

Van Winkle  
VAR 18493

Bainbridge Island

OCT 25 2013

OFFICE OF THE HEARING EXAMINER  
CITY OF BAINBRIDGE ISLAND

Dept. of Planning &  
Community Development

In RE the Motion of:

THAD VAN WINKLE,

Petitioner.

City of Bainbridge Island  
File No. VAR 18493

MOTION TO RECONSIDER AND/OR REMAND

Petitioners Thad and Renee VanWinkle are the owners of property commonly known as 15198 Washington St, Bainbridge Island, WA 98110. Petitioners respectfully request that the Bainbridge Island Hearing Examiner reconsider and reverse the Findings of Fact, Conclusions of Law and Decision of the Hearing Examiner dated October 15, 2013, a copy of which is attached as Exhibit "A". In the alternative, the Petitioners request that the Examiner remand the variance to the City with instructions to the City and the Petitioners to amend various provisions of the application.

This Motion is based on the standards set forth in RCW 36.70C.130(1)(b), (c) and (d). Those statutes provide as follows:

**RCW 36.70C.130**  
**Standards for granting relief...**

*(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:*

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1                   ***(b) The land use decision is an erroneous interpretation of the law, after allowing***  
2                   ***for such deference as is due the construction of a law by a local jurisdiction with***  
3                   ***expertise;***

4                   ***(c) The land use decision is not supported by evidence that is substantial when***  
5                   ***viewed in light of the whole record before the court;***

6                   ***(d) The land use decision is a clearly erroneous application of the law to the facts;***  
7                   ***(emphasis added)***

8                   In this case, the Applicants requested a variance; 1) increasing the lot coverage from 20% to  
9                   26% and 2) reducing the front setback on one side of the corner lot from 25 feet to 5 feet.

10  
11                   The Staff report, dated September 20, 2013, recommended approval of the variance with  
12                   conditions that are not applicable to this Motion. Relevant to this Motion, the Staff Report  
13                   made the following findings regarding the size of the structure:

14  
15                   ***"The proposed single family is similar in size to the existing residences in the vicinity. The***  
16                   ***requested lot coverage of approximately 2,007 square feet is also similar to existing use of***  
17                   ***properties in the vicinity of the subject parcel. The lot coverage encompasses a single-***  
18                   ***family residence with an attached two-car garage, and covered porches. No additional lot***  
19                   ***coverage will be allowed."***

20                   To support these findings, the Planning Department staff conducted two extremely thorough  
21                   and detailed analyses of the neighborhood conditions using professionally-accepted  
22                   techniques. Those analyses are described below:

23  
24                   ***"The applicant is proposing a single family residence and garage which are consistent***  
25                   ***with other residential uses in the vicinity. Two separate analyses concluded the proposal***  
                    ***is consistent with the size of residences within the vicinity of the subject parcel. The first***  
                    ***analysis considered all lots within the Port Madison Plat with a lot area of +0.05 acres of***  
                    ***the subject site, 0.18 acres. The identified parcels were reviewed to determine square***  
                    ***footage of residence and accessory use garages. Assessor data for primary above ground***  
                    ***structure and garage was accessed from the Kitsap County parcel search web portal. An***  
                    ***area measuring tool was used within the City's GIS to calculate approximate lot coverage.***

1       The City GIS provides a site plan view of structures, which is an appropriate view to  
2       determine lot coverage. City staff prepared the analysis for this variance application to  
3       infer similar conditions within the vicinity of the subject site. Information obtained from  
4       this analysis is for discussion purposes and does not constitute a survey."

5       "The median area was determined to be a more appropriate indicator than the average  
6       due to variation in the data set. Median area was calculated for primary structures and  
7       garages. According the City GIS there were ten lots which fell within the range for lot area  
8       (0.13-0.23). The results are in Attachment B, median primary structure above ground  
9       area was 1827 square feet, garage median area was 506 square feet, and the combined  
10       total area median area was 2,060 square feet. The City GIS analysis determined the  
11       median lot coverage was 1,899."

12       "The second analysis looked at lots within 500 feet of the subject property. The same  
13       approach was used as the first analysis. The results are in Attachment C, median primary  
14       structure above ground area was 2040 square feet, garage median area was 560 square  
15       feet, and the combined total area median area was 2,040 square feet (sic). The City GIS  
16       analysis determined the median lot coverage was 2,276."

