



## NOTICE OF HEARING EXAMINER RECOMMENDATION & NOTICE OF PUBLIC HEARING

**PROJECT NAME/NUMBER** Dryden Request for Special Permission, PLAN19-0063

**PROJECT DESCRIPTION:** The Applicant is seeking approval for the construction of a non-conforming deck and pergola built on the south side of an existing single family residence. The deck and pergola were constructed without the benefit of the required City permit(s) and are not observing the required setback from East Kincaid Street.

**PROJECT LOCATION:** The proposal property has an address of 425 S. 10th St. The parcel number is P52768, and it is located within a portion of the southwest 1/4 of Section 20, Township 34, Range 4, W.M.

On July 15, 2019 the Development Services Department received the Hearing Examiner's recommendation dated July 13, 2019. Mount Vernon Municipal Code (MVMC) 14.05.110(H)(4) states that an applicant or party of record feeling that the recommendation of the examiner is based on an erroneous procedure, errors of law or fact, err in judgment, or the discovery of new evidence, which could not be reasonably available at the public hearing, may make a written application for review within 10 days.

The applicant and parties of record have until July 29, 2019 to submit a request for reconsideration. Requests for reconsideration are required to comply with MVMC 14.05.110

City staff has created a page on the City's website where the site plans, technical reports, and other pertinent information can be viewed. This webpage can be viewed as follows: navigate to: [www.mountvernonwa.gov](http://www.mountvernonwa.gov); once here click on 'Departments' then 'Development Services' then then 'News Notices' then scroll down the page to find the project name/number.

**PUBLIC HEARING:** A closed record public hearing on the above described project will be held by the Mount Vernon City Council on **AUGUST 14, 2019** at 7PM at 1805 Continental Place, Mount Vernon.

**CITY CONTACT:** Further information can be obtained by contacting the following:  
City of Mount Vernon, Development Services Department  
Contact: Rebecca Lowell  
910 Cleveland Ave.  
Mount Vernon, WA 98273  
(360) 336-6214

**ISSUED:** July 18, 2019

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**BEFORE THE HEARING EXAMINER FOR THE CITY OF  
MOUNT VERNON**

Phil Olbrechts, Hearing Examiner

RE: Joel and Andrea Dryden  Special Permission	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION</b>
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**INTRODUCTION**

The Drydens request approval of a “special permission” request for a deck and pergola they’ve already built into the front yard setback of their nonconforming single family residence located at 425 S. 10<sup>th</sup> Street. The deck extends all the way into adjoining right of way. The “special permission” process sets criteria for the approval of expansion of nonconforming structures<sup>1</sup>. The “structure” subject to the “special permission” application is their single-family residence that is nonconforming because it encroaches nine feet into the applicable 20 foot front yard setback.

It is recommended that the Council deny the request. MVMC 17.102.020B only authorizes expansions of nonconforming structures if the entire structure is brought into conformance with current zoning standards. For this application, not only will the nine foot encroachment into the setback still remain if the deck is approved, the deck itself will increase that encroachment by another eleven feet. The only way the Drydens can have the encroachment the request authorized is through a variance of both MVMC 17.102.020B and the front yard setback variance. Approval of such a variance would be very difficult to justify in most situations, but in any event no such variance application has been filed so the City Council has no option but to deny the special permission application.

The law is easy to apply in this case. There is no legal basis for approval. The facts are mostly clear as well, but they are very hard facts. A close review of the summary of testimony below and the findings of fact will show that the Drydens deck has been

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<sup>1</sup> A nonconforming structure is a structure that complied with zoning standards when built but subsequently failed to conform with applicable zoning standards due to changes in those standards. It is uncontested in this proceeding that the single-family home conformed to setback standards when built and only became nonconforming due to the subsequent adoption of a 20 foot front yard setback.

