

**SAN JUAN COUNTY  
HEARING EXAMINER**

**FINDINGS, CONCLUSIONS, AND DECISION**

Applicant(s):	Janet Neutz 20111 North 60 <sup>th</sup> Street Seattle, WA 98103	<b>S.J.C. DEPARTMENT OF OCT 10 2017 COMMUNITY DEVELOPMENT</b>
Agent:	Francine Shaw P.O. Box 868 Friday Harbor, WA 98250	
File No.:	PVAR00-17-0001	
Request:	Variance from road standards	
Parcel No:	173123003	
Location:	Tax Parcel 173123007 Rosario Neighborhood, Orcas Island	
Summary of Proposal:	An application for a variance permit from road standards for portions of Tomihi Drive to serve a proposed two-lot short subdivision (PSP000-16-0002)	
Land Use Designation:	Rural Residential	
Public Hearing:	September 27, 2017	
Application Policies and Regulations:	SJCC 18.60.100 Roads – private roads SJCC 18.70.060 Subdivision and short subdivision design and development standards SJCC 18.70.070 Final subdivisions and short subdivisions SJCC 18.80.020 Application requirements SJCC 18.80.030 Public notice of application and comment SJCC 18.80.100 Conditional use and variance permit procedures	
Decision:	Denied	

**BEFORE THE HEARING EXAMINER  
FOR SAN JUAN COUNTY**

In the Matter of the Application of )  
 ) NO. PVAR00-17-0001  
**Janet Neutz** )  
 )  
 )  
 )  
for approval of a road standards variance )  
permit for portions of Tomihi Drive )  
to serve a proposed land division )  
of Tax Parcel 173123003, Orcas Island )

S.J.C. DEPARTMENT OF  
OCT 10 2017  
COMMUNITY DEVELOPMENT

**SUMMARY OF DECISION**

The request for a road standards variance permit for portions of Tomihi Drive to serve a proposed two-lot short subdivision (PSP000-16-0002) of Tax Parcel 173123003 on Orcas Island is **DENIED**.

**SUMMARY OF RECORD**

**Request:**

Janet Neutz (Applicant) requested a road standards variance permit seeking to be excused from the requirement to bring portions of Tomihi Drive up to current standards to serve a proposed two-lot short subdivision (PSP000-16-0002) of Tax Parcel 173123003 on Orcas Island.

**Hearing Date:**

The San Juan County Hearing Examiner held an open record public hearing on the request on September 27, 2017.

**Testimony:**

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

Lee McEnery, Planner, San Juan County Department of Community Development  
Francine Shaw, Applicant Representative

**Exhibits:**

The following exhibits were admitted in the record:

1. Department of Community Development Staff Report, dated September 12, 2017
2. Application cover sheet
3. Applicant narrative, dated June 13, 2017

4. Project description and regulatory analysis
5. Vicinity map
6. Map – Tomihi Drive from Olga Road to Ivy Lane
7. Map – Tomihi Drive from Ivy Lane to Anchor Rock Lane
8. Map – Tomihi Drive from Anchor Rock Lane to NW corner of property
9. Proposed land division map (Cavu short plat alteration, two pages)
10. Map – Required road improvements
11. Photos of the road (seven pages)
12. Public Works comment letter on road variance, dated August 25, 2017
13. Public Works comment letter on proposed land division (two pages), dated October 13, 2016
14. Fire Marshal comment letter on variance from fire protection, dated June 29, 2017
15. Comment letter from Bruce Hanna, dated August 23, 2017
16. SJCC 18.60.100 Roads – private roads (two pages)
17. Hearing Examiner decision on Whellams road variance, dated March 14, 2016
18. Legal advertising information
19. Vicinity map depicting the proximity of the subject property to the Whellams property

Upon consideration of the testimony and exhibits submitted at the open record public hearing, the Hearing Examiner enters the following findings and conclusions:

