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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM**

**KATHRYN and PATRICK SUTTON, a
married couple,**

No. 24-2-00836-37

Petitioners,

CERTIFICATION OF THE RECORD

vs.

**CITY OF BELLINGHAM, a Washington
municipal corporation,**

Honorable Judge Evan Jones

Respondent.

STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

- I, Kristina J. Bowker, being first duly sworn on oath depose and say:
1. I am the Assistant to the Hearing Examiner for the City of Bellingham.
 2. Attached hereto is a true and correct copy of the complete record concerning HE-24-PL-011, regarding a variance request for a short-term rental of a Detached Accessory Dwelling Unit (D-ADU).
 3. This record includes the following documents:

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Description of Document	Page No.
City of Bellingham’s Motion and Memorandum to Deny Variance without a Hearing	1
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Land Use Chapter – Bellingham Municipal Code 20.10.037 Short-term Rentals and Bellingham Municipal Code 20.18.020 Variance Criteria	28
City of Bellingham’s Reply to Applicant’s Response to Motion to Deny Variance	36
Ruling on City’s Motion to Deny Variance without a Hearing	42

DATED this 14th day of May 2024.

Kristina J. Bowker
Kristina J. Bowker

SUBSCRIBED AND SWORN before me this 14th day of May 2024.



Tracy Lewis
Signature of Notary Public

Tracy Lewis
Print Name

10/20/26
Date Commission Expires

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APR 16 2024

HEARING EXAMINER
CITY OF BELLINGHAM

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

IN RE:

NO. HE-24-PL-___

Applicant No: VAR2024-001

**CITY OF BELLINGHAM'S MOTION
AND MEMORANDUM TO DENY
VARIANCE WITHOUT A HEARING**

James Patrick Sutton and Kathryn A.
Sutton,
Applicants,

Sharon A. Rice, Hearing Examiner

Property Address: 1017 Liberty Street,
Bellingham, WA

Tax Parcel No. 3803313363920000

COMES NOW, the Planning and Community Development Department, by and through its attorney, Deputy City Attorney, James Erb, and respectfully moves the Hearing Examiner for an Order Denying the Variance without a hearing.

INTRODUCTION

The City Council recognizes that the strict application of the land use code may, in certain circumstances, create a unique hardship for property owners in the City. Therefore, the City Council has adopted Chapter 20.18 of the

**CITY OF BELLINGHAM'S MOTION &
MEMORANDUM TO DENY VARIANCE - 1**

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 778-8270

1 Bellingham Municipal Code (BMC) to allow property owners an opportunity to
2 seek a variance from the strict application of the land use code, provided that the
3 owner satisfies identified criteria. However, and importantly, the variance process
4 is not a mechanism by which the hearing examiner may substitute her judgment
5 with respect to matters of land use policy for the judgment of the City Council as
6 reflected in adopted land use regulations. Because the applicants cannot
7 establish that they meet the criteria for a variance, and because no presentation
8 during the scheduled public hearing could change that reality, the Planning and
9 Community Development Department moves for an Order Denying the Variance
10 without a hearing.
11
12

13 **FACTS**

14 The applicants, J. Patrick Sutton and Kathryn A. Sutton, own property at
15 1017 Liberty Street in the Sehome neighborhood. The property is zoned
16 Residential Single. Exhibit A (Land Parcel Report for 1017 Liberty Street). The
17 applicants applied for and received permits to construct a single-family residence
18 and a detached accessory dwelling unit (ADU) on their property. The applicants
19 are now seeking a variance from an adopted regulation that clearly and
20 unambiguously prohibits them from using their newly constructed detached ADU
21 as a short-term rental.
22
23

24 **ARGUMENT**

25 The City Council has adopted standards for the establishment of short-
26 term rentals. BMC 20.10.037. The municipal code defines a short-term rental as
27 follows:
28

1 "Short-term rental" means a lodging use, other than a hotel or motel, in
2 which a dwelling unit or portion thereof is provided to guests by a short-
3 term rental operator for a fee for fewer than 30 consecutive nights. A
4 dwelling unit or portion thereof that is used by the same individual or
individuals for 30 or more consecutive nights is not a short-term rental.
BMC 20.08.020.

5 BMC 20.10.037(B)(3) states: "Short-term rentals are permitted in residential,
6 commercial, and urban village general use types *per this section.*" BMC
7 20.10.037(B)(3)(emphasis added). The regulations further state:
8

9 ***Short-term rentals are not permitted in detached accessory dwelling***
10 ***units in residential single general use type areas.*** If the citywide
11 housing vacancy rate reaches four percent or higher, the city council shall
12 review whether short-term rentals should be allowed in detached
accessory dwelling units in residential single general use type areas. BMC
20.10.037(B)(5)(c)(emphasis added).

13 Short-term rentals are not permitted or otherwise allowed in detached ADUs in
14 residential single general use type areas. While the applicants seek a variance
15 from the regulation that clearly prohibits them from using their detached ADU as a
16 short-term rental, the municipal code does not allow for this type of variance.
17

18 Variances from the land use code are governed by Chapter 20.18 BMC.

19 The hearing examiner may grant a variance only if the applicant proves to the
20 hearing examiner's satisfaction that because of the unusual shape, exceptional
21 topographic conditions, or other extraordinary situation or condition in connection
22 with a specific piece of property the literal enforcement of this title would involve
23 practical difficulties and cause undue hardship unnecessary to carry out the spirit
24 and intent of this title. BMC 20.18.010(A). However, and importantly, the variance
25 procedure is not without limits. Property owners cannot request a variance from
26 any and all provisions of the land use code.
27
28

1 The variance procedure (and the application for a variance) states, in
2 pertinent part:

3 An application for a variance may be submitted for modification of any term
4 or requirement of this title except for the following:

5 1. To allow a use not generally permitted (either as a principal or
6 conditional use) in the general use type in which the subject property is
7 located... BMC 20.18.010(B).

8 The requested variance is precisely the type of variance that is prohibited under
9 BMC 20.18.010(B).

10 The municipal code clearly states that detached ADUs in areas zoned
11 Residential Single may not be used as short-term rentals. BMC
12 20.10.037(B)(5)(c). The applicants seek a variance from this regulation to use
13 their detached ADU in a Residential Single zone as a short-term rental. In other
14 words, they are requesting a variance to allow a use that is not generally
15 permitted in the general use type in which the subject property is located, i.e.,
16 using a detached ADU as a short-term rental in an area zoned Residential Single.
17 This is not arguable.

18
19 The applicable land use regulation clearly states, "short-term rentals are
20 not permitted in detached accessory dwelling units in residential single general
21 use type areas." BMC 20.10.037(B)(5)(c)(emphasis added). The hearing
22 examiner lacks authority to grant this type of request under BMC 20.18.010(B).
23 Moreover, there is no evidence or argument that could be presented at the
24 scheduled public hearing that would change that reality. Accordingly, the
25 Planning and Community Development Department respectfully requests that the
26
27
28 application for a variance be denied without a hearing.

**CITY OF BELLINGHAM'S MOTION &
MEMORANDUM TO DENY VARIANCE - 4**

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 778-8270

1 **CONCLUSION**

2 The applicants raise interesting policy questions about the City Council's
3 approach to regulating short-term rentals in Residential Single areas. But the
4 variance procedure may not be used to substitute the hearing examiner's
5 judgment with respect to questions of land use policy with the regulations
6 adopted by the City Council and codified in the Bellingham Municipal Code. If the
7 applicants would like the City Council to revise the regulations applicable to short-
8 term rentals in Residential Single areas of the City to permit the use of their
9 detached ADU as a short-term rental, that is a policy argument best addressed to
10 the City Council.
11

12
13 For these reasons, the Planning and Community Development Department
14 respectfully requests that this application for a variance be denied without a
15 hearing.
16

