BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

RE: Warren and Cynthia Willoughby Variance LU1900101	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Summary

The Applicants have applied for a variance to encroach six feet into an eight foot side yard setback for the construction of a 687 square foot garage along the wester property line of a lot located at 7110 Crescent Lane SW. The variance is denied. The Applicants have not met their burden of proof in establishing that denial of the variance would create undue hardship. Specifically, the Applicants have failed to establish that it is not reasonably possible to construct a garage that wouldn't necessitate the variance. The Applicants successfully established their preferred orientation of the garage, facing east, was not reasonably possible without the variance. However, the Applicants provided no compelling evidence that it was not reasonably possible to construct a functional garage facing north.

Testimony

Note: The following is a summary of testimony provided for the convenience of the reader only and should not be construed as containing any findings of fact or conclusions of law. The focus upon or exclusion of any particular testimony or hearing evidence in this summary is not reflective of the priority or probative content of any particular hearing evidence and no assurance is made as to accuracy.

Andrea Bell, City of Lakewood Associate Planner, summarized the staff report. In response to examiner questions, Ms. Bell confirmed that substandard setbacks are common throughout the City because when the City incorporated in 1996 this resulted in a lot of nonconformities. especially around lakes because of the unique shape of the lots. The lots around lakes tend to be narrower and longer than lots in other parts of the City.

John Zehnder, Applicant's counsel, presented Ex O. In response to Examiner questions, Mr. Zehnder noted that the garage couldn't be oriented towards the road as asserted by neighbors because the slopes would necessitate cuts that can't be accommodated by the lot width. Mr. Zehnder noted this is explained in more detail in his written materials.

Heather Burgess, counsel for adjoining neighbors of the Willoughbys, noted that if the variance is approved the garage will be built two feet from her client's property line. The proposal doesn't meet the variance criteria. The staff report doesn't accurately identify the size and other characteristics of the former garage. Photographs show that the structure formerly at the site was not a garage as asserted by the Applicant and it was smaller than its currently proposed replacement. Photographs show that the excavation for the new garage exceeds the size of the former building. The demolition permit for the former structure doesn't identify its size. If the garage were oriented towards the road there would be no need for a variance. In regard to Hearing Examiner comments on the conflicting case addressing the relevancy of surrounding nonconforming uses/structures for variance applications, the Lakewood City Council has different setback requirements for smaller lots and most notably didn't create any similar exception for lake lots. In response to additional examiner questions, Ms. Burgess noted that her client's home is located about 17 feet from the proposal.

In rebuttal, Ms. Bell noted that the subject lot is in the shoreline residential environment and the City's shoreline master program limits impervious surface to 35% for that designation. Ms. Bell did not know if re-orienting the garage to the road would take more impervious surface than allowed.

Mr. Zehnder explained that if you re-orient the garage to the road you'd have to cut into the slopes which would require shoring, which is added impervious surface. Mr. Zehnder noted that the Applicant's architect actually visited the property to assess development alternatives and the Connor's architect did not.

The record was left open until July 22, 2019 for public response to Ex. O (Applicant briefing) and July 24, 2019 for Applicant reply. New evidence was allowed excluding expert testimony.

Exhibits

Exhibits A-L at page 10 of the July 9, 2019 staff report were admitted during the July 16, 2019 hearing. The following documents have also been admitted:

M - GIS vicinity map of surrounding setback encroachments
N – Aerial photo of vicinity showing lot widths
O – July 16, 2019 letter from Zehnder with attachments

P- July 11, 2019 letter from Ron Thomas
Q – July 22, 2019 Burgess Response to July 11 Zehnder letter
R - July 24, 2019 Applicant Reply to July 22 Burgess letter

FINDINGS OF FACT

Procedural:

1. Applicant. Warren and Cynthia Willoughby,

2. Hearing. A hearing on the variance application was held on July 16, 2019. The record was left open for written argument through July 24, 2019.

Substantive:

3. Project Description. The Applicants have applied for a variance to encroach six feet into an eight foot side yard setback for the construction of a 687 square foot garage along the western property line of a lot located at 7110 Crescent Lane SW. The eight foot interior setback is imposed by LMC 18A.30.160D1e. A legal-nonconforming accessory structure previously occupied the same space where the new garage will be built – the previous structure, however, was only 0-1ft from the western property line.