#### **FINDINGS**

1. The Applicant requested approval of a road variance permit for portions of Tomihi Dive in the Rosario area of Orcas Island to provide access to the proposed two-lot subdivision (PSP000-16-002) of the 4.14-acre parcel.<sup>1</sup> The short plat is on hold pending the outcome of the instant variance process. If the short plat is approved, it would add one lot to the

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<sup>1</sup> The legal description of the subject property is Lot 1, Tomihi 2, a private subdivision recorded in Volume 3 of Short Plats, Pages 36, 36A, and 36B; also known as Tax Parcel number 173123003. *Exhibit 1.*

existing level of development in the vicinity. The property is currently vacant.  
*Exhibits 1, 2, 3, 4, and 9.*

2. Located in the Rosario Neighborhood, the subject property has a Rural Residential land use designation and is within the North Rosario Residential Activity Center, which allows one unit per two acres. The parcel can be divided into no more than two lots. In the event of subdivision approval, one additional lot would be created.

*Exhibits 1, 2, 3, and 4.*

3. Public Works commented on the proposed land division, noting that Applicants for land divisions are required either to show that the road providing access to the proposed lots meets the road standards of San Juan County Code (SJCC) 18.60.100, or to improve the access road to meet those standards. *SJCC 18.70.060.C.1.a.* Pursuant to County road standards, private roads serving 15 or more parcels require a minimum 20-foot-wide finished roadway, which may be surfaced with a minimum two lifts of light bituminous surface treatment or crushed rock, in a 30-foot wide easement. *SJCC 18.60.100, Table 6.3.* Public Works specifically expressed concern regarding: width and surfacing on the first stretch of Tomihi Drive from Olga Road to Ivy Lane; width and surfacing on the second stretch from Ivy Lane to Anchor Rock Lane; width and turnouts from Anchor Rock Lane to the northwest property line; and road grade generally. Public Works requested alignment data for the existing road specifically to document grades.

*Exhibits 1 and 13.*

4. In response to Public Works' comments, the Applicant submitted detailed information on Tomihi Drive for the segments of private road in question, including a road profile and photos. Based on that information, which was deemed acceptable by the County, the Applicant requests variance approval as follows:

- a. A variance from the width and surfacing standards is requested for the stretch of Tomihi Drive that reaches from Olga Road to Ivy Lane. The standards require a 20-foot width, and paving is required because this part of the road serves more than 40 parcels. The existing road is 18 feet wide, and its surface is gravel.

*See Exhibit 6.*

- b. A variance from the width standard is requested for the stretch of Tomihi Drive from Ivy Lane to Anchor Rock Lane. No variance from the existing gravel surfacing is required for the number of parcels served. The existing road width ranges from two to five feet narrower than the 20-foot width required. *See Exhibit 7.*

*Exhibits 4, 6, 7, 8, 10, and 11.*

5. Based on the information submitted by the Applicant's agent, variance approval is not required for the following road segments:

- The stretch of Tomihi Drive from Anchor Rock Lane to the subject property's northwest property line meets or exceeds the minimum width.
- A variance from the turnout requirement is not needed because the existing turnouts meet the standard for size and location.
- The road grade near the bend in Tomihi Drive is up to 18%. No variance from the surfacing requirements based on grade is needed for the proposal because both driveways serving the subject property exit Tomihi Drive before the grade increases to 16%, which is the threshold at which grade paving is required for private roads.

