



**DECISION AND ORDER of the
SNOHOMISH COUNTY HEARING EXAMINER**

Millie Judge
Hearing Examiner

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Everett, WA 98201

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DATE OF DECISION: April 17, 2012
APPELLANT: Jane Lee
FILE NO.: 11-109782 LU
TYPE OF REQUEST: Appeal of Denial of Variance for Setback Requirement
DECISION (SUMMARY): **Appeal Denied**
TAX ACCOUNT NO: 300623-002-014-00

This matter having come before the Hearing Examiner on April 4, 2012, and the testimony of witnesses having been heard and all exhibits having been admitted into evidence and considered, the Hearing Examiner enters the following Findings of Fact, Conclusions of Law and Decision based on a preponderance of the evidence:

FINDINGS OF FACT

1. The Record. The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits 1 through 26), as well as the testimony of witnesses received at the open record hearing. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.

NOTE: For a complete record, an electronic recording of the hearing in this case is available in the Office of the Hearing Examiner.

2. Parties of Record. The Parties of Record are set forth in the Parties of Record Register and include interested parties who testified at the open record hearing.

3. Public Hearing. The Hearing Examiner held an open record appeal hearing on April 4, 2012. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Bob Pemberton appeared and testified on behalf of the Snohomish County Planning and Development Services Department (PDS). John Spencer, attorney, and Jane Lee appeared at the public hearing on behalf of the Appellant. Ms. Lee did not testify during the hearing. No members of the public testified at the public hearing.

4. Jane Lee is the owner of certain real property known as tax parcel 300623-002-014-00 (hereinafter, the "subject property"), located at 8411 SR 92, Granite Falls, Washington. The subject property is 1.5 acres in size and contains a large, 2-story retail structure known as Junction Center. The property is zoned Rural Business (RB). The building appears to house several small, rural, retail and commercial businesses (including a Shell Mini-Mart, thrift store, equipment repair service, and an insurance office). (Exhibit 18) In front of a portion of the large building is a Shell gasoline station. (Exhibits 1, 11, 12, 13, 14, 16, 18)

5. Ms. Lee is alleged to have placed a small espresso stand in the driveway of the facility without permits in violation of SCC 30.23.030(1) and 30.23.100(1). (Exhibit 1) In obtaining permit(s) for the structure, Ms. Lee learned that the espresso stand is within the setback area of SR 92.
6. In response to the notice of a public hearing, several citizens wrote letters to the Hearing Examiner expressing concerns about the nature of the use of the espresso stand for adult entertainment purposes. (Exhibits 4, 6, 7, and 21) Such issues are a licensing matter for the County Auditor's Office and not an issue before the Examiner in these proceedings. In addition, a number of citizens wrote comment letters expressing concern about the espresso stand's prior history and concerns about traffic and safety impacts in the community. (Exhibits 20, 22, 23, and 24)
7. The Zoning Code provides that all structures placed on their lots must be in compliance with the requirements of the Bulk Matrix. (SCC 30.23.100(1)) According to the Bulk Matrix, in the Rural Business Zone, all structures must be setback at least 25 feet from a public or private right-of-way. See, SCC 30.23.030(1). It is uncontroverted that the espresso stand was placed on the edge of the public right-of-way (SR 92) in violation of the setback regulations.
8. Ms. Lee sought a variance from the setback requirement, claiming special circumstances under SCC 30.43B.020(1). The variance was denied by PDS on February 2, 2012.
9. Variances are governed by Chapter 30.43B SCC. A variance is the mechanism by which an adjustment is made to specific regulations being applied to a particular piece of property. The decision criteria is set forth in SCC 30.43B.100. That Section provides:

The department may approve or approve with conditions a variance request when the following criteria 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 the properties or improvements in the vicinity and zone in which the subject property is located; and
 - (4) The granting of the variance will not adversely affect the comprehensive plan.
10. The Appellant claims that PDS erred when it issued Finding of Fact No. 9 and Conclusion of Law No. 1. Appellant argues that Finding of Fact No. 9 is not supported by the evidence. No other matters within the PDS Decision on the Variance have been appealed. Finding of Fact No. 9 provides:

A substantial property right exists in that the coffee stand is permitted in the Rural Business zone as a restaurant. (SCC 30.22.110 Rural and resource zone categories—Use matrix)[.] However, in this case, the right to use the land for the permitted use in a legal location is not limited by any constraints related to the property. There are no special circumstances that prevent the structure from being placed in accordance with the required setback. The application does not conform to criterion 2.

Conclusion of Law No. 1 from the PDS Decision provides: “The applicant has not sufficiently demonstrated that all four decision criteria have been met.” (Exhibit 2) “Criterion 2” mentioned in Finding of Fact No. 9 refers to SCC 30.43B.100(2).