4. Surrounding Area. The Willoughby lot is a waterfront lot on Lake Steilacoom. It is surrounded by similarly configured narrow, long single-family lots fronting Lake Steilacoom, all zoned R1. As shown in Ex. M and N, the Willoughby lot is significantly narrower than most other lots in the vicinity. Some pie shaped lots to the east are narrower as they approach the shoreline, but the developed portions of those lots are in portions of the lots that are wider than the Willoughby lot. Most lots in the same vicinity as depicted in Ex. M have structures that also significantly encroach into the 8 foot side yard setback, sometimes even crossing the side lot lines.

5. Adverse Impacts. There is no compelling evidence in the record of any adverse impacts that would be created by the proposal. The eight foot setback imposed by the Lakewood City Council is a legislative determination that this amount of separation is necessary for public health, safety and welfare. Although the precise purpose of the setback is not identified in Lakewood's regulations, the constitutionality of setback requirements has been upheld by the US Supreme Court for a number of reasons, including that the setback allows for the passage of light and air and also provides for fire separation. See *Gorieb v. Fox*, 274 US 603, 608-609 (1927). As testified by counsel for the adjoining property owners to the west, Dr. Ross Dragonsholt and Dr. Beth O'Connor, the home on the adjoining property will be located 17 feet from the completed garage, which would exceed the 16 foot separation imposed by the City Council if the garage and home were directly adjacent to each other and both structures conformed to the eight foot setback. Consequently, as far as light and air and fire separation are concerned, the proposal would maintain the separation intended by the City Council.

Under similar reasoning, the same conclusion could be reached for protection of privacy if protecting privacy is one of the objectives of the eight foot setback. In the unlikely event that the Dragonsholt/O'Connors were to build a structure directly across from the Willoughby garage at some time in the future, the City's recommended conditions for fire walls would mitigate against any resulting fire safety issues resulting from that development.

The counsel for Drs. Dragonsholt and O'Connor asserted at the hearing that excavating within two feet of the property line as proposed by the Applicants would damage the roots of trees on their property, most notably some Gary Oak trees that in some circumstances, not present in this case, are a protected tree species under the City's Tree Preservation Code, LMC 18A.50.300. Given that that the construction of the proposed garage will involve an excavation of indeterminate amount, *see* Page 8, Ex. C, damage to tree roots in that area is certainly possible. However, case law is clear that the Applicants may engage in self-help to remove roots encroaching onto their property, even if such action would damage trees on adjoining property. *See Mustoe v. Ma*, 193 Wn. App. 161 (2016)(no cause for damages for damage to encroaching tree roots caused by ditch excavation).

6. Necessity for Variance. The Applicants have failed to establish that the variance is necessary to reasonably place a garage on their property. They successfully established that the requested variance is necessary for their preferred garage orientation, but they were not able to establish that the variance is necessary to build a feasible garage upon their property.

The Applicants' preferred orientation is to place it two feet from the western property line facing the east. This configuration gives them a 23-foot, six-inch clearance to access the garage. As acknowledged in the staff report, AASHTO[1] standards require 24 foot clearance for parking stalls angled at 90 degrees. Using the AASHTO standard for minimum clearance, the Applicants have successfully established that the variance is necessary for their preferred orientation.

However, the variance is not necessary to place a feasible garage on the property. Drs. Dragonsholt and O'Connor presented an alternate orientation of the garage that included sufficient turning clearance for vehicles using the garage to both enter and exit the property without having to drive in reverse. Exit P is a letter written by the Dragonsholt/O'Connor architect that has the garage facing north instead of east, with a turning area in front that allows vehicles exiting the garage to turn 180 degrees to drive off the property. The architect, Ron Thomas, opined in Ex. P as follows:

> *...At 50' feet wide, the site is wide enough to provide the desired garage size without intruding onto either side yard setback...With the garage turned 90 degrees, the owners could access the garage by driving straight into the garage. To exit, they would back out and use the turn out area to get turned around to drive out of their driveway.*

[1] AASHTO is the American Association of State Highway and Transportation Officials, which promulgates engineering standards that are recognized by LMC 12.18.060 as serving as source for "best practices" in street design.

