

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of

Robert W. Thomas Construction

VAR17536

For Zoning Variances

Introduction

An application was filed for variances from setback and lot coverage standards of the land use code to allow the reconstruction of an existing single-family house located at 10456 Fenton Road.

An open record public hearing was held December 6, 2012. Jennifer Sutton, Planner, represented the Department of Planning and Community Development. Robert W. Thomas represented the applicant.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony and exhibits admitted at the hearing, and after a site visit, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

Findings

1. Robert Thomas Construction, as agent for the property owners, Kim and Kimberly Bohlander, applied for variances from setback and lot coverage standards under the land use code and a reduction in the landslide hazard area buffer required by Chapter 16.20 to reconstruct a single family residence on their property at 10456 Fenton Road.
2. The site of the proposed construction is an 11,778 square foot trapezoidal-shaped lot with a steep slope determined to be about 120 high with slopes of 40-45 percent occupying the easterly quarter. The westerly 75 percent is relatively flat. According to Section 16.20.150, the lot is encumbered by a 120 ft. buffer from the edge of the landslide hazard area, which buffer extends westerly beyond the existing house.
3. The subject lot is in the R-2 zone where 20,000 square feet is the minimum lot size according to Section 18.20.020. The lot is nonconforming at .27 acres and is the smallest in the immediate area, though several nearby properties are less than half an

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acre in size. All are developed with single-family residences, most not as large as the proposed structure, but none of the nearby residences have yet been redeveloped. The minimum lot width and depth in the zone is 80 ft. but the width of the subject lot ranges from 29.5 to 60.85 ft.

4. The subject site and surrounding properties are designated OSR-2 in the Comprehensive Plan. The staff report notes two land use element goals relevant to this proposal: OLS 1.1 regarding the protection of critical areas and OS 4.2 recognizing existing development pattern of two units per acre.

5. The existing house was constructed in about 1924. It has a floor area of 1,201 square feet and is nonconforming as to front and rear setbacks and as to lot coverage. Current setback standards are 25 ft. for the front and 15 ft. for the rear and the existing house has setbacks of 3 ½ feet and 0 respectively. The house actually extends onto the adjacent property by a few inches. The maximum lot coverage allowed by Section 18.12.020 is 20 percent, which would be 2,355 square feet where the existing lot coverage is 20.5 percent.

6. The proposed front setback would be 3 ½ feet with the deck extending to within six inches from the Fenton Road right-of-way. The rear setback would be increased from no setback to three feet. With the addition of a second story deck and construction of a front porch the lot coverage would increase from the 20.5 to 24.5 percent, or 2,889 square feet. The new deck at 355 square feet is a "reasonable" size according to the architect. The detached garage, which is now nonconforming as to the front yard, would be replaced on about the same footprint as the existing garage. The height of the house would be increased to 30 ft., from a single story to three though more like a 2 ½-story house because of the steep slope of the roof. The total floor area of the new house would be 4,417 square feet.

7. Fenton Road ends at the edge of the slope. It serves one more residence to the east at the base of the slope. Access to that property is only by foot down steep stairs. Vehicles associated with that property currently park on the subject site. The Department confirmed that the reduced setback would not compromise access, including turning, of fire equipment.

8. There will be improvements associated with the redevelopment to storm drainage, the septic system, the community water supply line, and a well on the property. The fence, which is not on the property line but on the adjoining property, is to be relocated. Two parking stalls will be provided.

9. A reduction in the required 120 ft. buffer from the landslide hazard area to 10 feet plus the required building setback of 15 ft. was requested to allow the proposed construction. The Director of the Department of Planning and Community Development (Director) has approved the reduction, which is allowed if a critical areas report demonstrates that the reduction will not reduce the level of protection to the proposed development, adjacent properties and other associated critical areas. Section 16.20.050. The critical areas report (Exhibits 1 & 7) was reviewed by the City's Development Engineer and underwent third party review as required. All agreed that the buffer can be reduced safely and required factors of safety met if the report's

recommendations are followed. The Director imposed those recommendations and others required by Ch. 16.20 as conditions of approval.

10. Robert Thomas, the contractor for the project, described the subject property as an "extreme site", referring to its small size and limited possible development footprint. David Grellier, the project architect, described it as one of the more challenging sites of his 36 year practice.

11. Three letters of support for the proposal from property owners in the neighborhood were received. Two neighboring property owners testified about concerns they have with the redevelopment. The owner of the property adjoining on the north noted that the new, taller house at just three feet from his property line would loom over his house and likely block sunlight from reaching his property. He noted the loss of privacy and the potential for light trespass on his property from lighting on the deck. An owner of property on Grand Avenue to the west of the subject lot now has a "peakaboo" view from his solarium over the subject lot which would be eliminated by the taller structure proposed. He acknowledges that the reduced setback would not affect the degree of the view interference.

12. The majority of the new third floor is a steeply sloped roof, 45 degrees, so that the full three-story height would be set much farther than three feet from the property line. The contractor believes that the row of tall evergreen trees down the south side of Fenton Avenue would interfere with the sunlight reaching both the subject site and the northerly neighbor's in the winter. The majority of the sun the lots would enjoy is from the easterly morning sun, which would be unaffected by the redevelopment, except for the overhead summer sun which should not be affected by the new house, according to Mr. Thomas. He also opined that any blockage would be exactly the same even if the house would split in half from east to west, showing that the reduced setbacks would not affect the degree of sunlight obstruction.

