

## FINDINGS AND DECISION

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

In the Matter of the Appeal of

OWEN M. WINTER

FILE NO. S-80-043

from a determination of the  
Director of the Department of  
Construction and Land Use

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

#### Introduction

Owen M. Winter, appellant, appeals the decision of the Director of the Department of Construction and Land Use to deny a use permit for Building No. 3 at 2165 North 106th Street for nonconformance with the height limitation.

The appellant exercised his right to appeal pursuant to Section 25.40 of the Zoning Ordinance (86300, as amended).

Parties to the proceeding were: Owen M. Winter, architect, appellant; the Director of the Department of Construction and Land Use represented by Leigh Ann Collings, Intern.

This matter was heard before the Hearing Examiner on September 9, 1980.

For purposes of this decision, all section numbers, unless otherwise indicated, refer to the Zoning Ordinance (86300, as amended).

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. The subject property is a lot of 56,798 sq. ft. at 2165 North 106th Street, zoned Multiple Residence Low Density (RM 800).

2. It is proposed to construct three apartment buildings on the subject property with variance from Section 12.11(i) which limits group apartments to lots of less than 40,000 sq. ft.

3. On August 12, 1980, the Director of the Department of Construction and Land Use published his decision to deny a use permit. The Response of the Director and evidence at hearing shows the Director determined that the height of Building No. 3 could not be calculated from the grade level at the south end of the building after the proposed finishing because that finishing would create an "artificial earthen berm." The proposed height of the building is 35 ft. from the finished grade.

4. The finished ground elevation on the south side would be even with that of the adjoining property to the west and higher than that to the south.

5. The existing (before finishing) grade of the lot is uneven and slopes up to the north higher than the elevation of the proposed finished grade. Cutting and filling will occur over the lot to provide basements, access and appropriate slopes for pathways between buildings.

6. Section 12.51 provides that "no building shall exceed a height of 35 feet...."

7. "Height of Building" is defined at Section 3.09 as follows:

The vertical distance from the lot grade to the highest point of the roof surface of a flat or mansard roofed building or to the average height of the highest gable of a pitch or hipped roof building.

8. "Lot grade" is defined at Section 3.08 as:

For the purpose of determining the height of a building, lot grade shall be the average of the finished ground elevations at all exterior walls of the perimeter of a building, except that walls nearer than five (5) feet to an adjoining lot line shall be disregarded. In case walls are parallel to and within five (5) feet of a public sidewalk, alley, or other public way, the ground level of such walls shall be measured at the sidewalk, alley, or public way.

9. The Department calculates height by measuring from finished grade but the finished grade may not deviate from that "normally allowed." Department policy, as understood and applied by the plans examiner who examined the plans for the subject property, is to allow leveling of a site, i.e. fill on one side equal to the cut on the other.

10. An informational bulletin on "Measuring the Height of Buildings" has been published by the Department to explain Departmental methods and policy. The bulletin was not available when plans were filed for the subject property.

#### Conclusions

1. The Director's position is not that the term "finished ground elevations" where used in Section 3.08 is ambiguous and therefore requires construction but that the means of achieving the finished grade may be considered by the Director. An informal rule of thumb for determining whether the means of attaining the grade is permissible or "normally allowed" is being applied.

2. The Director urges that considerable weight be given his interpretation as the official charged with enforcing the ordinance. To the extent that a term is ambiguous, that is appropriate. East v. King County, 22 Wn.App 247 (1978). Where the term is unambiguous, however, no construction is necessary.

3. The Director included the Purpose and Scope statements of Section 2.1 in his Response to the appeal letter in support of his interpretation which considers the extent and source of the change of grade from existing to finished. The statement merely gives the general purpose of the ordinance and does not give any indication that the Council intended anything other than the language it used in Section 3.08.

4. Without qualifying language, the use of "finished ground elevation" could allow developers to build up the grade to increase the allowable building height. The Director is not permitted to amend the ordinance by formal or informal interpretation, however. "The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom." Pearson v. Evans, 51 Wn.2d 574, 576 (1978).

5. The Director erred in that the height is to be calculated from finished lot grade without regard to the manner of attaining that grade.

Decision

The Decision of the Director of Construction and  
Land Use is REVERSED.

Entered this 22nd day of September 1980.

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 appeal to the Superior Court should be filed within 20 days of the date of this decision. Vance v. Seattle, 18 Wn.App. 418 (1977).