

LAW DEPARTMENT

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RECEIVED

July 29, 1988

AUG 01 1988

OFFICE OF HEARING EXAMINER

Ms. Margaret Kocklars
Deputy Hearing Examiner
City of Seattle

Re: In the Matter of the Appeal of John Evans
File No. MUP-85-078(V)

Dear Margaret:

Enclosed for your information is a copy of the Court's Order on Writ of Certiorari taken in the above-noted hearing. The Judge focused upon the "equity" considerations, rather the legal requirements of obtaining a variance, and hence the result. A sometimes regrettable but all too frequent habit in land use cases.

So that you may know that the City Attorney's office was vigorous in its defense (I know you folks must sometimes wonder), I have also enclosed a copy of the City's Hearing Memorandum.

Very truly yours,

DOUGLAS N. JEWETT
City Attorney

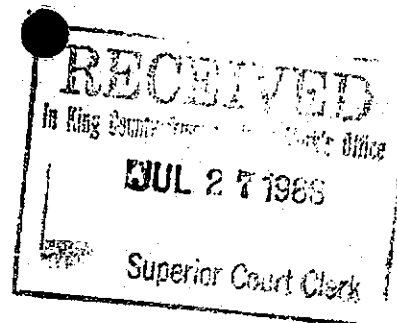
By 

MICHAEL P. MONROE
Assistant City Attorney

MPM:bps

COPY RECEIVED

JUL 27 1988

Douglas H. Smith
CITY ATTORNEY

SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING

ROBERT MARBETT, a single man,
Plaintiff,
vs.
CITY OF SEATTLE, a municipal
corporation,
Defendant.

NO. 86-2-02350-0

ORDER AND JUDGMENT ON WRIT OF
CERTIORARI

THIS MATTER having come on regularly for trial on July 7, 1988 before the undersigned Judge of the King County Superior Court, with the plaintiff Robert Marbett represented by Robert D. Johns and the defendant City of Seattle represented by Assistant City Attorney Michael P. Monroe, and the Court having considered the record on review, including specifically the transcript of the hearing held on January 8, 1986 by the Seattle Hearing Examiner and the exhibits submitted therewith, as well as the pleadings herein, and the arguments of counsel, NOW, THEREFORE;

The Court finds and concludes that the decision of the Seattle Hearing Examiner which was the subject of this action was arbitrary and capricious and contrary to law, inasmuch as the plaintiff Robert Marbett established that all of the requirements of Seattle Municipal Code 23.40.020 for front and side yard setbacks had been met.

ORDER AND JUDGMENT
ON WRIT OF CERTIORARI - 1

COPY

REED MCCLURE MOCERI THONN & MORIARTY
A PROFESSIONAL SERVICES CORPORATION
3600 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104-7081
(206) 293-4900

1 Based upon the foregoing,

2 IT IS HEREBY ORDERED that the City of Seattle grant the side
3 yard and front yard setbacks requested by Robert Marbett in applica-
4 tion number MUP-85-078(V).

5 IT IS HEREBY FURTHER ORDERED that judgment be entered herein in
6 favor of plaintiff in the amount of plaintiff's costs and statutory
7 attorney's fees, upon submission of a proper cost bill.

8 DONE IN OPEN COURT this 27 day of July, 1988.

9
10 Norma Huggins
11 JUDGE/COURT COMMISSIONER

12 Presented by:

13 REED MCCLURE MOCERI THONN & MORIARTY

14 By Robert D. Johns
15 Robert D. Johns
16 Of Attorneys For Plaintiff

17 Copy received, notice
18 of presentation waived:

19 Michael P. Monroe
20 Michael P. Monroe
21 Assistant City Attorney
22
23
24
25

MPM:ndc
07/07/88
6:RES3.1

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

ROBERT MARBETT, a single)	
man,)	NO. 86-2-02350-0
)	
Petitioner,)	RESPONDENT CITY'S
)	HEARING MEMORANDUM
vs.)	ON WRIT OF CERTIORARI
)	
THE CITY OF SEATTLE,)	
a municipal coporation,)	
)	
Respondent.)	

