

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Joseph and Noel Whatley
7008 Olga Road
Orcas Island

File No.: PVAR00-12-0001

Request: Variance **S.J.C. COMMUNITY**

Parcel No: 160852106 **SEP 30 2013**

Location: 7008 Olga Road **DEVELOPMENT & PLANNING**
Orcas Island

Summary of Proposal: Setback Variances for Deck and Shed

Land Use Designation: Olga Hamlet

Hearing Date: September 11, 2013

Application Policies and Regulations: SJCC 18.80.100(E) et. seq.

Decision: Deck variances approved with conditions; shed variance denied.

1 **BEFORE THE HEARING EXAMINER FOR THE COUNTY**
2 **OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

4 RE: Joseph and Noel Whatley 5 Conditional Use Permit 6 (PVAR00-12-0001)	7 FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
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S.J.C. COMMUNITY

SEP 30 2013

8 **INTRODUCTION**

DEVELOPMENT & PLANNING

9 The applicants seek a variance to side and rear yard setbacks for the expansion of
10 deck space and the retention of an existing shed. The deck variances are approved
and the shed variance is denied.

11 The rear and side yard setbacks are ten feet. The applicant proposes to place the deck
12 expansion within three feet three inches of the rear lot line and three feet four inches
13 of the side lot line. There is no information in the record on the proximity of the
existing shed within the side yard setback, but it appears to be within a couple feet of
14 the side lot line as depicted in a hand sketched site plan prepared by the applicant.

15 The deck variances are approved because they provide the applicant with a minimum
16 amount of rear yard space for recreational use. The rear yard currently cannot be
17 used because it accommodates two septic drain fields. According to the testimony of
18 staff, the drain fields cannot be used for recreational purposes without damaging
19 them. Without the variances the deck space that could be built into the rear yard
20 appears to be approximately 500 square feet in area. The variances would enable an
21 additional 260 square feet, which is a significant addition but still below a reasonably
22 sized space for rear yard use. It is also important to recognize that any addition to the
23 deck would require the footings to be located within the setbacks, because otherwise
24 they would have to be placed within the drain field area, which is not allowed by
25 County septic regulations.

As to the shed variance, the applicants have not established that requiring compliance
with setbacks for a garden shed deprives the owners of rights of others in the same
zone. The ability to provide for some reasonable outdoor storage of garden and
similar items could arguably be construed as a "right" afforded to other property
owners, but this "right" doesn't extend to an 8x12 foot shed. The applicants have not
demonstrated that there is no space on their property that could be reasonably used for
outdoor storage. There is insufficient evidence in the record to rule out the
possibility that a smaller shed could be placed in the front yard without blocking
views, that there is space available in the garage, that items could be stored under the

Variance

1 existing decking, etc. The applicants, of course, are focused on the placement of an
2 8x12 foot shed because it is pre-existing. The illegal construction of a shed cannot be
3 used to justify or facilitate the approval of a variance request.

4 TESTIMONY

5 Julie Thompson stated that the variance application is for a setback encroachment for a
6 ground level deck and storage shed. The deck covers the site's septic system.
7 According to Ms. Thompson, Mr. Phillips, the applicant's neighbor, has rescinded his
8 objections to the application. The deck extends into the rear yard. The deck extending
9 into the side yard was built with the house. The deck is 20.5ft long. If the variance is
10 not approved, the deck would be approximately 14ft and would not cover the septic
11 system. The applicant is unable to use the portion of the yard with the septic system
12 unless the larger deck is built as it is unsafe to walk on septic systems. There is
13 limited space in the front yard for recreation. The shed must be built far enough from
14 the home to meet building separation setbacks.

