City of Tacoma
Hearing Examiner

July 23, 2019

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**Re: *Karena Kirkendoll v. City of Tacoma***
**File No.: HEX2019-010 (LU18-0188)**

Dear Parties,

In regard to the above reference matter, please find enclosed a copy of the Hearing Examiner's Findings of Fact, Conclusions of Law, and Decision entered on July 23, 2019.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1): Findings, Conclusions, and Decision

Cc: Electronic Mail Delivery
David K. Fisher AIA, DK Fisher Architects, david@dkfisherarchitects.com
Angie Krupa, Legal Assistant, Office of the Tacoma City Attorney

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

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| **KARENA KIRKENDOLL,**<br><br>**Appellant/Applicant,**<br><br>**v.**<br><br>**CITY OF TACOMA,** a Washington municipal corporation, through its Planning and Development Services Department,<br><br>**Respondent.** | **FILE NO.: HEX 2019-010 (LU18-0188)**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION** |

**THIS MATTER** came before JEFF H. CAPELL, the Hearing Examiner for the City of Tacoma, Washington, for hearing on June 27, 2019. Appellant/Applicant Karena Kirkendoll, was represented by attorney William T. Lynn of Gordon Thomas Honeywell. Respondent City of Tacoma ("City") was represented by Deputy City Attorney Steve Victor.

During the hearing, witnesses were placed under oath and testified. Exhibits were admitted and reviewed.

At the conclusion of the hearing, the Hearing Examiner left the record open for the parties to submit information identifying the date the lot comprising the Subject Property (defined below) was created. This was submitted on July 1, 2019, and became Exhibit A-3. The record then closed that same day.

Based upon the evidence submitted, the Hearing Examiner makes the following:

## FINDINGS OF FACT

1. Appellant/Applicant Karena Kirkendoll (hereinafter "Kirkendoll" or "Appellant")[1] has appealed the City's denial of a requested design variance (LU18-0188) to increase the allowable floor area ratio ("FAR") in the construction of a single-family residence (the "FAR Variance"). *Exs. R-1~R3*. The denial of the FAR Variance was first issued in a written decision from the Director (the "Director") of Planning and Development Services ("PDS") dated February 19, 2019, which the City submitted as Exhibit R-3 (separately the "Original Decision").[2] The Director affirmed the Original Decision in his written Order Denying Request for Reconsideration... dated April 25, 2019 (*Exhibit R-1*, separately the "Reconsideration" and collectively with the Original Decision, referred to as the "Director's Decision").

2. The real property to which the FAR Variance attaches is located at 3308 N. Junett Street in the city of Tacoma (the "Subject Property"). *Exs. R-1 ~ R-4, R-23*. The Subject Property is in an area zoned R-2 residential, and the City's Comprehensive Plan (the "Comp Plan") designates the Subject Property as being within the "Single-Family Detached Housing Area," making Appellant's proposed residential use generally conforming with applicable zoning and the Comp Plan's goals and policies. In addition to the foregoing, the

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[1] PDS documentation refers to Fisher Architects as the applicant. This is incorrect. Fisher Architects is the agent of the actual applicant and record owner of the Subject Property, Karena Kirkendoll. Generally, the applicant for a land use permit must be the record owner of the property to which the permit applies. *See Clark v. Sunset Hills Mem'l Park*, 45 Wn.2d 180, 273 P.2d 645 (1954); *and Mangat v. Snohomish Cty.*, 176 Wn. App. 324, 326, 308 P.3d 786, 787 (2013) *rev. den.* 179 Wn.2d 1012, 316 P.3d 495 (2014).

[2] The Appellant's variance application requested both the FAR Variance and a rear yard setback variance (separately, the "Setback Variance"). The Original Decision granted the Setback Variance, and it is no longer at issue. City Associate Planner Latasha Santos testified that all criteria for approving the Setback Variance were met and that overall lot coverage/open space on the Subject Property ended up being about the same, with increases to the sideyards compensating for the reduction to what would otherwise be required at the rear of the Subject Property.



