

**BEFORE the HEARING EXAMINER for the  
CITY of MERCER ISLAND**

**DECISION**

FILE NUMBER: VAR22-001

APPLICANT: <sup>1</sup> Market Place Properties, LLC  
C/o Josh Thurman  
2212 Queen Anne Avenue N, #273  
Seattle, WA 98109

TYPE OF CASE: Variance from the front setback requirement of MICC  
19.02.020(C)(1)(a)

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to conditions

DATE OF DECISION: December 27, 2022

**INTRODUCTION <sup>2</sup>**

Market Place Properties, LLC, C/o Josh Thurman (“MPP”) seeks a Variance from the provisions of MICC 19.02.020(C)(1)(a) to reduce the front setback of three façade segments of a single-family residence under construction from a minimum of 20 feet to averages of about 17.27, 16.64, and 17.77 feet.

MPP filed the Variance application on September 6, 2022. (Exhibits 1, PDF 2; 2 <sup>3</sup>) The Mercer Island Department of Community Planning & Development (“CP&D”) deemed the application complete on September 13, 2022. (Exhibit 3)

The subject property is located at 9027 SE 60<sup>th</sup> Street. It is Lot 2 in Block 2 of the plat of *Timberland No. 4* (“Lot 2”). Its Assessor’s Parcel Number is 8650900030. (Exhibits 1, PDF 1; 14)

The Mercer Island Hearing Examiner (“Examiner”) viewed the subject property via Google Earth: Overhead imagery dated June 21, 2021; Street View imagery dated July, 2018.

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<sup>1</sup> Applicant’s mailing address taken from Exhibit 2, the variance application.

<sup>2</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>3</sup> 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. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Examiner held a hybrid predecision open record hearing pursuant to MICC 3.40.060 on December 14, 2022: In-person participation was available at the City Hall; remote participation was available through the “Zoom” platform. The City gave notice of the hearing as required by the MICC. (Exhibit 12)

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

- Exhibits 1 - 12: As enumerated in Exhibit 1 at PDF 8
- Exhibit 13: James Harper resume
- Exhibit 14: Survey comparisons
- Exhibit 15: Bush, Roed, & Hitchings, Inc. survey details
- Exhibits 16 - 20: Site photographs taken by CP&D staff

The action taken herein and the requirements, limitations and/or conditions imposed by this decision 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 pursuant to applicable law and policy.

### FINDINGS OF FACT

1. This is an “after-the-fact” variance application. Lot 2 is in an area zoned R-9.6. (Exhibit 1, PDF 1) The required minimum front setback in the R-9.6 zone is 20 feet. [MICC 19.02.020(C)(1)(a)] The need for a front setback variance was not discovered until the residence was nearly complete. (See Findings of Fact 3 - 5, below.) “After-the-fact” variance applications are not common, but neither are they unheard of. This particular “after-the-fact” variance application is unusual because of the circumstances which give rise to it.

CP&D recommends that the Examiner grant the requested variance subject to two essentially standard conditions. (Exhibit 1) Three written comments were received and entered into the record: The abutting neighbor to the east supports the application (Exhibit 5.1); two other commenters oppose approval, essentially on the ground that the City should not solve problems created by professionals in the development of property (Exhibits 5.2; 5.3). No public testimony was presented during the open record, predecision hearing.

Given that background, the Examiner will focus this Decision on the two variance criteria that are at the heart of the matter [MICC 19.06.110(B)(2)(a) and (2)(d)] and rely on MPP’s evidence and CP&D’s analysis for the remaining six criteria [MICC 19.06.110(B)(2)(b), (c), and (e) – (h)]. (See Exhibits 1; 6.1; 6.2; 8 – 10; and testimony) Subsections 19.06.110(B)(2)(a) and (2)(d) MICC read as follows:

- (a) The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an ‘unnecessary hardship’ is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot;

...