17 Respectfully submitted this 16th day of April 2024.

18 **CITY OF BELLINGHAM**

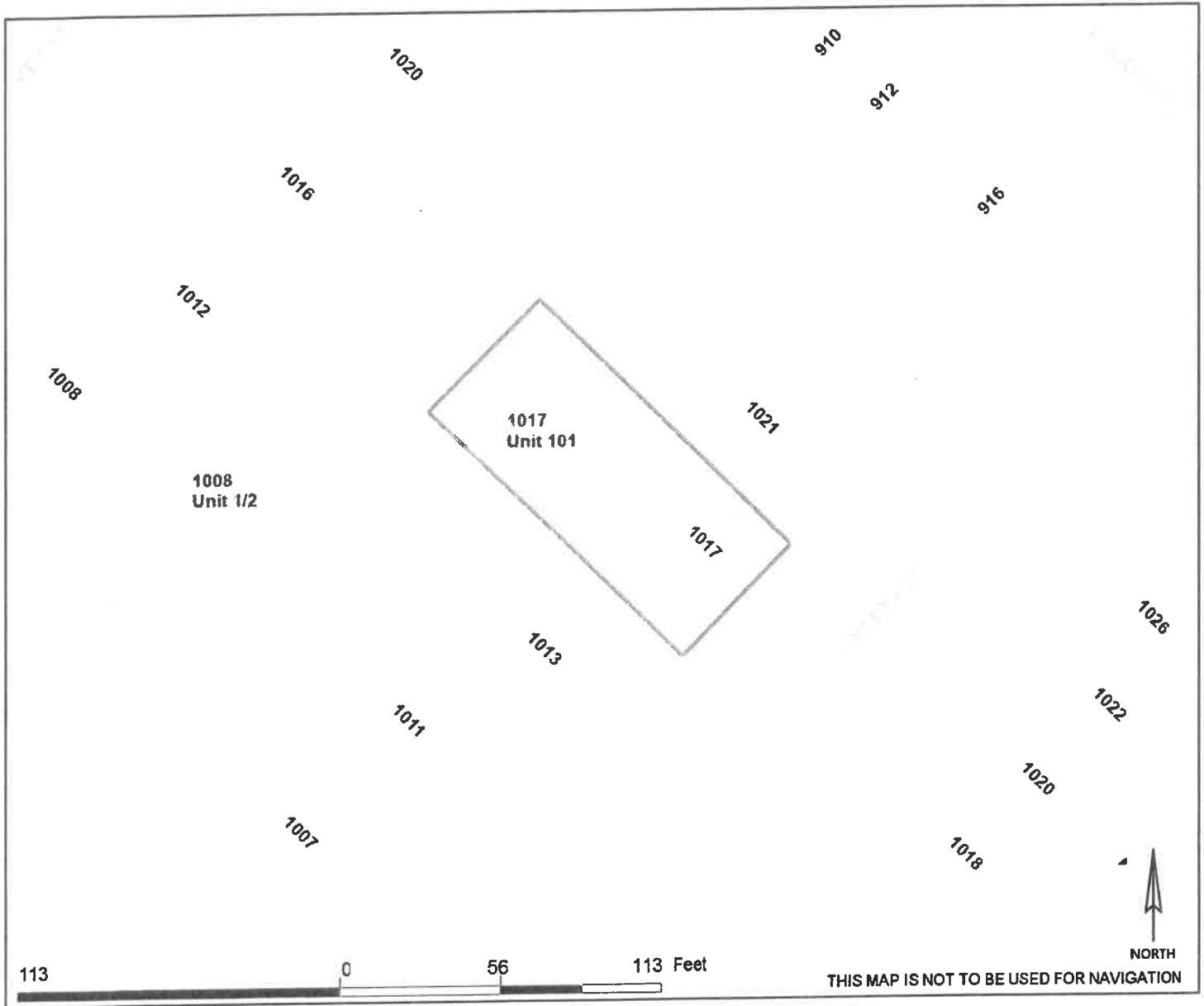
19  for

20 **James Erb, WSBA #40128**
21 Deputy City Attorney
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Land Parcel Report for 380331336392

for site address of 1017 LIBERTY ST



THIS MAP IS NOT TO BE USED FOR NAVIGATION

Assessor Property Info		Appraised Property Value	
Property ID:	77479	Land value:	\$285,460
Assessor address:	1017 LIBERTY ST	Improvement value:	\$802,570
Owner name:	JAMES P & KATHRYN A SUTTON	Total value:	\$1,088,030
Land use:	RES 2 BDRM W/ ADU		

EXHIBIT A

Legal Description

Contact the Whatcom County Assessors office (360-778-5050) for the complete legal description.

ELDRIDGE-BARTLETT'S ADD TO SEHOME LOT 21 BLK 18

Full Parcel Number(s)

3803313363920000

Site Address(es)

1017 LIBERTY ST

1017 LIBERTY ST UNIT 101

Parcel Area

Mapped parcel area (sq ft): 6873
Mapped parcel area (acres): 0.16
Assessor legal acreage: 0.16

Neighborhood

SEHOME

Zoning

RESIDENTIAL SINGLE Subarea: 11
Neighborhood Plans and Zoning

Historical Information

Sehome Historic District
Historic Property Report

Zoning (Urban Village)

(Not available)

Watershed

Whatcom Creek, Sub Basin: Lower Whatcom Creek

Survey Records

Recorded date	Survey firm / Description	Documents
09/10/2021	CITY OF BELLINGHAM/SURVEY 2021 MONUMENTS REPLACED BY COB	More info
03/15/2011	CONSTRUCTION SURVEYORS N W INC. SURVEY WORKSHEET FOR EW-0186. WATER MAIN REPLACEMENT. KEY AND LIBERTY STREETS. TWO SHEETS.	More info

Survey Records

Recorded date	Survey firm / Description	Documents
04/15/2009	CONSTRUCTION SURVEYORS N W INC. CONTROL WORKSHEET FOR SEWER REPLACEMENT PROJECT EU-0140. ELLIS STREET, E. MAPLE ST, ALLEY IN BLOCK 7 BETWEEN FRANKLIN & GRANT, ALLEY BETWEEN INDIAN & JERSEY. 4 SHEETS. SEE FB 916-1 & 2	More info
03/17/2008	PACIFIC SURVEY & ENGINEERING, INC. WATERFRONT DISTRICT HORIZONTAL AND VERTICAL CONTROL SURVEY. CORNWALL, RAILROAD, STATE, ROEDER, HOLLY. THIS IS THE AMENDED RECORD OF SURVEY FOR #4377 INCLUDES VERTICAL DATUM CONVERSIONS	More info
10/17/2007	CITY OF BELLINGHAM 2005 HORIZONTAL CONTROL NETWORK. SURVEY TO ESTABLISH LOCAL CONTROL POINTS TO EXTEND THE NATIONAL GEODETIC SURVEY (NGS) HORIZONTAL CONTROL NETWORK WITHIN THE BELLINGHAM AREA IN NAD83/98 WASHINGTON STATE PLANE, NORTH ZONE, U.S. SURVEY FEET DATUM. SEE AFFIDAVIT OF CORRECTION AF2090401447	More info
10/17/2007	CITY OF BELLINGHAM 2005 HORIZONTAL CONTROL NETWORK. SURVEY TO ESTABLISH LOCAL CONTROL POINTS TO EXTEND THE NATIONAL GEODETIC SURVEY (NGS) HORIZONTAL CONTROL NETWORK WITHIN THE BELLINGHAM AREA IN NAD83/98 WASHINGTON STATE PLANE, NORTH ZONE, U.S. SURVEY FEET DATUM. SEE AFFIDAVIT OF CORRECTION AF2090401447	More info
06/14/2002	PACIFIC SURVEY & ENGINEERING, INC. CONTROL WORKSHEET FOR THE 2002 SEWER REPLACEMENT PROJECT, EU0063. FROM IVY TO MAPLE AND FROM MASON TO KEY.	More info
06/30/1997	DAVID EVANS & ASSOCIATES, INC. SURVEY OF THE BELLINGHAM TIDELANDS INCLUDING SECTIONS, DLC'S WATERWAYS AND RR ROW'S. IN SECTIONS 22, 23, 24, 25-38-2 AND 31,36-38-3 AND 1, 2, 11, 12-37-3. TIDELAND PLATS. 8 SHEETS	More info
10/31/1996	CONSTRUCTION SURVEYORS N W INC. SURVEY OF STREETS FORM LIBERTY TO LINCOLN AND FROM LAUREL TO MAPLE. CITY JOB SE666	More info
09/11/1974	JAMES E. WILSON & ASSOCIATES CITY CADASTRAL MAP	More info

Subdivisions

Status	Name	Documents
CURRENT	ELDRIDGE & BARTLETT'S ADD. TO SEHOME	More info

Permits

Permit Number	Permit Type	Permit Subtype	Status	Final Date
BLD2021-0960	DEMOLITION	TOTAL	FINALED	03/16/2022
BLD2022-0196	NEW CONSTRUCTION SINGLE FAMILY OR DUPLEX	NEW STRUCTURE	FINALED	04/11/2024
BLD2022-0329	NEW CONSTRUCTION SINGLE FAMILY OR DUPLEX	ADU	FINALED	04/11/2024
ELE2019-2268	ELECTRICAL SINGLE FAMILY OR DUPLEX		FINALED	11/17/2020
ELE2021-2199	ELECTRICAL SINGLE FAMILY OR DUPLEX		FINALED	10/06/2021
ELE2022-2023	ELECTRICAL SINGLE FAMILY OR DUPLEX		FINALED	04/28/2023
ELE2023-0113	ELECTRICAL SINGLE FAMILY OR DUPLEX		FINALED	04/28/2023
ELE2023-0849	ELECTRICAL SINGLE FAMILY OR DUPLEX		FINALED	10/20/2023
PBW2021-0821	UTILITIES FRANCHISE		FINALED	12/27/2022

Projects - Land Use and Environmental

Project Number	Project Type / Description	Project Subtype	Status	Approved Date
ADU2022-0010	ACCESSORY DWELLING UNIT Sutton - Detached ADU w/ new SFR	DETACHED	APPROVED	04/18/2022
PRJ2004-01144	TIDEMARK PROJECT ADDITION TO EXISTING RESIDENCE: DINING		APPROVED	
PRJ2009-00551	TIDEMARK PROJECT NEW RESIDENTIAL ACCESSORY BLDG: DETACHE		APPLIED	
SEP2021-0050	SEPA Demo SFR and Construct New SFR - Sutton	PROJECT	APPROVED	02/17/2022
VAR2024-0001	VARIANCE STR in DADU - Sutton	RESIDENTIAL	IN REVIEW	

