

Variance Staff Report for Planning Commission Public Hearing Case File VAR 2022-01

Date: February 18, 2022

Case File: VAR 2022-01 6604 NE Logan Rd Street Side Setback

Applicant: 3 G's Construction, Inc.
PO Box 85
Salem, OR 97308

Property Owner: 3 G's Construction, Inc.
PO Box 85
Salem, OR 97308

Situs Address: 6604 NE Logan Rd

Location: Northeast corner NE Logan Rd/NE 66th St intersection

Tax Map and Lot: 06-11-34-AA-03200-00

Comprehensive Plan Designation: Single-Family Residential District (R-5)

Zoning District: Single-Family Residential, Roads End (R-1-RE) Zone

Site Size: 0.10 acre

Proposal: Vary required 16.38-foot street side setback to 10 feet

Surrounding Land Uses and Zones: North: Residential; R-1-RE
South: Residential; R-1-RE
East: Residential; R-1-RE
West: Residential; R-1-RE

Authority: Lincoln City Municipal Code (LCMC) 17.76.050.G states that Table 17.76.020-1 identifies the decision authority for each Type III application. Table 17.76.020-1 of LCMC Chapter 17.76 identifies a variance as a Type III application with the decision authority given to the Planning Commission.

Procedure: The Planning and Community Development Department mailed notice to the owners of all properties within 250 feet of the site on February 8, 2022. The *News Guard* published the public hearing notice on February 15, 2022.



Applicable LCMC Chapter 17.17 Single-Family Residential, Roads End (R-1-RE) Zone
Substantive LCMC Section 17.76.050 Type III Procedures
Criteria: LCMC Section 17.77.140 Variances

BACKGROUND

The subject property (site) is addressed as 6604 NE Logan Rd and contains a newly-constructed detached dwelling. The application for a structural (building) permit for the new construction was submitted on March 10, 2021. The review of the site plan by the former senior planner, David Mattison, took place on March 25, 2021, with subsequent approval. Public Works and Building staff completed their reviews and the permit was issued on April 28, 2021.

With the issued permit, the applicant proceeded to site preparation. This included clearing and grading, as well as setting the footings for the pouring of the foundation. The applicant requested the required setback inspection, which was subsequently performed on May 17, 2021, by David Mattison. David Mattison approved the setback inspection. Both the site plan and the setback inspection approved by David Mattison showed a street side setback of 10 feet, rather than the required 16.38 feet.

A citizen complaint was filed in January 2022 regarding the possible street side setback encroachment. The complaint was verified and a code violation case was created on January 20, 2022. A courtesy notice was issued to the property owner of the site requesting that, no later than January 30, 2022, one of three actions take place: remove all setback encroachments; apply for a zoning code text amendment to LCMC 17.17.070; or apply for a variance for the street side setback. The applicant chose to apply for a variance and subsequently submitted the required application and fee.

COMMENTS

On February 8, 2022, Fire Marshal Ulrich provided a comment that the requested variance has no conflict with OFC requirements.

On February 8, 2022, the director of Lincoln City Urban Renewal & Economic Development emailed that she has no comments.

On February 14, 2022, Patricia Hibler provided comments stating that the building of the house has impacted her view of the ocean and questioning the fairness of this variance request when she wasn't allowed to add a small deck to the street side of her house because it would have violated the setback. Staff notes that LCMC Title 17 has no requirements for view protection and impacts to views is not a criterion for approving or disapproving a variance.

ANALYSIS

17.08 Definitions

“Setback” means the minimum or maximum distance required between a specified object and another point. Typically, a setback refers to the minimum or maximum distance from a building or structure to a specified property line. “Street side setback” means the required distance from the street side property line and a specified object.

17.17.070 Lot requirements.

Lot requirements shall be as follows:

- D. The minimum front yard shall be 20 feet. Except that the minimum setbacks from Logan Road need not exceed the average setback of buildings on all lots within 100 feet of the lot on which the proposed building is to be located and that abut Logan Road.*

Finding: The average setback of buildings on all lots within 100 feet of the site and that abut Logan Rd calculates to 12.77 feet. Accordingly, the front setback for the site is 12.77 feet. All portions of the structure, including porches, stairs, decks, and balconies that are over 30 inches from the ground, must meet the 12.77-foot-front setback requirement. In this case, the front of the main wall of the house is set back 34.4 feet from the front property line, and the upper stairs and deck that are over 30 inches from the ground are set back 20 feet from the front property line. The front setback requirement is not only met, but is exceeded by 7.32 feet.

