



# CITY OF EDMONDS

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

GARY HAAKENSON  
MAYOR

In the Matter of the Application of	)	NO. PLN20090055
	)	
<b>Brent and Kelley Picasso</b>	)	FINDINGS, CONCLUSIONS,
	)	DECISION, AND ORDER
For a Variance.	)	
_____	)	

### SUMMARY OF ORDER

The application for a variance from a Park Court PRD restriction regarding construction within Tract 101 is **DISMISSED**. The Hearing Examiner does not have jurisdiction to vary the terms of the PRD through the zoning variance process.

### SUMMARY OF RECORD

#### Request:

Brent and Kelley Picasso (Applicant) requested a variance to allow a six-foot-tall cedar fence within Tract 101 of Park Court, a Planned Residential Development (PRD) that was recorded on October 3, 1990. The variance was requested due to a development restriction that was recorded with the PRD.

During the City’s review of the associated fence permit application, there was a dispute between the Applicant and the City Planning Division as to the review process required to approve the fence. The Planning Division thought that a plat amendment would be the appropriate procedure, whereas the Applicant wanted to submit the subject variance application. The City accepted the variance application, but the Planning Division requested that the Hearing Examiner make a threshold determination as to whether the variance is the appropriate procedural process, and then provide guidance on procedure if the Hearing Examiner determines that the variance is not appropriate. The Applicant requested a determination as to whether the fence constitutes “construction” under the development restriction of the PRD.

#### Hearing Date:

The City of Edmonds Hearing Examiner conducted an open record hearing on the request, and viewed the site, on March 18, 2010.

#### Testimony:

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

1. Gina Coccia, Associate Planner, City of Edmonds
2. JoAnne Zulauf, Engineering Technician, City of Edmonds
3. Kelley Picasso, Applicant
4. Ron Den Adel

*Findings, Conclusions, Decision, and Order*  
*Hearing Examiner for City of Edmonds*  
*Picasso Variance, No. PLN20090055*

5. Alvin Rutledge

Exhibits:

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

- A. Planning Division Report & Recommendation dated March 9, 2010, with the following attachments:
  - 1. Zoning/Vicinity Map
  - 2. Variance Application filed December 29, 2009
  - 3. Applicant Declarations, with recorded Park Court PRD plat map, contour map, and site photos (3)
  - 4. Addendum to Fence Permit Submittal #BLD20080944 received November 13, 2008
  - 5. Contour maps of 8314 208<sup>th</sup> Street SW
  - 6. Site Plan received November 13, 2008
  - 7. Engineering Comments dated January 12, 2010, Public Works Comments dated January 6, 2010, Fire Department Comments dated January 6, 2010, Building Comments dated January 11, 2010, and Parks Comments dated January 6, 2010
  - 8. Notice of Development Application, Public Hearing, and Comment Period dated March 1, 2010
- B. Letters in support of variance from neighbors Linda Weber, Christie Lasle, Joan & Kent Millikan, and Erin Eddins
- C. Site photos (3) submitted by Applicant
- D. Affidavits of Mailing, Posting, and Publication of Hearing Notice

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

**FINDINGS**

- 1. The Applicant requested a variance to allow a six-foot-tall cedar fence within Tract 101 of Park Court, a PRD that was recorded on October 3, 1990. Tract 101 is owned in common by all of the lot owners of the PRD. *Exhibit A, Attachments 2-4.*
- 2. The Applicant owns Lot 2 of the PRD, which is addressed as 8314 208<sup>th</sup> Street SW. Tract 101 is a ten-foot-wide open space tract that runs along the eastern boundary of the PRD, between the rear yards of Lots 1 and 2 and the 83<sup>rd</sup> Avenue West right-of-way. The fence is located within the portion of Tract 101 that borders Lot 2. The fence is wholly contained within Tract 101, and is set back one foot from the adjacent right-of-way. *Exhibit A, Attachments 1, 2, 3, and 6; Testimony of Ms. Picasso.*
- 3. The property is zoned Single-Family Residential (RS-8). *Exhibit A, page 2.*
- 4. The following restriction appears on the recorded PRD map:

Tracts 100 and 101 shall remain in a substantially natural state. No clearing, grading, filling, or construction of any kind shall occur except for necessary utility installations.