15 Applicant Testimony

16 Joseph Whatley reiterated that his neighbor, John Phillips, no longer opposes the
17 application.

18 EXHIBITS

- 19 Exhibit 1 Staff report
- 20 Exhibit 2 Request for Review
- 21 Exhibit 3 Application materials
- 22 Exhibit 4 Aerial Photo
- 23 Exhibit 5 Comment Letter Neely
- 24 Exhibit 6 Comment Letter from John Phillips
- 25 Exhibit 7 Email from Joseph Whatley dated Aug 30, 2013
- Exhibit 8 Email from John Phillips dated Aug 30, 2013

FINDINGS OF FACT

Procedural:

1. Applicant. Joseph and Noel Whatley
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on September 11, 2013 at 10:00 am at the Islander Bank Annex, 225 Blair Ave, Friday Harbor.

Substantive:

Variance

1 3. Site and Proposal Description. The applicants seek a variance to side and
2 rear yard setbacks for the construction for a deck and the retention of an existing
3 shed. The rear and side yard setbacks are ten feet¹. The applicant proposes to place
4 the deck within three feet three inches of the rear lot line and three feet four inches of
5 the side lot line. There is no information in the record on the proximity of the
6 existing shed within the side yard setback, but it appears to be within a couple feet of
7 the side lot line as depicted in a hand sketched site plan prepared by the applicant.
8 The variances are approved.

9 Per the application materials, the applicants request a variance to build a low deck
10 behind the house that would encroach into the building setbacks of the north side and
11 rear yard. The deck would be built over the sand filter for the septic system. The lot
12 is small at approximately 130 feet deep and 50 feet wide. The required setback from
13 Olga Road was 10 feet from the centerline when the house was built. (Current code
14 requires 47 feet.) The developer who built this house actually set it back 45 feet to
15 preserve a large cedar tree and to stagger it from the adjacent house to the south to
16 provide privacy.

17 The sand filter system that serves this property and the one to the south was placed
18 behind the house and takes up most of the available space. The deck would create a
19 usable area for the owners to use their yard. It would also help keep grass and weeds
20 from growing over the top of the sand filters.

21 In order to cover the sand filter without damaging it, they need to put the deck
22 footings between 12 and 18 inches away from the gravel. This will require placement
23 within the setback because the sand filter already is partly in the setback. The deck
24 has been designed to be as close to the ground as possible so neighbors' views aren't
25 obstructed.

There is also a request for a variance from the south property line for a garden shed
that is exempt from a building permit due to its size and use located between the large
cedar tree and the house. The application materials state that the applicants consulted
with the neighbors to the south about the placement of the shed near the property line
before commencing construction. It says they were very accommodating as they
were aware of the challenges created by this lot. At that time, no one was aware of
the setbacks, they didn't know a variance would be required, and so nothing was done
in advance.

¹ The staff report does not identify the code citation for the ten foot setback and no side or rear yard setback requirement is readily evident in the Uniform Development Code or the Olga Hamlet Plan. Table 3.9 of the Uniform Development Code imposes ten foot side and rear setbacks for hamlet residential areas, but SJCC 18.30.320 provides that this table only applies to the Deer Harbor Hamlet. Since no one objects to the imposition of ten foot setback requirements they will be taken as a verity, but nothing in this decision should be construed as a determination that ten foot setbacks apply.

1 4. Characteristics of the Area. The surrounding neighborhood consists of
2 small-lot residential development.

3 5. Adverse Impacts of Proposed Use. Approval of the deck variance will
4 arguably not create any significant adverse impacts. The applicants have been able to
5 work out a deck design to the satisfaction of the property owner adjoining the setback
6 variance, Phillips. The design features worked out between the applicants and
7 Phillips are reasonably designed to mitigate against view and aesthetic impacts and
8 will be incorporated into the conditions of approval.

9 Approval of the shed variance will significantly diminish the function of the setback
10 function to allow for the passage of light and air. The setback encroachment of the
11 shed, due to its proximity to the street, will create an impression of "wall to wall"
12 development from the street. This is a particularly sensitive issue given the
13 prevalence of small lots in the vicinity, as demonstrated in the aerial photograph of
14 the neighborhood, Ex. 4, and as noted in the staff report. Further, given the
15 surrounding small lot development, approval of the variance would serve as a broad
16 based precedent for justification of numerous other setback variance requests. If a
17 variance is granted simply because someone desires a garden shed without any
18 corresponding proof that there are no other reasonable storage alternatives, the
19 setback requirements in the compactly developed Olga Hamlet district have little
20 chance over time of withstanding the development objectives of owners of lots barely
21 large enough to accommodate single family homes and their driveways.

