

**BEFORE THE CITY COUNCIL OF THE  
CITY OF LINCOLN CITY, LINCOLN COUNTY, OREGON**

**[JUNE 27, 2022]**

<b>In the Matter of an Appeal of the Decision of</b>	<b>)</b>	
<b>The City of Lincoln City Planning Commission's)</b>		
<b>Denial of an Application for a Variance to the</b>	<b>)</b>	<b>FINAL ORDER</b>
<b>Street-Side setback in the R-1-RE zone</b>	<b>)</b>	<b>2022-01</b>
<b>File: APP 2022-01. 3 G's Construction Inc.</b>	<b>)</b>	

**I. NATURE OF PROCEEDINGS**

This matter came before the Lincoln City City Council for a *de novo* appeal hearing. The appeal was from a decision of the Lincoln City Planning Commission in its case file VAR 2022-01, denying the requested 6.38 foot variance to the street side setback in the R-1-Re zone.

A citizen complaint was filed in January 2022 regarding a 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. The variance request was set up as file number VAR 2022-01.

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. The required public hearing with the Planning Commission was held on March 15, 2022. Deliberations and the decision to deny the variance request was made on April 5, 2022. The written final order was adopted on April 19, 2022. The notice of the decision was mailed to the parties with standing with an appeal period ending on May 5, 2022, at 5:00 PM. The complete record of VAR 2022-01 is on file in the Planning and Community Development Department and is available for review, paper copies at reasonable cost, or electronic copies at no cost upon request.

The appeal was received on May 5, 2022. The application was deemed complete on May 5, 2022. On May 23, 2022, pursuant to LCMC 17.76.050.E, the Planning and Community Development Department mailed a notice of public hearing to property owners within 250 feet of the subject property. The *News Guard* published the public hearing notice on May 31, 2022.

On June 13, 2022, the Council conducted a public appeal hearing and considered the oral and written testimony presented, the staff report, and the record as a whole. There was no challenges to the Council's jurisdiction or the participation of any member. The Council closed the hearing and closed the record. Appellant waived final argument. The Council deliberated and ultimately denied the variance, upholding the Planning Commission's decision. The Council directed staff to return with written findings for adoption of the final decision.

Based upon the evidence in the whole record, the City Council makes the following findings of fact and conclusions of law:

## II. FINDINGS OF FACT

1) The Nature of Proceedings set forth above are true and correct and are incorporated herein by this reference.

2) The subject of File # APP 2022-01 is a decision of the Planning Commission denying a Variance to the Street Side Setback in the R-1-RE Zone.

3) The subject property is located at 6604 NE Logan Road in Lincoln City. It is located at the northeast corner of intersection of NE Logan Road and NE 66<sup>th</sup> Street. The property is identified as Tax Map and Lot: 06-11-34-AA-03200-00. The property is in the R-1-RE Residential Roads End zone (Chapter 17.17).

4) The Applicant/Owner for File APP 2022-01 is 3 G's Construction, Inc. 14980 74<sup>th</sup> Ave. SE Salem, Oregon 97317. Roger Griswold, President.

5) As regards the side yard setbacks, the Single Family Residential Roads End (R-1-RE) Zoning District, LCMC 17.17.070 (Lot Requirements), Paragraphs E. and F read, in plain english, as follows (emphasis added):

E. The minimum interior side yard shall be seven and one-half feet for single-story buildings and 10 feet for buildings with more than one story.

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.

6) 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.

7) 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.

8) In response to questions from Council, the applicant acknowledged that he retained land use professionals (drafter and engineer) to create the site plan.

#### IV. FINDINGS APPLYING APPLICABLE CODE CRITERIA

9) The Council finds and determines that the applicable criteria for this decision is contained in the Lincoln City Municipal Code, including Chapter 17.17. (*R-1-RE Zoning District*), specifically 17.17.070 (*Lot Requirements*), 17.08 (*Definitions*), and Chapter 17.77.140 (*Variance*), including specifically the approval criteria in Paragraph C.

10) The Council further finds and determines that it has received all information necessary to make a decision based on the staff reports, public hearing testimony, and the evidence in the whole record including the exhibits received.

11) The Council incorporates by this reference all findings and conclusions and exhibits as set forth in the Planning Director's Staff Report(s) in the record of the above referenced File(s) APP 2022-01 and VAR 2022-01. The Council finds and determines that the Planning Director's report(s) and analyses are complete and accurate and support the conclusion that the variance must be denied.

12). LCMC 17.17.070 (Lot Requirements), Paragraphs E and F provide:

E. The minimum interior side yard shall be seven and one-half feet for single-story buildings and 10 feet for buildings with more than one story.

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.

The Council finds and determines that the Code clearly provides for different setbacks depending upon whether the setback is an interior side yard or a street side setback. Interior side yard setbacks are 10 feet while the street side setback is 20 feet with a formula for possible reduction based on the front setback.

