

**BEFORE the HEARING EXAMINER of the
CITY of SULTAN**

RECOMMENDATION

FILE NUMBER: VAR07-001 ¹

APPLICANT: Frank H. Jones

TYPE OF CASE: Variance from Sultan Municipal Code 16.12.020 to reduce the required front setback from 20 feet to zero feet

SUMMARY OF RECOMMENDATION: APPROVE subject to conditions

DATE OF RECOMMENDATION: June 21, 2007

INTRODUCTION

Frank H. Jones (Jones), 26506 Fern Bluff Road, Monroe, Washington 98272, seeks approval of a Variance from the requirement of Sultan Municipal Code (SMC) 16.12.020 to reduce the required front setback from 20 feet to zero feet. Jones filed the Master Land Use Application in or around March or April, 2007. ² (Exhibit 1A ³) The City of Sultan (Sultan) Department of Community Development (DCD) deemed the application complete on May 8, 2007. (Exhibit 1, p. 1, § I.G)

The subject property is located at 802 Dyer Road, at the west end of Dyer Road between the road and the Skykomish River.

¹ The file number on City documents (VAR05-001) is incorrect. (See Exhibits 1 and 1G, for example.) Jones filed the application in or around March, 2007. The file number "VAR05-001" would represent an application filed in 2005. When the Examiner pointed this error out at the start of the hearing, DCD orally assigned file number "VAR07-001" to the application.

² Neither the application nor any of Jones' submittals were date stamped when received by the City. (Exhibit 1A; see also Exhibits 1B and 1E) Jones signed the application in three places. He dated the first signature October 2, 2006. (Exhibit 1A, p. 2) The other two signatures were affixed to the application in the presence of a Notary Public on March 16, 2007. (Exhibit 1A, pp. 3 and 4) The DCD Staff Report states that the application was filed April 20, 2007. (Exhibit 1, p. 1, § 1.G) The record contains nothing to substantiate that date. The preponderance of the evidence thus supports a finding that the application was filed sometime on or after Jones' signature was notarized on March 16, 2007, perhaps as late as sometime in April.

³ Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Recommendation is based upon all documents in the record.

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The Sultan Hearing Examiner (Examiner) viewed the subject property on June 13, 2007.

The Examiner held an open record hearing on June 13, 2007. DCD gave notice of the hearing as required by the SMC. (Exhibits 1.G and 1.H)

The following exhibits were entered into the hearing record during the hearing:

- Exhibit 1: Departmental Staff Report with Attachments 1.A – 1.H
- Exhibit 2: E-mail from Gerry Gibson, June 7, 2007
- Exhibit 3: Excerpt from December 14, 2005, City Council meeting
- Exhibit 4: Four (4) site photographs

The action taken herein and the requirements, limitations and/or conditions recommended for imposition by this recommendation are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take and recommend pursuant to applicable law and policy.

ISSUES

Does the application meet applicable criteria for approval of the requested Variance?

FINDINGS OF FACT

1. Jones seeks relief from the required front setback on Lot 2 of the 1960 *Replat of Dyer Addition* (Lot 2) to allow construction of a single-family residence. (Exhibits 1.A and 1.B) Lot 2 is located between Dyer Road and the Skykomish River. Lot 2 has a width of approximately 69 feet and a depth of approximately 155 feet. (Exhibit 1.F) Lot 2's area is approximately 23,550 square feet (SF) or 0.54 acres. (Exhibit 1) Lot 2 is presently undeveloped and substantially overrun with brush and brambles. (Exhibits 1, 1.B, and 4)
2. Lot 2 is zoned Moderate Density (MD). (Exhibit 1) Density and dimensional requirements for single-family dwellings in the MD zone include: 7,200 SF minimum lot area; 60 foot minimum lot width; 80 foot minimum lot depth; 20 foot minimum front setback; 5 foot minimum, total of 15 foot side setbacks; and 20 foot minimum rear setback. [SMC 16.12.020]

Lot 2 meets the density and dimensional standards of the MD zone. Jones seeks relief from the 20 foot front setback standard in order to construct a single-family residence to the front lot line.

