

CITY OF SPOKANE HEARING EXAMINER

Re: Variance Application by Gonzaga University to construct a new 3-story, 90 bed resident hall for students in the in a Context Area 4 (CA4) Zone.))))	FINDINGS, CONCLUSIONS, AND DECISION FILE NO. Z22-449FEW3
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SUMMARY OF PROPOSAL AND DECISION

Proposal: The Applicant, Gonzaga University, is seeking a variance to construct a new 3-story, 90-bed residence hall for students of Gonzaga University. The Applicant is seeking a height variance to allow a wall height of 35 feet and a maximum total height of 50 feet. The current zoning designation, CA4 (Context Area 4), has a maximum wall height of 25 feet and a maximum total height of 35 feet. This application is being processed as Type III application.

Decision: The variance application is denied.

FINDINGS OF FACT
BACKGROUND INFORMATION

Applicant/ Owner: Gonzaga University
c/o Ken Sammons
502 E Boone Ave
Spokane WA 99258

Property Location: The subject property is located at 802, 808, and 814 E. Sharp Avenue (Parcel Nos. 35171.2502, 35171.2512, and 35171.2504).

Zoning: The parcels are zoned Context Area 4 (CA4).

Comprehensive Plan Map Designation: The parcels are designated as Institutional in the City of Spokane Comprehensive Plan (CP).

Site Description: The site includes three tax parcels and is fully developed. The sites are in the process of being aggregated through a boundary line adjustment. There are three existing residential buildings on the site. The Applicant proposes to demolish the existing buildings to accommodate the new student residence hall. The site is generally flat, with the steepest slope being about 5%.

Surrounding Conditions and Uses: The surrounding zoning includes Context Area 4 (CA4) to the north, Context Area 2 (CA2) to the east, Context Area 3 (CA3) to the southeast, and Residential Two-Family to the south and west. The surrounding land uses include Center and Corridor Transition Area to the north, Center and Corridor Area to the east, and Institutional to the south and west.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code (SMC) 17C.123, Form Based Code and SMC 17G.060.170(E), Decision Criteria for Variances/Type III Applications.

Notice of Community Meeting: Mailed: November 14, 2022
Posted: November 14, 2022

Notice of Application/Public Hearing: Mailed: February 1, 2023
Posted: February 1, 2023

Community Meeting: November 29, 2022

Public Hearing Date: February 22, 2023

Site Visit: February 21, 2023

State Environmental Policy Act (SEPA): A Determination of Nonsignificance (DNS) was issued by the City of Spokane on February 1, 2023. Any appeal of the DNS was due on February 15, 2023. No appeal was filed.

Testimony:

Donna deBit, Assistant Planner II
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Ken Sammons
Gonzaga University
502 E Boone Ave
Spokane WA 99258
sammons@gonzaga.edu

Exhibits:

Staff Report, dated 1/15/23, including the following exhibits:

1. Application Materials, including:
 - General Application
 - Variance Application
 - Notification Map Application
 - Conditional Use Permit Application
2. Notice of Application & Public Hearing Materials, including:
 - Notice of Application & Public Hearing Instructions
 - Notice of Application and Public Hearing
 - Noticing Affidavits
3. Notification Map Application, Map, and List of Parcels
4. Site Plan and Elevations
5. Request for Agency Comments, including comments from:
 - Washington State Department of Ecology
 - City of Spokane Engineering
 - City of Spokane Fire Department
 - Spokane Tribe of Indians
6. SEPA and DNS
7. Community Meeting materials, including:
 - Community Meeting Instructions

Notice of Community Meeting for November 29, 2022
Noticing Affidavits
Meeting Attendance List
Letter to Neighbors

8. Staff Presentation

FINDINGS AND CONCLUSIONS

To be approved, the proposed variance must comply with the criteria¹ set forth in SMC Section 17G.060.170(E). The Hearing Examiner has reviewed the proposed variance and the evidence of record with regard to the application and makes the following findings and conclusions:

1. *The variance or modification of the standard or requirement is not prohibited by the land use codes. See SMC 17G.060.170(E)(1)(a).*

The question here is whether the land use codes specifically forbid the Hearing Examiner from granting the requested deviation from the height limitations applicable in the CA4 zone. The Hearing Examiner did not find any such prohibition in the land use codes. See e.g. SMC 17C.123.010 *et seq.* Staff also verified that there is no prohibition against utilizing a variance to increase the height of a structure beyond the 35-foot wall height or 50-foot total height restriction. See Staff Report, p. 5; *Testimony of D. deBit.* As a result, the Hearing Examiner concludes that this criterion for approval is met.

