

THE CITY OF SEATTLE

LAW DEPARTMENT

MUNICIPAL BUILDING . SEATTLE, WASHINGTON 98104

AREA CODE 206 TELEPHONE 625-2402

DOUGLAS N. JEWETT, CITY ATTORNEY

RECEIVED  
FEB 22 1984

February 16, 1984

OFFICE OF HEARING EXAMINER

Margaret Klockars  
Deputy Hearing Examiner  
Office of Hearing Examiner

Re: Robert Irwin, et ux., v. The City of Seattle, et al.  
King County Cause No. 82-2-03675-7  
Your File No. MUP-82-007

Dear Margaret:


Enclosed for your files and/or information is the Order of Remand in the above-entitled matter. The Court concluded in this case that an appeal to the Hearing Examiner must be timely made from a Director's Decision, and that this is a jurisdictional prerequisite, which may even be raised for the first time on appeal to the Superior Court. The Court also examined the issue whether there may be circumstances which would excuse an untimely filing of an appeal (I believe there is such a possibility) but, after hearing testimony and finding that no justifiable excuse existed in this case, declined to decide that issue.

It was clear in this case that no party ever raised the issue of an untimely appeal in the hearing before the Examiner, so it was understandably never caught at that level.

The matter has been remanded back to the Hearing Examiner and DCLU, and the variances granted by DCLU have been ordered reinstated by the Court. By copy of this letter I am notifying DCLU of this decision.

Very truly yours,

DOUGLAS N. JEWETT  
City Attorney

BY   
MICHAEL P. MONROE  
Assistant City Attorney

MPM:pl

cc: William J. Justen

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FEB 22 1984

OFFICE OF HEARING EXAMINER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

ROBERT IRWIN, et ux.,	)	
	)	
Plaintiffs,	)	NO. 82-2-03675-7
v.	)	
	)	ORDER OF REMAND ON
THE CITY OF SEATTLE, et al.,	)	WRIT OF CERTIORARI
	)	
<u>Defendants.</u>	)	

I. Hearing

1.1 Date. January 23, 1984.

1.2 Notice. This matter was assigned for hearing from the trial calendar, notice of trial date having been regularly served on all parties.

1.3 Appearances. Petitioners and plaintiffs Robert and Rita Irwin appeared in person and by their attorney, Howard K. Todd of Dodd, Coney & Bishop, P. S. The defendants City of Seattle, Office of the Hearing Examiner and Department of Construction and Land Use (hereinafter referred to as "City") appeared by and through Michael P. Monroe, for Douglas N. Jewett, Seattle City Attorney.

1.4 Purpose. Review of proceedings before the Hearing Examiner of the City of Seattle in the "Matter of the Appeal of

1 Victor and Margaret Berger from a determination of the Director of  
2 the Department of Construction and Land Use on a Master Use Permit  
3 Application", #MUP-82-007(V), brought by writ of certiorari issued  
4 by the Honorable Warren Chan, Judge of the King County Superior  
5 Court, on March 31, 1982.

6 1.5 Evidence. The record of the proceedings before the  
7 Hearing Examiner in #MUP-82-007(V). The sworn testimony of  
8 Margaret Berger, the presentation of which was stipulated to by the  
9 plaintiffs Irwin and the defendants City.

## 10 II. Findings

11 The Court, having considered the evidence and argument of  
12 counsel, finds:

13 2.1 The laws of the City of Seattle provided a fourteen  
14 day appeal period during which the determination by the Director of  
15 the Department of Construction and Land Use concerning the Irwins'  
16 application for construction variances could be appealed to the  
17 Office of the Hearing Examiner.

18 2.2 The record of the proceedings in the "Matter of the  
19 Appeal of Victor and Margaret Berger", #MUP-82-007(V), establishes  
20 that notice of appeal from the Director's determination was not  
21 received in the Office of the Hearing Examiner within the fourteen  
22 day appeal period.

23 2.3 Assuming, without deciding, that facts might exist in  
24

1  
2 3.3 Costs are awarded plaintiffs.

3 DATED this 7 day of February, 1984.

4  
5 151  
6 Honorable Judge Frank D. Howard  
7 King County Superior Court

8 Presented by:

9 Howard K. Todd  
10 Howard K. Todd  
11 of Dodd, Coney & Bishop, P. S.  
12 Attorneys for Plaintiffs

13 Approved as to form, notice of  
14 presentation waived:

15 Douglas N. Jewett  
16 Seattle City Attorney

17 151  
18 By Michael P. Monroe  
19 Assistant City Attorney

20 0230P

## FINDINGS AND DECISION

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

In the Matter of the Appeal of

VICTOR AND MARGARETE BERGER

FILE NO. MUP-82-007(V)

APPLICATION NO. 81274-0368

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

#### Introduction

Appellants, Victor and Margarete Berger, appeal the decision of the Director of the Department of Construction and Land Use (Director) to grant variances to Robert Irwin for property at 4752 Beach Drive S.W.