1 part of a successful effort to rehabilitate a dilapidated home in a manner that has not  
2 only benefitted the Dryden's property but their neighborhood as well. The Drydens  
3 presented a petition signed by over 40 of their neighbors attesting to the fact that the  
4 deck does not adversely affect the enjoyment of their own property. Numerous  
5 neighbors took the time to come to City Hall for a morning hearing to testify in  
6 support of the deck and to point out that the deck is a community resource that is used  
7 as a gathering place for neighbors to stop and talk and children to play. The Drydens  
8 and some neighbors also testified that most if not all neighboring properties also had  
9 nonconforming structures. The Dryden's home is in a neighborhood several decades  
10 old with numerous properties that may not comply with current zoning standards.  
11 The Fire Marshal even wrote a letter opining that the proposed setback encroachment  
12 would not create any problems for emergency access. Pictures of the deck also reveal  
13 several feet of separation between the travelled portion of the roadway and the  
14 adjoining sidewalk.

9 Setting aside the MVMC 17.102.020B issue, the Drydens made a very compelling  
10 case that they comply with the review criteria for special permission approval.  
11 However, the one issue they arguably could not overcome is the precedential impact  
12 of approving the request. If the Dryden request is approved, numerous other property  
13 owners seeking to maximize the development of their small lots will also approach  
14 City hall with similarly creative reasons why they should be authorized to construct  
15 their deck/gazebo/patio/tool shed etc. into the outermost edges of their front yard  
16 setbacks. That scenario easily could occur and result in significant adverse aesthetic  
17 impacts. Given the subjective and somewhat questionable basis for approval of the  
18 Drydens' request for approval, the integrity of the City Council's front yard setback  
19 standards could be undermined if this request is approved.

16 Even if the Council were to approve the special permission application, the Drydens  
17 still wouldn't be authorized to construct the deck. That's because nothing in the  
18 special permission standards suggests that approval of a special permission  
19 application exempts a project from variance review. A special permission only  
20 authorizes expansion of a nonconforming use. It doesn't authorize more violations of  
21 the zoning code. A special permission gives the City an opportunity to assess the  
22 impacts of the expansion of a nonconforming use on neighboring properties, whether  
23 or not additional zoning code violations are proposed. For example, if the Drydens  
24 had built the deck in their back yard in a manner that complied with applicable  
25 setback standards, a special permission permit would still be required but there would  
be no need for the variance. In this situation the Drydens are proposing both an  
expansion of a nonconforming use and a front setback violation. Those two actions  
require two separate permits -- the special permission and the variance. Further, not  
only do the Drydens need a variance to the front yard setback for their deck, they also  
need a variance to MVMC 17.102.020B. If the City Council does approve the special  
permission application, it should be conditioned upon acquiring a variance.

The evidence presented so far as it would relate to a variance application shows that it  
would be challenging for the Dryden's to acquire variance approval. The staff report

1 does an excellent job outlining the reasons justifying front yard setbacks. In order to  
2 overcome the strong policy considerations that support adoption of front yard  
3 setbacks, in a variance application the Drydens would have to establish that unique  
4 circumstances applicable to their property justify a departure from these policy  
5 considerations. Establishing those circumstances is usually difficult and arguably  
6 cannot be based upon nonconforming properties in the surrounding neighborhood.  
7 Case law generally prohibits a comparison to other nonconforming uses to assess  
8 special circumstances. *See Ling v. Whatcom County Board of Adjustment*, 21 Wn.  
9 App. 497 (1978). The judicial reasoning for this conclusion is compelling – if a City  
10 amends its zoning code to depart from current development patterns, that objective  
11 can be seriously undermined if variance applicants are allowed to rely upon existing  
12 nonconforming development patterns to perpetuate it. At the same time however,  
13 there is case law that authorizes comparisons to nonconforming properties if those  
14 nonconformities are unique to a particular area. *See Sherwood v. Grant County*, 40  
15 Wn. App. 496 (1985)

### 10 ORAL TESTIMONY

11 Rebecca Lowell, Senior City of Mount Vernon planner, summarized the staff report.  
12 In response to examiner questions, Ms. Lowell acknowledged that the Applicants  
13 would also need a variance to encroach into the front yard setback and that it was  
14 equally unlikely they could acquire variance approval. Ms. Lowell also clarified that  
15 the Code does allow decks to extend six feet into front yard setbacks and that if this  
16 exception were found applicable it would still necessitate removal of about five feet of  
17 the deck. But the front yard setback is nonconforming to start with, so arguably even  
18 a six-foot additional encroachment wouldn't be allowed. She further clarified that the  
19 house itself encroaches into the front yard setback as shown in Ex. 3.

