

ISLAND COUNTY HEARING EXAMINER

RE: Appeal	)	File No. APP 215/09
Appellant: James Murphy	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
	)	AND DECISION
	)	

---

**SUMMARY OF APPEAL AND DECISION**

APPEAL: James and Jean Murphy, appellants, have appealed a denial of a requested setback variance, VAR 363/08. The appellants were seeking to reduce their front yard setback requirement from thirty feet to eighteen feet six inches to accommodate construction of a new 3,645 square foot, including the attached garage single family residence.

DECISION: The decision of Island County Planning & Community Development denying the requested variance is upheld.

**FINDINGS OF FACT**

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on October 1, 2009.

I.

PRELIMINARY INFORMATION

Appellant: James and Jean Murphy

Property Location: On the corner of Scatchet View Dr. and Cultus Bay Rd.

Publication: September 16, 2009

Mailing of Notice to Appellant: August 28, 2009

Mailing of Staff Report: September 21, 2009

Date of Appeal: August 11, 2009

Date of Comprehensive Statement: September 1, 2009

Hearing Date: October 1, 2009

Exhibit Log:

1. Appeal Response
2. Staff Report
3. Notice of Appeal, received 8/11/09
4. Acknowledgement letter, dated 8/14/09
5. Comprehensive Appeal Statement, received 9/1/09
6. Land Development Permit Application, received 12/23/08
7. Application for Variance, received 12/23/2009
8. Site Plan map, received 12/23/08
9. Left Elevation map, received 12/23/08
10. Right Elevation map, received 12/23/08
11. Site data, dated 1/9/09
12. Notice of Complete Application to Larry Kwarsick from Andreana Richardson, dated 1/9/09
13. Memorandum from John Bertrand to Kyla Walters, dated 1/22/09
14. Memorandum from Aneta Hupfauer to Kyla Walters, dated 1/23/09
15. Review Comments from Kyla Walters to Larry Kwarsick, dated 2/12/09
16. Amendment to review letter from Kyla Walters to Larry Kwarsick, dated 2/18/09
17. Application: New Information submitted, letter in response to review comments from Larry Kwarsick to Kyla Walters, received 2/24/09
18. Application: New Information submitted, Four maps of elevations and floor plain, received 2/24/09
19. Memorandum regarding new information submitted 2/24/09 from Kyla Walters to John Bertrand and Aneta Hupfauer, dated 2/25/09
20. Memorandum regarding new information submitted 2/24/09 from John Bertrand to Kyla Walters, dated 2/26/09
21. Memorandum regarding new information submitted 2/24/09 from Aneta Hupfauer to Kyla Walters, dated 3/2/09
22. Application: New Information submitted, Letter with attachment of revised plans from Larry Kwarsick to Kyla Walters, received 5/12/09
23. Memorandum regarding new information submitted 5/12/09 from Kyla Walters to John Bertrand and Aneta Hupfauer, dated 5/28/09
24. Memorandum regarding new information submitted 5/12/09 from John Bertrand to Kyla Walters, dated 5/29/09
25. Memorandum regarding new information submitted 5/12/09 from Aneta Hupfauer to Kyla Walters, dated 6/16/09
26. Affidavit of Posting the Public Notice Sign, received 1/20/09
27. Island County Notice of Application, dated 1/21/09
28. Affidavit of Publication, received 1/23/09
29. Letter of mailing Staff Report from Paula Bradshaw to Larry Kwarsick, dated 9/1/09