The Applicants did not present any expert testimony to rebut the opinion of Drs. Dragonsholt and O'Connor architect, nor did they object to the admission of Ex. P without cross-examination. Drs. Dragonsholt and O'Connor initially presented their idea of re-orienting the garage in a June 13, 2019 letter, Ex. G and then had that re-orientation substantiated by their architect's opinion in Ex. P by letter dated July 11, 2019. Prior to the introduction of this concept by Dragonsholt/O'Connor on June 13, 2019, the Applicants generically addressed the option to re-orient the garage as follows on May 6, 2019 in Ex. C, p. 9:

> *There is no other reasonably location to place the garage. The property is already graded to accommodate the garage with the paved platform for entry. Re-orienting the garage in a different location may necessitate additional paving in front of the garage to allow for vehicles to turn around on the property, as it is it would be a substantial hardship to have to back out of the property. The additional area to turn around might increase the impermeable surface of the property and would likely require significant excavation to create a flat surface in the middle of the property with a reasonable grade for the entrance of the garage.*

Notably, the passage above was not written by an architect or any expert in project design. It was written by the Applicants' attorney, whose opinion was that re-orienting the garage "may" necessitate additional paving and that this "might" increase the amount of impermeable surface. During the hearing, when the examiner asked Applicants' counsel about the feasibility of re-orienting the garage as recently identified by Dragonsholt/O'Connor, Applicants' counsel responded that re-orienting the garage to the north would necessitate cuts into the slope that wouldn't be practical or feasible, which he said was addressed in his written materials. The quoted passage above comprises the full extent to which re-orientation was addressed in the written Applicants' written materials up to that point in the proceedings.

In a post-hearing submission, Ex. R, the Applicants' counsel faulted the Dragonsholt/O'Connor architect for not visiting the site or addressing slopes in his opinion. Applicants' counsel certainly had good reason to point out shortcomings in the opinion rendered by the Dragonsholt/O'Connor architect. However, LMC 18A.02.150 places the burden of proof on the Applicants. In contrast to Dragonsholt/O'Connor, the Applicants presented no architect or any other expert opinion on the feasibility of an alternative location. It's unclear whether Applicants' counsel ever had an architect review the Dragonsholt/O'Connor orientation or even whether the quoted passage above from the Applicants' written materials was based upon input from the Applicants' architect or any other expert. Given that the burden of proof was on the Applicants, this imbalance in expert opinion was fatal to the Applicants' position. Dragonsholt/O'Connor admit their architect didn't visit the project site, but his Ex. P rendering of a garage oriented towards the north was upon a site plan identifying the contour lines of the project site. The architect was fully aware of the slopes of the property when he opined that "*..the site is wide enough to provide the desired garage size without intruding onto either side yard setback…*" The architect didn't address whether the clearance area would exceed the regulatory impermeable area limitations of the project site, but neither did the Applicants except to write that re-orientation "may" require additional paving. In short, there is no information in the record as to whether additional paving that "may" be required for the re-orientation would violate impermeable surface restrictions. In criticizing the Dragonsholt/O'Connor for failing to

address impermeability impacts, the Applicants have apparently failed to recognize that they have the burden of proof – if there's a gap in information reasonably[2] necessary to establish compliance with the variance criteria it's their responsibility to fill it.

Perhaps the most challenging issue associated with the orientation proposed by Dragonsholt/O'Connor is that the orientation could obstruct emergency access to the Willoughby residence located behind it. The Ex. P rendering of the Dragonsholt/O'Connor orientation clearly shows that emergency access to the Willoughby residence would be limited to a footpath. The staff report concludes that "*[s]topping the driveway further from the residence would likely increase risks to fire fighters, police officers and EMTs and could delay and complicate their rescue efforts*." In response Dragonsholt/O'Connor assert that the access driveway to the Willoughby home fails to meet fire emergency access standards, Ex. G, p. 6 and their architect opines that the project site is not accessible to fire trucks. This is certainly one issue that could have benefitted from emergency responder input, such as a letter from the fire marshal. The staff report was authored by planning staff with no indication that there was any input from public works or emergency responder personnel. In the absence of input from public works staff or emergency responders, the most compelling evidence is again that provided by the Dragonsholt/O'Connor architect, since as an experienced architect he is in the best position of all the witnesses to ascertain what is necessary for adequate access. Further, even if fire trucks could use the driveway, it's unclear whether the Dragonsholt/O'Connor orientation would significantly hamper fire or any other emergency response. Fire hoses could conceivably be dragged past the garage to the Willoughby home, etc.

It's also somewhat questionable why the garage is considered to be an obstacle to access to the Willoughby residence as opposed to simply a part of the residence. In long narrow lots such as the Willoughby lot it's likely that some other homes have an attached garage separating the remainder of a home from its driveway. No one would seriously claim that the garage in those instances would act as an obstacle to emergency access. The fact that the Willoughby garage may have to be detached by a few feet from the residence due to grade separation doesn't on its face appear to be materially different from an emergency response standpoint from an attached garage.