I. INTRODUCTION

This matter comes before the Court by Writ of Certiorari entered on April 14, 1986. The record to be reviewed is that of the proceedings before the Hearing Examiner (Examiner) of the City of Seattle in Case Number MUP-85-078(V). Plaintiff seeks reversal of the Examiner's decision, which denied a variance request of the plaintiff, Robert Marbett.

A deck was built on Marbett's property without a permit. As built, the deck violated the City's zoning code because it

RESPONDENT CITY'S HEARING
MEMORANDUM ON WRIT OF CERTIORARI - 1

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CS 19.45 REV 10/85

1 encroached into the sideyard setback area, the front yard set-
2 back area, and exceeded the maximum permitted lot coverage.
3 Mr. Marbett was informed to either correct the violations by
4 removing the offending portions of the deck or apply for
5 variances to see if such could be granted under the cir-
6 cumstances. The City's initial decision was to grant all
7 three variance requests; this decision was appealed in part by
8 Mr. Marbett's neighbor. Only the two setback variances were
9 appealed to the City's Hearing Examiner who, after conducting
10 a full hearing on the matter, denied the requests for a
11 variance from the sideyard setback requirement and a variance
12 from the front yard setback requirement. The Examiner's deci-
13 sion in this matter was the final City decision.

14 The record and transcript of proceedings have been filed
15 with the Court. In this memorandum we will briefly discuss
16 the record, the standard of review, and the application of the
17 standard to the Examiner's decision. This Court will find
18 from its review of the record that the Examiner's decision was
19 well reasoned, amply supported by the facts, and should be
20 upheld.

21
RESPONDENT CITY'S HEARING
MEMORANDUM ON WRIT OF CERTIORARI - 2

DOUGLAS N. JEWETT
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II. BACKGROUND

Plaintiff Marbett's property is located at 2457 - 42nd Avenue West in Magnolia, on a through lot between 42nd Avenue West and Crane Drive West. The 50 by 107 foot lot slopes down from east to west and is developed with a single family residence and attached garage, both built in 1955. A nonconforming greenhouse, built without a permit but estimated to be about 30 years old, is located on the required front yard. An 18 by 17.5 foot deck was built by the property's former owner, again without a permit, eight feet above grade between the west side of the house and the greenhouse. Because the greenhouse became connected to the principal structure when the deck was constructed, the front yard setback on Crane Drive West is only one and one half feet (18.5 feet is required under the Code) while there is no ^{side-}set yard setback (4 feet is required under the Code). Seattle Municipal Code (SMC Sections 23.44.14A and 14C).

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III. ISSUE

WAS THE HEARING EXAMINER'S DENIAL OF PLAINTIFF'S
VARIANCE REQUEST ARBITRARY, CAPRICIOUS OR CONTRARY
TO LAW?

IV. APPLICABLE LAW

SMC 23.40.020 Variances.

* * *

C. Variances from the provisions or requirements of this Land Use Code or Title 24 shall be authorized only when all the following facts and conditions are found to exist:

1. Because of unusual conditions applicable to the subject property, including size, shape, topography, location or surroundings, which were not created by the owner or applicant, the strict application of this Land Use Code or Title 24 would deprive the property of rights and privileges enjoyed by other properties in the same zone or vicinity; and

2. The requested variance does not go beyond the minimum necessary to afford relief, and does not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which the subject property is located; and

3. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the zone or vicinity in which the subject property is located; and

4. The literal interpretation and strict application of the applicable provisions or requirements of this Land Use Code or Title 24 would cause undue and unnecessary hardship; and

5. The requested variance would be consistent with the spirit and purpose of the Land Use Code and adopted Land Use Policies or Comprehensive Plan component, as applicable.