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Subject Property is located within a View-Sensitive Overlay District ("VSD") which limits structure height to twenty five feet (25').[3] *Santos Testimony, Fisher Testimony; Ex. R-3.*

3. Appellant has owned the Subject Property since 2013, when she purchased it at auction. *Kirkendoll Testimony.* The Subject Property is currently bare land, but it was previously improved with a single-family residence, that, at certain places on the Subject Property, primarily along the western boundary, was built to within one foot of the property line. *Id.* Because of numerous structural and other problems with the condition of the prior improvements, including foundation integrity and water damage, the Appellant was advised that it was better to demolish the improvements than to try to renovate them, and she did so in 2014. *Id.*; *Ex. R-3.*

4. The Subject Property is mostly rectangular in shape and measures 80 feet by 50 feet (80' x 50'), with a total lot area of 4,000 square feet. *Santos Testimony; Ex. R-3, Ex. R-4, Ex. R-23.* Because the Subject Property is under 4,500 square feet in area, and is located in an R-2 zoning district, it is considered a "Level 2 Small Lot," making the Subject Property subject to small lot development standards, including a maximum FAR limitation of .5, unless a design variance is obtained. *Id. Tacoma Municipal Code* ("TMC") *13.06.100.D, TMC 13.06.145.D.2.* and *TMC 13.06.145.F.* Unvaried application of the FAR standards to the Subject Property would limit any house constructed to 2,000 square feet. *Santos Testimony; Ex. R-3, Ex. R-1.*

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3 *See TMC 13.06.645.B.3.* Santos testified that Appellant had been asked to submit a height survey verifying that the proposed two-story residential structure complies with the twenty-five foot (25') height limit, but that Appellant chose to defer that submittal. *See also Ex. R-10.* By email dated "Oct 8, 2018," PDS did inform the Appellant that "[y]ou may defer the height survey to the building permit stage to get this variance moving along." *Id.*

5. The Subject Property is bound on two sides by City right-of-way: on the North by North 34th Street, which is essentially a narrow alleyway, and on the West by North Junett Street. *Ex. R-3,* Both of these right-of-way areas are substandard and narrow, and do not readily accommodate on street parking.[4] *Kirkendoll Testimony, Fisher Testimony; Ex. R-4*. Many of the houses in this neighborhood have small garages built into the hillside in daylight basement fashion. *Fisher Testimony*.

6. Sometime after Kirkendoll purchased the Subject Property, City setback regulations applicable to the Subject Property changed, leading to her request for the Setback Variance. *Fisher Testimony, Santos Testimony; Ex. R-3, Ex. R-1*. In addition, during the time between demolishing the old house and applying for permits to construct, the City enacted its currently-in-place FAR regulations, leading to Kirkendoll's request for the FAR Variance. *Id.*

7. In the process of requesting the FAR Variance, several different elevations/ floor plans were submitted to the City, some with clearly ascertainable provenance, and at least one plan that is disputed. *Fisher Testimony, Santos Testimony; Ex. R-12, Ex. R-18, Ex. R-22, Ex. R-23*. The parties could not agree on whether Appellant had any role in drafting and submitting what appears to be a hand-drawn design that is included in Exhibit R-23 at page/slide 18 (the "Slide 18 Design" which is also found in Exhibit R-22). The City used the Slide 18 Design, and subsequent slide 19, that shows a single level home with daylight basement, for the City's position that the "Applicant has demonstrated a reasonable use that

[4] The Examiner is relying on testimony for this finding. He did, however, conduct a brief site visit to the Subject Property on July 12, 2019.

meets FAR." *Santos Testimony; Ex. R-23*. Appellant, on the other hand, denied ever submitting this single level design proposal. *Fisher Testimony*.[5] Ultimately, the two drawings most helpful to the Examiner, and most pointed to by the parties, are the Appellant's last "Baseline Model,"[6] and Appellant's "Alternative Design"[7] as compared at various places in the City's Exhibit R-23. *See also Ex. R-18*.

