



CITY OF EDMONDS

121 5TH AVENUE NORTH • Edmonds, WA 98020 • (425) 771-0220 • FAX (425) 771-0221
HEARING EXAMINER

GARY HAAKENSON
MAYOR

| | | |
|-------------------------------------|---|------------------------|
| In the Matter of the Application of |) | NO. PLN-2010-0040 |
| |) | |
| Mitch Soros |) | |
| |) | |
| |) | |
| For a Variance |) | FINDINGS, CONCLUSIONS, |
| _____ |) | AND DECISION |

SUMMARY OF DECISION

The request for an after the fact variance from the roof pitch requirement established at Edmonds Community Development Code 16.30.030 regarding structures built at 23709 84th Avenue West must be **DENIED** because the variance criteria are not satisfied by the application and the City's Hearing Examiner lacks authority to render decisions in equity.

SUMMARY OF RECORD

Request:

Mitch Soros (Applicant) requested a variance from Edmonds Community Development Code section 16.30.030 to allow two residential triplexes that have been completely built to remain, despite the post-completion discovery by City Staff of the structures' failure to comply with the roof pitch requirement established in the City code. The structures have been built at 23709 - 84th Avenue West, between 236th and 238th Streets SW, in Edmonds, Washington.

Hearing Date:

The Edmonds Hearing Examiner conducted an open record hearing on the request on August 19, 2010. The Hearing Examiner conducted a site visit on August 20, 2010 by driving by the subject property, observing it in the context of the surrounding development.

Testimony:

At the open record hearing the following individuals presented testimony under oath:

1. Gina Coccia, Planner, City of Edmonds
2. Mitch Soros, Applicant
3. Al Rutledge

Exhibits:

At the open record hearing the following exhibits were admitted into the record:

1. Staff Report dated August 5, 2010, with the following attachments:

1. Zoning & Vicinity Map
2. Land Use Application
3. Criteria Statement
4. As-Built Elevations
5. Elevations (File BLD20090210)
6. Building Division Comments
7. Public Notice & Publishing

Upon consideration of the testimony and exhibits submitted at the open record hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicant requested an after the fact variance from Edmonds Community Development Code (ECDC) 16.30.030 to allow two triplexes to remain, despite the post-construction discovery by City Staff that the roof pitch does not comply with the requirements in the City code. Design review and building permit review were completed for the buildings under permit numbers BLD20090210 and BLD20090211.¹ The completed structures are located at 23709 - 84th Avenue West in Edmonds.² *Exhibit 1, pages 1-2; Exhibit 1, Attachment 2.*
2. The subject property has a Multiple Residential (RM-1.5) zoning designation. *Exhibit 1, page 2.* The RM-1.5 zone allows a maximum structure height of 25 feet for residential structures. Structures in the RM-1.5 zone may exceed the 25-foot height limit up to 30 feet if "all portions of the roof above the stated height limit have a slope of 4 inches in 12 inches (4/12) or greater".³ *ECDC 16.30.030(A).*
3. Through the design review process, roofs with a pitch of 4/12 were proposed on both buildings, each 30 feet tall. Building plans depicting compliance with zoning code height and roof pitch requirements were reviewed and approved. However, the buildings initially constructed were built at grade, rather than on an excavated elevation, resulting in structures that exceeded the maximum height. *Exhibit 1, page 1; Coccia Testimony.*
4. According to the Applicant, the multifamily residential project was originally undertaken by a partnership consisting of the Applicant as investor and a professional builder. The Applicant was not involved in the construction and is not a builder or developer. When

¹ Review began under expired permits BLD20060572 and BLD20060573. *Exhibit 1, page 1.*

² The staff report indicates the two buildings are addressed as 23707 and 23709 - 84th Avenue W, while the application states they are addressed as 23709 and 23711 - 84th Avenue W. The property subject to the application is correctly depicted in the record at Exhibit 1, Attachment 1 and is known as Tax Account # 00451900101202. *Exhibit 1, page 1; Exhibit 1, Attachments 1 and 2.*

³ The Examiner takes note that a common abbreviation for a slope of 4 inches in 12 inches is "4/12". The abbreviation will be used throughout the instant decision.

the City informed the partnership that the buildings were too tall, the builder partner removed and replaced the roofs, reducing the height. According to the Applicant, "the subsequent framing inspection on 2/26/08 by 'Jn/JR' approved the changes, and a height inspection on 10/22/09 was approved by 'RDS'." *Exhibit 1, Attachment 3, page 3.*

