

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

In the Matter of the Appeal of

JOHN AND LAEL HANAWALT

FILE NO. MUP-87-015(V)
APPLICATION NO. 8602804

from a decision of the Director
of the Department of Construction
and Land Use on a master use
permit application

Introduction

The appellant exercised the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on April 23, 1987.

Parties to the proceedings were: appellants John and Lael Hanawalt pro se; and the Department of Construction and Land Use Director by Arthur Lee, associate land use specialist.

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 shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. With regard to the State Environmental Policy Act of 1971 (SEPA) and Chapter 25.05, Seattle Municipal Code, the action proposed in this subject application has been determined by the responsible official to be categorically exempt pursuant to the provisions of Chapter 197-11, WAC.

2. Applicant seeks a variance in order to allow a fence exceeding 6 ft. in height to exist along certain boundary lines on the subject property located at 212 Blaine Street (also known as 210 Blaine Street). Seattle Municipal Code Section 23.44.14D.10 limits fence height.

3. The subject property is located in an SF 5000 zone although the lot contains approximately 4,000 sq. ft.

4. The subject fence is located on the east and north property lines of the site. A concrete footing wall supports the fence. The footing rises above grade as much as 16 in. Fence posts and fencing are constructed above the footing. Not including the footing, the fence material measures approximately 6 ft. in height. The height of the footing varies because of slope irregularity.

5. The fence was built without a permit. In a previous proceeding before another Hearing Examiner the fence was found to be in violation of the code. No appeal or review of that earlier decision was perfected.

6. Property located at 1805 3rd Avenue North abuts the subject property. It contains a residence which is, at certain points, within inches of the fence line established by the applicant. Applicant concedes that the fence obstructs views and light into the kitchen of the property located at 1805 3rd Avenue North. The owner of that property also contends that light into basement windows is almost totally blocked.

7. Applicant earlier sought approval of the fence from the Department of Construction and Land Use and its predecessor and claims that they were told that no variance or permit would be required. Apparently this was grounded on the belief by applicant that the footing would not be included in the measurement of the fence height. Interpretations of the Department from January 1986 make clear that the footing height would be, in fact, included in a measurement of the fence height. While not explicitly stating the theory, it appears that applicant contends that the interpretation of the Department should not apply in this instance because it was adopted after the fence was built.

8. The applicants have, over the years, spent considerable time and effort in establishing fruit trees and plants. Applicants claim the fence is necessary for the propagation of the fruit trees because of the manner in which the fruit trees are pruned and supported. There is no proof that applicants are dependent upon income produced from the fruit trees or that the garden, including the fruit trees, is an income producing hobby.

9. Applicants also contend that the fence was constructed because of harassment from neighbors then located at 1811 3rd Avenue North. Applicants also contend and have established that the property at 1811 3rd Avenue North has been maintained in an unsightly manner and that, at times, the occupants of said property have maintained uses on that property which are inconsistent with the zoning for that area.

10. The property located at 1805 3rd Avenue North is occupied by tenants of the owner. The owner contends that the house is essentially unmarketable because of the effect on that property of the fence constructed by applicants. No evidence was presented which allows the Hearing Examiner to believe that the house has been subject to sale within the past two years.

11. A fence, including footing, of 6 ft. in height would have provided applicants with the security and protection they sought when the fence was initially constructed.

Conclusions

1. The criteria required for a variance are found at Seattle Municipal Code Section 23.40.020. The requirements of each element of that section must be met in order for a variance to be granted.

2. The Director's recommendation that the variance not be granted is not entitled to any deference by the Hearing Examiner. Seattle Municipal Code Section 23.76.022C.7.

3. While the interpretation regarding fence height limitations relied upon by the Director was adopted in January 1986 the language of the height limitation provision itself is clear. Further, applicants did not seek relief from the earlier decision of the Hearing Examiner finding the subject fence to be in violation of the Building Code. Any problems with respect to ambiguity of the fence height limitation and reliance based on earlier interpretations of the code should have been brought forth in the earlier hearing or in any review of that hearing. Collateral review of those issues in this variance proceeding would render the earlier hearing and proceedings a nullity and would further tend to complicate building and zoning code enforcement. As such the variance would be materially detrimental to the public welfare.

4. Rather than address each of the remaining criteria required in order for a variance to be granted, the Examiner will take note of specific criteria which are not satisfied by this application. First, the variance requested by the applicants

exceeds the minimum necessary to afford them relief and would therefore constitute a grant of special privilege to them which is inconsistent with limitations placed upon other properties in the same vicinity. If the height of the fence is shortened by a maximum of 20 in. in certain places it will be in compliance with the code even though the shortened fence might have a deleterious effect on certain plantings placed in the yard by applicants. Second, a variance in this case will be materially detrimental to an adjoining property owner whose view and light are severely reduced because of the existence of the fence. Finally, while strict interpretation and application of the Land Use Code will inconvenience applicants, they themselves could have reduced the inconvenience had they complied with the earlier decision of the Hearing Examiner with respect to the violation of the Building Code created by the fence. Plantings which have matured over time since the earlier decision could have been relocated.

Decision

The application for variance relief is denied.

Entered this 8th day of May, 1987.


Kelby Fletcher
Hearing Examiner Pro Tempore

CONCERNING FURTHER REVIEW OF
HEARING EXAMINER FINAL DECISIONS ON MASTER USE PERMITS

The decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.22(C)(12)(c).

If the Superior Court orders a review of the decision the person seeking review must arrange for and bear the cost of preparing a verbatim transcript of the hearing, but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104, (206) 625-4197.