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V. ARGUMENT

A. Standard of Review

The Court's review of Hearing Examiner decisions granting or denying a variance is limited to a review for arbitrary, capricious or unlawful determinations. Lewis v. Medina, 87 Wn.2d 19, 22, 548 P.2d 1093 (1976). Review is strictly limited to the record. Information which is not in the record, including information that might be obtained in a site visit or in an affidavit, should not be considered. Carlson v. Bellevue, 73 Wn.2d 41, 435 P.2d 957 (1968). The court can find the Hearing Examiner guilty of arbitrary and capricious conduct only if there is no support for her decision in the record and there has been a "willful and unreasoning action, in disregard of facts and circumstances." Northern Pacific Transportation Co. v. State Utilities and Transportation Commission, 69 Wn.2d 472, 479, 418 P.2d 735 (1966); Coughlin v. Seattle, 18 Wn.App. 285, 287, 567 P.2d 262 (1977). When there are opposing views, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though the reviewing court believes that an error has been committed. Smith v. Hollenbeck, 48 Wn.2d 461, 464, 294 P.2d 921 (1956); State ex rel. Lopez-Pacheco v.

1 Jones, 66 Wn.2d 199, 201, 401 P.2d 841 (1965). In determining
2 whether a conclusion is contrary to law, the court must con-
3 sider whether "the application of valid factual findings
4 results in a holding inconsistent with a proper construction
5 of the governing law." Coughlin v. Seattle, supra, 18 Wn.App.
6 at 287.

7 B. The Hearing Examiner's Decision Denying the
8 Variance is Supported by the Record.

9 Generally, variances are granted sparingly, only in
10 rare instances, and under peculiar and exceptional circumstan-
11 ces. 8 McQuillan, Municipal Corporations, (3rd Ed.Rev.)
12 § 25.162, Public Policy; minimizing of variances, p. 573.

13 Otherwise, zoning regulations would be emasculated
14 by exceptions until all plan and reason would
15 disappear and zoning in effect would be destroyed.
16 Moreover, prospective purchasers of property would
17 have little confidence in nominal standards and
18 would hesitate to purchase in the zoned area, where
19 the zoning meant little in view of arbitrary, free
20 and easy grants of variances by a zoning board.

21 Id. Logically these essential goals of the zoning process,
uniformity and certainty, are only achieved when variances are
granted according to set standards. In Washington, variances
may be lawfully granted only within the guidelines set forth
in the applicable zoning ordinance. Orion v. State, 103 Wn.2d
441, 548 P.2d 1093 (1986). Lewis v. Medina, 87 Wn.2d 19, 22,

1 548 P.2d 1093 (1976). The following guidelines have been
2 adopted by The City of Seattle and used to determine the
3 justification of variance approval:

- 4 1. Because of unusual property conditions not
5 created by the owner, the strict application
6 of the Land Use Code would deprive the pro-
7 perty of rights and privileges enjoyed by
8 other properties in the same zone or vicinity;
9 and
- 10 2. The variance requested does not go beyond the
11 minimum necessary to afford relief, and does
12 not constitute a grant of special privilege
13 inconsistent with the limitations upon other
14 properties in the same vicinity and zone; and
- 15 3. The granting of the variance will not be
16 materially detrimental to the public welfare
17 or injurious to the nearby properties; and
- 18 4. The literal interpretation and strict applica-
19 tion of the would cause undue and unnecessary
20 hardship; and
- 21 5. The requested variance would be consistent
with the spirit and purpose of the Code and
Land Use Policies. SMC 23.40.020(C).

Not one, but all of these criteria must be met before a
variance may be granted. SMC 23.40.020(c). Furthermore, the
granting of a variance from the zoning requireemnts cannot be
justified simply because the properties in the surrounding
area enjoy similar, but nonconforming, uses. St. Clair v.
Skagit County, 43 Wn.App. 122, 715 P.2d 165 (1987). Most
importantly, our courts have clearly concluded that the

1 "hardship" requirement in a variance decision means unne-
2 cessary hardship as it relates to the land itself, and not
3 personal hardship. Martel v. Vancouver Board of Adjustment,
4 35 Wn.App. 250, 256, 666 P.2d 916 (1983).

