

**BEFORE the HEARING EXAMINER for the
CITY of LYNNWOOD**

DECISION

FILE NUMBER: VAR-009791-2021

APPLICANT: Kenneth R. Packard
5715 212th Street SW
Lynnwood, WA 98036

TYPE OF CASE: Zoning Variance to reduce the required minimum lot width from 56 feet to 31 feet in order to build a single-family residence on a nonconforming lot

STAFF RECOMMENDATION: Approve

EXAMINER DECISION: GRANT subject to condition

DATE OF DECISION: September 20, 2021

INTRODUCTION ¹

Kenneth R. Packard (“Packard”) seeks a Variance from Section 21.12.300 Lynnwood Municipal Code (“LMC”) to reduce the required minimum lot width from 56 feet to 31 feet in order to build a single-family residence on a nonconforming lot. (This application is referred to in the record as “Packard Variance 2.”)

Packard filed the Variance application on April 16, 2021. (Exhibits 1 - 3 ²) The Lynnwood Development and Business Services Department (“Planning”) deemed the application to be complete on May 6, 2021. (Testimony) Planning issued a Notice of Application on May 12, 2021. (Exhibit 12)

The subject property is one of three contiguous lots (Lots 19, 20, and 21) located on the southwest shore of Hall Lake. The middle lot is addressed as 5715 212th Street SW; the other two lots have historically been used with the middle lot and do not currently have separate assigned addresses. The subject property’s Assessor’s Parcel Number is 27042100308500 (aka “Lot 20”). (Exhibit 1, PDF 1)

The Lynnwood Hearing Examiner (“Examiner”) is generally familiar with the subject area and viewed the subject property via Google Earth on September 15, 2021.

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² 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 an open record hearing on September 15, 2021. The hearing was conducted remotely using the “Zoom” platform due to assembly restrictions attendant to the current COVID-19 pandemic. Planning gave notice of the hearing as required by the LMC. (Exhibit 13) No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.

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

Exhibits 1 - 14: As enumerated in Exhibit 1, the Planning Staff Report

Section 1.35.025 LMC requires that decisions on project permit applications be issued within 120 calendar days after the application is found to be complete; subsection 1.35.025(A) LMC lists four exclusions from the 120-day count, one of which is an extension mutually agreed upon by Planning and the applicant. The open record hearing was held beyond the 120th day. (Testimony) Packard agreed to waive the timeline. (Testimony)

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. Packard owns three contiguous pie- or wedge-shaped lots (from west to east: Lots 19, 20, and 21) within the unrecorded *Halls Lake Water Front Addition (Halls Lake)* plat, located between Hall Lake’s southwest shore and 212th Street SW. ³ Historically there has been but one house on the three lots, more or less on Lot 20. (Exhibit 11, PDF 40 & 41) That house has been damaged by fire. (Exhibit 11, PDF 11, § 5.1) Packard now desires to demolish that damaged house and construct a single-family residence on each of the three lots.
2. Lots 19, 20, and 21 are three of 51 lots created in February, 1937, by the *Halls Lake* unrecorded plat. (Exhibit 9) Before 1971 Washington law did not require plats to be recorded. As the plat is unrecorded, the lots are legally described by metes and bounds, but are usually locally referred to simply as *Halls Lake* Lots 19, 20, and 21. (Exhibit 1, PDF 3)
3. The *Halls Lake* lots are in a part of the City which is zoned RS-8. (Exhibit 1, PDF 1) Single-family dwellings are a permitted use in the RS-8 zone. [LMC 21.42.100: Table 21.42.01] The RS-8 zone requires that lots contain a minimum area of 8,400 square feet (“SF”) and have a minimum width of

³ Documents are inconsistent in the spelling of the lake’s name: Some say “Hall,” some say “Halls,” some say “Hall’s.” The earliest document in the record (a copy of a 1937 unrecorded plat) uses “Halls.” However, more recent documents seem to have coalesced on “Hall.” In prior cases involving the lake, the Examiner has used the early spelling: “Halls.” The Examiner now elects to use the more modern “Hall” instead, except when referring to the 1937 plat.

70 feet. [LMC 21.42.200, Table 21.42.02] The LMC defines “lot area” as “ the total horizontal area within the boundary lines of a lot.” [LMC 21.02.485(A)] The LMC defines “lot width” as “the horizontal distance between the lot side lines measured at right angles to the line comprising the depth of the lot at a point midway between the lot front line and the lot rear line.” [LMC 21.02.485(C)] The *Halls Lake* lots extend into the middle of Hall Lake. (Exhibit 1, PDF 3) Lot 20 encompasses approximately 8,411 SF, all but about 5,424 SF of which is below the ordinary high water mark of the lake. (Exhibits 1, PDF 3; 6) The lot width of Lot 20 is about 31 feet. (Exhibits 1, PDF 2; 6)

4. Lot 20 is nonconforming as to lot width. Section 21.12.300 LMC allows nonconforming lots to be developed if the lot was legally created before the incorporation of Lynnwood and if lot width is “at least 80 percent of the current minimum standards of the respective zone.” [LMC 21.12.300(B)]

The City of Lynnwood was incorporated in 1959, some 22 years after the *Halls Lake* plat was created. [Official notice] Therefore, Lot 20 complies with the first criterion for development of a nonconforming lot. Eighty percent (80%) of 70 feet is 56 feet. Therefore, Lot 20 does not comply with the second criterion for development of a nonconforming lot.