22 The Nealys, who own property adjoining the proposed shed setback, object to the
23 requested variance. Given the proximity of the shed to their property line, the
24 objections of the Nealys are reasonable. The shed is a fairly significant encroachment
25 into the narrow setbacks that separate the structures on their property from those on
their neighbors.

6. Special Circumstances. The need for the variance is created by the small
size of the lot, the placement of the home close to the rear of the lot and the presence
of two drain fields that take up almost the entire rear yard of the property. The
placement of the home towards the rear of the lot was done in order preserve a large
tree located in the front yard and also to prevent the blocking of views of an adjoining
residence. According to a plat map attached to the Nealy letter, the lot was created in
1909, well before any setback requirements were adopted by San Juan County. The
rear yard is almost completely unusable due to the location of the septic drain fields.
According to the staff, the septic drain field area cannot be used for any recreational
purpose without damaging them. As shown in the site plan submitted by the
applicants, the requested variance will increase deck space (and hence usable rear
yard space) from approximately 500 square feet to 750 square feet. As shown in the
aerial photograph of the vicinity, most (but certainly not all) homes in the vicinity

1 have significantly more than 750 square feet of usable rear yard space². It is also
2 important to recognize that any addition to the deck would require the footings to be
3 located within the setbacks, because otherwise they would have to be placed within
4 the drain field, which is not allowed by County septic regulations.

4 CONCLUSIONS OF LAW

5 **Procedural:**

6 1. Authority of Hearing Examiner. The hearing examiner is authorized to
7 conduct hearings and issue final decisions on variance applications. San Juan County
8 Code (“SJCC”) 18.80.020 Table 8.1; 18.80.100(C).

8 **Substantive:**

9 2. Zoning Designation. Olga Hamlet.

10
11 3. Permit Review Criteria. The applicant seeks a variance to the side and
12 rear yard setback requirements of the Olga Hamlet zoning district. The criteria for
13 variances are governed by SJCC 18.80.100(E), which are quoted below in italics and
14 applied via corresponding conclusions of law.

15 **SJCC 18.80.100(E)(1):** *Literal interpretation and application of provisions of this*
16 *code would deprive the applicant of the rights commonly enjoyed by other properties*
17 *in the same district under the terms of this code, and allowing the variance will be in*
18 *harmony with the intent and spirit of this code;*

19 4. As detailed in the introduction section of this decision, imposition of the
20 ten foot side and rear yard setbacks would deprive the applicants of rights commonly
21 enjoyed by other properties in the same district as to the deck variances, but not the
22 shed variance.

23 As determined in FOF No. 6, the requested deck variance will increase the usable rear
24 yard space from approximately 500 square feet to 750 square feet. Further, without
25 the variance no deck expansion beyond the existing deck³ would be permitted,
because the footings must be placed outside the drain field area, which can only be in
the setback areas. The requested variance significantly increases usable rear yard

² It is reasonable to assume that most of the lots surrounding lots don't accommodate more than one
septic drain field. Consequently, even if drain fields are situated in rear yards, most of the rear yards in
the aerial photograph could accommodate a drain field and still significantly exceed the usable rear
yard space available to the applicants.

³ It appears that the existing deck in the rear yard is approximately 9x 28 feet in area. There has
already been at least some construction of the proposed expansion completed, but it is very difficult to
determine from the record how much of the deck expansion has already been completed.

1 open space but in a total amount that is still significantly below that available to other
2 property owners in the zone and vicinity. For these reasons, application of the
3 setback requirements would deprive the applicant of rights commonly enjoyed by
4 other properties in the same district. Given that the deck is designed and conditioned
5 to not create any adverse impacts and to be compatible with adjoining uses, approval
6 of the deck variance will be in harmony with the intent and the spirit of the zoning
7 code.