8. The City and the Appellant also disagreed on the following:

(a) whether the Appellant's "Baseline Model" actually meets the FAR of .5;

(b) whether the FAR calculation requires including any basement square footage if the majority of the basement/daylight basement is below grade;

(c) whether FAR should be calculated from the exterior of the structure or from the inside of wall studs;

(d) whether "chases" such as elevator shafts and open stairwells should be included in FAR calculations on more than the originating floor; and

(e) the ultimate question of whether Appellant's "Alternative Design" "[c]an be demonstrated to provide equal or superior results to the requirement from which relief is sought in terms of quantity, quality, location, and function." *TMC 13.06.645.B.4.b(5)*.

9. As regards the disagreements in Finding 8 above, the City's contention that the "Baseline Model" was not FAR-compliant rests on the City's calculation of a .52 FAR using its preferred measuring methodology.[8] The .02 difference between compliance and noncompliance could easily rest on the difference in approach between the Appellant and the City as to whether you measure from exterior walls or from the inside of interior studs,

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[5] *But see Ex. R-22*. Here, the document captioned "SCOPING REQUEST David Fisher 4/14/15" states: "The rebuilt home will be a single level home with a daylight basement," and appears to include the same plans the City pointed to in its Exhibit 23 as having been submitted by the Appellant.
[6] *See Ex. R-23* at page/slide 12 through 17.
[7] *Id.*
[8] As corrected in the Reconsideration from an erroneous 1.9 calculation in the Original Decision.

and whether chases are included beyond the originating floor.[9] Fisher testified that his approach to calculating FAR is the industry standard. This includes his contentions that basement square footage is entirely excluded if the majority is below grade, that calculations are made from the interior of wall studs, and that chases are excluded after the originating floor (i.e., only counted once). Santos testified that the City's calculations and approach were based on her "conversations with building code reviewers." Neither side presented any provisions from the International Building Code(s), from the TMC, or from other applicable laws in support of their respective positions, which makes drawing a definitive conclusion on the proper calculating method somewhat difficult. Fortunately, making this conclusion is not absolutely essential to this decision.

10. In any event, having a baseline model that meets FAR is not a requirement for the City to analyze whether a FAR design variance meets the TMC criteria found in TMC 13.06.645B.4.b. *Santos Testimony upon inquiry from the Examiner*. That said, the reasoning behind the Director's Decision's taking such exception to the Appellant's "non code-compliant baseline," purportedly calling it an "unreasonable comparison,"[10] is unclear, given that the "[p]roposed alternative design that ***departs from*** [the FAR] requirement…" is what ultimately has to be evaluated against the TMC 13.06.645 B.4.b criteria. [Emphasis added.] Ex. R-3, Original Decision at p. 9. While a compliant baseline plan might help for purposes of comparison and be used to illustrate more concretely whether the "equal or superior results" requirement has been met, it is not necessary.

[9] And without looking to how the daylight basement square footage is calculated.
[10] *Santos Testimony*.

11. Santos testified that the FAR standards are in place to limit floor area on small lots, and effectively reduce a structure's size, bulk and scale. In explaining the heart of the Director's denial at the hearing, Santos pointed to various angled views of the "Baseline Model" elevations and the "Alternative Design" keying in on the difference between the covered deck aspect of the "Alternative Design" as opposed to the uncovered deck in the "Baseline Model."[11] This difference, and its attendant increase (or reduction) in the scale of the proposed house appears to be the lynchpin of the City's denial. Santos testified that because of the "extended roofline," the "size and scale is affected," and therefore, the "Alternative Design" could not be considered equal to or superior to a presumed-code-compliant baseline model because the covered decks added scale/bulk to the house. There was some indication that the City was concerned over the "extended roofline" interfering with neighboring views, but the City could not refute Fisher's testimony that the northeast orientation of the "extended roofline" would not be in any neighboring house's view corridor. The City could only offer speculation as to any other interference. *Fisher Testimony, Santos Testimony.*