17       "The proposal is for an approximately 1241 square foot primary building foot print with,  
18       a 588 square footprint for attached two-car garage, and 178.6 square feet of covered  
19       porch. The lot coverage totals 2,007.6 square feet (Attachment D). This is similar to other  
20       single family residential lot coverage within the vicinity of the subject site. The denial of  
21       this variance would potentially deny the applicant the ability to preserve and enjoy a  
22       property right possessed by other properties in the same vicinity and zone which are not  
23       encumbered by a lot which is 39% less in area than the minimum lot for the R-2 zoning  
24       district."

25       Regarding the historic preservation aspects of the proposal, the Staff found as follows:

      "Port Madison is not a designated as a historic district; as such there are no design  
      guidelines for the Port Madison area. Currently, there are no standards that address  
      adjacent properties to historic structures or sites as suggested in the Comprehensive Plan.  
      That said, the proposal will incorporate similar elements found on single family  
      residences in the area, such as shutters, covered porches, and clapboard siding. ..."

      Regarding potable water service, the Staff found that:

      "The water system underground utilities are contained within the 40 foot right-of-way  
      (ROW) of State Street. The proposed building is set back five (5) feet from the parcel  
      boundary and does not encroach into the ROW. The 40 foot ROW width is sufficient access  
      to the water system access road. The ROW width is also sufficient to allow maintenance,  
      repair, and replacement of any existing underground utilities."

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2 Regarding the setback from State St., the Staff found that:

3 *"Street is defined in 18.36.020: a public way of travel that affords the principal means of*  
4 *access to abutting properties or a private way of travel that affords the principal means*  
5 *of access to four or more lots or to property that is, under existing laws, capable of*  
6 *division into four or more lots. The City has identified State Street as a privately*  
7 *maintained public right-of-way, which serves three lots. The Port Madison Water*  
8 *Company lot (Tract D in Attachment A) is unlikely to subdivide as the site is the location*  
9 *of the plat water system, contains recreational trails, and is owned by Port Madison*  
10 *Water Company. The current use of State Street is most similar to a private access road*  
11 *that would not have a front/street setback unless it served more than four residences."*

12  
13 Based on these findings and others not relevant to this Motion, the Staff recommended  
14 approval of the variance.

15  
16 The Examiner's hearing was held on September 27, 2013, and several neighboring property  
17 owners appeared to testify against the proposed variance.

18  
19 On October 15, 2013, the Findings of Fact, Conclusions of Law and Decision (the "Decision")  
20 was released. The 6-page document either ignored or completely dismissed the findings of the  
21 Staff.

22  
23 Regarding water system access, the Decision suggests a greater setback despite the Staff's  
24 findings that there was sufficient space even with the variance, focusing on the possibility that  
25 the water lines may not be exactly where they are supposed to be:

17. *Water System Access. The underground pipes for the water system are contained within the 40-foot right-of-way of State Street. The proposal with five feet of setback does not encroach upon this right-of-way. However, the precise location of the pipes within the right-of-way is not clear and the Water Company fears that future repair and*

1 maintenance of its system might damage the applicant's property. The Company asked  
2 that at least a 10 foot setback be maintained.

3 Regarding historic preservation, the Decision ignored the fact that Port Madison is not  
4 designated as an historic district and that there are no standards regarding adjacent  
5 properties. Instead, the Decision speculates that sometime in the future, the area may be  
6 designated as historic. Specifically, the Decision found that:  
7

8  
9 *"18. Historic Preservation. The house immediately north of the subject property (across*  
10 *State Street) was built in 1856. Still occupied, it is the oldest house on the island and one*  
11 *of the oldest in the state. The owner has carefully preserved this old residence and there is*  
12 *a likelihood that it will at some point be included in the National Register of Historic*  
13 *Places. Several persons expressed a concern that building a large house next door to this*  
14 *historic dwelling would have an adverse effect on its historic value. The Historic*  
15 *Preservation Commission asked that scale and massing of the applicant's proposed house*  
16 *be reduced, that the structure be moved more toward the center of the lot and that*  
17 *architectural details more closely resembling 19th century structures be incorporated*  
18 *into the design "*

19  
20 The Decision also claims that "it is difficult to analyze what it will look like in comparison with  
21 the homes around it", despite the detailed testimony of Applicant Renee VanWinkle regarding  
22 the aesthetics of the proposed structure, who is simply referred to as the "Applicant's wife".  
23

24 Regarding the size and placement of the structure, the Decision dismissed the two professional  
25 staff analyses in favor of one that was prepared by neighboring property owners, which  
appears to have considered the reaggregated lots rather than the platted ones. Specifically, the  
Decision stated without explanation that:

*"23. The Examiner is persuaded by the percentage of lot coverage approach taken by the  
opponents. It was not shown that the 20% coverage standard presents a hardship that  
precludes the applicant from building and occupying a residence on this property"*

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1 Regarding the setback from State St, the Decision either ignored or dismissed the Staff's  
2 findings that State St, which is graveled and used almost exclusively for access to the Water  
3 District's facilities, is in reality a private access road rather than a street, because it is  
4 extremely unlikely that the Water District property will be subdivided. The Decision  
5 acknowledges this reality by calling it a "stub" in paragraph 12, but then in paragraph 13, the  
6 Decisions labels it a "street":  
7

8  
9 *"13. The Staff Report points out that the current use of State Street is similar to that of a*  
10 *private access from which the setback would be only five feet. However, it is within the*  
11 *definition of "street" under BIMC 18.36.020, because Tract D is capable of subdivision.*  
12 *Therefore the 20-foot front setback applies."*

13 The Decision also exceeds the scope of the Staff report by referencing two "*large and beautiful*  
14 *old trees*" that are not even located on the subject property, calling for their protection without  
15 citing any Code authority for the proposition.  
16

17 For these reasons and more, the Applicants respectfully request that the Decision be reversed  
18 on reconsideration, or in the alternative that it be remanded to the City for further discussion  
19 and possible revisions.  
20

21  
22 **1. The Decision did not give the Staff Report due Deference.** Under RCW  
23 36.70C.130(1)(b), the determination of the staff is entitled to "*such deference as is due the*  
24 *construction of a law by a local jurisdiction with expertise*". The Decision is rife with examples  
25 of where the Decision dismisses the Staff report, including the discussion about structure size  
and location, where the Decision ignores two professional studies in favor on one prepared by  
the opponents. The same is true regarding the lack of an historic preservation designation in

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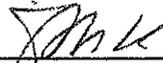
1 the neighborhood, the concern that the water lines may not be in their proper location and the  
2 lack of specific Code language calling for the protection of off-site trees.

3  
4 **2. The Decision is not supported by substantial evidence.** RCW 36.70C.130(1)(c) requires  
5 that the land use decision must be "*supported by evidence that is substantial when viewed in*  
6 *light of the whole record*". Substantial evidence is "*a sufficient quantity of evidence to persuade*  
7 *a fair-minded person of the truth or correctness of the order.*" *City of Redmond v. Cent. Puget*  
8 *Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998) (quoting  
9 *Callegod v. State Patrol*, 84 Wash.App. 663, 673, 929 P.2d 510 (1997)). Here, the decision  
10 references water line concerns that may not exist, historic preservation conditions that do not  
11 exist in the Code, tree protection requirements for off-site trees that do not exist in the Code. It  
12 also ignores two professionally-prepared state of the art studies in favor of one prepared by  
13 the non-professionals, who are citizens opposed to the development and therefore who have a  
14 strong bias.  
15  
16

17  
18 For these reasons and more, the Decision should be reconsidered and reversed, or in the  
19 alternative, remanded with instructions to discuss possible revisions with the Applicant.  
20

21 DATED this 25<sup>th</sup> day of October, 2013  
22

23 HELSELL FETTERMAN LLP

24   
25 \_\_\_\_\_  
Michael Spence  
WSBA No. 15885  
Attorney for Appellants Tad and Renee  
VanWinkle

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**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BAINBRIDGE ISLAND**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

**SUMMARY**

**Applicant:** Thad Van Winkle  
9555 NE Torvanger Road  
Bainbridge Island, WA 98110

**File No:** VAR18493

**Request:** Major variance to reduce one of two required front yard setbacks.  
Increased lot coverage is also sought.

**Location:** Port Madison at 15198 Washington Street;  
Tax parcel #4167-000-098-0004

**Comprehensive Plan/Zoning:** Comprehensive Plan: Open Space Residential (OSR) - 2  
Zoning: R-2 (two units per acre)

**Summary of Proposal:** Reduce front yard setback on State Street from 25 feet to 5 feet and increase lot coverage to 26%.

**Public Hearing:** After reviewing the report of Planning and Community Development, the Hearing Examiner Pro Tem conducted a public hearing on September 27, 2013.  
The Staff and the applicants testified in favor of the proposal.  
Eleven residents of the neighborhood testified in opposition. The Hearing Examiner visited the site on October 3, 2013.