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HEARING EXAMINER
CITY OF BELLINGHAM

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

IN RE:

Applicant No: VAR2024-001

James Patrick Sutton and Kathryn A. Sutton,
Applicants,

Property Address: 1017 Liberty Street,
Bellingham, WA

Tax Parcel No. 3803313363920000

NO. HE-24-PL-____

DECLARATION OF SERVICE

Sharon A. Rice, Hearing Examiner

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On April 16, 2024, I served a true and correct copy of the following documents to be delivered as set forth below:


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- 1. **City of Bellingham's Motion to Deny Variance Without a Hearing**
- 2. **Declaration of Service**

J. Patrick Sutton & Kathryn Sutton 1017 Liberty Street Bellingham, WA 98225	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Email: ipatricksutton@ipatricksuttonlaw.com <input type="checkbox"/> Hand Delivery
Hearing Examiner City of Bellingham 210 Lottie Street Bellingham, WA 98225	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Email: mail kbowker@cob.org <input checked="" type="checkbox"/> Hand Delivery

DATED this 16th day of April, 2024.

CITY OF BELLINGHAM


 Julie A. Steele
 Paralegal

1 **BEFORE THE HEARING EXAMINER**
2 **FOR THE CITY OF BELLINGHAM**

3
4 In the Matter of VAR2024-00001) NO. HE-24-PL-_____
5)
6 1017 LIBERTY STREET – SUTTON)
7 VARIANCE FROM SHORT-TERM) **RESPONSE TO MOTION TO**
8 RENTAL ORDINANCE) **DENY VARIANCE WITHOUT**
9) **A HEARING**
10 _____)

11
12 To the City of Bellingham Hearing Examiner and City of Bellingham Planning
13 and Community Development:

14 The Suttons oppose the City’s Motion to Deny Variance Without a
15 Hearing and would show as follows.

16 **EXECUTIVE SUMMARY**

17 Not every ordinance within a City’s “zoning ordinances” is *zoning*.
18 Zoning sets out general use types which are uniform within geographic
19 districts. Hearing examiners cannot grant variances from that. Regulating
20 specific uses is just an exercise of the police power. Hearing examiners can
21 grant variances from that.

22 **FACTS IN RESPONSE**

23 The City omits to mention a salient fact concerning the zoning of the
24 Sutton property. The “General Use Type” under Ordinances § 20.06.030 is
25 “Residential single.” And the further “use qualifier” is “detached.” *Both Sutton*
26 *dwelling (main and ADU) are detached residential dwellings used solely for*
27 *residential purposes – exactly as zoned.* No variance from that zoning is
28 requested.

29 Briefly as to the application itself, the Suttons built a new, 2- bedroom
30 2100-sq.ft. main dwelling and 1-bedroom, 625-sq.ft. detached ADU on a 7000-

1 square-foot lot in the Sehome neighborhood. The main dwelling was designed
2 to maintain neighborhood character and avoid massing and ungainliness. The
3 Sutton use the ADU themselves regularly, so they can only rent it out when
4 they are not using it. The ADU lies very close to the main dwelling, with a
5 small, landscaped garden between the two. The ADU and its large living area
6 and kitchen windows face the main house's kitchen and living areas, which
7 likewise have large windows facing the ADU. The ADU is a few feet from the
8 Suttons' detached home office.



View through main living room toward ADU

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View from NE back porch toward ADU 1

1 The ADU backs up against the alley. The main dwelling's carport shares a roof
2 with the ADU, with pathways leading from the carport to both dwellings. The
3 ADU also has its own dedicated parking space on the side opposite the carport.

4 ARGUMENT

5 *Leases for short terms is a residential use of a dwelling.*

6 The City appears to be contending that short-term renting is not a
7 residential use. Motion at 4, ll. 14-18. That is false. The Supreme Court of
8 Washington held in 2014 that leasing for short terms is a residential use: "If
9 a vacation renter uses a home 'for the purposes of eating, sleeping, and other
10 residential purposes,' this use is residential, not commercial, no matter how
11 short the rental duration." *Wilkinson v. Chiwawa Communities Ass'n*, 180
12 Wash. 2d 241, 252, 327 P.3d 614, 620 (2014); accord *Tarr v. Timberwood Park*
13 *Owners' Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018); see *Dianovich v. Grays Harbor*
14 *Cnty.*, 103 Wash. App. 1040 (2000) (city zoning of property for "residential
15 purposes" was unconstitutionally vague and did not bar short-term renting of

1 home).

2 The City itself acknowledges that a short duration of leasing is
3 residential by broadly allowing short-term leasing in all residentially-zoned
4 districts. See Ordinances § 20.10.037(B).

5 ***The zoning ordinance “generally permits” all ordinary***
6 ***residential uses in residential districts.***

7 The variance ordinance does not allow a property owner to seek a zoning
8 change, but only a modification to a specific requirement. It accomplishes that
9 by distinguishing between zoning categories – which are broad and uniform
10 within whole districts – from more specific or individualized property uses:

11 A. A variance is a modification of the terms of this title. . . .

12 B. An application for a variance may be submitted for modification of
13 any term or requirement of this title except for the following:

14 1. To allow a use not generally permitted (either as a principal or
15 conditional use) in the general use type in which the subject property
16 is located;

17 The City contends, in essence, that the Suttons are asking for a zoning
18 change for their ADU. But that is false because the Suttons are already
19 “generally permitted” to rent for short terms under the zoning ordinance’s
20 “general use type.” It is only under the separate *STR ordinance*, which has
21 unique, narrow provisions for *detached ADU’s*, that the Suttons are not
22 allowed a short-term rental license as of right. The City’s position is
23 tantamount to saying that the Suttons have to seek rezoning to an
24 unprecedented zoning category: “single-family residential detached accessory
25 dwelling short-term rental.”

26 Zoning doesn’t work like that. Zoning, under the state zoning enabling
27 act, allows cities to create comprehensive plans which in turn divide a city into

1 districts “uniform and equal in operation and effect.” *State ex rel. Smilanich*
2 *v. McCollum*, 62 Wash. 2d 602, 605, 384 P.2d 358, 361 (1963); *State ex rel.*
3 *Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wash. 2d 321, 331, 510
4 P.2d 647, 653 (1973); see RCW §§ 35.63.090, 35.63.110 (zoning enabling
5 statute). That’s exactly what the City’s 2016 comprehensive plan did. **Exhibit**
6 **A.** General use types are the purpose of zoning in the first place, and it’s why
7 BMC § 20.06.030, immediately after listing general use types, says: “The
8 intent of the general use type is to quickly orient someone to what general
9 types of uses may be allowed within an area.” § 20.06.030(A)(2).¹

10 So, not surprisingly in light of the significance of zoning as a broad
11 districting exercise, zoning is the sole province of the City Council. See *Lutz*
12 *v. City of Longview*, 83 Wash. 2d 566, 570, 520 P.2d 1374, 1377 (1974),
13 *abrogated on other grounds*, *Yim v. City of Seattle*, 194 Wash. 2d 682, 451 P.3d
14 694 (2019). That is why the City’s ordinances do not allow an administrative
15 hearing officer to, in effect, rezone a property to allow a different general use.

16 The Suttons are not seeking to vary their zoning. Residential zoning is
17 exactly what they want. When read strictly according to its plain terms, the
18 city code allows short-term rentals as both a “general” and a “conditional” use
19 in all residential districts citywide. These “general” and “conditional” uses as
20 defined in the Bellingham zoning ordinance are addressed in turn.

¹ The need for zoning to be broad and uniform in recognizable districts means that spot zoning is generally prohibited. *Save Our Rural Env’t v. Snohomish Cnty.*, 99 Wash. 2d 363, 368, 662 P.2d 816, 819 (1983) (“Spot zoning has been consistently defined to be zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan.”); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 875, 947 P.2d 1208, 1216 (1997) (same). What the Suttons seek, however, is consistent with Bellingham’s definition of single-family residential districting; the inconsistency is with the STR ordinance alone, not the zoning.

1 **STR of an ADU is a general use.**

2 When the Bellingham Ordinances do not allow a variance for a “use not
3 generally permitted . . . in the general use type in which the subject property
4 is located,” that is referring specifically to BMC Chapter 20.06, which sets out
5 the seven “general use types” for all of Bellingham:

- 6 a. Residential single.
- 7 b. Residential multi.
- 8 c. Commercial.
- 9 d. Industrial.
- 10 e. Institutional.
- 11 f. Public.
- 12 g. Urban village.

13 *See also* Exhibit A. Thus, for a “Residential single” zoning district, the
14 variance procedure at § 20.18.010(B) plainly forbids someone from seeking a
15 variance *to engage in the other 6 express general use types listed here*. So the
16 Suttons cannot seek a “variance” to open a shop, an apartment building, a
17 factory, a government office, or a hospital. They are limited to “residential
18 single” use and cannot use the variance procedure to deviate from that.

