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Mayor Ted Wheeler
Commissioner Amanda Fritz
Commissioner Chloe Eudaly
Commissioner Jo Ann Hardesty
City Hall
1221 SW Fourth Avenue
Portland, OR 97204

Re: Appeal of Japanese Garden Foundation
Hearing Date of January 30, 2020
LU 19-192268 CU

Dear Commissioners:

In 2009, the Japanese Garden Foundation (the "Applicant") purchased a house at 369 SW Kingston Avenue (the "Kingston House") to use as its administrative offices. My client, Mr. Joe Angel, lives across the street from the Kingston House. The Kingston House was then and is now designated on the Comprehensive Plan as Residential and is zoned R7. In 2009, the Applicant applied for a conditional use permit to allow an office use in the R-7 residential zone. The Applicant did not apply for a permanent conditional use permit, but instead applied for a conditional use permit for a maximum of 10 years. I represented Mr. Angel in that case.

The primary reason for the Applicant's request was to use the house for its office staff prior to and during the planned major expansion and renovation of the Japanese Garden. Mr. Angel and the neighborhood association were very concerned about the office use as well as the construction activity. However, Mr. Angel and the neighborhood association negotiated a compromise and did not oppose the Applicant's request. Prior to the hearing before the Hearings Officer, Mr. Greg Frank, the parties negotiated a Declaration of Restrictive Covenant, which was signed and recorded. That Declaration stated "the intent of the parties is that after a period of 10 years, the Property will not be used by Declarant (the Applicant) ... for office use, and that such office use be relocated within the Japanese Garden ... or to some other structure not constructed or intended for residential use in which office use is permitted of right." The Declaration did not prohibit the applicant from filing another temporary conditional use in 10 years. But the intent of my client and the neighborhood association was to work with the applicant as they moved forward with their plans for a substantially expanded and improved Japanese Garden, even though the construction impacts on the neighborhood would be substantial.



The Hearings Officer in 2009, Mr. Frank, who is also the same hearings officer on the case before you today, noted the Declaration and approved the application. His reasoning in 2009 is important to today's case. He stated that the house should be returned to residential use at the end of the 10 year period. "The house has been and in the future is expected to be used for residential purposes on a residentially-zoned parcel" and the "approval of the proposed Conditional Use, in this case, should not be considered as institutionalization of the subject site forever." The Hearing Officer's reasoning and conclusion was as follows:

"The Hearings Officer measured the 'intensity and scale of the proposed use' as those flowing from only a 10 year term. The Hearings Officer notes that had this proposal not included a 10 year term, the Hearings Officer may have arrived at a conclusion that the overall residential appearance and function of the residential area would have been significantly lessened and therefore, this approval criteria would not have been met. As such, with the representation by the applicant that the House and Subject Site would be used for administrative purposes for a period of 10 years, the Hearings Officer finds that the overall residential appearance and function of the residential area will not be significantly lessened. The Hearings Officer finds, with the 10 year term, this approval criterion is met."

In the present 2019 case the Hearings Officer found the following facts. The applicant in the last 10 years looked only for office space to replace the Kingston House offices within Washington Park and now blames Portland Parks and Recreation for not allowing such office space within Washington Park. Pg. 26¹ "The Applicant provided no rationale or reason why the City of Portland Parks would desire or be motivated to co-locate office space with the Garden within Washington Park." Pg. 28. "If the Applicant determines that it cannot meet its current alternative office space search parameters (walking distance and/or Washington Park) the Applicant can broaden its search to traditional office space markets and, if necessary, seek an additional short-term extension." Pg. 29 The record shows that during that 10 year period of time, the Applicant has simply not looked for office space outside of Washington Park. Pg. 26-27"

Reflecting on the 2009 case, the Hearings Officer explained:

"The Hearings Officer found, in 2009, that permanent use of the Kingston house as administrative offices would cause significant adverse impacts on the livability of the 'residential area'" H.O. Decision, Pg. 21.

¹ Page references are to pages in the Hearings Officers December 5, 2019 Decision.



