

RESOLUTION NO. 818

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO USE OF CITY RIGHT-OF-WAY UNDER CHAPTER 12.02 OF THE GIG HARBOR MUNICIPAL CODE; RENDERING THE DECISION ON LISA CLARK'S APPEAL OF DENIAL OF PERMIT TO USE CITY RIGHT-OF-WAY ABUTTING 7117 SOUNDVIEW DRIVE, GIG HARBOR, WASHINGTON.

WHEREAS, Lisa Clark, the Appellant, owns property located at 7117 Soundview Drive, Gig Harbor, Washington, and constructed a fence along Soundview Drive at its intersection with Grandview Place; and

WHEREAS, the City informed Appellant that the fence, which was constructed without first obtaining City approval, was located in City right-of-way, and thus Appellant needed to obtain an encroachment permit pursuant to chapter 12.02 of the Gig Harbor Municipal Code; and

WHEREAS, Appellant applied for an encroachment permit and on October 7, 2009, the City Engineer issued his notice of decision denying Appellant's application for encroachment permit based on a determination that the fence did not meet GHMC 12.02.030(A); and

WHEREAS, Appellant filed a Statement of Appeal on October 19, 2009; and

WHEREAS, the hearing date for this appeal was originally set for November 19, 2009. On November 9, 2009, Appellant moved to continue the hearing to a later date. On November 9, 2009, the City Council considered the request for continuance and rescheduled the hearing to December 14, 2009; and

WHEREAS, on December 14, 2009, the City Council heard argument from Appellant and City staff relating to this appeal;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

FINDINGS, CONCLUSIONS AND DECISION

Section 1. Appeal Hearing. Use of city streets is discretionary and legislative in nature. See *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wn.2d 555, 562, 408 P.2d 1012 (1965). As such, this appeal hearing is a legislative hearing and the appearance of fairness doctrine does not apply. Additionally, because street use permits are specifically excluded from the definition of a "land use decision" the requirements of chapter 36.70B and 36.70C RCW do not govern review of the subject application.

Section 2. Exhibits. The following documents were entered into the record for the appeal.

<u>Exhibit</u>	<u>Date</u>	<u>Description</u>	<u>Submitted by</u>
A	9/18/2009	Memorandum from Jeff Langhelm, PE, to Steve Misiurak, PE re: Sight Distance Evaluation	City
B	10/07/2009	Notice of Decision denying encroachment permit application No. EN-08-055 issued by City Engineer.	City
C	10/19/2009	Statement of Appeal submitted by Jane Koler on behalf of Lisa Clark.	Appellant
D	12/03/2009	Memorandum from Jeff Langhelm, PE, to Steve Misiurak, PE, regarding Discussion of Sight Distance Photos and attached photos	City
E	11/02/2009	Survey of Soundview Right of Way at Grandview Place prepared by Prizm Surveying, Inc.	City
F	11/18/2009	City Staffs' Memorandum of Authorities in Support of Dismissal of Appeal	City
G	12/14/2009	Photographs	Appellant
H	12/14/2009	Appellant's Hearing Memorandum	Appellant
I	12/06/1907	Waiver of Claim for Damages and Consent to Locate Road	Appellant
J	various	Appellant's copies of encroachment permit applications and materials related to public records request	Appellant
K	1/27/2009	Excerpt from Hearing Examiner Decision on APP 08-0001 (pp. 1, 3-5)	Appellant
L	--	Excerpt from Chapter 12.18 GHMC	Appellant
M	10/08/2008	E-mail from Stephanie Andrews to Lisa Clark	Appellant
N	1/08/2009	Excerpt from Staff Report on DRB 08-0020, APP 08-0001	Appellant
O	--	Excerpt from GHMC 12.02.030	Appellant

P	April 1952	Survey of Part of Govt. Lot 4, Sec. 8, T21N, R2E, W.M.	City
Q	3/22/1952	Survey of Part of Govt. Lot 4, Sec. 8, T21N, R2E, W.M.	City

Section 3. Representatives/Witnesses. Appellant was represented by Jane Koler. The following witnesses provided testimony on behalf of appellant: Brian Rousso and Gary Proctor, P.L.S. City staff was represented by City Engineer Stephen Misiurak, P.E. and Senior Engineer Jeff Langhelm, P.E. Additional comments were provided by Planning Director Tom Dolan, City Administrator Rob Karlinsey and City Attorney Angela Belbeck.

