

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

GARY AND DONNA MERLINO

FILE NO. S-88-009

from an interpretation of the
Director, Department of Construction
and Land Use

Introduction

Appellants challenge the interpretation by the Director, Department of Construction and Land Use, of the Land Use Code (88-013) regarding the permissible height of a fence at 9601 50th Avenue S.W.

The appellants exercised the right to appeal pursuant to the Seattle Municipal Code, Section 23.88.020, as amended.

Parties to the proceedings were: appellants, Gary and Donna Merlino, by their attorneys* David R. Halinen and Rhys Sterling, Halinen & Associates; and the Director, Department of Construction and Land Use, represented by Andrew S. McKim, land use specialist.

This matter was heard before the Hearing Examiner on June 15, 1989. The record remained open for posthearing briefs until June 27, 1989.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

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. In response to a request from appellants, the Director, Department of Construction and Land Use, issued an interpretation of the Land Use Code where he decided:

Fences and freestanding (sic) walls and side yards in Single Family zones are limited to six feet in height. Taller fences or walls may not be permitted by agreement with a neighbor. Seattle Municipal Code Section 23.44.014(D)(1) does not apply to fences or free standing (sic) walls.

Exhibit 7. A timely appeal of this decision was filed.

2. The subject fence has been constructed along much of the north property line of the lots at 9601 50th Avenue S.W. The property is zoned SF 9600 and is partly in the UR Shoreline Environment however none of the fence is within the shoreline.

3. The Merlino's purchased the property in 1980. Prior to constructing a new house on the property, Mr. Merlino filled and graded the lot to raise the house site to the approximate elevation of the houses on each side and to the rear and to get the proper fall for the drainage system he had installed. The former owner had told him that during winter storms the basement in the house on the east side of the lot floods so any new house should be built at least as high as the other houses and no basement should be constructed.

4. The record does not reflect whether a grading permit was

required and obtained.

5. The fence along the north property line is a free-standing concrete wall 7 ft. 8 in. above the 1 foot footings with columns 7 ft. 10 in. above the footings topped with 6 to 8 inch caps. The wall is to run some 400 ft. when it is finished.

6. The Merlino's and the Frazers, who own property which abuts the Merlino's north property line, entered into an Agreement for Boundary Wall which allows the construction of a wall on their common boundary in conformance with construction plans which were attached, which plans were the same as those provided the Department of Construction and Land Use.

7. The Merlino's plans are to create finished grades at an elevation of about 6 ft. along the Frazer property line, creating a 4 ft. differential between the Merlino and the Frazer properties. The lower part of the wall would then function as a retaining wall with 6 ft. or less rising above finished grade on the Merlino side. The full height above the footing would be exposed on the Frazer side.

8. Where the boundary line is between Merlino property and that of the Fauntleroy Improvement Club, Mr. Merlino agrees to limit the wall height to 6 ft. above the grade existing in 1980.

9. The DCLU practice has been to require the demolition of accessory structures, such as garages, when a principal structure, such as a single family residence, is demolished. It does not require that fences be removed when the principal structure is removed.

10. The Hearing Examiner finds that the grading done by Mr. Merlino for construction of the residence on the lot is not a minor adjustment to the surface of the lot.

Conclusions

1. The Hearing Examiner has jurisdiction over these parties and this subject matter pursuant to Section 23.88.020E.

2. Appellants offer three arguments to the conclusion reached by the Director: 1) that the Director's decision negates the meaning of Section 23.44.014(D)(1) which permits accessory structures in side yards when an agreement between the owners has been recorded; 2) that the wall is not higher than 6 ft. above existing high ground level; and 3) that limiting the height of a wall within a required yard to 6 ft. when that limit does not apply to walls outside the required yard violates due process and equal protection.

3. Section 23.44.014(D), Exceptions From Standard Yard Requirements, provides in relevant part:

1. Certain Accessory Structures. Any accessory structure may be constructed in a side yard which abuts the rear or side yard of another lot upon recording with the King County Department of Records and Elections an agreement to this effect between owners of record of the abutting properties.

Any accessory structure which is a private garage may be located in that portion of a side yard which is either within thirty five feet (35') of the center line of an alley or within twenty five feet (25') of any rear lot line which is not an alley lot line, without providing an agreement as provided in Section 23.44.016.

...

10. Freestanding (sic) Structures and Bulk-

heads. Fences, free standing walls, bulkheads, signs and similar structures six feet (6') or less in height above existing high ground level may be erected in any required yard. When located in the shoreline setbacks or in view corridors in the shoreline district as regulated in Chapter 23.60, these structures shall not obscure views protected by Chapter 23.60 and the Director shall determine the permitted height.

4. Section 23.44.014(D)(1) applies if a fence or free-standing wall is an accessory structure. That a fence is a "structure" under the definition of Section 23.84.036 is uncontested by the parties. The Director's position that it is not an "accessory" structure is supported by a provision of another exception which requires a 5 ft. separation between attached garages and accessory structures, Section 23.44.014(D)(6), and a practice of the Department of Construction and Land Use. The Director notes that fences would not serve some of their ordinary functions, keeping things or people in or out, in some cases if they could not be connected to attached garages so the Council could not have intended fences to be treated as accessory structures.

5. The department's practice of allowing fences to remain and require garages to be removed when the principal structure is demolished shows the department's view that a fence is not an accessory structure or that a fence does not house an accessory use that would be prohibited as a principal use. Since the Department of Construction and Land Use is charged with enforcement of the code, its construction of the code, through application, is to be given weight. Morin v. Johnson, 49 Wn.2d 275 (1976).