*Exhibits 1, 4, 8, 9, and 10.*

6. If the variance is denied, the applicable provisions require approximately 3,800 linear feet of right-of-way to be widened to 20 feet and nearly half of that length to be paved, with the remainder allowed to remain in gravel surface. The Applicant's agent argued that no other parcel owners along the path of improvements would be required to participate financially, and that the costs of these upgrades are unreasonably, disproportionately high for one property owner to have to bear. *Exhibits 4 and 10; Francine Shaw Testimony.* No bids or other cost estimates for the work were submitted.
7. Public Works Staff reviewed the requested variance and commented that the previously identified portions of Tomihi Drive still do not meet the road standards. *Exhibit 12.* Staff did not express support for or opposition to the requested variance.
8. Planning Staff noted that even without subdivision, the subject property can be developed in the following ways that do not trigger the obligation to bring the access road up to current standards. It could be developed with a single residence, which would be allowed to have a guest house and accessory structures. Two primary residences can be built on the parcel without subdivision, each with allowed guest houses and accessory structures. Vacation rental of one or both residences could be allowed, with the guest house(s) occupied by the owner(s). Staff asserted that each of these scenarios would generate approximately the same volume of traffic as would result from the proposed subdivision into two lots with single residences, and none of these scenarios would require road improvements. *Exhibit 1; Lee McEnery Testimony.*
9. The Applicant's agent asserted that the County code provision requiring roads that access subdivisions to be brought up to current standards imposes an undue hardship on the Applicant, considering the fact that the property could be developed to the same density whether subdivided or not. In addressing the variance criterion requiring the hardship suffered to result from unique circumstances "specifically related to the property", the Applicant's agent argued that the parcel is located on a substandard road that was built long before the Applicant purchased her property in 2000, and that the Applicant's "actions have not caused the inadequate driving width or surfacing of Tomihi Drive." *Exhibit 4, page 4; Francine Shaw Testimony.*

10. Planning Staff agreed with this assessment by the Applicant, stating the following in addressing variance criterion 3:

The property is located on a road built many years ago, before such standards existed. The applicants' actions did not cause the inadequate width or surfacing of portions of Tomihi Drive.

*Exhibit 1, page 4.*

11. Addressing variance criterion 1, Planning Staff stated:

Literal interpretation of the road standards applies regulations to the land division that are not applied to other residential use. The action that causes the requirement for improvements is a land division. Existing residences using this road can expand and add guest houses, can offer vacation rentals and bed and breakfast uses and have home occupations and cottage enterprises without any improvements required.

*Exhibit 1, page 4.*

12. The Applicant also argued that a variance was granted in 2016 to the owners of a nearby parcel (the Whellams) that allowed them to short plat their property into two lots without bringing Tomihi Drive up to road standards. The Whellams' property is located beyond the Applicant's property off of Tomihi Drive, also in the North Rosario Residential Activity Center. The Applicant asserted that the facts of the two cases are almost identical. *Exhibit 4.*

13. Planning Staff submitted the Whellams' decision in the record for the instant matter. Findings in that approved decision state the following:

The eastern portion of the subject property, where the upper building site is proposed, is accessed by Veneda Trail, which dead ends at the property boundary. The remainder of the parcel, which would house the lower building site, is accessed by Shore Road. Due to the site's topography, it is not feasible to access both building sites by one road. Both are private roads. Currently, the segments of both roads that access the subject property do not meet County private road standards, established at San Juan County Code (SJCC) 18.60.100. *Exhibit 17, Finding 3, page 3.*

There is a section of Shore Drive that narrows down to one lane, providing 12 to 14 feet of lane width, with a vertical rock wall on the east side of the road and a steep drop to the waterfront on the west side of the road.

*Exhibit 17, Finding 5, page 4.*

The conclusions include the following:

While it was the application for short subdivision that triggers the requirement to bring both roads up to standard, it is topography that makes compliance with road standards infeasible to the point of impossibility for a single landowner. *Exhibit 17, Conclusion 1, page 7.*

And:

The requirement to bring the road up to current standard was in fact triggered by the subdivision application filed by the Applicants; but the roads standards implicated result from topography, location of the property at the end of two sub-standard roads that predate the road standards, and the location of Veneda Trail along a rock face along a shoreline. *Exhibit 17, Conclusion 3, page 7.*

