

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

CAMILLE AND CHARLES RALSTON

FILE NO. MUP-88-055(V)
APPLICATION NO. 8803250

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

Introduction

Appellants, Camille and Charles Ralston, appeal the decision of the Director, Department of Construction and Land Use, on a master use permit application to deny a variance for the height of a fence at 1136 38th Avenue.

The appellants 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 September 8, 1988.

Parties to the proceedings were: appellants represented by Lynn Hurst, Montgomery, Purdue, Blankenship & Austin, and the Director, Department of Construction and Land Use, by Cheryl Waldman, 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. Richard Kellogg filed a master use permit application for a variance for the height of an existing fence at 1136 38th Avenue. The Director, Department of Construction and Land Use, denied the variance. Appellants, subsequent purchasers of the property, appeal.

2. The subject property is an SF 5000-zoned lot in Madrona. The lot is developed with a single family residence. The fence, which is the subject of this application, extends out to the front property line from the north edge of the house, along the front property line to the south property line and to the east along that line approximately 25 ft.

3. The fence is constructed of horizontal boards with a trellis on top which supports decorative vines. The height of the fence below the trellis varies because of the slope of the lot and ranges from about 5 ft. 10 in. to 6 ft. 3 in. along the front and to 10 ft. on the sides. The trellis is about 1.5 ft. high above the solid fence.

4. The Director treats the trellis as part of the fence.

5. The applicant applied for a variance in 1981 for the fence he had constructed without a permit. The variance was denied. At his request, the hearing on his appeal was continued indefinitely for medical reasons.

6. The slope of the lot down toward Lake Washington is a condition shared by most lots east of 34th Avenue.

7. Because of the slope of the area, houses at higher elevations look onto those of lower elevations. Many other properties use hedges to achieve a feeling of privacy.

8. The land use specialist found no record of variances for fence height in this area under the current code. The report for application X-78-134 (Exhibit 10) states that no fence height variances had been granted in the area at that time, 1978, which would have been under the prior code.

9. Appellants found that a variance had been approved in 1978, referred to above, under the prior code, for a 6.5 ft. fence, where approval was sought for an 8 ft. high fence which was already constructed.

10. Appellants showed six examples of fences in the area within required setbacks which were measured from 7 to 9 ft. in height. One of these, at 1420 - 36th Avenue, was the fence addressed by the variance in X-78-134. The trellis, some 3 ft. above that fence, was not addressed in that decision.

11. Appellants' house has a bedroom in the front of the house with windows facing the street.

12. Exhibit 7 shows that the line of sight from the windows of the house across the street to the west into the bedroom would not be interrupted by a fence 6 ft. high. It shows that a 6 ft. high fence would adequately screen the bedroom windows and front yard from view from the sidewalk.

13. The fence along the south side of the lot serves as the railing for the front entrance porch.

14. A stairway leading to the lake is located in the street right-of-way at the end of 38th Avenue. People from the area walk down 38th to get to the stairway.

15. The greater height of the fence is thought to discourage trespass by passersby.

16. There are many hedges in the neighborhood which are higher than 6 ft.

17. A petition signed by neighbors supports variance for retention of the fence.

Conclusions

1. The Hearing Examiner has jurisdiction over these parties and this subject matter pursuant to Section 23.76.022.

2. Section 23.44.014D allows fences 6 ft. or less in height to be erected in a required yard. Variance in this case is required for the height greater than 6 ft.

3. Variance from the code requirements may be granted only if the five facts or conditions listed in Section 23.40.020 are found to be present.

4. The first requirement is that there be an unusual condition of the property, not created by the owner or applicant, because of which the strict application of the code would deprive the property of rights and privileges enjoyed by other properties in the same zone or vicinity. Section 23.40.020C.1. Appellants offer four: the slope of the lot and of the area itself; the pedestrian traffic; the room arrangement with the bedroom at the front of the house; and the porch. Neither the slope, pedestrian traffic or elevated porch qualifies as an unusual condition since each is shared by many properties in the zone and vicinity. The location of a bedroom at the front of the house may be unusual but the limitation on fence height does not deprive the property of any rights enjoyed by others in that vegetation, screening, window treatment, etc., can be and are used effectively to maintain privacy where windows face the street.

5. The requested variance may not go beyond the minimum necessary for relief or constitute a grant of special privilege. Section 23.40.020C.2. The requested variance for a fence at least 7.5 ft. high would exceed the minimum necessary for relief where the conditions do not warrant any relief. The extra 3 inches on the solid portion across the front reflects the amount necessary for the slope and should be considered a de minimis violation and not require variance approval. That allowance would be similar to the extra 6 inches permitted by the variance which was granted in the area. There would be special privilege involved in the granting of a variance for this fence where there has been no showing of other similar variances. Other properties do have similar fences, but they were shown not to have received approval so cannot be considered as comparable to the subject property since they may be subject to enforcement action requiring compliance.

6. The requested variance may not cause material detriment to the public welfare or injury to other property in the area. Section 23.40.020C.3. The extra height was not shown to block any views and neighbors support the variance for retention of the fence so it appears that it would not be materially detrimental or injurious.

7. For variance approval the record must show that the literal interpretation and strict application of the code provision would cause undue and unnecessary hardship. Section 23.40.020C.4. Since other means may be used to create the privacy desired by appellants and to provide the necessary railing on the porch, the code provision would not cause undue or unnecessary hardship. While the loss of the trellis would decrease the aesthetic value of the fence, that is not the kind of hardship envisioned. Removal of part of an existing structure does not qualify as "undue and unnecessary hardship" where, though appellants did not construct it, they were aware of the status of the fence prior to purchasing the property.


8. Finally, the variance must be consistent with the spirit and purpose of the Land Use Code and the Single Family Residential Areas Policies (SFRAP). Section 23.40.020C.5. The SFRAP does not specifically address the height of fences in required yards. The Land Use Code provides exception to the required setbacks for fences. If the remainder of the variance criteria were satisfied, the higher fence would not be inconsistent with the spirit and purpose of the code.

9. Because not all requirements for variance approval have been shown to be present, the variance must be denied.

Decision

The variance is denied.

Entered this 23rd day of September, 1988.


M. Margaret Klockars
Deputy Hearing Examiner

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, Seattle, Washington 98104, (206) 684-0521.