Given that the Applicants have the burden of proof, it must be concluded that the Applicants failed to establish that the Dragonsholt/O'Connor orientation would be a significant impediment to emergency access.

[2] Although the Applicants have the burden of proof, that doesn't mean they have the impossible task of proving a negative, i.e. identifying and refuting every conceivable orientation of the garage. That's not what occurred in this appeal. Dragonsholt/O'Connor presented prima facie evidence substantiated by an expert, Ex. P, that a north facing garage could be feasibly built without a variance. The Applicants were given ample notice of this alternative configuration prior to the closing of the hearing and did not request opportunity for additional testimony or object to entry of the Dragonsholt/O'Connor expert testimony. If the Applicants didn't have the burden to at least generally establish that alternative configuration were not possible, that burden certainly did shift to them once they were presented with evidence that established a reasonable alternative. *Cf. City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 33 (2004)(once Applicant met its burden of proof, burden shifted to City to disprove).

Conclusions of Law

1. Authority. LMC 18A.02.502 Table 3 classifies variance permits as a Process III application subject to hearing examiner review.

2. Zoning. Residential 1 (R1).

3. Review Criteria. LMC 18A.10.311 governs the review criteria for variances. Applicable criteria are quoted below in italics and applied via corresponding conclusions of law.

VARIANCE

LMC 18A.10.311 Required Findings - Variances.
A variance shall only be granted after the Community Development Director or Hearing Examiner, as appropriate, has reviewed the proposed variance and has made written findings that the standards and criteria set forth below have been met or can be met subject to conditions of approval:

A. That unique circumstances or conditions exist that are applicable to the land or buildings for which a variance is sought. Said circumstances or conditions are peculiar to such land or buildings and do not apply generally to the land or buildings in the area. The Hearing Examiner or Director may consider legal, nonconforming aspects of existing structures for the purpose of this finding.

4. Criterion met. The criterion is met. As determined in Finding of Fact No. 4, there are unique circumstances applicable to the subject lot, specifically the lot is of unusually narrow width in its buildable area as compared to other lots in the vicinity.

Beyond the narrowness of the subject lot, surrounding setback encroachments are not considered to qualify as a unique condition for purposes of the criterion quoted above. In applying the special circumstances criterion, the parties have spent considerable time debating the extent and relevancy of surrounding nonconforming setback encroachments. Case law generally prohibits a comparison to other nonconforming uses to assess special circumstances. *See Ling v. Whatcom County Board of Adjustment*, 21 Wn. App. 497 (1978). In *Ling*, a property owner sought a use variance to authorize multifamily housing in a zoning district that only authorized single-family residences. The property owner sought approval on the basis that numerous surrounding lots were developed with multifamily housing. Whatcom County denied the variance request and the denial was sustained on judicial appeal under the following ruling:

> *If Ling's application for a variance were to be granted, it would appear that the Board would have no basis for denying subsequent variance applications by other*

owners. The single-family zoning benefits enjoyed by the area would be effectively lost.

21 Wn. App. at 500.

The reasoning of *Ling* was followed in a later case, *St. Clair v. Skagit County*, 43 Wn. App 122 (1986). In *St. Clair*, Skagit County approved a variance to a minimum lot width of 75 feet for a parcel; evidence presented to the Board of Adjustment showed several lots in the immediate area were nonconforming as to this minimum width. Id. at 127. These nonconforming lots predated the zoning and minimum lot size regulations at issue, which applied across the entirety of the County. *Id*. at 128. The Court upheld the County's denial of the variance, holding that if a variance were granted due to pre-existing substandard development, the County "*would be bereft, it seems, of valid grounds upon which to deny such applications in the future*." Id.

The reasoning of the courts in *Ling* and *St. Clair* is particularly compelling in the circumstances of this case. As testified by staff during the hearing, the R1 zoning applicable to the subject lot was adopted by the City Council for the narrow, long lots surrounding lakes when the City incorporated in 1996. The City Council was presumably aware of the narrow setbacks characteristic of that built environment and adopted its wider 8 foot setback requirement anyway. Given these circumstances, the eight foot setback must be construed as Council intent to change the development pattern of the R1 area. That intent would be subverted if that existing development pattern were used to justify additional setback encroachments.