14. During initial review of the instant proposed subdivision, it became clear that the project would have difficulty satisfying applicable fire protection standards due to the requirement to provide adequate fire flow in an area lacking water mains. The Applicant is pursuing a variance to the fire protection standards in a separate process decided by the Fire Marshal. The outcome of that process would determine whether a fire hydrant, water storage tank, or residential fire sprinklers would be the means of providing fire protection for the proposed land division. *Exhibits 1 and 14; Lee McEnery Testimony.*
15. The application was submitted June 13, 2017. Notice of application and of public hearing was mailed to owners of surrounding property within 300 feet of the site on August 1, 2017, and was on posted on-site on August 22, 2017. *Exhibits 2 and 18.*
16. The County received one public comment letter. The comments did not address variance criteria for approval, but expressed opposition to approval. *Exhibit 15.*
17. Upon review of the complete application materials, Planning Staff recommended approval with conditions. *Lee McEnery Testimony; Exhibit 1.* The Applicant waived objection to the recommended conditions. *Francine Shaw Testimony.*

## CONCLUSIONS

### **Jurisdiction:**

The Hearing Examiner is granted jurisdiction to hear and decide applications for variance pursuant to Chapter 36.70.970 of the Revised Code of Washington and Chapters 2.22 and 18.80 of the San Juan County Code.

### **Criteria for Review:**

Pursuant to SJCC 18.80.100.E, a variance shall be granted only if the applicant demonstrates all of the following:

1. Literal interpretation and application of provisions of this Code would deprive the applicant of the rights commonly enjoyed by other properties in the same district under the terms of this Code, and allowing the variance will be in harmony with the intent and spirit of this Code;
2. A variance is necessary for the preservation and enjoyment of a property right possessed by other property in the same vicinity or district, but which is denied to the property in question because of special circumstances on that property;
3. That the hardship described under subsection (1), above, is specifically related to the property and is the result of unique conditions such as irregular lot shape, size, or natural feature, and the application of this Code, and not, for example, from deed restrictions or the applicant's own actions;
4. The granting of the variance will not be materially detrimental to the public welfare or injurious to the right of other property owners in the vicinity; and
5. The variance will not permit a use prohibited by this Code in the district in which the subject property is located.

**Applicable Provisions of the County Code:**

*SJCC 18.60.100 Roads – Private roads.*

The following requirements apply to all private roads serving more than two parcels, except for roads requiring less than 1,000 cubic yards of grading, and to all new subdivision and short subdivision roads.

- A. Road Design Standards. The following design standards are applicable to all private roads:
  1. Maximum grade allowed (gravel), 16.0 percent; maximum grade allowed (paved), 22.0 percent;
  2. Minimum grade allowed, 1.0 percent;
  3. Minimum curve radius allowed, 50 feet;
  4. All roads and easements shall meet the minimum standards set forth in Table 6.3, Minimum Standards for Private Roads and Easements;
  5. In applying the standards in Table 6.3, the total number of existing and proposed parcels served by the entire road shall be counted;
  6. All dead end subdivision and short subdivision roads shall end in a cul-de-sac or “hammerhead” turn-around constructed in accordance with the construction standards accepted by the County engineer;

7. Private road intersections with County roads shall be constructed in accordance with the construction standards for driveway access permits (Figure 6.1), except that the width shall be as required in this subsection;
8. Storm drainage and culvert sizing shall be based upon an engineering analysis and the standards of SJCC 18.60.060(B) and 18.60.070. Maximum length of surface drainage for roadside ditches before discharging onto adjacent property or into a natural drainageway shall be 1,000 feet. The minimum size of road crossing-culverts shall be eight inches in diameter; however, where the private road or driveway meets the County road, a minimum of 12-inch diameter shall be required.

B. Road Materials. The following standards apply to materials for roads:

1. The source of surfacing materials must be approved by the County engineer before construction.
2. Plain concrete, reinforced concrete, corrugated metal pipe, or approved corrugated polyethylene drainage tubing and fittings may be used for drainage.

C. Road Construction Standards. The following standards apply to construction of roads:

1. Clearing and grubbing material shall be removed from rights-of-way.
2. All embankments shall be compacted in layers by heavy equipment.
3. No deleterious material shall be allowed in embankments or roadbeds.
4. All slopes shall be uniformly graded.
5. The gravel base shall be graded sufficiently to allow an even surface for vehicular traffic.
6. Driveways shall have culverts when needed.
7. Whenever feasible, underground utilities, together with service crossings, shall be installed after the subgrade has been completed, but before surfacing has been placed.

