

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF PUYALLUP**

In the Matter of the Application of)	No. P-20-0124
)	
Cascadia Senior Living, LLC)	Cascadia Senior Living Variance
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Variance</u>)	AND DECISION

SUMMARY OF DECISION

The request for approval of a variance from Puyallup Municipal Code 20.26.500, to eliminate a portion of a 30-foot-wide landscape buffer at the southwest corner of the property which was required for the development of the site with a 66-bed memory care facility as part of a previously approved conditional use permit, at 2121 South Meridian, is **GRANTED**.

SUMMARY OF RECORD

Hearing Date:

The City of Puyallup Hearing Examiner held an open record hearing on the request on June 28, 2022, using remote access technology.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Kendall Wals, City Senior Planner
Justin Younker, Applicant Representative

Exhibits:

The following exhibits were admitted into the record:

1. Variance Application, submitted November 16, 2020, with Critical Area Identification form, dated November 16, 2020; Vicinity Map, dated October 21, 2015; and Site Plan, dated November 12, 2020; and Landscape Plan, dated November 5, 2020
2. Determination of Complete Application Letter, dated December 7, 2020
3. Notice of Application Materials:
 - a. Affidavit of Notice, dated December 8, 2020
 - b. Notice of Complete Land Use Permit Application, dated December 8, 2020
 - c. Site Plan, dated November 12, 2020
 - d. Landscape Plan, dated November 5, 2020
 - e. Mailing Labels
 - f. 300-Foot Radius Map
 - g. Notice of Application Poster
4. Resubmittal Letter, dated March 14, 2022

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5. Updated Landscape Plan (2 Sheets), received March 14, 2022
6. Final Development Review Team (DRT) Letter, dated May 5, 2022
7. 1,000-Foot Buffer Map, dated June 15, 2022
8. Hearing Examiner Findings, Conclusions, and Decision – Cascadia Senior Living Conditional Use Permit (No. P-16-0002), dated February 9, 2018
9. Staff Report, dated June 16, 2022
10. Notice of Hearing Materials:
 - a. Affidavit of Notice, dated June 17, 2022
 - b. Declaration of Sign Posting, dated June 16, 2022
 - c. Posted Notice Photograph
 - d. Notice of Public Hearing, with Vicinity Map, Mailing Map, and Mailing Labels
11. City Staff Presentation

The Hearing Examiner enters the following findings and conclusions based upon the testimony at the open record hearing and the admitted exhibits:

FINDINGS

Background

1. On February 9, 2018, the City of Puyallup’s Hearing Examiner issued a decision approving a conditional use permit (CUP) to allow construction of a 47,257 square foot, 66-bed memory care facility on an approximately four-acre site on split-zoned property located within both the high density multiple-family residential (RM-20) and the low urban density single-family residential (RS-10) zoning districts. The previous CUP approval (No. P-16-0002) required that the project proponent, Cascadia Senior Living, LLC (Applicant), provide a “Type I” 30-foot-wide vegetative landscape buffer, and fencing, along the north and south property lines adjacent to residentially zoned properties, in accordance with the zone transition landscaping standards of Puyallup Municipal Code (PMC) 20.26.500. During the final construction stage of the approved development project, an abutting property owner to the south (at the southwest corner of the site) requested that an area of the required landscape buffer adjacent to the property owner’s backyard not be landscaped and that, instead, the required fencing meander on the site to allocate a portion of the subject property and its existing vegetation to the adjacent property owner. In making this request, the neighboring property owner alleged legal rights related to this portion of the subject property through the doctrine of adverse possession.¹ In an effort to work with the adjacent property owner and resolve the adverse possession dispute without litigation, the Applicant determined that approval of a

¹ An adverse possession claim is, essentially, a claim made by an adjacent property owner (the “claimant”) that ownership of some (or all) of a contiguous property should be awarded to the claimant in light of the claimant having made beneficial use of the property for many years despite the actual property owner knowing that such use has been occurring. To establish this, a claimant must prove, by a preponderance of the evidence, that their possession of the subject property has been “(1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile” and, further, that each of these four elements has “existed for ten years.” *Nickell v. Southview Homeowners Ass’n*, 167 Wn. App. 42, 271 P.3d 973 (2012).

