

- e. Legal Description
- f. Certification Letter, received May 21, 2008
- g. Map and list of neighboring property owners, undated
- h. Preliminary storm drainage report, dated April 24, 2008
- i. Traffic Impact Analysis
- j. SEPA checklist
- k. Title Report, received May 21, 2008
- l. Site plans (12 sheets), dated May 5, 2008
3. Property ownership verification: four Kitsap County parcel maps and property reports, searched May 22, 2008
4. Application transmittal letter, dated May 21, 2008
5. Letter of Completeness and Determination of Completeness, dated June 6, 2008
6. Affidavit of mailing and posting of Notice of Application, dated June 6, 2008
7. Comments from Jerry Arnett, received June 18, 2008
8. Response letter to Jerry Arnett from Associate Planner Tom Bonsell, dated June 25, 2008
9. SEPA Distribution – Determination of Non-Significance, dated June 25, 2008
10. Emails between Associate Planner Tom Bonsell and City Engineer Mark Dorsey dated June 2, 2008
11. Email from Associate Planner Tom Bonsell to Mark Kuhlman, dated June 2, 2008
12. Affidavit of Publication of SEPA comment period, dated June 11, 2008
13. Email from Alison O’Sullivan, Suquamish Tribe, to Ellen Ferguson, dated June 23, 2008, with Suquamish Tribe comments on Leora Park II Preliminary Plat, dated October 12, 2005
14. Comments from South Kitsap Fire and Rescue, dated June 25, 2008
15. Affidavit of mailing and posting of Notice of Public Hearing, dated June 27, 2008
16. Affidavit of publication of Determination of Non-Significance, dated June 28, 2008
17. Memorandum from Assistant City Engineer Andrea Archer, dated July 1, 2008
18. Affidavit of publication of Notice of Public Hearing, dated July 2, 2008
19. Staff report for hearing date of July 17, 2008
20. Comments from Pastor Jamie Greening, First Baptist Church, received July 7, 2008
21. Memorandum from Jennifer Haro, Associate Planner, City of Port Orchard, to File, dated July 16, 2008
22. Zoning map and legend, found at http://cityofportorchard.us/docs/planning/Zoning_hr.pdf

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 R4.5 – 4.5 Dwelling Units per Net Useable Acre to R12 – 12.0 Units per Net Usable Acre for property located at on the east side of Sydney Avenue, approximately 700 feet south of the intersection of Sidney

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Avenue and Goldenrod Street, in Port Orchard, Washington.¹ The Applicant submitted a separate preliminary plat application (No. SUBDIV 08-02) to subdivide the subject property into 18 single-family residential lots concurrently with the rezone application. *Exhibit 2.b; Exhibit 2.d; Exhibit 19, Staff Report, page 2.*

2. The City of Port Orchard (City) received the rezone application on May 20, 2008. *Exhibit 5.* The City transmitted notice of the application to relevant agencies on May 22, 2008. *Exhibit 4.* The City determined that the rezone application was complete on June 6, 2008. *Exhibit 5.* On June 6, 2008, the City mailed notice of the application to owners of property surrounding the subject property and posted notice on the subject property. On June 11, 2008, the City published notice of the application in the *Port Orchard Independent*. *Exhibit 6.* On June 27, 2008, the City mailed notice of the open record hearing associated with the application to surrounding property holders in accordance with City ordinances. The City published notice of the hearing in the *Port Orchard Independent* on July 2, 2008. *Exhibit 15.*
3. The City acted as lead agency to analyze the environmental impacts for both the proposed rezone and a concurrently submitted preliminary plat application (No. SUBDIV 08-02), as required by the State Environmental Policy Act (SEPA).² The City determined that with compliance with federal, state, and local regulations, the rezone and preliminary plat proposals together would not have a probable significant adverse impact on the environment, and issued a Determination of Nonsignificance (DNS) on June 28, 2008. The City issued the DNS pursuant to an optional process combining the comment period with the notice of application.³ The City published notice of the DNS in the *Port Orchard Independent* on June 28, 2008. The optional DNS comment period ended July 14, 2008. No appeals of the DNS were filed. *Exhibit 9; Exhibit 16; Exhibit 19, Staff Report, page 5.*
4. The rezone application states that the current zoning classification of Parcel No. 022301-2-081-2004 is Residential Mobile Home Park, and the current zoning classification of the

