

FINDINGS AND DECISION OF THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of

JOHN R. GREEN AND CAROL TILLEY

FILE NO. MUP-90-005(V)  
APPLICATION NO. 8904434

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

Introduction

Appellants, John R. Green and Carol Tilley, appeal the decision of the Director, Department of Construction and Land Use, to deny a variance to allow a freestanding structure (a fence) to exceed the maximum allowable height (the current fence is 7 feet 8 1/2 inches in certain areas; six feet is the maximum allowed per Seattle Municipal Code Section 23.44.014.D(10)). The fence has already been constructed at 6239 Sycamore Avenue N.W.

The appellants exercise their right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code (SMC).

This matter was heard before the Hearing Examiner on April 19, 1990. The record was kept open until April 23, 1990 to allow for a site visit.

Parties to the proceedings were the appellants, pro se, and the Director, Department of Construction and Land Use, by Susan Kunimatsu, Land Use Specialist.

After due consideration of the evidence elicited during the public hearing and the site visit on April 23, 1990, and the documents received prior to the closing of the record, the following shall constitute the findings of fact, conclusions of law, and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The original appeal included a request for variance to allow an accessory structure to exceed maximum lot coverage. At the hearing appellants made clear that such a variance was never sought by them and that they would demolish an existing carport and therefore have no need for such a variance.

2. The proposal of the appellants is to allow an already constructed fence to be more than six feet in height. This fence abuts a deck and extends along the side lot lines. The parties agreed that this is the sole issue on appeal.

3. The proposal site is in a Single Family (SF 5000) zone in the Phinney ridge neighborhood. The lot is 100 feet deep with 50 feet of frontage on Sycamore Street. The property slopes down to the west and becomes very steep at the rear lot line.

4. From a site visit it appeared that most of the properties in the neighborhood were quite similar to the subject property (in that all lots were sloped to the west with varying degrees of drop-off).

5. Additionally, appellants lot has a pre-existing rockery which roughly follows the western lot line.

6. The appellants constructed a deck during the same time frame as the construction of the fence. Due to the varying topography of the lot, the deck has portions which exceed 18 inches above grade.

7. The other lots in the neighborhood appear to have structures similar to the requested variance. Retaining walls appear to be the common method to avoid the six foot limit. Appellants have submitted various photographs which purport to depict structures in violation of the Code in their immediate neighborhood. While these photographs illustrate fairly what was observed in the site visit, they are merely illustrative and their weight is minimal. Similarly, the assertions that the addresses of potentially violative properties, submitted by appellants, were not required to seek variances is also illustrative.

8. A notice of violation was issued for the fence construction in April, 1989. A building permit application was filed in September, 1989.

9. Appellants had contact with the Department of Construction and Land Use prior to and during the construction of the fence and were given different answers regarding the necessity of obtaining a building permit.

10. Appellants made every effort to comply with existing codes and statutes in the construction of the fence.

11. Appellants believe that to comply with the code they would have to build a retaining wall which they estimate would cost some \$12,000. There is no evidence in the record, other than their assertions, that this cost is accurate nor is there evidence that a retaining wall is the sole alternative open to appellants.

12. There appeared to be no issue regarding view blockage as both parties and the next door neighbor did not raise the issue other than to say that there was no view blockage.

13. A letter dated March 23, 1990 and received by this office on April 6, 1990 requested that "Concerned Neighbors" be granted intervenor status in this matter. The letter supported the denial of variance and cited concerns with stability of the structures, safety of the users, and possible surface water drainage problems. The letter also expressed concern for the loss of privacy of the 'three down-hill neighbors' due to the height of the structure and a gate which allowed access into downhill neighbors yards. The letter was signed by thirteen persons with addresses appearing to be in the immediate area of the site. The letter was also endorsed, by separate note dated March 24, 1990, by Darleen Fitzpatrick. "Concerned Neighbors" was represented by Ms. Natalie Fobes at the hearing.