"The Hearings Officer finds that the language allowing the applicant to apply for a modification of the 2009 Decision Condition D 10 year term neither implied that such an application would be nor should be approved." Pg. 25

Given the above facts found by the Hearings Officer it was of considerable surprise at the hearing when a representative of the Applicant testified that the Applicant actually rents office space in an office building east of the Sylvan interchange for administrative functions and there was no explanation offered as to why that space or other nearby space could not accommodate office space for 12 staff people.

Well, 10 years later, here we are again before Mr. Frank and now the City Council with the Applicant seeking another 10 years. The primary approval criteria is the same today as it was 10 years ago: Section 33.815.105(A) requires proof of the following:

"A. **Proportion of Household Living uses.** The overall residential appearance and function of the area will not be significantly lessened due to the increased proportion of uses not in the Household Living category in the residential area. Consideration includes the proposal by itself and in combination with other uses in the area not in the Household Living category and is specifically based on:

- (1) The number, size, and location of other uses not in the Household Living Category in the residential area; and
- (2) The intensity and scale of the proposed use and of existing Household Living uses and other uses."

Applying the standards in 33.815.150 A the hearings officer found:

"The Hearings Officer finds the 'residential area,' in this case is unique and that any additional or different noise, glare from lights, late-night operations, odors, litter, and/or privacy/safety impacts do adversely impact the livability of the 'residential area'. The Hearings Officer finds office use is different from residential use no matter how many conditions are imposed to limit impacts from noise, glare from lights, late-night operation, odors, litter, privacy, and safety matters." Pg. 29.



"The Hearings Officer finds that granting an additional 10 year extension allowing the applicant to use the Kingston House for office use, in this unique 'residential area,' will adversely impact the 'residential area'. The Hearings Officer finds the use of the Kingston House as office space has meaning to 'residential area'. The Hearings Officer finds the use of the Kingston house as office space will have, or likely have, influence or effect upon the 'residential area'. The Hearings Officer finds granting the Applicant's requested 10 year extension will result in 'significant' adverse office use impacts on the 'residential area.'" Pg. 29 These findings show that the Applicant failed to meet its burden to prove facts showing compliance with the requirements of 33.815.105(A).

In this 2019 case, Mr. Angel and the neighborhood association suggested that the Applicant be given a two (2) year extension to find alternative office space. The Hearings Officer gave the Applicant a four (4) years extension which would not only give the Applicant a pragmatic relocation period, but would provide the Applicant with a "strong incentive to expedite its search for alternative office space; a process the Applicant represented to the Hearings Officer and opponents, in 2009, would be completed by 2019." Pg. 29.

The Hearings Officer warned in 2009 that "as long as the Applicant continues to prefer/focus upon relocating office space in Washington Park, it will be difficult to confidently predict when such alternative office space will be secured." Pg. 26. The Hearings Officer concluded that another 10 year extension likely would make Applicant reapply in 2029 for another extension. This would amount to a "permanent/institutionalized office use in a residential zone" inconsistent with the zoning code and comprehensive plan. Pg. 28, an outcome the Hearings Officer warned against in 2009. If the City Council grants Applicant's appeal and overrules the Hearings Officer that warning will become a reality. Further, that result would be to reward the Applicant for not taking seriously its obligations under the 2009 decision.

Mr. Angel and the neighborhood association trusted the Applicant and supported the 10 year conditional use and thereafter for 10 years have dealt with the substantial neighborhood impacts from the expansion of the Japanese Garden during construction and from additional visitors after construction. Mr. Angel and the neighborhood in this case even offered a two year extension and did not appeal the four year extension. The Applicants demand for a 10 year extension shows that the trust and neighborly cooperation of Mr. Angel and the neighborhood was misplaced.



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We request on behalf of Mr. Angel that the City Council deny the Applicant's appeal and affirm the well-reasoned decision of Hearings Officer Frank and thereby motivate the Applicant to find alternative office space.

Very truly yours,

A handwritten signature in blue ink, appearing to read "S. Janik", written over a light blue rectangular background.

Stephen T. Janik

STJ:pgm
Enclosures
cc: Mr. Joseph W. Angel, II (via email)