

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

WALLINGFORD COMMUNITY COUNCIL

File No. S-78-025

from a ruling of the Superintendent  
of Buildings

#### Introduction

The appellant, Wallingford Community Council, filed an appeal from an interpretation of the Superintendent of Buildings relating to property at 3638 Meridian Avenue North.

The appellants exercised their rights to appeal pursuant to Section 25.40, Ordinance 86300, as amended by Ordinance 104795.

Parties to the proceeding were: The appellant by Karen Boyle, the Superintendent represented by Joyce C. Kling, and the property owner, Larry Sloan.

This matter was heard before the Hearing Examiner on October 9, 1978.

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. Property at 3638 Meridian North is developed with a six-unit apartment building which is currently undergoing change. The characterization of that change and its legality is the subject of the interpretation and the instant appeal.

2. The structure was built in 1909 as a "flat building" probably containing four units. It was changed to six units around 1950. The property was rezoned to Single Family Residence High Density (RS 5000) from Duplex Residence High Density (RD 5000) in 1976. Prior to that zoning it was zoned Second Residence District.

3. Building Permit No. 576490 was issued May 15, 1978, "(t)o repair exterior east wall, exterior stairways and decks, replace broken windows and repair exterior doors, repair interior walls and alter some interior nonbearing walls, repair rotting inter-floor floors, repair or replace cabinets, extend roof east side."

4. Building permit number 578078 was issued July 31, 1978, "(t)o construct additional alterations to apartment building presently under repair under permit number 576490; new siding, roofing, rear deck; alter to 6 units as per plans; variance to be obtained for rear two-story deck or same to be removed.

5. The Superintendent's position is that, with the exception of the rear decks, the work being done does not involve an extension or expansion in the number of dwelling units and that no known or readily apparent structural changes have been made. He considers "(n)ew partitions, electrical wiring, cabinet work, plumbing, re-siding, eaves, gingerbread and similar modifications" to be permitted changes.

6. A recess in the east wall existed prior to the commencement of Mr. Sloan's project. The outer wall of the building now encompasses that space. The King County Assessor's record shows the recessed area to have been 8 by 11 ft. however, those measurements are believed by all parties not to have been accurate. A porch or platform filled the recess at both the first and second floors and each was common access area for the two apartments abutting it. The roof extended over the recess. The Superintendent's position is that the enclosure of this space is not expansion or extension since its use constituted living space both formerly as a porch and presently as a part of the units.

7. The record shows that alteration and construction was begun prior to the application for building permits. Some bearing walls may have been altered prior to inspection.

8. The appellant contends that the enclosure of the recess is an extension or expansion of the use and the building, made nonconforming by its use, and that the renovation of the building is to such a degree as to be contrary to the intent of the ordinance.

### Conclusions

1. The public policy of the state is that nonconforming uses be restricted and eventually phased out. The same policy or spirit is reflected in Seattle's zoning ordinance. Section 5.34(a) provides for maintenance of nonconforming buildings by ordinary repair but no expansion, extension or structural alteration except as otherwise required by law. A nonconforming use is also not to be expanded or extended. The subject structure is a nonconforming building by virtue of its nonconforming use.

2. It would appear that the amount of renovation undertaken by the property owner could, indeed, go beyond the "ordinary repair" allowed by the ordinance even if no expansion were considered to have taken place. Some ordinances limit the amount or percentage of value that can be expended on a nonconforming structure. Seattle's zoning ordinance does not establish any such standards. The appellant suggested the use of the building code's 50% of value as a standard but the purpose of that limit was to establish the point at which the building may be required to comply with certain safety provisions and is unrelated to the "ordinary repair" issue.

3. The court in Keller v. Bellingham, 20Wn.Spp.1(1978), directed that zoning regulations be strictly construed in favor of the property owner. The question there was whether the improvement to a nonconforming industrial plant constituted "enlargement" prohibited by the ordinance. The court said, in effect, that modernization does not constitute enlargement so unless the ordinance specifically prohibits it the improvement is allowed. Seattle's ordinance allows ordinary repair so long as no extension, expansion or structural alteration occurs. The format of the ordinance is to set out permitted uses and activities so that mind the provision should be construed to allow only activities constituting ordinary repair. The standard is ordinary repair and structural alteration is but one specific prohibition. The Superintendent's review of the application for the permit to do work on the nonconforming building was too limited and therefore in error.

4. The record suggests that new siding, new roof, new wiring, new kitchens and bathrooms, new windows and some new walls went in and concrete was poured. Each or all of the enumerated items is capable of being within the definition of ordinary repair depending upon the previous condition of the structure or its parts (i.e. broken windows, leaking roof).

5. It is unfortunate that permits were not applied for in a timely matter and inspections done to determine what could be allowed as ordinary repair. While the Superintendent used the wrong standard in issuing the permit, at this point it is impossible to reconstruct the earlier condition of the structure to determine what could be allowed as ordinary repair. The owner is entitled to execute ordinary repairs and since all of the work mentioned above may have been allowable his rights could be denied by requiring reversal of those changes.

6. The enclosure of the recessed area cannot reasonably be included within the definition of ordinary repair whether or not it is expansion. The Superintendent's allowance of the enclosure of the porch areas on each floor can be understood by his previous ruling on porches. The Superintendent has defined "porch" as "an elevated portion of a building with stairs or ramps to the ground providing access by means of useable doorway to the building." For purposes of lot coverage calculation an uncovered porch is not included but a covered porch is so it would appear from that the Superintendent treats covered porches as a part of the building. If the porches were already a part of the building then their enclosure would not be an expansion.

7. The basement garage in the variance matter No. X-78-344, was also within the structure. The Building Department, which cited its conversion to living space for variance, would differentiate the enclosure of the porches from that conversion on the basis that the porches were already living space so no expansion took place while the garage was not living space. Anderson in the Second Edition of the 7 American Law of Zoning states that "(t)he construction or enlargement of a building accessory to a nonconforming use is an extension of such use." Since the garage was already a part of the nonconforming use no expansion of the use and certainly not of the building occurred in that case. The Superintendent would have had to rely on work exceeding "ordinary repair" for that citation. Enclosure of porches cannot be considered ordinary repair and therefore is not permitted by the provision.

8. It is possible that the amount of enclosure in this case could be determined by tearing out the new construction. Because it appears that this space may have been relatively small and therefore the additional enclosed living space likewise small, it does not appear that the public interest would be well served by requiring this destruction. As the appellant pointed out, the community has not had an opportunity to speak to adverse affects which it would have been entitled to with a variance application. However, given the difficulty of determining the amount of variance and the lack of reasonably foreseeable actual material detriment no variance will be required.

9. The wisdom of the policy to eventually phase out nonconforming uses can be and is being debated. It is recognized that there is a tension between restricting improvements on nonconforming buildings to hurry their demise and return of the properties to conforming uses and the effect on a neighborhood of the structure's deterioration. The recognized need for additional housing in the City may also reflect upon its continued validity. The present ordinance provision does not allow, however, for these considerations in its application.

Decision

The Superintendent's interpretation is in error in so far as only a part of the correct standard was applied. To determine if work on a nonconforming building (nonconforming because of use) is permitted by the ordinance, the proper standard is whether the work constitutes ordinary repair not involving expansion, extension or structural alteration. No further enforcement action is possible or deemed appropriate in this case.

Entered this 19th day of October 1978.

M. Margaret Klockars  
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Deputy Hearing Examiner

Notice of Appeal

The decision of the Hearing Examiner in this case is the final administrative determination and any further appeal must be made to the courts.