

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

MR. & MRS. CLAUDE FLYNN

FILE NO. S-79-017

from a determination of the
Superintendent of Buildings

The appeal is GRANTED and the Findings and Decision of the
Superintendent of Buildings are reversed.

Introduction

Mr. and Mrs. Claude Flynn, appellants, filed an appeal from the Superintendent of Buildings' decision to issue a use permit for townhouses at 4424-4th N.W.

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

Parties to the proceeding were: The appellants by their attorney, Janet Quimby, Evans, Quimby, Hart, Inc., p.s.; Christopher Nyhus, property owner, personally and by his attorney, G. Richard Hill, Foster, Pepper, and Riveria; the Superintendent of Buildings by Greg Borba.

This matter was heard before the Hearing Examiner on August 1, 1979.

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 Facts

1. The architect for the property owner filed an application for a use permit for 5 attached townhouses at 4424-4th Avenue N.W. The structure would be 105 ft. long and an average of 26 ft. high.

2. Appellants own the adjoining lot to the south of the subject site which is comprised of Lot 13 and the south 25 ft. of Lot 14. Two residences occupy appellant's property - the one on the rear 45 ft. of the property is located 3 ft. from the property line dividing the appellant's property from the subject property.

3. Plans were submitted to the Planning Commission for review as required by Section 11.11(c)(11). Plans had been provided earlier by an architect previously associated with the project but were returned to that architect for revision of the yards. At the first Planning Commission meeting on the subject, the Commission asked the proponents of the project to meet with the community. After a second meeting the Commission voted to recommend approval of the design as presented. The Planning Commission visited the site as did members of the Department of Community Development (DCD).

4. The subject property is in a Duplex Residence High Density (RD 5000) zone. Development in the zone is predominately single family. Four duplexes are located within a radius of 300 ft. from the subject site. The Planning Commission's letter indicating approval of the proposal stated the Commission's misapprehension that four, 5 to 6 unit apartment structures are located within two blocks of the site.

5. The plans were modified after the Planning Commission's review. Where rear yards, measured from the point closest to the lot line, were 10 ft., 15 ft., 22.5 ft., 27.5 ft. and 16 ft. from east to west, the plans upon which the Building Department's decision was based showed rear yards, at the closest point, of 10 ft., 13.5 ft., 18.5 ft., 23.5 ft. and 15.5 ft. Front yards were shown as 27.5 ft., 22.5 ft., 17.5 ft., 10 ft. and 20 ft. The modified plans showed front yards at the narrowest point to be 26 ft., 22 ft., 15 ft., 10 ft. and 20.5 ft.

6. One or more of the Planning Commission members understood the method of calculating front and rear yards used by the Building Department to be the measurement of the distance between the property line and the dwelling unit's closest point.

7. The Superintendent has calculated the average front and rear yards provided by each dwelling unit and the structure by dividing the total square feet of open space in front or in back and dividing it by the measurement of the lot line involved.

8. Using the method described above, the Superintendent has found that the plans provide individual front yards of 26.75 ft., 23.45 ft., 17.39 ft., 12.39 ft. and 20.99 ft. and an average front yard of 20.33 ft. Rear yards are calculated at 10 ft., 13.5 ft., 18.5 ft., 23.5 ft. and 17.38 ft. and an average rear yard of 16.57 ft.

9. The Superintendent relied on the measurements in a letter from DCD to the Superintendent giving DCD's conditional approval of the project in his decision that the zoning code's requirements were met. The Superintendent's calculations were done after the appeal was filed. DCD represented that the average front yard would be "at least 20 ft.", the average rear yard would be "at least 15.4 ft.", and combined front and rear yards would be "at least 36.0 ft.". The letter stated that future adjustments to the plan to comply with yard requirements as more precise measurements are obtained were contemplated.

10. Section 11.11(c)(3) Ordinance 86300, as amended, provides in part:

Each townhouse dwelling shall have a rear and front yard totaling forty-five (45) feet, provided that the average of such front and rear yards for one townhouse structure shall be no less than twenty (20) feet and twenty-five (25) feet respectively and the minimum front or rear yard of any townhouse dwelling shall not be less than ten (10) feet.

11. The Superintendent has interpreted the ordinance to allow the application of Section 22.48, a rear yard modification provision, to Section 11.11(c)(3). The effect of the modification, according to the Superintendent, is to allow reduction of the 25 ft. rear yard requirement by 20% to 15.5 ft. because the lot is less than 105 ft. deep. The total front and rear yard requirement for the subject property would then be 35.5 ft. according to the this interpretation.

12. Section 11.11(c)(2) regarding minimum lot area provides specifically that the modification provision, Section 22.31, shall not apply to lot area for townhouse structures. Section 11.11(c)(4) provides specifically that Section 22.4, of which Section 22.45 applies to side yards, applies to modify the side yard requirement. Section 11.11(c)(5) regarding lot coverage states that the modification provision in Section 22.5 shall not apply. Section 11.11(c)(6) as to maximum height provides that the modification in Section 22.2 shall not apply.

13. Two streets abut the subject property, N.W. 45th

Street and 4th Avenue N.W., each 25 ft. wide with parking permitted on both sides. Traffic has been shifted onto N.W. 45th Street as a result of traffic controls put onto N.W. 48th and 49th Streets at Market Street. A recent traffic count on 45th just west of 3rd N.W. showed an AWDT volume of 1,060.

