

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

GARY M. MERLINO

FILE NOS. S-89-008 AND
S-89-009

AND

INTERPRETATION NO. 89-012

RICHARD & GWEN FRASER

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

Introduction

Appellants challenge Interpretation 89-012 issued by the Director of the Department of Construction and Land Use regarding (1) the method for measuring the height of a fence, bulkhead, freestanding wall, or similar structure and (2) whether column caps on fences are to be included in such measurements.

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

Parties to the proceedings were: appellant Merlino, represented by his attorney Rhys Sterling; appellants Fraser, represented by their attorney James Munn; and the Director of the Department of Construction and Land Use, represented by Andrew McKim, Land Use Specialist.

This matter was heard before the Hearing Examiner on January 4, 1990. The record remained open through January 19, 1990, to allow for a site visit and due to the Hearing Examiner's unavailability because of illness in the intervening period.

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

After due consideration of the evidence presented at the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on appeal.

Findings of Fact

1. In response to a request from appellant Merlino, the Director of the Department of Construction and Land Use issued an interpretation of the Land use Code wherein he decided:

"The height of the wall along the north edge of the Merlino property is properly measured from the pre-existing grade, i.e., the grade currently in existence on the north side of the wall on the Fraser property. Column caps are subject to the six-foot height limit for freestanding structures in required side yards."

Exhibit 1A. Both appeals of this decision were timely.

2. The wall at issue forms a boundary wall between the Merlino and Fraser properties. It extends westward from a point near 50th Avenue S.W. along much of the Merlino north property line of the lots at 9601 50th Avenue S.W. The subject property is zoned SF 9600.

3. The wall was built with prior approval of and under an agreement with the Frasers. They were concerned that there be a wall between the two properties of sufficient height to provide security, privacy and screening for them from a tennis court or other development to be built later on the Merlino property. They were also concerned with possible drainage problems due to the higher grade which had been created on the Merlino property.

4. Construction of the wall was begun in January 1988. By March 1988, it had been mostly completed, except for a portion at the eastern end

near 50th Avenue S.W., when DCLU issued a notice of violation and construction was stopped. The notice of violation was for failure to obtain a building permit for a fence exceeding six feet in height as required by the Seattle Building Code.

5. On April 1, 1988, the Merlino's submitted an application to build the fence, but that application was not processed by DCLU on the grounds that a fence in a required yard could not exceed 6 feet in height and the one proposed by the Merlino's did. That application included plans which showed a typical wall section of the fence extending 7 foot 8 inches above 1 foot footings with columns 7 feet 10 inches above the footings, and column caps above these. These plans depict the wall as it is presently, essentially.

6. Later in April 1988, after the application was rejected, the Merlino's solicited an interpretation from DCLU as to whether the fence was an accessory structure under Section 23.44.014(D), could be built higher than 6 feet by agreement, and therefore could be permitted in the sideyard at the height proposed. DCLU determined that it was not an accessory structure and that no agreement between the property owners could authorize what the code prohibited. It then affirmed that the height of fences and freestanding walls in side yards in single family zones were limited to 6 feet. (Interpretation 88-013).

7. The Merlino's appealed Interpretation 88-013 to the Hearing Examiner who concurred that the fence was not an accessory structure. The Hearing Examiner, however, went on to determine the method for measuring the fence and concluded that the basis for measuring the fence was from the grade existing at the time of application or when construction began, based on an interpretation of "existing high ground level" of Section 23.44.014(D)(10). (Refer to Hearing Examiner file S-88-009, Conclusions 10, 11, and 12.) Later, after reconsideration, the Hearing Examiner excised conclusions 10, 11, and 12 from the decision by Order of August 8, 1989, which correction essentially reinstated all of DCLU's interpretation.

8. On February 29, 1989, the Merlino's submitted an application for a variance from the height restriction of Section 23.44.014(D)(10). This application was denied by DCLU and the denial affirmed by the Hearing Examiner on appeal in file MUP-89-021(V).

