

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

In the Matter of the Appeal of

DAVID AND LISA BJERKE

FILE NO. S-82-001

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

Introduction

Appellants filed an appeal from an interpretation by the Director of the Department of Construction and Land Use (DCLU) that the legal use of the building at 620 and 622-32nd Avenue East is as a day care center.

Appellants exercised their right to appeal pursuant to the Seattle Municipal Code, Section 24.10.030, as amended.

Parties to the proceedings were: appellants by David R. Koopmans, Short and Cressman; the Director of the Department of Construction and Land Use by Judy Talman.

The 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. The subject property is addressed 620 and 622-32nd Avenue East. The property's legal description is

Lots 32 and 33, Block 2, Madison Street  
Cable Railway Addition.

2. The property was downzoned from RM 800 (Multiple Residence) to its current designation of Single Family Residence High Density (RS 5000) on August 18, 1972.

3. Lot 33 is developed with a building constructed in 1952 as a duplex. The question raised is as stated by the Director's interpretation, whether the building is a legally nonconforming duplex or is, as concluded by DCLU, a day care center.

4. The 1979 sales listing for the subject property remarked that the property was a nonconforming duplex. Seeking assurances of the property's status, the appellants, prospective purchasers, added a contingency to the real estate purchase and sale agreement which requested a land use certificate defining the subject property as a legal duplex. At this time the property was in actual use as a duplex, witnessed by the appellants' visual inspection of the premises. After a visit to the Building Department, the predecessor to DCLU, appellants felt assured that the property could be safely purchased as a duplex. Accordingly, the contingency was removed May 4, 1979.

5. From the closing of the real estate transaction in May, 1979, appellants operated the structure as a duplex. In January, 1981, appellants decided to sell the property. A land use certificate, then stated as a requirement for the sale, was requested. It showed the property in legal use as a day care center. On behalf of the appellants an interpretation was requested as to whether the building should be considered a nonconforming duplex. On January 7, 1982, the Director entered the interpretation, the subject of this appeal, concluding that

...the legal use of the building is as a day care center...although the duplex use could be permitted as a change from one nonconforming use to another if all the conversion criteria could be met, a variance to allow more than the permitted number of dwelling units on a lot would be required.

Notice of the Interpretation was published January 12, 1982, and the appellants took a timely appeal therefrom.

6. In August, 1952, application was made to "Construct Duplex-Per Plan on the subject property" and permission was granted by permit issued September 2, 1952.

7. By letter dated December 6, 1971, the Superintendent of Buildings notified Ms. Jeanette Causey in relevant part as follows:

Rechecking of the Building Department records reveals that a building permit has not been issued to establish a Day Care Center at 622 32nd Ave. East...Continued occupancy of these premises as a Day Care Center is in violation of both the Building and Zoning Ordinances. Occupancy of these premises, as a Day Care Center, must be discontinued until a Certificate of Occupancy can be issued indicating compliance with the Building and Zoning Ordinances.... (Appellant's Exhibit 7)

8. On or about December 27, 1971, a Reverend Robert J. Causey requested permission to "establish day care center in existing building." Variance relief was requested in order to establish the center on a "lot less than 10,000 sq. ft. in area." The application noted that the owner of the subject property was the house of Refuge Church of God Pentecostal, 527-23rd Avenue.

9. A public hearing was had on January 14, 1972, before the Board of Adjustment at which time the application for variance was granted. The stamp of approval provided

THIS AUTHORIZATION AUTOMATICALLY CANCELLED  
IF COVERING BUILDING PERMIT HAS NOT BEEN  
ISSUED IN ACCORDANCE WITH PLANS FOR WHICH  
AUTHORIZED WITHIN ONE YEAR FROM 1-14-72.

The stipulation was repeated in a January 20, 1972, letter to the Reverend Causey:

This authorization shall become void one year from date of hearing if covering building permit, in accordance with plans for which authorized, has not been issued.

