

**TUMWATER HEARING EXAMINER PUBLIC HEARING
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CONVENE: 4:05 p.m.

CASE NUMBER: TUM-24-0928, Three Lakes Crossing Fence Variance

DESCRIPTION OF PROPOSAL: The applicant is requesting approval of a Variance (TUM-24-0928) from required fence height regulations. The variance requests the ability to install a solid panel fence 72" tall within a corner lot setback.

PROJECT NAME: Three Lakes Crossing Fence Variance.

APPLICANT: Evan Mann
Copper Ridge, LLC
PO BOX 73790
Puyallup, WA 98373

PUBLIC HEARING: Hearing Examiner Mark Scheibmeir convened the public hearing at 4:00 p.m. to consider the applicant's request for a variance for the Three Lakes Crossing project. The application seeks a variance from the City's standard fence requirements seeking a higher fence than allowed by City regulations. The City's case number is TUM-24-0928. The applicant is represented by Evan Mann with SoundBuilt Homes/Copper Ridge, LLC. The City is represented by Senior Planner Alex Baruch. Prior to the hearing, he reviewed the Staff Report prepared by Planner Baruch. Examiner Scheibmeir reported he completed a remote site inspection by examining Google street maps of adjoining properties and the subject project site and is familiar with the property.

Examiner Scheibmeir reported the purpose of the hearing is to provide City staff with an opportunity to explain its Staff Report and recommendations and any proposed conditions followed by an opportunity for the Applicant to respond to the City's presentation and either add to or subtract from the City's suggestions. Public testimony will follow. Both the City and the Applicant will have an opportunity to respond to any testimony. All testimony will be under oath or affirmation. To date, no public comments have been received and no members of the public are present at this time.

Examiner Scheibmeir cited the following exhibits entered into the record:

Exhibit 1: Staff Report
Exhibit 2: Public Hearing Notice 09-13-2024
Exhibit 3: Three Lakes Crossing - Sight Distance
Exhibit 4: 17-2024 Chapter 18.46 FENCING
Exhibit 5: Three Lakes Crossing - Fence Variance Letter of Intent
Exhibit 6: Photo Fence Panels Removed 06-17-2024

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Exhibit 7: Public Notice Certification:
Exhibit 8: Percy Lane Photos
Exhibit 9: Full Height Fence Site Plan Example
Exhibit 10: Three Lakes Crossing Lot 30 Example
Exhibit 11: Ordinance #883 07-01-1984
Exhibit 12: Request for Variance 06-11-2024
Exhibit 13: Three Lakes Sight Distance

CITY TESTIMONY: Examiner Scheibmeir administered the oath to Tumwater Senior Planner Alex Baruch.

Planner Baruch reported the Applicant is requesting a variance to construct a 72” solid panel fence within a corner lot setback of Lot 29 within the Three Lakes Crossing plat located at the corner of Henderson Boulevard SE and 68th Ave SE.

The City defines corner lots as a lot with frontage on or abutting two or more intersecting streets. Front yards are defined as a yard running between the front line of a property line and setback line extending across the full width of a lot. The definition is depicted in the definitions within the zoning ordinance, which illustrates the front yard setback along any portion of the property that abuts the street. Based on those definitions, Lot 29 in the Three Lakes Crossing subdivision was categorized as a corner lot, which has a front setback on Henderson Boulevard SE and 68th Avenue SE along the entrance road to the subdivision and the frontage of the lot where the driveway is located

Fence height regulations include specific restrictions when a fence is proposed within setbacks and further restrictions for fence type within setbacks on corner lots. The ordinance provides two options for fences within the setback on a corner lot. The first option limits fences 36” in height for a distance of 15’ from the intersection of the property line abutting the street and 42” in height for the remainder of the front yard facing any street. The second option may be granted for a fence at a maximum height of 78” from the ground in the front or side yards on a flanking street if the portion above 36” is composed of open work in such a manner that eighty percent of any portion can be visible to oncoming traffic and pedestrians.

The history and background on Lot 29 is included in the Staff Report. The Applicant has been very responsive to the City when the issue was first addressed and has worked with staff to learn how the ordinance was applied to the plat. Five variance criteria are listed in the City’s code. A variance may only be granted if all five of the variance criteria are met. Staff’s analysis indicates that several of the criteria have not been achieved.