variance related to the landscaping requirements of PMC 20.26.500 would – in conjunction with recording an easement or finalizing some other form of agreement between it and the neighboring property owner – resolve the dispute. *Exhibit 1; Exhibit 4; Exhibit 5; Exhibit 8; Exhibit 9, Staff Report, pages 1 through 5.*

Application and Notice

2. In light of the unusual circumstances detailed above, the Applicant now requests approval of a variance from PMC 20.26.500 to eliminate a portion of the 30-foot-wide Type I landscape buffer at the southwest corner of the property that was required for the development of the site with a 66-bed memory care facility as part of the previous CUP approval. The property is located at 2121 South Meridian.² *Exhibit 1; Exhibit 4; Exhibit 5; Exhibit 8; Exhibit 9, Staff Report, pages 1 through 5.*
3. The City of Puyallup (City) determined that the application was complete on December 7, 2020. The next day, the City mailed or emailed notice of the application to property owners within 300 feet of the subject property and to reviewing departments and agencies, with a comment deadline of December 22, 2020. On December 9, 2020, the City published notice of the application in the *Tacoma News Tribune*. The Applicant posted notice of the application on-site on December 15, 2020. On June 13, 2022, the City provided notice of the open record hearing associated with the application by mailing notice to property owners within 300 feet of the subject property and by publishing notice in the *Tacoma News Tribune*. On June 16, 2022, the Applicant posted notice of the hearing on-site. The City did not receive any comments on the proposal in response to its notice materials. *Exhibit 2; Exhibit 3; Exhibit 9, Staff Report, page 2; Exhibit 10.*

State Environmental Policy Act

4. The variance request is exempt from environmental review under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, in accord with Washington Administration Code (WAC) 197-11-800(6)(e).³ *Exhibit 9, Staff Report, page 3.*

Comprehensive Plan and Zoning

5. The property is designated “High Density Residential” (HDR) and “Low Density Residential” (LDR) by the City Comprehensive Plan. “High density residential development is intended for areas near employment and/or commercial areas, where high levels of transit are present or likely. This designation creates a transition between

² The property is identified by Tax Assessor’s Parcel Nos. 7790000311 and 7790000312. *Exhibit 9, Staff Report, page 2.*

³ WAC 197-11-800(6)(e) provides that land use decisions that “[grant] variances based on special circumstances, not including economic hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use or density,” shall be exempt from SEPA review.

commercial uses and lower intensity residential uses. Some commercial uses may also be permitted.” *Comprehensive Plan, page 3.16*. “Low density residential areas shall allow single-family detached dwelling units, including manufactured homes. Other dwelling types, such as duplexes. Single-family attached, cottage housing, and accessory dwellings may be allowed under certain conditions.” *Comprehensive Plan, page 3.16. Exhibit 9, Staff Report, page 2*.

6. As noted above, the property is located within both the RM-20 and RS-10 zoning districts, with the majority of development of the memory care facility occurring within the RM-20 zoning district. The City’s RS single-family zoning districts are intended:

to reserve appropriate areas for low density residential living at a broad range of densities consistent with the Puyallup Comprehensive Plan. They further intend to protect the public health, safety and general welfare by ensuring adequate access to light, air, privacy and open space; minimizing traffic congestion and utility overload; protecting residential properties from noise, direct illumination, unsightliness, odors, smoke and other objectionable influences; and, facilitating the provision of public facilities and services commensurate with anticipated population and dwelling unit densities.

PMC 20.20.005.

