

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

In the Matter of the Application of)	No. R-1172
)	
Kevin Decker)	Poplar Heights
)	Birth & Wellness Center
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Rezone</u>)	AND RECOMMENDATION

SUMMARY OF RECOMMENDATION

The Hearing Examiner recommends that the request for a rezone from Residential 4.5 to Residential 20 for property located at 215 Poplar Street, in Port Orchard, Washington, be **APPROVED**, with one condition.

SUMMARY OF RECORD

Request:

Kevin Decker requests a rezone from Residential 4.5 to Residential 20 in order to locate a birth and wellness center on the site. The property subject to the request is located at 215 Poplar Street, in Port Orchard, Washington.

Hearing Date:

The Hearing Examiner held an open record hearing on the request on September 18, 2008.

Testimony:

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

- Tom Bonsell, City Planner
- James Weaver, City Planning Director
- Mark Dorsey, City Public Works Director
- Kevin Decker, Applicant
- Louise Wales
- Cammy Mills
- Dr. Joella Pettigrew
- Heather Kraetsch
- Alex Gainsbrugh

*Findings, Conclusions, and Recommendation
City of Port Orchard Hearing Examiner
Poplar Heights Birth & Wellness Center, No. R-1172*

Exhibits:

The following exhibits were admitted into the record:

1. Pre-application meeting letter, dated March 28, 2008
2. Application packet, received August 1, 2008, with the following attachments:
 - A. Rezone Application
 - B. Project Narrative, Site Map, and Legal Description
 - C. List of Neighboring Property Owners and Certification Statement
 - D. By-laws of the Poplar Heights Foundation
 - E. Certificate of Formation of Poplar Heights Birth and Wellness Center
 - F. Environmental Checklist
 - G. City of Port Orchard Business License application
 - H. Report on Low Impact Development Technologies
 - I. Permeable Interlocking Concrete Pavement guide
3. Kitsap County Parcel Map and Property Report, dated August 4, 2008
4. Email from Tom Bonsell, Associate Planner, to Kevin, sent August 4, 2008
5. Application Transmittal letter request for review, dated August 4, 2008
6. Letter of Completeness and Determination of Completeness, issued August 5, 2008
7. Notice of application/SEPA comment period with affidavit of mailing to neighboring property owners and posting property, dated August 8, 2008
8. SEPA Distribution notice of application/SEPA comment period and checklist, dated August 8, 2008
9. Notice of application/SEPA comment period with affidavit of mailing to complete list of neighboring property owners and posting (second mailing and posting due to incomplete list submitted with application), dated August 13, 2008
10. Affidavit of Publication of Notice of Application and SEPA Comment period, dated August 13, 2008
11. Comments from Assistant City Engineer Andrea Archer, received August 26, 2008
12. Comments from Loren & Karen T. Olsen, received August 27, 2008
13. Mitigated Determination of Nonsignificance (MDNS), issued August 28, 2008
14. Notice of Public Hearing with affidavit of publication, dated September 6, 2008
15. E-mails between Kevin Decker and Tom Bonsell
16. Site maps for Poplar Heights Birth & Wellness Center (2 sheets), dated August 1, 2008
17. Aerial Map
18. Staff Report prepared for September 18, 2008 open record hearing
- 19.A. Letter from Melissa Hudson, to Ted Hunter, received September 18, 2008
- 19.B. Letter from Jennifer Baxter, received September 18, 2008
20. Poplar Heights Child Birth Center narrative, received September 18, 2008

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

Findings, Conclusions, and Recommendation
City of Port Orchard Hearing Examiner
Poplar Heights Birth & Wellness Center, No. R-1172