9. The Merlino's then requested another interpretation of Section 23.44.014(D)(10) which sought answers to the following questions, as summarized in pertinent part:

- a. what is the basis for measuring fences, free-standing walls, bulkheads and similar structures, and from what elevational point and when are measurements to be taken to determine the structures height when the subject property has been filled above pre-existing grade;
- b. is the part of the structure that serves as a retaining wall when located on property that has been, is being, or will be filled excluded from such measurements (i.e., can the fence portion and retaining wall portion of the same structure be measured separately in such fill situations;
- c. whether or not the incremental height of the column caps are included in such measurements; and
- d. If a date-certain methodology is the basis for determining elevations for measurements, how will the section be applied where property will be filled (1) more than 6 feet and (2) less than 6 feet.

This interpretation request is the subject of the instant appeal.

10. The wall is a rebar-reinforced solid concrete structure designed with inset panels and protruding columns. The wall sections are 9 inches thick and reinforced vertically and horizontally, with rebar extending into the footing. The columns between the wall sections are 18 inches by 18 inches and are placed along the wall 11.5 feet from center to center. These columns are reinforced with rebar extending vertically and turning into the footings and with rebar extending horizontally into the wall sections. The columns extend two inches above the wall sections and are topped with decorative column caps extending 7 inches above the columns. The design of the wall coordinates with the Merlino house and is visually and aesthetically pleasing.

11. The wall as used is a dual purpose structure, serving as a retaining wall for fill on the Merlino property and as a fence or boundary wall between the two properties above the fill. The wall, however, was designed and built as an integrated structure, section by section, and not in separate parts for each function or in different construction stages.

12. Presently, the Fraser property ranges from 2-3 feet lower in elevation than the Merlino property at the wall. The height of the wall on the Fraser side is 8.5 feet above present grade at the highest point of the wall. With the columns and column caps, it is 9.2 feet above grade. At the same point on the Merlino side, the wall is 5.9 feet above present grade. With the columns and caps it is 6.6 feet above grade.

13. The wall's height at the portion yet to be built near the property's driveway connection with 50th S.W. and abutting the Fauntleroy Improvement Club property will not exceed 6 ft. including column caps above lot grade based on the 1980 survey.

14. The present difference in ground level between the two properties results mainly from grading having been done on the Merlino property prior to and in preparation for construction of the new home there. This grading was needed to elevate portions of the site sufficiently to prevent flooding of the property and water damage to the house from Puget Sound during storms and to provide for the drainage system planned. The resulting site elevation achieved for the home at the west end was about 6 feet, which is comparable to the elevations for the homes on either side of the Merlino home as well as that of the existing residence behind on the east end of the property. The Merlino's constructed their residence at this grade in accordance with building plans approved by the City of Seattle.

15. The grading plan developed for the construction contemplated that fill and leveling would be accomplished over most of the Merlino property to a maximum height of 6 feet eastward from the home to the curb curve of the driveway. Thereafter, it would be reduced gradually to about 3 1/2 feet to where the property accesses 50th Avenue S.W. When the agreement on the boundary wall was reached between Frasers and Merlino's, that plan was enlarged to extend comparable grading to the Merlino's north property line after the wall was built.

16. A significant portion of the grading planned for the property was done by the time the wall was begun in 1988. However, at the north property line, no grading had yet been done (except for filling of a ditch there) in order to allow for working room during construction of the wall and to prevent intrusion of the higher fill planned onto the Fraser property. Once the wall was constructed, the fill was extended to the north property line to the elevation at which it exists today.

17. Grading on the Merlino property is still not totally complete. When grading is complete there will be a total grade difference of 4 feet at certain points along the property line of the Merlino/Fraser properties. With the additional fill planned the top of the wall on the Merlino side will be about five ft. in height above finished lot grade, excluding column and column cap extensions.