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3. The Dyer Road right-of-way in front of Lot 2 is 60 feet wide. The Dyer Road right-of-way terminates at the east boundary of Tax Parcel 27080500201400 (the Short property), an approximate 5-acre tract which lies to the west of abutting Lot 1 in the *Replat of Dyer Addition* (Lot 1). The right-of-way narrows to 30 feet wide where it abuts the Short property. (Exhibits 1 and 1.F and testimony) Dyer Road is a two-lane, paved street without sidewalks. (Exhibit 4) The south edge of the Dyer Road pavement lies some 13.6 feet north of the north edge of Lot 2. (Exhibit 1.E)
4. The review criteria for a Variance are set out at SMC 2.26.120(C).⁴ The preamble to the criteria reads as follows:

No application for a variance shall be granted unless the examiner finds:

The four specific criteria which follow that preamble and the facts relating to each are as follows:

- A. "1. The variance shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the property on behalf of which their application was filed is located; and"

Facts: A single-family residence was built on Lot 1 in 1967. A single-family residence was built on Lot 3 (abutting the east side of Lot 2) in 1977. (Testimony) Most of the 78 lots in the *Replat of Dyer Addition* have a single family residence located on them. (Exhibit 1 and testimony)

- B. "2. That the granting of such 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 property is situated; and"

⁴ The Staff Report (Exhibit 1) and Jones' textual submittal (Exhibit 1.B) incorrectly state that the application is also subject to review under SMC 16.120.020(B) and SMC 16.18.030. Section 16.120.020 SMC was repealed by the City Council in 2006 and no longer exists. The Jones application was filed after the section was repealed; an application filed after repeal of a requirement cannot be subject to evaluation under the repealed requirement. (Even if the application had been filed prior to the repeal, it would still not be subject to review against the repealed section: Variance applications are neither subject to nor benefited by the vested rights doctrine.)

Section 16.18.030 SMC establishes criteria for review of setback variances involving "nonconforming lots." A "nonconforming lot" is one which "is smaller than the required minimums set forth in the dimensional and density requirements for each zoning district". [SMC 16.18.020] The Jones lot is not a nonconforming lot. (Testimony) Therefore, the criteria in SMC 16.18.030 are legally not applicable.

Therefore, neither set of criteria will be considered.

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Facts: The owner of Lot 1 (Willett) supports approval of the requested setback variance. The Short property will likely never be built upon. (See Finding 4.C, below.) The possibility that the west end of Dyer Road will ever be widened or significantly improved "is small if not non-existent."⁵ (Exhibit 1, p. 3) A standard five foot wide sidewalk, if ever built along the south side of Dyer Road, would be at least eight feet north of Lot 2's north property line.

- C. "3. That such variance is necessary: a. Because of special circumstances set forth in the findings relating to size, shape, topography, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located; and"

Facts: The entirety of Lot 2 as well as most of the *Replat of Dyer Addition* west of 10th Street is located within the regulatory floodplain. (Exhibit 1.C) All but the northerly 23 – 29 feet of Lot 2 is encumbered by the regulatory floodway within the floodplain. (Exhibits 1.E and 1.F) Construction of single-family residences is prohibited within the regulatory floodway. (Exhibits 1 and 1.C and testimony)

When the 20 foot front setback is considered, the residual building envelope ranges in depth from approximately three to nine feet. (Exhibit 1.E) Not even a single-wide mobile home could be placed on Lot 2.

The regulatory floodway angles away from Dyer Road as one goes upstream (east). (Exhibit 1.C) Thus, the non-floodway portion of the lots on the south side of Dyer Road increases as one goes east.

- D. "3. That such variance is necessary: ... b. Because for reasons set forth in the findings, the variance as approved would contribute significantly to the improvement of environmental conditions, either existing or potentially arising from the proposed improvement;"

Facts: Relaxation of the front setback on Lot 2 will allow construction of a residence which would require removal of the invasive brush now covering the lot and eliminate a place for illegal dumping of trash.