FINDINGS

1. Kevin Decker (Applicant) requests a rezone from Residential 4.5 (R4.5) to Residential 20 (R20) in order to locate a birth and wellness center on the site. The property subject to the request is located at 215 Poplar Street, in Port Orchard, Washington.¹ *Exhibit 2.A.; Exhibit 2.B; Exhibit 18, Staff Report, page 1.*
2. The City of Port Orchard (City) received the rezone application on August 1, 2008. The City determined that the application was complete on August 5, 2008. *Exhibit 6.* The City transmitted notice of the application and associated threshold environmental determination to relevant agencies on August 7, 2008. *Exhibit 5.* On August 8, 2008, the City posted notice of the application and SEPA comment period on the subject property, and mailed notice to owners of property surrounding the subject property. *Exhibit 7.* A second notice was posted and mailed to the complete list of neighboring property owners on August 13, 2008. *Exhibit 9.* On August 13, 2008, the City published notice of the application in the *Port Orchard Independent*. *Exhibit 10.* The notice of the application mailed to surrounding property owners and posted on-site included notice of the open record hearing associated with the application. *Exhibit 9.* The City published notice of the hearing in the *Port Orchard Independent* on September 6, 2008. *Exhibit 14.*
3. The City acted as lead agency to analyze the environmental impacts of the proposed rezone, as required by the State Environmental Policy Act (SEPA). The City determined that, with conditions, the proposed rezone would not have a probable significant adverse impact on the environment, and issued a Mitigated Determination of Nonsignificance (MDNS) on August 29, 2008.² The seven MDNS conditions require that the Applicant obtain a business license, certificate of occupancy, and approved rezone of the property prior to commencement of birthing activities; comply with City code requirements for clinics; limit building occupancy to 32 people; limit classes to no more than four days per week, between the hours of 7:00 AM and 10:00 PM; and ensure that no activities associated with the birthing center impinge on the general neighborhood single-family residential uses. The City issued the MDNS pursuant to an optional process combining the comment period with the notice of application.³ The optional MDNS comment period ended August 27, 2008. The City did not receive any appeals of the MDNS. *Exhibit 9; Exhibit 10; Exhibit 13; Exhibit 18, Staff Report, pages 1 and 5.*

¹ The subject property is identified by tax parcel number 352401-3-086-2007. *Exhibit 2.B; Exhibit 18, Staff Report, page 1.* A legal description is included with the rezone application. *Exhibit 2.B.*

² The MDNS was signed by James Weaver, City Planning Director and SEPA Responsible Official, on August 28, 2008. The staff report states that the MDNS was issued August 28, 2008; however, the MDNS states that it is issued "August 29, 2008." *Exhibit 13; Exhibit 18, Staff Report, pages 1 and 5.*

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.*

4. The subject property is currently zoned R4.5, as are surrounding properties to the north, east, and west. Property to the south is zoned R8. The City's Comprehensive Plan designates the subject property as High Density Residential (HDR). Properties to the north and east are designated Public and Community Spaces. Properties to the south and west are designated as Medium Density Residential (MDR). The subject property is currently developed with a single-family residence. *Exhibit 2.A; Exhibit 18, Staff Report, page 1.*
5. The R4.5 zone allows for development at a density of up to 4.5 dwelling units per net usable acre.⁴ 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.* The City staff report states that the proposed use is classified as “office/patient clinic.” This use is not permitted within the R4.5, R8, or R12 zones. *POMC 16.30.050, Table 2; Exhibit 18, Staff Report, page 5.*
6. The R20 zone allows development at a density of up to 20 dwelling units per usable acre. The purposes of the R20 zone are to “(a) allow high density residential development in urban locations where public services and facilities are most available; (b) implement comprehensive plan goals and policies for housing quality, diversity, and affordability, and (c) efficiently use residential land, public services, and energy.” *POMC 16.13.140(1).* The R20 zone purposes are accomplished by providing a mix of higher density housing types, and allowing only such accessory and complementary nonresidential uses as are compatible with multiple family residential communities. *POMC 16.13.140(2).* The R20 zone is appropriate in areas that have been designated by the Comprehensive Plan and are served by adequate public sewers, water supply, roads, and other needed public facilities and services; and where surrounding lands have been developed for commercial, business, employment, public facility, or other nonresidential but higher intensity activities, while offering greenbelt, recreation, pedestrian, and transit services most supportive of higher density living arrangements. *POMC 16.13.140(3).* The R20 zone mandates a minimum lots size of 2,178 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 R20 zoning districts. *POMC 16.40.025 Table 9.* The proposed birthing center, classified as