10. On July 18, 1972, the Reverend Causey filed an application to establish the day nursery in the existing building "per plan". Permit No. 547777 was issued February 26, 1973. A notation on Appellant's Exhibit 9, the subject permit, is dated February 26, 1973, and appears to read as follows: "O.K. to issue per plans dated 1/14/72." The report of inspector entry on the reverse page noted a March 23, 1973, visit and a certificate of occupancy issued on the same date.

11. A chronology identified by appellant as having been prepared by a DCLU employee showed that the duplex was constructed in 1952; that the property was rezoned from R-2-B to RM 800 in 1957; the December 6, 1971, Department letter to Ms. Causey; the January 14, 1972, Board of Adjustment variance grant; an August 18, 1972, rezone from RM 800 to RS 5000; and a February 26, 1973, permit issued to establish a day care center on the property. Preceding the next entry is a statement "permit never finalized."

12. By order dated February 11, 1975, the Hearing Examiner denied a request, dated January 27, 1975, for extension of the January, 1972, variance. The Hearing Examiner's order noted that the applicant "proposes to establish a day care center" and that the request for extension was untimely. The record is devoid of any other extension requests or grants.

13. DCLU concluded that pursuant to the variance of January 14, 1972, a permit was applied for July 18, 1972, to establish the day nursery; that the permit was properly issued on February 26, 1973. According to DCLU, thus began the legal status of the day care center.

14. The Polk Directory is considered as a general indicator of occupancy, although some entries have admittedly been erroneous. The Polk Directory listings per Director's Exhibit 1 follow:

<u>YEAR</u>	<u>LISTING</u>
1969	620 - Preston 622 - Maxwell
1971-2	620 - Bentley 622 - Vacant
1973	620 - No listing 622 - House of Refuge Church of God, Pentecostal day care center
1974	620 - No listing 622 - House of Refuge Church of God, Pentecostal day care center
1975	620 - No listing 622 - House of Refuge Church of God, Pentecostal day care center
1976	620 - No listing 622 - House of Refuge Church of God, Pentecostal day care center
1978	620 - No listing 622 - House of Refuge Church of God, Pentecostal day care center
1979	620 - No listing 622 - Vacant
1980	620 - Hyde 622 - Vacant (*Rake)

#### Conclusions

1. The July, 1972, application for a day nursery building permit was consistent with existing law. The land was zoned RM 800, authorizing outright day care use. Subsequent zoning to RS 5000 did not affect this vested right to use the land in accord with the regulations effective at the time of the application. Parkridge v. Seattle, 89 Wn.2d. 454 (1978). The permit was subsequently granted in 1973, and DCLU urges that the applicant or successor was entitled to and did use the land in accord therewith.

2. However, it appears that the applicant has met the building permits presumption of validity, Grant County v. Bohne, 89 Wn.2d 953 (1978). Unlike the variance authorization in Bohne, supra, the subject variance correspondence duly noted a one year limitation, i.e., the variance was to expire January 14, 1973. The permit was issued in February, 1973, although no extension or request therefore is of record. The February, 1975, denial of the January, 1975, variance extension requested noted that the applicant "proposes to establish a day care center." The Bohne court stated

Where a permit is shown to be issued in violation of an ordinance, it confers no rights on the holder. (Case cited) at 957.

Further, the

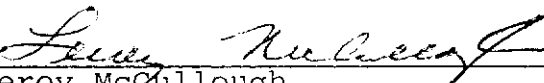
...failure of a landowner to obtain a building permit required by law, before establishing a use, may render the use unlawful from its inception and disqualify it to continue as a nonconforming use. 1, American Law of Zoning, Section 6.16 (Cases cited).

Thus, if the permit issued without authority, it was not a permit "required by law", and it afforded no legal protection to the property's use as a day care. As of the 1972 rezone the subject property became a legal nonconforming duplex. The matter of whether that status was modified by subsequent operation of law or fact is remanded for consideration by the Director.

#### Decision

The decision of the Director of the Department of Construction and Land Use is REVERSED and REMANDED.

Entered this 4th day of March, 1982.

  
Leroy McCullough  
Hearing Examiner