17 Andrea Dryden, Applicant, is a registered nurse and her husband is a forester. She and  
18 her husband purchased their home in the spring of 2017. She and her husband are not  
19 from the area and came from Indiana about 11 years ago. They decided to make  
20 Mount Vernon their permanent home to raise their two children. They love their  
21 neighbours and spending evenings on their deck watching their children and those of  
22 others play outside while socializing with neighbours. When they purchased their  
23 home they were excited about improving it and immediately commenced several home  
24 improvement projects. They were not aware they needed permits, since they were just  
25 replacing existing structures. There was a dilapidated deck on the back side of the  
house that was unsafe for their children. When they demolished that deck they found  
that much of the wood had rotted and the underside of the deck was inhabited by rats.  
Prior to their purchase, the yard was overgrown with rats. The backyard fence was  
falling in sections and it was overgrown with ivy and blackberries and the blackberries  
were also growing into the adjoining alley. She had believed that her home  
improvements were helping the City by her contributions in rejuvenating her part of  
the neighbourhood. The new deck was built larger than the one it replaced to make  
more space for friends, family and neighbours. She and her husband were not aware  
of setbacks because so many neighbouring homes were nonconforming. They thought

1 the front end of the deck was a logical place to stop since it ends at the location of a  
2 cement retaining wall. The deck only overhangs eight inches into the right of way.  
3 They would be happy to remove the overhang if it created a hazard of any kind. No  
4 other structure in their vicinity meets current setback requirements. The Fire Marshal  
has written that he did not find any fire code violations or emergency response  
problems with the deck, thus indicating there are no safety concerns for their home or  
surrounding homes.

5 Ms. Dryden noted that MVMC 17.102.080 requires that the examiner recommend  
6 approval of the special permission application if the evidence establishes that the  
7 proposal will have no material adverse effect upon the enjoyment of the properties in  
8 the area. A letter was sent to the neighbours to find out if anyone had problems with  
9 the deck and only positive comments were received. According to city staff, no  
10 complaints have been lodged with the City over the deck. Neighbours have told them  
11 that their improvements have inspired them to make their own home improvements.  
Ms. Dryden also presented a poll that took less than two hours to put together that has  
40 signatures from the homes closest to the Dryden residence in a two block radius in  
which the signators agreed with a statement that the deck did not have an adverse  
effect on the use of their property.

12 Ms. Dryden identified that none of the other lots in her area conform to the zoning  
13 street. She further noted that Kinkaid is a dead-end street 100 feet west of their  
property.

14 In responses to examiner questions, Mr. Dryden acknowledged that the new deck is  
15 quite a bit larger than the replaced deck. The replaced deck was 4x6 feet. The new  
16 deck is about 200 square feet.

17 Mr. Dryden referenced a photograph that showed that other neighbour encroachments  
18 into the front yard setback were far more obstructive than the deck. The photo also  
19 shows that Kinkaid is a dead-end street with I5 beyond and no one is going to extend  
Kinkaid into a trestle that goes over I5.

20 Mr. Dryden stated he never thought that Mount Vernon would go after such a benign  
21 project. All properties in the neighbourhood are nonconforming. Mr. Dryden  
22 referenced the staff report finding for subsection A of the special permission criteria  
23 that the 0-foot setback is not consistent with surrounding development patterns. Mr.  
24 Dryden referenced back to the Ex. 9 photo and an aerial photo that shows fences, rock  
25 walls, garages and other encroachments for properties such as 801 and 802 S. 9<sup>th</sup> St.,  
416 S. 10<sup>th</sup> St. The deck does not create “overcrowding” as referenced in the staff  
report. The deck does not encroach into a safe clearance zone given that there is far  
more space on their property for contractor access than most other neighbourhood  
properties. The project does not encroach into “light and air” as referenced in the staff  
report. This makes no sense – the sun comes from the south and their home is on the  
north side. There’s no impact on light and air. As to safety from fire – the fire  
marshal has written in Ex. 4e that there is no safety concern. The petition, Ex. 10,

1 contradicts the staff finding that the deck has a material adverse effect on adjoining  
2 properties.