2. *No other procedure is provided in this chapter to vary or modify the standard or requirement, or compliance with such other procedure would be unduly burdensome. See SMC 17G.060.170(E)(1)(b).*

The provisions governing the CA4 zone do not describe any procedures to vary or modify the height limitations of the zone. See SMC 17C.123.010 *et seq.*; *Testimony of D. deBit.* In this case, a variance is the only procedure available to obtain relief from strict application of the code. See Staff Report, p. 5; *Testimony of D. deBit.* Therefore, this criterion is satisfied.

3. *The variance does not allow or establish a use that is not permitted in the underlying district, or modify or vary a standard or requirement of an overlay zone, unless a specific provision allows for such variance. See SMC 17G.060.170(E)(1)(e).*

The site is zoned CA4. The proposed residence hall qualifies as “Group Living,” a type of residential use. See Staff Report, p. 6. According to Figure 17C.123.040-F, Group Living is outright permitted in the CA4 zone. See *id.*; *Testimony of D. deBit.* In addition, the proposed variance from the height limitations of the zone do not vary or modify a standard of an overlay zone. See *id.* Therefore, this criterion is satisfied.

4. *The following objectives are reasonably satisfied: (i) surrounding properties will not suffer significant adverse effects; (ii) the appearance or use of the property will not be inconsistent with the development patterns of the surrounding property; and (iii) the ability*

¹ The Staff report also addresses the criteria listed in SMC 17C.060.170(C), which generally apply to Type III applications. However, a Type III application for a variance is not subject to the criteria listed in subsection C. See SMC 17G.060.170(E). Therefore, this decision addresses only the criteria set forth in subsection E.1, which govern variance applications. See SMC 17G.060.170(E)(1).

to develop the property in compliance with other standards will not be adversely affected. See SMC 17G.060.170(E)(1)(d).

The Applicant proposes to replace three residential buildings with a single, modern student residence hall.

The proposed structure is going to be similar in design and height to other student housing structures that are in the immediate vicinity. See Staff Report, p. 5. Relatively tall structures are allowed on the properties immediately surrounding the site, excepting the land in the CA4 zone. See Exhibit 8, p. 10. In this regard, the proposal is roughly equivalent to what is currently allowed on the surrounding property. *Testimony of D. deBit.* For example, the proposed structure would be very similar to the Twohy Hall, which is across the alley to the south of the site. See Exhibit 8, p. 9; *Testimony of D. deBit.*

There is no evidence in this record that the proposed structure would have significant, adverse effects on the surrounding properties. This is not surprising, because the proposal involves replacing some residential buildings with a newer residential structure. It would be a part of a university campus and neighborhood that is already characterized by institutional buildings, residence halls, apartments, and single-family residences. The proposal does not change the nature of the use, or increase the intensity of the use in a material way.

The SEPA process also suggests that the proposal will not have significant impacts on the neighbors. The City issued a DNS for this proposal, suggesting that the potential impacts on surrounding properties are minimal. There were no public comments raising concerns about the project, and the DNS was not appealed.

There is no reason to suspect that granting the variance will impede the ability to develop the property in compliance with other standards. From the Hearing Examiner's review, there is nothing about this proposal that adversely affects the Applicant's ability to comply with other development standards that apply to the site. In any case, the project would be required to satisfy all development standards applicable to the Context Area 4 Zone. See Staff Report, p. 5; see *also* Condition 1.

The Hearing Examiner concludes that this criterion for approval of the variance is satisfied.

5. *Strict application of the standard or requirement does not create an unnecessary hardship due to the physical characteristics of the land. See SMC 17G.060.170(E)(1)(c).*

The CA4 zone has a maximum wall height of 25 feet and a maximum roof height of 35 feet. Gonzaga University is seeking a height variance to allow a wall height of 35 feet and a roof height of 50 feet. If the variance is approved, Gonzaga intends to construct a new residence hall that is nearly 15 feet taller than would be allowed on other property in the CA4 zone. The question here is whether the physical conditions of the project site render compliance with the height limitations of the zone so burdensome that a variance is proper. Unfortunately, the Hearing Examiner feels constrained to answer this question in the negative.

