

Market Place Properties, LLC

RESPONSES TO CRITERIA FOR APPROVAL OF VARIANCE REQUEST

A variance is being requested from the following code section: MICC 19.02.020(C)(1)(a). Specifically, Owner is requesting a variance which would reduce the front yard setback from 20 feet to distances ranging between 15.55 feet to 17.82 feet as measured from the front of the new residence.¹

A. Strict enforcement of the code will create an unnecessary hardship:

The property is located at 9027 SE 60th Street (the Property), in a neighborhood zoned R-9.6. In preparation for obtaining a building permit, a survey was performed and used as the basis for the building permit site plan submitted to the City for construction of a new single-family residence at the Property.² The City reviewed and approved the site plan and issued building permit 2001-170 to the Owner. The surveyor then staked off the foundation forms for the new residence to comply with the 20-foot front yard setback according to the permitted and approved plan set.³

After the foundation was poured and the residence fully framed out, an error was discovered in the survey and the mapped location of the site features. Specifically, the survey depicted rear and front yard fence lines as being located approximately 5 feet south of the rear and front Property lines. A recent forensic survey confirms the fence lines are located along the Property lines. The erroneously mapped location of the fence lines infected the original staking of the corners of the Property and later staking of the foundation forms. As a result of the error, the foundation of the Property was staked in a location which encroached into the front yard setback by approximately 3-4 feet.⁴ The surveyor acknowledged the error, but not until many months after the mistake was made.⁵

Strict enforcement of the 20-foot front yard setback would prevent completion of a single-family residence pursuant to the building permit issued by the City. Such a result would impose an oppressive financial burden on the Owner and negate the financial viability of the residential project. The project is otherwise fully compliant with applicable zoning, side yard setbacks, the Comprehensive Plan and other land use requirements, as acknowledged by the City when it issued building permit 2001-170.

¹ See, Bush, Roed & Hitchings, Inc. Survey and July 21, 2022 email memorandum, attached at *Exhibit A*.

² See, Site Surveying Inc. survey, attached as *Exhibit B*; Site Plan, attached as *Exhibit C*.

³ See, Certification re: Staking of Foundation, attached at *Exhibit D*.

⁴ See, Bush, Roed & Hitchings, Inc. Survey and July 21, 2022 email memorandum, attached at *Exhibit A*.

⁵ See, April 8, 2022 email attached at *Exhibit E*.

Under Washington law, issuance of the building permit constitutes a final land use decision by the City, regardless of the mistaken approval of a residence that encroaches on the front yard setback.⁶ The appropriate remedy to answer what is now known to be an erroneous building permit site plan is to grant the requested variance for modest relief from the 20-foot front yard setback.

B. Variance is minimum necessary to grant relief:

The proposed roughly 3 to 4-foot variance to the front yard setback represents at most a 20% reduction to the setback area. The requested reduction is the minimum which would allow the single-family home to remain as it is currently situated on the Property.

C. No use variance shall be allowed:

No use variance is being requested.

D. Special circumstances applicable to the lot:

The necessity of a variance is the result of a survey error which mistakenly mapped the location of site features on the Property. The error led to the inadvertent encroachment of the building in the front yard setback.

A court in North Carolina addressed a similar situation where, after issuance of a building permit for a duplex and commencement of construction, a second conflicting survey was discovered concerning the subject property.⁷ In conflict with the first survey, the second survey showed the duplex encroaching into the setback area. The owner sought a variance which was granted. The court found that the conflicting surveys were a special circumstances peculiar to the subject property and gave consideration to the fact that the owner relied in good faith on a survey from a licensed surveyor.

Likewise, the survey error here is unique to the Property and the physical improvements on the Property. This unusual circumstance was not the result of any deliberate act by the Owner, rather it arises from circumstances beyond the control of Owner and which are applicable only to this Property.

E. Not materially detrimental to public welfare or injurious to property or improvements in the area:

A small variance to the front yard setback will have no impact to the public welfare or surrounding properties. The 3 to 4-foot reduction will be imperceptible to the

⁶ See, *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002) (setting out the principle that even illegal land use decisions will stand if not timely challenged).

⁷ See, *Turik v. Town of Surf City*, 182 N.C. App. 427, 642 S.E.2d 251 (2007), attached at **Exhibit F**.

neighboring property owners and will be of no consequence to any future development on neighboring properties. Likewise, full use of the SE 60th Street right of way will still be available to the public and to the fire department and other emergency responders. A slight reduction in the front yard setback will not hinder access to the Property during emergency events.

F. Will not alter character of neighborhood nor impair use or development of adjacent property:

See response to Criterion E.

G. Variance is consistent with policies and provisions of Comprehensive Plan and Development Code:

Granting the requested variance will allow Owner to finish construction of a single-family residence on the property. Construction of a single-family residence furthers Comprehensive Plan policies encouraging preservation of a low density, single family residential community on Mercer Island. *See*, Land Use Issue (1); Land Use Goal 15; Housing Element Policy 1.4.

Additionally, allowing a reduction in the front yard setback and completion of a single-family residence is consistent with the R-9.6 use designation of the property under the Development Code.

H. Basis for request is not direct result of past action by current or prior property owner:

The need for the requested variance arose as the direct result of an error by a surveyor. The Owner had no role in performing the survey or marking the boundary line of the Property and the foundation forms. These acts were solely done by the surveyor. The hardship was not created by any deliberate act of the Owner.