

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

In the Matter of the Appeal of

DR. & MRS. JAMES L. POWER

FILE NO. S-77-017

from a ruling of the Superintendent
of Buildings

The interpretation of the Superintendent
of Buildings is REVERSED.

Introduction

The appellants, Dr. & Mrs. James L. Power and Mr. J. Ellicott, each filed appeals taking exception to a ruling regarding the interpretation of Section 21A.35(c) Ordinance as it applies to 13602 Riviera Place N.E. (Ellicott) and as it could apply to 4101 Beach Drive S.W. (Power).

The appellants exercised their right to appeal pursuant to Section 25.40, Ordinance 86300, as amended by Ordinance 104795.

Parties to the proceeding were: Dr. & Mrs. James L. Power, appellants, J. Ellicott, appellant, represented by Paul F. Culotta, Garry Shaw applicant, and Joyce Kling represting the Superintendent of Buildings.

This matter was heard before the Hearing Examiner on November 9, 1977.

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

Findings of Fact

1. In a written decision dated October 4, 1977, the Superintendent set forth an interpretation of Section 21A.35(c), Seattle Zoning Ordinance (formerly Shoreline Master Program), which is the provision relating to the required setback from the shorelines for residential properties. It is the Superintendent's interpretation that the distance from the shoreline of the new structure is to be the average of the distance of adjacent structures from the shoreline. "Adjacent structures" for this purpose would be all structures within the same block and same zone within 100 feet of the subject property.

2. This interpretation was requested by the architect for J. Ellicott, appellant, as it affects the placement of a proposed single family residence at 13602 Riviera Place N.E. This property is zoned Single Family Residence High Density (RS 5000) and is located in the Urban Residential Shorelines Environment. The proposed house is flanked by two existing structures and numerous other structures exist on both sides in the same block. Appellant proposes to place the structure in such a way that the shoreline face would be even with that of the house to the south but would extend forward of the house to its north. The effect of the ruling would be to require it to be set back from the shoreline a greater distance (as yet undetermined) diminishing its view to the south.

3. Dr. & Mrs. James L. Power also appealed the Superintendent's ruling as it could be applied to the proposed construction on a lot abutting theirs to the north at 4101 Beach Drive S.W. That property is zoned BN.

4. The Powers' triplex at 4109 Beach Drive S.W. is zoned Multiple Residence Low Density (RM 800) and has a 31 foot 2 inch shoreline setback. The next structure to the south has a setback of 22 feet 1 inch and the next further is setback 16 feet 7 inches. Immediately to the north of the subject property is a 150 foot wide street end right-of-way and the nearest structure to the north has a setback of 42 feet. The subject property is a trapezoidal shaped lot bounded on the west and west portion of the northern property line by a seawall. A 15 foot setback from the west shoreline is proposed which would effectively block the northerly and northwesterly view of appellants and at least the next structure to the south of them. Because properties to the south of appellant are located closer to the shoreline, including them in the averaging computation required by the Superintendent's interpretation would allow the proposed structure to extend closer to the shoreline than appellant's residence.

5. Both appellants argue, by implication, that the provision should be interpreted to mean that new structures shall not be located closer than the closer of the structures immediately to either side.

6. Section 21A.35(c), Seattle Code, was a part of the Seattle Shoreline Master Program and sets forth the required setback from shorelines for residential structures. It provides "residential structures shall not be located closer to the shoreline than adjacent structures. If there is no other structure within 100 feet, residential structures shall be located at least 25 feet back from the line of high regulated lake level of Lake Washington, Lake Union, and connecting fresh waters, or the line of ordinary high tide".

Conclusions

1. In arguing against the interpretation appellant Ellicott cites Pearson v. Evans, 51 Wn2d 574(1958) for the principle that the function of administering a zoning ordinance does not include interpretation in that questions of policy and discretion were settled at the time of its adoption. That point is well taken, however the language of the section is ambiguous and this ambiguity has created problems for both the department and the applicants thus making interpretation necessary for administration.