A variance is a narrow exception to the requirement of strict compliance with the zoning code. A variance will not be granted merely because compliance with the zoning code is inconvenient, burdensome, or costly. Rather, an applicant for a variance must demonstrate that "strict application" of the zoning code results in "unnecessary hardship." See SMC 17G.060.170(E)(1)(c). That "unnecessary hardship" must arise from "physical characteristics of

the land” that prevent the property from being developed in the same manner as other, similarly situated property. See *id.* In other words, a property owner may be allowed to vary from certain development standards, but only because it would be unfair to strictly enforce those requirements given the constraining, physical features of the land. See *Ling v. Whatcom County Board of Adjustment*, 21 Wn.App. 497, 498, 585 P.2d 815 (1978) (sustaining the denial of a variance because there were no unique circumstances as to the shape, topography, location, or surroundings that did not apply generally to other property in the zone).

There is no evidence that some physical characteristic of the property prevents Gonzaga from using its property consistent with the height standards of the zone. The university can construct a residence hall that is 35 feet or less in height. *Testimony of D. deBit.* The land does not have any physical conditions that make it too difficult to construct a compliant building. See *id.* Rather, a smaller structure simply does not serve the university’s long-term objectives or plans. *Testimony of K. Sammons.* The Hearing Examiner does not question or criticize Gonzaga’s assessment of its own needs. However, a variance must be based on the objective characteristics of the property. A variance cannot be based on the subjective needs or desires of the applicant. See e.g. *St. Clair v. Skagit County*, 43 Wn.App. 122, 126-27, 715 P.2d 165 (1986) (holding that evidence of hardship or difficulty that will support a variance must relate to the land itself and not to the owner-applicant).

In its submissions and at the hearing, the Applicant suggested several rationales in support of the issuance of a variance. None of these rationales, however, established that physical characteristics of the property make it necessary to exceed the maximum height limit of the zone.

The Applicant suggested in its Variance Application that a variance was needed to facilitate compliance with the updated energy codes. Specifically, Question 2 of the Variance Application asks: “What physical characteristics of the property interfere with your ability to meet the required standards?” See Exhibit 1, p. 3. As relevant here, the Applicant’s answer to this question is: “New energy codes for ventilation require higher floor-to-floor distances.” See *id.* The university’s representative testified that the current energy code does not allow electric baseboard heating. *Testimony of K. Sammons.* As a result, the new residence hall must use forced air ventilation, requiring the installation of ductwork, which increases the structure’s height “a little bit.” See *id.* Gonzaga also desired to install solar panels, to better satisfy energy efficiency goals or standards. See *id.*; see also Staff Report, p. 5. The roof structure has a unique design to accommodate the solar array. *Testimony of K. Sammons.*

The Hearing Examiner concludes that neither compliance with energy codes nor energy efficiency features support the approval of a height variance. A height variance must be justified by *physical conditions* that make compliance with the zone code too burdensome. The energy code may require Gonzaga to design a slightly taller structure to accommodate duct work. However, this is a technical, legal requirement of the building codes. The need to build a taller building does not arise from a physical condition of the land. The Hearing Examiner concludes that the energy code is not relevant to the variance criteria.

Even if the energy code was relevant, there is no evidence that compliance with the energy code actually necessitates a structure over 35 feet in height. Mr. Sammons only testified that the energy code required a small increase in the overall height. *Testimony of K. Sammons.* The precise amount of the height increase was not stated, but it was only enough space to accommodate duct work. In addition, the Applicant can design and construct a residence hall that satisfies the energy code without exceeding the height limits. For example, the residence

hall could be constructed as a single-story or a two-story structure. Admittedly, the university does not want to build a residence hall that it considers too small to meet its needs. However, that is beside the point, legally. There are no physical features impeding the development of a residential use that complies with the height standard. That being the case, there is no basis to grant a variance.

The university's plan to install solar panels does not change the analysis, for similar reasons. The solar panels are merely a desired amenity. *Testimony of K. Sammons*. The solar panels are not necessary for the project. *See id.* Gonzaga is not legally required to install solar panels, for example. *Testimony of D. deBit*. In addition, even if solar was mandated, there is no evidence that the solar panels will only work if the structure exceeds 35 feet in height. The unusual design of the roof is intended to accommodate solar panels. However, the variance was sought to allow a taller structure, not to permit the unusual roof design. The Hearing Examiner concludes that the desire to install a solar array cannot justify the issuance of a height variance.