F. The minimum street side yard shall be 20 feet, except that it may be one foot less for each two feet of front yard setback over the minimum, but not to less than 10 feet.

Finding: The front setback for the site is 12.77 feet. The front of the main wall of the house is set back 34.4 feet from the front property line. However, the upper stairs and deck on the front of the house that are over 30 inches from the ground are only set back 20 feet from the front property line. Accordingly, the provided front setback is 7.32 feet over the minimum of that which is required (required 12.77 feet, provided 20 feet – 20-12.77 = 7.32).

The provided front setback is 20 feet. The required front setback is 12.77 feet. The distance over the minimum of 20 feet is determined by subtracting the minimum requirement (12.77 feet) from what has been provided (20 feet) to yield 7.32. That number is then divided by 2, which equals 3.62.

3.62 is then subtracted from the minimum street side setback of 20 feet to give the required street side setback for this site at 16.38 feet. The provided street side setback is 10 feet, which means that the house encroaches by 6.38 feet into the required street side setback.

17.77.140 Variance

C. Approval Criteria. To approve a variance, the planning commission shall make findings of fact, based on evidence provided, that all of the following circumstances exist:

- 1. Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity and result from lot size or shape legally existing prior to the date of the ordinance codified in this title, topography, or other circumstances over which the applicant has no control;*

Finding: This criterion requires evidence of an exceptional or extraordinary circumstance that applies to this site, which does not apply to other properties in the vicinity, over which the applicant has no control. The applicant feels this criterion is met with the extraordinary circumstance being the city's inaccurate review and approval of the site plan showing the 10-foot street side setback, followed by the city's inaccurate passing of the setback inspection, both over which the applicant has no control. The applicant's narrative specifically states the following:

“The extraordinary circumstance here is the fact that with a street side setback of 10 feet, the newly-constructed house on the property does not meet the street side setback requirement... The situation came about as a result of a cascade of mistakes on the part of the city... Before purchasing the property, on November 17th, I called and talked to James White in the planning department in a 13 minute phone call. Among the matters I spoke with him about, we specifically talked about setbacks. At that time he told me that the street side setback was 10 feet... Except for the misinformation about the street side setback he was very helpful and informative... As a part of the planning department review the reviewer, David Mattison, checked the setbacks, including the street side setback. The plans showed clearly that the proposed setback was 10 feet. The reviewer approved the plans as I submitted them with the 10-foot setback... When the forms were in place, as required I called the city for an inspection. One of the primary purposes of this inspection is to ensure that the house is being placed properly on the lot in accordance

with the approved plans and that the required setbacks are met. The planning department’s inspector, David Mattison, approved everything and the forms passed inspection. I then went ahead and poured the footings and built the house... This was a shock to me as I had asked specifically about setbacks, had passed the building plans review (including setbacks), and had passed the field inspection (also including setbacks). As a consequence I have a completed house that is not allowed to be occupied, and I am asking for a variance.”

The applicant’s narrative also states:

“As a side note, it is important to understand that this is not a case of claiming that because of the city’s repeated mistakes, the city is estopped from applying the ordinance’s setback requirement. Instead, this is a case where, yes, the setback requirement applies, but because of the extraordinary circumstance resulting from the city’s mistakes – the completed house that does not fully meet the setback requirements – the ordinance’s variance provisions allow me the necessary relief.”

The applicant has not provided any evidence of an exceptional or extraordinary circumstance which does not apply to the other properties in the R-1-RE zone or the vicinity **and** result from lot size or shape legally existing prior to the date of the ordinance codified. No evidence has been provided that the lot size or shape of the site is an exceptional or extraordinary circumstance. No evidence has been provided that the topography of the site is an exceptional or extraordinary circumstance. The applicant is relying on the “other circumstances over which the applicant has no control” portion of 17.77.140.C and is claiming the circumstance over which the applicant has no control is the city’s inaccurate approval of the site plan and subsequent inaccurate approval of the setback inspection. Staff concludes that the applicant has not provided evidence to support the existence of an exceptional or extraordinary circumstance that applies to the site; therefore, this criterion is not met.