5. According to the Applicant, the builder partner was "in trouble on his other projects" and the Applicant dissolved the partnership, which was a lengthy and expensive process. The Applicant hired a new, reputable builder to complete the project, including cabinets, flooring, and appliances. *Exhibit 1, Attachment 3; Soros Testimony.*
6. After the Applicant's new contractor completed the buildings, a City employee visited the site to conduct a final inspection. At the final inspection, it was discovered that the new roofs were built with a pitch of 2.5/12, rather than the required 4/12. The buildings as completed satisfy the "25 + 5" height rule but the roofs are too flat and do not satisfy the 4/12 pitch requirement. According to the City, the employee who signed off on the framing inspection was a temporary worker unfamiliar with the roof pitch regulation who erred when s/he did not require the partnership to submit revised plans for review and approval by the Planning Division prior to sign off. *Exhibit 1, pages 1, 6; Coccia Testimony.*
7. The subject property is flat, with a maximum two feet elevation difference across the site. There are no critical areas on or near the site, and no wildlife is known to inhabit it. *Exhibit 1, page 2.*
8. The site is located between Highway 99 and SR-104 in south Edmonds. It abuts multi- and single-family residential parcels in all directions, but is very near commercially zoned (CG) areas along Highway 99. The immediately adjacent neighborhood contains a mix of commercial, multi-family, and older residential homes. Properties to the west are zoned Single-Family (RS-8) and developed with residences. To the east and north, the site abuts a vacant 1.8-acre RM-1.5 parcel. To the south, it abuts two six-unit condominium buildings constructed in 2000, also zoned RM-1.5. There are two large RS-8 zoned properties in the immediate vicinity developed with churches. *Exhibit 1, page 3.*
9. The maximum height in the nearby CG zone is 60 feet. The nearest commercial parcel east of the site is developed with the project known as Aurora Marketplace, which contains a Safeway and a TJ Maxx. The maximum height for residences in the RS-8 zone is 25 feet, although churches in that zone may be as tall as 35 to 50 feet, if approved through the conditional use permit process. *Exhibit 1, page 3; Site Visit.*
10. According to Planning Staff, the 30-foot tall triplex buildings on-site serve as a desirable transition between the 60-foot commercially zoned structures and the 25-foot single-family residential structures in the immediate vicinity. *Coccia Testimony; Exhibit 1, page 4.*

11. The subject property has a “Corridor Development” land use designation pursuant to the City of Edmonds Comprehensive Plan. The Comprehensive Plan sets out the City's vision for the corridor and establishes goals and policies intended to guide development as follows:

Medical/Highway 99 Activity center and Highway 99 Corridor

Highway 99 is characterized by a corridor of generally commercial development with less intense uses or designed transitions serving as a buffer between adjacent neighborhoods... Highway 99 occupies a narrow strip of retail and commercial uses bounded by residential neighborhoods. Historically, the corridor has developed in a patchwork of uses, without a clear focus or direction... Encourage a variety of uses and building types. A variety of uses and building types is appropriate to take advantage of different opportunities and conditions. For example, a tall hotel or large scale retail development may be an excellent addition to the south of the corridor while some small restaurants and convenience shops might cater to hospital employees, trail users and local residents near 216th Street SW. Where needed, the City should consider zoning changes to encourage mixed use or taller development to occur.

- B.4.** New development should be high-quality and varied – not generic – and include amenities for pedestrians and patrons.
- B.5.** Protect residential qualities and connect businesses with the local community. Pedestrian connections should be made available as part of new development to connect residents to appropriate retail and service uses.
- B.6.** New development should be allowed and encouraged to develop to the fullest extent possible while assuring that the design quality and amenities provided contribute to the overall character and quality of the corridor. Where intense development adjoins residential areas, site design (including buffers, landscaping, and the arrangement of uses) and building design should be used to minimize adverse impacts on residentially-zoned properties.

2009 Comprehensive Plan, pages 59-64, as cited at Exhibit 1, page 4.

12. Staff argued that the series of events that make up the history of the completed buildings could be considered "special circumstances", including: the change in ownership prior to completion; errors on the part of the Applicant's former partner and the building inspector; and discovery of noncompliance so late in the construction process. However, Staff acknowledged that these circumstances do not relate to the property itself. It is possible for buildings to be constructed on-site that satisfy all portions of the zoning code without a variance; in fact, plans for such buildings were submitted by the Applicant and approved by the City. *Exhibit 1, page 6; Coccia Testimony.*

