



City of Tacoma  
Hearing Examiner

July 23, 2019

Karena Kirkendoll  
P.O. Box 7561  
Tacoma, WA 98417-0561  
Email: [karenakirkendoll@msn.com](mailto:karenakirkendoll@msn.com)  
(Electronic & First Class Mail Delivery)

William T. Lynn, Attorney at Law  
Gordon Thomas Honeywell LLP  
1201 Pacific Avenue, Suite 2100  
Tacoma, WA 98402-4314  
Email: [BLynn@gth-law.com](mailto:BLynn@gth-law.com)  
(Electronic & First Class Mail Delivery)

Steve Victor, Deputy City Attorney  
Office of the Tacoma City Attorney  
747 Market Street, Room 1120  
Tacoma, WA 98402-3701  
Email: [svictor@ci.tacoma.wa.us](mailto:svictor@ci.tacoma.wa.us)  
(Electronic & Interoffice Mail Delivery)

**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](mailto:david@dkfisherarchitects.com)  
Angie Krupa, Legal Assistant, Office of the Tacoma City Attorney

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**KARENA KIRKENDOLL,**  
**Appellant/Applicant,**

**v.**

**CITY OF TACOMA,** a Washington  
municipal corporation, through its  
Planning and Development Services  
Department,

**Respondent.**

**FILE NO.: HEX 2019-010**  
**(LU18-0188)**

**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,**  
**CONCLUSIONS OF LAW,**  
**AND DECISION**

**ORIGINAL**

1 **FINDINGS OF FACT**

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

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

18 \_\_\_\_\_  
19 <sup>1</sup> PDS documentation refers to Fisher Architects as the applicant. This is incorrect. Fisher Architects is the agent  
20 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).

21 <sup>2</sup> 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.

1 Subject Property is located within a View-Sensitive Overlay District (“VSD”) which limits  
2 structure height to twenty five feet (25’).<sup>3</sup> *Santos Testimony, Fisher Testimony; Ex. R-3.*

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

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

20  
21 <sup>3</sup> 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.*

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

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

13           7.    In the process of requesting the FAR Variance, several different elevations/  
14 floor plans were submitted to the City, some with clearly ascertainable provenance, and at  
15 least one plan that is disputed. *Fisher Testimony, Santos Testimony; Ex. R-12, Ex. R-18, Ex.*  
16 *R-22, Ex. R-23*. The parties could not agree on whether Appellant had any role in drafting  
17 and submitting what appears to be a hand-drawn design that is included in Exhibit R-23 at  
18 page/slide 18 (the "Slide 18 Design" which is also found in Exhibit R-22). The City used the  
19 Slide 18 Design, and subsequent slide 19, that shows a single level home with daylight  
20 basement, for the City's position that the "Applicant has demonstrated a reasonable use that  
21

---

<sup>4</sup> 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.

1 meets FAR.” *Santos Testimony; Ex. R-23*. Appellant, on the other hand, denied ever  
2 submitting this single level design proposal. *Fisher Testimony*.<sup>5</sup> Ultimately, the two  
3 drawings most helpful to the Examiner, and most pointed to by the parties, are the  
4 Appellant’s last “Baseline Model,”<sup>6</sup> and Appellant’s “Alternative Design”<sup>7</sup> as compared at  
5 various places in the City’s Exhibit R-23. *See also Ex. R-18*.

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

7 (a) whether the Appellant’s “Baseline Model” actually meets the FAR of .5;

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

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

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

13 (e) the ultimate question of whether Appellant’s “Alternative Design” “[c]an be  
14 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)*.

15 9. As regards the disagreements in Finding 8 above, the City’s contention that the  
16 “Baseline Model” was not FAR-compliant rests on the City’s calculation of a .52 FAR using  
17 its preferred measuring methodology.<sup>8</sup> The .02 difference between compliance and  
18 noncompliance could easily rest on the difference in approach between the Appellant and  
19 the City as to whether you measure from exterior walls or from the inside of interior studs,  
20

21 <sup>5</sup> *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.

<sup>6</sup> *See Ex. R-23* at page/slide 12 through 17.

<sup>7</sup> *Id.*

<sup>8</sup> As corrected in the Reconsideration from an erroneous 1.9 calculation in the Original Decision.

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

11 10. In any event, having a baseline model that meets FAR is not a requirement for  
12 the City to analyze whether a FAR design variance meets the TMC criteria found in TMC  
13 13.06.645B.4.b. *Santos Testimony upon inquiry from the Examiner*. That said, the reasoning  
14 behind the Director's Decision's taking such exception to the Appellant's "non code-  
15 compliant baseline," purportedly calling it an "unreasonable comparison,"<sup>10</sup> is unclear, given  
16 that the "[p]roposed alternative design that *departs from* [the FAR] requirement..." is what  
17 ultimately has to be evaluated against the TMC 13.06.645 B.4.b criteria. [Emphasis added.]  
18 Ex. R-3, Original Decision at p. 9. While a compliant baseline plan might help for purposes  
19 of comparison and be used to illustrate more concretely whether the "equal or superior  
20 results" requirement has been met, it is not necessary.  
21

---

<sup>9</sup> And without looking to how the daylight basement square footage is calculated.

<sup>10</sup> *Santos Testimony*.

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

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

---

<sup>11</sup> See *Ex. R-23* at page/slides 12 through 17.



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

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

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

19 15. Any conclusion herein which may be more properly deemed or considered a  
20 finding is hereby adopted as such.  
21

1 CONCLUSIONS OF LAW

2 1. The Hearing Examiner has jurisdiction over appeals of PDS Director decisions  
3 on variance permits pursuant to Tacoma Municipal Code (“TMC”) 1.23.050.B.2 and TMC  
4 13.05.050. Hearings on such decisions are conducted *de novo* in accordance with TMC  
5 1.23.060. Appellants in land use appeals have the burden to show by a preponderance of the  
6 evidence that the Director’s Decision should be reversed or modified. *TMC 1.23.070.C*. In this  
7 appeal, that burden of proof falls to Kirkendoll to show that the Director’s Decision was  
8 incorrectly decided and that the TMC’s applicable variance criteria were met. *See also TMC*  
9 *13.06.645.B.4.b*.

10 2. The law requires that decisions from adjudicative tribunals rest upon evidence.<sup>12</sup>  
11 Evidence is used to establish facts. “Proof of the fact to be established may be by direct or  
12 circumstantial evidence.”<sup>13</sup> Argument, however, is not evidence.<sup>14</sup>

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

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

<sup>12</sup> *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356-357, 493 P.2d 1018, 1022-1023 (1972).

<sup>13</sup> *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).

<sup>14</sup> *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).