6. The definitions in the Land Use Code do not clearly resolve the issue of the status of a fence. The Land Use Code defines "...accessory structure" as "...a structure which is incidental to the principal structure." Section 23.84.002. The principal structure is "...the structure housing one (1) or more principal uses as distinguished from any separate structures housing accessory uses." Section 23.84.030. A fence does not house an accessory use but separate structures not housing accessory uses are not necessarily disqualified as accessory structures by this definition.

7. Since the term "incidental" is not defined in the code, an elementary rule of statutory construction is that such words be given their ordinary meanings. King County Council v. Public Disclosure Commission, 93 Wn.2d 559, 561, 611 P.2d 1227 (1980). "Incidental", in the context used, means "2. secondary or minor but usually associated." Webster's New World Dictionary (Second College Edition, 1978). A fence or wall is normally a minor structure and it is usually secondary to a principal structure or use. These definitions do not lead to any clear resolution of the issue.

8. Since the legislative definition does not clearly classify fences as accessory structures, and fences are treated elsewhere in the code and by departmental practice as not being accessory structures the examiner is left with insufficient justification to reverse the Director's interpretation given the substantial weight accorded that decision.

9. If fences and free-standing walls are not accessory structures, subsection (1) does not apply so there is no conflict between subsections (1) and (10).

10. The method of measuring the fence then must be resolved. At issue is the meaning of "existing high ground level", a term not defined in the Land Use Code. The Code does define "existing lot grade", used in measurement of other structures, as "the natural surface of the lot in preparation for construction."

Section 23.84.024. If this definition applied it would dictate measuring from the prefilled grade and lowering the fence portions not within the exception allowed by subsection (1). Another rule of construction, however, requires that when certain words are used in one case and different words in another, it is to be presumed that there is a difference in legislative intent. Seeber v. Washington State Public Disclosure Commission, 96 Wn.2d 135, 139, 140, 634 P.2d 303 (1981).

11. "Existing" is not defined in the Land Use Code, although elsewhere in the code it is used to mean that occurring naturally, prior to grading. The ordinary meaning of "existing" is that occurring or present, according to Webster. "Ground level" is not defined in the dictionary but "grade" is defined as the degree of rise or descent of a sloping surface or the ground level around a building, suggesting that the City Council intended "ground level" to mean the same as "grade". The use of "high" ground level allows the fence to be measured from the higher side of the fence if the fence is located across a slope or tops a retaining wall.


12. Given those meanings, the provision allows the fence to be 6 ft. high above the grade as it existed at the time of application for permit for the fence or at the time of construction if no permit is required (or occurred without permit), measured from the level on the higher of the two sides of the fence. This interpretation would carry out the intent to give the language meaning different from "existing lot grade". The difference recognizes earlier changes in lot grade otherwise permitted. If the effect of permitted grading, especially where extensive, were not recognized, a property could be foreclosed from having any fence or be restricted to an unusually low fence as a result of measuring from the natural contour, prior to grading.

13. As to appellants' argument regarding the constitutionality of the provision, the Office of Hearing Examiner is without authority to determine the constitutionality of a statute. Argument was permitted to preserve the issue for review at a higher level.

Decision

The interpretation of the Director is modified. The fence is to be measured as described in Conclusion No. 12.

Entered this 12th day of July, 1989.


M. Margaret Lockars
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 a 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, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104.

BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

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FILE NO. S-88-009

from an interpretation of the
Land Use Code

ORDER ON RECONSIDERATION

The Director, Department of Construction and Land Use, by Andrew S. McKim, land use specialist, filed a Motion for Clarification and Reconsideration of the decision in this matter entered July 12, 1989. Appellants, Gary and Donna Merlino, by their attorneys, Rhys A. Sterling, Halinen & Associates, filed Appellant's Response in Opposition to the Department of Construction and Land Use's Motion for Clarification and Reconsideration.

The Hearing Examiner as an administrative agency, has only limited inherent power to reconsider or modify its decisions. Hall v. Seattle, 24 Wn.App. 357,, 602 P.2d 366 (1979). Where the issue is the lack of jurisdiction or authority to issue a decision even that limited authority is not needed.

The Director, Department of Construction and Land Use, objected at the outset of the hearing to the hearing examiner's considering the issue of the meaning of "existing high ground level." Evidence was presented and argument made on the issue. The objection was renewed in Director's Response to Appellant's Hearing Briefs. Upon further reflection the hearing examiner recognizes the merit in the Director's contention. The Hearing Examiner's authority is only that conferred by the City Council. Section 23.88.020, Seattle Municipal Code, provides for appeals to the Office of Hearing Examiner of interpretations made by the Director after public notice, opportunity to comment, etc. While the point from which a fence is to be measured seems inherent in the issue of fence height, the precise issue of the interpretation was whether the Merlino's may build a fence in excess of six feet in height if they secure a written agreement from their neighbor.


As there was no interpretation of the meaning of "existing ground level," the decision exceeded the authority of the hearing examiner. Therefore, conclusions Nos. 10, 11 and 12 should be stricken.

The Director seeks clarification of the decision as to whether the ornamental column caps are subject to the six-foot height limit. Finding of Fact No. 5 assumes the inclusion of the caps in the fence height. No evidence or argument was presented before the hearing examiner that they should not be subject to the height limit so the Director's reading controls.

Order

Conclusions Nos. 10, 11 and 12 entered on July 12, 1989, are hereby stricken.

Entered this 8th day of August, 1989.


M. Margaret Klockars
Deputy Hearing Examiner