

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

KAMPE CONSTRUCTION CO., INC.,

FILE NO. G-88-002

from a notice of violation of the
Grading Ordinance.

Introduction

Kampe Construction Co., Inc., appeals the notice of violation of the Grading Ordinance issued by the Director, Department of Construction and Land Use, for the premises known as 5934 47th Avenue S.

A hearing was held on this appeal on September 23, 1988, before the Office of Hearing Examiner. Representation of the parties was as follows: the appellant by Eugene D. Seligmann, Seligmann, Dreiling & Beckerman, and the Director by Mark D. Summers, code compliance coordinator.

The appellant exercised its right to appeal pursuant to Section 22.804.230, Seattle Municipal Code.

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

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

Findings of Fact

1. A Notice of Violation was issued to Kampe Construction and Maya Wati Chand for the condition of property at 5934 47th Avenue S. The violation was described as:

Violated the Grading Code by making a cut on the east side of the property without meeting steepness and drainage standards.

Violated the Grading Coe (sic) by not installing and maintaining appropriate erosion control measures on cut face.

Exhibit E.

2. The condition observed by the Director's witness, a geotechnical engineer, was that the cut behind the house is at a slope of approximately .5 horizontal to one vertical. Material on the soft upper part was falling off into the flat area.

3. The Director's staff determined that the Grading Ordinance requires that slopes be no greater than two to one unless accompanied by an approved, engineered design. The standards for erosion control assure that the slope is left in a permanently stable condition.

4. Kampe Construction obtained a construction permit in 1984 and built a residence on the property.

5. The engineer spoke with the inspector who told him that a cut was part of the construction plan.

6. The record of inspections on the master use and construction permit ends with a stamped "OK FINAL," "OK FINAL", is initialed by the inspector and dated June 25, 1985.

7. The subject property was conveyed to Chand and Dharendra Prasad and Chandra W. Prasad in 1985.

8. Wynn Kampe, president and owner of Kampe Construction died in 1987.

Conclusions

1. The Hearing Examiner has jurisdiction over these parties and this subject matter pursuant to Section 22.804.230.

2. Appellant raises the defenses of estoppel and laches. It argues that the City is estopped from enforcing the code standards by the inspector's final approval. Section 22.804.200 provides:

A. Upon completion of the work, the owner or his representative shall notify the Director of Construction and Land Use that the grading operation is ready for final inspection. Final approval shall not be given until all work, including installation of all drainage facilities and their protective devices and all erosion control measures, have been completed in accordance with the final approved plans and required reports have been submitted.

3. The elements of an estoppel appear to be present: 1) the City has, through its inspector, given its final approval to the construction and now asserts that the work did not conform to code requirements; 2) Kampe Construction sold the property for a price presumably based, at least in part, on the total investment including the cost of the work; and 3) Kampe would be injured by the City's current enforcement action against a company with no interest in the property.

4. The defense of equitable estoppel, however, is not favored. Mercer v. State, 48 Wn. App. 496, 739 P.2d 703 (1983). The purpose of the doctrine is to prevent manifest injustice and is applicable to government only when the exercise of governmental powers will not be impaired. Finch v. Matthews, 74 Wn.2d 161, 175, 443 P.2d 833 (1968). Here, the City's police power to preserve the safety of the public would be affected if the defense were permitted. Where enforcement of the code is for the protection of the public, equitable estoppel may not be allowed to interfere. See United State v. 111.2 Acres of Land, More or Less, 293 F. Supp. 1042 (E.D. Wash. 1968).

5. The defense of laches is raised by appellant because of the period of delay from the construction of the project to the notice of violation. Laches requires proof of knowledge or reasonable opportunity to discover the violation, unreasonable delay and injury to the person raising laches as a defense. Chelan Co. Deputy Sheriffs Assn. v. Chelan County, 45 Wn. App. 812, 725 P.2d 1001 (1986). Laches, too, is not favored and may be applied against a government body only when the governmental power will not be impaired. Again, even though the elements may be present, laches would restrict the Department's ability to secure conformance with its codes and does not apply.

6. The responsibility of the Director is to investigate sites where there may be a failure to conform to grading standards and requirements and, if she determines that the standards have not been met, to serve a notice of violation upon the "owner or other person responsible for the condition..." Section 22.804.220. Appellant complains that it is not the owner and the Department of Construction and Land Use has not produced any evidence that Kampe Construction Co. is responsible for the condition or that it came into existence when appellant had an interest in the property.

7. Since the Hearing Examiner is to accord substantial weight to the notice of violation, Section 22.804.230E, the appellant is required to show that the notice is clearly erroneous. Brown v. Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981).

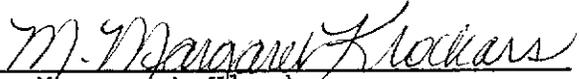
Where appellant challenges the decision, the record must be reviewed for error. It shows that appellant constructed the residence; that the plans reportedly provided for a cut at an unidentified location; that after the final inspection the City's inspector signed off on the permit showing that the construction was in compliance with code requirements; that the violation is one which would have been visible to the inspector and would not be a latent defect; and that ownership of the property has changed. It does not show whether there has been any subsequent construction activity or any evidence of the age of the cut.

8. The evidence does not support the Director's conclusion that appellant is "responsible" for the condition. The notice of violation as to Kampe Construction Co. is, then, clearly erroneous and should be reversed.

Decision

The notice of violation as to Kampe Construction Co. is reversed.

Entered this 7th day of October, 1988.


M. Margaret Klockars
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 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.