5. Jones at one time considered donating Lot 2 to the City. That donation never happened. In 2005, Jones asked the Council to vacate the south 30 feet of Dyer Road in front of Lot 2 to allow additional area in which to build a single-family residence outside of the regulatory floodway. On December 14,

⁵ The City's Comprehensive Plan (Plan) contemplates connection of the east end of Dyer Road with the west end of Skywall Drive. Such a connection, if it ever happened, would not generate any additional traffic in the vicinity of Lot 2.

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2005, the Council, during consideration of the right-of-way vacation request, discussed the possibility of a setback variance instead. Jones asked the Council to table the vacation request. The Council did not approve the right-of-way vacation request.⁶ (Exhibit 3)

6. A comment in opposition states that "Other permits and variances have been denied." (Exhibit 2) Neither Jones, DCD, nor the Examiner are aware of any setback variance requests on Dyer Road which have been denied.⁷ (Testimony and official notice)
7. The entirety of the Short property lies within the regulatory floodway. (Exhibit 1.C and testimony) Willett has been in conversation with Short exploring the possibility of acquiring the Short property and combining it with his Lot 1. If consummated, that action would effectively create one large lot containing a single-family residence with virtually no further development potential. The owner of Lot 1 would essentially have control of the floodway land at the end of Dyer Road. (Testimony)
8. DCD recommends approval of the requested setback variance subject to four conditions. (Exhibit 1) In addition to the errors previously identified in this Recommendation, the DCD Staff Report contains the following additional errors:
 - A. Page 2, § I.J, ll. 2 and 3: The references to Exhibits C and D should be to Exhibit F.
 - B. Page 3, § II: The reference to Exhibits B and C in the middle of the page should be to Exhibit B only.
 - C. Page 5, § IV: The incomplete concluding sentence in this paragraph (... as indicated on.) needs "Exhibit E" added for completeness (... as indicated on Exhibit E.).
 - D. Page 5, § V: No other issues exist for discussion.
 - E. Page 5, § VII, ¶ 1: The citation to "SMC 21.04.50" is incorrect in two regards: Its form is incorrect (the correct citation is "SMC 21.04.050"); and the cited section has no applicability to the Jones variance request (SMC 21.04.050 sets forth conditional use permit review criteria).

⁶ The facts in this Finding are based upon Exhibit 3, an excerpt from the Council's December 14, 2005, meeting minutes. Unfortunately, the excerpt ends at the point where the Council voted to close the public hearing. The Council's action is not included in the excerpt. Based upon the testimony during the hearing and the fact that Jones seeks a front setback variance, the Examiner concludes that the Council did not approve the vacation. Whether the Council denied the vacation or merely tabled it is completely irrelevant: The full-width right-of-way exists today.

⁷ The Examiner has served as Sultan's Hearing Examiner since mid-1999. The Examiner has no record of any prior variance request along Dyer Road since that time.

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9. Any Conclusion deemed to be a Finding of Fact is hereby adopted as such.

PRINCIPLES OF LAW

Authority

Applications for a Variance from requirements of the Unified Development Code [Title 16 SMC] require a pre-decision open record hearing following which the hearing body forwards a recommendation to the Sultan City Council (Council) for final action. [SMC 16.120.050] The Examiner is charged with the responsibility and authority to conduct the required open record hearing. [SMC 16.120.050]

Review Criteria

The review criteria for zoning code variances at SMC 2.26.120(C) have been listed in Finding 4, above.

Vested Rights

The vested rights doctrine does not apply to variance applications.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof.

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS

1. The above Findings of Fact, especially those in Finding 4, demonstrate compliance with applicable variance criteria. The extent of Lot 2's encumbrance by the regulatory floodway constitutes the hardship which justifies approval of a setback variance. If the front setback requirement were imposed, no reasonably buildable area would exist on Lot 2. (The suggestion made by one hearing participant that Jones investigate building "sideways" on the lot is without substantial merit: No matter which way one looks at a building on Lot 2, one of its maximum dimensions will be three feet – a totally impractical width or length for a residence.)

Lot 2 is more encumbered by the regulatory floodway than any lot along the west end of Dyer Road except abutting Lot 1 – which has a residence built before Sultan adopted flood plain regulations. Lot 2 is thus distinguishable from its neighbors in the *Replat of Dyer Addition*.