13. The Applicant cannot afford to replace the roofs or to demolish and restart the project. The economic downturn occurred during the project and the Applicant indicates that lenders are unwilling to assist in correction of the roofs. The Applicant testified that he has invested his life savings in the project. He acknowledged that the triplexes do not satisfy the code's roof pitch requirements but argued that he acted in reliance on the approved inspections, incurring significant expenses he would not have incurred had the structures failed the 2008 and 2009 inspections after the roof replacement. *Exhibit 1, Attachment 3; Soros Testimony.*
14. The Applicant argued that the roof pitch requirement of the code is for aesthetic purposes only, and that aesthetic requirements should not, by themselves, serve as the basis for the severe hardship that he would experience if a variance is not granted. He argued that the large commercial development nearby has 60-foot tall structures with flat roofs and his roofs are not as flat as theirs. He argued that the buildings as completed are attractive and not detrimental to the area. *Soros testimony; Exhibit 1, Attachment 3.*
15. No City personnel available at the time of hearing could testify as to the purpose of the roof pitch requirement. *Coccia Testimony.*
16. Staff agreed that the buildings are attractive and compatible with the character of the surrounding area, appearing similar to the adjacent condominiums. Staff noted the triplexes are not generic, if for no other reason than their custom roofs. *Coccia Testimony; Exhibit 1, page 4.*
17. To remove the roofs again and correct the pitch on the existing buildings would render the majority of the third floor of each building uninhabitable. *Soros Testimony; Exhibit 1, page 2.*
18. Notice of Application and Public Hearing posted on-site, published in *The Herald*, and mailed to surrounding property owners within 300 feet, consistent with the requirements of ECDC 20.03. *Exhibit 1, page 3; Exhibit 1, Attachment 7.*
19. Public testimony at the hearing noted that taller buildings are also allowed in nearby Mountlake Terrace and contemplated whether the buildings would go into foreclosure if the variance were not granted. *Rutledge Testimony.*

CONCLUSIONS

Jurisdiction:

The Hearing Examiner has jurisdiction to hear and decide variance requests pursuant to ECDC 20.01.003.A and .C and ECDC 20.85.020.

Criteria for Review:

Pursuant to ECDC 20.85.010, no variance may be approved unless all of the following findings can be made:

A. Special Circumstances. That, because of special circumstances relating to the property, the strict enforcement of the zoning ordinance would deprive the owner of use rights and privileges permitted to other properties in the vicinity with the same zoning.

1. Special circumstances include the size, shape, topography, location or surroundings of the property, public necessity as of public structures and uses as set forth in ECDC 17.00.030 and environmental factors such as vegetation, streams, ponds and wildlife habitats.

2. Special circumstances should not be predicated upon any factor personal to the owner such as age or disability, extra expense which may be necessary to comply with the zoning ordinance, the ability to secure a scenic view, the ability to make more profitable use of the property, nor any factor resulting from the action of the owner or any past owner of the same property;

B. Special Privilege. That the approval of the variance would not be a grant of special privilege to the property in comparison with the limitations upon other properties in the vicinity with the same zoning;

C. Comprehensive Plan. That the approval of the variance will be consistent with the comprehensive plan;

D. Zoning Ordinance. That the approval of the variance will be consistent with the purposes of the zoning ordinance and the zone district in which the property is located;

E. Not Detrimental. That the variance as approved or conditionally approved will not be significantly detrimental to the public health, safety and welfare or injurious to the property or improvements in the vicinity and same zone;

F. Minimum Variance. That the approved variance is the minimum necessary to allow the owner the rights enjoyed by other properties in the vicinity with the same zoning.

Conclusions Based on Findings:

1. Washington courts have said, “[r]easons for a variance must be reasons pertaining to the property itself which prevent full use of the property to the extent other properties in the vicinity and under the same zoning can be used. ... Evidence of hardship or difficulty that will support a variance must relate to the land itself and not to the owner-applicant.” *St. Clair v. Skagit County*, 43 Wn. App. 122, 126-127 (1986).
2. There are no special circumstances pertaining to the subject property. It is nearly flat and of a size and shape to allow construction in compliance with the zoning code; it contains no critical areas. The approved plans demonstrate that compliant buildings can be built on it. Errors by the Applicant's builder partner (a former owner) and by City employees

do not constitute special circumstances for the purpose of the variance provisions. But for economic considerations, the Applicant could correct the roof pitch to make it comply with code. The City's variance provisions specifically prohibit reliance on either economic factors personal to the Applicant or on errors of the owner or any previous owner of the property in demonstrating compliance with the special circumstances criterion. *ECDC 20.85.010(A)(2); Findings 3, 7, 12, and 13.*

3. Because all of the variance criteria must be satisfied, and the first is not met, it is not necessary to analyze the remaining criteria.
4. Denial of the requested variance is an extremely unsatisfying outcome for all parties. The City's Hearing Examiner is a "creature of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication." *Chaussee v. Snohomish County Council, 38 Wn. App. 630 (1984)*. As to the Applicant's arguments relating to his reliance on the City employee's sign off of the inspections, the Examiner lacks authority to decide fairness-based, equity arguments; such authority is reserved to higher, reviewing decision making bodies.

