FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

STIMSON BULLITT — FILE NO. LUCE-83-004

from the final Order of the Director, Department of Construction and Land Use, of a Notice of Land Use Code Violation

and

from a Notice of Grading Violation by the Director, Department of Construction and Land Use — FILE NO. G-83-001

Introduction

Stimson Bullitt appeals final orders of the Director of the Department of Construction and Land Use (Director) on notices of violation of the Land Use Code and the grading ordinance concerning a single property addressed 10801-47th Avenue S.W. and 10801 Arroyo Beach Place S.W.

The appellant exercised his right to appeal the Land Use Code matter pursuant to Chapter 23.90, Seattle Municipal Code; and to appeal the grading ordinance matter pursuant to Chapter 22.804, Seattle Municipal Code.

These matters were heard concurrently before the Hearing Examiner on March 17, 1983. Stimson Bullitt, Esq., appeared pro se; the Director was represented by Joyce Kling.

For purposes of this decision all section numbers refer to Title 22, 23 or Title 24, Seattle Municipal Code, unless otherwise indicated.

After due consideration of the evidence elicited during the public hearing, the following shall constitute the findings of fact, conclusions and decisions of the Hearing Examiner on these appeals.

Findings of Fact

1. The subject property is located at 10801 47th Avenue S.W. The property address is also given as 10801 Arroyo Beach Place S.W. The legal description appears in the December 28, 1982, Department of Construction and Land Use Notice of Violation and is incorporated herein by reference.

2. The property includes Puget Sound beach front. The beach area is designated Conservancy Management (CM) by the Seattle Shoreline Master Program.

3. Stimson Bullitt, property owner and appellant herein, first saw the subject property in approximately 1979. In the fall of 1982 he started a project to, as he describes it, repair the property's disintegrated rip-rap (stone) bulkhead. Appellant secured no shoreline substantial development permit for the activity.

4. The project involved placing huge boulders along the beach area generally seaward and in front of a standing timber and piling bulkhead located 30-40 ft. seaward of the toe of the bank. The project cost has exceeded $1,000.

5. According to appellant the original rip-rap was built of Gorst rock, which he intended to repair with a harder, more durable rock.

6. The north adjacent property has a timber bulkhead with a rock toe. The Director's records show the bulkhead as at the edge of the bank; and as having been authorized in 1978.

7. To the best of the north adjacent property owner's knowledge a combination timber pile-land fill-rip-rap bulkhead was located along appellant's beach front for some 40 years. The witness further recalled that the bulkhead was 7 to 9 ft. in height above beach ground, and that the stone approximated the height of the timber piling.

8. Another neighbor testified that originally the rocks were close to the bulkhead; but their height never equaled the timber pilings, which were themselves approximately 12 ft. above the witness' head. There is no direct or other evidence of record showing the height or configuration of a previous rip-rap along appellant's property.

9. Photographs taken in 1980 of the appellant's beach area show pebbles and a sandy area, large logs and other pieces of driftwood and continuing immediately landward, the steeply declining vegetated bluff. A worn timber bulkhead is shown along the northern segment of the beach area. Rocks of various dimensions appear strewn seaward of the timber piling. Continuing north, the photograph shows the rip-rap in all instances to be of lesser height than the timber piling bulkhead.

10. In response to an application to extend the existing timber bulkhead southward and to use landfill, an alternative plan and shoreline permit were approved for installation of a drift sill and berm system (SMA 80-88). The sill-berm project is nearing completion. The Director considered that type of protection more effective than the traditional bulkhead rip-rap system.

11. An application to extend the existing timber bulkhead southward and to place landfill landward of the new bulkhead (SMA 80-88) was denied because the proposed bulkhead was considered inconsistent with the Shoreline Master Program.

12. The Director's witness was on site in January and again in March, 1983. By this time contemporary photographs show a variety of boulder heights against the wood piling.

13. By Notice of Violation dated December 28, 1982, the Director asserted violation of the Seattle Grading Ordinance and the Shoreline Master Program. For correction on both items, the Notice required that "all rocks placed seaward of the timber and piling bulkhead" be removed. Following requested reconsideration of the Notice of Land Use Code Violation, the Director sustained the Notice on February 15, 1983.

14. The Shoreline Master Program charge was subsumed in the category of Land Use Code Enforcement, Hearing Examiner File LUCE-83-004, and the Grading ordinance under Hearing Examiner File G-83-001. Appellant filed timely appeals from both and both matters were heard concurrently before the Hearing Examiner.

15. In hearing the Director's representative alleged that appellant violated the grading ordinance provisions because (1) the appellant's work was done in the beach area and (2) by virtue of the waste, i.e., rocks more than 12 in. long, having been deposited on the shoreline. The Notice citations were to Seattle Municipal Code Sections 22.804.090D and 22.804.220. Responding to the issue of waste, appellant likened the deposit of rocks to lumber in the front yard of a house set for construction or renovation. As to the shoreline program violation, appellant urged that the activity in question was either permissible replacement or authorized repair. For the shoreline-Land Use Code Enforcement matter, the Notice of Violation cites were Sections 24.60.005, 24.60.035, 24.60.225, 24.60.295, 24.60.710 and 23.90.02A, Seattle Municipal Code.

Conclusions

1. In appeals from the Director's decisions on grading matters substantial weight is to be given the Notice of Grading Violation and the appellant has the burden of establishing the contrary position. Section 22.804.230. The Director's Land Use Code enforcement decisions are deemed prima facie correct, and again, the burden of establishing a position contrary to the Director rests with the appellant. Section 23.90.18.

