

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

TERRY LIBERMAN

FILE NO. S-87-003

from an interpretation of the
Director, Department of Con-
struction and Land Use

Introduction

Appellant, Terry Liberman, appeals the interpretation of the Land Use Code by the Director, Department of Construction and Land Use, as it applies to a proposed accessory pool/recreation structure at 1100 - 5th Avenue West.

Parties to the proceedings were appellant, represented by Joel E. Haggard, attorney at law, and the Director by Andrew McKim, land use specialist.

This matter was heard before the Hearing Examiner on June, 17, 1987.

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 shall constitute the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The Department of Construction and Land Use refused to issue a permit for the conversion of an existing garage at 1100 5th Avenue West to a pool house. Terry Liberman requested a formal interpretation of the Land Use Code as it applies to his application. The interpretation was issued and this appeal followed.

2. The Libermans purchased the subject property about two years ago. A new garage was constructed and then renovation of the house was planned. To save money they decided to reduce their plans from a three-story to a two-story house and use the garage structure for the recreation area. The downstairs of the house has their son's bedroom, a guest bedroom, bath, laundry and an area, approximately 10 ft. by 11 ft., for watching television in a large hallway. There is no other recreation area in the house.

3. The current plan for the pool house includes four small rooms, two to be dressing rooms, one a tanning room and one for storage of garden equipment, etc., an activity center or recreation room of 600 sq. ft. and a wet bar in the hallway to be concealed behind two doors except when in use.

4. The size of the recreation room is necessary to accommodate and provide clearance for a full-sized pool table which is now being built, and elaborate interior furnishings.

5. The wet bar is to have a 12 in. by 12 in. sink, 10 in. deep, and an undercounter refrigerator.

6. The bathroom in the pool house would have a toilet and lavatory. A shower may be installed outside, near the pool. The bathroom is needed to avoid swimmers entering the house, dripping chlorine-treated water on carpets, etc.

7. The building to be used as a pool house is against a hillside with a retaining wall behind and windows only on the front. To reach it one must pass through the yard.

8. Appellant filed an affidavit with the Department of Construction and Land Use which states "I hereby certify that this is a Single Family Dwelling and is not intended to be designed, arranged, used, rented, or sold as a duplex or for any apartment use." He added words to the effect that no stove or 220 volt or 208 volt wiring will be installed.

9. The Director concluded that a second recreation room, the size proposed, in a separate structure, with a "food preparation area" in a separate room, with a bathroom "exceeds the limits of what is customarily incidental to a single family residence, and violates the intent to prohibit principal uses in required rear yards.

10. Director's Rule 7-83 addresses determining the existence of a dwelling unit. The rule defines "wet bar" as

A bar facility located in a larger room used for the mixing and serving of beverages and previously prepared or packaged food items. A dwelling unit wet bar will not have a 208 or 220-volt appliance outlet or gas outlets.

The rule then lists fourteen elements, the existence of one or more to be considered evidence of the existence of a second dwelling unit. Those relied upon by the Director in the interpretation are:

(c) Lockable interior doors that can exclude a portion of the dwelling unit from access to the entire unit.

* * *

(i) ... the ease of creating separate entrances.

(j) Additional food preparation areas, including some combination of the following features: stoves, refrigerator, kitchen cabinets, microwave oven, hotplate, sink, dishwasher.

1. Size of Area - If the area is as large as the primary kitchen, it should not be considered a convenience food preparation area unless there is no other factor indicating that a separate dwelling unit exists or is intended.

2. Location of Area - If the convenience food preparation area is located in a recreation room, not in a separate room, it is generally assumed to be accessory. However, if the recreation room is located in an area which could be altered to be used as a separate dwelling unit, the food preparation area should not be permitted. It must not be in a separate room.

3. Name of Area - No matter what it is called (wet bar, refreshment area, or canning room), if it appears to be a food preparation area as indicated by the factors listed above, it shall not be permitted.

11. The Department of Construction and Land Use has found that owners are more likely to rent out a detached structure as a second dwelling unit than a part of their principal structure.

12. The Department of Construction and Land Use is attempting to do "preventive maintenance" to cut down on enforcement activity by prohibiting any design and arrangement that has the potential for conversions to a dwelling unit.

13. The Department of Construction and Land Use bases its determination as to what is customarily incidental on the number of applications that have been made for a particular use in Seattle.

14. As a matter of practice, the Department of Construction and Land Use accepts affidavits as to intended use only for principal structures.

15. An application for use of an accessory structure as a "recreation room" would not be accepted by the Department of Construction and Land Use as the use should be part of the principal use, not an accessory use.