30. Affidavit of Mailing letter to Larry Kwarsick and Jean & James Murphy, dated 9/1/09
31. Email and attachment from Larry Kwarsick to Kyla Walters, dated 2/16/09
32. Email from Kyla Walters to Larry Kwarsick, dated 2/17/09
33. Email from Kyla Walters to Larry Kwarsick, dated 3/23/09
34. Email from Kyla Walters to Larry Kwarsick, dated 4/1/09
35. Email and attachment from Larry Kwarsick to Kyla Walters, dated 4/10/09
36. Email from Larry Kwarsick to Kyla Walters, dated 4/10/09
37. Email from Larry Kwarsick to Kyla Walters, dated 4/17/09
38. Email and attachment from Larry Kwarsick to Kyla Walters, dated 4/22/09
39. Email from Larry Kwarsick to Kyla Walters, dated 5/4/09
40. Email from Larry Kwarsick to Kyla Walters, dated 5/11/09
41. Email and attachment from Ingrid Smith to Kyla Walters, Randy Brackett, Joe Araucto and Connie Bowers, dated 6/9/09
42. Email from Kyla Walters to Angie Homola, dated 6/11/09
43. Affidavit of Publication, dated 9/16/09
44. Letter from Paula Bradshaw to Larry Kwarsick, dated 9/21/09
45. Affidavit of mailing, dated 9/28/09
46. Building permit application, handed forward at the hearing by Mr. Kwarsick
47. Findings of Fact (excerpt) 2 pages
48. 35.108 – 35.129 (excerpt) 2 pages
49. Document titled, “Eventual or Probable Average Setback”

#### HEARING TESTIMONY

Larry Kwarsick  
Sound Planning Services  
P.O. Box 581  
Langley, WA 98260

Kyla Walters  
Island County Planning & Community Development  
P.O. Box 5000  
Coupeville, WA 98239

Robert Pederson  
Island County Planning & Community Development  
P.O. Box 5000  
Coupeville, WA 98239

Jim Murphy  
12413 NE 162 Street  
Woodinville, WA 98072

## II.

On December 23, 2008 the appellants filed an application for a variance with Island County Planning & Community Development. The application was processed by Island County Planning & Community Development, was determined to be complete on January 9, 2009 and the variance application notices required by Ordinance were given. Thereafter Planning & Community Development requested additional information. The information was supplied and extended discussions took place between the appellants' representative and Planning Department staff. On August 4, 2009 the Planning Department issued a formal Administrative Decision denying the variance.

The Muphy's, through their agent Larry Kwarsick, filed a timely appeal of the variance denial and thereafter a timely Comprehensive Statement of Appeal.

## III.

The appellants are the owners of two adjacent lots, lots 1 and 2 of Division 1 of the Plat of Sandy Hook. The plat itself is a large older plat of relatively small lots located on the very southern end of Whidbey Island.

The appellants intend to build a home on lot 1. The adjacent lot, lot 2 will at least partially be used for the septic drainfield system for the home on lot 1. Lot 1 contains 7,600 square feet and is located at the corner of the intersection of Cultus Bay Road and Scatchet View Drive. The lot has approximately one-hundred ten feet of frontage along Cultus Bay Road and seventy-seven feet of frontage along Scatchet View Drive. The setback off Cultus Bay Road is 30 feet and the setback off of Scatchet View Drive is 20 feet.

The appellants intends to place most of the drainfield and reserve area on the adjacent lot, lot 2 but has indicated a desire to perhaps develop lot 2 with a small home in the future.

The appellant is seeking to reduce the 30 foot setback from Cultus Bay Road to 18.5 feet in order to place the proposed home within 18.5 feet of Cultus Bay Road. The appellants and Planning agree that the Murphys are entitled to a 25 foot setback if they apply for setback averaging. However the appellants determined that they wish to seek a variance to allow construction within 18.5 feet of Cultus Bay Road. The appellants propose a two story home of 3,645 square feet with a building footprint of 1,823 square feet. While the overall square footage is larger than many single family residences the request for a 1,823 square foot building footprint could be considered a reasonable use of the property.

Both the appellants and Planning agree there is approximately 3,645 square feet of buildable area on this site, outside of the required setbacks. Subject to potential other limitations the appellants could construct a home with a much larger footprint on lot 1 without requiring a setback variance.