The Applicant also emphasized that there were several complications in developing this site, and that these factors may also justify the variance. The complicating factors included the lot coverage limits, permeability of the soil, and fire access. *Testimony of K. Sammons*. The Applicant provided additional details regarding potential impediments to fire access, such as the presence of power lines, the proximity of the roundabout, and limited lot depth. *See id.* The Hearing Examiner acknowledges that these factors are genuine and complicate the development process. However, these matters do not support the issuance of a height variance.

The factors complicating the development of the site do not prompt the need to build a structure that exceeds the height restriction of the zone. The lot coverage and setback standards, for example, certainly restrict the amount of space available for a building. However, every development must satisfy the standards related to drainage, lot coverage, setbacks, height, and the like. These requirements are not physical characteristics of the property. They are developments standards adopted by the local legislature, and they apply equally to all properties in the particular zone. The fact that an owner cannot construct a building as large as desired is not a basis to deviate from the development standards. Moreover, the Hearing Examiner cannot allow a deviation from one development standard (such as height) in order to compensate for the development constraints imposed by another development standard (such as lot coverage).

None of the complicating factors actually prevent Gonzaga from constructing a building that conforms to the zone code. The one factor that seemed most troublesome concerns fire access. *Testimony of K. Sammons*. However, the Fire Department approved a modified standard given the limitations of the site. *See id.* The Fire Department's compromise did not require Gonzaga to construct a taller structure, to the Hearing Examiner's knowledge. On the contrary, the fact that the proposed structure has wall heights over 30 feet triggered "requirements for fire aerial access." *See Exhibit 5, p. 6.* Thus, if anything, proposing a taller structure led to more access requirements, not less. In any case, the need for a height variance did not arise due to any site limitations related to access.

The Hearing Examiner concludes that there are no physical characteristics that make compliance with the height standards unduly burdensome. As a result, this criterion for a variance is not satisfied.

6. *Floodplain variance is subject to the additional criterion of SMC 17E.030.090 and SMC 17E.030.100. See SMC 17G.060.170(E)(6).*

This criterion does not apply to this proposal and, therefore, the Hearing Examiner finds it satisfied.

SUMMARY OF DECISION

The Hearing Examiner concludes that the Applicant did not satisfy the fundamental basis for the approval of a variance. There is no evidence that the Applicant cannot comply with the height limit because of some *physical characteristic* of the site. There is nothing about the size, shape, topography, or location of the property that makes it “unduly burdensome” for the Applicant to construct a conforming building. The Applicant has not identified any physical conditions (whether related to land, structures, or location) that preclude compliance with the zoning code or deprive the Applicant of rights and privileges available to others.

Having said that, there aren't any compelling or practical reasons, based on this record, why the project should not be allowed. The project will be aesthetically pleasing. The proposed building would be essentially the same as other residence halls, including one on adjacent property to the south. Nothing about the project will be bothersome or offensive to the neighbors. There have been no negative comments about the proposal. The project poses no apparent harm to anyone. Even granting these contentions, however, the Hearing Examiner cannot approve the variance. It is not enough to establish that a project is “harmless.” Similarly, an approval or denial of a project does not turn on whether the Hearing Examiner believes a project is generally “good” or “bad.” The decision-making process, rather, relies upon a set of criteria that are legislatively established. In short, the proponent of the project must affirmatively show that all the criteria for approval of the use are satisfied and, thus, that the project is consistent with the public policies adopted by the City Council. Here, that burden was not satisfied.

DECISION

Based on the findings and conclusions above, it is the decision of the Hearing Examiner to deny the proposed variance.

SIGNED this 7th day of March 2023.



Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding conditional use permits are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF THE ISSUANCE OF THE DECISION.** Pursuant to RCW 36.70C.040(4)(a), the date of the issuance of the decision is three days after a written decision is mailed by the local jurisdiction. This decision was mailed on March 8, 2023. **THEREFORE, THE DATE OF THE LAST DAY TO APPEAL IS APRIL 3, 2023, AT 5:00 P.M.**

In addition to paying any Court costs to appeal the decision, the ordinance requires payment of a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the Court.

Pursuant to RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.