

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

GEORGE K. AND STELLA M. COOK

FILE NO. S-79-039

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

These appellants, George and Stella Cook, filed an appeal from an interpretation of the Superintendent of Buildings (Superintendent) that their residence at 5228 - 42nd Avenue S.W. is not a legal nonconforming duplex and the Superintendent's refusal to issue a use permit to establish such duplex use.

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

Parties to the proceeding were: George K. Cook, the appellant, pro se, and the Superintendent, represented by Joyce Kling, Zoning Administrator.

This matter was heard before the Hearing Examiner on January 16, 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. The subject property is the residence of the appellants, located at 5228 - 42nd Avenue S.W. in a Single Family Residence High Density (RS 5000) zone (so zoned in 1957).

2. The upstairs is rented as an apartment with kitchen facilities. These kitchen facilities bring the structure within the Zoning Ordinance definitions of duplex, even though there is only one water heater, one electrical meter, etc.

3. In 1923 this neighborhood was zoned First Residential District and a duplex could have been legally established from 1927 - 1946 if written approval of adjoining property owners was obtained or from 1946 - 1957 when authorized after public hearing. No evidence was available from the appellants as to this period since it pre-dated their ownership. Evidence from the City for this period is less than complete since the records are inaccessible for the earlier years.

4. This apartment existed when the appellants purchased the property on July 5, 1957. (A basement apartment also existed at that time which no longer exists.)

5. The earliest building permit from City records is a 1914 permit to build a residence on the site, which now is the cottage on the site. A 1916 permit was to build the main house now on the site as a residence. Subsequent permits for a garage and house improvements provide no evidence of multiple residential use until a 1960 use permit to "reside existing dwelling" which labels the occupancy "H" which was 3 or more families. The entry in "No. Dwelling Units" is "3".

6. The appellant testified that some years ago a building inspector came around and told them that inasmuch as this apartment had been in use for the length of time it had it was all right to continue its use. Evidence from the Superintendent's records indicated there had been an inspection in 1964.

7. The Superintendent's interpretation of December 10, 1979, is based on Superintendent's Ruling 20-79 effective December 5, 1979, regarding evaluation of nonconforming uses. This ruling requires proof "that the use could have been lawfully established either by construction or conversion under the Zoning Ordinance at the time from which its existence can first be proved.... If discretionary approval, such as conditional use or variance, would have been required for establishment of the use at the time its establishment can be proved, proof that such approval was given must be submitted. Only official documents from the authorizing agency are acceptable."

The Superintendent held that the appellant did not prove the property at 5228 - 42nd Avenue S.W. was a legally established use under land use regulations when it was established and therefore it is not a legal nonconforming use.

8. The Superintendent maintains that only lawful uses of land are protected by Section 3.22 of the Zoning Ordinance legalizing nonconforming uses.

9. The Superintendent argued that each day of a zoning violation is a separate offense, so the City's citation of this at least 22 year extant duplex is not an application to a stale violation.

Conclusions

1. Time passing is an important element in legal concepts. Statutes of limitation, adverse possession, and laches are examples of its centrality. Statutes of limitations limit the time the government can act against wrongdoers, as well as the time private parties can redress wrongs done to them. Since a zoning violation is an ongoing "wrong" there is a distinction, but it does not negate the relevance totally here since this appellant did not establish an illegal use, but purchased in 1957 property which had upstairs and basement apartments at the time.

Adverse possession is a concept whereby the right to property is transferred from one party to another by open and notorious use over a period of time. The analogy here is that this upstairs apartment was never hidden and in fact building permit No. 485372 issued in 1960 indicated on its face 3 dwelling units. Subsequent to that, probably 1964, a building inspector upon inspection advised the appellants the apartment was all right since it has been there so long.

Laches involves a lapse of time which would cause inequity if enforcement of some right or claim were allowed. This concept is applicable here. These appellants bought this residence with the apartments in 1957. They are now

retired and the income from the apartment helps them make ends meet. They relied on assurance by the officials made over a decade ago that the apartment was all right. They remained in this residence assuming they could continue to afford it in retirement partly because of the small income from the apartment.

2. No detriment was portrayed to this residential neighborhood from this duplex.

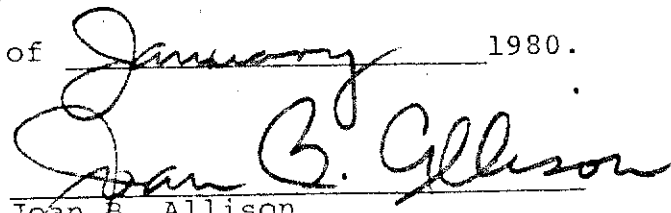
3. The burden put on appellants to prove legal establishment of a use without any time limitation attached is not reasonable nor in the public interest. The safeguards provided by Section 5.34(b) requiring nonconforming use change only to conforming use and Section 5.34(a) prohibiting alteration and expansion of any nonconforming use are sufficient to protect residential neighborhoods from proliferation or unlimited continuation of nonconforming uses.

4. The facts of this case support the appellants in their right to a use permit for the duplex.

Decision

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

Entered this 23rd day of January 1980.


Joan B. Allison
Hearing Examiner Pro Tempore

Notice of Right to Appeal

The decision of the Hearing Examiner in this case 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).