

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF PORT ORCHARD**

In the Matter of the Application of)	No. R-1167
)	
Chuck Childress)	
)	
<u>For Approval of a Rezone</u>)	FINDINGS, CONCLUSIONS, AND RECOMMENDATION

SUMMARY OF RECOMMENDATION

The Hearing Examiner recommends that the request for a rezone from R-4.5 to R-12 for property located at 2205 and 2207 Sidney Avenue, in Port Orchard, Washington, be **APPROVED**, with conditions.

SUMMARY OF RECORD

Request:

Chuck Childress requests a rezone of two parcels totaling 0.77 acre, from R-4.5 to R-12, to bring the parcels' zone classification in compliance with the Comprehensive Plan designation. The property is located at 2205 and 2207 Sidney Avenue, in Port Orchard, Washington.

Hearing Date:

The Hearing Examiner held an open record hearing on the request on May 15, 2008.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

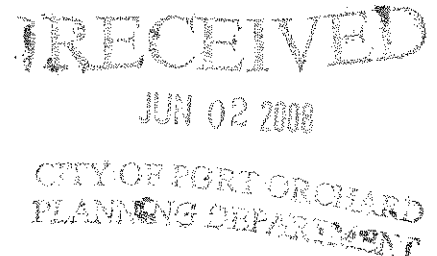
- Tom Bonsell, Associate Planner
- Mark Kuhlman, P.E., Applicant Representative
- Tim Steichen

Exhibits:

The following exhibits were admitted into the record:

1. Rezone Application, received October 19, 2007, with the following attachments:
 - a. Legal Description
 - b. Project Narrative, dated September 27, 2007
 - c. Application Letter, dated September 27, 2007
 - d. Environmental Checklist, prepared September 27, 2007
 - e. Map of surrounding parcels for public notice distribution
 - f. Mailing List for surrounding parcels
 - g. Map of surrounding parcels
2. Notice of Complete Application, issued April 3, 2008

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3. Kitsap County Parcel Search for 2205 Sidney and 2207 Sidney
4. Application Transmittal Letter, dated October 22, 2007
5. Letter from Jennifer Haro, City Planner, to Project Applicant, dated January 17, 2008
6. Letter from Mark Kuhlman, P.E., to Tom Bonsell, dated February 14, 2008
7. Emails between Thomas Bonsell and Mark Kuhlman regarding rezone review process
8. Letter from Thomas Bonsell to Mark Kuhlman, dated March 6, 2008
9. Letter from Thomas Bonsell to Mark Kuhlman, dated March 17, 2008
10. Letter from Mark Kuhlman to Tom Bonsell, received March 24, 2008
11. Receipt for Hearing Examiner rezone review
12. Zone Reclassification Site Plan – Existing Lots, received April 1, 2008
13. Public Notice of Application / SEPA comment period, sent April 7, 2008
14. Affidavit of Publication of Notice of Application, signed April 12, 2008
15. Affidavit of Notice of Application, signed May 5, 2008
16. Letter from Tim Gates, CTED, to Thomas Bonsell, received April 16, 2008
17. Revised Notice of Application / SEPA comment period, sent April 23, 2008
18. Determination of Non Significance, issued April 29, 2008
19. Notice of Public Hearing, dated May 3, 2008
20. Affidavit of Notice of Hearing, signed May 5, 2008
21. Aerial map of subject property
22. Staff Report and Recommendation to Hearing Examiner
23. Letter from Jerry Arnett, received May 12, 2008

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

1. Chuck Childress (Applicant) requests a rezone from R-4.5 to R-12 for property located at 2205 and 2207 Sidney Avenue, in Port Orchard, Washington.¹ The two parcels, totaling 0.77 acre, each contain an existing single-family residence.² *Exhibit 1; Exhibit 1.b; Exhibit 1.d.*

¹ The two parcels are identified by tax parcel numbers 022301-2-076-2001 and 022301-2-077-2000. *Exhibit 1; Exhibit 22, page 1.* A legal description is included with the rezone application. *Exhibit 1.*

² The staff report states that the parcels total 0.77 acre, as do the Kitsap County parcel reports. *Exhibit 3; Exhibit 22, page 1.* The notice of hearing states that the two parcels total 0.76 acre, as indicated on the site plans. *Exhibit 12; Exhibit 19.*

