

**CITY OF KIRKLAND
HEARING EXAMINER FINDINGS,
CONCLUSIONS AND DECISION**

APPLICANT: Matt Mengert of Thielsen Architects on behalf of Dale and Lisa Christian

FILE NO: SHR07-00002

APPLICATION:

1. Site Location: 437 5th Avenue West, an unopened right-of-way in which a private access easement has been constructed (5th Avenue West ROW).
2. Requests: To allow construction of a detached garage and accessory dwelling unit (ADU) structure, the Applicants request variances to:
 - A. reduce the Kirkland Zoning Code's (KZC) and the Shoreline Master Program's (SMP) required 20-foot front yard setback along the unopened 5th Street West right-of-way (5th Street West ROW) to 5 feet;
 - B. reduce the KZC's required 10-foot rear yard setback from the 5th Avenue West ROW to 1.25 feet;
 - C. reduce the SMP's required 5-foot side yard setback from the 5th Avenue West ROW to 1.25 feet.
3. Review Process: Process IIA, Hearing Examiner conducts public hearing and makes a final decision.
4. Summary of Key Issues: Compliance with the KZC and SMP variance criteria for reduction of the required setbacks along the 5th Avenue West ROW and 5th Street West ROW.

SUMMARY OF RECOMMENDATION/DECISION

Department of Planning and Development
Hearing Examiner:

Approve with condition
Approve with condition

PUBLIC HEARING:

The Hearing Examiner visited the site and held a public hearing on the application on July 5, 2007, in the Council Chambers, City Hall, 123 Fifth Avenue, Kirkland, Washington. A verbatim recording of the hearing is available at the City Clerk's office. The minutes of the hearing are available for public inspection in the Department of Planning and Community Development.

COMMENT:

Comments by the following persons, who offered sworn testimony at the hearing, are summarized in the minutes of the hearing:

From the City:
Tony Leavitt, Project Planner

From the Applicant:
Dave Thielsen, Architect

CORRESPONDENCE:

There were no public comment letters entered into the record.

FINDINGS, CONCLUSIONS AND DECISION

Having considered the evidence in the record and inspected the site, the Hearing Examiner enters the following:

FINDINGS OF FACT:

Site Description

1. The site is addressed as 437 5th Avenue West, and is located within the Market Neighborhood. It is bounded on the west by Lake Washington, on the east by Waverly Way, on the north by the 5th Street West ROW, and on south by another single-family lot.
2. The site is approximately 12,848 square feet in area, but is narrow and deep (58 feet by 221 feet). It is zoned Waterfront District II (WD II), and the shoreline designation is Suburban Residential (SR).
3. The site is accessed via the 20 foot wide private access easement road, 5th Avenue West, which runs north/south through the middle of the site and adjacent properties. West of the 5th Avenue West ROW is a recently constructed residence. On the west side of the residence is a 20 foot sanitary sewer easement. The site also has a 33 foot high water line setback from Lake Washington. Across the 5th Avenue West ROW to the east is a recently completed parking area cut into a hillside that has a slope of approximately 96% and extends to Waverly Way above. Behind the parking area is a steel pile shoring wall that extends approximately 36 feet up the hillside. On the north, the 5th Street West ROW, an unimproved street end, runs east/west through the entire site.
4. The site is located within a Seismic Hazard Area and High Landslide Hazard Area per the City's Sensitive Areas Map.
5. Some properties adjacent to the 5th Avenue West ROW are developed with accessory structures, including garages and ADUs, that encroach into the required rear

setback for the ROW. The existing ADUs range in size from 320 to 1,193 square feet, with two to five parking stalls. City records show that these structures were approved through the City's variance process.

6. Other properties in the vicinity that abut unopened street ends, and are thus considered corner lots, encroach into the required front setback for the street end right-of-way.

Proposal

7. The Applicant proposes to construct a two-car garage, with accessory dwelling unit (ADU) above, within the existing four-car parking area along the east edge of the 5th Avenue West ROW. The proposal will maintain the four parking spaces, with two being housed within the proposed garage structure. The other two would remain exterior parking that would be partially covered by the ADU. The exterior parking area would also incorporate a new enclosed exterior storage shed and screened mechanical area.