5 In the instant case, in her application of criteria No. 1
6 the Examiner properly found no 'unusual condition' of the pro-
7 perty itself which would warrant a variance. Since the deck
8 had been built illegally without a permit, the Examiner
9 reviewed the matter as if the deck had not been built and the
10 variance was being sought to request that a deck be built
11 intruding within the front yard and sideyard setback areas.
12 The Examiner determined that the topography of Marbett's yard
13 did not create an unusual property related condition depriving
14 him of useable open space. A patio area underneath the deck
15 provided ample useable open space relative to the open space
16 enjoyed in other yards in the area. The Marbett deck would
17 merely cover this flat patio area. No new open space would be
18 created by this deck. Furthermore, no property condition pre-
19 vented the owner from having a view deck in this location,
20 reduced to the allowable legal size of 13 by 14 feet.
21

1 Viewed from this perspective, denial^{of the} sideyard and front
2 yard variances would not operate to deprive the Marbett pro-
3 perty of any rights and privileges enjoyed by other property
4 in the vicinity. The plaintiff can have a deck on his pro-
5 perty, just like his neighbors. It must however, be like his
6 neighbors' decks in that it must conform to the setback
7 requirements of the Land Use Code. Hence, granting the
8 variance would actually contradict the stated purpose of the
9 variance guidelines, and allow Marbett alone a special privi-
lege not enjoyed by other property owners.

10 In addition, this "hardship" requirement only addresses
11 the physical condition of the property itself which was not
12 created by the owner or applicant. A structure built without
13 a permit hardly classifies as an inherent property condition.
14 Both the greenhouse and the deck were built without permits
15 and neither conform to the present zoning regulations,
16 although the greenhouse enjoys a "grandfathered" status. This
17 nonconforming greenhouse is positioned directly on the pro-
18 perty line. Construction of the deck between the greenhouse
19 and the house would therefore increase the nonconformity of an
20 already nonconforming structure.
21

1 Strict enforcement of the Land Use Code cannot result in
2 any 'undue and unnecessary hardship' to the plaintiff because
3 any 'hardship' has been owner-created. Lewis v. Medina,
4 supra. In the instant case the present owner Mr. Marbett
5 stands in the shoes of the owner who built the deck without
6 first obtaining a permit. Had a permit been sought the deck
7 would not have been built into the required set back areas.
8 Mr. Marbett cannot claim a hardship due to the prior owner's
9 illegal action.

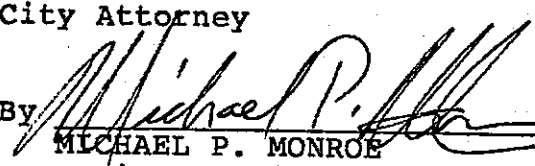
10 VI. CONCLUSION

11 The Examiner concluded that Mr. Marbett failed to satisfy
12 all the requirements necessary to obtain variances from the
13 front yard and side yard requirements applicable to all homes
14 in a single family zone. In light of the facts and cir-
15 cumstances, the Examiner's decision is well reasoned. It is
16 certainly not an arbitrary and capricious decision, even
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1 though there may be opposing views. For the aforementioned
2 reasons, the Examiner's decision should be sustained.

3 Respectfully submitted,

4 DOUGLAS N. JEWETT
City Attorney

5 By 
6 MICHAEL P. MONROE
Assistant City Attorney

7 Attorneys for Respondent
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RESPONDENT CITY'S HEARING
MEMORANDUM ON WRIT OF CERTIORARI - 11

DOUGLAS N. JEWETT
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CS 1045 REV 10/85

BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

In the matter of the Appeal of

JOHN EVANS

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

FILE NO. MUP-85-078(V)
APPLICATION NO. 8504049

ORDER DENYING REQUEST
FOR RECONSIDERATION


The applicant Robert Marbett, through his attorney, Robert D. Johns, filed a Request for Reconsideration of the decision of the Hearing Examiner in this matter. Responses were filed on behalf of the Director by Malli Anderson and by the appellant, John R. Evans.

