

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

RAY FOWLER

FILE NO. MUP-84-061(V)
APPLICATION NO. 8402392

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

Introduction

Applicant proposes to repair or replace an existing accessory garage structure at 10535 Alton Avenue N.E. The Department of Construction and Land Use denied the variances needed to provide less than the minimum front yard and to allow parking in a required front yard. Applicant submitted this appeal.

The appellant exercised his right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on August 23, 1984.

Parties to the proceedings were: appellant-applicant pro se; and the Director of Department of Construction and Land Use (DCLU) by Arthur Ward.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

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

Findings of Fact

1. The subject site is located in a Single Family (SF) 7200 zone between N.E. 105th and N.E. 107th Streets. Alton Avenue N.E. is east adjacent to the site. The property address is 10535 Alton Avenue N.E.

2. The subject parcel is the most southerly of three parcels created by a short subdivision approved in July, 1983, by DCLU. The subject property was denoted as Parcel C. The Master Use Permit application number was 83-207 and the King County Recording Number 830721-0725. North abutting "Parcel B" is vacant.

3. The subject lot is of a long narrow configuration. At Alton Avenue N.E., the site is 45.25 ft. wide. The site's northern property line extends roughly 196 ft. Due to a southeasterly angle of adjacent Alton Avenue, the property's south property line is longer, approximately 201 ft. The lot area is 8,595 sq. ft.

4. The subject lot is developed with a recently constructed single family residence. The residence measures 20 ft. wide and 48 ft long. Its rear wall is 112 ft. from the rear (west) lot line.

5. The front wall of the residence is some 36 ft. from the front lot line. Between the structure's front facade and the front lot line is an older garage structure that has fallen into disrepair. The garage structure pre-dates the residential structure.

6. The variance plot plan drawn by applicant, Exhibit 5, shows a 4 ft. distance between the residence and the garage, and a 4 ft. distance between the front lot line and the front of the garage. Beyond the front lot line is the public right-of-way. There appears to be space in this area in front of the garage to park parallel to the garage.

7. The on-site garage was not shown on the short subdivision plat application or approval. The DCLU witness submitted that the Land Use Code prohibits an accessory use on a proposed subdivision parcel where no principal use is on that parcel, Section 23.44.40(B); and that therefore, the applicant's existing garage cannot be treated as a legal nonconforming use. In special instances Section 23.44.82(C) allows nonconforming accessory structures such as the applicant's garage to be rebuilt or replaced, although not expanded.

8. Applicant prefers to maintain the covered parking in its present site by either repairing or replacing the garage. Section 23.44.14(A) requires a minimum front yard of 20 ft.; the existing garage setback is 4 ft. And Section 23.44.16(D)(2) essentially prohibits the location of parking in front yards. After numerous contacts with DCLU before and after his 1984 purchase of the property, applicant applied for variances from Sections 23.44.14 and 23.44.16. DCLU's denial of those variances is the subject of this appeal.

9. Project applicant testified credibly that he received assurances from the builder that the existing garage use/location was appropriate, and that he relied on DCLU ensure proper construction conformity.

10. Topographically, part of the subject lot drops off rather suddenly to the south lot line. The ridge of the drop-off is approximately 12 ft. from the south lot line near the front of the lot and the distance narrows as the drop-off area proceeds rearward.

11. The plot plan for the 1983 building permit, Exhibit 2, shows no front yard garage structure, but a "parking pad" set 5 ft. from the south property line and extending to the dwelling structure's front wall. Exhibit 2 shows no ridge or drop-off on site.

12. According to the DCLU representative, the applicant could locate a parking pad between the south wall of the house and the south lot line, building into the slope area, if necessary, for support.

13. According to applicant most homes in the immediate area have double garages, including "a series that abut the street." Applicant was not aware if the referenced dwellings had been granted variance relief. According to DCLU the nearby single family developments "all appear to provide their required front yards, although there appears to be a 'tack-on' carport at 10535 Alton Avenue N.E. that may extend into the required yard."

14. Several neighborhood residents signed letters indicating approval of applicant's "desire to demolish the old garage presently located on his property, and to replace it with a new one... of the same size and in the location..." but conforming "in style and general appearance to the construction of his recently purchased home."

15. With regard to the State Environmental Policy Act of 1971 (SEPA) and Chapter 25.04, Seattle Municipal Code, the action proposed in this subject application has been determined by the responsible official to be categorically exempt pursuant to the provisions of WAC 197-10-170.

Conclusions

1. The variance criteria of Section 23.40.20 are summarized at page 2 of the Director's decision. The criteria, in the conjunctive, include the requirement that an unusual property condition be shown which, without variance relief, would deprive the applicant of development rights and privileges enjoyed by other properties in the same zone or vicinity.

