

WHATCOM COUNTY HEARING EXAMINER

re: The application of **Sharon V. Lyon**
for a Zoning Variance Permit

VAR2020-0007

REVISED
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant is requesting a Zoning Variance Permit to reduce the required east side yard property line setback from 5-ft to 0-ft. for existing bedroom and sitting area addition, address is 5054 Fir Street, Blaine, Washington.

Decision: The requested Zoning Variance Permit is denied.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted and evidence presented at the public hearing.

FINDINGS OF FACT

I.

Applicant: Sharon V. Lyon

Site Address: 5054 Fir Street
Blaine, Washington 98230

Agent: Dannon C. Traxler, Attorney

Assessor's Parcel Number: 405124-364247

Zoning: Urban Residential Medium [URM6]

Comprehensive Plan: Urban Growth Area [Birch Bay]

Subarea: Birch Bay - Blaine

Lot Size: 5,443 square feet

Roads: Public

Water & Sewer Supply: Birch Bay Water & Sewer District

Fire Protection: Whatcom County Fire District #21

Law Enforcement: Whatcom County Sheriff's Office

Public Schools: School District #503

Topography: Generally, the site is mostly flat.

Vegetation: The subject site is mostly developed.

Adjacent Land Uses:

North:	URM6 – Residential
East:	URM6 – Residential
South:	URM6 – Residential
West:	URM6 - Residential

SEPA Review: Categorically exempt from SEPA threshold review.

Authorizing Codes, Policies, Plans, and Programs

State Environmental Policy Act (SEPA) - Washington Administrative Code, 197-11
Revised Code of Washington [RCW] 36.70B, LOCAL PROJECT REVIEW
RCW 58.17, PLATS—SUBDIVISIONS—DEDICATIONS
Whatcom County Comprehensive Land Use Plan
Whatcom County Code (WCC) 2.11, Hearing Examiner
WCC 12.08, Development Standards

WCC 14, Use of Natural Resources
WCC 15, Building Code
WCC 16.08, Whatcom County Environmental Policy Administration
WCC 16.16, Critical Areas
WCC 20, Official Whatcom County Zoning Ordinance
WCC 21, Subdivision Regulations
WCC 22, Land Use and Development Procedures
WCC 23, Shoreline Management Program
WCC 24, Health Regulations
Business Rules of the Whatcom County Hearing Examiner (Whatcom Co. Res. 86-41)

Legal Notices: Posted – Notice of Public Hearing, March 4, 2021
 Mailed – Notice of Public Hearing, February 24, 2021
 Published – Notice of Public Hearing, March 4, 2021

Hearing Date: March 17, 2021

Parties of Record

Sharon Lyon, Applicant
5054 Fir Street
Blaine, WA 98230

Dannon Traxler – Langabeer & Traxler, P.S., Agent
2605 Meridian St
Bellingham, WA 98225

Robby Eckroth – Planner II – Current Planning
5280 Northwest Dr
Bellingham, WA 98226

John & Lynda Daddona
5047 Fir St
Blaine, WA 98230

Sheryl Hull-Cline
5058 Fir St
Blaine, WA 98230

Admitted Exhibit List:

1. Revised application
2. NOAR Response Narrative
3. Agent authorization
4. Fee responsibility

5. Encroachment
6. Deed
7. Mailing labels
8. Neighbor list
9. Receipt
10. Revised site plan
11. Stormwater design approved
12. Determination of completeness
13. Legal notice
14. Notice of Application
15. Vicinity map
16. TRC routing memo 2nd submittal
17. Site visit photos
18. Combined public comments
19. Combined staff memos
20. Staff report
21. Lyon Posting Dates Agenda-Zoom
22. E-mail of Sheryl Hull-Cline of March 16, 2021

II.

The Applicant is requesting a Zoning Variance to reduce the east side yard setback from 5-ft. to 0-ft. for an already existing and built bedroom & sitting room area.

III.

The Whatcom County Technical Review Committee has made factual findings regarding the requested Zoning Variance Permit in a report entitled "Finding, Conclusions, and Recommendations" (herein "Staff Report", Ex. 20), dated February 22, 2021. The Findings of Fact set forth in the Staff Report are adopted to the extent they are deemed to accurately describe the premises, the zoning, and the procedural and ministerial steps taken by both the applicant and the County. The Applicant's Agent has indicated that there are no factual inaccuracies in Staff's factual findings. No party had requested the Hearing Examiner subpoena witnesses pursuant to WCC 2.11.220. There was no oral public comment on the application at the public hearing. There were no objections from any party to any of the

exhibits the Hearing Examiner admitted into the record.

IV.