The area of the property related to the requested variance is within the RM-20 zone. The RM-20 zone allows “for a wider range of multifamily uses, including apartments, duplex, triplex, fourplex, townhouse and other multifamily residential housing types” and is “intended to provide for substantially higher density multifamily residential land uses.” *PMC 20.25.005*. The proposed memory care facility is being constructed on the property in accordance with the prior CUP approval and consistent with applicable zoning code requirements. The Applicant seeks a variance only with respect to a portion of the required landscaping buffer and fencing at the southwest corner of the site, consistent with the request by the adjacent property owner to not install landscaping in this area and to have the required fencing meander on the subject property to allocate a portion of the property to the adjacent property owner’s benefit. *Exhibit 1; Exhibit 4; Exhibit 5; Exhibit 8; Exhibit 9, Staff Report, pages 1 through 5*.

Existing Site and Critical Areas

7. The subject site is bordered by South Meridian to the west and 3rd Street SE to the east. The southeastern portion of the property contains a wetland and associated buffer area that continues onto a parcel to the south. The wetland and its associated buffer would not be impacted by the requested variance. Properties to the north and south of the site are zoned RM-20 and RS-10 and are developed with single-family residences. Properties to the east, across 3rd Street SE, are zoned RS-10 and are developed with residential uses.

Properties to the west, across South Meridian, are zoned RM-20 and are developed with multifamily residences. *Exhibit 7; Exhibit 8; Exhibit 9, Staff Report, page 3.*

Proposed Variance

8. As noted above, the Applicant requests a variance from PMC 20.26.500 to eliminate the need to install a portion of the 30-foot-wide Type I landscape buffer at the southwest corner of the property that was required as part of the previous CUP approval. The Applicant's application materials address the specific criteria for a variance under PMC 20.85.010 and assert:
- The variance request would not affect or limit the uses of properties in the vicinity and/or the contiguous zone of the subject property. The variance request does not pertain to a single-family residential use.
 - The request for a variance to eliminate a portion of the 30-foot-wide Type I landscape buffer in the southwest corner of the property, north of Parcel No. 779000321, would not be detrimental to the public health, safety, comfort, convenience, or general welfare. The requested variance would also not adversely affect the character of the surrounding neighborhood or be injurious to the adjacent properties or improvements. The owner of Parcel No. 779000321 is claiming adverse possession of this area and does not desire to have the required landscaping installed in this area.
 - The reason for the variance request is due to an adverse possession claim by the owner of Parcel No. 779000321. The owner of this parcel desires to continue using the area "as is" and does not want the dense planting required by the Type I landscape buffer. The existing landscaping in this area consists of lawn and five trees.
 - The Applicant believes that the adverse possession claim meets the requirements of a special circumstance and is a hardship that is caused by the adjacent property owner and not by the Applicant or previous owners of the subject property. The landscape buffer is required only to benefit adjacent residential properties by creating a buffer between those properties and the commercial use of the subject property. The owner of the adjacent property, however, does not desire to have the landscape buffer.

Exhibit 1.

9. City staff reviewed the proposal against the variance criteria of PMC 20.85.010, and determined:
- Two variance requests have been granted within 1,000 feet of the site, one related to a sign size and the other related to a reduced building setback. There has not been another landscape variance request within the vicinity of the subject property, but it would be an option, subject to the same review criteria, for a conditionally permitted nonresidential use in the RM-20 and/or RS-10 zone within the vicinity of the site.