2. The Examiner would first note that alleged negligence of DCLU was a major thrust of applicant's presentation. That is to say that in applicant's view, DCLU had ample opportunity to notice the preexisting garage structure; and the progress of the dwelling's construction which was contingent on that garage structure's presence. Thus, applicant's argument would be, DCLU is estopped to deny repair of the existing garage or its replacement within the present area.

3. The Land Use Code provides specific procedures for challenge to DCLU application of code sections to specific fact patterns. Those procedures are in Chapter 23.88, Interpretations. Nevertheless, consideration must be given in this proceeding to the Land Use Code's dim view of any lot's providing only an accessory use. Further, applicant or his agent must bear some responsibility for the subdivision and building permit plans which fail to show the existence of a garage structure on site. The Examiner therefore must proceed to the questions of whether variance relief criteria are met; not to the question of whether a variance should be required.

4. This case presents a unique combination of circumstances. The subject parcel is a long narrow lot characterized by banks or bluffs and was created as a result of a subdivision approval in 1983. Although not fully recognized, the site's development included and presently includes a garage structure which predated construction of the single family structure. Per DCLU, the dwelling provides a 112 ft. rear set back. The south side yard setback is affected by a slight bluff area that expands to 12 ft. near the front of the garage. Are all the variance criteria met by these facts? The Hearing Examiner is constrained to conclude that they are not, and the variance must therefore be denied.

5. The problem is the impact of the dwelling's location on site. The applicant's agent, the builder, placed the dwelling in its present location. Had the house been placed 20 ft. farther west, into the 112 ft. rear setback, the applicant would have been able to locate a front garage without a requirement for variance relief. Similarly, had the house been situated differently auto access may have been possible along the south of the house to the rear yard. Thirdly, although less significantly, a parking pad was illustrated on the building permit plot plan and the record reflects no reason why the same was not done or why the same could not be done, although the south embankment may increase the construction difficulties and costs.

6. In the case of Re Schrader, the Oklahoma Supreme Court set aside the Appellate Court's approval of a variance when the following circumstances were presented. One Lulla Schrader had a carport built alongside her house, without permit. The carport encroached into all but 6 inches of the Code's 15 ft. setback. After ruling

against Schrader's constitutional claims, the Supreme Court held that (a) there was no evidence of lot peculiarity (b) the requested relief would "completely destroy" the intent of the Ordinance and (c) that loss of the \$3500 construction costs did not constitute an undue hardship. The Court stated:

Generally, a hardship created by the owner of the premises constitutes no valid basis for a variance from, or exception to, a zoning ordinance, for to allow circumvention of the Ordinance by the purposeful creating of a hardship to the landowner, by the landowner, emasculates the ordinance as effectively as repeal...

at p.138.

7. The Schrader holding is in accord with 5 Williams, American Land Planning Law, Section 146.02:

If a developer proceeds to build in willful violation of the zoning Ordinance, and is caught, the court will not listen to a plea of hardship if the municipal authorities insist that the violation be corrected; and the situation is not appreciably better if the violation is...accidental. In most of these cases, usually involving relatively minor yard regulations, the courts have taken a tough attitude towards erring developers...

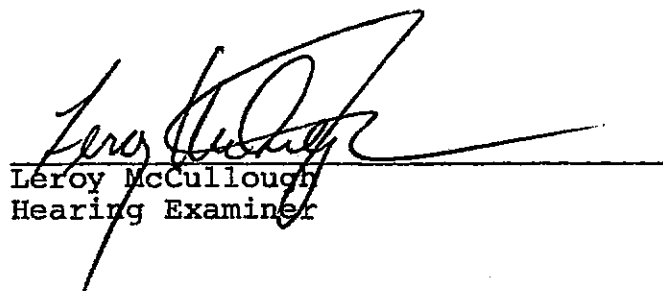
Paplow v. Minsker, 350 NYS 2d 238 (1973) seems to suggest at least one Court's view that extreme circumstances such as an unavoidable lapse in a nonconforming use should be considered in an application for variance submitted by a stranger purchasing in good faith.

8. Since the unusual property condition in this case is properly characterized as having been created by owner/applicant; and since an alternative to the requested variance relief exists, the variance is denied. Approval under the circumstances would exceed the minimum necessary for relief and it could further set a negative precedent in that builders would be able to escape responsibility for their actions by a de facto "emasculatation" of the land use code and policies.

Decision

The decision of the DCLU Director is affirmed.

Entered this 27th day of August, 1984.


Leroy McCullough
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. 2 Am. Jur. 2d., Admin. Law Section 524. Any request for judicial review of the decision must be filed in King County Superior Court within fourteen days of the date of this decision. Seattle Municipal Code Section 23.76.36(B)(11); Akada v. Park 12-01 Corporation, 37 Wn. App. 221 (1984); JCR 73.

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, 400 Yesler Building, Seattle, Washington 98104.