18. The Merlino's acquired the property in 1980. At that time there was no significant grade differential at the property line between the Fraser and Merlino properties. Before the wall was built in 1988 the grade was still comparable at the property line, although, as previously indicated, much of

the rest of the Merlino property had been filled, along with a 20 inch-deep, 30 inch-wide ditch on the Fraser property which was near the property line.

19. The record does not reflect whether a grading permit was required or obtained for the fill. However, there was no evidence presented nor does DCLU contend that the fill and grading was done illegally.

20. For a number of years and prior to construction of the boundary wall, the Frasers had a 6 feet high fence extending along the southern portion of their property about 3 feet from the property line. Much of the fence was on top of a 2 foot retaining wall which was mostly underground except for that portion exposed by the ditch on its south side as the property sloped down from the east. This fence has since been torn down, although the retaining wall remains on the Fraser property north of the present boundary wall.

21. The Director of DCLU indicates that in cases where there has been an existing natural higher grade elevation between two different pieces of property, the Department has interpreted "existing high ground level" to mean "the grade on the higher ground side" where the fence is to go and that this principal applies even "where the owner has created a cut, and built a three-foot retaining wall to support the bank." (Exhibit 1A, p. 6, Conclusion 4.) Thus, in practice, the Department would allow a 6 foot fence to be built atop the three foot retaining wall on the property with the higher elevation. In such a case, the Department interprets "existing high ground level" to be the "existing higher ground level" at the grade on the uphill side of the retaining wall. (Exhibit 1A, p.6, Conclusion 4.)

22. In this appeal, Mr. Merlino asks that the dual purpose of the wall be recognized, that the height of the retaining and fence portions of the wall be separately measured in determining the permissible height of the wall, that the 6 feet high limitation on the wall apply only to that portion extending above finished lot grade following completion of fill on the Merlino property, and that the column caps be excluded from the height limitation. The Frasers ask to have the wall remain as it is for protection and screening of their property and seek modification of the interpretation to permit measurement of the wall from existing grade.

Conclusion

1. The Hearing Examiner has jurisdiction over these parties and this subject matter pursuant to Section 23.88.020E.

2. Appeals of interpretations "shall be considered de novo and the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director." Section 23.88.020E.5. The Director's interpretation is to be given substantial weight and the burden is on the appellant to establish the contrary.

3. Under Section 23.44.014(D)(10) of the Land Use Code:

"...fences, freestanding walls, bulkheads, signs and similar structures six feet (6 ft.) or less in height above existing high ground level may be created in any required yard..."

4. There is no serious dispute that the wall constructed here serves presently as both a fence and retaining wall. Whether or not these functions may be combined in a single structure exceeding six feet under the Code and in the circumstances presented here is in dispute. The Director has implicitly determined in the interpretation that they may not where no grading has been performed at the property line until after the wall had been started and where there was no naturally existing topographical break or differential in lot grade before the wall was started.

5. The Hearing Examiner agrees that there was no topographical break or substantial differential in lot grade at the property line between the Merlino and Fraser properties before and when the wall was started. Nor was there significant grading there, although there had been significant grading on other parts of the Merlino property for construction of the home and other

improvements there. There had been some grading as well on the Fraser property just north of where the wall was constructed by the filling of a ditch there. But these facts are not in and of themselves determinative of the issues presented in this appeal.

6. In construing a statute such as the code provisions at issue, the prime objective is to carry out the legislative intent. Stone v. Chelan Cy Sheriff's Department, 110 Wn.2d 806, 809, 756 P.2d 736 (1988.) That intent is determined primarily from the language of the statute. Stone, at 810. Another rule of construction is that the use of different language in different portions of a statute indicates a difference in legislative intent. Saber v. Public Disclosure Commission, 96 Wn.2d, 135, 634 P.2d 303 (1981). However, statutes are also to be construed as a whole, giving effect to all language used, considering provisions in relations to one another and harmonizing them whenever possible. Newschwander v. Board of Trustees, 94 Wn.2d 701, 707, 620 P.2d 88 (1980.)

