

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

SAM VISKOVICH

FILE NO. S-87-012

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

Introduction

Sam Viskovich appeals the interpretation of the Land Use Code issued by the Director, Department of Construction and Land Use, for property addressed as 1235 and 1235 1/2 N.E. 89th Street, Seattle.

The appellant exercised the right to appeal pursuant to the Seattle Municipal Code, Section 23.88.020, as amended.

Parties to the proceedings were: appellant, by James Hanken, Esq.; and the Director, Department of Construction and Land Use, by Guy Fletcher, senior land use specialist. Joan Hall, former owner, testified for property owner Virginia Cain.

This matter was heard before the Hearing Examiner on January 29, 1988.

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. The subject property is located at 1235 N.E. 89th Street. The property is legally described as Lot 3, Acre 3, Block 20, Maple Leaf Addition to Green Lake Circle.

2. The property is currently zoned SF 5000. Between 1957 and 1982, it was zoned RS 5000. From the time of its annexation into the city in 1945 until 1957, it was zoned R1-A. All of these designations denote single family zoning.

3. The lot measures 45 feet by 145 feet for a lot area of 6525 square feet.

4. There are two existing houses on the lot. Tax records obtained from the state archives show the front house as having been built in 1920 and the smaller back house in 1928. These records indicate the property has consistently been taxed as having two houses. The rear structure has a street address of 1235 1/2 N.E. 89th.

5. The two subject structures lie directly east of appellant who purchased his site in 1977 and constructed his present home in 1979. The appellant testified credibly that there was no rear house occupancy in 1977 or 1978; and that the Polk Directory showed a total of 17 years' vacancy between 1947-81. One such period was "from 1977-81" per the Polk directory. However, a tenant letter of record alleges occupancy of the 1235 1/2 structure from June 1978 - January 1979 "for the rent \$100.00 per month." Another tenant letter recites occupancy from February 1983 - May 1985.

6. One rental agreement copy of record shows that 1235 1/2 was rented for a 6 month minimum term beginning February 14,

1979, with water, sewer and garbage paid by the landlord. Another copy shows a rental beginning June 1, 1985 to May 31, 1986 and a third copy reflects a 12 month rental period from June 1, 1986 - May 31, 1987.

7. The inconclusive meter readings supplied show suggested activity at 1235 1/2 during periods of 1963 and 1965. Correspondence from City Light indicates that pre-1971, customer information is unavailable, but that City Light could verify continuous electric service at 1235 1/2 N.E. 89th Street "since October 1, 1975."

8. It was undisputed that RCW 35.63, the legislation enabling cities and counties (other than charter cities) to regulate land use, was enacted in 1935.

9. The Hearing Examiner finds that the City has no record of any permits connected to the construction of the houses and DCLU has no records indicating the use of the property.

10. In order to remedy this situation, the previous owner of the property applied for a permit to establish for the record the existence of two houses. The Department project number is 8705506. Hall purchased the property in 1978 and sold it to Virginia Cain in 1987. It is that permit application addressed by the subject interpretation requested by Mr. Viskovich.

11. According to the DCLU witness, the King County Zoning Code in force immediately prior to annexation was held invalid in the mid 1950's by Judge Hodson of the King County Superior Court. The basis for the ruling was the County's failure ever to have adopted a Comprehensive Plan. For that reason, the Department witness continued, the usual Departmental policy is to treat as legally nonconforming any situation that existed prior to annexation.

12. DCLU reports that the Director's Rule pertaining to application to establish a use for the record is DR 11-80. That Ruling is entitled "Legalization of Existing Non-conforming Uses."

13. DCLU also reports that on September 3, 1987, Wilbur Young of the Department's Housing and Zoning Division inspected the subject property; that the inspection found a number of minor violations; that Ms. Virginia Cain, the new owner, expressed her willingness to make necessary repairs; and that on October 12, Mr. Young reinspected the property and found the houses to be in compliance. No written report to that effect is of record.

Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.88, Seattle Municipal Code.

2. Pursuant to Seattle Municipal Code Section 23.88.020-(E)(5)

...the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director. The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant.