14. A letter of February 9, 1990 received by this office on February 14, 1990 stated that variances shouldn't be granted to anyone unless everyone is granted variances.

15. An updated letter received by DCLU on September 8, 1989 and by this Office on February 8, 1990 favored the granting of the variance citing the structures safety and conformity with the neighborhood.

16. A letter of August 23, 1989 received by DCLU on August 28, 1989 by this office on February 8, 1990 supported the granting of the variance.

17. A note dated April 16, 1989 requested that the variance be denied fearing that a precedent would be set.

18. A letter dated August 23, 1989 and received by DCLU on August 29, 1989 was in favor of variance.

19. A letter dated August 18, 1989 requests that the variance be denied.

20. A letter received by DCLU on August 21, 1989 listed a series of conditions which would gain the writer's disapproval and it would appear that, ultimately, the letter was against the variance.

21. A note received by DCLU on August 21, 1989 opposed the variance.

22. Various members of the "Concerned Neighbors" wrote prior to the March 23, 1990 letter to either express their objections to the structure or to request an extension of the time for public comment.

#### Conclusions

1. A preliminary motion was made by "Concerned Neighbors" to be granted intervenor status. The motion was made through letter in 13 above. This motion was denied on April 17, 1990 on the grounds that "Concerned Neighbors" had failed to make service on any party as required by Hearing Examiner Rule 1.23. This motion was renewed, at the Public Hearing herein, and it was again denied due to non-compliance with Hearing Examiner Rule 1.23. Facts were testified to by both Ms. Fobes, as representative of "Concerned Neighbors" and by the representative of DCLU that would indicate that this office has had a past practice of performing the necessary service for the party making the motion.

2. To grant a variance, the Director or the Hearing Examiner must find the existence of the facts and conditions required by SMC 23.40.020C to wit: 1) and unusual property condition not created by the owner or applicant because of which the strict application of the code would deprive the property of the rights and privileges enjoyed by other properties in the same zone; 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 be 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 policies.

3. There is a property condition not created by the owner. However, this condition is not unusual in Seattle nor in this neighborhood. Most, if not all, of the properties in this area slope steeply as it is a ridge. Whether other properties have managed to evade penalty for violation of the code is not the paramount concern, rather the concern is consistent application of the code.

4. The variance does not go far beyond the minimum requested to afford relief. There was an absence of testimony as to what the minimum necessary to afford relief would be other than speculation. To sanction this variance would confer special privilege upon appellants.

5. Based on the evidence received, the variance would not be materially detrimental to the public welfare or injurious to other property (though there was substantial testimony that privacy would be reduced at least as to Ms. Fobes).

6. Appellants have already suffered undue and unnecessary obstacles due to their unflinching efforts to get advice on what DCLU would do regarding their construction. They have already constructed the fence and deck, only after securing what they believed was DCLU's blessing. Unfortunately, the hardship of topography is shared with their neighbors who are also saddled with similar lots.

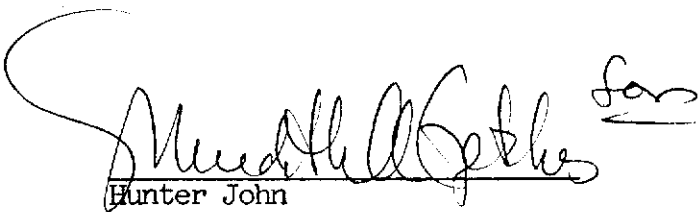
7. The purpose of the code's section on fence height is undoubtedly to set a maximum height for fences in Seattle. The City Council was well aware of the topography of Seattle and set no exemption for the various slopes in Seattle. The variance would be inconsistent with the spirit and purpose of the code.

8. The required facts and conditions have not been shown to be present, the variance must be denied.

#### Decision

The variance is Denied.

Entered this 9<sup>th</sup> day of May, 1990.

  
Hunter John  
Hearing Examiner Pro Tempore

#### CONCERNING FURTHER REVIEW OF THE 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, 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.