

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

In the Matter of the Appeal of

L. MARIO DI MARTINO

FILE NO. MUP-90-065(V)
APPLICATION NO. 9003180

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

Introduction

The appellant, Mr. Di Martino appealed the decision of the Director of the Department of Construction and Land Use (DCLU) to deny his request for variances to allow an accessory structure in the required front yard, and in the required side yard, and to allow a fence over height in the required yard. The appellant exercised his right to appeal pursuant to the Master Use Permit (MUP) Ordinance.

This matter was heard before the Hearing Examiner on November 7, 1990. The record was held open November 16, 1990, to allow time for a site inspection. The site inspection was conducted on November 16, 1990.

Parties to the proceeding were: the appellant, L. Mario Di Martino, pro se; Faith Lumsden, land use specialist representing DCLU, and Molly Hurley, land use specialist, appearing as a witness.

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

After due consideration of the evidence elicited during the public hearing, including testimony and documents received prior to closing the record, and the site inspection, the following shall constitute the findings of fact, conclusions of law, and the decision of the Hearing Examiner.

Findings of Fact

1. The subject property is located at 2616 Walnut Avenue S.W.
2. The subject property is zoned Single Family (SF) 5000 and is approximately 5000 square ft.
3. The property is developed with a single family residence with a basement apartment which is rented out as a separate dwelling unit. The site has one detached garage.

4. The subject property is bordered by a vacant lot to the north, residential development to the west and south, and Fairmount Park to the east.

5. The appellant has installed a 7.5 ft. by 19 ft. swim spa, surrounded by a deck, a small shed to house the spa equipment and enclosed the area with a 8 ft. fence.

6. The land use code requires a five foot side yard setback and a 20 ft. front yard for this property. The spa equipment shed, portions of the deck and the fence extends 3 ft. into the required side yard and 4 ft. into the required front yard. The 8 ft. tall fence surrounding the spa area is 2 ft. taller than allowed in the required side and front yard setbacks.

7. Several months prior to the appellant's construction of a section of the fence, the appellant allowed his next door neighbor to the south, to construct a section of an 8 ft. fence 2 ft. into the appellant's property. For aesthetic compatibility with the neighbor's fence, the latticed fence the appellant constructed to enclose his spa area was built to the same 8 ft. height.

8. The fence also protects the appellant's privacy in the spa area from the neighbors in the apartment building on the northend of the vacant lot next to appellant's property. The apartment building is in a area zoned Lowrise 2 Residential/Commercial with a height limit of 25 ft. The Appellant's spa area can also be observed from the second floor of the residence two houses south of the appellant's property.

9. The appellant planted ivy on the other side of the latticed fence with the expectation that the ivory will eventually cover the fence and create a "green wall" between his property and the neighbor's property. The ivy has begun to cover the side of the fence.

10. The primary purpose of the spa equipment shed is to protect the mechanical equipment (i.e., heating pumps, water filters etc.), needed for the safe operation of the swim spa, from natures elements and human tampering. Enclosing the equipment shed is also more aesthetically pleasing than exposed mechanical equipment. Under the land use code, the appellant may be allowed to maintain the mechanical equipment in the required front yard without a structured enclosure as long as the noise ordinance provisions are not violated. SMC 23.44.014(12). The neighbor's original complaint regarding the noise from the spa has been referred to the Central Environmental Health Division of the Seattle/King County Department of Public Health. A decision from the Health Department on possible violation of the noise ordinance is forthcoming. Until a

decision is issued, only the equipment shed, and not the mechanical equipment in the shed is at issue in this proceeding.

11. The spa equipment shed is 3.5 ft. wide and 6 ft. long. The shed is 8 ft. tall where it is joined to the fence and slopes down to 5 ft. where it is joined to the garage. The spa equipment covers most of the cement floor space in the shed. The appellant built the shed at 8 ft. to be the same height as the fence. The Appellant could reduce the height of the shed to approximately 5 ft. and still have clearance to remove the larger filter pipes for maintenance.