⁴ 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.*

“office/patient clinic” is a permitted use in the R20 zone. *POMC 16.30.050, Table 2; Exhibit 18, Staff Report, page 5.*

7. City Planner Tom Bonsell testified that zoning classifications should be consistent with Comprehensive Plan designations, as required by Chapter 36.70A Revised Code of Washington (RCW). Mr. Bonsell testified that the City is currently updating the 1995 Comprehensive Plan. He testified that as part of the Comprehensive Plan, the Council is considering a general rezone of the area to R20. Mr. Bonsell explained that the rezone request is a non-project rezone, and that the specific development proposal will be reviewed separately with the building permit and certificate of occupancy review. *Testimony of Mr. Bonsell.*
8. According to the 2008 Draft Comprehensive Plan, the HDR designation allows for housing density of up to 20 dwelling units per net usable acre. The purposes of the HDR designation include the provision of high density residential development and the efficient use of residential land, public services, and energy. The HDR designation allows for development of single-family and multi-family dwellings, as well as for traditional uses such as parks, schools, and churches. *2008 Draft Comprehensive Plan Land Use Element.* The City staff report states that the subject property and other properties in the area are underdeveloped for their Comprehensive Plan designations. According to the staff report, when the City Council enacted Ordinance No. 1916, the Council determined that uses such as the proposed birth center “are compatible with high density residential uses and will make services more convenient to residents of the R-20 zone.” *Exhibit 18, Staff Report, page 3.*
9. Loren and Karen Olsen sent a letter to the City, dated August 26, 2008, expressing concern about the proposed birth center and rezone request. The Olsens expressed concern that the proposed use could create traffic issues, increased stormwater runoff, and a loss in value for surrounding properties. The Olsens questioned whether there is a need for additional R20-zoned properties in the City. *Exhibit 12.*
10. James Weaver, City Planning Director, testified that the MDNS conditions would mitigate impacts arising from the proposed rezone and development. He further testified that home occupation permit regulations would apply to the proposed birth center. Mark Dorsey, City Public Works Director, testified that drainage and parking issues would be addressed during building permit and certificate of occupancy reviews. In an email to Mr. Bonsell, Andrea Archer, Assistant City Engineer, stated that the Public Works Department would perform a complete review of the proposed use, including review of water and sewer connections and parking conditions, when the owner requests a certificate of occupancy. *Exhibit 11; Testimony of Mr. Weaver; Testimony of Mr. Dorsey.*

11. The City also received two letters supporting the proposed birth center and rezone request, submitted at the open record hearing on September 18, 2008. In addition, members of the public testified to support the requested rezone and proposed birth center. Louise Wales testified that there is currently a shortage of places to birth babies within a reasonable distance from Port Orchard. Cammy Mills testified that expectant mothers must now travel to Tacoma, a trip of 30 to 60 minutes, depending on the traffic. Dr. Joella Pettigrew testified that the proposed center would be good for practitioners and would provide education to the community. Heather Kraetsch and Alex Gainsbrugh also testified to voice their support of the proposed birth center and the rezone request. *Exhibit 19.A; Exhibit 19.B; Testimony of Ms. Wales; Testimony of Ms. Mills; Testimony of Dr. Pettigrew; Testimony of Ms. Kraetsch; Testimony of Ms. Gainsbrugh.*
12. Poplar Street provides the sole access to the property. According to the SEPA checklist, public transit is available within a few minutes walk from the site. The property is currently served by electricity, water, natural gas, garbage service, and sanitary sewer service. *Exhibit 2.F; Exhibit 8.*

CONCLUSIONS

Jurisdiction

The City of Port Orchard Hearing Examiner has jurisdiction to hold an open record 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).*⁵

Criteria for Review

The City Council may approve, approve with modifications, or deny an application for a reclassification of property 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

⁵ 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). *City Ordinance No. 047-07.* POMC Chapter 2.76 has not yet been codified and is not currently available on the City website.