3 Mr. Dryden noted that staff had suggested they could bring the deck into conformance  
4 by removing six feet of the deck. He acknowledged that was feasible but completely  
5 unnecessary. The whole deck would have to be cut off. Support beams would have to  
6 be moved back. You might as well tear the whole deck down and rebuild it. The deck  
7 has been in place for two years. The deck was built on June 16, 2017. There's no  
8 benefit to removing the deck.

9 Mark Johnson, neighbour, living at 402 S. 10<sup>th</sup>, said the first time he went into the  
10 Dryden house was in 1954. He's lived in his house for 40 years. He's spent  
11 considerable time maintaining the alley next to the Dryden property, removing  
12 noxious weeds, thistles and blackberries. Before the Drydens moved in the backyard  
13 was dishevelled, was not maintained, the fence was falling over, it was full of  
14 blackberries and noxious weeds. The Dryden improvements have enhanced the  
15 neighbourhood, providing a venue for neighbours and children to gather. Mr. Johnson  
16 emphasized the nonconforming status of surrounding homes. His own garage is  
17 nonconforming.

18 Gene Johnson noted that it's nice to see the Drydens and other neighbours on the  
19 Dryden deck when driving down 10<sup>th</sup> St.

20 Mary Whitten, neighbour, lives directly across the street from the Drydens on 424.  
21 She thinks its lovely how the Drydens have improved their home. People like the  
22 neighbourhood because each house is different. She recently sold her house at 424 but  
23 bought another house in the same neighbourhood because she loves its character. One  
24 of the reasons her 424 house sold was because the Drydens crossed the street and  
25 talked to the potential buyers and made the neighbourhood sound appealing to young  
families. The City shouldn't make the neighbourhood look like a difficult place to live  
for young families because of over-restrictive development regulations. None of the  
properties conform to the zoning code.

Charles Carpenter lives has been at his residence at 412 for six years. The  
neighbourhood has several families with children. People enjoy the Dryden deck.

Eric Johnson used to live on South 10<sup>th</sup>. He's had to live next to a drug house for  
years. So, he's interested to see how planners are making it easier for people to make  
neighbourhoods more liveable.

In rebuttal, Ms. Lowell noted that the deck nonconformance was brought to the  
attention of the City by the Skagit County Assessor. The Assessor's Office believed  
there was a dwelling unit being built into the on-site garage. The City isn't looking for  
violations. But when the City gets complaints it's legally obligated to respond to  
them.

1 In closing, Ms. Dryden said she and her husband were very excited about buying an  
2 older home to fix it up and to make their neighbours part of their family. They  
3 shouldn't have to tear down a deck that the fire marshal believes is not a safety hazard.  
4 She and her husband truly didn't know permits were required and based on  
5 surrounding development they had no basis to believe that their development was  
6 nonconforming.

7 Mr. Dryden noted that there must be some way to allow the deck to remain. The City  
8 has resolved bigger problems.

9 Chris Philips, Development Services Director, noted that City code enforcement didn't  
10 bring up the deck issue, it was raised by the Skagit County Assessor's Office.

## 11 **EXHIBITS**

12 Exhibits 1-5 identified at page 3 of the June 17 2019 staff report were admitted into  
13 the record during the June 27, 2019 hearing. The following documents were also  
14 admitted during the hearing:

- 15 5c Comment letter from Catheryn Gilbert/Worley dated June 25, 2019
- 16 6. Staff Report
- 17 7. Sign in sheet.
- 18 8. June 17, 2019 staff report.
- 19 9. 8x11 Dryden photo of neighborhood
- 20 10. Dryden Petition

## 21 **FINDINGS OF FACT**

### 22 **Procedural:**

- 23 1. Applicant. Joel and Andrea Dryden, 425 S. 10<sup>th</sup> St., Mount Vernon, WA  
24 98274.
- 25 2. Hearing. A hearing for the special permission application was held on  
June 27, 2019 in the planning conference room at the Mount Vernon City Hall.