5. Packard seeks relief from the minimum lot width requirement through this Variance.⁴ Packard does not seek relief from any other development standards. Packard has submitted plans showing that a single-family residence can be built on Lot 20 in compliance with other applicable standards. (Exhibits 7; 8)
6. The City Attorney's office opined in or around 2011 that under current land use law, the City must allow development of each of the nonconforming lots individually. (In other words, the City cannot force an owner of contiguous lots to combine them until they meet current minimum lot area requirements.) [Official notice, case 2011VAR0001, p. 4, Finding of Fact 6, Decision issued October 17, 2011]
7. Similar variances have been granted to other nonconforming lots around Hall Lake: 2006VAR0001, 2006VAR0002, 2011VAR0001, and 2011VAR0002. [Official notice]
8. The review criteria for Variances are set forth at LMC 21.26.350. The eight specific criteria and the facts relating to each are as follows:
 - A. The variance for the subject property will not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and the zone in which the property is located; and

Facts: Lynnwood’s Criterion A is identical to Bellevue’s Criterion A (as it existed in the 1990s) except for one word: Bellevue used the word “district” instead of “zone.” Bellevue’s

⁴ Companion applications for Lots 19 (VAR-009789-2021) and 21 (VAR-009792-2021) were heard concurrently with this application and are the subject of separate concurrently issued Decisions.

Criterion A was the subject of adjudication by the Washington State Court of Appeals. [*Hoberg v. City of Bellevue*, 76 Wn. App. 357, 884 P.2d 1339 (1994)] Decisions of the Court of Appeals establish legal precedent, especially where the ordinance language presently at issue is identical in all substantive respects with the ordinance language ruled on by the Court. The *Hoberg* court ruled as follows regarding Bellevue's version of Criterion A:

Criterion A restricts the granting of use variances. ... Relief from setback is a classic example of an area variance, as opposed to a use variance. An area variance is one which does not change the specific land use but provides relief from dimensional requirements such as setback, yard size, lot coverage, frontage or height restrictions.

...

In short, *Hoberg*'s application did not propose a use variance. The Board [of Adjustment] erred in denying *Hoberg*'s application as contrary to Criterion A.

[*Hoberg*, at 360 and 361] Lynnwood's Criterion A must be interpreted in a similar fashion.

This is not a use variance request. Rather, it is a lot width variance request. Nothing in the variance would allow use of Lot 20 for any use not allowed on all RS-8 zoned properties in the City.

- B. The variance is necessary because of special circumstances relating to the 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 land use zone in which the subject property is located; and

Facts: Under current Lynnwood subdivision regulations, a plat proposing lots of the size or shape of Lot 20 would not be approved. Lot 20 was approved, apparently for the purpose of residential development, long before the Lynnwood Subdivision Ordinance or even the City of Lynnwood existed. Most other single-family lots in Lynnwood in the RS-8 land use zone and in the vicinity can be developed with a single family residence.

- C. 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 subject property is located; and

Facts: Other than minimum lot width, Packard proposes to meet minimum requirements of the City of Lynnwood codes, the official City standards for public health, safety, and welfare. Packard's proposal was reviewed by the Lynnwood Fire Marshal and Public Works Department with respect to public safety. Neither expressed any concerns nor recommended any conditions. (Exhibit 1, PDF 13)

- D. The special circumstances of the subject property make the strict enforcement of the provisions of this code an unnecessary hardship to the property owner; and

Facts: If the lot width provision of LMC 21.42.200, even as modified by LMC 21.12.300, were strictly enforced, it would not be possible to develop Lot 20.

- E. The special circumstances of the subject property are not the result of the actions of the applicant or a predecessor in interest; and

Facts: Lot 20 was created in 1937 before the advent of modern subdivision design regulations. Packard has not re-subdivided or otherwise reconfigured the three contiguous lots he owns. However, Lynnwood was incorporated in 1959 and City zoning and subdivision regulations have changed multiple times since 1937, making Lot 20 nonconforming through no fault of Packard or previous owners. (Exhibit 1, PDF 13)

- F. The variance is the minimum necessary to fulfill the purpose of a variance and the need of the applicant; and

Facts: The minimum lot width required by LMC 21.42.200, as modified by LMC 21.12.300, is 56 feet. Lot 20 is 31 feet wide. Any lesser variance would leave the lot still undevelopable.