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For Criteria 1, staff does not believe special conditions exist for the development or that the literal interpretation of the provisions in the code would deprive the property owner of the right commonly enjoyed by other properties within the community. Other properties throughout the City have met corner height regulations when required.

A large grade is located at the rear of Lot 29 due to taller retaining walls along Henderson Boulevard enabling more visibility into the backyard of the property. Staff believes there is privacy and safety for the lot with one of the corner lot fence options allowed by the ordinance, especially with the option that enables a 72" tall fence where any portion over 36" is comprised of transparent material where eighty percent of any portion is transpicious to oncoming traffic and pedestrians. Additionally, the lot's location behind a large retaining wall would also provide privacy for the homeowner as the backyard is below grade.

Staff does not believe that the Applicant meets the requirements of Criteria 2 concerning special conditions or circumstances that were not the result of actions by the Applicant. Opportunities were available throughout the development of the subdivision to orient a landscape tract along the side of the lot similar to Lot 30, which includes a landscape tract adjacent to the home. It is not considered a corner lot. Consequently, the corner lot fence requirement would need to be applied to the lot or any other corner lot within the subdivision.

In terms of Criteria 3, staff believes granting a variance for a solid fence would be a privilege conferred to the property that has not been provided to other properties within the same zoning district. For properties within the City limits, staff applies the corner lot fence regulations since the ordinance was implemented in 1984. The same diagram, distance, and height regulations have been in place since adoption of the ordinance. Granting a variance for a solid fence would be a privilege to the property that was not provided to other corner lots throughout the City. There is no exception included within the ordinance for meeting fence distance requirements for vehicles that would allow an opaque fence to be installed within the setback on a corner lot.

For Criteria 4, staff agrees with the Applicant that installing a 72" tall fence would not be materially detrimental to the public welfare as sight distance requirements appear to be met.

For Criteria 5, the reasons as outlined in the application do not justify the variance or that a 72" tall solid type fence would be a minimum variance that would enable reasonable use of the land. The proposed

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fence configuration would provide a benefit other properties have not been granted within the City in a similar configuration. The lot configuration was determined by the Applicant and a building permit was approved for the construction of a single-family home on Lot 29 where a fence meeting ordinance requirements could be constructed along Henderson Boulevard SE and 68th Avenue SE providing ample privacy and screening.

Due to the application not meeting all variance criteria, staff recommends denial of the application.

Examiner Scheibmeir remarked that the ordinance is 40 years old and enacted in the 1980s. The Applicant has suggested that the ordinance is clearly based on line of sight concerns and how, in this particular situation, those concerns are simply not in play. He asked whether staff is aware of the reason for enactment of the provision, such as any provision within the ordinance that identifies the purpose or other historical information indicating specific reasons for the requirement. While it may be intuitive that line of sight is an issue, he asked whether there is any confirming information that speaks to that position.

Planner Baruch advised that the intent section of the code identifies minimum requirements and standards for fencing where needed to promote safety, provide screening to safeguard privacy, and to protect the aesthetic assets of the community in general. The provision is located within the fencing section of the code within the intent section.

**APPLICANT
TESTIMONY:**

Examiner Scheibmeir administered the oath to Kurt Wilson with SoundBuilt Homes.

Mr. Wilson presented a PowerPoint presentation on the intent of the fencing code. Clearly, the intent is stated within the code to promote safety, privacy, and aesthetic assets of the community. The Applicant meets the intent of the code for safety. The intent of the code is for visibility and sight distance. The heights that are defined in the code, as well as the setbacks, corner yard heights, and front yard heights are clearly intended to allow for visibility. When the application was submitted for a variance, the first request was to demonstrate the site distances. Site distance is the key and the Applicant meets sight distances. When the plat is developed, ample radius is included on each corner of the lot providing a significant amount of sight distance.

Secondly, privacy for future homeowners is important. In this particular case, Lot 29 sits lower than Henderson Boulevard and the access road. Because of its positioning, the lack of a 6' high fence creates a fishbowl situation as the yard and home could be observed by

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anyone parked along the access road or leaving the site. The Applicant believes the code creates unintended consequences as future homeowners would not enjoy privacy or security that other homeowners would enjoy. That should be considered as well.

The last issue is aesthetics. All other homes in the plat would have standard 6' tall cedar fences on three sides of each home. Lot 29 would be created as a different lot with a different aesthetic with negligible benefits to the community or to the homeowner. If the intent is for safety and privacy, the Applicant has proven the development is safe while eliminating privacy for Lot 29.

