

**THE HEARING EXAMINER OF THE CITY OF BELLINGHAM
WHATCOM COUNTY, WASHINGTON**

IN RE:

HE-21-PL-016

**KATHLEEN LAX, JAKE
BURRY, SKIP and ALEXIS
WILLIAMSON, Appellants**

**RULING ON APPELLANTS'
REQUEST FOR
RECONSIDERATION**

**MCKENZIE FUNK, Property
Owner**

**Appeal of Notice of Decision
PBW2021-0697 approving
driveway installation at 1112 18th
Street and the consolidated
appeal of CAP2021-0052**

**SHARON A. RICE, HEARING
EXAMINER**

On September 6, 2022, after careful deliberation, a decision was issued denying the above-captioned appeal in its entirety (Decision). On September 9, 2022, Appellants submitted a timely request for reconsideration alleging an error in fact and/or in law in that the Decision did not include or impose on the appealed-from street obstruction permit a condition stipulating that the driveway allowed by its terms to be constructed was limited to the use of the subject property at 1112 18th Street.

The following documents were reviewed in reaching the ruling on the reconsideration request:¹

- Request for Reconsideration, dated September 9, 2022, with attached excerpts from Exhibit A2

¹ An Appellant request to expedite party responses to the instant motion and decision on reconsideration was initially granted via email circulated by the Hearing Clerk. However, it subsequently came to light that the Owner's Attorney had left the firm and new counsel was required to respond to the motion. Therefore, the expedited turnaround on Decision on Reconsideration was rescinded to allow Owner's new counsel time to adequately respond. These procedural discussions and determinations were conducted via email via the Hearing Clerk.

RULING ON RECONSIDERATION REQUEST

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M:/HE/DATA/APPEALS/Lax-Burrry-Williamson Appeal 1112 18th Street

**OFFICE OF THE HEARING EXAMINER
CITY OF BELLINGHAM
210 LOTTIE STREET
BELLINGHAM, WA 98225
(360) 778-8399
hearing@cob.org**

- City Response to Request for Reconsideration, dated September 14, 2022
- Owner Response to Request for Reconsideration, dated September 16, 2022
- Appellants' Reply in Support of Request for Reconsideration, dated September 21, 2022, with attached excerpts from Exhibit A13 and A13.1

Requested Relief

Appellants contend that the Decision's failure to remand the street obstruction permit to Public Works with instruction to include a condition restricting use of the driveway to only the subject property (1112 18th Street) was a clear mistake of material fact and/or a clear error of law.

Appellants argued that statements made by then-City Engineer Tom Rosenberg "that the right-of-way permit would only allow ... the single-use of that driveway [for] the pre-existing residence at 1112 18th Street [and that if other parcels developed in future, those] owners would then be forced to provide other access from the south" should be read as an intended condition. *Exhibit A2*. Appellants argue that because Council approved 1993 variance based on compliance with Public Works' recommendations, that single-use of the driveway by 1112 18th Street was necessarily intended to be a condition on the future construction permit to the same extent as those conditions called out in the Public Works Staff report and on the face of the approved construction plans, and that not to impose such a condition on the instant street obstruction permit constitutes clear error.

Both the City and the Property Owner were requested to respond to the motion for reconsideration. Both parties opposed it on grounds stated in their responses.

Discussion

On appeal, Appellants had requested that the 1993 (if found to be valid) be read to have been conditioned by Council to 1) require abandonment of the driveway if alternate safer access was later found to exist and 2) restriction to use of the driveway to only the residence at 1112 18th Street. On reconsideration, Appellants contend that the Examiner has clear authority to remand the street obstruction permit to Public Works with instruction to condition the permit to allow access only for vehicles to 1112 18th street, on the grounds that this was a clear intention of Public Works when they recommended approval to City Council in 1993. Appellants contend that it was not the variance that was to be conditioned on "single-user access," but the permit authorizing development of the driveway, which would be the instant street obstruction permit. Appellants argue that current Public Works Staff overlooked this requirement which is indicated in the Council meeting minutes when they issued the instant street obstruction permit without such a condition, and that this Public Works error needs to be corrected now.