12. Fisher testified that the Appellant's "Baseline Model," and "Alternative Design" are the same mass and the same scale, built in the same footprint on the same topography, and that they look virtually the same, with the only visual differences being the extended roofline referenced in Exhibit R-23 at slides 14 through 16, and the addition of doors and windows in the daylight basement. Of course, the ultimate square footage calculation would also be different owing to covered decks being included in FAR, and

[11] *See Ex. R-23* at page/slides 12 through 17.

additional usable floor area in the daylight basement. Fisher further testified that the solid to void ratio with the windows in the basement is considered to be a better visual design by industry standards.

13. Santos testified that the Director believed that the Slide 18 Design meets the TMC FAR requirement, having a total square footage area of only 1,950 by the City's calculation. Santos characterized the Slide 18 Design as "a true and reasonable baseline," and that the Slide 18 Design supported the Director's finding that there was "no practical difficulty in building a 2,000 sq. ft. or smaller home" on the Subject Property. *Santos Testimony.*

14. Santos further testified that the Director determined that "denying the FAR Variance does not prohibit reasonable use of the property," and that the Appellant's "Alternative Design" "does not provide equal or superior results in the ***size, bulk, and scale*** of the structure." [Emphasis added.] On inquiry from Appellant's legal counsel, Santos testified that the design variance criteria were not particularly flexible and that obtaining a FAR variance would be very difficult. Finally, Santos contended that the Director could have limited FAR beyond the TMC's stated .5 in granting the Setback Variance, but did not, and that the denial of the FAR Variance was not somehow tied to the granting of the Setback Variance, but could have been.

15. Any conclusion herein which may be more properly deemed or considered a finding is hereby adopted as such.

## CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over appeals of PDS Director decisions on variance permits pursuant to Tacoma Municipal Code ("TMC") 1.23.050.B.2 and TMC 13.05.050. Hearings on such decisions are conducted *de novo* in accordance with TMC 1.23.060. Appellants in land use appeals have the burden to show by a preponderance of the evidence that the Director's Decision should be reversed or modified. *TMC 1.23.070.C.* In this appeal, that burden of proof falls to Kirkendoll to show that the Director's Decision was incorrectly decided and that the TMC's applicable variance criteria were met. *See also TMC 13.06.645.B.4.b.*

2. The law requires that decisions from adjudicative tribunals rest upon evidence.[12] Evidence is used to establish facts. "Proof of the fact to be established may be by direct or circumstantial evidence."[13] Argument, however, is not evidence.[14]

3. TMC 13.06.645 governs variances. Subsection B.4 of that section specifically sets forth the criteria for approving design variances. In that regard, TMC 13.06.645.B.4.b provides the following:

> Criteria. The Director or Hearing Examiner may, in specific cases, authorize variances to design standards upon the finding that the variance request meets one of the criteria listed below. Standardized corporate design and/or increased development costs are not cause for variance. Failure to meet an appropriate test shall result in denial of the variance request. The Director or Hearing Examiner may issue such conditions as necessary to maximize possible compliance with the intent of the regulation from which relief is

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[12] *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356-357, 493 P.2d 1018, 1022-1023 (1972).
[13] Lamphiear, 6 Wn. App. at 356, *citing Arnold v. Sanstol,* 43 Wn.2d 94, 260 P.2d 327 (1953); *see also GLEPCO, LLC v. Reinstra,* 175 Wn. App. 545, 563, 307 P.3d 744, 752-753 (2013).
[14] *Jones v. Hogan*, 56 Wn.2d 23, 31-32, 351 P.2d 153, 159 (1960); *Hollins v. Zbaraschuk*, 200 Wn. App. 578, 594, 402 P.3d 907, 915 (2017); *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361, 370 (2007).

sought. The applicant carries the burden of proof to demonstrate applicability of the appropriate test(s):

(1) Unusual shape of a parcel established prior to 2002 creates practical difficulties in achieving compliance with the design standard sought to be varied.