2. A beach area is the area between the water's edge and the line of vegetation, as indicated in Section 22.800.080(3), Seattle Municipal Code. "Fill" is defined as

> ...any act by which earth, sand, gravel, rock, or similar...materials is deposited, placed, pushed, pulled or transported to a place other than the place from which it is excavated and the materials so placed (emphasis added). Section 22.80.080(25).

"Waste" is defined as

> ...earth materials which...have rock...with maximum diameter greater than twelve inches... Section 22.80.080(59).

The definition of "grading" is the "...excavation or fill or any combination thereof." Section 22.80.080(28).

3. It is clear that appellant's deposit of rock on the shore in front of the timber piling constitutes "grading" as the act constitutes an act of depositing rock, or filling. Less clear is whether mere deposit of rock intended for use in construction constitutes depositing "waste" on shorelines in contravention of Section 22.804.090 of the grading ordinance.

4. The introduction to the definitional section of Chapter 22.800.080 notes that the defined words should have the stated meaning "unless the context clearly indicates otherwise". It was unrefuted that appellant intends to use the boulders or rocks in a specific project. Accordingly, the boulders do not fall within the stated or intended definition of "waste". As the Notice of Violation provides no citation for the Director's second issue asserted in hearing; i.e., work on the beach area, no jurisdiction is exercised to adjudicate that matter nor the claim that other sections of the grading ordinance were violated. In the notice of grading violation, the Director is to state "separately each violation of the (grading) standards or requirements." Seattle Municipal Code Section 22.804.220. The Notice of Grading Violation is reversed.

5. Section 23.90.02A provides that

> It is a violation of this Land Use Code to use or cause to be used any structure or land, or to construct, locate, or cause to be constructed or located any structure within the City of Seattle without first obtaining the permits or authorizations required by the Land Use Code for the respective use, location or construction.

Premised on the foregoing, the Director notified appellant of a perceived Land Use Violation relative to appellant's project.

6. Bulkheading falls within the definition of development. Section 24.60.035. Unless appellant's project falls within the "normal maintenance or repair" or construction of "normal protective bulkhead common to single family residences", appellant's

project is "substantial development", as the cost has already exceeded $1,000. Seattle Municipal Code, Section 24.60.225. And a substantial development permit is required. Seattle Municipal Code Section 24.60.295. Appellant secured no such permit, and further concedes that the project costs have exceeded $1,000. The issue remaining is whether or not the exemptions apply to appellant's project.

7. Does the project constitute "normal maintenance or repair of existing structures or developments?" Seattle Municipal Code 24.60.225A. Pursuant to Superintendent's Ruling (SR) 22-79(3), pilings, piers and bulkheads may be repaired without a substantial development permit. There is to be no change in "size or configuration of the structure".

8. The north neighbor speculated that appellant's combination bulkhead rip-rap landfill was some 40 years in existence. Another neighbor remembers rocks close to the bulkhead, although she testified, the rocks never approached the height of the pilings. Photographs of 1980, show a large stretch of beach area without any functional pilings; and without rip-rap. Other 1980 photographs show more northerly, organized pilings with some seaward rip-rap. The piling is adjacent to the stone bulkhead along the north neighbor's property. Clear evidence as to the scope of any pre-existing configuration was not submitted to the record.

9. The Director conceded in the Findings and Decision of its Hearing Officer, Reconsideration of the Notice of Violation, that if the rip-rap presently scattered on the beach originally formed a (timber piling) rock toe, recreation of that original rock toe "could be considered repair". Continuing, the Conclusion notes:

> Therefore if the scattered rip-rap was relocated to the base of the piles, that placement of rock would be considered repair since the resulting bulkhead with rip-rap toe would presumably be approximately the same size and configuration as it was originally. Conclusion 2.

10. Based on the disparity in size between the relocated boulders and the scattered beach area rip-rap, the Director concluded that by use of the boulders a bulkhead of a higher and deeper magnitude would be created; hence it could not be considered maintenance and repair

> "..absent some showing that the original size and configuration of the bulkhead was considerably greater than what the evidence on the beach would indicate. Conclusions 3 and 4.

Further, the time lapse evidenced by the scattered rip-rap suggested to the Director that the issue was no longer maintenance and repair.

11. SR 22-79 does not require that the replacement components of the bulkhead be the same as those of the original construction; the restriction is as to the ultimate size or configuration of the structure. Appellant testified credibly that as part of the project the replacement boulders would be swept closer to the piling. The record is silent as to the proposed height. Testimony from several witnesses reflected that a piling rip-rap combination was of long-standing. Accordingly, the Director's order is modified. Appellant may replace the rip-rap with the boulders to a height and shoreward expansion approved by the Department of Construction and Land Use. Under the circumstances herein it appears an unfair burden to require appellant to show the precise dimension of a previously existing bulkhead.

12. Similarly, if the resulting structure is recreated to a reasonable dimension, it would be unreasonable to require replacement with the same type of (soft) rock as a condition of project approval. Neither the spirit nor terms of the ordinance or Superintendent's Ruling would be harmed by the foregoing.

13. It is therefore not necessary to reach the question of whether the project constitutes construction of the normal protective bulkhead common to single family residences, although it is noted that the north neighbor has a bulkhead of construction similar to that proposed by appellant.

Decision

The Director's decision as to the grading ordinance violation is REVERSED.

The Director's decision as to the shoreline/land use code violation is REVERSED and REMANDED. Reconstruction of the bulkhead with materials proposed by appellant is approved as replacement or repair and is hence exempt from the substantial permit requirement. The Department of Construction and Land Use approval as to the height and seaward extent of the revetment is a condition of this Order.

Entered this 31st day of March, 1983.

Leroy McCullough
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 further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App 418 (1977); JCR 73 (1981). Should an appeal 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.