Despite *Ling* and *St. Clair*, a court did find cause to uphold a variance request due to surrounding nonconforming uses in *Sherwood v. Grant County*, 40 Wn. App. 496 (1985). *Sherwood* dealt with a variance application to place a mobile home in a zoning district that prohibited mobile homes. The court found acceptable "special circumstances" because the project site was located near numerous other mobile homes, some of them nonconforming within the same zoning district. The court found *Sherwood* distinguishable from *Ling* because it found the project site to be in a "unique" location that had a prevalence of mobile homes, thus precluding the "domino effect" that was of concern in *Ling*. 40 Wn. App. at 499.

Ling and *St. Clair* can be reconciled with *Sherwood* by a determination of whether a condition is indeed "special" (or "unique" as referenced in Sherwood) to a localized area and not applicable to a particular zoning district as a whole Specifically for this case, if setback encroachments surrounding the project site are only endemic to a small portion of the entire R1 district, that is a compelling "special circumstance" that can be used to justify approval of the variance without creating a "domino" effect that would render the eight foot sideward setback adopted by the City Council completely meaningless. In the converse, if the encroachments are endemic throughout the R1 district, then fears of the domino effect are well grounded.

The City's zoning map, vicinity/aerial maps submitted by the City (Ex. M and N) and the Applicants' prehearing briefing (Ex. C, p. 10-12) shows that more likely than not the setback encroachments are endemic throughout the entire R1 zoning district. As shown in the City's zoning map, the R1 district

is primarily limited to the lots surrounding Gravelly Lake, Lake Steilacoom and American Lake as well as a stream. These lots are almost all narrow and long, in line with the Willoughby lot. The vicinity and aerial maps submitted by the City show that almost all lots in the vicinity of the project site have setback encroachments. This development pattern is also shown in other parts of Lake Steilacoom and Gravelly lake in the afore-mentioned Applicants' prehearing briefing. As testified by staff during the hearing, the R1 zoning district covers properties that were developed before annexation into the City, which would be consistent with endemic setback nonconformities. For all these reasons, it is fairly clear that a substantial number, if not most lots, have nonconforming setbacks throughout the R1 district.

Given that the side yard setback encroachments are endemic to the R1 district as a whole instead of a localized portion of it, the facts of this appeal are more in line with *Ling* and *St. Claire* and there is no basis for a finding of special circumstances. based upon For similar reasons, using the nonconformities to justify a variance would be contrary to legislative intent. The City Council must be presumed to have known of the narrow setbacks endemic in the built environment of the R1 district when it adopted its 8 foot setback requirement, establishing a legislative intent to change the existing narrower setback development pattern. Using that nonconforming development pattern to then grant variances to the 8 foot setback requirement would directly subvert the Council's objective of eliminating it.

Another arguable reason to find the Sherwood case inapplicable to this appeal is that, as emphasized in *Sherwood*, the special circumstances criterion of that case expressly authorized consideration of location or surroundings. The special circumstances variance criterion was quoted as follows in the *Sherwood* opinion:

> *Because of special circumstances applicable to subject property including size, shape, topography, **location or surroundings**, the strict application of the zoning ordinance is found to deprive subject property of rights and privileges enjoyed by other properties in the vicinity and under identical zone classification.*

40 Wn. App. at 498 (emphasis from court opinion retained).

The "location or surroundings" element of the variance criterion in Sherwood is found in many of the variance criteria adopted by other jurisdictions and is in fact part of the mandatory variance criteria required by RCW 35A.63.110(2)(b), at least for those jurisdictions that still have boards of adjustment making their variance decisions. Notably, the City of Lakewood doesn't include "location or surroundings" in its special circumstances criterion. It could be argued that the prevalence of surrounding nonconformities is "peculiar to such [Applicants'] land" as required by the City's special circumstances criterion, but with the seemingly deliberate exclusion of the "location or surroundings" term given the regulatory context for variance criteria, it doesn't appear that the City Council wanted the surrounding development pattern to play a factor in assessment of the special circumstances criterion.

LMC 18A.10.311B. *That proof exists of undue hardship if the variance is not granted. It is not sufficient proof of hardship to show that a greater profit would result if a variance were granted; nor shall loss of value be a valid reason to grant a variance. Furthermore, the hardship cannot be self-created, nor can it be created by actions of a property owner or a previous property owner who purchases property with or without the knowledge of restrictions present. The hardship must result from the strict application of this title; and be suffered directly by the property in question. Evidence of a variance granted under similar circumstances shall not be considered as a solely sufficient cause to grant hardship relief.*