### 26 **Substantive:**

- 27 3. Site/Proposal Description. The Applicant requests approval of a "special  
28 permission" request to build a deck in the front yard of a single family residence  
29 located at all 425 S. 10th Street all the way into adjoining right of way in violation of  
30 applicable front yard setback requirements. The house is nonconforming because it  
31 encroaches nine feet into the twenty foot setback. A photograph of the deck (shown  
32 on the right side of the road), admitted as Exhibit 9, is pasted below:



4. Characteristics of the Area. Surrounding uses are single-family residential. According to neighbors, all lots are nonconforming for one reason or another. Examples of alleged nonconformities includes a garage, a rockery and a fence. The picture below, appropriated from the staff report, shows the Dryden's home designated with a red square. The aerial was taken before the Dryden's built the deck that is the subject of this special permission application.



1 5. Adverse Impacts. There are no clearly discernable significant adverse  
2 impacts associated with the proposal except for its precedential impact. Pertinent  
3 impacts area addressed separately as follows:

4 A. The most significant potential impact is arguably impediment to emergency  
5 response as asserted in the staff report. However, the City’s fire marshal in  
6 Ex. 4e stated that “*I do not find any fire code violations or impacts that would*  
7 *create an issue for fire response.*” The Mount Vernon Fire Marshal is the  
8 only expert on emergency response who testified about response impacts, so  
9 his opinion is considered determinative and the deck is not found to impede  
10 emergency response.

11 B. Compatibility (preventing overcrowding of land; providing for adequate  
12 passage of light and air; effect on appearance and use of area). The deck by  
13 itself is not found to create significant compatibility impacts. However, as a  
14 precedent, approval of the deck would likely create significant compatibility  
15 impacts.

16 The staff report asserts that the deck is not consistent with the surrounding  
17 development pattern. The Drydens and their neighbors testified about alleged  
18 nonconforming structures such as a fence, wall and garage. Without more  
19 information it isn’t possible to make a very accurate determination whether  
20 most of these structures are in fact nonconforming. City development  
21 standards authorize fences and retaining walls in setback areas and there are  
22 setback exceptions for garages as well. See Chapter 17.99 MVMC and  
23 MVMC 17.78.040. A review of the photographs of this recommendation  
24 supports the staff position in that other than fences (which are authorized),  
25 there is overall a consistent wide separation between single-family homes and  
associated right of way.

Arguably pertinent benefits of the proposed deck are that it is part of a  
rehabilitation project for a dilapidated single-family home and that the deck  
serves as a community resource. As testified by the Drydens and neighbors,  
the Drydens’ deck project was part of a series of improvements to replace a  
deteriorating deck from the back yard of the property and to clean up an  
overgrown yard area. The rehabilitative value of the deck is ultimately highly  
questionable, since the Drydens’ could have rehabilitated their home without a  
front yard setback encroaching into City right of way.

As testified by a couple neighbors, the deck also serves as a community  
gathering place for adults and children and its visibility in that function helps  
create a sense of community. However, there is no guaranty that the Drydens  
will remain in their current residence for any set period of time and no  
guaranty that they will always have the time or inclination to maintain their  
deck as a neighborhood resource.

1 Overall, the negative precedential impacts of approval outweigh the positive  
2 appearance and compatibility benefits of the Dryden deck. The reasons for  
3 approving the Dryden deck vis-a-vie rehabilitation and community resource  
4 benefits are highly subjective. Given the small lots of the surrounding area,  
5 there is plenty of incentive for other homeowners to maximize the  
6 development potential of their lots by citing similar creative reasons for  
7 approval. The result very well could be a series of decks, gazebos, patios etc.  
8 all abutting public right of way up and down the streets of the Dryden  
9 neighborhood. Such a scenario would most likely create overcrowding and  
10 adversely affect aesthetics in a significant manner.

11 C. Utility Work. The staff report asserts that the deck reduces clearance area for  
12 utility or similar public work. That is certainly an issue with the eight inches  
13 of deck extending into the right of way. Unquestionably, the City can require  
14 the Drydens to remove their eight inch encroachment in City right of way and  
15 can do so at any time that space is necessary for public work. Beyond that  
16 eight inches, however, the City has no right to expect the Dryden's to limit  
17 development on their property solely to accommodate public development  
18 activities in the absence of a justly compensated construction easement or  
19 similar device. For these reasons, impacts on potential utility or similar public  
20 work are not considered significant.