- G. The variance is consistent with the purpose and intent of the zoning code; and

Facts: The purpose of the Lynnwood Zoning Code, Title 21 LMC, is set forth at LMC 21.04.015(A):

A. General. This title (LMC Title 21, Zoning, also called the zoning code) provides regulations concerning the use of land and structures and the location, size, and bulk of structures for the purpose of avoiding or abating public nuisances. This title also intends to promote the protection and promotion of the quality of the natural environment and the health, safety, morals, and other aspects of the general welfare of present and future inhabitants of the city of Lynnwood in accordance with the comprehensive plan and state law, judicial decisions, and Central Puget Sound Growth Management Hearings Board decisions regarding land use regulations. To these ends, it is the intent of these regulations to implement the city of Lynnwood comprehensive plan and the future land use plan map.

These general purposes include the more specific purposes set forth elsewhere in this title.

Lot 20 is zoned RS-8, thus indicating that it is consistent with the intent of the zoning code to develop it with a single-family residence as proposed. The purpose of the single-family zone regulations is to provide for a range of housing densities and styles consistent with

contemporary building and living standards and to encourage infill single-family residential development. (Exhibit 1, PDF 14)

H. The variance is in accord with the comprehensive plan.

Facts: Lot 20 is designated Low Density Single-Family (SF-1) on the City's adopted Comprehensive Plan. (Exhibits 1; 14) Relevant Comprehensive Plan provisions are quoted in Exhibit 1 at pages 5 - 7.

9. Lynnwood's State Environmental Policy Act ("SEPA") Responsible Official issued a threshold Determination of Nonsignificance ("DNS") for Packard's three Variance applications on July 16, 2021. (Exhibit 10) The DNS was not appealed. (Exhibit 1, PDF 5, § VI)
10. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁵

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

Authority

A Variance is a Process I application which is subject to an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [LMC 1.35.100, .168, and .175]

Review Criteria

The review criteria for Variances at LMC 21.26.350 have been listed in Finding of Fact 8, above.

A "consistency determination" is also required for all "land use and development applications." [LMC 1.35.070] A variance is not *per se* a land use or development application; it is a request to relax development regulations to facilitate a subsequent land use or development application. The consistency determination does not apply to variance applications.

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)]

In 2014 the State Supreme Court flatly declared: "While it originated at common law, the vested rights doctrine is now statutory." [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)] The *Potala* court rejected a contention that the filing of a complete shoreline substantial

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development permit application vested development rights because no statutory provision established vested rights for shoreline permits. [*Supra*, at 196-206]

Variances are not the subject of any state vesting statute. If Sultan had a local vesting ordinance applicable to land use applications, the Examiner would be obliged to follow it as enacted. [*Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994); *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)] But the City has no such local ordinance. Thus, the Examiner must follow the most current case law.

Under the most current case law, there is no vesting for Variance applications because there is no statutory provision providing vesting for such applications.

Historically, appellate courts have never applied the vested rights doctrine to applications for variances or exceptions from adopted standards.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [LMC 1.35.155]

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 City Attorney's opinion addresses a legal concept which is commonly referred to as "takings". "Takings" jurisprudence can be quite complicated and nuanced, but, greatly simplified, appellate courts at both state and Federal levels have held that it is unconstitutional for government to so regulate private property as to render it unusable. That could be the case if Packard's three lot width variance applications were denied: Packard (or whoever owned Lots 19, 20, and 21) would not be able to use them for the purpose for which they were created and are zoned. The City Attorney has opined that requiring them to be combined in some fashion is not legally defensible.

The evidence in the record, summarized in the Findings of Fact, above, demonstrates compliance with the required criteria for issuance of the requested lot width variance. Not only is a "takings" analysis unnecessary, to the extent that it would amount to a constitutionality analysis it would be impermissible: Neither a Hearing Examiner nor a City Council have authority to rule on the constitutionality of a duly enacted ordinance. [*Exendine v. City of Sammamish*, 127 Wn. App. 574, 113 P.3d 494 (2005), rev. denied 156 Wn.2d 1018 (2006)]

2. The variance needs to be conditioned to clearly indicate that a lot width variance is being granted for Lot 20 as it exists today and that no further variances are being approved. Such a condition will be imposed.
3. 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** Packard Variance 2 **SUBJECT TO THE FOLLOWING CONDITION:**

A variance to Section 21.12.300(B) Lynnwood Municipal Code (LMC) is granted to Lot 20 of *Halls Lake Waterfront Addition* unrecorded plat to allow construction of a single-family residence on a nonconforming lot which has a lot width (31 feet) which is less than both the required minimum for the RS-8 zone in which it is located and the special provision for nonconforming lots. No other variance is either expressed or implied.

Decision issued September 20, 2021.

/s/ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁶

Kenneth R. Packard

Kirke Rappe

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Community Development Department a written request for reconsideration within seven calendar days following the issuance of this Decision in accordance with the procedures of LMC 1.35.168. Any 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. See LMC 1.35.168 for additional information and requirements regarding reconsideration.

⁶ The official Parties of Record register is maintained by the City's Hearing Clerk.

NOTICE of RIGHT of APPEAL

This Decision is final subject to the right of a party of record (See LMC 1.35.148.) with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of LMC 1.35.175. Any appeal must be filed within 21 days following the issuance of this Decision. See LMC 1.35.175 for additional information and requirements regarding judicial appeals.

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.”