(d) There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;

2. Lot 2 is a nearly square parcel having about 105 feet of frontage on the south side of the SE 60<sup>th</sup> Street right-of-way and a north-south depth of about 107 feet. Lot 2 is relatively flat with a treed perimeter. Until MPP's project began, a single-story residence was located more or less on the north half of the lot. The lot is enclosed with a perimeter fence. Lot 2 is served by public water and sewer services. (Exhibits 9, PDF 8 & 9; 11, PDF 6; 17; 20; and Official notice of Google Earth imagery)
3. The need/justification for the requested variance was caused by an error or errors made by one or more licensed land surveyors, whose work both MPP and CP&D relied upon. Some background is needed to put that error (or errors) into context.

Lot 2 is the central of five lots situated on the south side of SE 60<sup>th</sup> Street between 90<sup>th</sup> and 92<sup>nd</sup> Avenues SE. All five of those lots are within the *Timberland No. 4* subdivision; the westerly lot is in Block 4; the remaining four lots are within Block 2. *Timberland No. 4* was developed in or around the 1950s. SE 60<sup>th</sup> Street extends easterly from Island Crest Way on the west to terminate in a cul-de-sac approximately 265 feet east of 92<sup>nd</sup> Avenue SE. The distance between Island Crest Way and the center point of the cul-de-sac bulb is about 865 feet. There are only two survey monuments<sup>4</sup> in that entire distance: One at the intersection of the Island Crest Way and SE 60<sup>th</sup> Street centerlines, and one aligned with and just north of the cul-de-sac radius point. (Exhibit 14; and testimony)

SE 60<sup>th</sup> Street appears to the naked eye to be a straight street. However, the street's bearing<sup>5</sup> changes ("breaks") at the dividing line between Blocks 2 and 4: The SE 60<sup>th</sup> Street centerline angles slightly to the south of east from Island Crest Way to the bearing break and then angles slightly to the north of east from that point to the end of the cul-de-sac. If a straight line is drawn from the Island Crest Way monument to the cul-de-sac monument, that line will be about five feet north of the actual platted centerline as it passes Lot 2. (Exhibit 14; and testimony)

An analogous situation exists with SE 61<sup>st</sup> Street to the south (and may exist with the other east-west streets within *Timberland No. 4*). (Exhibit 14)

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<sup>4</sup> A "survey monument" in the context of a public street system is a permanent marker placed beneath the surface of a street and protected by what appears from the surface to be a miniature manhole cover. Monuments are typically placed where the centerlines of intersecting streets cross, where a street changes direction (a "bearing break"), where a curve begins ("radius point"), and where a curve ends ("point of tangency"). [Official notice]

<sup>5</sup> The "bearing" is the direction of a straight street segment expressed in degrees, minutes, and seconds of a compass bearing. Although bearings could be denoted on the basis of the 360 degrees into which a circle is commonly divided (with north being either 0° or 360°), surveyors commonly divide the circle into quarters and express bearings as so many degrees east or west of north or south. [Official notice]

4. At some time in the past, Lot 8 in Block 2 of *Timberland No. 4*, kitty-corner to the southwest of Lot 2, was surveyed by a licensed land surveyor who apparently was not aware of the bearing break in the east-west streets between Blocks 2 and 4. As a result, that surveyor (“Goldsmith”) marked the corners of that lot about five feet north of where they should have been. (Exhibit 15; and testimony)
5. Before beginning its work on Lot 2, MPP retained Site Surveying, Inc. (“Site”) to survey Lot 2 and mark its corners. Site made the same error as did Goldsmith and/or relied on Goldsmith’s work. As a result, Site located Lot 2’s corners about five feet north of their platted location. Site then provided a site plan to MPP which it and its architect relied on in preparing plans to demolish the house on Lot 2 and replace it with a new house. The plans showed that all segments of the front, north wall of the new house would be more than 20 feet south of the SE 60<sup>th</sup> Street right-of-way line, thus easily complying with the required 20-foot front setback. CP&D, relying on Site’s survey and the architect’s plans, issued a building permit to MPP for construction of a new residence. Site then set the corners for the new foundation, relying on its prior survey work. It was not until the foundation had been poured, the residence had been framed, roofed, and sided, and electrical and mechanical systems had been roughed in that the survey error was discovered. MPP promptly filed this variance application to resolve the situation. (Exhibits 9, PDF 6; 11; and testimony)
6. The north façade of the new residence has five modulations. The house is not perfectly parallel to the SE 60<sup>th</sup> Street right-of-way. The setback of each façade segment increases slightly from west to east. (Exhibit 15)