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- The proposed deviation from the City's zoning standards would apply only for the interface of the project site to 2205 South Meridian (the residential property to the southwest). All other abutting residential properties would retain the required landscaping buffer.
- This is a unique circumstance where the project site plan was reviewed and approved through the conditional use permit, civil permit, and building permit processes, and the approved permits were compliant with the zone transition landscape buffer requirement. In the final stages of site work, however, the abutting property owner opposed the planting and fencing of the specified area of the site. The buffering standards are intended for the protection and mitigation of impacts to the abutting residential properties. Therefore, if the abutting property owner opposes the improvements and the Applicant is compliant with the abutting property owner's request to stagger/meander the fencing on-site, the variance would not be a grant of special privilege.
- The Hearing Examiner's decision for the previously approved conditional use permit application included a finding regarding the dense landscape buffer provided along the north and south property lines adjacent to residentially zoned properties.
- The location of the variance request is along South Meridian, a major arterial. The subject area would function as the abutting property owner's backyard and does not appear to be out of character with the neighborhood. The six-foot-high vinyl fencing has been in place since the completion of the project, and the five existing mature trees remain within the subject area. The existing vegetation provides some buffering from the adjacent nonresidential use.
- Granting the variance would not be detrimental to the public health or safety of the neighborhood because the public would not perceive the lack of landscape buffering in this area. The "front yard" of the Applicant's property abuts the backyard of the residential property that would benefit from the variance approval. The front yard landscaping for the memory care site abuts the fencing of the subject area, and the existing trees would be retained within the subject area. The proposed variance would not cause harm to the abutting property owner who is objecting to the landscape buffer and, instead, would continue the abutting property owner's comfort and convenience by retaining the existing characteristics of the subject area.
- The Applicant states that the adjacent residential homeowner is claiming adverse possession and is requesting that the landscape buffer not be installed. It is City staff's understanding that the adverse possession claim has not been litigated and that the Applicant is attempting to work with the abutting property owner instead of taking legal action. The adverse possession claim/request by the abutting property owner is a unique situation and could be seen as a special circumstance not caused by the current or previous property owners of the project site.

Exhibit 9, Staff Report, pages 3 through 5.

Testimony

10. City Senior Planner Kendall Wals testified generally about the proposal and how it would meet the specific criteria for approval of a variance. She provided a brief history of the development, including the relevant permit history and earlier CUP approval, and stressed that the neighboring property owner's unresolved adverse possession claim constitutes a special or unique circumstance related to the location or surroundings of the subject property warranting variance approval. Ms. Wals stressed that development of the approved memory care facility is nearing completion, that no new or additional development is proposed in connection with the requested variance, that approval of the variance would not impact neighboring properties or the subject property in a detrimental way, and that resolving the dispute between the property owners in this manner would not foreclose the possibility of the Applicant repositioning the fence and installing the applicable vegetative buffer should circumstances change (such as the neighboring property owner selling their property) in the future. *Testimony of Ms. Wals.*
11. Applicant Representative Justin Younker testified that the Applicant concurs with the City's assessment of the situation and stressed that the neighboring property owner did not raise objections or concerns about the required landscape buffer (or alleged adverse possession) during the earlier CUP process. Nevertheless, in an effort to amicably resolve the situation and avoid litigation, the Applicant determined that seeking variance approval would be the best way forward. Mr. Younker noted that the Applicant considered using the boundary line adjustment process, as well, but determined that – rather than relinquish title to the disputed property – obtaining a variance would allow the Applicant to maintain title to the area while also allowing for a use easement to be granted to the neighboring property owner. *Testimony of Mr. Younker.*

Staff Recommendation

12. City staff determined that the proposal meets the City's variance criteria and recommends approval of the variance. *Exhibit 9, Staff Report, page 5.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide requests for variances from the Puyallup Municipal Code. *PMC 2.54.070; PMC 20.85.005.*

Variance Criteria

The Hearing Examiner may grant a variance when supported by written findings showing specifically that all of the following conditions exist:

- (1) The variance shall not constitute a grant of special privilege inconsistent with the limitations upon uses of other properties in the vicinity and/or contiguous zone in which the property on behalf of which application has been filed is located. For purposes of this subsection, vicinity shall be defined to only include a radius of 1,000 feet or be within the boundaries

- of an established subdivision when the variance request pertains to a single-family residential use; and
- (2) That the granting of such variance will not be detrimental to the public health, safety, comfort, convenience and general welfare, will not adversely affect the established character of the surrounding neighborhood within a radius of 1,000 feet, and will not be injurious to the property or improvements of such vicinity and/or contiguous zone in which the property is located; and
 - (3) That such variance is necessary, because of special circumstances relating to the size, shape, topography, unusual natural features, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity within a radius of 1,000 feet and/or contiguous zone in which the subject property is located. Such circumstances shall not be the result of some action caused by the applicant and/or previous property owners.