The appellants exercised their right to appeal pursuant to the Master Use Permit Ordinance, Chapter 24.84, Seattle Municipal Code.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code, Title 24 (Ordinance 86300, as amended) unless otherwise indicated.

This matter was heard before the Hearing Examiner on February 18, 1982.

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. Applicant Irwin applied for variances under a master use permit from the rear and side yard requirements and to allow the expansion of a building nonconforming as to bulk. The Director granted the variances. Appellants appeal.

2. The subject property is a lot in a Single Family Residence High Density (RS 5000) zone. The lot was developed with a single story, single family residence with attached garage. Mr. Irwin added to the garage to make it a two car garage some time in the past. In June, 1981, he applied for and obtained a permit to allow a second story addition. Due to an error, whose fault is not of record, it was not determined that the second story would extend over the garage requiring variances so the addition was constructed.

3. The structure, before the addition, provided a 26 ft. front yard, 5 ft. rear yard, 4 ft. south side yard to the garage and 7 ft. to the house and 13 ft. north side yard.

4. Section 24.20.090 requires at least a 5 ft. side yard. The side yard next to the garage and rear yard are, therefore, nonconforming. Section 24.20.090 requires a 25 ft. minimum rear yard setback. The site provides 5 ft. To build above the garage would require a variance from Section 24.14.040 to allow the expansion of a building non-conforming as to bulk.

5. Section 24.62.120 requires a minimum 8 ft. side yard since the wall of a two story structure would be more than 50 ft. long. Variance would be required for the 4 ft. and 7 ft. setback portions of the side yard.

6. The subject site is relatively level. The area slopes up to the east of the site. Houses on the slope and some on the lower level have views of the water. The legally permitted addition to the subject house plus that in required yards had the effect of totally eliminating the water view from 5430 S.W. Angeline, reducing the water view from 5447 S.W. Jacobson Road and affecting the view from other houses. The amount of that view obstruction from the second story located within required yards is less clear although that within the required rear yard causes a definite reduction from 5430 S.W. Angeline.

7. Yard variances have been granted in the area, all for lots on the water side of Beach Drive S.W. which are generally narrow, shallow, and often sloping. (Applicant's Exhibits 11a and b.)

8. There are two story houses in the vicinity.

#### Conclusions

1. Variance may be granted only if certain facts are established. Section 24.74.030A(1) requires a showing that the code provisions operate to deny a property development rights enjoyed by others in the vicinity or zone because of a unique property condition which was not created by the applicant. The Director relied upon the size and location of the existing one story house as that property condition. The record reflects, however, that applicant created part of the condition when he added to the garage in the required rear and side yards. To rely on that part of the building outline as justification for a second floor along that outline would violate the express terms of the first requirement for a variance.

Further, while the record indicates the existence of two-story houses in the area it does not reflect that the area's pattern includes a second story over the garage space necessary for comparable development. No similar development can be found in the photo exhibits offered by the Director's representative and applicant. The requested variances were not shown to be the minimum necessary for relief.

2. Since the rest of variances granted in the area involved different property conditions and are not comparable and the applicant did not establish that a second floor over the garage was necessary to attain comparable development, the full extent of the variances would confer special privilege.

3. Some obstruction of others' views has been caused by the second story within the required yard. The loss of view because of the remainder of the addition is not to be, and has not been, considered. That loss adds to the importance to the viewer of the remainder which the addition over the garage removed.

4. The Single Family Residential Policies provide an exception to the required yard setbacks where 60% or more of an existing wall extends into the required yard. The line formed by the nonconforming wall can be used so long as the side wall is at least 3 ft. from the property line and the rear wall is 20 ft. from the rear property line. The side yard would not conflict but the rear yard would conflict since the rear wall is only 5 ft. from the rear property line.

5. Since all of the requirements of Section 24.74.030A must be met for variance and the application as to the rear yard variance fails to establish the satisfaction of 1, 2, and 4 plus some injury to other properties present, the Director's decision must be modified to deny the rear yard variance for the garage addition.

Decision

The Director's decision is REVERSED as to the rear yard variance and that variance is DENIED. The remainder of the Director's decision is AFFIRMED.

Entered this 4th day of March, 1982.

M. Margaret Klockars  
M. Margaret Klockars  
Deputy Hearing Examiner

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, 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.