A reduced setback will not harm adjacent properties or the public interest. Development of the Short property is highly unlikely. Thus, the west end of Dyer Road will not experience increased traffic

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volumes. Even with a zero front setback as requested, 13 feet will separate the building from the edge of the pavement. No sight distance problems will be created. Recommended Condition 4 (barring parking between the pavement edge and the front property line) is necessary in order to ensure that vehicles parked on the property do not extend into the traveled way and block visibility.

2. A basic concept underlying variances is that when relief is warranted, the relief to be granted should be the minimum necessary to afford reasonable use of the property. Complete elimination of the front setback will provide for a building depth of between 22 and 29 feet, hardly excessive. Full relief is justified.

However, setback relief should not allow any part of the building to intrude into the air space above the Dyer Road right-of-way. Section 16.150.190(14) SMC states that setbacks "are the lines beyond which no part of a building may project, except as may be otherwise provided in this code." Footnote 12 to the Table of Dimensional and Density Requirements for the MD zone in SMC 16.12.020 allows eaves to project up to 12 inches toward the property line where the setback is five feet and to project up to 16 inches where the required setback is at least six feet. No such projection should be allowed to cross the plane of the north property line/Dyer Road right-of-way line.

3. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following exceptions:
 - A. Recommended Conditions 1 and 2 have nothing to do with the requested setback variance. They simply remind the permittee of standard code compliance matters that will have to be addressed in any development proposal. Jones is on notice by virtue of their presence in the DCD Staff report. They need not become conditions of approval.
 - B. Recommended Condition 3 (which requires construction to conform to Exhibit 1.D) should not be imposed. The uncontroverted testimony is that Jones did not prepare exhibit 1.D; DCD apparently prepared Exhibit 1.D. Thus, it does not represent a development proposal. It merely serves to indicate how a reasonably sized building could be constructed on Lot 2 if the front setback were eliminated. Development of Lot 2 should not be forced to comply with a purely hypothetical, schematic site plan not presented by the applicant.
 - C. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended Condition 4 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
4. Any Finding of Fact deemed to be a Conclusion is hereby adopted as such.

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RECOMMENDATION

Based upon the preceding Findings of Fact and Conclusions, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **RECOMMENDS APPROVAL** of a Variance from SMC 16.12.020 to relax the required front setback on Lot 2 of the *Replat of Dyer Addition* **SUBJECT TO THE ATTACHED CONDITIONS.**

Recommendation issued June 21, 2007.

\\s\ John E. Galt (Signed original in official file)

John E. Galt

Hearing Examiner

NOTICE OF RIGHT OF RECONSIDERATION

This Recommendation, dated June 21, 2007, is subject to the right of reconsideration pursuant to SMC 2.26.120(D). Reconsideration may be requested by the applicant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk/Treasurer not later than 5:00 p.m., local time, on July 2, 2007 (which is the first business day after the tenth calendar day after the date of mailing of this Decision). Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See SMC 2.26.120(D) and 16.120.110 for additional information and requirements regarding reconsideration.

NOTICE OF COUNCIL CONSIDERATION

This Recommendation becomes final as of the eleventh calendar day after the date of mailing of the Recommendation unless reconsideration is timely requested. If reconsideration is timely requested, the Examiner's order granting or denying reconsideration becomes the Examiner's final recommendation. The Examiner's final recommendation will be considered by the Sultan City Council in accordance with the procedures of SMC 2.26.120(D) and Title 16 SMC. Please contact the Department of Community Development for information regarding the scheduling of Council consideration of this Recommendation. Please have the applicant's name and City file number available when you contact the city.

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."

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RECOMMENDED CONDITIONS OF APPROVAL
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This Variance is subject to compliance with all applicable provisions, requirements, and standards of the Sultan Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. This Variance is limited to relaxation of the front setback to zero feet for construction of a single-family residence on Lot 2 in the *Replat of Dyer Addition*; PROVIDED, that no part of any building constructed on said Lot 2 may extend over the plane of the south edge of the Dyer Road right-of-way line. No other Variance is either expressed or implied herein.
2. No parking shall be allowed between the paved edge of Dyer Road and the front property line.