



MEDINA, WASHINGTON

AGENDA BILL

Monday, April 22, 2024

Subject: Non-administrative Variance and Hearing Examiner Proposal

Category: Discussion and Direction

Staff Contacts: Steve Wilcox, Development Services Director and Jennifer S. Robertson, City Attorney

Summary

A. Non-Administrative Variance.

The Council work plan for Development Services included a review of the non-administrative variance procedures for the purpose of ensuring that the City's land use codes and comprehensive plan are implemented and that variances are a rare exception, granted only when truly necessary. The non-administrative variance code is found at MMC 16.72.030. Non-administrative variances are heard by the City's hearing examiner. The City staff review the application and generate a staff report as part of the hearing examiner process. Often the applicant is represented by legal counsel for the hearing. In the past, non-administrative variances have been easily granted, which is contrary to the intent that they be a rare exception, and only granted when necessary for the property owner to make reasonable use of their property.

As an example, there have been recent code enforcement violations where structures were built without benefit of required Medina permits. Proper permitting would have identified that these structures were not allowed under our Municipal Code. Options would have been given, but permits would not have been accepted or issued. Once Medina staff became involved these structures were posted and work was stopped. Options were given including to apply for variance which did occur. In both of these recent variance applications the hearing examiner approved of the structures in the non-compliant locations. Medina does not process very many variance applications annually with some years none at all.

The attached draft revisions to MMC 16.72.030 would tighten up the criteria under which this type of variance may be granted by the hearing examiner and would provide greater guidance to the hearing examiner and applicants regarding the situations that would justify the granting of a non-administrative variance. These proposed revisions are outlined below:

1. MMC 16.72.030.A is clarified to ensure that non-administrative variances are only granted when they meet the criteria in the code.
2. MMC 16.72.030E.1 is modified to add more detail as to what type of lot may be eligible for a variance. This provides better guidance for the hearing examiner and applicant.

EXHIBIT 1

3. MMC 16.72.030E.2 is modified to clarify that prior non-administrative variances do not create precedent and cannot be used as a justification for obtaining a future non-administrative variance.
4. MMC 16.72.030.E.3 is modified to expand the list of items under which a non-administrative variance may not be granted, including:
 - a. To alter any provision establishing a permitted or conditional use within a zoning district; (revision to subsection “b”)
 - b. To alter any administrative provisions including procedures or fees; (revision to subsection “c”)
 - c. To legalize structures or improvements that were installed in violation of MMC and which would not be permitted without a variance; (**New** subsection “d”) (Note, this would prohibit the owner who builds something without permits and in violation of the code being able to keep that improvement by gaining a variance.)
 - d. To alter the maximum residential density allowed in any zoning district; (**New** subsection “e”)
 - e. To alter the provisions of Chapter 14.04 MMC, SEPA. (**New** subsection “f”)
5. MMC 16.72.030.F is modified to clarify that a non-administrative variance may only be granted if it meets all of the criteria in that section. (Note, this is far more typical variance code language than what is currently in the Medina code.)
6. MMC 16.72.030.F.1 is modified to remove the “vicinity” language when evaluating whether the grant of the non-administrative variance constitutes a special privilege. Instead, the consideration is limited to the zone. The purpose for this suggested edit is to avoid the compounding of variances granted when one is granted in an area of the city; the “vicinity” language makes it more likely that the neighboring property owner could meet this criterion just due to be near a property that obtained a variance. Limiting this to zone, treats properties in the same zone equitably, regardless of what their neighbors may or may not have been granted.
7. MMC 16.72.030.F.2 is modified to narrow what is deemed “necessary” for the purposes of granting the non-administrative variance by requiring that the variance is necessary to “make reasonable use of the property” and tying that necessity to the factors related to the lot, including factors that “substantially constrain development” such that “the property owner cannot develop the property consistent with allowed uses.”
8. MMC 16.72.030.F – **three new subsections** “5”, “6”, and “7” are recommended which provide additional criteria that must be met before a non-administrative variance can be granted. These are:
 - a. The applicant must have first evaluated alternative development concepts in compliance with the existing code and that undue hardship would result if such adherence to code provision is required;
 - b. The variance is consistent with the purpose and intent of the relevant city ordinances and the comprehensive plan;
 - c. The basis for the variance request is not the result of deliberate actions of the applicant or property owner;
9. MMC 16.72.030.F.8 (currently subsection “5”) is modified to limit the approval to reasonable use of the property as opposed to using the language “reasonable relief” as is in the current code.

