

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

UNIVERSITY PARK COMMUNITY CLUB

FILE NO. S-85-001

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

Introduction

University Park Community Club appeals the interpretation of the Land Use Code as applied to property at 5004 17th N.E. by the Director, Department of Construction and Land Use.

The appellant exercised the right to appeal pursuant to the Seattle Municipal Code, as amended.

Parties to the proceedings were: appellant, University Park Community Club, represented by Jeff Eustis, attorney at law; the Director, Department of Construction and Land Use (DCLU), represented by Guy Fletcher, land use specialist; and Laura Olson, property owner, represented by Jeremiah Long, attorney at law.

This matter was heard before the Hearing Examiner on October 8, 1985.

For purposes of this decision all section numbers refer to the Seattle Municipal Code, Title 23, as amended, 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. In response to a request for an interpretation of the Land Use Code as to what types of food service are permitted under a boarding house use and whether a porch may be enclosed, the Director issued an interpretation. The interpretation concluded that food service must be limited to a defined, non-transient population and that enclosure of the porch was not an expansion of the nonconforming use. Appellant appeals this decision.

2. The building at 5004-17th N.E. was built circa 1914 to be used as a retirement home. As early as 1928 the building was used as a fraternity house. The Acacia fraternity purchased the building circa 1939 for use as a fraternity house. That use continued to 1967 when the chapter was discontinued. The alumni association then rented rooms in the house until 1971. In 1971, the roomers were evicted and a family was placed in the building as caretakers. A decision to sell the facility finally was made when the alumni group realized its hope to recolonize was unrealistic.

3. In 1972, Mrs. Olson purchased the property, which was advertised as a fraternity house, from Acacia for \$50,000.

4. The property is currently zoned SF 5000. From 1977 to 1982, it was zoned RS 5000. From 1958 to 1977 the property was zoned RD 5000. From the first zoning until 1958 the designation was R1-A (First Residence).

5. The first floor of the fraternity house had a formal living room, dining room, informal living room, kitchen and powder room. Folding or sliding doors separated the living and dining rooms. The basement contained one large and two smaller recreation rooms, another room called the "townies" room, a storage room, garage and closet space. On the second floor were five large study rooms, a large bathroom and large sleeping porch. The third floor housed another large sleeping porch, five or six large study rooms and a small bathroom without shower. The back porch was not enclosed by walls or roof.

6. During the years witness Bob Doupe was involved with the fraternity, 1959-1963 and 1970 to the present, the maximum number of residents at the fraternity house was around 35. The highest membership, including non-residents, was 44. The sleeping porches contained a total of approximately 44 beds. The highest number fed in the dining room was 40 to 50 on Monday nights.

7. After purchasing the fraternity house, Mrs. Olson cleaned and repaired the kitchen and dining room and began feeding people within a couple of weeks, according to her testimony which was unrefuted. She then proceeded to clean, repair, renovate and/or alter one room at a time. When the room was ready she would rent it. The sleeping porches and study rooms were divided into two rooms each. At some point the open porch area at each side of the front entry way was enclosed and made into rooms. The former "powder" room is now a sleeping room as is what was the "actives" living room, presumably the informal living room.

8. According to Mrs. Olson's testimony, breakfast, lunch and dinner are served in the facility on the subject property currently to some 75 persons including her 56 roomers from this facility and five other rooming houses she operates. Another 18 have signed up for next month. Non-roomers pay for meals by the week or month. Meals have been served to as many as 117 persons. At this time Mrs. Olson does not offer any single purchase meals though she has in the past.

9. The Department's records show only construction permits to install fire sprinklers in 1975 and to rebuild a roof over the walkway in 1983. There is no evidence that the issuance of the 1975 building permit included any consideration of the status of the stated occupancy (use) of the structure or its impact on the area. Department records show no permit issued for the construction of the sleeping porch addition.

10. That the sleeping porch was added some time after the initial construction of the structure is uncontroverted.

11. The sleeping porch addition extends into the area of the required rear yard.

12. Permitted uses in the RD 5000 zone classification did not include a fraternity use.

13. The change of use of the property from fraternity to boarding house was not legally established until 1985.

Conclusions

1. Nonconforming use is currently defined as:

A use of land or structure which was lawful when established and which does not conform to the use regulations of the zone in which it was located. A use shall be considered established if it conformed to applicable zoning regulations at any time, or when it has commenced under permit, a permit for the use has been granted and has not expired, or a structure to be occupied by the use is substantially underway in accordance with Section 23.04.10.D.