2. The City of Port Orchard (City) received the rezone application on October 19, 2007.³ *Exhibit 2; Exhibit 22, page 6.* The City determined that the rezone application was complete on April 3, 2008. *Exhibit 2; Exhibit 22, page 2.* The City transmitted notice of the application and associated threshold environmental determination to relevant agencies on April 7, 2008 and published notice in the *Port Orchard Independent* on April 12, 2008. *Exhibit 13; Exhibit 14.* The City also provided notice of the application and environmental determination by mailing notice to surrounding property owners and posting notice on the subject property. *Exhibit 15.*
3. The City acted as lead agency to analyze the environmental impacts of the requested rezone, pursuant to the State Environmental Policy Act (SEPA). The City determined that the rezone would not have a probable significant adverse impact on the environment, and issues a Determination of Nonsignificance (DNS) on April 29, 2008. The City issued the DNS pursuant to an optional process combining the comment period with the notice of application.⁴ The optional DNS comment period ended April 28, 2008. The City did not receive any comments on the DNS. *Exhibit 18.*
4. The City provided notice of the open record hearing associated with the rezone by mailing notice to surrounding property owners and posting notice on-site. *Exhibit 20.* The City published notice of the hearing in the *Port Orchard Independent* on May 3, 2008. *Exhibit 19.*
5. The property is designated Medium Density Residential in the City Comprehensive Plan, as is surrounding property to the north, east, and south. Property to the west is designated High Density Residential. *Exhibit 1; Exhibit 22, page 1.* The Medium Density Residential designation was enacted in 2000 by Ordinance No. 1807.⁵ Pursuant to the ordinance, the Medium Density Residential designation allows for housing density of 8 dwelling units per net acre, and potentially up to 12 dwelling units per net usable acre. The ordinance requires that areas designated Medium Density Residential contain adequate water, sewer, and drainage services, including other requirements. Medium

³ The Applicant had previously submitted a short plat application for the -077 parcel. Mark Kuhlman, Applicant Representative, testified that the short plat application was not reviewed by the City, was not considered a complete application, and was withdrawn by the Applicant. *Exhibit 1.b; Testimony of Mr. Kuhlman.*

⁴ The Washington Administrative Code provides for an optional Determination of Nonsignificance (DNS) process, which is an integrated project review process and comment period to obtain comments on the notice of application and the likely DNS threshold determination for the proposal. *WAC 197-11-355.*

⁵ The Ordinance states that the land use designations “have been developed as a result of extensive public participation and planning goals.” *Ordinance No. 1807, Section 1.* With adoption of the ordinance, the City Planning Commission determined that the addition of the Medium Density Residential land use designation “is not detrimental to the health, safety, and welfare of the community and is propose to be within the character of the Growth Management Act, Comprehensive Plan, and the community.” *Ordinance No. 1807, Attachment A.*

Density Residential areas are intended to allow infill and redevelopment with strict design guidelines, and be pedestrian oriented and compatible with existing development. *Ordinance No. 1807.*

6. The subject property is currently zoned R-4.5, as is all surrounding property. The R-4.5 zone allows for development at a density of up to 4.5 dwelling units per net usable acre.⁶ The primary purposes of the R-4.5 zone are to “(a) provide for an urban residential environment that is consistent with the traditional image of the Port Orchard area and (b) to implement comprehensive plan goals and policies for housing quality, diversity, and affordability, and to efficiently use residential land, public services, and energy.” *Port Orchard Municipal Code (POMC) 16.13.120.* The R-4.5 zone mandates a minimum lot size of 6000 square feet; maximum lot coverage of 45 percent; and minimum landscaping site coverage of 55 percent. *POMC 16.40.025 Table 9.*
7. The R-12 zone allows development at a density of up to 12 dwelling units per net usable acre. The primary purposes of the R-12 zone are to “(a) define areas that allow a greater dwelling unit density - particularly in locations that are well served by the arterial circulation system and community facilities in general, (b) implement comprehensive plan goals and policies for housing quality, diversity, and affordability, and (c) efficiently use residential land, public services, and energy.” *POMC 16.13.130(1).* The R-12 zone purposes are accomplished by providing a mix of housing types and densities, and allowing only such accessory and complementary nonresidential uses as are compatible with higher density communities. *POMC 16.13.130(2).* The R-12 zone is appropriate in areas that have been so designated by the City Comprehensive Plan and that provide adequate sewer, water, streets, and other public facilities, and where surrounding properties have already been developed for lower intensity residential uses but abut nonresidential land uses featuring services supportive of higher density residential uses. *POMC 16.13.130(3).* The R-12 zone mandates a minimum lot size of 3630 square feet; maximum lot coverage of 85 percent; and minimum landscaping site coverage of 15 percent. Other development standards, including setbacks and building height, are the same for both the R-4.5 and R-12 zones. *POMC 16.40.025 Table 9.*
8. No critical areas have been identified on the property. In the rezone application materials, the Applicant states that the property is currently underdeveloped for its Comprehensive Plan designation. The rezone application asserts that there is a need for higher density zoned properties in the City, as the City currently features few properties zoned R-12. Mark Kuhlman, Applicant Representative, testified that the proposed rezone would facilitate infill development with recent housing developments at a similar density in the area. *Exhibit 1.b; Exhibit 1.d; Exhibit 22, pages 3 – 5; Testimony of Mr. Kuhlman.*

