



**DECISION OF THE SNOHOMISH COUNTY
HEARING EXAMINER PRO TEMPORE
ON APPEAL OF VARIANCE DENIAL**

Hearing Examiner's Office

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Millie Judge
Hearing Examiner

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DATE OF DECISION: January 28, 2011

FILE NO: 10-107021 LU

APPELLANT: **Mark Verbarendse**

RESPONDENT: Department of Planning and Development Services (PDS)

SUBJECT: **Appeal of administrative denial of a request for setback variance**

DECISION: The denial of the variance is reversed. The requested setback variance is granted.

BASIC INFORMATION

LOCATION: 2807A Norman Road
Stanwood, WA 98292
Section: 3 Township: 31N Range: 5E W.M.

COMPREHENSIVE PLAN:
General Policy Plan Designation: Riverway Commercial Farmland

ACREAGE: 13.5 acres

ZONING: A-10

PROCEDURAL MATTERS

The application was filed and deemed complete on September 22, 2010. Notice of application was duly given and no written comments were received. The PDS staff made a site visit on October 11, 2010. The request is exempt from environmental review. On November 22, 2010, the variance was denied by written findings and conclusions. The denial was timely appealed on December 6, 2010, by the applicant, Mark Verbarendse.

The appeal hearing was held upon due notice at the Hearing Room in County Administration-East Building before Wick Dufford, Hearing Examiner Pro Tempore. Appellant Verbarendse represented himself and presented consultant Tammy Zempel as a witness. Senior Planner Bob Pemberton, the author of the administrative decision, represented Planning and Development Services (PDS). Fourteen exhibits were admitted into the record.

ISSUE ON APPEAL

The administrative decision was based on the conclusion that no special circumstances are presented that justify the granting of a setback variance. See SCC 30.43B.020(1). The appellant asserted that special circumstances do, in fact, exist by virtue of the location of the building in relation to conditions of the floodplain.

DECISION CRITERIA

Under SCC 30.43B.020, PDS may approve a variance only when all of the following conditions are met:

1. There are special circumstances applicable to the subject property or to the intended use, such as size, shape, topography, location or surroundings, that do not apply generally to other properties or classes of use in the same vicinity and zone;
2. A variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties in the same vicinity and zone but which because of special circumstances is denied to the property in question;
3. The granting of the variance will not be materially detrimental to the public welfare or injurious to properties or improvements in the vicinity and zone in which the property is located; and
4. The granting of the variance will not adversely affect the comprehensive plan.

FINDINGS OF FACT

1. The subject building is at 2807-A Norman Road on the valley floor in the floodplain of the Stillaguamish River. The Appellant controls 13.15 acres lying between the Burlington Northern Railroad right-of-way and Norman Road. The river is to the south of Norman Road. The site is to the north of Norman Road.
2. The subject building is an existing 6,783 square-foot "commercial agricultural accessory structure" placed 41.5 feet from the centerline of Norman Road. The setback required is 50 feet from the centerline of the road. The Appellant applied for a variance from this setback in order to leave the building in its present location.
3. The proposal is in a primarily agricultural, low density, residential area, zoned A-10. Except for scattered buildings, the site and surrounding area are largely open and free of sight-obstructing barriers.
4. The subject building is used by Earthworks Northwest Inc. for storage of hay and for equipment storage and repair. It shares a 0.8 acre lot with a single-family residence,

addressed as 2903 Norman Road. The residence is to the west of the building and a septic drain-field lies between the two. The rear line of the lot that these two structures occupy was recently moved by lot line adjustment to resolve setback problems on the north. There isn't room consistent with setbacks to move the subject building farther back on the lot.

5. The structure in question represents the replacement of a previous building on the same footprint and is devoted to essentially the same use. The old building was apparently constructed on the site some years ago, before the adoption of current zoning regulations, and therefore at the time of its destruction constituted a nonconforming structure. The old building was deteriorating and the project to repair it developed into a replacement. However, replacement did not occur within a year of the take down of the prior building, and, thus, cannot be viewed as a repair project. See SCC 30.28.075.
6. The replacement occurred in 2004. No permits were obtained. The subject variance application was filed on September 22, 2010. A building permit was sought in conjunction with the variance application. Action on the building permit awaits the outcome of this variance proceeding.
7. The replacement building is a new steel-sided structure which is neatly finished and painted and represents an improvement in terms of aesthetics over the prior structure.
8. Norman Road is designated as a collector arterial. In reviewing the application, the Transportation Engineering Section of PDS noted: "Since no new trips will be created, the existing building will be used the same as the previous structure, development in this area is very unlikely due to the subject parcel being [in] the flood plain and there is no accident history, the DPW/PDS Traffic Section does not object to the subject variance being approved."
9. With his appeal, the applicant/appellant presented numerous declarations of neighbors supporting the variance. These included statements from his immediate neighbors along Norman Road. There were no public comments on the variance application. No public opposition is disclosed in the file.
10. The administrative decision on the variance application concluded that items (2), (3) and (4) of the variance criteria are met, to wit: The agricultural use of a building of this size and shape is allowed in the zone and this represents a substantial property right (Criterion 2); no detriment to adjoining private properties or improvements in the area would be caused by the variance (Criterion 3); No detriment to the implementation of the comprehensive plan would ensue from granting the variance (Criterion 4).
11. The denial was based solely on a failure to satisfy Criterion 1. The decision states:

The applicant has not sufficiently demonstrated that a special circumstance is presented. PDS concludes that there is no reason relating to the property or to the intended use, such as size, shape, topography, location or surroundings that would not allow the structure to be placed 8 feet 6 inches farther from the road. The application does not conform to Criterion 1.