2. The critical words are "adjacent structures". To define this term the Superintendent looks to the definition section of the code (3.02) and takes the definition for "adjacent properties", "Properties within the same block and zone". This is a reasonable approach to a difficult problem. However, the article containing the ambiguous provision was set, in its entirety, into an existing code and caution must be used when attempting to define its terms by the definitions in the pre-existing code.

3. The purpose of the article Shorelines Management Act of 1971 and Seattle Shorelines Master Program gives guidance. The purpose of the article is to implement the policy of the Act by regulating development of the shorelines in order to

- a) preserve, enhance and increase views of the water and access to the water,
- b) encourage water-dependent uses, and

- c) provide for maximum public use and enjoyment of the shorelines of the city."

Section 21A.01, Seattle Code.

4. The general rule of interpretation of zoning ordinances recognized by the Washington Supreme Court is:

...(T)hat zoning ordinances should be liberally construed to accomplish their plain purpose and intent. At the same time the court bears in mind that they are in derogation of the common law right to use property so as to realize its highest utility and should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language. State ex rel Standard Mining and Development Corp. v. City of Auburn, 82 Wn2d 321, 326(1973), citing Hauser v. Arners, 44 Wn2d 358(1954).

5. Both the interpretation made by the Superintendent and that offered by appellants accomplish, to some degree, the plain purpose and intent of the article. The rule further requires, however, that care be taken not to extend the provision beyond the purpose and intent clearly stated in its language.

6. Appellant Ellicott aptly notes that while averaging language does not appear in Section 21A.35, it does appear in other provisions both within the Article and without, showing that if the averaging were intended that language would have been used.

7. The Superintendent, in meeting the need to be definite about which adjacent structures would be included in the computation, has created somewhat of a strained interpretation. Not only is the term "adjacent structure" defined by use of the definitions of "adjacent properties" and the concept averaging imposed but the 100 foot inclusion seems to be borrowed from the sentence following.

8. "Adjacent" is defined as lying near, close, contiguous in Section 12.11, Anderson American Law of Zoning. Webster and Black agree but add adjoining and neighboring.

9. Using the term "adjacent structures" in its common and ordinary meaning the section can be read as "Residential structures shall not be located closer to the shoreline than the next structure to each side. If there is no other structure within 100 feet...". If there is a structure on each side a choice has to be made as to which structure will control since, again, no intent can be found to use averaging.

10. The purpose of the Article should be considered in making this choice. The preservation, enhancement and increase of views of the water would best be served by allowing the new structure to be placed in line with the structure closer to the shoreline. If appellant Ellicott's and the structure to each side of his are considered one can see that the possibility for increase of view is created by allowing placement even with the southerly neighboring structure. If he is required to stay even with the northerly neighbor his view is not enhanced. The view from the structure to the north may or may not be somewhat diminished depending upon the distance between the structures but the possibility of taking advantage of a closer placement is not removed by this interpretation.

11. This interpretation is limited to the specific factual situation of the Ellicott appeal. Because the provision has created a common and continuing problem it would seem appropriate for the Superintendent to initiate

the rule making procedure pursuant to the Administrative Code (Ordinance 102228, as amended). Hopefully with broad enough input a rule or rules may be promulgated to meet all foreseeable situations.

12. As to the property which is the subject of the Powers' appeal, the Superintendent asserts that ruling No. 7-77 applies. An appeal of that ruling would be untimely and is thereby sufficiently vague that it could be applied to the subject or any other property. To do so in the manner suggested however, would fly in the face of its stated reason "... to prevent adverse impact on existing residential uses by new construction ahead of the historic setback line, the primary concern is view blockage and maintenance of open space along the shoreline" and therefore should not be applied as suggested to this property. Since there has been no specific ruling as to the interpretation of Section 21A.35(c) as it is applied to the proposed construction at 4101 Beach Drive S.W. it would be appropriate for interested parties to request the Superintendent to make a formal ruling as to that interpretation.

Decision

The interpretation of the Superintendent of Buildings is REVERSED.

Entered this 16th day of November, 1977.

Margaret Klockars
Margaret Klockars
Deputy Hearing Examiner

Notice of Appeal

The decision of the Hearing Examiner in this case is the final administrative determination and any further appeal must be made to the courts.