**Decision:** The variances are denied.

## FINDINGS OF FACT

1. Thad Van Winkle (applicant) seeks setback and lot coverage variances. The setback variance was designated as a major variance pursuant to the Bainbridge Island Municipal Code (BIMC).

2. The site is located at the corner of Washington Street and State Street within historic Port Madison. The address is 15198 Washington Street. The property is Lot 98 of the Port Madison plat filed in 1906.

3. The lot is 7,840 square feet (0.18 acre) in size. It is located within an R-2 zone (two units per acre). The Comprehensive Plan designation is OSR-2. The lot is undersized for the R-2 district.

4. Many lots in the original plat were similar in size to the subject lot. The Comprehensive Plan encourages aggregation of such lots. According to the Staff Report, a number of owners of multiple contiguous lots in Port Madison have aggregated their ownerships voluntarily to conform to the R-2 minimum lot size of 20,000 square feet.

5. The applicants are owners of a single small lot abutting other ownerships. Aggregation is not available to them.

6. The property was previously developed with an approximately 1,000 square foot single family residence which burned down. The applicants seek to erect a new residence with a built-in two-car garage and covered porch -- the total creating a footprint of 2,007 square feet (house 1,241 square feet, garage 588 square feet, covered porch 178 square feet). The proposed uses are allowed within the district.

7. The file contains only CAD drawings of the proposed house, so it is difficult to analyze what it will look like in comparison with the homes around it. It will be two-stories high, within the applicable 30-foot height limit. It will have features found on other single family homes in the area, such as shutters, covered porches, dormer windows, and clapboard siding. The applicant's wife testified that their intention is to build a house in a style that fits in with the existing housing in Port Madison.

8. In addition to the house and garage, the application shows an onsite septic system including both a primary and a reserve drainfield, as well as an infiltration pit.

9. The lot coverage standard for the zone is 20%. The proposed structure would cover 26% of the lot. A variance is sought to allow this.

10. As a corner lot, the property is subject to two front setbacks -- 25 feet from each street. The proposed new house would meet the front setback from Washington Street, but would be only five feet from State Street. A major variance is sought to allow the proposed structure to intrude 20 feet into the setback from State Street.

11. Washington Street is a paved public street which serves as one of the principal thoroughfares through the neighborhood. State Street is quite different. It is a short privately maintained public right-of-way bordered by two lots and ending at a third. The two bordering lots are also served by Washington Street. The third lot is a large heavily forested parcel owned by the Port Madison Water Company (Tract D). It is the site of the community's water reservoir, standpipe, and booster pump. The water system's outfall line and main feeder supply trunk are buried beneath State Street. The system supplies water to around 100 homes.

12. State Street is a stub -- what's left of an originally platted street, the rest of which was long ago vacated. The site plan submitted with the application identifies it as a gravel driveway. The Water Company gravels and grades it for normal and emergency access to the system's facilities, a use that occurs about once per week. Additional periodic use is for access to a system of trails within Tract D.

13. The Staff Report points out that the current use of State Street is similar to that of a private access from which the setback would be only five feet. However, it is within the definition of "street" under BIMC 18.36.020, because Tract D is capable of subdivision. Therefore the 20-foot front setback applies.

14. The subject lot itself, aside from the foundation of the former home, is given over to brush, small trees, and a thicket of evergreen shrubbery. However, next to Washington Street near the southwest and northwest corners of the property are two large and beautiful old trees: one a locust and the other a big leaf maple. They are the dominant features of the setting, largely defining its present visual character. These significant trees are located on the public right-of-way (or perhaps partially on adjacent land), but their branches overhang the applicant's property.

15. Substantial opposition to this proposal was registered in writing and in testimony at the hearing by members of the Port Madison community. Their criticism focused on five general subject areas: (1) stormwater, (2) water system access, (3) historic preservation, (4) preservation of significant trees, and (5) size and placement of the proposed structure.

16. Stormwater. There have been drainage problems in the past adjacent to this site, but the project will be required to infiltrate stormwater runoff pursuant to current code requirements. The Staff Report states that, with an on-site engineered infiltration system, the runoff will be significantly less than from homes built prior to existing regulations. There is no evidence to the contrary.

17. Water System Access. The underground pipes for the water system are contained within the 40-foot right-of-way of State Street. The proposal with five feet of setback does not encroach upon this right-of-way. However, the precise location of the pipes within the right-of-way is not clear and the Water Company fears that future repair and maintenance of its system might damage the applicant's property. The Company asked that at least a 10 foot setback be maintained.