⁶ Net usable site area is defined as “the total site area less sensitive environmental features (equal to gross useable site area) and dedications as these areas are defined elsewhere in this code.” *POMC 16.40.040.*

9. The property lies adjacent to Sidney Road to the west and Goldenrod Street to the north. *Exhibit 12*. Jerry Arnett sent a comment to the City, expressing concern that the existing street system is inadequate to support a higher residential density. *Exhibit 23*. Tim Steichen testified at the open record hearing that he has lived to the west of the subject property for 55 years. He expressed concern that pedestrian facilities along Sidney Road are inadequate and unsafe, particularly for children walking to and from school. He suggested that a safe walking area be provided along Sidney Road. *Testimony of Mr. Steichen*.
10. Tom Bonsell, Associate Planner, agreed that there is a need for better pedestrian facilities in the area. He testified that the City is now reviewing its Comprehensive Plan, and this presents an opportunity for members of the public to request that the City Council address pedestrian safety concerns. *Testimony of Mr. Bonsell*.
11. The City of Port Orchard provides water and sewer service to the property. Puget Sound Energy Services provides electric service to the property. *Exhibit 1.d; Exhibit 22, page 4*.
12. In his comment letter, Mr. Arnett also expressed concern that the proposed rezone would result in densities too high for the area and would create stormwater run-off problems. Mr. Bonsell responded that traffic and stormwater issues would be addressed by the Public Works Department if development occurs. He testified that the City Council considered the impact of increased density on the area when it approved the current Comprehensive Plan, with a Medium Density Residential designation for the area. Mr. Bonsell also explained that there is no development proposal before the Hearing Examiner at this time: the Hearing Examiner is only reviewing a request to rezone the property owned by the Applicant. Mr. Kuhlman noted that any future development would be required to comply with current City code, including any new zone classification. *Exhibit 23; Testimony of Mr. Bonsell; Testimony of Mr. Kuhlman*.
13. An accessory building located in the northern portion of the property extends into the City right-of-way. Mr. Bonsell testified that this is a legally non-conforming structure as regards setback requirements, and may remain for the time being. However, if the City decides to improve the right-of-way, the owner would be required to remove the structure. The City proposed a condition of approval limiting the property owner's rights to maintain the accessory building within the City right-of-way. Mr. Kuhlman testified that the Applicant would remove the structure. *Exhibit 22, page 5; Testimony of Mr. Bonsell; Testimony of Mr. Kuhlman*.

CONCLUSIONS

Jurisdiction

The City of Port Orchard Hearing Examiner has jurisdiction to hold a hearing on rezone applications that are not part of the Comprehensive Plan Amendment process. Based on the evidence in the record, the Hearing Examiner may recommend that the City Council approve,

approve with modifications, or deny the application. *Port Orchard Municipal Code (POMC) 2.76.080; POMC 2.76.100; POMC 2.76.110; POMC 16.01.021(3).*⁷

Criteria for Review

Port Orchard Municipal Code (POMC) 16.25.060 sets forth the standards and criteria the Hearing Examiner must use to evaluate a request for a rezone. A request for a rezone shall only be granted if:

- (1) The reclassification is substantially related to the public health, safety, or welfare; and
- (2) The reclassification is warranted because of changed circumstances or because of a need for additional property in the proposed land use zone classification or because the proposed zoning classification is appropriate for reasonable development of the subject property; and
- (3) The subject property is suitable for development in general conformance with zoning standards under the proposed zoning classification; and
- (4) The reclassification will not be materially detrimental to uses or property in the immediate vicinity of the subject property or incompatible with such uses; and
- (5) The reclassification has merit and value for the community as a whole; and
- (6) The reclassification is in accord with the comprehensive plan; and
- (7) The reclassification complies with all other applicable criteria and standards of the Port Orchard Municipal Code.