2. *The variance is necessary for the preservation of a property right of the applicant which is substantially the same as owners of other property in the same zone or vicinity possess;*

Finding: The applicant states that “the property right involved here is the right to build and occupy a detached dwelling on the property” and that the “house has been built but cannot be occupied because the final inspection revealed that it does not meet the setback requirement” and that the “variance is needed so that the house may be occupied.”

Staff finds that a detached dwelling is an allowed use in the R-1-RE zone, per LCMC Chapter 17.17. This property right is enjoyed by all property owners in the R-1-RE zone. When a detached dwelling is constructed in accordance with the Oregon Residential Specialty Code (ORSC), occupancy of that dwelling is allowed. Again, this occupancy right is shared by all properties in the R-1-RE zone that meet the requirements of the ORSC. A building permit for a detached dwelling has been applied for and obtained. The construction of the dwelling is complete and is ready for the final building inspection by the building official. Provided the ORSC requirements are met and passed in the building official’s final building inspection, the building official will issue the certificate of occupancy. Setback violations are not grounds for denying issuance of a certificate of occupancy. Specifically, ORSC R105.4 states that the building official is authorized to prevent occupancy or use of a structure where in violation of this (referring to the ORSC) code by withholding or revoking a certificate of occupancy. However, setback requirements are not part of the ORSC; therefore, meeting or not meeting a setback requirement is irrelevant to the issuance of the certificate of occupancy. This criterion is not met.

3. *The variance should not be materially detrimental to the purposes of this title, or to property in the zone or vicinity in which the property is located, or otherwise conflict with the objectives of any city planning policy;*

Finding: The site is in the R-1-5 zone. The site is surrounded on all sides by properties also in the R-1-5 zone. Surrounding properties either already contain detached dwellings or are planned for the future construction of detached dwellings. The existing dwelling on the southeast corner of the NE Logan Rd/NE 66th St exceeds the required 20-foot street side setback at approximately 27'-1 ¾". However, houses at 1830 NE 66th St, 1918 NE 66th St, 6555 NE Neptune Dr, and 2030 NE 66th St do not meet the required 20-foot street side setback at 18'-10 ½", 16'-1 ¾", 14'-1/4", and 8'-8 ¼", respectively. Additionally, it appears that two existing houses don't meet the required 20-foot front setback at 19'-5 ¾" for 1923 NE 66th St and 16'-11 ½" for 2023 NE 66th St. Having one more house not meeting a required setback in amongst the 6 houses in the vicinity that also don't meet a required setback will not be materially detrimental to the vicinity. Staff also notes that the R-1-RE zone is the only residential zone in the city that requires a minimum 20-foot street side setback and a minimum 20-foot front setback. The R-1-5, R-1-7.5, and R-1-10 zones only require a minimum 5-foot street side and front setback for single-story dwellings and a minimum 7.5-foot street side and front setback for two- or three-story dwellings. Staff concludes that this circumstance for granting a variance exists.

4. *The variance requested is the minimum variance which would alleviate the hardship.*

Finding: The required street side setback in this case is 16.38 feet, and what has been provided in the completed house construction is 10 feet. The request is the minimum necessary to alleviate the street side setback encroachment by allowing a variance to the minimum requirement from 16.38 feet to 10 feet. The hardship is that, since the house is constructed, there are three options to alleviate the encroachment: 1) obtain a 6.38-foot variance; 2) obtain a text amendment to change the minimum street side setback requirement in the R-1-RE zone; or 3) remove the southernmost 6.38 feet of the house to meet the required 16.38-foot-minimum setback from street side property line. The applicant states: "The minimum necessary to alleviate this hardship is varying the street-side setback from 16.38 feet to 10 feet." Staff concludes that this criterion is met.

RECOMMENDATION

Staff submits that the evidence presented in the submitted application materials, as concluded in the findings in this report, is not sufficient to show that every criterion is being met, and recommends denial of the request.