Section 4. Standard of Review. City streets belong to the public and the City has absolute control of the streets in the interests of the public. *City of Seattle v. Samis Land Co.*, 55 Wn.App. 554, 559, 779 P.2d 277 (1989). An abutting property owner has no legal right to make private use of a public street unless an ordinance expressly authorizes and permits for such a use. *Id.* The conditions under which the City may allow the use of its streets is a matter entirely within the discretion of the City Council. *Baxter-Wyckoff*, 67 Wn.2d at 562.

Section 5. Applicable Law. The City Council has authority over its streets and adopted chapter 12.02 of the Gig Harbor Municipal Code to regulate issuance of permits for street use, the authority of which is recognized in *Samis Land*, 55 Wn.App. at 559. The City’s zoning code, Title 17 of the Gig Harbor Municipal Code, does not apply to this hearing. In addition, the provisions of chapter 12.18 of the Gig Harbor Municipal Code do not apply since that chapter relates to master use permits for cable and telecommunications providers, as authorized under chapter 35.99 RCW.

Section 6. Additional Background. Appellant’s fence is the subject of a pending Court of Appeals matter. Appellant applied to the City for design review approval of the subject fence, which was denied by the City. Appellant appealed the City’s decision to the Hearing Examiner, who affirmed the denial. Appellant appealed the Hearing Examiner’s decision to the Pierce County Superior Court in Cause No. 09-2-05944-1 under the Land Use Petition Act. The City removed the case to Federal Court, which remanded the state claims back to Pierce County Superior Court. Pierce County Superior Court ruled in favor of the City and Appellant appealed that decision to the Court of Appeals.

Section 7. Appeal. Section 12.02.060 of the Gig Harbor Municipal Code provides that a person having been denied a street use permit (commonly referred to as an “encroachment permit”) may appeal such decision to the City Council, and that the City Council’s decision shall be final, binding and conclusive, the decision being solely within the discretion of the legislative body.

I. FINDINGS

1. Appellant applied for an encroachment permit (EN-08-055) for a fence she built in City right-of-way without first obtaining City approval.

2. As part of its evaluation of the application for encroachment permit, City staff conducted a sight distance evaluation to ensure that adequate stopping sight and intersection sight distance was available at the intersection of Grandview Place and Soundview Drive. City staff used methodology in accordance with AASHTO "Geometric Design of Highways and Streets," 2004 edition. See *Exhibit A; Exhibit B*.

3. As a result of the sight distance evaluation, City staff determined that there was inadequate sight distance available at this intersection due to the presence and height of the subject fence. *Testimony of Jeff Langhelm and Stephen Misiurak*. The criteria utilized in the evaluation is summarized in a memorandum from Senior Engineer Jeff Langhelm to City Engineer Stephen Misiurak, dated September 18, 2009. See *Exhibit A*.

4. City staff also took photographs at the intersection of Soundview Drive and Grandview Place, depicting the visual obstruction presented by the fence and further supporting staff's conclusion that there is inadequate sight distance available. See *Exhibit D; testimony of Jeff Langhelm*.

5. The City Engineer, Stephen Misiurak, concluded that the sight distance analysis indicated that the fence impedes the visibility for drivers making a left turn from a minor road (Grandview Place) to a major road (Soundview Drive) causing a dangerous condition and denied the permit. See *Exhibit B; testimony of Stephen Misiurak*.

6. It does not matter that Grandview Place is a private road, because it is the function of the road, not the ownership, that determines whether or not it is an "intersection" subject to sight distance evaluation where it meets another road. In addition, sight distance evaluation is required for private roads within plats. *Testimony of Stephen Misiurak*.

7. Appellant argues that no encroachment permit is required either because the City does not own the property on which the fence is located, or because Appellant's fence does not intrude into the City portion of the public right-of-way or any public place open to pedestrian travel. *Testimony of Gary Proctor; argument by Jane Koler, Appellant's counsel*.

8. The City hired Prizm Surveying, Inc., to determine whether Appellant's fence is located in the City right-of-way. See *Exhibit E*. The survey shows Appellant's fence is not on Appellant's property, and that it lies within and intrudes upon City right-of-way. See *Exhibit E*. The survey further shows the right-of-way was not conveyed to Appellant. *Id.*

9. Appellant acknowledged that the fence is not located on Appellant's deeded property. *Testimony of Gary Proctor*.

10. Appellant offered testimony that the Waiver of Claim for Damages and Consent to Locate Road dated December 6, 1907 (*see Exhibit I*), wherein the original property owners relinquished to Pierce County (the City's predecessor-in-interest) 30 feet of property to establish the road now known as Soundview Drive, only dedicated the portion of roadway that was improved, and speculated that some case law existed to support that conclusion, but provided no citations. *Testimony of Gary Proctor.*

11. The language of the Waiver of Claim for Damages and Consent to Locate Road dated December 6, 1907, provides that the owners consent that the road be established, and

[F]orever relinquish unto Pierce County, Washington, a Right-of-Way, Thirty (30') feet in width, east of and adjoining the center line of Sec. 8 T21N, R2E, W.M.,

Giving and granting unto said Pierce County the said Right-of-Way with full power and authority to locate, lay out and establish said Road as proposed, and to perpetually maintain the same as a County Road.