13). Applying the formula for street side yard setback reduction in the instant case, the City Council finds and determines that the street side setback for the subject property is 16.38 feet, as follows:

LCMC 17.17.070 (Lot Requirements), Paragraph D (Front setback) provides:

- 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.

The average setback of buildings on all lots within 100 feet of the subject site and that abut Logan Rd calculates to 12.77 feet. Accordingly, the minimum 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 minimum 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; however 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.

The upper stairs and deck on the front of the house that are over 30 inches from the ground are 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 ( $20' - 12.77' = 7.23$ ). That number of 7.23 is then divided by 2, which equals 3.62 feet. 3.62 feet 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 constructed dwelling on site provides a street side setback of 10 feet, which means that the house encroaches 6.38 feet into the required street side setback.

14). LCMC 17.77.140 provides that to approve a variance all the following circumstances (listed in LCMC 17.77.140 C). must exist:

#### 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;



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

15). LCMC 17.77.140 provides that to approve a variance all the following circumstances (listed in LCMC 17.77.140 C) must exist:

**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;**

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, which results from size, shape, topography or other circumstances, existing prior to the adoption of the code, over which the applicant has no control.

The applicant argues this criterion is met with the extraordinary circumstance being the city staff's error - the inaccurate review and approval of the site plan showing the 10-foot street side setback, followed by the city missing the error on the setback inspection, both over which the applicant argues he had no control. Later the applicant argued that the completed noncompliant building on the lot which cannot be occupied without violating the code, is the extraordinary circumstance over which the applicant had no control.

The applicant reads the applicable criterion as only: "[or] other circumstances over which the applicant has no control" and ignores the rest of the paragraph. This selective interpretation of this section is summarily rejected by the Council. All criterion must be satisfied. The Council finds and determines that the criterion requires that the extraordinary circumstances result from lot size, lot shape, lot topography, or other lot circumstances, (similar to size, shape and topography), and that these circumstances legally existed prior to the adoption of the Title. Council finds and determines that the applicant's interpretation ignores the qualifiers of "circumstances" in the entire section and that the Council meant to give meaning to the entire section. The alleged extraordinary circumstance - staff error and a noncompliant home - did not result from lot size, shape or topography, or similar circumstance, nor did the staff error or completed noncompliance home exist prior to the adoption of the code. See Elder v. Douglas County, 33 Or LUBA 276, 279-80 (1997). (*The need for a variance cannot serve as the exceptional circumstance justifying a variance*).



Finally, even if Council accepted the applicant's truncated interpretation of this standard, the applicant cannot state that the circumstance of the noncompliant home was beyond his control. While the applicant focuses on staff's error, he does not acknowledge his own. The Municipal Code [LCMC Chapter 17.16] points to the established law that the burden is on the applicant to comply with the Code:

L. Burden of Proof. The applicant shall bear the burden of proof that the proposal complies with all applicable approval criteria and development standards.

The applicant acknowledged in response to Council questions that he had land use professionals (drafter and engineer) help him with the home plans. The applicant had exclusive control over drafting the noncompliant plans. The applicant caused the home to be constructed in its noncompliant state, and therefore did have control over this "circumstance". The City's Planner is not the applicant's planner and owes the applicant no special duty. Loosli v. City of Salem, 345 Or. 303 (2008). It is the responsibility of the applicant to read the code and ascertain for themselves the applicable requirements." City of Grants Pass v. Josephine County, 25 Or LUBA 722, 728 (1993). (*City planner provided a citizen with erroneous information regarding the date on which a local decision became final. Relying on that erroneous information, the petitioner filed a notice of intent to appeal (NITA) with LUBA. LUBA dismissed the appeal, which was filed late based on the erroneous information, stating: "The fact that petitioner may have relied on erroneous information from a county planner is of no import. A participant in local land use proceedings must ascertain for itself, from the local code, what it must do to protect its rights."*).

In this case, the applicant, or his land use professionals, were responsible to read the plain language of LCMC 17.17.070, Paragraph F and see that the minimum required street side setback is 20 feet, with a formula set forth there for possible reduction. The applicant cannot label the completed noncompliant building or staff's error in missing the applicant's mistake in designing the building as an extraordinary circumstance over which the applicant had no control. Staff's error cannot justify or compel a violation of the code. Bankus v. Brookings, 252 Or 257, 260 (1969) (*estoppel cannot arise from an action of a local government official who purports to waive a mandatory standard*). Clackamas County v. Emmert, 14 Or App 493, 502-503, 513 P2d 532 (1973) (citing Milwaukee v. Leavitt, 142 NW2d 169, 172-173 (1966)). (*Estoppel is not generally a permissible defense against government enforcement of its land use regulations. Zoning ordinances are enacted for the benefit and welfare of the citizens, and issuance of a building permit that violates the ordinance is not only illegal per se, but also injurious to the property owners. Citizens have a right to rely on government officials not to act in violation of the ordinance. When officials act in violation of the ordinance, the government is not estopped from enforcing the ordinance even if the permit holder has incurred expenditures in reliance on the permit*).

