (Throughout the appeal process, other than the general request for waiver of essentially all fees, there has been no specific relief requested by the Appellant (dollar amount, time adjustment, etc.,) tied particularly to any aspect of her individual claim components, and none can be elucidated from the hearing record in any of the presentations and evidence.)

10. In the latter part of the Appellant's appeal statement, Ms. Heiting requests an indication as to whether conditional use permit approval is possible in her situation.

11. The Appellant sums up her appeal by contending that since the July meeting did not have a positive result, but rather entailed a negative discussion regarding the feasibility of obtaining a conditional use permit, it was "not a valid meeting" and the time undertaken in that meeting should be considered an "error" on the part of DDES (with the implication that these negative aspects and "error" should preclude any charges of staff time).

12. Lastly, Ms. Heiting's statement decries "the County's policy of scheduling and billing for meetings which are frustrating, negative in their impact on citizens, and frightfully expensive…."

13. DDES noted at hearing that since Ms. Heiting decided to proceed with the July meeting despite the lack of staff preparation, it was necessary for the technical review staff in attendance to engage in immediate spontaneous review of her new proposal during the meeting so that any "possible dealbreakers (unresolvable problems)" would be revealed in their topical areas of responsibility.

14. At hearing, Ms. Heiting seemed to declare a layperson's inexperience in these matters, stating, "I didn't understand I couldn't switch horses that fast (regarding staff review lead time to address a new proposal)," and also stated that she "understand[s] now that [she] should have cancelled (the July meeting)."

CONCLUSIONS:

1. The thrust of the Appellant's complaints about the billed staff time have more to do with the qualitative aspects of the review and the negative result that eventuated than with any particular disputation of the amount of staff time expended. While certainly sympathetic to her understandable frustration with spending money on DDES review time only to receive bad news and a perceived adverse outcome, the Examiner must note that the permit review fee structure established by county code is outcome-neutral: There is no guarantee of success, and there is no fee waiver in cases of adverse outcome.

2. Ms. Heiting's stated "layperson's inexperience" is understandable and is also met with some sympathy regarding the difficulties of navigating the permit system, but it is tempered by the fact that she was accompanied by several professional consultants with whom she could, and perhaps did, consult during the meetings.

3. Appellant Heiting states that she "understand[s] now that [she] should have cancelled (the July meeting)." But it must be acknowledged that she expressly decided to proceed with the July meeting in the face of DDES's indication that, because the submittal of the new development plan for a different property was precipitous, it had not had an opportunity to prepare for its review at the meeting and perhaps a postponement was in order. The Appellant requested that the meeting proceed anyway, requesting as noted that "as much information" be given as possible. This decision to proceed and to obtain "as much information" as possible were her choice and direction. Accordingly, the expenditure of DDES staff time on technical issues such as geology, slopes and drainage in the July meeting, despite a fundamental questioning of the ability to obtain a conditional use permit, was reasonable under the circumstances. As noted above, DDES felt obligated to properly explore in the meeting the ancillary technical issues which, aside from the fundamental zoning issues, could have presented "dealbreakers" in and of themselves. This was a reasonable response, particularly given the Appellant's request of "as much information" as possible.

4. Nevertheless, DDES waived its billing of technical staff time for the April meeting, which was approximately 63 percent of the total billing associated with that meeting. This waiver appears to have been a very reasonable and forgiving approach to the Appellant's complaints about unnecessary review expenditure given the basic zoning problems.[4]

5. Regarding the contended duplication or overlap of zoning personnel between the two meetings, the Examiner finds no apparent unreasonableness of charges in the record. First and foremost, as already noted the Appellant made no specific claim about the overlap in terms of hours and/or fees. Next, the second meeting mostly involved a different site than the first, which substantially undercuts the argument of overlap. It appears that some of Ms. Heiting's complaints in this regard have to do with the substantive tone of the discussion, whether or not a conditional use permit was feasible and whether or not setback variances were feasible, rather than an actual unwarranted overlap of review personnel. In the final analysis, it cannot be concluded from the record presented that an unreasonable expenditure of time was charged for zoning/land use personnel in this case. With respect to the assertion that some zoning/land use staff time during the meeting was spent trying to locate other DDES personnel desired by the Appellant to be present, there is no indication in the record (it was not brought out at the hearing) that such search time was billed or how much time it involved.

6. In the final analysis, the Appellant has a form of "buyer's remorse" in her exploration of the school's permitting situation. But exploring even mere possibilities of development costs money under the County's permit fee system: The pre-application service that is given is a service of outcome-neutral review, not one predicated solely on approval, though that may eventually result. In other words, it is not just review time with a positive outcome (from an applicant's view) that may be billed, but review in general, on an outcome-neutral basis.

[4] The DDES write-off of time was of the lower April technical time rather than the higher July time. That is reasonable given the basic logic that it is the lower amount which can be considered to be "duplicative." And since the meetings largely involved different properties, the amount of duplication would seem somewhat limited.

7. There is no showing from the record presented that the time billed by DDES in the two pre-application meetings (after the adjustment by waiver of 7.75 hours/$1,085.00) are unreasonable charges. The appeal must therefore be denied.

8. Regarding Ms. Heiting's desire for an indication of the possibility of conditional use permit approval, the Examiner must decline to address that issue, for two reasons: First, the Examiner does not have subject matter jurisdiction over that issue in this fee appeal matter. Second, conditional use permit decisions are appealable to the Hearing Examiner; given the possibility that a conditional use permit decision could be appealed, it would be inappropriate to comment on or appear to pre-judge the matter.[5]

DECISION:

The fee appeal is DENIED as not supported by the record presented.

ORDERED July 27, 2009.

Peter T. Donahue
King County Hearing Examiner

MINUTES OF THE JANUARY 27, 2009, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. A08F0018

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Bergam and Steve Bottheim, representing the Department and Joan Heiting, the Appellant.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	Department of Development and Environmental Services (DDES) November 24, 2008 decision letter for fee waiver requests for A08PM118 and A08PM125
Exhibit No. 2	Notice and Statement of Appeal of November 24, 2008 DDES decision on fee waiver requests
Exhibit No. 3	Fee Waiver/Adjustment of Fees Authorization for $1085 signed November 21, 2008
	Cover letter to fee waiver request for A08PM118 dated October 31, 2008
Exhibit No. 4	Hours charges detail for A08PM118
Exhibit No. 5	Hours charges detail for A08PM125
Exhibit No. 6	Fee waiver request for A08PM125 dated November 7, 2008
	Cover letter for fee waiver request for A08PM125 dated November 7, 2008
Exhibit No. 7	DDES report to the Hearing Examiner for the January 27, 2009 public hearing

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[5] Similarly, Ms. Heiting's side comment at hearing of her desire to return to 1981-era zoning allowances is not addressed. That is a matter for the legislative forum, or perhaps a site-specific rezone request. The Examiner has no authority over the former, and similar to the conditional use permit issue, it would be improper to consider the latter in this proceeding.