POMC 16.25.060.

In addition to the rezone criteria provided in the City code, Washington state courts apply the following general rules to rezone applications:

- (1) there is no presumption of validity favoring the action of rezoning;
- (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have substantially changed since the original zoning; and
- (3) the rezone must bear a substantial relationship to the public health, safety, morals or welfare.

Parkridge v. Seattle, 89 Wn.2d 454 (1978).

Proof of changed circumstances are not required for a rezone if the proposed rezone and associated development implement policies contained in the comprehensive plan. *Bjarnson v. Kitsap County*, 78 Wn. App. 840 (Div. I, 1995); *Henderson v. Kittitas County*, 124 Wn. App. 747 (Div. III, 2004). Only general conformance with a comprehensive plan is required. *Woods v. Kittitas County*, 130 Wn. App. 573 (Div. III, 2005).

⁷ On December 19, 2007, the Port Orchard City Council passed and the Port Orchard Mayor signed City Ordinance No. 047-07, repealing POMC 2.20.040 in its entirety and adding a new POMC Chapter 2.76 (Hearing Examiner). POMC Chapter 2.76 has not yet been codified and is not currently available on the City website. Although the rezone application vested prior to enactment of the new City code, the Applicant opted to use the new Hearing Examiner review process.

Conclusions

1. **The rezone is substantially related to the public health, safety, or welfare.** The City Council reviewed the potential impacts of increased density when the Medium Density Residential land use designation was approved to allow development at eight to twelve dwelling units per acre. After consideration of public input and planning goals, the City Council determined that the increased density would continue the community character. The City provided appropriate notice of the rezone application and associated open record hearing. The proposed rezone would allow for infill development with a variety of housing types and densities development, in compliance with the property's Comprehensive Plan land use designation. The City analyzed the potential environmental impacts of the proposed rezone and determined that granting the rezone would not result in probable adverse environmental impacts. The City issued a Determination of Nonsignificance on April 29, 2008. There was no comment on or appeal of the DNS. Any future development of the property would be reviewed for compliance with City requirements, including transportation and drainage standards. *Findings 1 – 13.*

2. **The rezone is warranted because of changed circumstances.** Proof of changed circumstances is not required for a rezone if the proposed rezone and associated development implement policies contained in the comprehensive plan. In 2000, the City Council enacted Ordinance No. 1807, creating the Medium Density Residential land use designation. The subject property is currently designated Medium Density Residential in the City Comprehensive Plan. The proposed rezone would allow for development at a density of up to 12 dwelling units per acre, providing the opportunity for infill development with a variety of housing types and designs, consistent with the Comprehensive Plan. *Findings 5 – 8.*

3. **The subject property is suitable for development.** The property is currently developed with two single-family residences. The City of Port Orchard provides water and sewer service to the property. Puget Sound Energy Services provides electrical service. The property has access to Sidney Road and Goldenrod Road. The City reviewed the environmental impacts of the rezone request and determined that the rezone would not result in a probable significant adverse impact on the environment. Future development of the property would be reviewed for consistency with the City's traffic and stormwater standards. *Findings 3, 9, 11, 12.*

4. **The rezone will not be materially detrimental to or incompatible with uses and properties in the immediate vicinity.** The property would be accessed by Sidney Road or Goldenrod Road. Surrounding properties are designated for Medium Density Residential development, except for property to the west, which is designated for High Density Residential development. The City Council already reviewed the potential impacts of higher density with enactment of Ordinance No. 1807, and determined that the higher density would not be detrimental to the health, safety, and welfare of the

community, and would be within the character of the Growth Management Act, Comprehensive Plan, and the community. The proposed rezone would allow for infill development on currently underdeveloped parcels. *Findings 5, 7, 9.*