11. On appeal before the Hearing Examiner, the Appellant bears the burden of proof by a preponderance of the evidence. Under the County Code, the Hearing Examiner is not required to grant deference to the Director’s decision. (See, SCC 30.71.100 and SCC 30.71.110)
12. The subject property is 1.5 acres in size, rectangular in shape, and relatively flat. Although it is adjacent to the Pilchuck River, the property does not have an oddly shaped boundary or other natural features (e.g., onsite wetlands) causing physical constraints that make meeting the 25-foot setback requirement difficult or impossible. Instead, the record reveals that the owner’s placement of other commercial uses on the subject property, specifically, a large, 2-story building, parking stalls, signage and gas station pumps, have created the constraints that lead to the need for a variance from the 25-foot setback requirement. (Exhibits 1, 11, 12, 13, 14, 16, 18)
13. The Appellants argue that these existing uses are a proper basis for granting a variance based on “special circumstances” where they create constraints that make it physically difficult and/or impossible to achieve a 25-foot setback.
14. Appellants produced no evidence to support a claim that the right to place an espresso stand in the driveway of her commercial property is “a use possessed by other properties in the same vicinity and zone, but which because of special circumstances is denied to her property.” (SCC 30.43B.100(2)). No analysis of surrounding properties in the same zone was provided.
15. Any Finding of Fact that should be deemed to be a Conclusion of Law is hereby adopted as such.

CONCLUSIONS OF LAW

Based on the Findings of Fact entered above, the following Conclusions of Law are entered:

1. The Hearing Examiner is authorized to hear and decide this matter pursuant to Title 2 SCC and Chapter 30.71.030 and 30.71.050 SCC.
2. It is well-settled law that the reasons for granting a variance must be reasons pertaining to the property itself which prevent full use of the property to the extent other properties in the vicinity and under the same zoning can be used. *St. Clair v. Skagit County*, 43 Wn. App. 122 (1986).¹

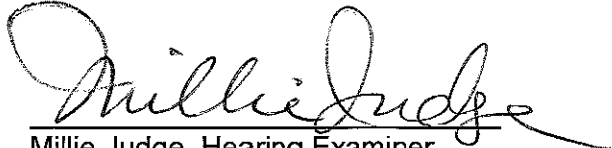
¹See also, *Martel v. Vancouver*, 35 Wn. App. 250, 256, 666 P.2d 916 (1983) (*Evidence of hardship or difficulty that will support a variance must relate to the land itself and not to the owner-applicant*); and 3 R. Anderson, ZONING 18.30 (2d ed. 1977).

3. In the present case, PDS found that Ms. Lee's right to use the land for an espresso stand (a permitted use), in a legal location is not limited by any special circumstances related to the property. The Appellant's inability to achieve the 25-foot setback is the result of other uses that have been placed on the subject property. (Testimony of Bob Pemberton; Exhibit 2) Where a property owner configures their land with commercial uses that prevent the use of the property for other commercial uses, no hardship or special circumstances exist. Such decisions by a property owner are presumed to be voluntary business decisions. No property has an unlimited amount of room for any and all uses. However, Appellant argues that if she cannot place an espresso stand on her property along with all of the other commercial uses, she will be deprived of a substantial property right enjoyed by other properties in the vicinity.
4. The Hearing Examiner concludes that Ms. Lee enjoys a substantial property right in her existing commercial businesses. Her inability to site a new use (a small espresso stand) on the property is not the result of a special circumstance; rather it is the result of her own business choices that have led to the result in this case. The Appellant failed to prove by a preponderance of the evidence that special circumstances exist in this case relating to the property itself. *St. Clair v. Skagit County*, 43 Wn. App. 122 (1986)
5. The Appellant failed to prove by a preponderance of the evidence that the siting of an espresso stand is a use enjoyed by other properties in the vicinity.
6. The Hearing Examiner concludes that the Director correctly applied the variance criteria set forth in SCC 30.43B.100(2). There is substantial evidence in the record supporting his decisions to deny the variance.
7. In light of the entire record, the Appellant has failed to meet her burden of proof to show that Finding of Fact No. 9 and Conclusion of Law No. 1 in the Director's Decision are not supported by the evidence and should be overturned. The appeal should be denied.
8. Any Conclusion of Law that should be determined to be a Finding of Fact is hereby adopted as such.

DECISION AND ORDER

The appeal is denied. The denial of the variance to the setback requirement by PDS is affirmed.

Decision issued this 17th day of April, 2012.


Millie Judge, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to Superior Court. 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 30.85 SCC and Ch. 36.70C RCW, and the Superior Court Civil Rules and Rules of Civil 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 APRIL 27, 2012**. There is no fee for filing a petition for reconsideration. "The party seeking reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties to the appeal as of the date of filing." [SCC 30.85.210]

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 other elements of the decision are not supported by the record; and/or
- (e) New evidence which could not reasonably have been discovered prior to the hearing and which is material to the decision has been discovered.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.85.210. A matter that has been subjected to reconsideration once, shall not again be subject to reconsideration.

NOTE: Please include the County file number in any correspondence regarding this case.

Appeal

The decision of the hearing examiner in this matter constitutes a final land use decision within the meaning of Chapter 36.70C RCW. Accordingly, any person with standing may file an appeal of this decision in Superior Court **within 21 days from the date of this decision** pursuant to the Land Use Petition Act (LUPA). (See, RCW 36.70C.040(4) for guidance on how to calculate the appeal period). In addition to meeting other requirements, appeals must comply with the specific requirements of Sections 36.70C.040, 36.70C.060 and 36.70C.070 RCW. Service on Snohomish County must be made by

delivery of a copy of the petition to the Clerk of the County Council or the person identified by or pursuant to RCW 4.28.080 to receive service of process. (RCW 36.70C.060) Service on other parties must be made according to SCC 36.70C.040. The Office of the Hearing Examiner cannot provide legal advice. If you have questions about filing a LUPA appeal, please consult with your attorney.

Staff Distribution:

Department of Planning and Development Services: Bob Pemberton