5. Criterion not met. The criterion is not met. As determined in Finding of Fact No. 6, the Applicants established that the requested variance is necessary for their preferred garage orientation, but it is not construed as undue hardship for the Applicants to be deprived of the one garage orientation they prefer for their lot. Rather, undue hardship would exist if the side yard setback prevented the Applicants from constructing any feasible and functional garage on their property. As further detailed in Finding of Fact No. 6, project opponents were able to demonstrate the reasonable possibility with expert testimony that a fully functional and feasible garage with a different orientation could be built on the subject lot without a setback variance. The Applicants presented no evidence except for conjecture from their attorney that such an orientation was not reasonably feasible. The project opponents presented the most compelling evidence on the need for the variance while the Applicants carried the burden of proof under LMC 18A.02.150. Under these circumstances it must be found that the Applicants failed to meet their burden of proof in establishing that the Applicants have not established that it is not possible to build any reasonably placed garage on their property without a variance.

LMC 18A.10.311C. *That the granting of the variance shall be consistent with the comprehensive plan and in agreement with the general purpose and intent of the regulations imposed by this title.*

6. Criterion arguably met. Approval of the variance is arguably consistent with the City's comprehensive plan. The City's comprehensive plan has no goals or policies that directly addresses variances or the significance of setbacks. However, the neighborhoods and housing sections of the comprehensive plan in chapter 4 emphasize the importance of preserving neighborhood character and stability. Similarly, LMC 18A.30.110 provides that a purpose of the R1 zoning district is to preserve the identify of large lot neighborhoods. Setbacks play an important role in preserving what the City Council would believe to be a major neighborhood characteristic, which is the spacing between buildings and roads. Authorizing variances to these requirements in situations where undue hardship is not established has the potential to seriously undermine the integrity and vision of the setback requirements imposed by the City Council by opening the door to a plethora of similar variance requests. However, as determined in Finding of Fact No. 5, the proposal does not undermine any pertinent setback objectives, since the residence on the adjoining lot is located 17 feet away from the proposed garage site. Consequently, authorizing variances under similar circumstances for other projects would not result in a land use pattern of reduced spacing between buildings or between buildings and roads contrary to neighborhood character. This finding is qualified as "arguably" because there is the possibility that neighboring property owners will subsequently add a structure next to a variance approved structure that results in narrower building separation than intended, e.g. after

the Willoughbys build their garage within 2 feet of their side property line Dragonsholt/O'Connor could then build a large shed directly across from the garage on their side yard line, resulting in a building separation of 10 feet instead of the 16 intended by the City Council. That scenario does not appear likely, however.

LMC 18A.10.311D. *That the granting of the variance shall neither be injurious to the neighborhood or community, nor otherwise detrimental to the public welfare.*

7. Criterion met. The criterion is met. As determined in Finding of Fact No. 5, no adverse impacts are anticipated for the proposal and therefore the proposal will not be injurious to the neighborhood, community or public welfare.

LMC 18A.10.311E. *That the granting of the variance will not confer upon the applicant any special privilege that is denied by this title to other lands, structures, or buildings in the area.*

8. Criterion not met. The granting of any variance in the absence of undue hardship would confer a special privilege as variances should not be approved under such circumstances. If the setback did create undue hardship, then there would be no special privilege in the granting of the variance because the zoning code likely authorizes encroachments similar to that sought by the Applicants throughout the R1 district for legal nonconforming structures for the reasons identified in Conclusion of Law No. 4.

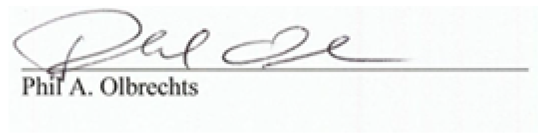
LMC 18A.10.311F. *That the granting of the variance will not permit the establishment of any development or use which is not permitted by the title.*

9. Criterion met. Approval of the variance would not permit the establishment of any development or use otherwise permitted by the zoning code. LMC 18A.30.130A14 authorizes residential accessory uses in the R1 district, which is construed to include garages.

DECISION

The variance is denied. The Applicants have not met their burden of proof in establishing that denial of the variance would create undue hardship.

DATED this 30th day of July, 2019.



Hearing Examiner for Lakewood

Appeal Right and Valuation Notices

LMC 18A.02.502 Table 3 provides that the final decision of the Hearing Examiner on variance applications is subject to appeal to superior court. Appeals of final land use decisions to superior court are governed by the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. LUPA imposes short appeal deadlines with strict service requirements. Persons wishing to file LUPA appeals should consult with an attorney to ensure that LUPA appeal requirements are correctly followed.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.