

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

THERESA GERGELY

FILE NO. S-82-006

from an interpretation of the Director,
Department of Construction and Land Use

Introduction

Theresa Gergely appeals an interpretation of the Director of Construction and Land Use of the zoning chapter of the Seattle Municipal Code for property at 322 North 71st Street.

Appellant exercised her right to appeal pursuant to the Seattle Municipal Code, Section 24.10.030, as amended.

Parties to the proceedings were: Theresa Gergely by Ross Radley, attorney at law; Director of the Department of Construction and Land Use (DCLU) by Judy Talman.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code, Title 24, as amended, unless otherwise indicated.

This matter was heard before the Hearing Examiner on November 3, 1982.

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 located at 322 N. 71st Street in a Single Family Residence Zone (SF 5000). The legal description is:

Lot 13 and the W. 10' of Lot 12
Block 1, Hillman's Lake Front Addition to the
City of Seattle, Division #4

2. Between 1957 and June, 1982, the property was zoned RS 5000; per the Director's interpretation between 1923 and 1947 the property was zoned R1. Duplexes are not permitted in the SF designation, and were not permitted under the RS designation but were permitted under the R1 designation as a conditional use by the Board of Public Works.

3. Appellant - present owner, Theresa Gergely, requested an interpretation of the land use provisions of the Seattle Municipal Code as applied to the subject property.

4. The Director of the DCLU entered his interpretation on September 13, 1982, that the subject property could not be established as a nonconforming duplex in the zoned area.

5. According to DCLU the structure was erected as a one story frame cottage in 1903; was extensively added to in 1907; had an addition in 1957; had been extensively remodeled in the last few years without the benefit of permits; and appellant, through permit, had separate electric meters installed in June, 1981.

6. Present use of the property is as a duplex. The structure has an upper and lower level and two separate entries. The north entry abuts a three car carport for the lower level and the east entry opens to a hallway containing two doors. The interior easterly facing door is for the lower level and the interior door for the upper level opens to a flight of stairs going upwards.

7. Inspection by DCLU in March, 1981, showed the structure to be a single family residence. DCLU records and testimony indicate a suspected illegal use of the property as a duplex in that same month. Further DCLU records indicate that the structure may have been converted to a duplex some four years earlier.

8. Appellant - present owner, Theresa Gergely, testified she purchased the property as a duplex on the basis of her site examination and the seller's listing of the structure as a duplex.

9. DCLU maintains that the Hearing Examiner's powers are limited as set forth in Section 3.02.120 of the Seattle Municipal Code and as stated in the Land Use Code, Chapter 23, Seattle Municipal Code. DCLU further maintains that the equitable concept of estoppel is not applicable and that Rule 20-79, as superseded, governs the standard of proof as well as the criteria for legalizing existing nonconforming uses.

10. Complaints regarding the duplex use have been received by DCLU and one of the complaints has been by the seller of the property.

11. Evidence in the form of an affidavit submitted by appellant, found credible by the Hearing Examiner, indicates usage as a duplex with dual and separate food preparation areas, i.e., in the upper and lower units since 1929. Appellant Exhibit 6.

12. The record does not clearly show when the upper level portion was added to the one level cottage. However, based on Appellant Exhibit 6, we find that the addition occurred prior to 1923.

Conclusions

1. The Director's decision is to be accorded substantial weight and the burden of proving the contrary rests with the appellant. Hearing Examiner Appeal Rule 8.9; Section 24.10.070, as amended.

2. Section 24.08.050, as amended, defines a dwelling unit as:

A room or rooms located within a building, 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.

3. Director's Rule 20-79, superseded by 11-80, provides that a use permit to establish an existing nonconforming use will be issued if it can be shown

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.

4. The Director's Ruling also notes as a definition of nonconforming use

A lawful use of land or structure in existence on the effective date of this ordinance or at the time of any amendments thereto and which does not conform to the use regulations of the zone in which such use is located.

5. The Director's position is that appellant must prove that the structure's use as a duplex was at a time when such use would have been legal. In effect appellant is asked to show with DCLU records legal duplex use prior to 1923 or documentation of permitted use by the Department of Public Works sometime in 1929 or thereafter.

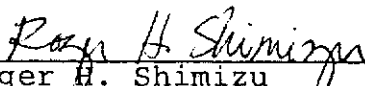
6. It appears that duplex use could have been established as early as 1907 when there was an addition to the one story cottage. Appellant Exhibit 6. Further, based on evidence of record, the dwelling was clearly in use as a duplex as of 1929. Therefore, the use "could have been lawfully established either by construction or conversion under the Zoning Ordinance at the time from which its existence can first be proved". Rule 11-80.

7. Under the circumstances of this case, the appellant - present owner, Theresa Gergely, should be issued a use permit for the duplex.

Decision

The appeal is GRANTED and the interpretation of the Director of the Department of Construction and Land Use is REVERSED.

Entered this 17 day of November, 1982.



Roger H. Shimizu
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 further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App 418 (1977); JCR 73 (1981). Should an appeal be filed, instruction 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 of the appellant is successful in court.