19 **STR of an ADU is a conditional use.**

20 The Sutton’s proposed use is also denominated as a “conditional use”
21 within the Bellingham zoning ordinance’s “general uses.” Ordinance §
22 20.16.020 (the conditional use chapter) itemizes all such conditional uses.
23 That list includes “short-term rental.” It then defines “short-term rental”
24 without *any* reference to “detached” vs. “attached”:

25 A lodging use, other than a hotel or motel, in which a dwelling unit

1 or portion thereof is provided to guests by a short-term rental
2 operator for a fee for fewer than 30 consecutive nights. A dwelling
3 unit or portion thereof that is used by the same individual or
4 individuals for 30 or more consecutive nights is not a short-term
5 rental.

6 Accordingly, an ADU of *any* stripe constitutes a “conditional use” of
7 “residential single” use under the zoning ordinance. It is only within the short-
8 term rental ordinance *itself* – to which the Suttons’ variance request is
9 directed – that any distinction is made between attached and detached ADU’s.
10 That is narrow and specific, and it’s not zoning.

11 **STR of a detached ADU is a modification of the terms**
12 **of Title 20 narrower than a general or conditional use.**

13 The Suttons’ application is narrower than either the general use type or
14 the conditional use type under the zoning ordinance. It seeks a modification
15 solely as concerns the detached vs. attached distinction (and related
16 permanent-occupancy requirement) *within the short-term rental ordinance* at
17 § 20.10.037.

18 The City avoids a strict reading of the ordinances. When the City argues
19 that “[t]he municipal code clearly states that detached ADU’s in areas zoned
20 Residential Single may not be used as short term rentals. BMS
21 20.10.037(B)(5)(c),” that’s not what the ordinance actually says. It says that
22 “[s]hort-term rentals are not permitted in detached accessory dwelling units
23 *in residential single general use type areas.*” That is, even though short-term
24 rentals *do* fall within the general use type (residential), or even, for that
25 matter, the conditional use type (short-term rental), a *detached* ADU comes in
26 for particularized treatment unlike any other kind of dwelling under the STR
27 ordinance. It requires a variance from the STR ordinance alone, and not a

1 departure from either the general or conditional use definitions under the
2 zoning ordinance.

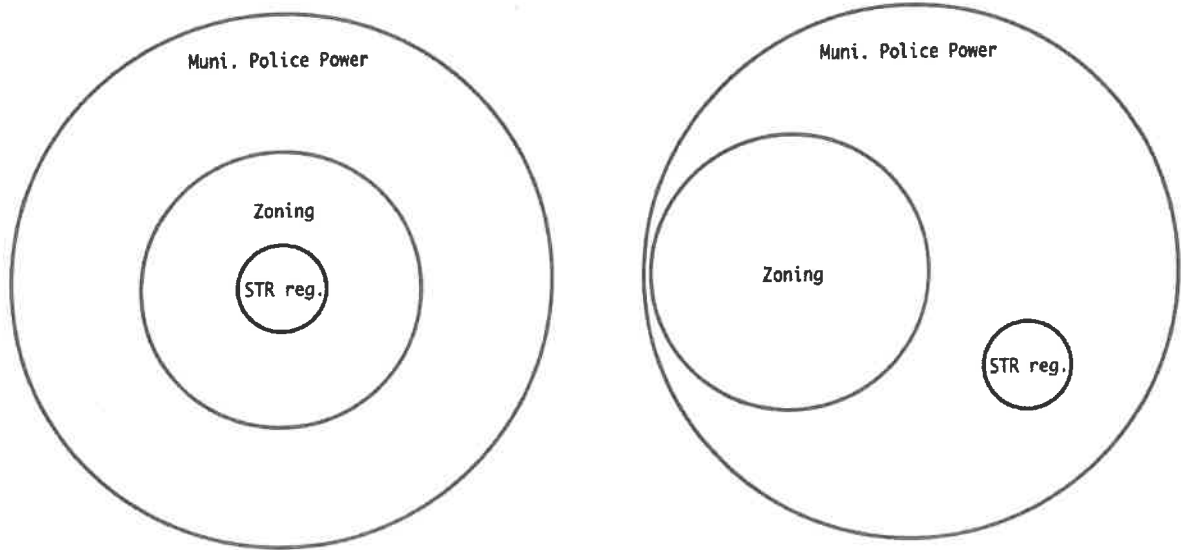
3 While the Suttons seek a variance from the attached vs. detached
4 requirement within the STR ordinance, there are many other, similarly
5 narrow and specific requirements in the STR ordinance from which a property
6 owner might seek a variance. For example, the limit on one STR per owner, or
7 the number of guests, or the number of parking spaces, or the minimum age
8 to be a tenant. *See* BMC § 20.10.037(D)(1)-(16). Like the detached/attached
9 requirement, none of these are zoning categories or departures from general
10 uses allowed in residential districts. *See, e.g., Icicle/Bunk, LLC v. Chelan*
11 *Cnty.*, 28 Wash. App. 2d 522, 526, 537 P.3d 321, 324 (2023) (upholding hearing
12 examiner’s decision on the merits that city regulation of number of STR’s did
13 not deprive owner of continuation of nonconforming use).

14 ***Regulation of tenant duration of occupancy is not zoning.***

15 Not all ordinances *within* a city’s zoning provisions constitute *zoning*.
16 *See, e.g., Feil v. E. Washington Growth Mgmt. Hearings Bd.*, 153 Wash. App.
17 394, 405, 220 P.3d 1248, 1253 (2009), *aff’d*, 172 Wash. 2d 367, 259 P.3d 227
18 (2012) (where county had 10 zoning districts, recreational overlay was not a
19 zoning action). Since short-term rentals are already a residential use, even the
20 City’s designation of them as a conditional use is not zoning, but merely an
21 exercise of the police power to regulate activities within zoning districts. *See*
22 *Zaatari v. City of Austin*, 615 S.W.3d 172, (Tex. App. – Austin 2019, *pet.*
23 *denied*) (“a ban on . . . short-term rentals does not advance a zoning interest
24 because both short-term rentals and owner-occupied homes are residential in

1 nature”). A citizen can seek a variance administratively precisely because it’s
2 just a residential use within a residential district. The City might contend it’s
3 zoning, but then such action would be *ultra vires* given the requirements of
4 the zoning enabling statute that zoning serve certain specific purposes and
5 divide the city into uniform districts for broad use classifications. A city can’t
6 allow a 30-day resident in one house and bar a 29-day resident the next house
7 over and call that zoning; both are a historically recognized residential use
8 consistent with residential zoning, so normal administrative processes apply.
9 *Compare, e.g., Latta v. Chelan Cnty.*, 28 Wash. App. 2d 1047 (2023) (after city
10 completely banned STR’s in certain zoning districts, upholding hearing
11 examiner’s decision on the merits that challengers’ STR’s were not a
12 nonconforming use); *Randall v. Chelan Cnty.*, 27 Wash. App. 2d 1020 (2023)
13 (same).

14 A Venn diagram summarizes the parties’ contentions:



1 In sum, BMC § 20.18.010 does not apply because the Suttons' intended
2 use is both the general "residential single" and the conditional "short-term
3 rental."

4 ***The City has waived its contention.***

5 Prior to submitting their application to the City, the Suttons spoke with
6 a City official who stated that the City would not accept a conditional use
7 permit application for a short-term rental because the proper procedure, in
8 the City's view, is a variance. The City official stated that because short-term
9 leasing is already categorized as a "conditional use" under BMC §
10 20.16.020(M), and allowed broadly under § 20.10.037, the City viewed a
11 request for an exception to § 20.10.037(B)(5)(c) for a detached ADU as a
12 variance request. The City has therefore waived any contention that the
13 Suttons have sought the wrong procedure.²

14 **CONCLUSION**

15 The motion to deny the Sutton's a hearing should be denied because the
16 hearing examiner is not being asked to alter zoning or allow a general use type
17 which is not allowed in the Suttons' zoning district, but merely to modify a
18 conspicuously narrow provision within the short-term rental ordinance.

19

² Undersigned counsel, who was on the call with co-applicant Kathryn Sutton, declares this under penalty of perjury. In addition, the Suttons relied on City guidance, and if the City demanded the wrong procedure, it should refund the Suttons' application fees for pursuing exactly what the City demanded.