Table 6.3. Minimum Improvement Standards for Private Roads and Easements.

Total Number of Parcels Served	Improvement Standard
3 to 14 (1 to 14 for all subdivisions)	Minimum of 30-foot-wide road easement, with a minimum 12-foot-wide finished roadway. Turnouts to be approved by the County engineer. Cul-de-sacs or hammerhead turnarounds constructed in accordance with County standards are to be located at a maximum of 1,000-foot intervals. <sup>(3, 4)</sup>
15 to 40	Minimum of 30-foot-wide road easement, plus slope easement, with a minimum 20-foot-wide finished roadway, which may be surfaced with a minimum two lifts of light bituminous surface treatment or crushed rock.
41 or more	Minimum of 30-foot-wide road easement, plus slope easement, with a minimum 20-foot-wide finished road surfaced with a minimum two lifts of light bituminous surface treatment. <sup>(4)</sup>

**Conclusions Based on Findings:**

1. As a preliminary matter, hearing examiner decisions do not carry the weight of precedent. Each land use application is reviewed on its own merits for compliance with criteria for permit approval. That said, the Whellams decision is easily distinguished from the facts of the instant application. In the Whellams’ case, there was substantial topography and the fact that Veneda Trail is located along a shoreline with a rock face that would have had to be blasted/excavated to make that roadway meet width standards. Topography and location along a rock faced shoreline are features inherent in the land that formed the basis for conclusions 1 and 3 of the Whellams decision. The instant record contains no evidence of unique circumstances inherent in the land that render compliance with the road standards unduly burdensome to the Applicant. No areas of substantial topography are involved; the portion of Tomihi Drive greater than 16% in grade is beyond the site’s access points. The only argument proffered in the record in response to variance criterion 3 is location on a substandard road. Location on a substandard private road is not a unique circumstance in San Juan County. Washington courts have said, “[r]easons for a variance must be reasons pertaining to the property itself which prevent full use of the property to the extent other properties in the vicinity and under the same zoning can be used.... Evidence of hardship or difficulty that will support a variance must relate to the land itself and not to the owner-applicant.”<sup>2</sup> The materials submitted do not demonstrate compliance with criteria 1 through 3. *Findings 2, 4, 5, 6, 12, and 13.*
2. The record shows that the Applicant can develop the same number of dwelling units and that similar levels of residential uses can be operated on the subject property (home occupations, vacation rentals, etc.) without subdividing. *Findings 2, 9, and 11.* With this

<sup>2</sup> *St. Clair v. Skagit County*, 43 Wn. App. 122, 126-127 (1986).

denial, the only right the Applicant does not enjoy - that was enjoyed by the Whellams and could be enjoyed by others whose properties contain unique features that render compliance with road standards infeasible- is to subdivide without upgrading the road. As concluded above, without unique features inherent in the land that cause the hardship complained of, the request cannot be approved. The fact that that the Applicant's property is on an old substandard road is the reason upgrade requirements are triggered in the first place. The Applicant's agent's arguments can be construed as an assertion that the code as written is unfair to the Applicant. Unfortunately, the County's hearing examiner lacks authority to approve permits based on fairness arguments. Hearing examiners are "creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication."<sup>3</sup> The only body with authority to change the code to make road standards consistent for all higher density development is the County Council.

### DECISION

Based on the preceding findings and conclusions, the request for a road standards variance to allow access to the proposed two lots of short subdivision (PSP000-16-0002, Tax Parcel 173123003) without bringing affected segments of Tomihi Drive into full compliance with County road standards is **DENIED**.

Decided October 10, 2017.

By:



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Sharon A. Rice  
San Juan County Hearing Examiner

### Effective Date, Appeal Right, and Valuation Notices

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

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<sup>3</sup> *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 (1984).

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This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter. Such decisions are not subject to administrative appeal to the San Juan County Council. See also, SJCC 2.22.100.

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirements may result in dismissal of the appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and consult with a private attorney.

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