1 Addressing the need underlying this reconsideration request, Appellants contend that the
2 current Property Owners clearly intend to access both 1112 18th Street and 1109 18th
3 Street by the instant driveway, as they own and plan to redevelop 1112 and are renting
4 and intend to purchase 1109. By implication, Appellants contend that vehicle traffic
serving 1109 18th Street would render the use of the driveway markedly less safe than
the (alleged) unsafe conditions that will arise if 1112 18th uses the approved driveway.

5 While it is true that Conclusion 3 of the Decision only addresses the question of the
6 requested abandonment condition, the findings generally address “conditions” discussed
7 and intended to be imposed by City Council when they voted unanimously to approve
8 the variance. As stated in Findings 7 and 21, based on testimony offered by City Public
9 Works Staff and a former Bellingham City Councilmember who participated in the 1993
10 variance proceedings, approval of the variance – and all conditions imposed – was
memorialized in the Council meeting minutes. If there had been a motion to impose any
restriction as a condition, said restriction would have been incorporated into the motion
prior to vote. Specifically, Finding 21 states:

11 Addressing whether the Council intended to condition the variance approval on its
12 serving only the one residence, Mr. Asmundson testified no, they did not intend to so
13 condition it, as there was no need; it was a variance approving a driveway, which by
definition serves one residence and is not a road.

14 The only conditions explicitly stated by the Public Works Department and/or the City
15 Engineer are detailed in Finding 9; these address 1) the Department’s requirement that
16 the driveway’s design make it clear it is not an extension of Highland Drive and 2)
17 obtaining consent from the abutting property owners fronting Knox Avenue. When the
18 then-applicant was unable to obtain neighbor consent, the variance was denied;
19 however, it was later approved on appeal without said consent. The only other
20 conditions explicitly stated in the record are the 18 “notes” related to construction on the
21 face of the approved plans, as detailed in Finding 10.

22 At hearing, as noted in the Appellants Reply in Support of Request for Reconsideration,
23 current Public Works Staff testified that the approved street obstruction permit
24 authorizes construction and use of a driveway by 1112 18th Street and that should any
25 other property desire to take access by the same route, that property owner would be
26 required to obtain variance approval.

27 In their reconsideration request, continuing their argument which did not succeed on
28 appeal, Appellants allege significant safety concerns if the approved driveway is used by
vehicles for any other property; however, the record presented fails to demonstrate any
safety concerns of such obvious and overriding gravity that the instant permit needs to
be conditioned further.

1 The variance approval as issued and upheld in the instant appeal is already limited to the
2 subject property (1112 18th Street). Any other parcel that desires to obtain vehicular
3 access by the same route as the driveway would need its own relief - in the form of a
4 variance - from the current City Code requirement to abut a minimum standard street.
5 To attempt to condition the instant street obstruction permit to prohibit consideration of
6 future variance applications is beyond the scope of the instant appeal proceeding and
7 outside the Examiner's authority. To the extent any issues may arise in the future from
8 vehicles using the driveway for 1112 to access 1109 (or any other parcel abutting
9 unimproved 18th Street), these issues are currently speculative and not ripe; any such
10 issues may perhaps be appropriately addressed through the code enforcement process, or
11 some other future process.

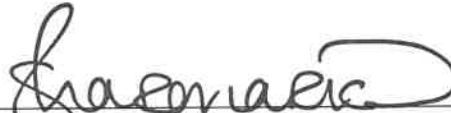
12 RULING

13 While Appellants accurately point out that Decision Conclusion 3 only directly
14 addresses the appeal's requested abandonment condition, when read as a whole the
15 Decision clearly concludes that no other conditions were imposed at time of the 1993
16 variance approval beyond those explicitly stated in writing on the face of the approved
17 plans. The undersigned continues to decline to read into the meeting minutes any intent
18 by Council to condition the variance approval further.

19 No clear error of material fact or law has been shown. Reconsideration is denied.

20 ENTERED September 26, 2022.

21 **BELLINGHAM HEARING EXAMINER**

22 
23 Sharon Rice