Mr. Wilson shared a diagram from the code created in 1984 that reflects the intent of fences. The diagram features lots that do not resemble Lot 29. Lot 29 provides an ample radius of at least 24' enabling vehicles and pedestrians to have visual access around the corners. Extending the corner to the actual 90° angle as depicted in the code would create a clearance over 24' on each side offering significant visibility compared to what is depicted in the code. The Applicant recognizes that the diagram depicts code requirements, but it does not capture or anticipate actual development occurring in the City of Tumwater.

Mr. Wilson displayed a sight distance exhibit demonstrating significant sight distance in both directions 350' south and 350' to the north. There is no issue of sight distance as it relates to the lots. Additionally, Jared Crews with the Engineering Department reviewed the diagram and conveyed no concerns with the proposal. The fence is located 14' from the sight distance triangle and does not cause any sight hindrance to pedestrians or vehicles. The Applicant proposes a standard 72" tall fence placed 20' from the tangent extending around the curve and joining an existing 72" tall fence along Henderson Boulevard as allowed by code. The proposal variance pertains to a 70' fence section that would provide privacy and security to Lot 29 through the yard.

Examiner Scheibmeir requested the Applicant provide the City with a copy of the presentations. City staff will forward the materials to his office.

Mr. Wilson noted that the variance application was submitted after discussing the proposal with staff about the logic of the fence height. The discussion also referred to the possibility of submitting a variance considering all of the variables. Director Michael Matlock suggested moving forward with a variance application. Following the company's enumeration of the criteria, staff issued a recommendation of denial, which was surprising. The most important aspect is the condition the

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proposal must meet of the property not receiving any more benefits than currently provided to surrounding properties. Following additional research by the Applicant on the City of Tumwater's fence ordinance and its application to proposals, the Applicant discovered that the City is not applying the code evenly or equally, which is an important consideration. As an example, the regulation was not applied to a home located at 4842 Lambskin Street SW. The community located off Lambskin is a relatively new community that was allowed to install 6' tall fences. City residents are enjoying the benefits of 6' tall privacy cedar fences on side yards. Mr. Wilson cited other properties with 6' tall cedar fencing. Six-foot tall cedar fencing is standard across the industry and in the Puget Sound region. Requiring Lot 29 to install a reduced height privacy and visibility fence gains nothing for the City as sight distance is adequate per Engineering staff. The action only hinders this particular lot. It appears based on the numerous examples, that the code is not being applied and that the Applicant will be held to a standard that the City has not universally applied across the community.

Additionally, the way the City defines the fronts of lots is another factor. The City is applying front yards to Lot 29 because it fronts three streets on three sides. It has created a unique situation because typically, front yards, side yards, and rear yards are identified and established. In the case of an intersection with a corner lot, the lot is often referred to as a flanking yard or another definition. The situation is a clear indication that the City did not contemplate this particular scenario as it relates to fences.

Staff also included within the record reference to Susan Lakes as an example of a project that met this particular standard. However, it is a cherry picked recent project whereby the standard was imposed by the City while many other projects within the City do not comply with the standards nor were evenly applied across the City in addition to the lack of any code enforcement to regulate the practice of fences built along side yards.

Examiner Scheibmeir administered the oath to Evan Mann with SoundBuilt Homes.

Mr. Mann reiterated how the property is oriented and how the entrance to the neighborhood creates headlights trespassing into the home. The house essentially is located within a fishbowl. A sidewalk abuts the location of the fence along the property line. Not only pedestrian traffic but also vehicular traffic would impact the home because of the elevation of the lot relative to the grade of the sidewalk with a lower height fence. A number of issues are concerning as a builder of thousands of homes in Puget Sound. Fences have become a

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paramount issue for new homeowners for retaining pets within their yards and for security and safety for their children. This particular section has not been uniformly applied by the City. It is imperative to provide the right solution for fencing the rear yard for the future homeowner. The Applicant would also suffer financial impacts by creating an inferior situation relative to the other lots because the lot will be a detriment to a future homebuyer because of a lower-height fence. In reality, after several years, the homeowner would likely replace the fence with a 6' tall fence and the City would likely not enforce the code similar to other enforcement issues in the City. The issue speaks to reality in terms of the code. The intent of the code speaks to public health, safety, and welfare while sight distance has become the issue. He offered that a review of all criteria should prove as a valid reason for approving the variance. He thanked Examiner Scheibmeir for his consideration.