Accordingly, based on the above, the City Council finds and determines that the applicant has failed to meet the first required circumstance listed in LCMC 17.77.140 C, (in that, *inter alia*, the applicant had control in that he designed



and constructed his home in violation of the applicable setbacks), and therefore he has failed to meet his burden for approval of a variance. This criterion / circumstance is not met.

**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:**

- 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;**

The applicant quotes the City Attorney's statement that a single family home on a lot is an example of a property right. The applicant had the ability to construct a code compliant single family home on his lot. A detached dwelling is an allowed use in the R-1-RE zone, per LCMC Chapter 17.17. The required building permit was obtained, and a detached dwelling was constructed. The fact that the detached dwelling was not placed in accordance with the required street side setback is not the loss of a property right. Other lots in the same zone may have noncompliant setbacks, owing to legal nonconformities, but other lot owners do not possess a right to violate the setbacks in effect at the time they made application to build. (so - not substantially the same as other owners). No evidence was provided in the submitted materials showing that violating that required street side setback is a property right (or that others - aside from legal nonconformities share that right). The submitted materials did not provide any evidence that a property right is being lost if the variance request is not approved. The fact that removal of the front decks will eliminate the Class B setback violation the applicant complains of, shows there is no denial of the right to a single family home. (see street side setback formula's tie to the front setback). This criterion / circumstance is not met.

**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:**

- 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;**

The site is in the R-1-RE zone. The site is surrounded on all sides by properties also in the R-1-RE zone. Surrounding properties either already contain detached dwellings or are planned for the future construction of detached dwellings. Except for existing legal nonconformities (approved under County R-1-A zoning) the surrounding vacant properties will be required to comply with the established zoning. The Planning Commission and Council both noted the R-1-RE zoning effort was only recently accomplished and that it had a great deal of community support. A variance, for new construction can be detrimental to the purposes of the zone. As to the properties surrounding this property, the



existing dwelling on the southeast corner of the NE Logan Rd/NE 66<sup>th</sup> St exceeds the required 20-foot street side setback at approximately 27'-1 ¾". However, houses at 1830 NE 66<sup>th</sup> St, 1918 NE 66<sup>th</sup> St, 6555 NE Neptune Dr, and 2030 NE 66<sup>th</sup> 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. Having one more house not meeting a required setback in amongst the houses in the vicinity that also don't meet a required setback will not be materially detrimental to the vicinity. Council finds and determines that 6.38 foot variance will not be materially detrimental to the purposes of the zone or to surrounding properties. This criterion / circumstance is met.

**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:**

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

The requested variance is 6.38 feet (reducing the required 16.38 foot setback to ten feet. Staff noted that with the upper stairs and deck being set back 20 feet from the front property line, and using the averaging option for the front setback requirement, the required street side setback is 16.38 feet. With removal of the upper stairs and deck, though, the front of the house is 34.4 feet from the front property line. The increase in the front setback to meet the actual home decreases the required street side setback to 10 feet.

34.4' provided minus 12.77' required = 21.63' overage

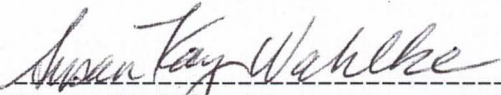
The amount of overage of provided front setback (21.63') is divided by 2, which equals 10.8'. 10.8' is then subtracted from the street side setback of 20 feet to give the required street side setback for this site of 9.2 feet, or 10 feet since the street side setback cannot be less than 10 feet. Accordingly, with removal of the upper stairs and deck there would be no street side setback encroachment and no need for a variance, which means that the requested 6.38-foot variance is not the minimum required to alleviate the hardship. Some alternative (minimal access improvement) in the front of the house would be the minimum variance. This criterion / circumstance is not met.

## VI. ORDER

Based on the above Findings of Fact and Conclusions of Law, the City Council for the City of Lincoln City finds and determines the variance requested in APP 2022-01 / VAR 2022-01 is DENIED as it does not comply with all the mandatory criterion in LCMC 17.77.140.C. as specified herein. The decision of the Planning Commission denying the application is therefore UPHELD and the APPEAL by the Owners to set aside denial is rejected.

ADOPTED THIS 27<sup>th</sup> DAY OF June 2022.



A handwritten signature in cursive script, reading "Susan Kay Wahlke", written over a horizontal dashed line.

Susan Wahlke, Mayor

Authorized by the full Council on June 27, 2022.