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10. MMC 16.72.030.G – ****new subsection**** – this new subsection defines “hardship”: “For purposes of this section, it shall not be deemed a hardship if the applicant can develop the property for its allowed use under the zone without the granting of a variance.” By putting this definition in the code, the hearing examiner will need to use this definition in weighing the criteria for granting the non-administrative variance.
11. MMC 16.72.030.H (previously “G”) – “Conditions of Approval” is modified to specifically permit the hearing examiner to reduce the scope or scale of any variance granted to “ensure that the variance is no more than the minimum necessary to provide reasonable use of the property”. This provides more flexibility to the hearing examiner such that the answer on whether to grant the variance is not limited to “yes” or “no”. Rather, the hearing examiner can tailor the variance to more closely meet the City’s standards while giving the applicant added flexibility to make reasonable use of the property.

If the Council is supportive of narrowing the code language for granting non-administrative variances and believes the draft code is an appropriate starting point, then the next step would be for the Council to direct staff to take this matter to the Planning Commission for review of the code, holding the public hearing, and making a recommendation to the Council.

This meets and supports Council’s priorities 3 through 5.

Council Priorities:

1. Financial Stability and Accountability
2. Quality Infrastructure
3. Efficient and Effective Government
4. Public Safety and Health
5. Neighborhood Character and Community Building

B. Hearing Examiner Proposal.

The City of Medina hearing examiner, Alex Sidles, recently gave the City notice that he has been appointed by Governor Inslee to the Growth Management Hearings Board. Therefore, the City needs a new hearing examiner. Phil Olbrechts of Olbrechts & Associates has submitted a proposal which is attached. Mr. Olbrechts is a very experienced hearing examiner who has practiced law for over 30 years and served for many years as a city attorney or deputy city attorney earlier in his career.

The City and Mr. Olbrechts have agreed to contract terms, but the contract will not be executed until Council has an opportunity to comment on his qualifications. The requirement that the City Council be allowed to comment on qualification of a potential hearing examiner is required by MMC 2.72.020. Therefore, if any council member has comments about Mr. Olbrechts, they may either provide those comments during the council meeting or may communicate separately with the City Manager’s office.

This meets and supports Council’s priorities 3 and 4.

Council Priorities:

1. Financial Stability and Accountability

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2. Quality Infrastructure
3. Efficient and Effective Government
4. Public Safety and Health
5. Neighborhood Character and Community Building

Attachments

- Draft update to MMC 16.72.030
- Hearing Examiner Proposal and Background for Phil Olbrechts of Olbrechts & Associates, PLLC

Budget/Fiscal Impact: If the Council sends the draft code to the Planning Commission, that will take staff time to process the amendment.

Hiring a new hearing examiner will be an expense to the City's budget, however, with the imminent the departure of the current hearing examiner, a new examiner needs to be hired.

Recommendation:

1. Provide input to staff on draft revisions to MMC 16.72.030 and provide direction on whether this draft amendment should be transmitted to the Planning Commission for review and processing.
2. Provide input to the City Manager on the qualifications of the proposed new hearing examiner.

City Manager Approval:

Proposed Council Motion: "I move to direct staff to forward the proposed revisions to MMC 16.72.030 to the Planning Commission for review and processing."

Time Estimate: 30 minutes