7. In the Code section at issue, structures such as fences, walls and bulkheads are permitted in a sideyard in single family zones if they do not exceed 6 feet above "existing high ground level." That term is not defined in the Land Use Code, nor are the words within that term separately defined by the Code.

8. Under principles of statutory construction, words used in a statute which are not defined must be given their plain and ordinary meaning. King County Council v. Public Disclosure Commission, 93 Wn.2d 559, 561, 611 P.2d 1227 (1980). The plain and ordinary meaning of "existing" is that occurring or present, according to Websters. It is synonymous with "in existence" or "being" as well as "present," according to Roget's International Thesaurus. "High" means an elevated place or region, a high point or level. Webster's. The plain meaning of "ground" in a land context means the surface of the earth, soil, and area around or belonging to a house or other building. Webster's Ninth New Collegiate Dictionary. It is synonymous with "land," "soil," "dirt," according to Roget's Thesaurus.

9. In other parts of the code, similar terms such as "grade," "existing grade" or "existing lot grade" are used when referring to different land planes and techniques for measurement of structure height. In the Grading and Drainage Ordinance "grade" means the ground surface contour. Section 22.800.080.27. In Webster's dictionary that word is defined as a degree of rise or descent of a sloping surface; or a reference level, such as "ground level." The terms "existing grade" and "existing lot grade" are defined the same way in the Land Use Code and in the Grading and Drainage Ordinance:

...the natural surface contour of a lot, including minor adjustments to the surface of the lot in preparation for construction.

Section 23.84.024; Section 22.800.080.23. The lower of existing grade or finished grade is what is used for measurements of the height of structures in single family zones. See Section 23.44.012; Section 23.86.006. If this term applied it would dictate measuring from the prefilled grade not the finished grade with fill.

10. The policies behind required yards in single family zones and limitations on intrusions therein reflect a legislative intent to foster open space between structures and preserve the visual character, greenery and other streetscape of residential communities. Section 23.16. 002A (pp 23-11.) The height limitations policies on residences generally evidence an intent to have structures relate to the topography of the site and area, maintain scale, and avoid unnecessary view blockage. Sections 23.16.002A., 23.16.002B. The policies also seek to allow residents maximum flexibility in the use and enjoyment of their property, while maintaining the privacy, safety and rights of neighbors. Section 23.16.002A, pp23-9.

11. Construed as a whole, harmonizing the differing terminology in relation to one another, and considering the plain and ordinary meaning of the words, it seems clear that the words "existing ground level" mean the same as "existing grade" or existing lot grade." To contend that this term would mean

"finished" grade would be contradictory to the plain meaning of the word "existing." The term "existing high ground level" then means the natural high ground level in existence at the time of construction of the wall, prior to grading, not from later filled ground or to be filled ground or finished grade. Minor grading such as the fill of the ditch in preparation for construction of the wall would be permitted. (This is not the case where a new property owner acquires property which has been filled previously and then constructs a fence or wall on top of that fill. In such a case, a different result might obtain.)

12. In the instant case, there was no significant differential in grade (or ground level) at the property line between the Merlino and Fraser properties at the time construction of the fence was commenced. Since the existing natural ground level there was the same for both properties, there was no higher ground level from which to measure the fence or wall as is the case when a fence is located on sloped property. Accordingly, the basis for measuring the wall at issue here is from the ground level or grade at the Merlino north property line as it existed at the commencement of construction of the wall, which from the facts, appears to be the grade currently existing on the north side of the wall.

13. The question still remains, however, whether the wall structure may be separately measured for each portion because of its dual purpose as used and contemplated by the parties' agreement. The Code makes no specific provision for dual purpose structures of this nature. For guidance, however, the definition of "structure" is helpful.