(2) Preservation of a critical area, unique natural feature, or historic building and/or feature creates practical difficulties in achieving compliance with the design standard sought to be varied.

(3) Widely varied topography of the building site creates practical difficulties in achieving compliance with the design standard sought to be varied.

(4) Documentation of a pending public action, such as a street widening, creates practical difficulties in achieving compliance with the design standard sought to be varied.

(5) A proposed alternative design that departs from a requirement that can be demonstrated to provide equal or superior results to the requirement from which relief is sought in terms of quantity, quality, location, and function.

4. A design variance applicant only has to meet one of the criteria above to qualify for a variance. Here, the criteria in both subsections (1) and (5) were considered or argued in some fashion along the way to the Director's Decision. The Director's Decision was correct in determining that TMC 13.06.645.B.4.b(1) does not apply here. *See Ex, R-3, Director's Decision* at p. 9. Although the Subject Property was parcelized prior to 2002, there is nothing particularly unusual in its ***shape*** that would create an inability to meet FAR standards. *FoF 4.* The Director's Decision erroneously refers to "the shape ***and/or size*** of the parcel," but TMC 13.06.645. B.4.b(1) takes no account of size. [Emphasis added.]

5. The Director's determination that the Appellant's proposal could not meet the

criterion set forth in TMC 13.06.645.B.4.b(5), however, was in error. Given the full written record in this appeal, together with the testimony presented at the hearing, it is clear to the Examiner that the City has misinterpreted its own code, leading to a misapplication of the design variance requirements, at least in regard to this particular FAR Variance.

6. Although there was some suggestion at the hearing, in questioning and argument, that TMC 13.06.645.B.4.b(5) is ambiguous, the Examiner cannot conclude that such is the case, even though the parties had different interpretations of that subsection. Rather, the Examiner concludes that TMC 13.06.645.B.4.b(5), as read in the entire context of TMC 13.06.645, is clear on its face, as will be explained further below. The City has simply misinterpreted and misapplied it in this instance leading to an unreasonable interpretation/ application. "A statute is ambiguous if it is 'susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.'"[15] The City's interpretation of the TMC 13.06.645.B.4.b(5) variance criterion is not a reasonable interpretation because it renders the provision meaningless. Constructions that would render a portion of a statute or ordinance "meaningless or superfluous," or that otherwise nullify any provisions thereof should be avoided,[16] and legislation generally "[m]ust be construed as a whole, and effect should be given to all the language used…"[17]

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[15] *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006).
[16] *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41-42, 156 P.3d 185, 189 (2007); *see also Centrum Fin. Servs., Inc. v. Union Bank, NA*, 1 Wn. App. 2d 749, 759-760, 406 P.3d 1192, 1197 (2017), *and Locke v. City of Seattle*, 133 Wn. App. 696, 704, 137 P.3d 52, 56, 2006.
[17] *State ex rel. Royal v. Bd. of Yakima County Comm'Rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994); *Centrum Fin. Servs., Inc.*, 1 Wn. App. 2d at 759-760.

7. "Municipal ordinances, such as the ordinances at issue here, are local statutes that are to be construed according to the rules of statutory construction.[18]" "Where a statute is clear on its face, its plain meaning should 'be derived from the language of the statute alone.'"[19]

8. In denying the FAR Variance, the City applied TMC 13.06.645.B.4.b(5) erroneously. It is clear from the record that, in denying the FAR Variance, the City read TMC 13.06.645.B.4.b(5) to require that a "proposed alternative design" "provide equal or superior results" in the size, bulk, and scale of the structure proposed. That is not what TMC 13.06.645.B.4.b(5) actually says, but it does explain the City's contention that obtaining a design variance from FAR standards would be very difficult. In actual application it would be impossible.