- (7) The reclassification complies with all other applicable criteria and standards of the Port Orchard Municipal Code.
POMC 16.25.060.

In addition, 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 when the High Density Residential land use designation was approved to allow development up to 20 dwelling units per acre. After consideration of public input and planning goals, the City Council determined that the HDR designation would be consistent with the community character. The proposed rezone of the subject property from R4.5 to R20 would create consistency between the property's zoning classification and Comprehensive Plan designation. The City provided appropriate notice of the rezone application and associated open record hearing. The City analyzed the potential environmental impacts of the proposed rezone and determined that granting the rezone would not result in probable significant adverse environmental impacts. The City issued a Mitigated Determination of Nonsignificance (MDNS) on August 29, 2008. There was no appeal of the MDNS. Any future use of the property would be reviewed for compliance with City requirements during the building permit and certificate of occupancy reviews. *Findings 1 – 4, 6 – 8, 10.*
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. The subject property is currently designated High Density Residential in the City Comprehensive Plan. The proposed rezone would ensure consistency between the property's zoning classification and HDR designation under the Comprehensive Plan. The City Council has determined that uses such as the proposed birth center are compatible with the property's HDR designation. *Findings 4 – 8.*
3. **The subject property is suitable for development.** The property is currently developed with a single-family residence. The property has access to Poplar Street, and is served by

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electricity, natural gas, garbage service, water service, and sanitary sewer service. Public transportation is available. 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 uses of the property would be reviewed for compliance with City standards during the building permit and certificate of occupancy reviews. *Findings 3, 4, 8 – 10, 12.*

4. **With a condition, the rezone will not be materially detrimental to or incompatible with uses and properties in the immediate vicinity.** The requested rezone would bring the property's zoning classification into compliance with the HDR designation under the Comprehensive Plan. The proposed use is a permitted use within the R20 zone. The City analyzed the potential environmental impacts of the proposed rezone and determined that with conditions, granting the rezone would not result in probable significant adverse environmental impacts. The City issued a Mitigated Determination of Nonsignificance on August 29, 2008. A condition of approval is necessary to ensure that the Applicant comply with the MDNS conditions to mitigate potential impacts of the proposed birth center and rezone. *Findings 3 – 8.*
5. **The rezone has merit and value for the community as a whole.** Approval of the rezone request would facilitate development of a birthing center. Expectant mothers in the City of Port Orchard currently must leave the area to birth their babies. The proposed birthing center would also provide education to the community. The proposed birthing center is a permitted use in the requested R20 zone. The proposed use would be reviewed to ensure compliance with City standards, including parking and stormwater runoff requirements, during the building permit and certificate of occupancy reviews. Approval of the rezone request would ensure that the property's zoning classification is consistent with the Comprehensive Plan designation. *Findings 1, 4 – 12.*
6. **The rezone is in accordance with the Comprehensive Plan and complies with the City code.** The City Comprehensive Plan designates the subject property as High Density Residential, providing for development at a density of up to 20 dwelling units per acre. 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 20 dwelling units per acre, bringing the property's zoning classification into compliance with the Comprehensive Plan designation. Future use of the property would be reviewed during the building permit and certificate of occupancy reviews to ensure compliance with City code, including parking and stormwater runoff standards. *Findings 4 – 12.*

Discussion

This rezone application is reviewed under the recently 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, which 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.

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 permit review.

RECOMMENDATION

Based on the above findings and conclusions, the Hearing Examiner recommends that the request for a rezone from Residential 4.5 to Residential 20 for property located at 215 Poplar Street, in Port Orchard, Washington, be **APPROVED**, with the recognition that business uses for the site must comply with the SEPA Mitigated Determination of Nonsignificance issued August 29, 2008 (Exhibit 13).

Recommended this 30th day of September 2008.


THEODORE PAUL HUNTER
Hearing Examiner