8 For the reasons stated in the introduction section of this decision, approval of the shed
9 variance is not necessary for the enjoyment of rights commonly enjoyed by other
10 properties in the same district. While the ability to accommodate some outdoor
11 storage is arguably a "right" to which other property owners are entitled, the
12 construction of an 8x12 shed certainly is not such a right and the applicants have not
13 demonstrated that other options for outdoor storage are not reasonable available to
14 them.

15 **SJCC 18.80.100(E)(2):** *A variance is necessary for the preservation and enjoyment*
16 *of a property right possessed by other property in the same vicinity or district, but*
17 *which is denied to the property in question because of special circumstances on that*
18 *property;*

19 5. As determined in FOF No. 6, the need for the deck variance is created by the
20 special circumstances of the lot, specifically its small size, location of the home and
21 location of two septic drain fields. The small size of the lot is certainly not unique to
22 the vicinity and district, but the small size in combination with the two septic drain
23 fields is most likely a very unique feature of the property.

24 As previously concluded, the existing shed is not a right possessed by other property
25 owners in the vicinity so the shed variance does not comply with the criterion quoted
above.

SJCC 18.80.100(E)(3): *That the hardship described under this subsection is*
specifically related to the property and is the result of unique conditions such as
irregular lot shape, size, or natural features, and the application of this code, and
not, for example, from deed restrictions or the applicant's own actions;

6. For the reasons outlined in COL No. 5, the variance is due to the unique
conditions of the property. The reference to "natural features" in the criterion above
suggests that the drain fields, as a manmade feature, are not a relevant factor.
However, it should be recognized that the drain fields are only a problem because of
the small lot size (a relevant factor) and the location of the house. The location of the
house, in turn, was set to protect adjoining views and a front yard tree, both of which
constitute natural features. Further, the location of the house, size of the lot and
location of drain fields are not attributable to the applicants' own actions.
Washington courts do not attribute the actions of prior owners to current owners

Variance

1 under the self-imposed hardship variance standard. *See Hoberg v. City of Bellevue*,
2 76 Wn. App. 357 (1994).

3 **SJCC 18.80.100(D)(4):** *The granting of the variance will not be materially*
4 *detrimental to the public welfare or injurious to the right of other property owners in*
5 *the vicinity; and*

6 7. As determined in FOF No. 5, there are no significant adverse impacts
7 associated with the deck impact. Notably, the impacts of the deck variance are
8 sufficiently minor and the special circumstances of the property sufficiently unique
9 that no significant cumulative impacts can be reasonably anticipated. Conversely, the
10 cumulative impacts created by the precedent of approving the shed variance are a
11 matter of very serious concern. Creating a development "right" for a 96 square foot
12 garden shed would lower the bar for variance approvals to a level where all of the
13 setback requirements of the compactly developed Olga Hamlet district could be
14 circumvented with a modicum of creativity and hardship. As further noted in FOF
15 No. 5, the shed variance on its own creates some arguable significant adverse
16 impacts. For these reasons, approval of the deck variance is consistent with the
17 criterion above while the shed variance most assuredly is not.

18 **SJCC 18.80.100(D)(5):** *The variance will not permit a use prohibited by this code in*
19 *the district in which the subject property is located.*

20 8. Garden sheds and decks are permitted accessory structures in the Olga
21 Hamlet district.

22 DECISION

23 The proposed deck variances are as conditioned below. The proposed shed variance
24 is denied because it fails to satisfy all variance criteria.

25 1. The applicants shall submit a revised deck design that incorporates the
design features identified in the Ex. 7 email to the extent staff finds necessary to
protect the privacy and views of adjoining properties.

2. Failure to comply with the conditions of this permit may result in
revocation.

3. Prior to occupancy, the applicants shall schedule a site inspection if found
necessary by staff to assure compliance with this decision.

Dated this 27th day of September, 2013.


Phil A. Olbrechts

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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.

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 requirement 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.