Respectfully submitted,
/s/ J. Patrick Sutton
J. Patrick Sutton
Washington Bar No. 60024
1017 Liberty Street
Bellingham, WA 98225
Tel. (512) 417-5903
jpatrickssutton@jpatrickssuttonlaw.com

EXHIBIT A

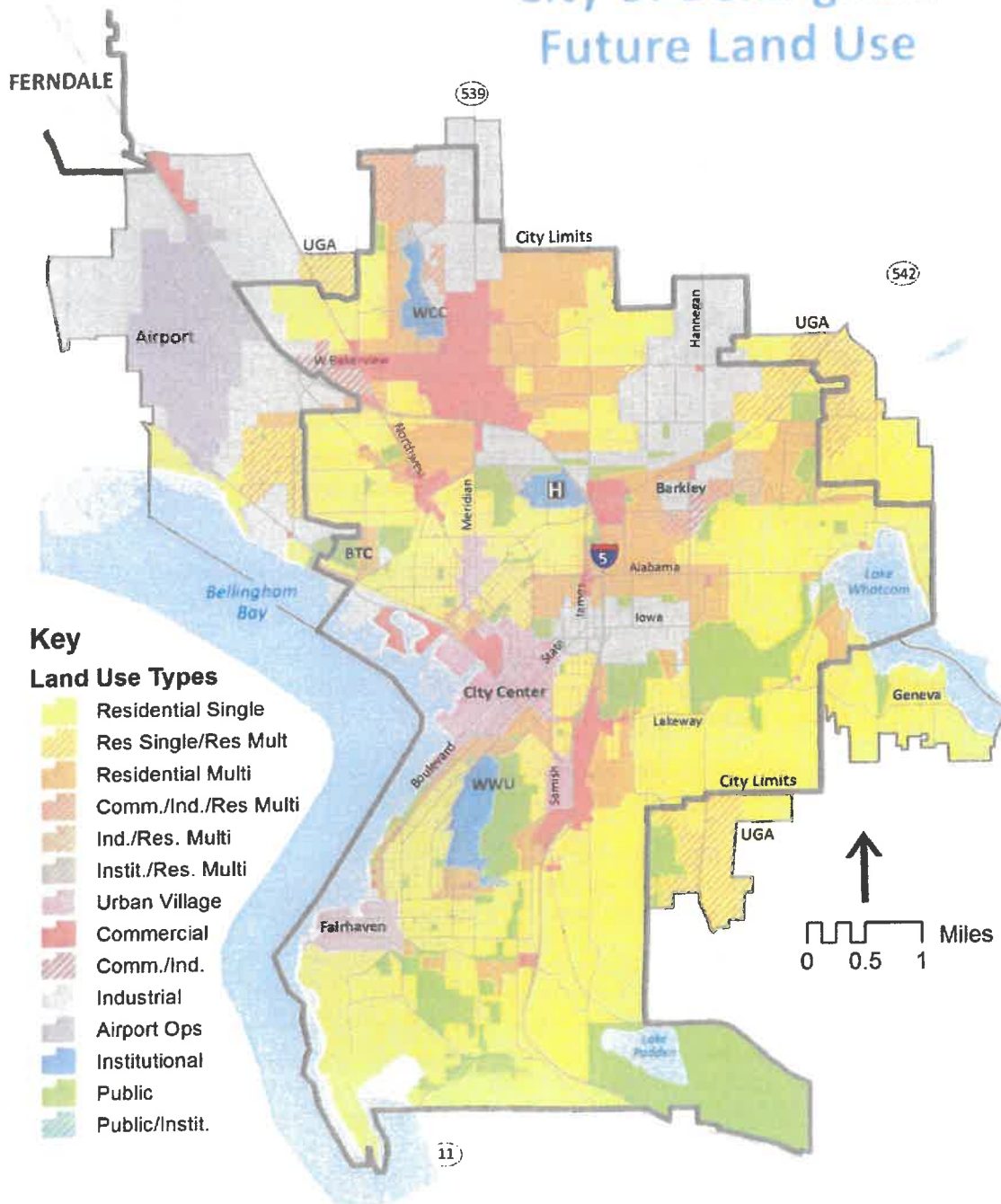
II. Land Use Designations

Land uses within Bellingham are governed by the designations contained in the City's 25 neighborhood plans; zoning designations and development regulations in the Land Use and Development Code; and other design, development and environmental regulations. The City's seven general land use categories and acreages are shown on the Future Land Use Map and Land Use Categories table:

- Single-family Residential
- Multi-family Residential
- Commercial
- Industrial
- Urban Village
- Institutional
- Public

The City's land use categories are further defined in the following Goals and Policies section.

City of Bellingham Future Land Use



III. Goals and Policies

Residential Development

Over half of the City's total land area is zoned residential, making it the dominant land use in Bellingham in terms of total acreage. Residential development is also encouraged in the City's commercial and urban village zones. Bellingham had approximately 37,825 dwelling units in 2015, the majority of which were single-family homes. During this same year, developed residential areas of the City contained an average density of 6.5 units per acre.

Zoning	Acres	Percent
Residential Single	9,719	42.3%
Residential Multi	3,263	14.2%
Commercial	1,275	5.5%
Industrial	3,908	17.0%
Urban Village	865	3.8%
Arts and Entertainment	418	1.8%
Airport Ops	1,624	4.5%
Public *	2,537	10.9%
Total Acres	22,989	100.0%

GOAL LU-1 Support sense of place in neighborhoods.

Policy LU-1 The Single-Family Residential designation permits a range of housing densities to achieve the City's housing diversity and affordability goals. In undeveloped or infill areas, new housing may include single-family detached, single-family attached, townhouses, cottage housing, accessory dwelling units, clustered housing and other small-scale housing forms. Accessory, public and semi-public uses are also allowed.

Policy LU-2 The Multi-Family Residential designation is intended for areas that are able to support higher concentrations of people, while encouraging a desirable living environment within and adjacent to these districts. This zoning also provides a compatible mixture of residential housing types, typical accessory uses, public and semi-public uses, office uses and limited neighborhood commercial uses in appropriate areas.

Policy LU-3 Residential densities are permitted as follows:

Residential, Low Density – 7,201 or more square feet per dwelling unit (5 or less units per acre). The Low-Density Residential designation should be used for land that is not suited for more intense urban development because of environmentally-sensitive areas and/or public facility or utility capacity limitations.



Single-family homes in the Columbia Neighborhood. Photo by Aarin Wright.

Residential, Medium Density – 3,600 to 7,200 square feet per dwelling unit (6 to 12 units per acre). The Medium-Density Residential designation should be used for land that is suitable for moderate density development.

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

In the Matter of VAR2024-00001) NO. HE-24-PL-_____
)
1017 LIBERTY STREET – SUTTON)
VARIANCE FROM SHORT-TERM) **DECLARATION OF SERVICE**
RENTAL ORDINANCE)
_____) Hearing Examiner Sharon A. Rice

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a U.S. citizen residing in the State of Washington at 1017 Liberty Street, Bellingham, WA 98225. I am over 18 years of age and competent to make this Declaration.

On April 17, 2024, I served a true and correct copy of this Declaration of Service and the Sutton Response to Motion to Deny Hearing upon the following:

- City of Bellingham, via email on Julie Steele, jasteele@cob.org, and Emy Scherrer, erscherrer@cob.org, City of Bellingham.
- Hearing Examiner, City of Bellingham, via email on Kristina J. Bowker, kbowker@cob.org.

Respectfully submitted,
/s/ J. Patrick Sutton
J. Patrick Sutton
Washington Bar No. 60024
1017 Liberty Street
Bellingham, WA 98225
Tel. (512) 417-5903
jpatrickstutton@jpatrickstuttonlaw.com

20.10.037 Short-term rentals.

A. *Purpose.* This section provides standards for the establishment of short-term rentals. The regulations are intended to balance the economic opportunity created by short-term rentals with the need to maintain the city's housing supply and protect the rights and safety of owners, guests and neighbors.

B. *Applicability.*

1. The regulations and standards in this section apply to short-term rentals citywide, unless otherwise noted.
2. Subsections [\(D\)\(1\)\(a\)](#) through [\(D\)\(1\)\(c\)](#), [\(D\)\(2\)](#), [\(D\)\(5\)](#), and [\(D\)\(9\)\(a\)](#) and [\(D\)\(9\)\(b\)](#) of this section do not apply to short-term rentals in commercial and urban village general use type areas.
3. Short-term rentals are permitted in residential, commercial and urban village general use type areas per this section.
4. Short-term rentals are not permitted in industrial, institutional or public general use type areas, including these designations within urban village general use type areas.
5. Short-term rentals are permitted in legally established accessory dwelling units in accordance with this section as follows:
 - a. Short-term rentals are permitted in legally established attached accessory dwelling units citywide.
 - b. Short-term rentals are permitted in legally established detached accessory dwelling units in commercial, residential multi and urban village general use type areas.
 - c. Short-term rentals are not permitted in detached accessory dwelling units in residential single general use type areas. If the citywide housing vacancy rate reaches four percent or higher, the city council shall review whether short-term rentals should be allowed in detached accessory dwelling units in residential single general use type areas.
 - d. On sites where a short-term rental is permitted in a legally established accessory dwelling unit, a short-term rental permit may be obtained for either the primary dwelling unit or accessory dwelling unit, but not both.
 - e. All other Bellingham Municipal Code sections related to accessory dwelling units apply to short-term rentals, including owner occupancy requirements.
6. Short-term rentals are not permitted on properties in the Lake Whatcom Watershed that drain to Basin One of Lake Whatcom as identified on BMC Map 16.80.040, or shoreline areas regulated per BMC Title [22](#), Shoreline Master Program.