Originally, an existing home built in 1956 was seated on the lot, which spans approximately 49.98 feet east to west, and 108.85 feet north to south. There are 5 foot setbacks on the north, east, and west boundaries, and a 20 foot setback on the south boundary. The residence prior to modification was within the setbacks.¹ The existing residence was expanded in a non-conforming way and built to the eastern and western lot lines without permits or a variance. The existing home is placed more than the existing home's entire length back from the northern setback. The existing structure would require a retroactive variance for a hardship to be in compliance with the law.

The Applicant's Application describes hardship in two general ways: 1.) a prior hardship relating to usage by a disabled person,² and 2.) the hardship of compliance with code enforcement.³ The application asserts that the house was expanded in the most practical way, but its supporting materials do not provide evidence as to whether the prior hardship could have been resolved in other ways such as improving an existing bedroom or expanding the house in the north or south direction over areas now covered with decking and away from the most proximate lot lines.

V.

There were three written comments opposing the Variance submitted (Ex. 18 and 22). Many of the comments had to do with alleged prior bad acts of the Applicant regarding her use of the property and the effect on neighboring lots; much of that was not relevant to this

1 Ex. 10, Site Plan

2 Ex. 1, at §3

3 Ex. 1, at §7

application and thus not considered. Significant concern, however, was expressed about her non-conforming unpermitted use and expansion of her house to the lot line, and the Applicant's lack of care about fire safety and the property rights of others in that regard. The comments documented the growth of the house occurring after her acquisition as owner of the property. The comments express concern about the lack of permits and the inequity of her going to get a variance for a problem she created. One noted that the house exceeds the property line.

Two comments expressed a concern for lack of enforcement action on the violations either from the County or a fire department, but this factual record examines the facts applicable to the variance and not code-enforcement issues – the Hearing Examiner takes judicial notice that code enforcement is generally handled by a different set of individuals from those that do permitting.

VI.

Testimony from the Applicant and her Agent established that the dwelling was extended all the way to the eastern property line in 2010. The Applicant testified that: she was the property owner at the time but was not the one who had expanded the home; that her father was solely responsible for the addition which she had nothing to do with; and that a contractor said they would get all the permits necessary. The Applicant testified that her father showed her the plans but said she did not approve them and that her father only showed the plans to her because he was her father and not to get her approval to modify her property. The Applicant testified she was present for the conversation with the contractor but was not there to approve or disapprove as she had not hired the contractor. The testimony seems to contradict the description in the Applicant's application that the contractor was assuring her

personally.⁴ The testimony also contradicted staff testimony at the hearing regarding their perception of the situation.

VII.

Staff testified that the Applicant's construction to the lot line could be seen to fail the first prong of the variance criteria as the need for a variance was a hardship caused by Applicant's own actions (see discussion below) but had not put down that legal conclusion. They had not put down that legal conclusion conforming with their view because they were attempting to anticipate the Hearing Examiner's decision to disregard that legal requirement regardless of the law.

VIII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

The request to grant a Variance can be granted only if the request is consistent with the Zoning Variance Criteria of WCC 20.84.120 (1 through 3).⁵ It is possible to grant a retroactive variance, so long as it meets the variance criteria. The requested variance does not meet the three requirements and consequently the project does **not** satisfy the criteria needed to grant a variance.

First Prong.

⁴- Ex. 1, Revised Application at 2 (annotated as page 4 of 9).

⁵- Since repealed by Ord. 2020-045 after application and replaced with near identical language in WCC 22.05.024(4)(a).

The application fails on the first prong, if the hardship is dealing with code enforcement:

That any variance granted shall not constitute a grant of special privilege, be based upon reasons of hardship caused by previous actions of the property owner, nor be granted for pecuniary reasons alone;

In the case at hand, the variance is needed due to the previous actions of the property owner which created an existing structure extending the dwelling all the way to the property line, if not beyond. It may be a hardship that one's dwelling is subject to enforcement action, but it is a hardship of the Applicant's making.

It is the property owner's responsibility to oversee the development and legal conformity of their property. This is not a case where a guileless absentee property owner returned after 10 years of absence to find a surprise extra bedroom attached to their house extending to the property line and decided to approach the County about a variance. In this case, the property owner was fully knowledgeable and participatory in the expansion of the house. This was done also with apparent notice from her neighbors which should have also alerted her to the fact that her house was out of conformance, even if it was her responsibility to know the zoning she bought into or had not looked at the adjacent dwellings. It is also the property owner's responsibility and duty to acquire permits; and while authority to get permits may be delegated away, responsibility cannot. To the extent that the hardship is dealing with code enforcement, it is the Hearing Examiner's conclusion that the expansion to the lot line was in fact her own prior act.