16. An application for a "wet bar" in an accessory structure would not be accepted by the Department of Construction and Land Use.

17. If the design and arrangement of a proposed structure would allow conversion to a second dwelling unit, the Department of Construction and Land Use will not permit it without regard to any showing of actual or intended use.

Conclusion

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

2. The Director's decision has two independent bases: 1. the proposed use is not customarily incidental to a single family residence; and 2. the proposed use constitutes a second dwelling unit.

3. The rule for accessory uses not specifically listed in the Land Use Code is that those "customarily incidental" to principal uses that are permitted outright are also permitted outright. Section 23.44.040. The Director is given authority to determine whether a use is customarily incidental to a principal use. Section 23.42.020.

4. "Incidental," in the sense it is used in the Land Use Code, means "2. secondary or minor, but usually associated...." Webster's New World Dictionary (2d College Ed. 1978). "Customarily", means "according to custom; usually." Id.

5. In making her determination the Director focused on the degree or extent of the use. She acknowledges in her decision, despite evidence as to current practice, that a recreation room with a wet bar has been recognized as customarily incidental to a residence; she, nevertheless, finds a large second recreation room with bathroom and wet bar not to be customarily incidental. The record reflects that the proposed recreation room would not be a second such room, and the necessity for the size was shown. The other reason for the Director's finding was that permits for such uses as proposed by appellant have not been usual in Seattle. The Director misread the test. The proposed accessory use must be customarily incidental, or usually secondary, to that principal use, not customary in the City. The true question is whether a pool house with recreation area is a use customarily incidental to a residence. The only evidence in the records, other than the Director's statement that it is not customary in Seattle, is that there is no reason why it is not a customarily incidental use, i.e., that it is a logical accessory to a single family residence with pool.

The Hearing Examiner concludes that the Director's determination was based on a factual error (the existence of a recreation area in the main structure), and a misinterpretation of the code.

6. The second reason found by the Director for her decision was that the proposed accessory use is a second dwelling unit. "Dwelling unit" is defined as

A room or rooms located within a structure, designed, arranged, occupied or intended to be occupied by not more than one family and permitted roomers or boarders, as living accommodations independent from any other family. The existence of a food preparation area within such room or rooms shall be evidence of the existence of a dwelling unit.

7. Appellant urges that the pool house is not a dwelling unit because the structure is not intended to be occupied by a family independent from the main use, as evidenced by the affidavit filed. Undertaking further analysis under the definition of the characteristics of a dwelling unit, the examiner concludes that the structure, as described, is not designed or arranged as a dwelling unit to be used independently with its tiny changing tanning and storage rooms, a sink and refrigerator, toilet and sink, and windows on only one side, nor is it to be occupied independently.

8. The basis for her determination that the pool house would constitute a second dwelling unit was Director's Rule 7-83. Appellant contends that none of the elements listed in the rule are present in the proposed alteration of the garage. The sink and refrigerator do not fit within the rule's definition of "wet bar" because the bar facility would not be a part of a larger room, such as the recreation room; the area is separate but with a refrigerator and tiny sink, it does not meet the definition of "food preparation area" either as it is not "designed, arranged, intended or used for cooking or otherwise making food ready for consumption." Section 23.84.012. Its existence is inconclusive as to the presence of a dwelling unit.

9. Element "c" is not present in that if interior doors were locked they would not separate a portion of the dwelling unit from the remainder. The Director would have been considering intent to avoid dividing the structure to accommodate two units by looking at the actual separation of the accessory structure from the principal structure. Again, that feature is inconclusive as to the existence of dwelling unit.

10. In element "i", again the described situation is not presented but the opportunity to create separate entrances is. The feature, in itself, is inconclusive.

11. Not only are the elements cited by the Director not present but neither are other elements in the rule which provide indicia of a dwelling unit, notably a complete bathroom. It can be noted also that lack of windows in the structure on three sides would detract from its use as a dwelling unit. The Director's intention to avoid future enforcement problems by use of the rule is laudable. Even applying the rule, however, there is not sufficient evidence of a dwelling unit to support the decision of the Director.

Decision

The Director's determination that the proposed use is not customarily incidental to a single family use and that a separate dwelling unit is proposed is reversed. This decision does not prohibit the Director from requiring that any "wet bar" be a part of the recreation area and that the applicant file an affidavit as to intended use of the structure.

Entered this 1st day of July, 1987.

M. Margaret Klockars
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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 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, 400 Yesler Building, Seattle, Washington 98104.