

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

In the Matter of the Appeal of

CALVIN F. BANNON

FILE NO. S-80-051

from a determination of the Director
of the Department of Construction
and Land Use

Introduction

Appellant, Calvin F. Bannon, appeals from an interpretation by the Director of the Department of Construction and Land Use (Director) for Gary Merlino, applicant, regarding the establishment of the shoreline setback line for property at 9607-50th Avenue S.W.

The appellant exercised his right to appeal pursuant to Section 25.40 of the Zoning Ordinance (86300, as amended).

Parties to the proceeding were: appellant, represented by Jeffrey M. Eustis, attorney at law, and Director, represented by Gordon F. Crandall, Assistant City Attorney. Also present and appearing was Martin A. Godsil, attorney at law, representing the applicant.

This matter was heard before the Hearing Examiner on November 25, 1980.

For purposes of this decision, all section numbers, unless otherwise indicated, refer to the Zoning Ordinance (86300, as amended).

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

Findings of Fact

1. Gary Merlino requested an interpretation regarding the required shoreline setback for a proposed residence.
2. The subject property is at 9607-50th Avenue S.W., Parcel B.
3. The applicant had filed a plot plan with his application for a use permit showing the building envelope for the proposed residence more than 100 ft. from the residence on the northeast side and within 100 ft. of the residence on the southwest side, which is the Bannon residence.
4. The Director determined the required setback line based on Superintendent's Ruling 14-79 (c)(3), for a regular shoreline with one adjacent structure.
5. Appellant's chief contentions of error are that the Director erred in (1) measuring the setback by a line parallel to the lot line rather than perpendicular to the line of ordinary highwater; (2) using the actual shoreline which he alleges was established by unlawful fill; (3) using an incorrect ordinary high water line.
6. The owner of the subject property, Mr. Peabody, caused fill to be added to his property on at least two occasions, starting in about 1956 and the last time not later than January,

1969. No permits were obtained nor bonds posted for any of the fill. No bulkhead was constructed to contain the fill.

7. The shoreline was changed between 1956 and 1969 (Appellant's Exhibits 1 and 5) by the fill, in that the bulkhead demarking a slightly concave shoreline was covered and the shoreline protruded out some 28-60 ft., according to Appellant's Exhibit 6.

8. Between 1969 and the present some of the protrusion from the fill has diminished because of wave action and other natural forces.

9. The ordinary high water mark or line of mean higher high tide can be determined with similar accuracy by using either the 11.3 ft. tide of the tide chart produced by the Coast and Geodetic Survey or by using the City of Seattle datum to determine elevation and then subtracting 1.20 ft.

10. The applicant commissioned a professional survey of the topography of the subject property to establish ground elevations from which the ordinary high water mark could be ascertained.

11. The appellant established the ordinary high water mark by use of the tide chart and observation of the tide on November 9, 1980.

12. The ordinary high water mark established by the survey is accorded greater weight for the purpose of this decision because it was done under the supervision of a licensed professional engineer who has no interest in the outcome of the case.

13. The Director's representative indicated that the Director will require revision if the line was not correctly represented.

14. The adjacent (Bannon) residence was determined to be 100 ft. from the shoreline and the patio 84 ft. from the shoreline at those structure's closest points to the shoreline using a line both parallel to the nearest lot line and perpendicular to the shoreline.

15. Conclusion No. 1, Interpretation of the Director, states that a line, essentially parallel to the shoreline, should be and has been established for the residential setback line.

Conclusions

1. The determination of the Director is to be considered prima facie correct. Section 25.44, Ordinance 86300, as amended. The same presumption should be accorded the rules promulgated by the Director interpreting the provisions of the ordinance.

2. Section 21A.35(c) provides, in part, "Residential structures shall not be located closer to the shoreline than adjacent structures."

3. Superintendent's Ruling 14-79 defined "Residential Setback Line" as "The closest distance to the shoreline permitted for new residential structures...."

4. The method of determining residential setback in the instant case, followed by the applicant and the Director, is described in Ruling 14-79, (c)(3) as follows, in part:

Adjacent structure on one side when the shoreline is regular:

The residential setback for new principal buildings and/or parts shall be at a distance from

the shoreline no less than that of the adjacent structure as measured from the closest point of the wall of the existing (adjacent) structure to the shoreline.

5. The purposes to be implemented by the Shoreline Master Program Regulations are stated in Section 21A.01. One is to "(a) preserve, enhance and increase views of the water and access to the water."

6. The Director's use of the lot lines to determine the angle of the line measuring the 100 ft. setback from the shoreline does not provide a setback measure consistent with that of the adjacent house which is to be determined at its closest point to the shoreline. While there is a presumption that the ruling is correct, appellant's argument that both the purpose of the provision and consistency would be better served by measuring by a line perpendicular to the shoreline is more compelling than the rationale offered in support of the method used and is sufficient to overcome the presumption.

7. RCW 90.58.270 gives consent to fills placed in navigable waters prior to December 4, 1969, provided they are not in trespass or in violation of state statutes. Appellant urges that since the fill was in violation of both the federal Rivers and Harbors Act and the Seattle Grading and Filling Ordinance for failure to obtain permits, file a bond, and to contain the fill within a bulkhead, it is illegal, gives no prescriptive rights and is not subject to the consent of RCW 90.58.270. That provision is unambiguous, however, in its use of "state" statutes. Further, where the statute specifically mentions one thing, "state statutes," there is an inference that the omission of others such as "local statutes" was intended. See East v. King County, 22 Wn.2d 247(1978). Where the language of the statute is clear and free of ambiguity, there is no room for construction. Krystad v. Lau, 65 Wn.2d 827(1965).

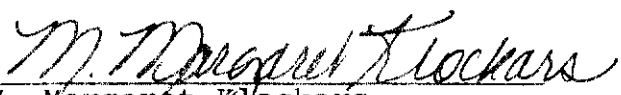
8. Contrary to appellant's contention, Article 11, Section 11, Washington State Constitution, does not equate state statutes and local laws but gives political subdivisions the authority to make local laws so long as they are not in conflict with general laws. A City ordinance is not, therefore, to be treated as a state statute under RCW 90.58.270. Use of the existing shoreline and ordinary high watermark, whether affected or not by the fill, is, therefore, permitted under RCW 90.58.270.

9. As to miscellaneous errors referred to in the hearing the appellant did not sustain his burden of overcoming the presumption of correctness given the determination.

Decision

The matter is remanded for determination of a residential setback line measuring the 100 ft. distance at right angles to the ordinary highwater mark.

Entered this 5th day of December, 1980.


M. Margaret Klockars
Deputy Hearing Examiner

Notice of Right to Appeal

A final decision of the Hearing Examiner is the final administrative determination by the City. Any appeal to the Superior Court should be filed within 20 days of the date of this decision. Vance v. Seattle, 18 Wn.App. 418(1977).