12. The appellant's property slopes downward to an approximately 8 ft. cement deck in the rear of the house. There is a sharp slope at the end of the cement deck downhill toward Fairmount Park. The cement patio is the front entrance into the basement apartment. The appellant cannot relocate the spa equipment shed in the rear yard because of the topographic features of the rear yard and because it would block the tenant's private access to the apartment.

13. There are no topographic or other restraints on the appellant relocating the spa equipment shed to other portions of the front yard which are not within the required front yard area. The appellant has testified to the existence of an old unused oil tank buried in the front yard but the appellant has not adequately explained why he would have to excavate the old oil tank in order to place the spa equipment on the ground surface.

14. The appellant contends that he built the swim spa for health related reasons. The appellant is limited to swimming as his primary form of exercise. As a result of his busy work schedule and the incompatible hours the public pool facilities are open, he needs the convenience of his private swim spa to meet his daily exercise routine. The appellant contends that he cannot afford to move the spa equipment from its current location to a new location in the front yard because of the cost involved. If he is required to remove the equipment he will be forced to cease operation of the swim spa and be deprived of his exercise routine. Most of the plumbing equipment (water and pump lines) for the spa is under the deck between the spa and the equipment shed. The appellant would have to remove the deck to gain access to the plumbing before he could relocate the spa equipment and the shed.

15. DCLU received one letter regarding the appellant's request for a variance during the comment period. The neighbor was not opposed to the fence or the accessory structure in the required yard area, but did object to the noise from the spa operation. As noted earlier, a response on the noise issue is pending.

16. During the site inspection, the undersigned was not able to detect a high noise volume generated by the spa equipment, the noise appears to be generated by the pumping action of the water in the swim spa.

Conclusions

1. Variance decisions of the Director are appealable to the Hearing Examiner pursuant to SMC 23.76.022. The Director's determination on variances is given no deference.

2. In accordance with SMC 23.40.020, variances from the provisions of the land use code shall be authorized only when all the following facts and conditions are found to exist:

A. 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

B. 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

C. 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

D. 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

E. 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.

3. Variance to allow an accessory structure in the required front and side yards:

A. The appellant's steeply sloping rear yard is an unusual condition which limits the appellant's use and

enjoyment of the rear yard. The appellant's use of the rear yard is further restricted because the access to the basement apartment is across the only part of the rear yard that is not steeply sloped. However, the unusual conditions relate only to the rear yard and do not effect the ample additional space in the front yard for the accessory structures. The appellant would not be deprived of the rights and privileges enjoyed by others in the vicinity if he were required to place his accessory structures in the section of the front and side yards that are not within the required yard space.

B. The requested variance goes beyond the minimum necessary to afford relief and would be a grant of special privilege. The appellant can build a spa equipment shed on other sections of the property without requesting a variance. Oddly enough, under the land use code, the appellant could maintain the spa equipment in it's current location without the shed coverage as long as the noise ordinance is not violated. SMC 23.44.014(12). The equipment shed serves a useful purpose, but does not have to be in the required yard, and may not be necessary under the code. Since the appellant has several other options for siting the equipment shed, to grant the variance would be a grant of special privilege to the appellant and would go beyond the minimum necessary to afford relief.

C. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property in the zone. Admittedly, the majority of the properties in the area are developed with landscaped front and side yards. However, the appellant's garage is already located in the front/side yard area eliminating the landscaped setback between the other residences. Additionally, the fence and spa equipment shed add a tasteful addition to the appellant's home and to the surrounding area.