7. Short-term rentals are not permitted in any dwelling unit or building that has received approval under the city's multifamily tax exemption program (Chapter [17.82BMC](#)). This standard does not apply after the exemption period has ended.
8. Short-term rentals are not permitted in housing units subsidized through city programs.
9. Specific terms in this section are defined in Chapter [20.08](#) BMC, Definitions.
10. Short-term rentals do not include hotels or motels. See Chapter [20.08](#) BMC, Definitions, for definitions of "hotel" and "motel."

C. *Process.* Upon the effective date of the ordinance codified in this section, all short-term rental operators will be required to obtain a short-term rental permit. Short-term rental permit applications will be processed per the table below as a Type I or Type II permit in accordance with Chapter [21.10](#) BMC, Procedures and Administration.

1. The following table applies to all dwelling units:

Short-Term Rental Type:	Review Process Type for Residential General Use Types:	Review Process Type for Commercial and Urban Village General Use Types:
- Primary Residence. No more than 2 bedrooms in a dwelling unit, including an accessory dwelling unit (when permitted), may be rented to overnight guests. The subject dwelling unit must serve as the primary residence of the applicant (the owner or long-term tenant) for no less than 270 days per year. The whole dwelling unit may be rented for no more than 95 days per year. (1)	Type I	Type I
- Primary Residence. No more than 5 bedrooms in a dwelling unit, including an accessory dwelling unit (when permitted), may be rented to overnight guests. The subject dwelling unit must serve as the primary residence of the applicant (the owner or long-term tenant) for no less than 270 days per year. The whole dwelling unit may be rented for no more than 95 days per year. (1)	Type II	Type I
- Nonprimary Residence. No more than 5 bedrooms in a dwelling unit, including an accessory dwelling unit	Not allowed (2)	Type I

The Bellingham Municipal Code is current through Ordinance 2024-04-013, passed April 8, 2024.

Short-Term Rental Type:	Review Process Type for Residential General Use Types:	Review Process Type for Commercial and Urban Village General Use Types:
(when permitted), may be rented to overnight guests. The subject dwelling unit is not the primary residence of the applicant. There is no limit on the number of days per year the dwelling unit may be rented.		

Notes for the process type table:

- 1 In commercial and urban village general use type areas, the requirements for the minimum number of days per year the dwelling unit must serve as the primary residence of the applicant and the maximum number of days per year the dwelling unit may be rented do not apply.
- 2 If the citywide housing vacancy reaches four percent or higher, the city council shall review whether short-term rentals should be allowed in nonprimary residences in residential general use type areas.

D. *Standards.*

1. *Number of Short-Term Rental Permits per Operator.* It is the intent of these regulations to limit the ownership and operation of short-term rentals located in residential general use type areas to no more than one per individual, family living together, domestic partnership, those living as a family unit and/or acting as a principal in any business entity that has ownership of a residential unit. Assigning ownership and/or application for short-term rental use to separate individuals that are living together as a family, in a domestic partnership, or living as a family unit as a means of exceeding this limitation is not permitted.
 - a. An operator may be a principal, spouse or registered domestic partner of a principal in no more than one short-term rental permit issued pursuant to this section.
 - b. A maximum of one Type I or Type II short-term rental permit is permitted per operator.
 - c. A long-term tenant who has signed at least a 270-day lease may serve as a short-term rental operator. The property owner must serve as a co-applicant on the tenant's application. A tenant's short-term rental permit counts toward the permit cap of one short-term rental permit for both the tenant and property owner.
2. *Number of Short-Term Rentals in Condominiums.* No more than one unit or 25 percent of the total units, whichever is greater, in a condominium building may include a short-term rental. If a condominium association approves, more than 25 percent of the dwelling units in the building may include short-term rentals if approved through a Type III-A conditional use permit process.

3. *Proof of Primary Residency.* An affidavit must be submitted to the planning and community development department on or before January 1st of every even-numbered year attesting to primary residency when the short-term rental is identified as such in the original application.
4. *Number of Guests.* No more than two guests, excluding children five years old and under, per bedroom are permitted per guest stay.
5. *Parking.* At least one off-street parking space must be provided for guests on site during guest stay. The planning director may determine, through a simple parking analysis provided by the applicant, that on-street parking or nearby parking may be substituted for off-street parking.
6. *Appearance and Behavior.*
 - a. The short-term rental must be operated in a way that will prevent unreasonable disturbances to nearby residents.
 - b. There must be no change in the outside appearance of the building or premises that indicates the site is hosting a commercial use, other than one flat, unlighted sign not exceeding two square feet in area and mounted flush against the building.
7. *Local Contact Person.*
 - a. The name, address and telephone number(s) of a local contact person who is responsible for the short-term rental and lives within an hour's drive of Bellingham must be submitted with the short-term rental application. This person can be the operator or a designee of the operator.
 - b. Any changes to the name, address or telephone number(s) of the local contact person must be submitted to the planning and community development department within one month of the change(s).
 - c. The local contact person shall be available 24 hours a day to ensure that the short-term rental is maintained and operated per the requirements of this section.
8. *Notifications.*
 - a. For Type I short-term rental permits:
 - i. A courtesy notice with information regarding the short-term rental (e.g., description of the rental and number of bedrooms to be rented) and the local contact person's information must be mailed or delivered to residents and property owners of property abutting and across the street from the short-term rental.
 - ii. If the Type I short-term rental is located in a multifamily building, the notification letter must be mailed or delivered to all recognized organizations whose boundaries include the short-term rental, the property manager if there is one, and all residents and owners of dwelling units abutting, across the hall from, above, and below the short-term rental.

- iii. A copy of the notification letter and a list of the names and addresses of all the residents and property owners that received the notification must be submitted with the short-term rental application.
 - b. For Type II and Type III-A short-term rental permits, notice must be provided per the noticing procedures in Chapter [21.10](#) BMC, Procedures and Administration.
 - c. The planning director shall prepare a set of “good neighbor guidelines” that must be included in the rental agreement and posted in the short-term rental unit, which includes at least the following:
 - i. A copy of the short-term rental permit;
 - ii. Contact information for the operator or designated local contact person;
 - iii. The location of the designated parking space(s), if required;
 - iv. The location of fire extinguisher(s), fire exits and escape routes;
 - v. The location of trash, compost and recycling containers; and
 - vi. Noise considerations and other rules of conduct.
 - d. The city-issued short-term rental permit number must be clearly displayed on the platform(s) advertising or offering the short-term rental.
9. *Events.*
 - a. Type I or Type II short-term rentals must not include weddings, banquets, parties, charitable fundraising, or other gatherings for direct or indirect compensation. The intent of short-term rentals is to provide transient accommodations and allow for limited accessory uses. These limited accessory uses must be consistent with typical residential uses that are allowed.
 - b. Small, informal noncommercial gatherings of family and friends of short-term rental guests are permitted, provided the gathering is not a disturbance to the surrounding neighborhood.
10. *Food.* If a short-term rental operator provides breakfast, light snacks, or both to guests, the facility and operator must meet applicable health and safety regulations including, but not limited to, regulations of the Whatcom County health department and the Washington State Department of Health.
11. *Safety.* The planning and community development department must verify, through a city inspection, that each dwelling unit to be rented to overnight guests meets the following requirements:
 - a. Each bedroom must comply with building code requirements for a sleeping room that were in place when the bedroom was legally established;
 - b. Each bedroom must have a smoke alarm that is interconnected with a smoke detector in an adjacent hallway that is in the dwelling unit; and

- c. Each bedroom must be located on the floor of a dwelling unit that is equipped with a functioning carbon monoxide alarm. If the dwelling unit does not have fuel burning equipment or an attached garage, a carbon monoxide alarm is not required.
12. *Age Requirement.* The person booking the short-term rental shall be over the age of 25 years old.
13. *Licenses and Taxes.*
 - a. Short-term rental operators shall meet all local, state and federal requirements regarding licenses and taxes.
 - b. Proof of a valid business license is required with the short-term rental permit application.
14. *Insurance.* Short-term rental operators shall maintain liability insurance appropriate to cover the short-term rental use in the aggregate of not less than \$1,000,000 or conduct each short-term rental transaction through a platform that provides equal or greater insurance coverage.
15. *Renewal.* Short-term rental permits must be renewed on or before January 1st of every even-numbered year.
16. *Nontransferability.* Short-term rental permits are not transferable to another operator or location.
17. *Permit Revocation.*
 - a. If an operator fails to comply with the regulations of this section and conditions of approval, the planning director shall work with the applicant to achieve voluntary compliance. If voluntary compliance cannot be achieved, the planning director may revoke a short-term rental permit for failure to comply with the regulations of this section. Any such decision may be appealed to the hearing examiner in accordance with BMC [21.10.250](#).
 - b. A legally established, previously approved bed and breakfast use is abandoned if the use ceases for at least one year. An operator seeking to reestablish the bed and breakfast use shall obtain a short-term rental permit to operate a bed and breakfast facility.
 - c. A new short-term rental permit will not be issued to the operator of a revoked bed and breakfast facility or short-term rental until two years from the time of revocation have passed.
18. *Nonconforming Status.* No use that constitutes or purports to be a short-term rental, which was engaged in that activity prior to the adoption of this section, will be deemed to have been a legally established use under the provisions of the Bellingham Municipal Code and that use will not be entitled to claim legal nonconforming status.
19. *Alterations and Expansions.* If construction, including expansion of building area or alterations that increase the intensity of the facility, accompanies the short-term rental use, the project will be reviewed for conformance with all applicable building and construction codes.