9. A variance by definition will vary. A request for a design variance means that the applicant is seeking relief from application of some design requirement, not seeking to meet it anyway, or even exceed it, but that is the result that the City's interpretation of TMC 13.06.645.B.4.b(5) produces. The plain language of TMC 13.06.645.B.4.b(5) does not require that the "proposed alternative design" "provide equal or superior results" in the size, bulk, and scale of the structure proposed. In other words, it does not require that the "proposed alternative design" "provide equal or superior results" to what otherwise would be required by the FAR standards, which is how the City has interpreted TMC 13.06.645.B.4.b(5) as applied to the FAR Variance. To do so would render TMC 13.06.645.B.4.b(5) meaningless because no real variance would be permitted. TMC 13.06.645.B.4.b(5) does allow for an applicant to ***vary***

[18] *Ford Motor Co.*, 160 Wn.2d at 41-42, *citing McTavish v. City of Bellevue*, 89 Wn. App. 561, 565, 949 P.2d 837 (1998); *see also Sleasman v. City of Lacey,* 159 Wn.2d 639, 643, 151 P.3d 990 (2007).
[19] *Id., internal cites omitted.*

from the FAR standards if the "proposed alternative design" "provide[s] equal or superior results" "in terms of quantity, quality, location, and function." The Appellant's "proposed alternative design" does just that, as discussed and formally concluded below.

10. The City's interpretation and application of TMC 13.06.645.B.4.b(5) result in pretzel logic,[20] where the exception can only be met by keeping the rule anyway in a way that reflexively devours itself leaving the provision meaningless as applied in this appeal to the FAR standards. If the alternative design has to be equal or superior to the FAR standards themselves in terms of size, bulk and scale, the FAR would be met (or exceeded) and no variance would be needed, again making TMC 13.06.645.B.4.b(5) meaningless and of no effect. For TMC 13.06.645.B.4.b(5) to have effect and be meaningful, obtaining a variance under its auspices must be possible. Analyzing whether a "proposed alternative design" "provide[s] equal or superior results" "in terms of quantity, quality, location, and function" rather than in size, bulk and scale, makes a variance possible, and therefore this code provision achieves meaningfulness and has an actual effect. The plain language controls.

11. In addition to the City's mistaken interpretation of TMC 13.06.645.B.4.b(5) discussed above, it also erred in its denial of the FAR Variance application in three additional ways. First, the City seemed to give significant weight to the idea that, if the Appellant ***can*** build a FAR-compliant house on the Subject Property, it therefore ***must*** comply with the FAR standards and is not entitled to a variance. This concept appears nowhere in TMC 13.06.645.B.4.b.

[20] "Faulty or circular reasoning that does not stand up to scrutiny." https://www.macmillandictionary.com/us/dictionary/american/pretzel-logic

Secondly, the City referenced the Director's codified ability to "[i]ssue such conditions as necessary to maximize possible compliance with the intent of the regulation from which relief is sought,"[21] as justification for denying the FAR Variance. This was also error. The Director's ability to add conditions to a discretionary permit such as a variance only comes into play if the variance is approved, and presumably the approval is based on the imposition of reasonable conditions. The ability to add reasonable conditions to an approval cannot be reverse engineered to become justification for a denial.

Finally, in denying the FAR Variance, the City appears to have relied, at least in part, on its contention that the Appellant's preferred baseline model did not meet the FAR standards. This disagreement, although unfortunate and somewhat distracting, is not dispositive, or even a contributory factor in assessing whether a requested design variance meets the test of TMC 13.06.645.B.4.b. While having a code-complaint baseline model is helpful in making comparisons, it is not necessary for an approval to be granted, nor is it determinative either way.