**PUBLIC
TESTIMONY:**

Examiner Scheibmeir invited members of the public to provide testimony.

Permit Manager Tami Merriman affirmed that no member of the public was present to testify.

**CITY OF
TUMWATER
RESPONSE:**

Planner Baruch noted that lot corners are defined within the ordinance. Corner lots are defined as having frontage or abutting two or more intersecting streets. He agreed that the diagram for fences does not depict all situations within the City, as there are many different lot configurations. It is necessary to consider all the elements of the code and render the best decision as it applies to Lot 29, a corner lot with three frontages.

Additionally, code enforcement within the City is administered by a complaint-basis process.

Staff is reviewing site infrastructure and building permit requirements and cannot allow situations that violate the code continue without undertaking a variance process or reducing fence height to meet code requirements.

In a response to an email from Director Matlock's to the Applicant citing the possibility of a variance, Permit Manager Merriman also referred to potential issues with one of the variance criteria that requires special conditions or circumstances existing on the lot. Other correspondence spoke to some apprehension to the variance criteria. Staff also considered that the fence regulations within the ordinance would provide privacy, safety, and aesthetics.

Examiner Scheibmeir administered the oath to Michael Matlock, City

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of Tumwater Director of Community Development.

Director Matlock reiterated the comments of Planner Baruch as it speaks to the application of the code, which is clear and unambiguous. In terms of the variance, the proper procedure requires adherence to the criteria. The examples of fences not in compliance are handled by code enforcement which is a complaint-based process established by the City.

**APPLICANT
REBUTTAL TO
CITY TESTIMONY:**

Mr. Mann pointed out the importance of considering how the City has not applied the code to new projects equally and evenly across the City. The code has been in effect for 40 years and has been marginally applied, if ever. It is only recently, that somehow this is becoming an issue. SoundBuilt Homes has developed other properties in Tumwater and it has never been an issue. Some fences are being installed that lacked the application of the code. If the City had a long record of applying the code to all projects, then it would make sense; however, the code has not been consistently applied and has been enforced on the project. Lacking any public benefit, the action appears to be arbitrary and capricious to enforce the fence code for this particular project when it has been established that there are no safety concerns but there are legitimate privacy and security concerns for Lot 29. Staff can profess that the lot has privacy and safety; however, requiring a fence that enables visibility to the property would clearly lack security and privacy. The Applicant builds solid fences because homeowners want privacy and security. For staff to argue otherwise would be erroneous. The assertion that special conditions do not exist does not speak to how lots have changed and the process of development has changed in Tumwater. Site distance has been created because intersections have a larger radius for sight distance. Subsequently, conditions have changed to allow for higher height fences. The code does not capture all circumstances.

Mr. Mann added that SoundBuilt Homes has built subdivisions in Tumwater under the same situation with 6' high fences in the exact same circumstances and did not encounter any issues. Within new subdivisions, the City has indicated it does enforce code violations because it is complaint-based. That argument would make sense lacking any police power in the permitting process. However, for new construction, the City requires an inspection process when a certificate of occupancy is issued. At that time, fences have been installed and building inspections are in progress. The generality of conditions associated around the City of older and newer homes that have the same condition is contrary as the City argues that it has no obligation because code enforcement is complaint-based. However, the City has an obligation to enforce the code for newer houses on a corner lot configuration when issuing a certificate of occupancy.

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CITY RESPONSE: Planner Baruch emphasized that he and Manager Merriman joined the City three years ago. Current staff cannot speak to previous permitting staff responsible for development review and approval of fence height regulations for new development. Permits are not required for 6' tall fences within a residential subdivision. Current staff members have applied fence requirements to new projects during the last three years.

Examiner Scheibmeir acknowledged the intelligent and thoughtful discussion by both parties with legitimate points. He requested a copy of the documents presented during the meeting by the Applicant and will issue a decision after receipt of the documents to enable the parties to complete the project. He thanked everyone for attending.

ADJOURNMENT: **With there being no further business, Examiner Scheibmeir adjourned the public hearing at 4:39 p.m.**

Prepared by Valerie L. Gow, Recording Secretary/President
Puget Sound Meeting Services, psmsoly@earthlink.net