Nothing in the Waiver of Claim for Damages document indicates an intent to dedicate any less than the full 30 feet in width.

12. Appellant alleges that the fence is "in her side yard," "along an interior lot line," "not on any portion of the public right-of-way," on the right-of-way but "at a significantly lower grade than the level of the road shoulder," "in a gully many feet below the City right-of-way on property owned by Ms. Clark." *See Exhibit F, page 2.* Additionally she alleges "Lisa Clark erected a fence on her property, but within the City right of way easement." *Exhibit H, p. 4.*

13. Appellant's deeded property only extends to the right-of-way line, not over it. *Exhibit E.* In other words, the City's right-of-way abuts Appellant's property. Appellant erected the subject fence within the City's 30-foot right-of-way, and not on Appellant's property. *Id.*

14. Appellant offered testimony and evidence of other fences and vegetative screens in the right-of-way along Soundview Drive for which the City had not issued encroachment permits. *Testimony of Brian Rousso; see also Exhibit G.*

15. The City Engineer testified that many of such fences and hedges predated the City's incorporation, and that such fences and hedges were grandfathered in by Pierce County standards. Others predated the 1992 improvements to Soundview Drive. *Testimony of Stephen Misiurak.*

16. Appellant submitted evidence of encroachment permits that had been issued by the City to other parties for activities along Soundview Drive. *See Exhibit J.*

17. The encroachment permits issued along Soundview Drive were for installation of gas lines and other utilities, and temporary closures for purposes of surveying, loading a moving van, curb painting and other work that did not endanger the use of Soundview Drive. See *Exhibit J*. The Appellant did not show that any other property owner along Soundview Drive had been issued an encroachment permit for placement of a permanent fence in the City right-of-way.

18. Appellant argued the definition of right-of-way under GHMC 12.18.020 does not include land dedicated for streets and not opened and improved for motor vehicle use by the public. This provision only applies to chapter 12.18 GHMC regarding use of the right-of-way by cable and telecommunications providers, but even if it did apply, Soundview Drive has clearly been opened and improved for public travel.

19. Appellant argues that consideration of this encroachment permit is premature due to the need to resolve zoning issues, to be resolved by the court of appeals. *Exhibit C*. GHMC 12.02.010 provides that an encroachment permit must be obtained before placement of the fence in the City right-of-way and thus consideration is not premature.

20. Appellant submitted exhibits showing the height of the fence, including the Hearing Examiner decision on APP 08-0001 and related staff report which both stated the fence was 6 foot 8 inches (*Exhibit K; Exhibit N*). The staff report also provided that the fence stands 5-to-6 feet above the grade of Soundview Drive, depending on where the measurement is taken. *Exhibit N*.

21. Mr. Rousso testified that if the fence was 5-to-6 feet in height he believed a building permit would not be required, and acknowledged a building permit is required for fences in excess of six feet in height. *Testimony of Brian Rousso*.

22. A building permit is required for a fence exceeding six feet in height. *Testimony of Tom Dolan*.

23. No finding is made on the height of the fence based on the evidence presented. Whether a building permit is required is not germane to this appeal; however, the City Council specifically does not waive any building permit requirement as a result of this decision.

24. Any conclusion of law deemed to be a finding of fact is hereby adopted as such.

II. CONCLUSIONS

1. GHMC 12.02.060 provides that a person having been denied an encroachment permit may appeal such decision to the City Council, and that the City Council's decision shall be final, binding and conclusive, the decision being solely within the discretion of the legislative body.

2. The City continued the original hearing date once at the request of the Appellant, but could not continue it further due to the need to act quickly to protect the public health, safety and welfare.

3. The subject fence lies within City right-of-way, as confirmed by the survey performed by Prizm Surveying (Exhibit E). The City's right-of-way is not an easement over Appellant's property; it is a right derived directly from the 1907 Waiver of Claim for Damages and Consent to Locate Road. See *Exhibit I*. No credible or persuasive evidence was submitted to refute the City's claim of ownership under the 1907 Waiver of Claim for Damages and Consent to Locate Road. In addition, Appellant has not shown that a determination of whether the right-of-way is an easement owned by the City or owned by the City in fee title affects the City's ability to enforce chapter 12.02 GHMC or to deny the encroachment permit for the reasons stated in the City Engineer's decision.