14. DCD used the ITE Trip Generation Tables to predict generation of up to 50 trips per day by the proposed development.

15. A Declaration of Non-Significance was prepared and filed under the State Environmental Policy Act for the project.

16. A 6 ft. high solid wood fence has been required by DCD on the east and south property lines for privacy. The Flynns have a cyclone fence at the north border of their property. The Flynns object to the solid wall as it would cut off light, air and view. The property owner, indicated at hearing, a willingness to modify the proposed fence with DCD's approval to make it more acceptable to both himself and appellants.

17. The proposal provides almost no usable common space. Although Section 11.11(c)11(d) provide for a common open space, DCD views it as relatively unimportant.

18. The site rises to the east. The need to keep the driveway grade at or below 14% has determined the front yard setbacks for the eastern units. Yard revisions could be accomplished by reducing the bulk or number of units or by increasing the height.

19. The plans examiner for the Building Department testified that the balconies could not project into the required yard because of the support posts extending to the ground.

Conclusions

1. Issue 1: Whether the Superintendent's interpretation that the ordinance permits the use of averaging to determine whether the proposal satisfies the front and rear yard requirements of Section 11.11(c) (3) is correct.

"Front Yard" is defined by the Ordinance as "An open space between the side lot lines of a lot, ending from the front lot line to a line on the lot parallel to the front lot line, to a depth, measured horizontally, as specified in this Ordinance."

2. "Open Space" is defined as "Any part of a lot unobstructed from the ground upward except as specified in Section 22.4 of this Ordinance."

3. Words used in the Ordinance, unless otherwise defined, are to be given their common and ordinary meaning. "Parallel" is defined by Webster's New Collegiate Dictionary 1977, as "1a: extending in the same direction, everywhere equidistant, and not meeting". Using that definition the Ordinance's definition of a yard would describe a space with at least two parallel sides free from any intrusions from the building except for features permitted by Section 22.4. Although great deference should be given a long standing interpretation by the Superintendent, no support for the Superintendent's position was found in the language of the ordinance. The side yard modification provision, Section 22.46(b), which specifically allows use of averaging when the building and side lot lines are not parallel would be unnecessary if averaging were contemplated within the definition of yards.

4. Section 11.11(c)(3) does not provide for open space totalling 45 ft., as suggested by the Superintendent but for a rear and frontyard totalling 45 ft. Those yards are specifically defined as stated. The fact that the yards for each dwelling unit may be averaged for the structure does not change the definition of front and rear yards for each unit to 45 ft. of "open space" for each. The minimum of 10 ft. or greater is not for the averaging referred to for the structure but to further the flexibility of the units. For example, one with a 10 ft. rear yard and 35 ft. front yard could be offset by one with a 35 ft. rear yard and 10 ft. front yard and with a unit in between with a 30 ft. front yard and 15 ft. rear yard the average front yard would be 25 ft. and rear yard 20 ft. as required.

5. Because the Superintendent's decision to issue a use permit was based on the incorrect calculation, the matter must be remanded for recalculation.

6. Issue 2: Whether the Superintendent's interpretation is correct that the rear yard modification in Section 22.48(a) applies to Section 11.11(c)(3). Ambiguity is present because the provision is silent as to the applicability or non-applicability of the modification provision. The relationship of the provision to others in the section does not aid in construing the provision since some specifically provide that the exceptions do not apply and one specifically provides for modification under the conditions of the exception. Going beyond the section to other articles shows that the bulk regulations generally state "except as modified in Section 22.X" which lends support to appellants' position.

7. The approach of the ordinance seems to be to permit a greater number of units by allowing them to be attached but to deny the modifications that would further increase the density and scale beyond one unit per 1600 sq. ft. and 55% lot coverage. The side yard modifications can apply because only two are involved and the section does not allow reduction beyond 5 ft. at the narrowest point which is the same as otherwise allowed in the zone. This suggests that the intent is to allow the greater density and sufficient flexibility in the placement of each unit between the front and rear lot lines to achieve separation of the units despite their attachments while observing the yards otherwise required in the zone. Other lots in the zone would be permitted to reduce the rear yards by Section 22.48(a) if they were of this depth so the modification should not be denied for townhouse use.

8. Issue 3: Whether the Planning Commission's consideration of preliminary plans, which have subsequently been modified, was sufficient under Section 11.11(c)(11). The differences between the plans reviewed by the Planning Commission and the Building Department are not substantial. While the yard adjustments will affect the relationship between the proposed structure and the Flynns' property, the difference is not of a magnitude that would be likely to sway a decision-maker from a previous decision and therefore is not significant.

9. The Commission's judgment as to design criteria is within an area of broad discretion due to the special expertise of that body. Since no specific standards are present in the ordinance, the Hearing Examiner would not reverse those determinations absent a showing of an arbitrary and capricious decision. The Hearing Examiner, therefore, would not consider various impacts of the project such as traffic except under SEPA and no evidence of disclosure of traffic impacts or other impacts in the environmental documents was presented by appellants to support conditioning or denying a permit based on environmental impacts.

Decision

The appeal is GRANTED and the matter is remanded to the Superintendent of Buildings.

Entered this 17th day of August, 1979.

M. Margaret Klockars
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Deputy Hearing Examiner

Notice of Right to Appeal

The decision of the Hearing Examiner in this case in 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).