*Exhibit A, Attachment 3.*

5. Pursuant to ECDC 20.35.100, “After the effective date of the final approval [of a PRD], the city shall permit use of the land and erection of structures in compliance with the plans as approved. Any use or structure inconsistent with the approved plan shall not be permitted.” *ECDC 20.35.100.*
6. A fence permit is required per ECDC 17.30.000 because the fence is located within 10 feet of a street right-of-way and is within a critical area (steep slope). *Exhibit A, page 1.*
7. The City Planning Division interprets the PRD restriction as prohibiting the requested fence, because it would constitute “construction of any kind” within Tract 101. ECDC 20.35.110(A) provides a procedure for modifying an approved PRD. *Exhibit A, pages 1 and 6.*
8. The Planning Division suggested a hedge as an alternative to the fence, because it would not be “construction” and it would allow Tract 101 to remain in a natural state. *Exhibit A, page 6.*
9. Moving the fence such that it encroaches into City right-of-way might be an alternative if the Applicant can obtain approval of an encroachment permit. Although the Applicant unsuccessfully attempted to obtain an encroachment permit for the fence in 2005 (the requested encroachment was one foot, to accommodate the fence footings), recent modifications to the relevant ordinances have made it easier to obtain a permit. However, approval is not guaranteed. *Testimony of Ms. Coccia; Testimony of Ms. Picasso.*
10. Provided the top two feet of the fence are removed as proposed (the fence is currently eight feet tall, including a decorative top section), the fence does not violate any provision of Title 16 or Title 17 of the ECDC. *Testimony of Ms. Coccia; Exhibit 1.*
11. The Applicant argued that the fence should not be considered “construction” within Tract 101 because the definition of “structure” set forth in ECDC 21.90.150 excludes residential fences less than six feet in height. *Testimony of Ms. Picasso.*
12. The Applicant argued that the Hearing Examiner should hear and approve the variance based on *Martel v. City of Vancouver Board of Adjustment*, 35 Wn. App. 250 (1983), which provided that a restrictive covenant is not grounds for denying a zoning variance. *Exhibit A, Attachment 3.*
13. The owners of four of the neighboring lots within the PRD submitted letters in support of the variance. *Exhibit B; see also Exhibit A, Attachment 4.*

14. Notice of the open record hearing was mailed to adjacent property owners on March 2, 2010, posted on site on March 1, 2010, and published in *Everett Herald* on March 1, 2010. *Exhibit A, Attachment 8; Exhibit D.*

### CONCLUSIONS

1. The existing fence is wholly within Tract 101 and alienates a one-foot-wide strip of the tract. The Hearing Examiner concurs with staff's interpretation that the existing fence constitutes "construction of any kind" contrary to the terms of the PRD.<sup>1</sup> *Findings 2, 4, and 7.*
2. The variance process is not the appropriate procedure for modifying the terms of the PRD. Although the Hearing Examiner has jurisdiction to hear and decide variance requests pursuant to ECDC 20.01.003, ECDC 20.85.000 is clear that variances may only be granted from "any requirement of the zoning ordinance (ECDC Titles 16 and 17) except use and procedural requirements." *ECDC 20.85.000.* The requested variance is from a PRD restriction and/or the requirements of the PRD ordinance. Neither of these is within ECDC Title 16 or 17. The requirement that the City only approve permits that are consistent with the approved PRD is from ECDC Title 20, and it is a procedural requirement. The Hearing Examiner does not have jurisdiction to grant the requested variance and the application must be dismissed. *Findings 4, 5, and 10.*
3. *Martel v. City of Vancouver* does not mandate that the Hearing Examiner hear and/or grant the requested variance, because that case involved a zoning variance (deviation from minimum lot area standards), and here there is no zoning variance to grant. Whether the principles of the case mandate that the City take any particular action with respect to the fence permit application is outside the scope of this decision. *Findings 10 and 12.*
4. The Hearing Examiner concurs with staff that the Applicant might attempt the PRD modification process to authorize the existing fence. The Hearing Examiner does not warrant that completion of such process would be successful, however. All of the relevant criteria must be satisfied.
5. Although at the hearing there was much discussion as to alternative fence locations, the Hearing Examiner will not rule on these hypothetical scenarios. The appropriate procedure would be for staff to first make an administrative decision on an alternative, such as by granting or denying a permit, or by issuing a formal interpretation. This would preserve all parties' right to an open record hearing on the administrative decision, if allowed by code.

---

<sup>1</sup> The Hearing Examiner questions whether the language need be interpreted so strictly as to prohibit fencing that is truly on the tract boundary, since the interior of the tract would still be in a "substantially natural state." However, an application for a fence on the tract boundary is not presently before the Hearing Examiner and so no ruling on that hypothetical will be made as part of this decision.

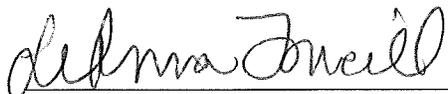
**DECISION/ORDER**

Based on the preceding Findings and Conclusions, the application for a variance from the Park Court PRD restriction regarding construction within Tract 101 is **DISMISSED**. The Hearing Examiner does not have jurisdiction to vary the terms of the PRD through the zoning variance process.

ORDERED this 30<sup>th</sup> day of March 2010.

Toweill Rice Taylor, LLC  
Hearing Examiners for the City of Edmonds

By:



---

LeAnna C. Toweill

## **RECONSIDERATION AND APPEAL**

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

### **REQUEST FOR RECONSIDERATION**

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

### **APPEALS**

Pursuant to ECDC 20.85.020(B), as amended by Ordinance No. 3783, appeals of hearing examiner decisions on variances shall be to City Council in accordance with the procedures set forth in ECDC 20.07. Appeals must be filed within 14 days of decision issuance. The appeal, and the required filing fee, must be received by the development services department no later than 4:30 p.m. on the last day of the appeal period. Filing a request for reconsideration is not a prerequisite to filing an appeal.

### **EFFECT OF REQUEST FOR RECONSIDERATION ON APPEAL DEADLINE**

The timely filing of a request for reconsideration stays the Hearing Examiner's decision until such time that the Hearing Examiner issues a decision on reconsideration.

### **NOTICE TO COUNTY ASSESSOR**

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