20. *Relationship to Other Sections of the Code.* The provisions of this section apply in addition to the provisions of any other code provision or ordinance. Where there is a conflict, the more restrictive provision applies.

21. *Effective Date.* The provisions of this section and other sections of the Bellingham Municipal Code related to short-term rentals will not take effect until six months after the date of adoption.

22. *Evaluation of Ordinance.* This section will be reviewed two years from the effective date of the ordinance codified in this section to assess the impact of short-term rentals on the city's neighborhoods and housing market.

E. *Violation – Penalty.*

1. Any person operating a short-term rental without a required permit as described in subsection (C) of this section shall be in violation of this subsection and subject to the penalties in Chapter [20.52](#) BMC.

2. Any person operating a short-term rental in violation of any standard outlined in subsections (B) and (D) of this section shall be in violation of this subsection and subject to the penalties in Chapter [20.52](#) BMC and permit revocation under subsection (D)(17) of this section. [Ord. 2021-12-053 § 4; Ord. 2018-11-024 § 5 (Exh. A)].

The Bellingham Municipal Code is current through Ordinance 2024-04-013, passed April 8, 2024.

Disclaimer: Users should contact the Deputy City Clerk for ordinances passed subsequent to the ordinance cited above.

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City Telephone: (360) 778-8000

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The Bellingham Municipal Code is current through Ordinance 2024-04-013, passed April 8, 2024.

20.18.020 Variance criteria.

Variances can be granted by the hearing examiner if the applicant proves to the hearing examiner that the following criteria are satisfied:

- A. Because of special circumstances, not the result of the owner's action, applicable to the subject property (including size, shape, topography, location, or surroundings), the strict application of the provisions of this title is found to deprive the property of rights and privileges enjoyed by other property in the area and under the identical land use classification; and
- B. The granting of the variance will not be unduly detrimental to the public welfare nor injurious to the property or improvements in the vicinity and subarea in which the subject property is located.
- C. The subject property cannot be reasonably used under the regulations as written. [Ord. 2002-10-069 § 48; Ord. 9024, 1982].

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HEARING EXAMINER
CITY OF BELLINGHAM

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

IN RE:

James Patrick Sutton and Kathryn A. Sutton,
Applicants,

Property Address: 1017 Liberty Street,
Bellingham, WA

Applicant No: VAR2024-001, Variance
for Short Term Rental of ADU

Tax Parcel No. 3803313363920000

NO. HE-24-PL-011

CITY OF BELLINGHAM'S REPLY
TO APPLICANTS' RESPONSE TO
MOTION TO DENY VARIANCE

Sharon A. Rice, Hearing Examiner

COMES NOW, the Planning and Community Development Department, by and through its attorney, Deputy City Attorney, James Erb, and replies to the Applicants' *Response to Motion to Deny Variance Without a Hearing* as follows:

The Hearing Examiner cannot issue a variance to permit a use that is not allowed as either a principal or conditional use in the applicable general use type. BMC 20.18.010(B). Short-term rentals in detached ADUs in residential single general use type areas are not allowed as a permitted or conditional use. BMC 20.10.037(B)(5)(c). Indeed, the municipal code expressly prohibits using a detached ADU in a residential single general use area as a short-term rental. *Id.*

City of Bellingham's Reply to Applicants' Response
to Motion to Deny Variance - 1

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 778-8270

CIGITAL

1 Because the applicants seek a variance to permit a use that is expressly
2 prohibited, their application for a variance must be denied.

3 The City does not contend that “short-term renting is not a residential use.”
4 Applicants’ Response, 3. Instead, the City is arguing that the applicants cannot
5 use their detached ADU located in a residential single general use type as a
6 short-term rental because of the plain language of BMC 20.10.037(B)(5)(c) which
7 prohibits that specific use.
8

9 Nor is the City contending that “the Suttons are asking for a zoning change
10 for their ADU.” Applicants’ Response, 4. The City argues that the Suttons are
11 seeking a variance that the Hearing Examiner cannot grant under BMC
12 20.18.010(B) because the applicable regulations expressly prohibit their
13 proposed use.
14

15 The applicants wrongly assert that “the city code allows short-term rentals
16 as both a “general” and a “conditional” use in all residential districts citywide.”
17 Applicants’ Response, 5. This broad assertion ignores the specific prohibition in
18 BMC 20.10.037(B)(5)(c) on using a detached ADU in a residential single general
19 use type as a short-term rental.
20

21 BMC 20.30.030 identifies the permitted and conditional uses in areas
22 designated residential single. Uses that are not identified as permitted or
23 conditional are, by necessary implication, prohibited. This section provides, in
24 pertinent part:
25

26 No building or land shall be used within an area designated residential
27 single, except as follows: ...
28

1 7. Detached accessory dwelling unit (consistent with procedures and
2 requirements outlined in BMC 20.10.036) ...

3 11. Short-term rentals, per BMC 20.10.037. BMC 20.30.030(A)(7); BMC
4 20.30.030(A)(11).

5 Detached ADUs are permitted in residential single general use types subject to
6 the more specific regulations in BMC 20.10.036. And short-term rentals are
7 permitted in residential single general use types subject to the more specific
8 provisions of BMC 20.10.037, which details standards for the establishment of
9 short-term rentals. One of those standards, i.e., BMC 20.10.037(B)(5)(c), clearly
10 prohibits using a detached ADU in a residential single general use type as a
11 short-term rental. Nowhere in the municipal code does it imply, much less state,
12 that what the applicants propose to do is a conditional use.
13

14 The applicants do not seriously argue that there exists a conflict in the
15 municipal code regarding the short-term rental regulations. Even if a conflict did
16 exist with respect to the prohibition against using their detached ADU as a short-
17 term rental, BMC 20.10.37(D)(20) states: "The provisions of this section apply in
18 addition to the provisions of any other code provision or ordinance. Where there
19 is a conflict, the more restrictive provision applies." The more restrictive provision,
20 i.e., BMC 20.10.037(B)(5)(c), expressly prohibits them from using their detached
21 ADU as a short-term rental.
22


23
24 The City did not waive its argument that the applicants "*have sought the*
25 *wrong procedure.*" Applicants' Response, 10. Staff correctly informed the Suttons
26 that they could not use their detached ADU as a short-term rental because it is in
27 an area zoned residential single. Staff also correctly informed them that the
28

1 Planning and Community Development Department could not process or grant a
2 conditional use permit to use their detached ADU as a short-term rental because
3 BMC 20.10.037(B)(5)(c) prohibits them from using their detached ADU as a
4 short-term rental. As explained above, using a detached ADU in a residential
5 single general use type is not a conditional use; it is a prohibited use. The Suttons
6 then chose to pursue a variance notwithstanding the express limitation on the
7 Hearing Examiner's ability to grant variances in BMC 20.18.010(B). The
8 argument that the City has somehow waived its contention that the Suttons
9 cannot receive the requested variance is meritless.
10

11
12 The Bellingham Municipal Code expressly prohibits the Suttons from using
13 their detached ADU as a short-term rental. Their proposed use is not allowed as
14 either a principal or conditional use in the residential single area where they live.
15 Accordingly, the Hearing Examiner cannot grant the requested variance under
16 BMC 20.18.010(B). The Planning and Community Development Department,
17 therefore, moves for an Order Denying the Variance without a hearing.
18

19 Respectfully submitted this 19th day of April 2024.

20 **CITY OF BELLINGHAM**

21
22 
23 **James Erb, WSBA #40128**
24 **Deputy City Attorney**

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APR 19 2024

HEARING EXAMINER
CITY OF BELLINGHAM

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

IN RE:

NO. HE-24-PL-011

James Patrick Sutton and Kathryn A. Sutton,
Applicants,

DECLARATION OF SERVICE

Sharon A. Rice, Hearing Examiner

Property Address: 1017 Liberty Street,
Bellingham, WA

Applicant No: VAR2024-001, Variance
for Short Term Rental of ADU

Tax Parcel No. 3803313363920000

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On April 19, 2024, I served a true and correct copy of the following documents to be delivered as set forth below:

DECLARATION OF SERVICE – PAGE 1

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 778-8270

ORIGINAL

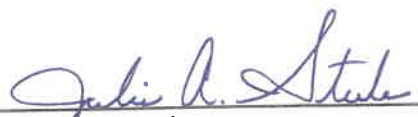
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1. **City of Bellingham's Reply to Applicants' Response to Motion to Deny Variance**
2. **Declaration of Service**

J. Patrick Sutton & Kathryn Sutton 1017 Liberty Street Bellingham, WA 98225	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Email: jpatricksutton@jpatricksuttonlaw.com <input type="checkbox"/> Hand Delivery
Hearing Examiner City of Bellingham 210 Lottie Street Bellingham, WA 98225	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Email: mail kbowker@cob.org <input checked="" type="checkbox"/> Hand Delivery

DATED this 19th day of April, 2024.