Section 23.84.26, Ordinance 110381. The 1957 code defined "nonconforming use" as:

Use, nonconforming means a lawful use of land or structure in existence on the effective date of the ordinance codified in this subtitle or at the time of any amendments thereto and which does not conform to the use regulations of the zone in which such use is located.

Section 24.08.220, Ordinance 86300, as amended.

2. Fraternities were permitted uses under the R1-A zoning of the code which preceded the 1957 code. Fraternities were not a permitted use in the RD 5000 zoning classification. Neither fraternities nor boarding houses are permitted in the SF 5000 zone under the current Land Use Code.

3. In 1957, the fraternity on the subject property was a nonconforming use in that it was a permitted use under the code in effect prior to the 1957 code but did not conform to the new zoning, RD 5000 or SF 5000.

4. The Land Use Code, Ordinance 110381, effective 1982, provides: "(a)ny nonconforming use may be continued subject to the provisions of this Section". Section 23.44.80. The 1957 Code, Ordinance 86300, as amended, provided that "(a)ny nonconforming building or use may be continued, subject, however, to provisions of Section 24.14.040 through 24.14.070". Section 24.14.030. As a nonconforming use, the fraternity use was permitted to continue under both the 1957 and 1982 code if it was not abandoned.

5. The facts presented at hearing do not constitute abandonment of the fraternity use.

6. A fraternity house was a nonconforming building in the RD 5000 zone and is a nonconforming building in the SF 5000 zone.

7. In 1972, under the 1957 code, a nonconforming use in a nonconforming building could be changed only to a use permitted in a less intensive zone than the nonconforming use subject to two exceptions. Section 24.14.060.C. The applicable exception is Section 24.14.060.E which states:

In any zone, except an M or I zone, a nonconforming use in a nonconforming building, may be changed to a use permitted in a less intensive zone than the zone in which the nonconforming use would be conforming, or to another use which is listed and grouped in the same zone classification as an outright permitted use, if such new use will be no more detrimental or injurious than the previous nonconforming use to other property in the same zone or vicinity.

8. Under the 1957 code, both boarding, lodging or rooming house and fraternity houses were first permitted outright in the Multiple Residence Low Density (RM 800) zone. The fraternity use could have been changed to the boarding/rooming house use pursuant to Section 24.14.060.E. if it was determined that the new use would be no more detrimental than the fraternity house use. Since the change of use was never formally established, at least until 1985, that determination would not have been made. The 1985 permit was based on the assumption it had been made sometime in the past. The current Land Use Code also provides for consideration of the detriment of the new use when one nonconforming use is converted to another use not permitted in single family zones. Section 23.44.80.H. So whether the use was established under the 1957 or 1982 code, the potential detriment should have been considered when the 1985 permit was issued.

9. Appellant urges that the Director erred in failing to limit the use as to number of boarders. The 1957 code defined "boarding, lodging, or rooming houses" as "...a building, other than a hotel, where meals and/or lodging are provided for compensation for seven or more nontransient persons". Section 24.08.030"B"6. The Director is correct that the definition does not tie meals to lodging in a way that would set up a principal-incidental use relationship as urged by appellant.

10. The Director concluded in Conclusion No. 4 that the only limitation on the number of non-transient served is the physical limitation of the structure itself. That conclusion results from her interpretation of Keller v. Bellingham, 92 Wn.2d 726, 600 P.2d 1276 (1979), that only structural expansion can be restricted.

11. The nonconforming use provision in the Bellingham ordinance states:

A nonconforming use shall not be enlarged, relocated or rearranged after the effective date of the ordinance which made the use nonconforming.

Bellingham City Code Section 20.06.027(b)(2). Seattle's 1957 code was different, however, in that it addressed independently changes in nonconforming structures and in nonconforming uses.

A. Subject to Section 24.14.050, any nonconforming building or part may be maintained with ordinary repair, but, no such building or part shall be extended, expanded or structurally altered, except as otherwise required by law, nor shall a nonconforming use be extended or expanded...(emphasis added).