8. The proposed structure will have a total gross floor area of approximately 1,726 square feet, with the ADU having an approximate gross floor area of 692 square feet.

9. The proposed structure will be visible primarily from the 5th Avenue West ROW, and visual impacts to the north and south will be minimal. It will be approximately 26 feet below, and not visible from Waverly Way.

10. Most of the proposed structure that would be visible from Lake Washington would be located outside SMP-required setbacks.

Comprehensive Plan

11. The Market Neighborhood Land Use Map in the Comprehensive Plan designates the subject property for low density residential use at 1 to 3 units per acre.

History

12. In 2002, the applicant was granted a variance from the required KZC and SMP 20-foot front setback from the 5th Street West ROW for construction of a single family residence.

Public Comment

13. The Department received no comments during the public comment period on the application, which ran from May 3, to June 4, 2006.

State Environmental Policy Act

14. The Department issued a Determination of Nonsignificance for the proposal on May 12, 2006, which was not appealed.

Applicable Law

15. The KZC allows detached accessory structures associated with detached dwelling units in the WD II zone. The SR Shoreline Environment also allows these uses.

16. The KZC requires a 20 foot setback from a front property line, (in this case the property line adjacent to the 5th Street West ROW), and a 10 foot setback from the rear property line, (in this case the property line adjacent to the 5th Avenue West ROW).

17. Required setbacks in the SR shoreline environment are 20 feet from a front property line, (in this case the property line adjacent to the 5th Street West ROW), and 5 feet from the side property line (in this case the property line adjacent to the 5th Avenue West ROW).

18. KZC 120 20 sets forth the following criteria for obtaining a variance from Zoning Code requirements:

1. The variance will not be materially detrimental to the property or improvements in the area of the subject property or to the City in part or as a whole; and
2. The variance is necessary because of special circumstances regarding the size, shape, topography, or location of the subject property ... ; and
3. The variance will not constitute a grant of special privilege to the subject property which is inconsistent with the general rights that this code allows to other property in the same area and zone as the subject property.

19. WAC 173-27-170 establishes the criteria for obtaining a variance from the requirements of the Shoreline Master Plan for development located landward of the ordinary high water mark:

1. That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;
2. That the hardship described above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;
3. That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;
4. That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;

5. That the variance requested is the minimum necessary to afford relief;
and
6. That the public interest will suffer no substantial detrimental effect.

20. Under Process IIA, the applicant bears the burden of convincing the Hearing Examiner that the applicant is entitled to the requested decision. KZC 150.50.

21. KZC 150.65.3 requires the Hearing Examiner to use the variance criteria in deciding this application. In addition, the Examiner may approve the application only if it is “consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan,” and “it is consistent with the public health, safety and welfare.”

CONCLUSIONS:

1. Given the steepness of the slope on the east side of the property up to Waverly Way, it is highly unlikely that the 5th Street West ROW will ever be opened to vehicular traffic, although it might be used for future pedestrian access to Lake Washington. The requested setback reductions would not interfere with future improvements to allow this access to the Lake. Thus, the variance will not be materially detrimental to the City, in part or as a whole, or to the public interest served by the SMP.

2. The buildable areas of properties along the 5th Avenue West ROW are quite densely developed. The proposed structure is in keeping with other similar structures along the east side of this ROW and would be an aesthetic improvement over the existing view of a bare parking area and shoring wall. Further, because other structures already encroach into the existing 5th Street West ROW and 5th Avenue West ROW, these rights-of-way provide no sense of openness that might be otherwise diminished by the proposal. Thus, the variance will not be materially detrimental to the property or improvements in the area.

3. The buildable area of the subject property is highly constrained by the unopened street end and access easement, and their associated setbacks, the sewer easement running through the property, the 33-foot high water line setback, and the steep slope on the east side of the property. The variance is necessary because of these special circumstances.

