

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

In the Matter of the Appeal of

JAMES WESTERHOLM

MUP-90-097(V)
APPLICATION NO. 9004327

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

Introduction

The appellant's application for a variance allowing him to create two lots not meeting minimum lot size requirements was denied by the Department of Construction and Land Use (DCLU). The appellant exercised the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the undersigned Deputy Hearing Examiner on January 7, 1991. The record was held open until January 14, 1991 to allow time for a site visit by the Examiner.

Parties to the proceeding were: the appellant, James Westerholm by Peter Nichols, attorney-at-law; and the Director of the Department of Construction and Land Use (Director) by Jan Mulder, senior land use specialist.

After due consideration of the evidence elicited during the public hearing and as a result of the personal inspection of the subject property and surrounding area by the Hearing Examiner, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on appeal.

Findings of Fact

1. The subject property is located on the south side of N.E. 90th Street, between 17th and 20th Avenues N.E. The property is addressed as 1723 N.E. 90th Street. The property is zoned Single Family 5000 (SF 5000).

2. The property is a rectangular parcel measuring 66 feet (east-west) by 145 feet (north-south), for a total of 9,570 square feet.

3. The property has been owned by the applicant for approximately 18 months. Prior to his purchase, the property was developed with an older single family home located near the rear (south end) of the lot.

4. A new single family home is currently under construction on the property, to the front of the existing house. Because the Land Use Code allows only one single family house on a lot, the permit for that house was granted by DCLU on the condition that the existing house be converted to use as a workshop upon completion of the new home. The requirement that the existing house not be used as a dwelling unit is stamped on the plans. DCLU also required the posting of a bond.

5. The appellant is seeking a variance that would enable him to divide the subject property into two lots of less than the minimum required lot size of 5000 square feet. Appellant's proposal is to create two lots of 4785 square feet. Parcel A, consisting of the northern half of the site, would contain the new single family home as well as a ten foot wide access easement to Parcel B. Parcel B would encompass the southern half of the existing lot and would include the existing single family home. If the variance and subsequent short plat were successful, the appellant would retain the old house as a separate residence and not use it as a workshop. Instead, he would live in the new house and would rent out the old house.

6. Section 23.40.020.C.1 provides as follows:

Variances from the provisions or requirements of this Land Use Code or Title 24 shall be authorized only when all the following facts and conditions are found to exist:

(1) 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

(2) 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

(3) 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

(4) The literal interpretation and strict application of the applicable provisions or requirements of the Land Use Code or Title 24 would cause undue and unnecessary hardship; and

(5) 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.

7. Section 23.44.014 sets forth the yard requirements applicable in Single Family zones. That section generally requires front yards of 20 feet, side yards of 5 feet, and rear yards of 25 feet or 20 percent of lot depth, whichever is less.

8. The Code defines the front property line of a lot as being that property line which abuts a street. When a lot does not abut a street, the practice of DCLU is to allow the property owner to select which property line that will be treated as the front. Once the front property line is designated, it becomes possible to determine the location of the various required yards.

9. New lots must meet the standards of the the Land Use Code.

10. The prior owner of the property had attempted to purchase sufficient land from one of the adjoining properties so as to have 10,000 square feet and thus be able to create two lots meeting minimum lot size requirements. His efforts were unsuccessful. Nonetheless, the appellant indicates that he bought the property believing that he could acquire the needed property. However, the owners of the neighboring properties have been unwilling to sell.

11. No existing lot along N.E. 90th Street between 17th Avenue N.E. and 20th Avenue N.E. has less than the required 5,000 square foot minimum lot area. There are three lots located directly to the east of the subject site that each contain 9,570 square feet, the same size as the subject property. Immediately to the west is a parcel that was divided into a northern and southern lot in 1986. That parcel measured approximately 91 by 145 feet or 13,195 square feet. Of the two lots created by the division of that parcel, the northern lot (Parcel A) measures 7826 square feet, while the southern lot (Parcel B) measures 5370 square feet. Based on the lot configurations shown on the Kroll map, the average homesite along the north side of N.E. 90th between 17th and 20th Avenues N.E. is 7,475 square

feet; the average size along the south side of the street is 7,424 square feet. The lots abutting the same block of N.E. 89th average approximately 6,000 square feet.