Section 24.14.060. The current code also addresses nonconforming uses and structures in separate sections, Section 23.44.80 and Section 23.44.82 where both are prohibited from being extended or expanded except under certain conditions. The separate treatment of use and structures shows that each could be expanded independent of the other, i.e., the use could be expanded (but that expansion is prohibited) without the structure's expansion and vice versa.

12. Even if Seattle's code provisions were not different in their recognition of the ability to expand the structure and use independently and, hence, the separate prohibitions, Keller still does not prohibit the Director from limiting the increase in business of the boarding house. In Keller, the Court recognized that

"(w)hen an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by ordinance".

p. 731. In the instant case the increase in diners over the number served in the fraternity may be of that magnitude. While the Court said that intensification is permissible if the nature and character of the use remains the same and the facility is substantially the same, we have here extensive change in the facility to accommodate the number of diners, and in the rooming part of the facility as well. The test put forth by the Court is "whether the intensified use is 'different in kind' from the nonconforming use in existence when the zoning ordinance was adopted". Keller, supra, p. 731. In Keller the trial court had found no change in the nature or the character of the use from the addition of six electrolytic cells to the 26 already in use at a chlor-alkali facility. The same use had continued but its production capacity had been increased by a factor of almost 25 percent. Here, the nature of the use has changed in that the principal function of the current use is the serving of meals throughout the day and evening to persons not residing on the site. It can be noted that meal service at a fraternity is an integral part of that use but that housing and social intercourse are equal parts. Even given that difference between the two types of uses, the change to a boarding house of similar intensity or volume, some 50 diners, 30 some living on the site, would not necessarily have wrought a "fundamental" change. Moreover, the change in type of use, from fraternity to boarding house, was expressly permitted by Section 24.14.060.E. of the 1957 Code. Here, however, the change to a boarding house which serves about twice the number of diners the fraternity did, the majority of whom live elsewhere, with the traffic associated with that increase, may well have effected a fundamental change.

13. The Director's conclusion that she was prohibited from placing a restriction on the volume of the use (number of diners) was in error. The matter, then, should be remanded for consideration of the level of business that is permitted without changing the nature and character of the use the property had supported when the zoning ordinance was adopted.

14. The second issue is whether the code permits the rear porch enclosure or extension. It was uncontroverted at hearing that the building is nonconforming as to bulk, as well as to use, because the structure encroaches on the required rear yard. The interpretation, when dealing with the porch, addressed only expansion of the nonconforming use, not the rear yard setback. The addition appears to result in an increase in the extent of the nonconformity in violation of Section 23.44.82. The Director erred in failing to consider whether the rear addition extended the nonconformity of the structure and should have been restricted.

Decision

The decision of the Director is remanded for consideration of the appropriate limitation on numbers of roomers/boarders and to determine whether the rear addition violates Section 23.44.82. The Office of Hearing Examiner retains jurisdiction to consider objections to the Director's further consideration provided any objections are filed within 14 days of the issuance of the Director's decision. If no objections are filed, that decision will be final and the jurisdiction of the Office of Hearing Examiner will be terminated.

Entered this 1st day of November, 1985.

M. Margaret Klockars
M. Margaret Klockars
Deputy Hearing Examiner

BEFORE THE HEARING EXAMINER

CITY OF SEATTLE

In the Matter of the Appeal of

UNIVERSITY PARK COMMUNITY CLUB

FILE NO. S-85-001

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

FINAL DECISION FOLLOWING
REMAND

A decision was entered by the Hearing Examiner in this matter November 1, 1985, remanding the decision of the Director, Department of Construction and Land Use (DCLU), for consideration of the appropriate limitation on numbers of roomers/boarders and to determine whether the rear addition to the building violates Section 23.44.82, Seattle Municipal Code. Jurisdiction was retained by the Hearing Examiner.

The Director issued her decision following remand on January 31, 1986. The property owner, by her attorney, Steven J. Lange, filed objections to the Director's decision on remand. Appellant, pro se and by its attorney, Jeffrey M. Eustis, and the Director, by Guy Fletcher, filed responses to those objections.