Marbett asserts that Findings of Fact No. 6 and 8 create a factual impossibility. To the contrary, both are correct. The house is set back approximately 32 feet as shown on Exhibit 1, and as stated in Finding of Fact 8. The deck does extend 20 feet 9 inches from the house toward the front property line. The greenhouse is 10 feet 2 inches deep, according to Exhibit 1. Adding a depth of 20 feet 9 inches of the deck, 10 feet 2 inches for the greenhouse and 9 inches for the setback from the street to the greenhouse results in a 32 foot setback to the house. The width of the greenhouse is 17 feet 10 inches, according to Exhibit 1.

The other mistake urged by Marbett is that the Hearing Examiner should not have considered the front yard variance. The appeal letter refers specifically to side and front yard variances and was entered in the record as Exhibit No. 2. Also, in Exhibit No. 11, appellant objects to the deck extending into the front and side yard setbacks. While appellant's witness, Wooten, testified that the front yard projection was "not that big" there was no indication that Evans' appeal as to that variance was dropped.

The Director's decision on variances is to be given no deference: Section 23.76.22.C.7. Therefore, the applicant retains the burden, even on appeal, of producing facts that support the requested and appealed variance. Evidence was not adduced to show the presence of all the facts and conditions set out at section 23.76.40.20C which allow a variance to be granted. Therefore, the Request for Reconsideration is denied.

Entered this 3rd day of April, 1986.


M. Margaret Klockars
Deputy Hearing Examiner
400 Yesler Building, 5th Floor
Seattle, Washington 98104
Telephone: 625-4197

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

In the Matter of the Appeal of

JOHN EVANS

FILE NO. MUP-85-078(V)
APPLICATION NO. 8504049

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

Introduction

John Evans appeals the decision of the Director, Department of Construction and Land Use, to grant variances for a deck at 2457 42nd West.

The appellant exercised his right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on January 8, 1986.

Parties to the proceedings were: appellant, John Evans; the Director, represented by Malli Anderson, land use specialist, and applicant, Robert Marbett, represented by Bob Johns, attorney at law.

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 applicant applied for a master use permit to construct a deck addition to a single family house at 2457 42nd Avenue West. The Director determined that yard setback and lot coverage variance were required and granted those variances. Appellant appeals the granting of the yard setback variances only.

2. The subject property is a SF 5000-zoned, through lot measuring 50 by 107 feet and sloping down from 42nd Avenue W. on the east to Crane Drive West on the west.

3. The single-family house on the lot was constructed in 1955. A greenhouse which is estimated to be more than 30 years old is located near Crane Drive and existed prior to the time the subject lot was split off from the lot to the south.

4. William Fleckenstein, the owner prior to the applicant, constructed a deck without a permit in the area between the house and the greenhouse over a level, paved trellis/patio area.

5. The greenhouse is located on the northerly property line and 18 inches from the front property line. It measures 17 feet, 10 inches by 10 feet, 2 inches.

6. The deck extends 20 feet, 9 inches from the house to the greenhouse and is 18 feet wide from the northerly property line to the line of the southerly wall of the greenhouse. The floor of the deck is some 8 feet above the grade with a railing, and at one place a solid fence, 3 feet above that.

7. Houses in the vicinity have water views to the west, southwest and northwest. Most have decks attached to the house or on top of terraced garages. At least one deck over a garage is covered.

8. The house on the lot abutting the subject lot on its southerly side is set back 17 feet from Crane Drive, forward of the house on the subject lot which is set back 32 feet.

9. Two lots on the easterly side of Crane Drive have terraced garages close to the street property line and on the side property line.

10. The trellis which had been in the location of the deck had large beams, sliding glass doors on the southerly side and a plastic or fiberglass wall on the property line. The trellis was demolished and members of the trellis were used in the deck support. The sliding doors and plastic wall remain, enclosing a paved patio. Exhibit 9.

11. The Director has determined that Sections 23.44.14A and C require a front yard setback of 18.5 feet and a side yard setback of 4 feet. Exhibit 7. Exhibit 1 shows a side yard requirement of 5 feet.

12. The house on the south side of the subject lot reduces the scope of the water view from the subject house by approximately 20 degrees. The deck allows the view to be recaptured.

13. Appellant's house is on the next lot to the north. That house has a deck set back farther from the side property line than the house to which it is attached. The relative height of the two decks was disputed. The exhibits show that the height differential is not great.