DECISION

Based on the preceding findings and conclusions, the request for a variance from the roof pitch required by ECDC 16.30.030 must be **DENIED**.

DECIDED August 31, 2010.

Toweill Rice Taylor LLC
City of Edmonds Hearing Examiners
By:



Sharon A. Rice



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RECONSIDERATION AND APPEAL

The following is a summary of the deadlines and procedures for filing requests for reconsideration and appeals. Any person wishing to file or respond to a request for reconsideration or an appeal should consult the relevant ordinances and/or contact the Planning Division of the Development Services Department for further procedural information.

REQUEST FOR RECONSIDERATION

Pursuant to ECDC 20.06.010, requests for reconsideration may be filed with the City Planning Director within 10 calendar days of the Hearing Examiner's decision. The filing deadline is 4:30 p.m. on the last business day of the reconsideration period. Only parties of record (i.e., the applicant, any person who testified at the open record hearing on the application, any person who individually submitted written comments on the application, or the City of Edmonds) may file a request for reconsideration. The grounds for reconsideration are limited to errors of procedure, errors of law or fact, errors of judgment, or the discovery of new evidence that was not known and could not in the exercise of reasonable diligence have been discovered prior to hearing. Reconsideration requests must contain the information specified in ECDC 20.06.010(D) and be accompanied by the required filing fee.

APPEALS

Pursuant to ECDC 20.01.003(C), appeals of Hearing Examiner decisions on variances shall be made to the City Council, which body conducts a closed record appeal hearing on the appeal pursuant to the provisions of ECDC 20.07. Appeals to the City Council must be filed within 14 days of the date the Hearing Examiner decision is issued. The appeal must be submitted by 4:30 pm on the last business day of the appeal period. The appeal must contain the information specified in ECDC 20.07.004(D) and be accompanied by the required filing fee. Filing a request for reconsideration is not a prerequisite to filing an appeal.

EFFECT OF REQUEST FOR RECONSIDERATION ON APPEAL DEADLINE

The timely filing of a request for reconsideration stays the Hearing Examiner's decision until such time that the Hearing Examiner issues a decision on reconsideration, and any judicial appeal must be filed within 21 days of the decision on reconsideration.

LAPSE OF APPROVAL

Section 20.05.020(C) of the ECDC states: "Time Limit. The approved variance must be acted on by the owner within one year from the date of approval or the variance shall expire and be null and void, unless the owner files an application for an extension of time before the expiration and the city approves the application."

NOTICE TO COUNTY ASSESSOR

The property owner may, as a result of the decision rendered by the Hearing Examiner, request a change in the valuation of the property by the Snohomish County Assessor's Office.



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HEARING EXAMINER

GARY HAAKENSON
MAYOR

OFFICE OF THE HEARING EXAMINER CITY OF EDMONDS, WASHINGTON

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| Regarding the request of |) | |
| |) | |
| Mitch Soros |) | Case No. PLN-2010-0049 |
| |) | |
| |) | |
| For a Variance |) | DECLARATION OF SERVICE |
| _____ |) | |

I, Sharon A. Rice, the undersigned, do hereby declare:

- That I am a partner in the firm of Toweill Rice Taylor LLC, which maintains a professional services agreement with the City of Edmonds, Washington for the provision of Hearing Examiner services, and make this declaration in that capacity; and that I am now and at all times herein mentioned have been a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18), and competent to be a witness and make service herein; and that on August 30, 2010 I served a copy of the decision in case PLN-20100-0040 upon the following individuals at the addresses below by first class US Mail:

Mitch Soros
11511 - 39th Avenue SE
Everett, WA 98208

Edmonds Development Services
121 Fifth Avenue North, First Floor
Edmonds, WA 98020

Clerk of the Edmonds City Council
121 Fifth Avenue North, First Floor
Edmonds, WA 98020

Peggy Anderson
23713 - 84th Avenue W #201
Edmonds, WA 98026

Alvin Rutledge
7101 Lake Ballinger Way
Edmonds, WA 98026

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, this 30th day of August 2010 at Edmonds, Washington.

Sharon A. Rice
Toweill Rice Taylor LLC