4. Through the variance processes, other properties in the same area and zone as the subject property have been allowed to erect structures similar to the proposed structure. The proposed zoning and shoreline variances will not constitute a grant of special privilege to the subject property.

5. The proposal will provide an additional dwelling unit in a manner that is consistent with applicable goals of the Comprehensive Plan. Further, as conditioned by this decision, the proposed variance is consistent with all applicable development regulations. The proposal is therefore consistent with the public health, safety and welfare.

6. The strict application of the dimensional standards set forth in the SMP would significantly interfere with the reasonable use of the property for a detached garage and storage area.

7. The hardship for which the variance is requested is specifically related to the property, and results from unique conditions such as the steep slope on the east side, and the other constraining factors discussed in Conclusion 3 above, together with the application of the SMP.

8. The design, size and scale of the proposal is compatible with other principal and accessory uses within the area authorized under the Comprehensive Plan and SMP.

9. The proposed variance is the minimum necessary to afford relief and allow a structure similar in size and scale to other detached structures along the 5th Avenue West ROW.

DECISION:

Based on the foregoing findings and conclusions, the variance application is approved, subject to the condition recommended in Section I.B of the Department's June 28, 2007 Advisory Report.

Entered this 9th day of July, 2007, pursuant to authority granted by KZC 150.65.

Sue A. Tanner
Hearing Examiner

EXHIBITS:

The following exhibits were entered into the record:

Exhibit A Department's Advisory Report with the following attachments:

1. Vicinity Map
2. Development Plans
3. Development Standards
4. SEPA Determination, Memo, and Enclosures
5. Applicant's Variance Statement
6. Market Neighborhood Land Use Map
7. Natural Greenbelt Protective Easement Agreement

PARTIES OF RECORD:

Applicant: Matt Mengert, Thielsen Architects, 720 Market Street, Suite C, Kirkland, WA 98033

Property Owners: Dale and Lisa Christian, 437 5th Avenue West, Kirkland, WA 98033

Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

APPEALS AND JUDICIAL REVIEW

The following is a summary of the deadlines and procedures for appeals. Any person wishing to file or respond to an appeal should contact the Planning Department for further procedural information.

APPEALS

Appeal to City Council:

Section 150.80 of the Zoning Code allows the Hearing Examiner's decision to be appealed to the City Council by the applicant and any person who submitted written or oral testimony or comments to the Hearing Examiner. A party who signed a petition may not appeal unless such party also submitted independent written comments or information. The appeal must be in writing and must be delivered, along with any fees set by ordinance, to the Planning Department by 5:00 p.m., _____, twenty-one (21) calendar days following the postmarked date of distribution of the Hearing Examiner's decision on the application.

Appeal to Shorelines Hearings Board:

Pursuant to RCW 90.58.180 and WAC 173-27-220 any person aggrieved by the City's final decision on the Shoreline Substantial Development Permit may seek appeal to the state Shorelines Hearings Board by filing a petition for review. All petitions for review shall be filed with the Shorelines Hearings Board within 21 days of the date the Department of Ecology receives the City's decision. Within seven days of filing any petition for review with the Shorelines Hearings Board, the petitioner shall serve copies of the petition for review on the Department of Ecology, the State Attorney General and the City of Kirkland. The petition for review must contain items required by WAC 461-08-055.

JUDICIAL REVIEW

Section 150.130 of the Zoning Code allows the action of the City in granting or denying this zoning permit to be reviewed in King County Superior Court. The petition for review must be filed within 21 calendar days of the issuance of the final land use decision by the City.

LAPSE OF APPROVAL

Under Section 150.135 of the Zoning Code, the applicant must submit to the City a complete building permit application approved under Chapter 150, within four (4) years after the final approval on the matter, or the decision becomes void; provided, however, that in the event judicial review is initiated per Section 150.130, the running of the four years is tolled for any period of time during which a court order in said judicial review proceeding prohibits the required development activity, use of land, or other actions. Furthermore, the applicant must substantially complete construction approved under Chapter 150 and complete the applicable conditions listed on the Notice of Approval within six (6) years after the final approval on the matter, or the decision becomes void.