The Technical Review Committee's legal conclusion and recommendation was incorrect because, as was testified to, they attempted to draft their conclusion to anticipate

that of the Hearing Examiner's.⁶ They did this despite apparently feeling that the variance was in fact needed due to a hardship caused by the Applicant's previous actions. Indeed, in the Staff Report the County's analysis of former WCC 20.84.120(1) is non-responsive to the prong itself:

The subject lot is limited in size (5,443 square feet) and thus poses constraints for any development on the parcel while complying with Whatcom County's development standards. Whatcom County allows for a maximum of 4,000 square feet for a parcel fully encumbered by critical areas through the reasonable use exceptions process provided in WCC 16.16.270. This proposal asks for just over half of that size.⁷

It does not discuss '*special privileges*' or lack thereof. It does not discuss '*hardship caused by previous actions of the property owner*' or lack thereof. It does not discuss '*pecuniary reasons*' or lack thereof. That being said, if the hardship is not having to conform with code but instead having to deal with a disability, that presumably is not the Applicant's prior act and brings us to the second prong.

Second prong.

Neither the application, nor the County's analysis, seems to adequately address the second prong's threshold issue adequately.

Because of special circumstances applicable to the subject property, including size, shape, topography, location or surrounding, the strict application of the zoning ordinance is found to cause a hardship and deprive the subject property of a use or improvement otherwise allowed in the identical zone classification. Aesthetic considerations or design preferences without reference to restrictions based upon the physical

⁶- The TRC should apply their analysis of the ordinances and applicability to the facts as they see fit in their professional judgment, as opposed to tailoring their legal conclusions and recommendations to anticipated Hearing Examiner decisions that would not follow the law. The worst that can happen is that the Hearing Examiner disagrees with the conclusion, as happens to be the case here.

⁷- Staff Report at 5.

characteristics of the property do not constitute sufficient hardship under this section;

There is no analysis or explanation as to what it is about what makes the nature of this variance a necessity and the prior hardship it attempts to address the ideal way at the time to address the nature of the property at the time. This seems like a threshold question for a retroactive variance. What were the ADA requirements that needed to be met to allow usage? Could the ADA accessibility issue have been resolved by expanding or widening the doorways of an existing bedroom? Given the size of the house, the lot, and the legal setbacks in all directions, would expanding the house without needing a variance in the north or south direction over areas now covered with decking and away from the most proximate lot lines be a less impactful way to address the hardship at the time? The Hearing Examiner does not find that there is any existing hardship based on the special circumstances of the property or at least has not been presented with convincing evidence of such, aside from code enforcement; indeed, the Applicant bought the property with a dwelling that was already in place and not extended to the lot lines. The Hearing Examiner also does not find any substantive non-conclusory evidence in the record that the path the Applicant took was the path the County would have approved at the time to meet the hardship at the time. There is no argument or evidence as to whether or not the hardship could have been overcome by other means which did not require a variance. A variance can only be granted where it would otherwise deny use of the property and create a hardship. There is no evidence in the record that modifying a bedroom that addressed the hardship they described could not have been achieved without building past the setbacks to the lot line and requiring a variance.

It appears from the admitted exhibits that given the lot size, setbacks, and existing house footprint, that there was ample room to expand without a variance or encroaching on

setbacks. The burden was on the Applicant to show that they meet the requirements of the second prong, and they have not met the burden.

Third Prong.

Finally, the third prong, has unanswered questions which the fact that it is an expansion all the way to the 0 foot of the lot line, and the public comments regarding aesthetics, fire safety, and drainage raise the question of material detriment. The requirement is that “[t]he 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 subject is situated.” While mitigation has been proposed as a condition, including usage of a fire wall and improved drainage, there does in fact appear to be a danger to public welfare in terms of fire safety and some history of unlawful drainage regarding the neighboring property. This prong could possibly be satisfied if the second prong were supported— material detriment is a relative standard, and where there is an unanswered question of whether there are less materially detrimental options regarding the neighboring property available, the building to the lot line is inherently materially detrimental to a neighboring property in this type of zoning. As outlined as a presupposition in the Staff Report analysis, setbacks are promulgated and required for good reasons, both for safety and aesthetics of the neighborhood. Based on the site plan it appears there is ample room for growth without encroaching on the setbacks.

The fact that the existing structure would need to be at least partially torn down to build a fire wall at the lot line is a fact not lost on the Hearing Examiner. The structure needs to be at least partially dismantled for safety reasons whether the variance is to be granted or not, and it is a doing that is necessitated by the Applicant’s acts. There is no present hardship in this situation that is not of the Applicant’s making, and there is no showing that the prior

hardship could not have been addressed without a variance.

II.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

A Zoning Variance Permit to allow a reduction in the east side yard setback from 5-ft to 0-ft for existing bedroom and sitting area addition, located on Assessor's Parcel No. 405124-364247, addressed as 5054 Fir Street, Blaine, Washington, is denied.

**NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF
THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final.

The Applicant, any party of record, or any County Department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 1st day of April 2021.



Rajeev D. Majumdar, Hearing Examiner *Pro-Tem*