13. A City code requirement addresses the spillage of light onto other properties.

14. The criteria for major variance approval are as follows:

1. The variance is consistent with all other provisions of this code, except those provisions that are subject to the variance, and is in accord with the comprehensive plan.;
2. The need for a variance has not arisen from previous actions taken or proposed by the applicant;
3. The variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and zone, but that is denied to the property in question because of special circumstances on the property in question, and will not constitute a grant of special privilege inconsistent with the limitations upon uses of other properties in the vicinity in which the property is located;

4. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is located; and

5. The variance is requested because of special circumstances related to the size, shape, topography, trees, groundcover, location or surroundings of the subject property, or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access.

Section 2.16.120.

15. The Department found that the criteria for major variance had been satisfied and recommended granting of the variances subject to conditions assuring construction would be located according to the approvals and that surface and storm water will be handled appropriately.

16. The City's Responsible Official determined that the proposal is not subject to review under the State Environmental Policy Act.

17. Notice of the public hearing was published on November 16, 2012, mailed on November 21, 2012, and posted at the site on November 26, 2012, and on the City's website and at City Hall.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this matter pursuant to Section 2.16.120.

2. Notice and public hearing requirements of Chapter 2.16 were met.

3. As the findings show, with the Director's approval of the buffer reduction the other provisions of the code are met by this proposal. The proposal is in accord with the Comprehensive Plan in that it would effect no change on the development pattern. The first criterion is satisfied.

4. The second criterion is satisfied in that the owners represented by the applicant have not taken any action that created need for the requested variances.

5. Other properties in the zone and vicinity do enjoy reasonable sized homes and to require that this very small, unusual site observe the standard front and rear setbacks and lot coverage restriction would deny this property that right. Whether increasing the lot coverage beyond the existing nonconforming coverage to allow a large second-story deck is necessary for the enjoyment of a substantial property right when there is no evidence in the record that other houses in the area have second story decks is a closer call. The Department pointed out that the Council eliminated the requirement in the variance criteria that the approved variance be the minimum necessary for relief in the recent amendments to the chapter. Rules of statutory construction do presume that the Council knew what it was doing and intended the result when it took an action, though

without some further legislative history it is not possible for the hearing examiner to know with certainty whether the Council believed that the reference in the criterion to the rights possessed by other property in the area made the deleted requirement redundant or whether it eliminated it believing that if the variance would not cause detriment there was no reason to limit it to the minimum necessary for relief. The Department's position that we need only consider that the size would not be materially detrimental to others is already addressed by the next criterion so also would be redundant. That other nearby properties are likely to be redeveloped and can be enlarged is a factor that can be considered in comparing this proposal to rights possessed by other properties in the vicinity and that the size of the deck proposed is regarded as reasonable assures that variance approval for this property will not constitute a grant of special privilege. Therefore, it should be concluded that the third criterion is satisfied.

6. As the findings show, the record does not contain any evidence that the variances requested would be materially detrimental to the public welfare or injurious to property in the area. The setbacks and lot coverage for the deck proposed would not contribute to view obstruction. The setback on the north side would be increased slightly from the existing situation and the effect of the additional height and closeness to the joint property line on privacy is mitigated somewhat by the use of the third floor and the steepness of the roof's slope. Further, the reduced setback apparently would have little effect on the amount of sunlight reaching the abutting lot.

7. The findings show that there is no question that there are special circumstances related to the subject property in terms of size, shape, topography and existing nonconforming development. These circumstances significantly affect the ability to redevelop without some relief. Its small size, shape, and topography make redevelopment without variance nearly impossible.

8. The conditions proposed by the Department are appropriate to assure that the redevelopment conforms to the approvals given. Conditions related to the approved buffer reduction should be included as well for ease of reference.

Decision

The requested variances from front and rear yard setbacks and maximum lot coverage standards are granted subject to the following conditions:

1. The building permit for construction of this single-family home and detached garage shall be in substantial conformance with variance site plan date-stamped September 13, 2012 and floor plans date-stamped August 3, 2012.
2. The applicant shall obtain an approved building permit from the Department of Planning and Community Development prior to construction. The building permit shall conform to all applicable requirements outlined in BIMC Title 18, except for the setback and lot coverage variations allowed by this variance, file no. 17536.

3. Detailed building elevations showing average existing grade and height calculations shall be provided with the building permit application.
4. Prior to building permit submittal, the applicant shall have a licensed surveyor clearly delineate the southern, western, and northern property lines/ edge of right-of-way by staking those property lines and the location of the proposed foundations. The property line and staking shall be inspected prior to building permit issuance. The property line delineation shall remain throughout construction. A setback inspection must be completed by a planner prior to the foundation footing inspection.
5. At the time of building permit application, a Surface & Storm Water Pollution Prevention Plan (SWPPP) shall be provided for City review and approval in accordance with BIMC 15.20. The SWPPP shall follow the recommendations of the geotechnical report prepared by Aspect Consulting, dated October 25, 2012.
6. All recommendations of the geotechnical report prepared by Aspect Consulting, Inc. dated October 25, 2012, shall become conditions of this approval, unless subsequent geotechnical reports make conflicting recommendations based on updated data or techniques. Building permits for each of the building areas shall also follow all applicable geotechnical requirements in effect at the time of building permit application. City Geotechnical Step forms 1, 2, and 3 shall be submitted through the building permit process.
7. The applicant for each building permit shall sign and record an Indemnification or Hold Harmless agreement and a critical area Notice to Title, pursuant to BIMC Section 16.20.150.D and Section 16.20.190, respectively, prior to issuance of the building permit.

Entered this 17th day of December 2012.


Margaret Klockars
Hearing Examiner *pro tem*

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City in this matter. A person with standing may appeal this decision to the Kitsap County Superior Court. To be timely, a petition for review must be filed within the 21-day appeal period [see RCW Ch. 36.70].