12. The Examiner takes notice that the lower Stillaguamish River is subject to frequent flooding. At the hearing, the appellant's consultant testified that the property in question is not only in the flood plain but actually in the floodway.
13. The appellant testified, in effect, that the placement of the subject building represents the wisdom of experience with floods in the immediate vicinity. He said that before and after purchasing, he has given close attention to the advice of old-timers in the area who have had long experience with Stillaguamish floods. They advised him that the building's location was deliberately selected as a spot unlikely to be affected by floodwaters.
14. The appellant's property has some topographic variation and the subject building is evidently on a relatively high spot. He said that in his own experience with numerous flooding events, the flood waters have flowed through his property around the building site but have never actually reached the building itself.
15. He further testified that he believes that most of the older buildings in the area represent old-timer knowledge of flood patterns and that they were put where they are on the basis of optimum placement for minimizing flood effects.
16. He argued that moving the building could have adverse impacts in terms of changing the flood flow pattern to the detriment of other properties. Avoiding such adverse effects of changing the flow regimen is a basic principle of flood management.
17. Appellant's position is that the location of the building in relation to flood flows is a special circumstance that satisfies the first variance criterion. He noted that the building is in a proven locale and urged that moving it would present hazards to the public welfare.
18. The flood flow information was presented for the first time at hearing. The Examiner, having observed the witnesses, finds the information credible and determines, therefore, that special circumstances are in fact present that justifies the granting of the variance.
19. None of the reasons for establishing the setback will be violated by allowing this building to stay where it is. The County is unlikely to build a wider road at this location. Aesthetics and the sense of open space in this agricultural setting are not degraded. The safety of the roadway is not compromised.
20. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

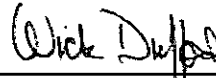
1. The Hearing Examiner has jurisdiction over the subject matter of this proceeding. SCC 30.71.050.
2. The required setback at the location in question is 50 feet from the centerline of Norman Road. SCC 30.32.030(1). A variance is therefore needed to authorize the current placement of the building at 41.5 feet from the centerline.

3. The appellant has the burden of proving by a preponderance of evidence that the variance criteria are met. The Examiner concludes that the appellant has carried his burden in this case.
4. Based on the findings, the Examiner concludes that all four of the criteria for the granting of a variance have been met. SCC 30.43B.020.
5. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The appeal is granted. The administrative denial is reversed. A variance shall be issued to the appellant allowing the subject building to remain in its present position at 41.5 feet from the centerline of Norman Road.

Decision issued this 28th day of January, 2011.



Wick Dufford, Hearing Examiner Pro Tempore

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any party of record may request reconsideration by the Examiner **within 10 days** from the date of this decision. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, Robert J. Drewel Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S No. 405, 3000 Rockefeller Avenue, Everett WA 98201) **on or before February 7, 2011**. There is no fee for filing a petition for reconsideration. "The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing." [SCC 30.72.065]

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the Applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
- (f) The Applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

Appeal

An appeal to the County Council may be filed by any aggrieved party of record **within 14 days from the date of this decision.** Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the hearing examiner. An aggrieved party need not file a petition for reconsideration but may file an appeal directly to the County Council. If a petition for reconsideration is filed, issues subsequently raised by that party on appeal to the County Council shall be limited to those issues raised in the petition for reconsideration.

Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S No. 604, 3000 Rockefeller Avenue, Everett, WA 98201) **on or before February 11, 2011**, and shall be accompanied by a filing fee in the amount of five hundred dollars (\$500.00) for each appeal filed; PROVIDED, that the fee shall not be charged to a department of the County. The filing fee shall be refunded in any case where an appeal is summarily dismissed in whole without hearing under SCC 30.72.075.

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner findings, conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal shall be limited to the following:

- (a) The decision exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching his decision;
- (c) The Hearing Examiner committed an error of law; or
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by substantial evidence in the record. [SCC 30.72.080]

Appeals will be processed and considered by the County Council pursuant to the provisions of Chapter 30.72 SCC. Please include the County file number in any correspondence regarding the case.

Staff Distribution:

Department of Planning and Development Services: Bob Pemberton

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.

PARTIES OF RECORD REGISTER
VERBARENDSE 10 107021 LU
PDS ADMIN APPEAL - SETBACK
VARIANCE

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