12. To the north of N.E. 90th, the east side of 20th Avenue N.E. is developed with a row of five houses developed on 3,000 square foot lots. Because the topography descends from west to east, and because the homes built on those lots are two-story, the homes are visible from the front of the subject property. These small lots were, presumably developed in reliance on the undersized lot exception of 23,44.010B.3. That exception is inapplicable in this case.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76, Seattle Municipal Code. Under the terms of that Chapter, the decision of the Director on a variance application is to be given no deference.

2. The granting of a variance requires satisfaction of all five of the criteria of section 23.40.020C.1 referenced above (Finding No. 6). The first of those criteria requires a showing of some unusual condition applicable to the subject site that deprives the property owner of rights and privileges enjoyed by other properties in the same zone or vicinity. The applicant here is unable to satisfy that first criterion. While the subject site is large, other sites along the same street are of similar size. Moreover, while not quite as large as the subject site, most lots in the area are greater than 5,000 square feet. With the exception of the five houses along 20th Avenue N.E. and the one shortplat on N.E. 89th referenced in the DCLU decision, there was no demonstration of other instances in the neighborhood where persons had been allowed to build on parcels of less than 5,000 square feet.

3. As to the second of the criteria, the variance would, as noted by the DCLU report, not exceed the minimum necessary to allow two lots on the subject site. However, granting permission to the applicant to create lots of less than 5,000 square feet would constitute a grant of special privilege. Very few building sites in the neighborhood are less than 5,000 square feet, and none of those lots are of recent creation. The exception that allowed the construction of the houses on the 3,000 square foot lots specifically provides that it applies only to lots created prior to 1957.

4. Granting of the variance would not be materially detrimental to the public welfare. It would, however, have adverse impacts for the residents of adjoining properties. The result of the variance would be to allow creation of a

front and back lot. Even when no lot size variance is required, residents of properties neighboring sites that are proposed to be split in this way often complain of the impact on their privacy and on the character of the neighborhood. These concerns are real. Along those lines, the fact that one site has been divided in this way is insufficient to support the suggestion that the neighborhood character is already altered. It is also worth noting that the site that was divided in this way is almost 40 percent larger than the subject site.

5. The literal interpretation and strict application of the Land Use Code provisions on lot size will not cause the applicant undue and unnecessary hardship. The appellant has owned the property for only 18 months and has, at all times, been aware that the property was too small to be split into two lots without a variance. The record is clear that DCLU placed him on notice from the beginning that he could not have the two residences on the site without a variance and a short plat, both discretionary decisions. It was the applicant's choice to build the new residence prior to obtaining those approvals.

6. In terms of consistency with the spirit and purpose of the Land Use Code and adopted policies, arguments can be made on both sides. On the one hand, the policies favor the creation of affordable housing. On the other hand, they favor retention of neighborhood character. In light of the application's failure to meet the other criteria, this issue need not be resolved here.

7. In reference to the appellant's repeated argument regarding the small amount by which the two new lots would be below the minimum lot size, it is worth noting that when discussing any development standard, one can always argue about the exact point at which the Code establishes a limit. Thus, it can be argued that a structure 31 feet tall would not have that much more impact than one 30 feet in height, or that a 4.5-foot side yard would achieve most of the goals of a 5-foot side yard. However, the limit in the Code is the one that the City Council decided was reasonable. Therefore, merely to argue the de minimis nature of a proposed variance is not sufficient. The Code does not distinguish between large and small variances. Instead, all variances must satisfy the same criteria.

8. Finally, the Examiner would note that if the property were to be divided, it is unclear how the rear lot would satisfy its front yard requirement of 20 feet. A straight line drawn across the site at its north-south midpoint would, by the Examiner's calculation, cross only 14.5 feet in front of the residence on the rear lot. The structure's setback from all other property lines is also less than 20 feet.

Decision

The decision of the Director is AFFIRMED.

Entered this 25th day of January, 1991.



Guy E. Fletcher
Deputy Hearing Examiner

Concerning Further Review of
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. Any 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 (15) 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, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.