#### IV.

Members of the appellants' family are what their representative calls persons with "special needs" and states that these family members need a level access from Cultus Bay Road to be able access the upper story of the two story home. The garage, driveway, and main entrance to the home are at the first floor level off of Scatchet View Drive. The appellants plan an elevator to allow easy access of the special needs members of the family to the second floor. The appellants' representative suggests that during times of a power failure the elevator would not be available and the special needs members of the family would need to access the second floor from Cultus Bay Road. The disabilities of family members require wheelchair access. No evidence has been put into the record showing that an additional 6.5 feet of setback reduction is the only way to provide reasonable wheelchair access to the second floor of the home. While the appellants state that they need on-grade access and that the setback reduction is required to provide on-grade access no factual information has been submitted demonstrating on-grade access is necessary, and/ or why access cannot be accommodated without the variance they have requested.

The appellants have stated that moving the home as close as possible to Cultus Bay Road is the “best way” to provide an on-grade access but have not attempted to demonstrate why other ways, although not the “best” could not reasonably provide wheelchair access.

V.

Both Planning’s decision on the variance and the Comprehensive Statement of Appeal discuss in some detail setback averaging. Planning believes that setback averaging for this lot reduces the setback to twenty-five feet. The appellant propose various ways of implementing the setback averaging sections of the code which would result in decreasing the average setback below twenty-five feet but in no case could the house be built as proposed unless a variance beyond that reached by setback averaging is granted.

VI.

There is one home within one-hundred feet and fronting Cultus Bay Road on the south side of the proposed home site. There are no homes along Cultus Bay Road to the north of lot 1 within one-hundred feet. Immediately to the north of lot 1 is Scatchet View Drive and the parcel along Cultus Bay Road on the same side as lot 1, across Scatchet View Drive, is a community drainfield area which is unlikely to be developed. The appellants have suggested not counting the width of the Scatchet View Drive right of way in measuring one-hundred feet for the purpose of setback averaging. If the right of way of Scatchet View Drive was not counted there would be another house within one-hundred feet of lot 1 and the appellants argue that through some combination of average setback measurements and of not counting the eighteen inch eave extension the setback allowed by averaging should be twenty-two feet seven inches.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

**CONCLUSIONS OF LAW**

I.

The granting of variances in Island County is regulated by ICC 17.03.210.

ICC 17.03.210A.1 allows the County to grant variances to the setback requirements of the Zoning Ordinance. Paragraph 5 of this section indicates when a setback variance may be appropriate and reads as follows:

5. A variance may be appropriate where a Lot is exceptionally narrow or shallow or contains unusual topographic conditions, but only when strict application would result in peculiar, exceptional and undue hardship on the Owner of such property.

17.03.210D sets forth the standards for granting a variance and requires for all variance requests that “the applicant demonstrates and the County finds that ...” all of the standards have been met. In addition to the general standards in ICC 17.03.210D, paragraph 2 of that section also requires that when requesting a setback the applicant must demonstrate and the County find that:

- a) The granting of the variance must be necessary for the Reasonable Use of the land or Building and the variance as granted by the County is the minimum variance that will accomplish this purpose. The findings shall fully set forth the circumstances by which this Chapter would deprive the applicant of a Reasonable Use of his land. Mere loss in value shall not justify a variance.

The applicant has failed to demonstrate any unusual characteristics of the lot, such as size, width or unusual topographic conditions which would result in the required “peculiar, exceptional and undue hardship on the Owner of such property” without the granting of a variance. There is available to the appellant a building site in excess of 3,100 square feet. By constructing a two story residence, as the applicant intends, a structure of around 6000 square feet could be built without a variance. The applicant is only proposing a structure of 3654 square feet

Generally the hardship required to obtain a variance must result from characteristics of the parcel of land. In this case the appellant has argued that because of the special needs of family members they are entitled to an accommodation pursuant to the American Disabilities Act. Even if this is legally correct the appellants have not demonstrated, as they are required by the Code to do, that denial of the setback would result in the type of extra-ordinary hardship required by the Variance Ordinance. In fact information submitted by the appellants indicates that there are alternative ways of obtaining a grade level access. The appellants have failed to demonstrate the hardship required and have further failed to demonstrate that the only reasonable way of addressing a hardship is through a setback variance.

As indicated above the appellants can build in the neighborhood of 6,000 square feet of structure on this property without a variance. This allows reasonable use of the land and adequately demonstrates that a variance is not necessary.