12. The meaning of zoning variance criteria and their application in a particular case present questions of law or mixed questions of law and fact.[22] The Examiner now turns to the actual elements of TMC 13.06.645.B.4.b(5), applying the law to the relevant facts established in the record. The question from the plain language of TMC 13.06.645.B.4.b(5) then is whether the Appellant's "[p]roposed alternative design that departs from [the FAR]

[21] Found in TMC 13.06.645.B.4.b. The Director is also granted more general authority to condition discretionary permits at various places in TMC 13.05. *See e.g., TMC 13.05.040.B.*

[22] *See Citizens v. Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079, 1086 (2001). This particular admixture may be responsible for the lines between the Findings of Fact and Conclusions of Law in this Decision being perhaps less clear than might otherwise be desirable.

requirement can be demonstrated to provide equal or superior results to the [FAR] requirement from which relief is sought in terms of quantity, quality, location, and function."[23]

**(a) Quantity**: Of the four factors listed in TMC 13.06.645.B.4.b(5) (quantity, quality, location, and function), quantity is really the lone cause-for-pause in this appeal from a conceptual standpoint. In the context of positive things like housing, human beings generally consider more to be better (i.e., superior). While it seems odd that a proposed alternative design's being larger than what the FAR allows would somehow assist in being able to vary from the FAR standards and indeed be larger, that is how TMC 13.06.645.B.4.b(5) reads. In any event, a request to vary from the FAR's limitations is presumed to be targeting a larger floor area; being superior in quantity cannot be read to mean the FAR standards must be met or even exceeded by being smaller because that is not a variance, that is a compliance.

No definition for quantity is provided in TMC 13.06.645.[24] *Webster's* online defines "quantity" in pertinent applicable part as "a determinate or estimated amount (1.b)," "total amount or number (1.c)," or "the aspect in which a thing is measurable in terms of greater, less, or equal or of increasing or decreasing magnitude (2.a)."[25] Likewise, the phrase "equal or superior" is not defined in the TMC. Again turning to *Webster's* online, the most appropriate definition for "equal" reads "of the same measure, quantity, amount, or number as another (1.a),"[26] and for "superior" reads: "greater in quantity or numbers (4.a)."[27]

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[23] The Examiner notes here that this four factor list is conjunctive, and therefore, the Appellant must show that all four are met by the proposed alternative design.

[24] TMC 13.06.700 provides that, "For words that are not defined in this chapter [TMC 13.06], or that do not incorporate a definition by reference, refer to a *Webster's Dictionary* published within the last ten years." In this case, none of the elemental factors set forth in TMC 13.06.645.B.4.b(5) are defined in TMC 13.06.

[25] https://www.merriam-webster.com/dictionary/quantity?src=search-dict-box

[26] https://www.merriam-webster.com/dictionary/equal

[27] https://www.merriam-webster.com/dictionary/superior?src=search-dict-box

Only one house is proposed here. That quantity is equal whether FAR is stringently applied, or is varied. Appellant's proposed alternative design ***is*** greater in quantity or number in terms of floor area. Definitionally, being greater in quantity or number makes the proposed alternative design superior in quantity.

Fisher testified that the proposed alternative design can be built within the same building envelope as what otherwise would be a FAR-compliant design. Taking that statement as true,[28] being able to have additional usable floor area inside the same structural footprint as what otherwise would be a FAR-compliant structure makes the home produced from that alternative design superior in quantity as well.

**(b) <u>Quality</u>**: *Webster's* online defines "quality," in pertinent part as "degree of excellence **:** grade (2.a)," and as "superiority in kind (2.b)."[29] Again, humans are prone to liking bigger, better, and more. In our vehicle-centric society, having a garage in a house is easily considered superior in kind to a house that does not. Add to that things such as a guest room in the proposed daylight basement, and covered decks here in the rainy Pacific Northwest, and there is easily achieved a greater degree of excellence and superiority in kind in the home proposed in the alternative design, and therefore superior quality. To say otherwise requires a level of mental gymnastics in which the Examiner is unwilling to engage.