4. The City Council has no authority to determine any adverse possession claim made by the Appellant; however, the City Council notes that Appellant could not have adversely possessed the portion of property on which the fence was erected because government property (with an exception not applicable here) cannot be adversely possessed. *Commercial Waterway District v. Permanente Cement*, 61 Wn.2d 509 (1963).

5. GHMC 12.02.010 requires a person to obtain an encroachment permit before placing any "structure,... or any other material or thing tending to obstruct, damage..., or interfere with the free use [of public right-of-way]..., or cause a dangerous condition." Because Appellant's fence is a structure interfering with the free use of the public right-of-way and causing a dangerous condition, an encroachment permit is required, and should have been obtained prior to placement of the fence.

6. GHMC 12.02.030 sets out minimum requirements for issuance of an encroachment permit. GHMC 12.02.030(A), provides the following requirement:

The proposed use will not protrude into or over any portion of a public right-of-way or public place open to vehicle or pedestrian travel in such a manner as to create a likelihood of endangering the use of such public place by vehicle or pedestrian traffic.

Here, the proposed use (existing fence) protrudes over public right-of-way (Soundview Drive). To determine whether such protrusion creates a likelihood of endangering use of the public place, City staff properly conducted a sight distance evaluation in accordance

with the “Geometric Design of Highways and Streets,” in the AASHTO manual, 2004 edition, a nationally recognized and adopted engineering technical manual adopted by the City. A portion of Appellant’s fence lies within the sight distance triangle, and thus the subject fence causes a danger to the health, safety and welfare of the traveling public both on Soundview Drive and Grandview Place. It does not matter that Grandview Place is a private road, because it is the function of the road, not the ownership, that determines whether or not it is an “intersection” subject to sight distance evaluation where it meets another road. The subject fence does not meet the requirement of GHMC 12.02.030(A) because the fence protrudes over a portion of City right-of-way in such a manner as to create a likelihood of endangering the use of Soundview Drive by vehicle and pedestrian traffic.

7. Prior to listing requirements for issuance of an encroachment permit, GHMC 12.02.030 provides in part:

Requirements shall include, *but are not limited to*, the following:

(Emphasis added.) As such, the requirements set forth in GHMC 12.02.030 are the minimum requirements, and the City Engineer may require additional items, such as Appellant’s demonstration that the fence meets the requirements for sight distance using the sight distance triangle, which is a nationally recognized tool. No specific notice is required within chapter 12.02 GHMC. In any event, the City has placed the public on notice of such safety requirements by its adoption of the AASHTO standards and its Public Works Standards which include use of the sight distance triangle.

8. The City has issued encroachment permits on Soundview Drive, but none of those permits included a request for a fence or other permanent structure that caused a danger to users of Soundview Drive.

9. Appellant’s reference to the definition of “corner lot” in Title 17 (Zoning Code) of the Gig Harbor Municipal Code has no application to this appeal under the provisions of Title 12 of the Gig Harbor Municipal Code.

10. Appellant’s reference to the definition of an “intersection” from the Rules of the Road provisions in Title 46 RCW has no application here.

11. Chapter 12.18 GHMC applies to cable and telecommunication providers and the provisions of that chapter have no application here.

12. Resolution of zoning issues relating to Appellant’s property is not necessary in order for the City to make a decision on an encroachment permit and thus consideration of the encroachment permit application was not premature. An encroachment permit should have been obtained prior to placement of the fence. See GHMC 12.02.010.

13. The City Council has no authority under this proceeding to consider constitutional issues, as the Council's review authority is limited to the issues contained in chapter 12.02 of the Gig Harbor Municipal Code. *Chaussee v. Snohomish County*, 38 Wn.App. 630, 637, 689 P.2d 1084 (1984).

14. Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

III. DECISION.

Based upon the foregoing findings and conclusions, the City Council affirms the decision of the City Engineer dated October 7, 2009, to deny encroachment permit application No. EN-08-055, and further orders the Appellant to immediately remove all of the fence that was erected in City right-of-way as reflected on Exhibit E.

RESOLVED this 11th day of January, 2010.

APPROVED:



Mayor Charles L. Hunter

ATTEST/AUTHENTICATED:



Molly Towslee, City Clerk

FILED WITH THE CITY CLERK: 01/07/09
PASSED BY THE CITY COUNCIL: 01/11/09
RESOLUTION NO. 818