21 D. Traffic. As acknowledged in the staff report, the proposal will not adversely  
22 affect traffic.

23 E. Parking. As acknowledged in the staff report, the proposal does not take away  
24 from any required parking on the project site.

25 F. Economic Impact. The precedential impact of the proposal as identified in  
Finding of Fact No. 5B could conceivably have a negative impact on property  
values by reducing neighborhood desirability, but such impacts are too  
speculative in the absence of pertinent data or expert opinion.

**CONCLUSIONS OF LAW**

**Procedural:**

1. Authority of Hearing Examiner. The hearing examiner has authority to hold  
hearings and make recommendations to the City Council on requests for "special  
permission" to expand nonconforming buildings and uses as authorized by MVMC  
17.102.030.

**Substantive:**

2. Zoning Designation. The project site is zoned R-1, 7.0.

1 3. Review Criteria. “Special permission” criteria are governed by MVMC  
2 17.102.070 and 17.102.080, which are quoted below in italics and applied through  
3 corresponding conclusions of law. MVMC 17.102.070 lists factors to be considered  
in evaluating compliance with MVMC 17.102.080.

4 **MVMC 17.102.070(A):** *The effect of such enlargement, expansion or reconstruction*  
5 *on the appearance and use of the area that might be affected;*

6 5. For the reason identified in Finding of Fact No. 5B, approval would create  
7 significant adverse aesthetic impacts due to the precedential impact of approval.

8 **MVMC 17.102.070(B):** *The effect of the granting of such permit on traffic patterns*  
9 *in the area;*

10 6. As determined in Finding of Fact No. 5D, the proposal will not create any  
11 significant impacts to traffic.

12 **MVMC 17.102.070(C):** *The adequacy of parking facilities provided or to be*  
13 *provided;*

14 7. The proposal does not affect the adequacy of parking for the reasons identified in  
15 Finding of Fact No. 5E.

16 **MVMC 17.102.070(D):** *The effect on adjacent and nearby property or the economic*  
17 *effect of the proposed expansion, alteration or reconstruction on both the applicant*  
18 *and the owners of property in the vicinity.*

19 8. Adverse economic impacts are inconclusive for the reasons identified in Finding  
20 of Fact No. 5F.

21 **MVMC 17.102.080 Approval of application – Procedure:** *If, after considering the*  
22 *foregoing factors, the hearing examiner finds that the proposed alteration, expansion,*  
23 *or reconstruction will not have a material adverse effect upon the use and enjoyment*  
24 *of the properties within the area, which conform to the existing zoning, then and in*  
25 *that event, the hearing examiner shall recommend issuance of a permit for such*  
*alteration, expansion, or reconstruction and forward such to the city council for*  
*approval or disapproval by majority vote. If approved by the city council, the permit*  
*may then be issued.*

9. The criterion quoted above is not met. For the reasons identified in Finding of  
Fact No. 5B, it is determined that the proposal will have a significant adverse impact  
on compatibility/aesthetics and therefore it cannot be found that the proposal will not  
have a material adverse effect upon use and enjoyment.

1 **MVMC 17.102.020B.** *Except as set out below, an existing nonconforming building or*  
2 *structure utilized for a conforming use may be enlarged or expanded only if it*  
3 *conforms to the regulations of this document and of the building code such that, when*  
4 *completed, it will no longer be a nonconforming building or structure. ...*

5 10. For the reasons identified in the Introduction, the proposal will not result in a  
6 structure that conforms to the zoning code and therefore for that reason alone the  
7 requested special permission cannot be approved due to the MVMC 17.102.020B  
8 requirement quoted above.

### 9 **Recommendation**

10 The special permission request should be denied because the proposal fails to bring  
11 the single-family home into full compliance with current zoning standards as required  
12 by MVMC 17.102.020B and the proposal would also create significant adverse  
13 aesthetic impacts due to its precedential impacts as outlined in Finding of Fact No.  
14 5E.

15 Dated this 13th day of July 2019.

16   
17 Phil A. Olbrechts

18 City of Mount Vernon Hearing Examiner