**(c) <u>Location</u>**: Inasmuch as the basic footprint of any house to be built on the Subject Property will be materially the same, this factor is easily met in terms of providing equal results. What appeared to be the City's heavy reliance in the denial on the extended roofline of

[28] The City's disputed .02 difference is so small as to not be not dispositive because it could be eliminated with very little change to the design.
[29] https://www.merriam-webster.com/dictionary/quality?src=search-dict-box

the covered deck in the proposed alternative design cannot be considered a barrier to the locational factor being met. It is true that in the proposed alternative design something will be present (extended roofline) that is not present in the baseline model, but that does not change anything material in the actual location of the house as designed.[30] Rather, that difference is exactly what the City called it: a change to the bulk/scale/mass of the structure, not the location. Both designs advanced by the Appellant have a ground level structural footprint that measures 34 feet by 39 feet (34' x 39 '). The Slide 18 Design FAR-compliant design shows a ground level structural footprint of 35 feet by 40 feet (35' x 40'). The difference is negligible enough that the Examiner concludes that the "location" element of TMC 13.06.645.B.4.b(5) is met as being equal, even if not superior.

**(d) Function**: *Webster's* online defines "function" as "the action for which a person or thing is specially fitted or used or for which a thing exists (2)."[31] Houses are specially fitted for residing in and they exist for that purpose. Houses do not expressly need to have garages—some have them, some do not. Houses exist with decks and without. An even smaller subset of houses with decks is comprised of houses with covered decks. In a location such as where the Subject Property sits, on-street parking is extremely difficult. *FoF 5*. Adding that function to the house makes the house superior to a design that omits a garage. Adding to that an additional room in the daylight basement and covered deck area enhances the function of the house even further. While these additional amenities add to the FAR, they can be easily said to

[30] It should be noted here that the City's objection to the extended roofline were not rooted in analyzing any of the actual four factors of quantity, quality, location, and function, but rather were objected to because they added bulk and scale to the structure. As already pointed out, a lesser quantity house (i.e., a house without the covered decks and usable basement area) cannot be considered superior in quantity without engaging in tortured logic. Secondarily, the City thought that the extended roofline might interfere with neighbors' views, but Fisher testified that this was not the case due to the proposed house's orientation, and the City could not refute his testimony.

provide superior results in terms of function to the house represented in the proposed alternative design.

13. Any finding herein which may be more properly deemed or considered a conclusion is hereby adopted as such.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

## DECISION

The Director's Decision denying the FAR Variance in this matter is hereby REVERSED, and Appellant Kirkendoll's requested FAR Variance is APPROVED as having met the requirements of TMC 13.06.645.B.4.b(5), but subject to the following conditions:[32]

1. The structural footprint of the house, at the building permit stage, must be substantially the same as the proposed alternative design, i.e., 34 feet by 39 feet (34' x 39 '), and in substantially the same location shown in the proposed alternative design;

2. A height survey must be submitted prior to the building permit for the house being approved showing that the house will meet the VSD limitation of twenty-five feet (25');

3. Approval of the FAR Variance is expressly conditioned on the limitation that no height variance will be allowed for any house to be built on the Subject Property that exceeds the FAR of .5 as herein varied under this Decision;

4. Because the FAR Variance granted by this Decision is based on analyzing the

[31] https://www.merriam-webster.com/dictionary/function?src=search-dict-box

[32] As referred to above, the Examiner has the authority to impose reasonable conditions on a variance approval under TMC 13.06.645.B.4.b. as well as TMC 13.05.040.B.

quantity, quality, location, and function of Kirkendoll's proposed alternative design as shown in the record to this appeal, at the building permit stage, the house applied for must not materially deviate from the proposed alternative design and the total FAR must not exceed .76.

**DATED** this 23rd day of July, 2019.

**JEFF H. CAPELL, Hearing Examiner**

ORIGINAL



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Office of the Hearing Examiner
Tacoma Municipal Building
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## NOTICE

## RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

## NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision may be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner will likely need to be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.