D. At the outset it is important to note that in determining whether the literal interpretation of the land use code would cause undue and unnecessary hardship, appellant's potential cost in removing part or all of the existing construction and relocating it to a new site cannot be considered. To consider the cost of removing the existing building as a hardship would allow the appellant to benefit from his own wrongdoing. Under the provisions of the Land Use Code the appellant was required to obtain a building permit before he began construction of the swim spa area. If appellant had applied for the required permits he would have been advised that he could not put the accessory structures in the current location. Excluding any potential cost related to the denial of the variance, there are no property related hardships associated with the denial of the variance request. The appellant has not identified the

exact location of the underground oil tank nor has he explained how the unused tank would affect his siting of the spa equipment shed. Finally, denial of the variance request is not interfering with the appellant's exercised routine. The appellant will not have all of the amenities that he would like but he can still use the swim spa.

E. The requested variance to allow an accessory structure in the required front and side yard setbacks would be inconsistent with the Land Use Provisions which encourages open spaces between single family residences with front and sideyard setback requirements .

4. The appellant has not established the facts and conditions necessary for a variance to be authorized. The appellant must remove the portions of the accessory structure which are in the required front and side yard setbacks. The appellant is not required to take any action toward compliance with this decision until the Health Department issues a ruling on the possible noise ordinance violations issue.

5. Variance to allow a fence over 6 ft. in the required yard:

A. There are no unusual conditions applicable to the property that would warrant granting a variance for a fence over 6 ft. tall in the required front and side yard. As noted in the DCLU decision, the 6 ft. fence height restriction only applies to fences in the required yard space. The appellant can build a taller fence on his property as long as it is not in the required yard spaces.

B. The appellant contends that the 8 ft. tall fence is needed to protect his privacy from the occupants in the nearby apartment building and the two story residence two houses away from his house. Two matters must be noted in response. The first is that both the apartment building and the two story family residence are within the allowable height limits for the type of structure. Thus, the heights of the structure do not pose an unusual relationship to the appellants residence. Secondly, the appellant has other options available to protect his privacy. The most obvious alternative is to plant tall vegetation surrounding his property. The vegetation will eventually provide more protection than the current fence and more than the allowed 6 ft. fence in the side yard. Because the appellant has other viable options, the request for a fence to exceed the allowable height limits in the required yard, exceeds the minimum necessary to afford relief.

C. The granting of the variance will not be materially detrimental to the public welfare. The addition of two ft. of an attractive fence will not be materially

detrimental or injurious to the property or other properties in the zone. The only possible harmful effect may be caused by the precedential effect of allowing the fence to remain.

D. The literal interpretation and strict application of the land use code will not cause undue and unnecessary hardship because the appellant has other options available to him to obtain the remedy he seeks. Again, it must be noted that the Appellant's cost in removing the fence cannot be considered in determining the property related undue and unnecessary hardships.

E. The requested variance would be inconsistent with Land Use Policies which try to encourage open spaces between single family residences by reducing the height of fences in required yard spaces.

6. The appellant has not established the five criteria for granting a variance. Because the appellant has so many other options available to him it would be inappropriate to grant the variances requested. The cost to the appellant is unfortunate, but the cost cannot be considered in determining whether or not a variance should be granted.

Decision

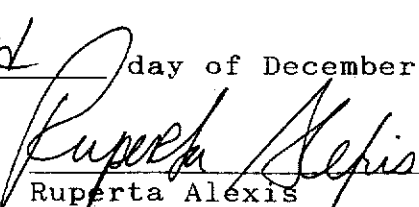
The variance to allow an accessory structure in the required front yard is Denied.

The variance to allow an accessory structure in the required yard is Denied.

The variance to allow a fenced over height in a required yard is Denied.

In order to provide the appellant with a consistent set of instructions that satisfy the city's land use ordinances and the Health Department's noise ordinance provisions, the appellant is not required to take any action on this variance denial for six months or until the Health Department issues a decision on whether the spa equipment violates the noise ordinance, whichever occurs first.

Entered this 3rd day of December, 1990.


Rupert Alexis
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW
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, and party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.22(C)(12)(c).

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, Room 1320 Alaska Building, 618 Second Avenue, Seattle Washington 98104, (206) 684-0521.