¹ The subject property is identified by tax parcel numbers 022301-2-081-2004; 022301-2-082-2003; 022301-2-083-2002; 022301-2-137-2008. *Exhibit 2.b; Exhibit 19, Staff Report, page 2.* A legal description is included with the rezone application. *Exhibit 2.e.*

² The Washington Supreme Court endorsed this combined threshold review process when it found impacts of a specific development proposal can be a useful yardstick to measure rezone impacts. *See Citizens Alliance v. Auburn*, 126 Wn.2d 356, 365 (1995). Combined threshold review is consistent with Port Orchard Municipal Code (POMC) 16.06.110; is a more efficient use of City, applicant and public resources; and promotes SEPA policies. *See* 126 Wn.2d at 366 (“The SEPA rules underscore flexibility and gauge the level of detail according to the proposal at issue”).

³ 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.*

remaining parcels that make up the subject property is R4.5 (Residential zone single family detached).⁴ *Exhibit 2.b*. The surrounding property to the north, east, and south is zoned R4.5 and contains single-family residences. Properties to the west are zoned High Density Residential (R20) and contains a church and multi-family residences. *Exhibit 19, Staff Report, page 2*.

5. The R4.5 zone allows for development at a density of up to 4.5 dwelling units per net usable acre.⁵ 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 R4.5 zone requires a minimum lot size of 6,000 square feet; maximum lot coverage of 45 percent; and minimum landscaping site coverage of 55 percent. *POMC 16.40.025 Table 9*.
6. The subject property is currently designated Medium Density Residential by the City Comprehensive Plan, as is surrounding property to the north, east, and south. Property to the west is designated High Density Residential. *Exhibit 2.b; Exhibit 19, Staff Report, page 2*.
7. The City Council enacted the Medium Density Residential (MDR) Comprehensive Plan designation in 2000 through City Ordinance No. 1807.⁶ Pursuant to the Ordinance, the MDR designation allows for housing density of 8 dwelling units per net usable acre, and potentially up to 12 dwelling units per net usable acre. The ordinance requires that areas designated MDR contain adequate water, sewer, and drainage services, among other requirements. MDR areas are intended to allow infill and redevelopment with strict design guidelines, intended to be pedestrian oriented, and intended to be compatible with existing development. *Ordinance No. 1807*.

⁴ James Weaver, City Planning Director, testified that there is no Residential Mobile Home Park zoning classification set forth within the City Code or within the City Comprehensive Plan, and that the Residential Mobile Home Park classification is known as “holdover zoning”, equivalent to the R-4.5 zoning classification that does appear within the City Code. *Testimony of Mr. Weaver*. Mark Kuhlman, P.E., testified for the Applicant that he assumed the current zoning classification for the subject property is R-4.5, because all property surrounding the subject property is also zoned R-4.5. *Testimony of Mr. Kuhlman*.

⁵ 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*.

⁶ 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 proposed to be within the character of the Growth Management Act, Comprehensive Plan, and the community.” *Ordinance No. 1807, Attachment A*.

8. Development of single-family residences within the R12 zoning district is permitted at a density of up to 12 dwelling units per net usable acre. *POMC 16.30.080 Land Use Table*. The primary purposes of the R12 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 R12 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 R12 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 R12 zone requires a minimum lot size of 3,630 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 R4.5 and R12 zoning districts. *POMC 16.40.025 Table 9*.
9. The site plan map submitted by the Applicant showing existing conditions within the subject property depicts four mobile homes located on the subject property. Mark Kuhlman, P.E., testified for the Applicant that the subject property currently contains only three mobile homes, one of which is owned by the owner of the subject property. Mr. Kuhlman testified that the subject property is not a mobile home park, because individual homes are not currently placed on individual lots within the subject property.⁷ The City staff report states that the existing mobile homes on the subject property would be removed prior to the development of the property. Other than the mobile homes present on the property, the subject property is pastureland and relatively flat. The steepest slope present on the property measures approximately 13 percent grade. Significant trees lie in or adjacent to the Sidney Avenue right-of-way, located adjacent to the west of the subject property.⁸ *Exhibit 2.1; Exhibit 19, Staff Report, page 2; Testimony of Mr. Kuhlman.*