5. **The rezone has merit and value for the community as a whole.** The City currently has few properties that are zoned R-12. The proposed rezone would allow infill development with a variety of housing types and designs, consistent with the Comprehensive Plan. The rezone would allow for development of currently underdeveloped properties at a density that complies with the Comprehensive Plan land use designation. Future development would be reviewed to ensure compliance with the current City code, including traffic and stormwater standards and requirements for setbacks, building height, lot coverage, and landscaping. *Findings 5, 7, 8, 12.*

6. **The rezone is in accordance with the Comprehensive Plan and complies with the City code.** The Comprehensive Plan designates the subject property as Medium Density Residential, providing for development at a density of eight to twelve dwelling units per acre. Surrounding property is likewise designated, except property to the west, which is designated as High Density Residential. The current zone only allows for development at a density of up to 4.5 dwelling units per acre. The proposed rezone would allow development of up to 12 dwelling units per acre, creating the opportunity for infill development with a variety of housing types, consistent with the Comprehensive Plan. Future development would be reviewed at the time of application to ensure compliance with the City code in place at that time, including traffic and stormwater standards and requirements for setbacks, building height, lot coverage, and landscaping. Future development would be conditioned to note that the property owner is responsible for removal of an existing garage that extends into the City right-of-way. The City Council may wish to address pedestrian safety concerns along Sidney Road with the current review of the City Comprehensive Plan. *Findings 5 – 10, 12, 13.*

Discussion

This is the first rezone application to be reviewed under the newly approved Hearing Examiner process in the City of Port Orchard. The Hearing Examiner system is a quasi-judicial process, with a single open record hearing on an application for change in zoning designation. This is in contrast to legislative action, such as a Comprehensive Plan amendment, with potentially multiple hearings on a land use policy proposal. The state legislature and City Council recognize the importance of an efficient process by providing for a single open record hearing under the Hearing Examiner for certain land use applications. *See Revised Code of Washington (RCW) 35.63.130; RCW 36.70B.050(2); Port Orchard Municipal Code (POMC) 16.01.021(3).*

City code authorizes the Hearing Examiner to hold an open record hearing on rezone requests that are not part of the Comprehensive Plan Amendment process. *POMC 16.01.021(3).* The City Council then reviews the Hearing Examiner's recommendation in a closed record hearing to ensure that no mistakes have been made by the Hearing Examiner. "Open record hearing" is

defined as a "hearing, conducted by the hearing examiner, that creates the City's official record through testimony and submission of evidence and information". *POMC 16.08.520*. In contrast, the closed record hearing to be held by the City Council does not allow for the submittal of new evidence or testimony. *See POMC 16.08.138*. If the City Council determines that no mistake has been committed by the Hearing Examiner, the City Council would likely approve the Hearing Examiner's recommendation. If the Council amends or rejects the findings of the Hearing Examiner, it should do so only with specific reference to exhibits or testimony in the record that support the rejection or amendment. If the Council believes a mistake was made in a conclusion, it is suggested the Council also review the underlying support for that conclusion to determine specifically how it fails to provide support. Conclusions should only be modified or rejected if the reference in support of the conclusion fails to provide substantial evidence in support of the conclusion.

In general, when a rezone application and preliminary plat are initiated in the same timeframe, it is preferable to consolidate review of the proposals. *RCW 36.70B.120*. In this case, the short plat application was withdrawn prior to City review, and only the rezone application is under review by the Hearing Examiner. The City proposed two conditions of rezone approval regarding removal of an existing non-conforming structure and compliance with R-12 zoning standards. However, when reviewing a rezone application, the Hearing Examiner does not review development proposals. Rather, the role of the Hearing Examiner is to review the rezone request to ensure compliance with the rezone criteria found in *POMC 16.25.060*. Moreover, the Applicant did not submit a specific development proposal to the Hearing Examiner for review. Therefore, it is inappropriate at this time for the Hearing Examiner to impose conditions governing site development as conditions of rezone approval. Development-related conditions are more appropriately proposed and considered during site development review.

RECOMMENDATION

Based on the above findings and conclusions, the Hearing Examiner recommends that the request to rezone property located at 2205 and 2207 Sidney Avenue, in Port Orchard, Washington from R-4.5 to R-12 be **APPROVED**.

Decided this 30th day of May 2008.


THEODORE PAUL HUNTER
Hearing Examiner