3. The record shows that the prior property owner applied for a permit to establish for the record the (legal) existence of two houses on the single lot. Appellant, a neighboring property owner, requested and received a DCLU Interpretation on the issue. The Interpretation was adverse to appellant's position. In hearing, appellant's counsel objected to the fact that appellant was required to show error before the Hearing Examiner when in the appellant's opinion, it should be the property owner's burden to show ordinance compliance. The Hearing Examiner declined to order any remand or variance from the scheme of Seattle Municipal

Code Section 23.88.020(E)(5), supra, and here reaffirms that ruling.

4. As the Hearing Examiner understands the essence of appellant's case, the existence of the two houses on a single lot constitutes a nonconforming use which was discontinued by virtue of the fact that the 1235 1/2 structure was vacant "from 1971 through 1981" and that additionally, "periods of vacancies of more than one year exist prior to that time." According to appellant, proper construction of cited provisions dictates a result that "requires only one single family dwelling on each lot."

5. As the Hearing Examiner understands the DCLU position, the two houses on the single lot represent nonconformity as to development standards and not as to use since both houses are single family dwellings.

6. To support its conclusion, DCLU applied portions of the nonconforming use analysis and terms of "Superintendent's" Ruling 11-80. For example, DCLU suggested that by virtue of its history before annexation to the City, the use of the land for two structures could have been lawfully established, Rule 11-80(1). DCLU also noted Housing Code compliance (Rule 11-80(3)). However, in Interpretation and presentation, DCLU deemphasized paragraph 2 of the Rule (11-(2)) which paragraph requires continuous use or loss of nonconforming use status.

7. The Hearing Examiner concludes that the subject property does not present a "nonconforming use," defined at Seattle Municipal Code Section 23.84.026 "N" as

...a use of land or a structure which was lawful when established and which does not now conform to the use regulation of the zone in which it is located...(emphasis supplied)

8. The property is in a single family zone. Seattle Municipal Code Section 23.44.006 includes a single-family dwelling unit as one of several principal uses permitted outright in single-family zones. The problem is that Section 23.44.006(A) includes the statement that "one...single-family dwelling unit shall be permitted on a lot." It can be argued that this language constitutes a "use regulation," Seattle Municipal Code Section 23.84.026 "N," which would mean that the present land use does not comply.

9. On the other hand, it can be argued that the language of 23.44.006(A) relating to one single-family unit per lot is a development standard to be applied to the single family permitted use. Given the substantial weight to be accorded the DCLU Director's decision, and given the legislative scheme, the Hearing Examiner is inclined to accept the language of Section 23.44.006(A) as development standard language.

10. Seattle Municipal Code Section 23.44.006 lists as permitted uses in a single family zone the

- (A) Single-family Dwelling Unit,
- (B) Floating Homes,
- (C) Existing Cemeteries and others.

As it does with the single-family unit delineation, the Code includes general comments about the floating home, cemetery and other uses. These comments are in the nature of advisory statements as to how the delineated items should be addressed.

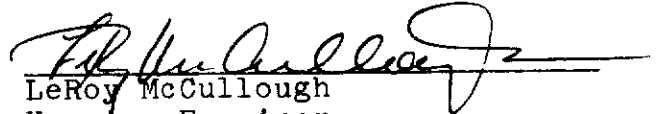
11. DCLU has generally applied the one dwelling unit per lot stipulation as a development standard which can be the subject of variance relief. See for example Exhibit 5, MUP 87-045(V). It is clear from Seattle Municipal Code Section 23.40.020 that variances may be sought from the single family zone development standards, Seattle Municipal Code Section 23.40.020(A), but that use variances "shall not be accepted for filing."

12. The Hearing Examiner therefore agrees with the DCLU Interpretation that a nonconforming "situation" exists.

Decision

The DCLU Interpretation is AFFIRMED.

Entered the 16th day of February, 1988.


LeRoy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

The decision of the Hearing Examiner in this case is the final administrative determination by the City, and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within fifteen days of the date of this decision. Should such a 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.