CITY OF BELLINGHAM



Julie A. Steele
Paralegal

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

IN RE: J. PATRICK and KATHRYN SUTTON, Applicants 1017 Liberty Street Bellingham, WA Parcel # 3803313363920000 VAR2024-0001 / Variance request for Short-Term Rental of a D-ADU	HE-24-PL-010 RULING ON CITY’S MOTION TO DENY VARIANCE WITHOUT A HEARING SHARON RICE HEARING EXAMINER
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Motion

The above-captioned application for variance is scheduled to be heard in an open record public hearing before the City of Bellingham Hearing Examiner on May 8, 2024. At Bellingham Municipal Code (BMC) 20.10.037.B(5)(c), the City code states: “Short-term rentals are not permitted in detached accessory dwelling units in residential single general use type areas.” The Applicants seek a variance from the to allow use of a detached accessory dwelling unit on real property at 1017 Liberty Street (subject property) for short term rentals.

On April 16, 2024, the City Attorney’s office submitted to the Hearing Clerk a motion to deny the variance application without a hearing.

The following submittals were considered in deciding the motion.

- City’s Motion to Deny Variance Without Hearing, dated April 16, 2024, with attached Land Parcel Report for 380331336392
- Applicants’ response to City’s motion, submitted April 17, 2024, with attached excerpts from the Bellingham Comprehensive Plan
- Land Use Chapter
- City’s reply to Applicants’ response to motion, dated April 19, 2024

Jurisdiction

1 *BMC 2.56.050.E*

2 In the performance of duties prescribed by this chapter or other ordinances, the hearing
3 examiner may:

4 (5) Dispose of procedural requests or similar matters; ...

5 *BMC 20.18.010 General provisions.*

6 A. A variance is a modification of the terms of this title. The hearing examiner may
7 grant a variance only if the applicant proves to the hearing examiner's satisfaction
8 that because of the unusual shape, exceptional topographic conditions, or other
9 extraordinary situation or condition in connection with a specific piece of property
10 the literal enforcement of this title would involve practical difficulties and cause
11 undue hardship unnecessary to carry out the spirit and intent of this title.

12 B. An application for a variance may be submitted for modification of any term or
13 requirement of this title except for the following:

- 1. To allow a use not generally permitted (either as a principal or conditional use)
in the general use type in which the subject property is located; or

14 *Hearing Examiner Rules of Procedure*

15 *2.02 Hearing Examiner's Jurisdiction*

16 The Hearing Examiner can only hear and decide applications and appeals, and make
17 recommendations in those matters and on those issues where ordinance or other
18 appropriate authority grants to the Hearing Examiner the authority to do so.

Additional Applicable Rules and Regulations

19 *Hearing Examiner Rules of Procedure*

20 *2.05 Expeditious Proceedings*

21 To the extent practicable and consistent with requirements of law, hearings shall be
22 conducted expeditiously. At every stage in the proceedings, all parties shall make
23 every reasonable effort to avoid delay.

24 *2.17 Motions*

25 (a) All motions, other than those made during a hearing, shall be in writing, and shall
26 state the order or relief requested and the grounds for the motion. Every motion and
27 answering statement and accompanying papers, shall be served on each party
representative on the day it is filed with the Hearing Examiner.

28 (b) Within seven (7) days after service of any written motion, or such longer or shorter
29 period of time as may be designated by the Hearing Examiner, the other party(ies)

30 *Ruling on City Motion to Deny Variance without a Hearing*

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H:/DATA/HEARING EXAMINER/DECISIONS/Sutton 1017 Liberty Street VAR D-ADU

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BELLINGHAM, WA 98225
(360) 778-8399

1 shall file a written answer. When the Hearing Examiner has received the answering
2 statement(s), or the seven (7) days or other period of time designated by the Hearing
3 Examiner has elapsed, the Hearing Examiner shall rule on the motion.

- 4 (c) Prior to ruling the Hearing Examiner may, in the Examiner's discretion, call for oral
5 argument at the Examiner's own initiative (*sic*) or at the request of a party.
6 (d) For motions made at hearing or for motions made for the extension of time or the
7 expedition of hearings, the Hearing Examiner may waive the requirements of this
8 section and may also rule upon such motions orally.

9 *4.02 Dismissal*

- 10 (a) An appeal may be dismissed without a hearing if the Hearing Examiner determines
11 that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant
12 relief, or it is without merit on its face, frivolous, or brought merely to secure delay.
13 (b) Any party may request dismissal of all or part of an appeal at any time with notice
14 to all parties. The Hearing Examiner may make a ruling on a motion to dismiss
15 based upon written arguments or may call for oral arguments.
16 (c) When the decision or action being appealed is withdrawn by the issuing
17 Department, the appeal becomes moot and shall be dismissed.

18 *BMC 20.10.037 Short-term rentals.*

19 ...
20 B.
21 ...

- 22 5. Short-term rentals are permitted in legally established accessory dwelling units
23 in accordance with this section as follows:

- 24 ...
25 c. Short-term rentals are not permitted in detached accessory dwelling units in
26 residential single general use type areas. If the citywide housing vacancy
27 rate reaches four percent or higher, the city council shall review whether
28 short-term rentals should be allowed in detached accessory dwelling units in
29 residential single general use type areas.

30 *BMC 20.18.020 Variance criteria.*

Variations can be granted by the hearing examiner if the applicant proves to the hearing
examiner that the following criteria are satisfied:

- A. Because of special circumstances, not the result of the owner's action, applicable to
the subject property (including size, shape, topography, location, or surroundings),
the strict application of the provisions of this title is found to deprive the property of

1 rights and privileges enjoyed by other property in the area and under the identical
2 land use classification; and

3 B. The granting of the variance will not be unduly detrimental to the public welfare nor
4 injurious to the property or improvements in the vicinity and subarea in which the
5 subject property is located.

6 C. The subject property cannot be reasonably used under the regulations as written.

7 Discussion

8 It is undisputed that the Applicants' parcel is located in the Residential Single general
9 use type/zone and is improved with a detached accessory dwelling unit that was built
10 with City permits and inspections.

11 Short term rentals are expressly prohibited from being approved in detached accessory
12 dwelling units in the Residential Single zones. *BMC 20.10.037.B(5)(c)*.

13 While the Hearing Examiner has authority to consider applications for variance,
14 pursuant to BMC 20.18.010.B(1), the City should not accept an application for variance
15 that seeks to permit a use not permitted in the general use type, and the Examiner lacks
16 authority to consider such a variance application.

17 Further, if a hearing were to be conducted, the Applicants will not be able to make
18 successful demonstration of compliance with variance criteria for approval adopted at
19 BMC 20.18.020.A and C. The Applicants have not asserted and can make no showing
20 of circumstances inherent in the land that deprive Applicants of rights and privileges
21 enjoyed by other property in the area and under the identical land use classification.
22 The subject property is currently well used with both a residence and an accessory
23 dwelling unit.

24 Washington Courts have held, "[r]easons for a variance must be reasons pertaining to
25 the property itself which prevent full use of the property to the extent other properties in
26 the vicinity and under the same zoning can be used. ... Evidence of hardship or
27 difficulty that will support a variance must relate to the land itself and not to the owner-
28 applicant." *St. Clair v. Skagit County*, 43 Wn. App. 122, 126-127 (1986). The
29 Applicants' desire to put their property to a use that is prohibited by City regulations is
30 not a factor inherent in the land that can be addressed through variance approval.

31 Thus, while the Hearing Examiner Rules of Procedure only expressly grant the
32 Examiner authority to dismiss appeals without hearing if the "Examiner determines that
33 it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief,"

34 *Ruling on City Motion to Deny Variance without a Hearing*

35 *Page 4 of 5*

36 H:/DATA/HEARING EXAMINER/DECISIONS/Sutton 1017 Liberty Street VAR D-ADU

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and the City's motion to dismiss a permit application without hearing is unusual and not expressly provided for in Code or Rule, consideration of such a motion is supported by Hearing Examiner Rules 2.05, 2.17, and 4.02 and by BMC 2.56.050.E(5).

Order

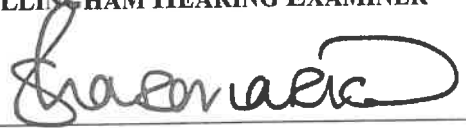
Because the proposed use is expressly prohibited in the zone, and because variances to use prohibitions are prohibited by code, the application for variance is denied without hearing.

Pursuant to BMC 20.18.010.B(1), the City should not have accepted the permit application for variance from a use prohibition. The instant application shall be rejected and the application fee refunded.

The hearing set for May 8, 2024 is stricken.

Ordered April 24, 2024.

BELLINGHAM HEARING EXAMINER



Sharon Rice