

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

GARY AND DONNA MERLINO

FILE NO. MUP-89-021(V)
APPLICATION NO. 8900858

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

Introduction

Appellants, Gary M. and Donna Merlino, appeal the decision of the Director, Department of Construction and Land Use, to deny their master use permit application for a variance to allow a fence to exceed the height limit in required yards.

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 June 15, 1989. The record remained open until June 27, 1989, for post hearing memoranda.

Parties to the proceedings were: appellants, Gary and Donna Merlino, by their attorneys, David Halinen and Rhys Sterling, Halinen & Associates; the Director, Department of Construction and Land Use, by Jan Mulder, land use specialist; and respondent intervenor, Fauntleroy Improvement Club, Inc., represented by Sherry H. Rogers, Lee, Smart, Cook, Martin & Patterson.

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. Gary Merlino filed a master use permit application for variances to allow a fence to exceed the height limit in the required yards at 9601 and 9607 50th Avenue S.W. The Director, Department of Construction and Land Use, denied the requested variances and this appeal followed.

2. The subject of the application is a concrete wall, largely completed, along the north property line of the lots at the above addresses. The lots are located on Brace Point in West Seattle in an SF 9600 zone. A portion of the westerly lot is within the UR Shoreline Environment, however the subject fence does not extend into the shoreline area.

3. The concrete wall extends 7 ft. 8 in. above 1 ft. footings with columns 7 ft. 10 in. above the footings topped with 6 to 8 inch caps. The wall is to run over a 400 ft. length when it is finished. Mr. Merlino has modified the request at hearing to request variance only for that portion not adjacent to the Fauntleroy Improvement Club, Inc., property.

4. Fences and free-standing walls not otherwise exempt due to recorded agreements with adjacent neighbors are limited to 6 ft. above existing high ground level.

5. Merlino's constructed the wall as a noise barrier and aid to privacy. A swimming pool and tennis court would be located

across from the bedrooms in the neighbors' house and the wall would attenuate any noise from those recreational facilities. The Frazers have a dog area and the wall would reduce the noise received on the Merlino's property.

6. The Merlino's purchased the property in 1980. Prior to constructing a new house on the property, the lot was filled and graded to raise the house site to avoid problems of flooding and to get the proper fall for the drainage system that had been installed.

7. The floor of the Merlino house is at elevation 5.5 - 6.5, the Frazer house to the north at 5.71 and the Bannon house on the property to the south at 7.18. The house on the eastern portion of Merlino property is at elevation 5.48 and the owner had told Mr. Merlino that the basement in that house had flooded during winter storms.

8. The elevation of the grade along the Merlino-Frazer boundary on the Frazer side is shown on Exhibit 1 as ranging from 1.7 to 2.4. The elevation of the grade along the southern boundary of the Merlino lot ranges from 1.5 to 3.0.

9. Both lots to the north and south slope down from the site of the house to the Merlino property line.

10. Mr. Frazer, who lives on the lot on the north side of the Merlino lot, has no objection to the proposed height of the fence.

11. The property owned by the Fauntleroy Improvement Association, Inc., abutting the easterly portion of the Merlino lots is used as a community space. Residents of the Laurentide Community view it as a secluded, quiet area with plenty of trees and vegetation.

12. While the wall as it exist does not block views from any residences, it is visible to residents of several houses and from the recreational area. Witnesses object to the character of the fence. They seek to maintain the naturalness of the area with wood and vegetation as opposed to concrete.

Conclusions

1. To grant a variance, the Director or Hearing Examiner must find the existence of the facts and conditions required by Section 23.40.020C., i.e., 1) an unusual property condition 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; 2) that the variance does not go beyond the minimum necessary to afford relief and does not confer special privilege; 3) the variance will not materially detrimental to the public welfare or injurious to other property; 4) that the literal interpretation and strict application of the provision would cause undue and unnecessary hardship; and 5) that the variance would be consistent with the spirit and purpose of the land use Code and the policies.

2. The property conditions offered by the applicant as unusual are that the property was subject to flooding and had inadequate natural drainage which conditions led the Merlino's to add the four feet of soil. Those conditions are not property conditions which deprive the property of rights enjoyed by other properties in the vicinity. While filling the lot to elevate the house was presumably necessary to reduce flooding and resulted in elevations comparable to the surrounding houses, the elevation at the boundary between Merlino lots and the lots to each side was still some 4 or 5 ft. below the elevation of the houses suggesting that both of those lots slope down to the property line. No reason was shown why the Merlino property could not have been graded in the same way. Further, the measurement of the fence from the existing high ground level (that existing at the time of construction or application, whichever was earlier)

will allow a full 6 ft. above grade. The cited property conditions do not warrant a fence higher than 6 ft.

3. Height greater than 6 ft. above the existing high ground level would exceed the minimum necessary for relief and would constitute special privilege where there is no property condition which warrants relief and where the record does not show any other fences or walls in the area exceeding 6 ft.

4. Several hundred feet of concrete wall over 8 ft. tall is out of character with this neighborhood. While the neighbors prove no actual injury there is some detriment to the character of the neighborhood.

5. The strict application of the height limitation may not afford the applicants the privacy they would desire but was not shown to cause undue and unnecessary hardship. For the purpose of the analysis it should be noted that the fact that the wall has already been constructed must be disregarded.


6. The intent of the code and policies is to maintain the pattern of open spaces between residences by requiring minimum setbacks. p.23-11. The tall wall would interrupt the pattern of open spaces and thereby be inconsistent with the intent of the policies.

7. Since the required facts and conditions were not shown to be present, the variance must be denied.

Decision

The variance is denied.

Entered this 12th day of July, 1989.


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, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.