The western-most segment varies from 17.18 to 17.36 feet south of the SE 60<sup>th</sup> Street right-of-way; its average setback is 17.27 feet. That part of the house contains a powder room and a bathroom, both 6 feet deep, behind which is a 12-foot wide bedroom. (Exhibits 9, PDF 15 & 17; 15)

The next two segments have setbacks greater than 20 feet; the Examiner has not calculated their average setback. (Exhibit 15)

The fourth segment varies from 15.55 to 15.72 feet south of the SE 60<sup>th</sup> Street right-of-way; its average setback is 15.64 feet. That segment houses two of the garage’s three vehicle bays. (Exhibits 9, PDF 15 & 17; 15)

The final, fifth segment varies from 17.77 to 18.82 feet south of the SE 60<sup>th</sup> Street right-of-way; its average setback is 17.77 feet. That segment houses the garage’s third vehicle bay. (Exhibits 9, PDF 15 & 17; 15)

Thus, the minimum requested front setback is 15.55 feet (at the northwest corner of the garage) and the maximum proposed setback exceeds the required 20 feet. The average setback of the three facade segments not meeting the code-required 20 foot setback is 16.89 feet. (Calculated from Exhibit 15)

7. The western segment of the north façade would have to be moved south an average of 2.73 feet to comply with the code. That shift would shrink the powder room and bathroom to a width of about 3

feet, realistically unworkable. If those rooms were kept at 6 feet wide, the bedroom would shrink to about 9 feet wide. (Exhibit 9, PDF 15 & 17)

The two-bay portion of the garage would have to be moved south an average of 4.36 feet to comply with the code. That portion of the garage has a usable depth of about 19 feet. A garage with a depth of less than 15 feet would be practically unusable. If its south wall were pushed back to compensate, it would take out about 4 feet of the kitchen. (Exhibit 9, PDF 15 & 17)

Finally, the third bay of the garage would have to be moved south an average of 2.23 feet to comply with the code, reducing that bay's usable depth to about 17 feet. Compensation for that loss of depth would essentially eliminate a mud room access into the residence. (Exhibit 9, PDF 15 & 17)

8. The south edge of the SE 60<sup>th</sup> Street pavement is about 20 feet north of the right-of-way line (which is the north property line). (Exhibit 9, PDF 9) Since the new garage facades are an average of 15.64 and 17.77 feet south of the right-of-way line, there is more than 30 feet between the garage facades and the edge of the pavement.
9. Variance applications such as the current application are categorically exempt from the threshold determination requirements of the State Environmental Policy Act ("SEPA"). (Exhibit 1, PDF 3)
10. The requested variance is supported by Robert Farrell, the abutting resident to the east. (Exhibit 5.1) The requested variance is opposed by Barbara Veldee ("Veldee"), address not provided, and by Tony & Missy Johnson ("Johnson") of 9031 SE 59<sup>th</sup> Street. Both assert that the criteria for approval of a variance are not all met.

Veldee asserts that the request fails to meet variance criteria (2)(a), (2)(d) – (2)(f), and (2)(h). (Exhibit 5.2)

Johnson asserts that MPP created its own problem which it should resolve without approval of a variance by the City. "Although I am empathetic to the situation these folks have created for themselves, it is not incumbent on the community to excuse such shoddy work." (Exhibit 5.3)

11. MPP asserts that all eight variance criteria have been met. (Exhibits 6.1; 6.2; 8; 10)
12. CP&D also concludes that the request complies with applicable criteria. (Exhibit 1)
13. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK <sup>6</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

A Variances is a Type IV application. The Examiner conducts an open record hearing and renders a final decision on Type IV applications which is subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Tables A and B; MICC 19.15.140; Chapter 3.40 MICC]

The Examiner may “1. Approve; 2. Conditionally approve; 3. Continue the hearing; 4. Remand the application to staff; or 5. Deny the application.” [MICC 19.15.140(C)]

### Review Criteria

The review criteria for Variances are set forth at MICC 19.06.110(B)(2)(a) – (h):

- a. The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an ‘unnecessary hardship’ is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot;
- b. The variance is the minimum necessary to grant relief to the property owner;
- c. No use variance shall be allowed;
- d. There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;
- e. The 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 property is situated;
- f. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;
- g. The variance is consistent with the policies and provisions of the comprehensive plan and the development code;

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<sup>6</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

- h. The basis for requesting the variance is not the direct result of a past action by the current or prior property owner;

### Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)]

Since a Variance application is not listed in the first sentence of that paragraph, it does not enjoy any vested rights.

### Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.07.140(B); MICC 19.15.060(A)]

### 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 OF LAW**

1. The facts in evidence and the analysis thereof contained in Exhibits 1 and 8 regarding compliance with variance criteria MICC 19.06.110(B)(2)(b), (2)(c) and (2)(e) – (2)(h) are quite compelling. Criterion (2)(b): Allowing the residence to be completed in its present configuration is the minimum setback relief that would afford any practical relief to MPP; Criterion (2)(c): This is not a use variance by definition; Criterion (2)(e): No evidence of any kind exists in the record regarding an adverse impact to the neighborhood from approval of the variance. There will be plenty of length to safely park vehicles in the driveway without impacting the SE 60<sup>th</sup> Street travel lanes; Criterion (2)(f): No evidence of any kind exists in the record regarding an adverse impact to the neighborhood from approval of the variance; Criterion (2)(g): CP&D has enumerated many comprehensive plan policies which are supportive of approval; and Criterion (2)(h): MPP did not create the situation giving rise to the need for the variance. The need for “the variance is not the direct result of”

anything MPP did. The work of licensed professional surveyors was relied upon by MPP and CP&D to the ultimate detriment of MPP.

2. MPP submitted a copy of a North Carolina appellate court case [*Turik v. Town of Surf City*, 182 N.C. App. 427 (North Carolina Court of Appeals, 2007)] supporting its argument that economic factors may be taken into consideration in determining whether an “unnecessary hardship” exists. The facts in *Turik* are fundamentally similar to those in MPP’s case: A building permit was issued based upon a survey submitted by a licensed land surveyor, construction began, and, while construction was on-going, a discrepancy in the survey was discovered. The appellate court upheld the Town’s approval of a setback variance, based in part on economic factors as well as other considerations: The relief requested was relatively little; approval of the variance would cause no harm to adjoining properties; the applicant followed all required steps in obtaining the building permit; the need for the variance was not the result of the applicant’s actions. (Exhibit 9, PDF 36 - 49 <sup>7</sup>)

The Examiner has found no Washington appellate court cases addressing consideration of economic factors in the context of zoning variances. The Washington Supreme Court, in a case involving a facial challenge to the legality of certain ordinances enacted by Seattle, said:

Economic hardship cannot usually be urged as a reason for the invalidity of an otherwise valid statute or ordinance enacted under the police power. *Wiegardt v. Brennan*, 192 Wash. 529, 73 P.2d 1330 (1937); *State v. Dexter*, 32 Wn.2d 551, 202 P.2d 906, 13 A.L.R.2d 1081 (1949).

[*Bitts, Inc. v. Seattle*, 86 Wn.2d 395, 544 P.2d 1242 (1976)] The *Bitts* court’s holding is not an absolute prohibition against consideration of economic factors: “usually” does not indicate an absolute condition.

3. If the requested variance were to be denied, MPP would be denied the ability to complete the nearly-completed house for which the City issued a valid permit. MPP would have to tear down everything that has been built to date and start over, or would have to cut back three of the five façade segments. MPP would have to reduce the depth of the garage stalls between 2.23 and 4.36 feet, leaving part of the garage only 14 feet deep. To make the garage usable, its south wall would have to be pushed into the kitchen some 4 feet. The two bathrooms in the westernmost façade would have to be cut back about 2.73 feet. Since they are only 6 feet deep to begin with, approximately 3 feet out of a 12-foot wide bedroom would have to be lost, leaving a dysfunctional bedroom. The cascade of resulting consequences would be extremely burdensome and would, in the Examiner’s opinion, ultimately render the project infeasible – solely because of a surveyor’s error that no one recognized until long after a legal building permit had been issued.