⁷ RCW 59.30.020(9) defines “mobile home park” as “any real property that is rented or held out for rent to others for the placement of two or more mobile homes, manufactured homes, park models, or recreational vehicles for the primary purpose of production of income, except where the real property is rented or held out for rent for seasonal recreational purposes only and is not used for year-round occupancy.” *RCW 59.30.020(9)*. RCW 35.21.684, RCW 35A.21.312, and RCW 36.01.225, as amended, govern placement and location of manufactured homes. RCW Chapter 59.20, the Manufactured/mobile home landlord-tenant act, applies to rental agreements regarding mobile home lots, cooperatives, or subdivisions. *RCW 59.20.040*.

⁸ POMC 16.08.712 defines “significant tree” as “an existing tree which is: 1) any healthy tree with a diameter at breast height (DBH) of 18 inches or greater with adequate live crown to maintain tree vigor and aesthetics; or 2) any tree identified as providing wildlife habitat for threatened or endangered species; or 3) any tree of historical or cultural significance as defined within the comprehensive plan.” *POMC 16.08.712*.

10. The City received four comments on the proposed rezone and associated development of the subject property. Alison O’Sullivan, Biologist for the Suquamish Tribe, submitted comments that the proposed project is within the usual and accustomed fishing area of the Suquamish Tribe, and expressed concern regarding the potential for water quality impacts to Blackjack Creek and Sinclair Inlet and cumulative impacts from the proposed site development and other subdivisions in the area. The South Kitsap Fire and Rescue’s Prevention and Education Office submitted comments concerning the lack of fire hydrants indicated on the site plan for associated development; access for fire department vehicles; and the need for an on-site fire flow test. Jerry Arnett submitted comments in response to the City’s Determination of Nonsignificance (DNS), stating that increased density on the subject property may alter groundwater drainage patterns, potentially causing undesirable flooding; inquiring about water supply for development on the subject property; inquiring about impervious surface limits upon associated development; and inquiring if associated development would destabilize slopes in Blackjack Canyon. Pastor Jaime Greening, First Baptist Church, 216 Prospect Street, Port Orchard, submitted a letter expressing support for the proposed rezone as a positive and welcome change to the neighborhood. *Exhibit 7; Exhibit 13; Exhibit 14; Exhibit 20.*
11. No critical areas have been identified on the property. The project SEPA checklist states that no groundwater would be withdrawn as part of proposed development, nor would water be discharged to groundwater. Blackjack Creek and Blackjack Canyon are located approximately 1,300 feet to the east of the subject property. The Applicant would submit a temporary erosion and sedimentation control plan for City approval prior to beginning construction, which would require the use of Best Management Practices to control erosion throughout construction. *Exhibit 2.j; Exhibit 19, Staff Report, page 7.*
12. With development of the plat associated with this rezone request, houses, driveways and other impervious surface would cover approximately 54 percent of the subject property. Development associated with the proposed rezone would incorporate stormwater control in compliance with the Department of Ecology Stormwater Management Manual and City Code in effect at the time of preliminary plat application. The development associated with the proposed rezone would manage and treat stormwater runoff in an on-site detention pond and provide for further treatment after exit from the detention pond in an off-site bioswale located within a utility easement on the neighboring Gazebo Plat to the northeast. Following treatment in the pond and bioswale, stormwater runoff would be release to an existing storm drainage system within the Gazebo Plat consisting of closed storm drainage pipe and open ditch conveyance, connecting to a storm drainage system containing a regional detention pond in the neighboring Flower Meadows Plat. Finally, treated stormwater would be released from the detention pond to an HDPE outfall flowing to Blackjack Creek, which flows north two miles to Sinclair Inlet. Mark Dorsey, City Public Works Director, testified to propose that any approval of the associated plat application include a condition that the plat storm drainage system shall contain sufficient

capacity to manage stormwater runoff generated by the development. *Exhibit 2.h; Exhibit 2.j; Exhibit 19, Staff Report, pages 7 and 9; Testimony of Mr. Dorsey.*