14. The property owner estimates the cost of moving the existing deck at approximately \$2,500. Appellant's witness disputes this estimate.

15. Appellant has been told that the existence of his neighbor's deck in its location may compromise the privacy of his house and may cause a potential purchaser to be "inclined to pay less" for the property. Exhibit 12.

16. According to O. Wooten, appellant's witness, who has experience with construction permits, the cost would not have been greater to build the deck with the required setbacks.

Conclusions

1. To qualify for a variance, the applicant must show that all the facts and conditions set forth in Section 23.40.20.C. exist. No deference is to be given the Director's decision. Section 23.76.36.B.7.

2. The first requirement is the existence of unusual conditions applicable to the property, not created by the owner, which cause the strict application of the Land Use Code to deprive the property of rights and privileges enjoyed by others. Section 23.40.20.C.1. The Director found that the slope on the westerly edge of the lot deprived the property of adequate usable outdoor open space. The exhibits show, however, that the deck merely covers the space under the deck which is a flat patio area so there was existing usable space. Further, the location of the deck has no bearing on the amount of outdoor, usable space. Other properties do have view decks but no property condition was shown which would prevent this property from having a conforming view deck.

3. The variance may not go beyond the minimum necessary for relief and may not constitute a special privilege. Section 23.40.20.C.2. Since no relief is warranted, the requested variances would exceed that needed. While terraced garages on the block were shown to be located at side lot lines without setback, the code has provision for a different treatment of garages than decks.

Moreover, the subject property is already nonconforming as to the side yard with the greenhouse on the property line.

4. The third requirement is that the variance cause no material detriment to the public welfare or injury to other property. Section 23.40.20.C.3. Granting of the variance would not cause material detriment to the public welfare. There is some evidence, however, of potential injury to appellant's property caused by the proximity of the deck.

5. The evidence must also show that the literal interpretation and strict application of the Land Use Code would cause undue and unnecessary hardship. Section 23.40.20.C.4. The cost of moving the deck and that of reducing its size, if necessary, represents a hardship to the applicant. The hardship is unnecessary only in the sense that it could have been avoided had permits been applied for prior to construction. The applicant cited Board of Adjustment v. Kwik-Check Realty, 389 A.2d 1289 (Del. 1978), as support for the contention that the cost of moving the deck constitutes "undue and unnecessary hardship." In the cited case, the court agreed that economic considerations may be a sufficient justification for the granting of a variance, under the ordinance applicable in that jurisdiction. Here, however, the issue is different in that the cost represents remedying the result of construction done without permit, rather than restrictions on a legal, nonconforming use. No case was cited which involved illegal construction. Since no advantage should be gained from avoidance of construction permits, the deck must be regarded as "proposed" and any cost involved in bringing it into conformity should not be recognized.

6. The granting of the setback variances must be consistent with the spirit and purpose of the Land Use Code and Single Family Residential Areas Policies. Section 23.40.20.C.5. The Director found consistency with the spirit and purpose of "providing more useable outdoor open space." While it may be generally desirable to maximize usable outdoor space, the policies are very clear that certain minimum setbacks are to be provided, i.e., for side yards no less than 3 feet. pp. 16.02.07 and 16.02.08. The code has created exceptions but the applicant's deck is not within those exceptions. While the code also contemplates variances, this application cannot be said to be within its spirit and purpose or that of the policies.

7. Since all of the facts and conditions required for variance relief are not present, the variances must be denied.

Decision

The yard setback variances are denied.

Entered this 22nd day of January, 1986.


M. Margaret Klockars
Deputy Hearing Examiner

Concerning Further Review of Hearing Examiner Final Decisions on Master Use Permits

The decision of the Hearing Examiner in this case is final 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 of the decision must be filed in King County Superior Court within fourteen days of the date of this decision. Seattle Municipal Code Section 23.76.36(B)(11).

If the Superior Court orders a review of the decision the person seeking review must arrange for and bear the cost of preparing a verbatim transcript of the hearing, but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104.