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<sup>7</sup> The case copy contained in Exhibit 9 suffers from missing text at every page break, apparently due to a computer formatting glitch in MPP’s source. In order to be able to read the complete text, the Examiner found a complete copy in a different on-line resource. [<https://caselaw.findlaw.com/nc-court-of-appeals/1341353.html>, last visited December 26, 2022] Since appellate court decisions are matters of public record, resort to an extra-record source to fill in the textual gaps is appropriate.



Criterion (2)(a) is met.

4. The list of “special circumstances” in Criterion (2)(d) is not exclusive. The code qualifies the list with the words “such as”. “Such as” means that the stated items are only examples; other factors may also exist and may be considered.

Size, shape, topography, or solar energy capture requirements are not special circumstances in this case. But “location of the lot” is a special circumstance because of the SE 60<sup>th</sup> Street break in bearing and the resulting surveying errors. While the error of assuming that the line between the two SE 60<sup>th</sup> Street monuments is a straight line could affect all the lots fronting on the portion of SE 60<sup>th</sup> Street between the two monuments, its effect is applicable to and greatest in the immediate vicinity of Lot 2.

Criterion (2)(d) is met.

5. Some might suggest that MPP’s solution should be to sue the surveyor for damages. A law suit would be expensive and lengthy. In the meantime, the house would be sitting in its nearly finished condition. Even if MPP were to prevail in such a suit, that victory would not change the location of the house. And whether the loser’s insurance would cover the enormous costs associated with trying to move or rebuild the house seems debatable. Forcing a private lawsuit seems like a remedy devoid of a solution.
6. Some have expressed concern about adverse precedent from approval of this variance. First, no variance decision sets precedent for any subsequent variance application. Every variance application is decided on its own merits based upon the applicable law and the specific facts of the case.

Second, Hearing Examiner decisions do not establish legal precedent in any event. Legal precedent is not present until the Court of Appeals level of judicial review.

Notwithstanding the above, the undersigned has been known to state that if two applications are presented to an examiner that have identical fact and legal patterns, it would not be unreasonable to expect that the same examiner would decide the two cases similarly. CP&D is now well aware of the bearing break and historic surveying errors associated therewith. Those errors affect many lots in *Timberland* to one extent or another. But now that the City is aware of the situation, no basis exists to grant any future variances based on the surveying error.

7. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment.

The Examiner finds and concludes that the extent of the variance granted herein must be limited to the current location of the new residence and its northern facades. This variance should not extend to any future additions or alterations to the residence nor to any future structures on Lot 2. Therefore,

the Examiner will add a condition identifying Exhibit 15 as the approved site plan showing the limits of the front setback variance as approved.

The “(if the proposed variance is granted)” parenthetical clause in Recommended Condition 2 is no longer necessary and will be omitted.

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

### DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner’s site view, the Examiner **GRANTS** the requested Variance **SUBJECT TO THE ATTACHED CONDITIONS**.

Decision issued December 27, 2022.

*John E. Galt*

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John E. Galt  
Hearing Examiner

### HEARING PARTICIPANTS <sup>8</sup>

Alan Wallace, unsworn attorney  
James Harper  
Ryan Harriman

Abigail Stagers, unsworn attorney  
Joshua Thurman  
Bio Park, unsworn attorney

### NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

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<sup>8</sup> The official Parties of Record register is maintained by the City’s Hearing Clerk.

### **NOTICE of RIGHT of APPEAL**

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

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.”

### **CONDITIONS OF APPROVAL VAR22-001 Market Place Properties, LLC**

This Variance is subject to compliance with all applicable provisions, requirements, and standards of the Mercer Island City Code, standards adopted pursuant thereto, and the following special conditions:

1. The Variance granted hereby is strictly limited to relief from the front setback requirements of MICC 19.02.020(C)(1)(a) for the house currently under construction on Lot 2 of Block 2 of *Timberland No. 4* as depicted on Exhibit 15. No other variance is either expressed or implied.
2. The Applicant shall record the survey contained in Exhibit 9, page 2, illustrating the encroachment onto the required front yard setback with the King County Recorder’s Office.
3. The Applicant shall record a notice on the subject property’s title with the King County Recorder’s Office. The notice on title must contain the Hearing Examiner’s decision.