13. Jerry Arnett testified at the open record hearing in opposition to the proposed rezone, testifying that the rezone would result in too much development upon the subject 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 consistent with the Comprehensive Plan designation. *Exhibit 2.c; Testimony of Mr. Arnett; Testimony of Mr. Kuhlman.*
14. The City of Port Orchard would provide water and sewer service to the property. Puget Sound Energy Services would provide electric service to the property. City staff proposed that any approval of the associated plat application include a condition that the development shall contain fire hydrants; that fire hydrants shall be depicted on site plan maps; that the Applicant or developer shall perform an on-site fire flow test; and that site development shall provide fire department vehicle access. *Exhibit 2.j; Exhibit 19, Staff Report, pages 7 – 8.*

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).*⁹

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

⁹ 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.

- 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).

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 Council enacted the Medium Density Residential (MDR) land use designation to allow development at 8 to 12 dwelling units per acre. After consideration of public input and planning goals, the City Council determined that increased density associated with enacting the Medium Density Residential (MDR) land use designation would be consistent with the community character. The City provided appropriate notice of the rezone application and associated open record hearing. The proposed rezone would allow for development with a variety of housing types and densities, in compliance with the property's Comprehensive Plan land use designation. The City analyzed the potential environmental impacts of the proposed rezone together with the concurrent plat application, and determined that together, the rezone and preliminary plat proposals would not result in probable significant adverse environmental impacts. The City issued a Determination of Nonsignificance (DNS) on June 28, 2008. There was no appeal of the DNS. Any future

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development of the property would be reviewed for compliance with City requirements, including transportation, fire safety, public utilities, erosion control, and stormwater drainage standards. *Findings 1 – 4, 7, 8.*

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. *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). 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 by the City Comprehensive Plan, which allows for housing density of 8 dwelling units per net usable acre, and potentially up to 12 dwelling units per net usable acre. 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, at a development density consistent with the Comprehensive Plan. *Findings 1, 4, 7, 8, 13, 14.*
3. **The subject property is suitable for development.** The subject property currently contains single-wide mobile homes, which would be removed prior to proposed development. The City of Port Orchard would provide water and sewer service to the property. Puget Sound Energy Services would provide electrical service. Vehicles would access the subject property through Sidney Road, located adjacent to the west of the subject property. The subject property contains no critical areas, and is relatively flat. Future development of the property would be reviewed for consistency with City development requirements, including zoning, transportation, fire safety, erosion control, and stormwater drainage standards. *Findings 3, 8, 9, 11, 12, 14.*
4. **The rezone will not be materially detrimental to or incompatible with uses and properties in the immediate vicinity.** Vehicles would access the property through Sidney Road, located adjacent to the west of the subject property. Surrounding properties are designated Medium Density Residential by the City Comprehensive Plan, except for property to the west, which is designated High Density Residential. Surrounding property contains single-family residential development, a church, and multi-family 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. Existing mobile homes on the subject property would be removed prior to site development. *Findings 4, 6, 7, 9.*

5. **The rezone has merit and value for the community as a whole.** 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 the subject property at a density allowed under the Medium Density Residential (MDR) Comprehensive Plan land use designation for the property. Future development would be reviewed to ensure compliance with the current City code, including zoning, transportation, fire safety, erosion control, and stormwater drainage standards. *Findings 1, 4, 6 – 8, 11 - 14.*

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 similarly designated, except property to the west, which is designated as High Density Residential. The subject property’s current zoning classification allows for a development 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 land use designation of the subject property. Future development would be reviewed at the time of application to ensure compliance with the City code in place at that time, including zoning, transportation, fire safety, erosion control, and stormwater drainage standards. *Findings 1, 4 – 8, 11 – 14.*

Discussion

This is the first concurrent rezone and preliminary plat application to be reviewed under the newly- adopted Hearing Examiner process in the City of Port Orchard. The Hearing Examiner review process was established by the City Council under POMC Chapter 2.76 (effective December 19, 2007).

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.* 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. 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 on the east side of Sidney Avenue, approximately 700 feet south of the intersection of Sidney Avenue and Goldenrod Street, in Port Orchard, Washington, be **APPROVED**.

Decided this 10th day of August 2008.


THEODORE PAUL HUNTER
Hearing Examiner