14. The term "structure" is defined in the Land Use Code as follows:

"'Structure' means anything constructed or created on the ground or any improvement built up or composed of parts joined together in some definite manner and affixed to the ground, including fences, walls and signs, but not including poles, flowerbed frames and such minor incidental improvements."

Section 23.84.036. This definition appears to contemplate there could be more than one component part in a structure.

15. If the retaining wall portion of the structure had been underground it would not have been counted in height.

"Underground portions of structures are not included in height calculations. The height of structures shall be calculated from the point where the sides meet the surface of the ground."

Section 23.86.006.A.5. However, since it is exposed on one side, the full exposed height would count.

16. The department's practice in application of this term in other circumstances has some relevance. In the interpretation the Director indicated that in practice the department would allow fences to be built on top of exposed retaining walls, even where the wall had been created by a cut, and would measure the height of the fence portion from the higher level at the uphill side of the retaining wall, at least where there was a pre-existing natural grade differential (Director's Conclusion 4, p. 6). Presumably, then, the department would also measure the retaining wall portion in that formula from the grade created by the cut upwards to the top of the wall. It is not clear whether the Director would apply this principal for departmentally-approved fills up to 6 feet resulting in a retaining wall need and further security on top, or for other fills where there is no evidence of some form of deception or advantage gained by filling.

17. If the separate measurement principal urged by the appellants were to apply in this case, however, there would be a height advantage gained by the fill, that being a taller structure than the Code would otherwise allow under pre-construction existing ground conditions. The need for this taller

structure to provide screening and privacy to the Frasers resulted directly from the Merlinos' decision to fill their property to achieve a higher elevation, even though some of that fill was presumably justified for protection of the house and needed drainage. With that fill the Merlinos gained a benefit for themselves but the Frasers suffered a detriment, i.e. an intrusion on their privacy and security. The fill extension to the boundary wall was not needed as the Hearing Examiner earlier concluded in the variance request. (Conclusion 2.) To allow separate measurements for each function of the wall also would lead to abuse of the Code by developers in other circumstances. Under the rationale urged, a 6 feet retaining wall and a 6 feet fence above fill could be erected creating a 12 feet barrier at a property boundary where one property owner had filled to the maximum. Such a construction would run counter to the spirit and plain words of the statute. Accordingly, the Hearing Examiner declines to place such a construction on the statute. The separate uses of the wall should not be measured separately to determine the permissible height of the wall.

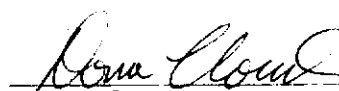
18. The Code makes no specific reference to ornamental features of fences. As a usual rule, no part of a structure may extend beyond the maximum height limit unless specifically exempted or excepted under the provisions of the Code. Section 23.86.006A.4. There are exceptions in the Code for intricate exceptions or design or ornamental features for other structures. A rigid application in measuring a fence structure to include minor ornamental features such as column caps of 7 inches in height and which occur only every 11.5 feet would produce an unnecessary result. It would be contrary to other provisions of the code recognizing the value of and providing allowances for ornamental features. It is also noted that the definition of "structure" itself excludes "minor incidental improvements" from regulation otherwise. Accordingly, the column caps should be excluded from measurement of the wall. The columns themselves, however, are not minor incidental improvements or merely ornamental features. They provide mass and stability for the wall sections and should be counted as part of the wall height.

19. The last request is conditioned on measurements applying a date-certain methodology. The method used here is an event-certain methodology, not a date-certain one. In any event, in this case no grading except for minor grading on the ditch was earlier performed where the construction of the wall was to take place. Therefore there is no need to resolve this issue presently.

Decision

The interpretation of the Director is Affirmed except as to measurement of the column caps. In this respect the Director's interpretation is modified to exclude the column caps from measurement of the wall.

Entered this 5th day of February, 1990.



Dona Cloud

Hearing Examiner Pro Tempore

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 fourteen 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, 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104.