The appellant is allowed Reasonable Use of the land without the requested variance and has failed to establish there is a peculiar, exceptional and undue hardship on the owner resulting from strict application of the setback requirements. The requested setback variance should be denied and the decision of Island County Planning in denying the variance should be upheld.

## II.

The appellant appears to contest the determination of the Planning Department that averaging of the setback pursuant to ICC 17.03.180.S.6 results in a 25 foot setback from Cultus Bay Road.

The suggestion by the appellants that the intervening width of the Scatchet View Drive right of way should be excluded from the calculations to determine the average setback is not consistent with the applicable Ordinance language (b), which reads as follows:

- b) The required street Setback of a Dwelling Unit need not exceed the Existing or probable average of the street Setbacks of Dwelling Units on all Lots in the same Zone within one-hundred (100) feet on both sides of the proposed Dwelling Unit and on the same side of the street. On vacant Lots within the same Zone and within one-hundred feet of the Lot being developed, standard Yard Setback requirements shall be used in determining the average.

There is nothing in this Ordinance section which indicates that any figure other than one-hundred feet from the subject lot is appropriate. This section is clear on its face and since it is not ambiguous it is not subject to interpretation but must be applied as written. The only dwelling units to be considered in setback averaging under this section are dwelling units located on lots within one-hundred feet of the proposed dwelling. The submissions by the appellant point out that the immediate lots across Scatchet View Drive from this parcel are community drainfields and appears to be suggesting that since the lots are vacant this would somehow influence averaging. However the language of the Ordinance makes it clear that for vacant lots within one-hundred feet the standard yard setback requirement is to be used in determining the average. In this case

the drainfield lots would be vacant and the 30 foot setback and must be used for setback averaging.

The appellant raises issues regarding how eaves are to be treated in setback averaging. Normally eaves or overhangs on residential structures are a standard 18 inches. This only requires that the measured setback for the dwelling units within one-hundred feet be from either the eave or the house face consistently for all of the dwelling units involved in the averaging.

The parties appear to agree that the only actual dwelling unit within one-hundred feet of the subject site is 20 feet from the edge of the right of way and that the only other lot within one-hundred feet does not contain a dwelling unit. This would require averaging a 20 foot and a 30 foot setback. The 25 feet stated by staff appears to be the correct figure for any setback reduction based on averaging.

### III.

The appellant correctly point out that their requested variance would not have a negative impact on the surrounding community and that, since the lots in this subdivision are small and require onsite drainfields, other variances similar to the one they seek are likely to be granted in this area in the future. However staff cannot make the findings necessary under the applicable Code sections to grant an approval. The current variance sections of the Zoning Ordinance do not allow a no harm no foul kind of analysis and neither staff nor the Hearing Examiner can rewrite the Ordinance in order to be able to grant variances which do not negatively impact the community and do benefit the landowner. This is a legislative prerogative.

To the degree that this request is based on view enhancement it can be stated that the current Code does not allow approval of a variance for that reason. However ordinance changes allowing consideration of view enhancement as a basis for a variance could be adopted by the County. The Whatcom County Shoreline Management Program allows shoreline setback reductions based on view enhancement if certain criteria are met. Views are important to people. They pay extra for views, including additional taxes, and this Examiner can think of no good reason not to facilitate a

property owners view potential in situations where it can be shown that there are no negative impacts.

IV.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

**DECISION**

The decision of Island County Planning & Community Development denying a requested variance in their decision on VAR 363/08 is upheld.

Entered this 16<sup>th</sup> day of October, 2009, pursuant to authority granted under the laws of the State of Washington and Island County.

---

MICHAEL BOBBINK

Island County Hearing Examiner

APPEAL PROCESS:

APP (Administrative Decision)

Appeal Process: This land use decision is a final determination which may be appealed by filing a land use petition in Island County Superior Court within twenty-one (21) days of its issuance. Specific requirements for the petitions contents, time and service of process, and payment of the cost of the transcription of the record of the hearing may be found in Chapter 70C of Title 36 RCW