The Director concluded on remand that the impacts of the increase in the level of operation over that of the fraternity represents a fundamental change in the nonconforming use and, at its level of operation, is more detrimental to other properties in the same zone. To keep the same character of use that had existed, the Director concluded that the number of diners should be restricted to those residing in the structure and at other rooming houses owned by Mrs. Olson.

Mrs. Olson objects to these conclusions contending that a nonconforming use has a constitutionally protected right to expansion; that the increase in number of meals served has no impact on the area; and that the economic effect on Mrs. Olson is out of proportion to the benefit to the public from the restriction.

The scheme of the City's Land Use Code allows for the continuance of nonconforming uses and allows a change in use to another listed in the same zone classification "if such new use will be no more detrimental or injurious than the previous nonconforming use to other property in the same zone or vicinity". Section 24.14.060.E, Seattle Municipal Code. Mrs. Olson, unlike the owners in the cases cited in her brief, has changed the use from that existing at the time of the zoning change which made the use nonconforming and that change is subject to this limitation. Neither the scheme of the Land Use Code nor the restriction on the use imposed by the Director operates to deprive the property owner of the right to use the property that existed at the time of the zoning change. The code restriction and limits imposed by the Director serve only to assure that the new nonconforming use does not affect other properties to a greater extent than the fraternity use would have. This restriction surely passes constitutional muster when provisions for cessation of nonconforming uses over a period of time are within the police power of municipalities. Cases cited by Mrs. Olson dealt with violation of due process which occurred when immediate cessation of a use which pre-existed the zoning was required. See State v. Thomasson, 61 Wn.2d 428, 378 P.2d 441 (1963). This is not the purpose of Section 24.14.060.E, Seattle Municipal Code, and has not been required by the Director.

A natural increase in the number of residents of a validly established nonconforming use, subject to the limitations of the existing structure, is not prohibited. See Keller v. Bellingham, 20 Wn.App. 1, 578 P.2d 881 (1978); People v. Perkins, 282 NY 329, 26 NE 2d 278 (1940). And, as recognized by the Director, a change in the character of the use would not necessarily result from a substantial increase in the volume.

A boarding/rooming house, with meal service not limited to roomers, has a different purpose and character than a residence operated by a fraternal organization, however. The effect of the degree of use on the neighborhood may differ depending on whether the use is a residence with its natural increase in members or a business seeking to maximize profits by increasing its volume. The Director's decision on remand reflects her consideration of both the different character of the use, residential versus commercial, and the substantial intensification of the use, treating it as similar in character for this purpose. The change in character and intensification was found to be more detrimental to properties in the vicinity and therefore the use could not be permitted under Section 24.14.060.E, Seattle Municipal Code. By restricting the intensity or volume the Director concluded she could assure that the character remain similar to the residential fraternity use. This decision is not clearly erroneous.

The statement of policy intent at p. 16.02.04, Seattle Municipal Code, which Mrs. Olson urged the Director should have considered, is not applicable as the boarding/rooming house is not an institution as defined by the Land Use Policies or Land Use Code.

The Director does not have authority to consider the economic effect on Mrs. Olson of the application of Section 24.14.060.E, Seattle Municipal Code, to the change in use.


As to the porch enclosure or expansion, the Director concluded that it increases the structure's nonconformity to the extent that it intrudes into the required rear yard. Mrs. Olson maintains that her rights to the porch addition are vested.

The rule in Washington is that rights vest at the time of application as long as the proposed project conforms to codes and regulations in existence at that time. Mercer Enterprises v. Bremerton, 93 Wn.2d 624, 611 P.2d 1237 (1980). If the construction proposal did not conform to the requirements or restrictions of Section 23.44.82, no rights to that expansion existed. If the application or building permit failed to conform to the provisions of the code, its issuance conferred no rights. Eastlake Community Council v. Roanoke Association, Inc., 82 Wn.2d 475, 513 P.2d 36 (1973). The Director's decision as to the porch addition is not clearly erroneous.

Decision

The Director's decision on remand is affirmed.

Entered this 8th day of April, 1986.


M. Margaret Klockars
Deputy Hearing Examiner

Concerning Further Review

The decision of the Hearing Examiner in this case is the final administrative determination by the City, 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 must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within fourteen days of the date of this decision. Should such request be filed instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, 400 Yesler Building, Seattle, Washington 98104.