18. Historic Preservation. The house immediately north of the subject property (across State Street) was built in 1856. Still occupied, it is the oldest house on the island and one of the oldest in the state. The owner has carefully preserved this old residence and there is a likelihood that it will at some point be included in the National Register of Historic Places. Several persons expressed a concern that building a large house next door to this historic dwelling would have an adverse effect on its historic value. The Historic Preservation Commission asked that scale and massing of the applicant's proposed house be reduced, that the structure be moved more toward the center of the lot and that architectural details more closely resembling 19th century structures be incorporated into the design.

19. The Staff noted that Port Madison is not designated as a historic district and that there are no design guidelines or standards that address historic structures or sites, though this is suggested in the Comprehensive Plan.

20. Preservation of Significant Trees. The record contains compelling photographic evidence of the extraordinary qualities of the large locust and big leaf maple trees. One witness, an eminent plant pathologist and arborist, testified that the two trees are the largest of their kind on the island. He said that if the applicant's project were carried forward as proposed, the chance of losing these trees would be very high. Unquestionably, the scene would be irreparably changed were the overhanging branches to be cut off. He strongly urged finding a way to save the trees.

21. Again, no City ordinance specifically protects significant trees.

22. Size and Placement of the Proposed Structure. The majority of opposing comments centered on the size and placement of the proposed structure. The Staff conducted two separate analyses regarding the size of the proposed residence and concluded that it is consistent with the size of residences in the vicinity. The opponents did their own analyses focusing on percentage of lot coverage.

a) The Staff's first comparison considered 10 lots within the Port Madison Plat considered to have a lot area comparable to the subject site and found that median structure square footage and lot coverage were similar to the proposal. The second analysis looked at lots within 500 feet of the subject property and, again using median structure size, found lot coverage in square feet to be similar to that proposed.

b) The opponents looked at 8 similarly sized lots within the plat (eliminating as dissimilar two lots considered by the Staff) and determined that the average lot coverage is 20% with a median of 21%. Within 500 feet of the subject property, which they termed the "historic heart of Port Madison", the opponents found average lot coverage to be 11% with a median at 14%.

23. The Examiner is persuaded by the percentage of lot coverage approach taken by the opponents. It was not shown that the 20% coverage standard presents a hardship that precludes the applicant from building and occupying a residence on this property.

24. Additionally, there was no showing that a residence within the lot coverage standard could not be placed at a distance from State Street greater than five feet.

25. The application states that the "variance requested is the minimum necessary to build a house consistent with the upscale homes in the neighborhood." It is not clear what this was intended to mean. The homes in the neighborhood are a mixture of old and relatively new. The setting is full of picturesque variety. But no generally "upscale" characteristics were shown that would necessitate building a house of the size sought at the position sought on the lot in question. As the testimony showed, there are many homes in the area smaller than the one proposed.

26. Any conclusion herein which may be deemed a finding is hereby adopted as such.

### CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding.
2. The proposal is categorically exempt from the procedural requirements of the State Environmental Policy Act. WAC 197-11-800(6)(b).
3. The criteria for granting a variance are set forth at BIMC 2.16.120(E)(1):
  - a. 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.
  - b. The need for the variance has not arisen from previous actions taken or proposed by the applicant.
  - c. 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 limitation upon uses of other properties in the vicinity in which the property is located.
  - d. 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
  - e. 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.

4. The subject variances are denied for failure to demonstrate that criteria (c) and (d) above have been met. The special circumstance involved here is lot size. No substantial property right to build a home of the size proposed in the context of the Port Madison locality was shown. Nor was a right to locate such a home within five feet of State Street shown. In addition, material detriment to the public welfare from irreparable damage to the two significant trees near the property's boundary was not demonstrated to be unlikely.

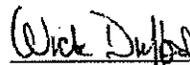
5. The opponents in this matter suggested that a more modest proposal with attention to architectural compatibility and care for the significant trees next to the site would be welcome. There might, indeed, be some level of variation from the dimensional standards of the Code which would be appropriate on this small lot. Negotiation among all concerned might produce an acceptable project.

6. Any finding herein which may be deemed a conclusion is hereby adopted as such.

#### **DECISION**

The requested variance is **DENIED**.

**DATED**, this 15th, day of October, 2013.



\_\_\_\_\_  
Wick Dufford, Hearing Examiner Pro Tempore

#### **RECONSIDERATION/APPEAL**

A Request for Reconsideration may be filed within 10 days of this decision. The decision may be appealed to the Superior Court pursuant to Chapter 36. 70 RCW within 21 days of the date of decision or decision on reconsideration, if applicable.