PMC 20.85.010.

The Hearing Examiner has the authority to impose conditions and safeguards as deemed necessary to protect and enhance the health, safety, and welfare of the surrounding area and to ensure that the proposed variance fully meets the criteria set forth in PMC 20.85.010.

PMC 20.85.015.

The criteria for review adopted by the Puyallup City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

1. **The variance does not constitute a granting of special privilege inconsistent with limitations upon uses of other properties in the vicinity.** The proposed variance from applicable zone transition landscaping standards that were required as part of the previously approved conditional use permit allowing commercial development on the site would not constitute a grant of special privilege. These landscape buffering standards are intended to mitigate the impacts of commercial development on abutting residential properties, and the Applicant proposes a variance from these standards to satisfy a request from the only adjacent residential property owner that would be impacted by the landscape buffer reduction. The adjacent property owner's request to not install a portion of the required landscaping abutting the neighboring property was made during the final stages of the approved site development, and the Applicant would install the required landscaping along other portions of the site abutting residential properties. *Findings 1, 2, 6 – 12.*

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2. **The granting of the variance would not be detrimental to the public health, safety, comfort, convenience and general welfare; would not adversely affect the established character of the surrounding neighborhood within a radius of 1,000 feet; and would not be injurious to the property or improvements of such vicinity and/or contiguous zone in which the property is located.** The City provided reasonable notice and opportunity to comment on the proposal. The City did not receive any comments on the proposed variance in response to its notice materials. The proposal is exempt from SEPA environmental review, in accord with WAC 197-11-800(6)(e). The subject property is designated High Density Residential and Low Density Residential by the Comprehensive Plan and is within the RM-20 and RS-10 zoning districts. With the requested variance, development of the site would be consistent with the Comprehensive Plan and with all applicable development regulations of the zoning code, as determined by the previous Hearing Examiner's decision approving a conditional use permit.

As discussed above in Conclusion 1, the Applicant's proposed variance to allow a reduction in the required landscaping buffer was made to satisfy a request by an adjacent property owner, and the landscape buffer reduction would be limited to an area abutting the adjacent property. The affected area abutting the adjacent property contains existing trees that provide some buffering from the commercial use of the subject property, and the proposed variance allowing this area to remain in its current state would not adversely affect the existing character of the surrounding neighborhood or be injurious to the properties or improvements in the vicinity. Moreover, use of the variance process (as opposed to seeking a boundary line adjustment) allows the Applicant to obtain legal title to the area in question such that repositioning the fence and installation of the required vegetative buffer would be possible should circumstances change in the future. *Findings 1 – 12.*

3. **The variance is necessary because of special circumstances relating to the size, shape, topography, unusual natural features, location, or surroundings of the subject property.** The variance is necessary because of the special circumstances resulting from the adjacent property owner's adverse possession claim and request not to install the required landscaping within the area of the property claimed to be adversely possessed. These circumstances were not caused by the Applicant or previous property owner, and granting the variance would allow the Applicant to complete the commercial development of the site consistent with the previous conditional use permit, while amicably resolving the situation with the neighboring property owner without need for litigation. The Hearing Examiner notes that this is a highly unusual situation and, as a general rule, the variance process is ill-equipped to address (let alone resolve) disputes between adjacent property owners. That said, the Hearing Examiner accepts the suggestion made by both the City and Applicant that the unresolved adverse possession dispute constitutes a special circumstance related to the location and surroundings of the subject property. The record clearly establishes, further, that approval of the variance

request would not have detrimental impacts or harm the applicable properties or other properties in the vicinity. *Findings 1, 2, 6 – 12.*

DECISION

Based on the preceding findings and conclusions, the request for approval of a variance from PMC 20.26.500 to eliminate the requirement for the Applicant to install a portion of a 30-foot-wide landscape buffer at the southwest corner of the property, which was required for the development of the site with a 66-bed memory care facility as part of a previously approved conditional use permit, at 2121 South Meridian, is **GRANTED**.

DECIDED this 15th day of July 2022.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center