

## FINDINGS AND DECISION

### OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

HOWARD AND CYNTHIA JENSEN

FILE NO. S-84-001

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

#### Introduction

Appellants, Howard and Cynthia Jensen, appeal the interpretation by the Director, Department of Construction and Land Use, of the Land Use Code as applied to an accessory structure at 3926 N.E. Surber Drive.

Parties to the proceedings were: appellants represented by Linda R. Larson, Syrdal, Danelo, Klein and Myre, P.S.; the Director represented by Judy Talman.

This matter was heard before the Hearing Examiner on August 27, 1984.

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

After due consideration of the evidence elicited during the public hearing, the following shall constitute the decision of the Hearing Examiner on this appeal.

#### Findings of Fact

Facts agreed to by the parties are as follows:

1. The property is located at 3926 N.E. Surber Drive and is legally described as Lots, 8, 9, 10, Block 6, Belvoir Addition.
2. The property is zoned SF 5000 (Single Family Residence, minimum lot size 5000 square feet).
3. Between 1923 and 1957 the property was zoned RIA (First Residence District). Between 1957 and 1982 the property was zoned RS 5000 (Single Family Residence, minimum lot size 5000 square feet).
4. The subject property is composed of three platted lots and contains approximately 24,000 square feet of lot area.
5. On December 21, 1933, Permit #309952, "to build a 23 x 41'6" one faml. res." on the West 50 feet of Lot 9 and the East 10 feet of Lot 8 of Block 6, Belvoir Addition was issued. The permit showed the address of the property as 3926 East 37th Street. In 1935 a permit was issued to alter the residence.
6. On December 11, 1935, Permit #316906, "to erect servants' quarters, two car garage in basement. For use in connection with existing residence and to be occupied by same family only", was issued. The permit describes the property as lots 8-9-10, Block 6, Belvoir Addition and shows the address as 3926 East 37th Street. The occupancy is stated as "servants quarters + garage" and the building is described as being 21 feet x 58 feet.

7. In 1954, permit #432064, "construct addition to existing residence per plan," was issued for lots 8, 9, 10, Block 6, Belvoir Addition. The address given is 3926 Surber Drive and the occupancy is shown as "one family residence." The letter requesting the interpretation states that the accessory building was "converted into two living units in approximately November 1954" and that "the two units have been rented continuously since 1954, but tenants have not had caretaking or servants' responsibilities."

8. From 1923 to the present, the zoning which has regulated the property has allowed only one single family dwelling to be constructed on a lot.

9. The Zoning Ordinance in effect prior to 1957 did not specifically allow servants quarters in single family zones but did provide that "(i)n a First Residence District, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted...". (Ordinance No. 45382, Sec. 3(b)).

10. Ordinance 86300, which became effective in 1957, specifically allowed "separate living quarters containing no more than one dwelling unit for domestic servants employed on premises when the lot is fifteen thousand (15,000) square feet or more". (Sections 6.31(b), 7.31, 8.31) as an accessory use in single family zones.

11. As of June 11, 1982, the property has been regulated by Title 23 (the "Land Use Code") of the Seattle Municipal Code. The Land Use Code does not allow accessory servants quarters in single family zones and allows only one residence on single family zoned lots.

12. Section 23.44.80, which contains the restrictions on non-conforming uses in single family zones, provides in part that

Any nonconforming use which has been discontinued for more than twelve consecutive months shall not be reestablished or recommenced. A use shall be considered discontinued when:

- a. A permit to change the use of the property or structure was issued and acted upon, or
- b. The structure, or portion of a structure, is not being used for the use allowed by the most recent permit, or
- c. The structure is vacant, or the portion of the structure formerly occupied by the nonconforming use is vacant. The use of the structure shall be considered discontinued even if materials from the former use remain or are stored on the property. A multi-family structure with one or more vacant dwelling units shall not be considered unused unless the total structure is unoccupied.

13. "Nonconforming use" is defined as:

A use of land or structure which was lawful when established and which does not conform to the use regulations at any time, or when it has commenced under permit, a permit for the use has been granted and has not expired, or a structure to be occupied by the use is substantially underway in accordance with Section 23.04.10D.

Additional findings:

14. Appellants purchased the subject property in January, 1984. The two units in the carriage house structure were occupied by tenants who had no caretaking responsibilities.

15. Appellants applied for a construction permit in February or March, 1984, and at that time were advised that the rental of the two units was an illegal use. They were told that one unit could be returned to "servants' quarters" use.

16. Appellants gave notice to their tenants and the units were vacated in April and May, 1984.

17. The division of the three lot parcel into two, each with a structure, would require variances. The lots created would have irregular lines, according to appellants' architect, Harry B. Rich.

18. To convert the two units to one would be costly because there is no internal connection between the two.

19. Under the Director's interpretation the structure could only be used as a garage and other uses accessory to the principal use such as recreation room or workshop.

20. The main house and carriage house are similar in architectural style and finish.

### Conclusions

1. On an appeal of an interpretation pursuant to Chapter 23.88, the interpretation of the Director is to be given substantial weight and the burden of establishing the contrary is to be upon the appellant. Section 23.88.20(E)(4).

2. Appellants urge that the unnecessary hardship to them and the absence of public benefit resulting from the Director's interpretation can be considered by the Director. Asia v. Seattle, 4 Wn.App. 530, 482 P.2d 810 (1971), cited by appellants, did look at hardship and public benefit but in a apparent constitutional challenge to the application of the ordinance. The issue is more clearly stated in Seattle v. Martin, 54 Wn.2d 541, 342 P.2d 602 (1959), cited in Seattle v. Asia, where the court used the balancing test advocated here to determine the validity of an ordinance requiring termination of the nonconforming use one year after it became nonconforming. In the case before the hearing examiner, only the Director's interpretation of the code in the light of the present facts is challenged. Seattle v. Asia, is, then, inapposite. Even were a taking issue framed, the examiner would not have authority to decide it. If a balancing were permitted, it is clear that the public benefit, if any since the use has existed for 30-50 years, is far outweighed by the hardship to appellants.

3. While Section 23.44.80 would allow the continuation of the nonconforming use, the stipulated facts show that the nonconforming use was discontinued some time in the past, greater than 12 months ago. The most recent duplex use, and even the use of a single unit because it was not connected to the use of the principal structure, was unlawful, not nonconforming. Since Section 23.44.80(A)(2) states that a discontinued nonconforming use may not be recommenced, the Director had no choice but to decide that the structure has lost its nonconforming status and must be used as accessory to the single family residence. Therefore, his decision must be affirmed.

Decision

The decision of the Director is affirmed.

Entered this 10<sup>th</sup> day of September, 1984.

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. 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. Akada v. Park 12-01 Corporation, 37 Wn. App. 221 (1984); JCR 73. 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.