

- D. Legal Descriptions
- E. Project Narrative
- F. Map and Mailing List of Neighboring Property Owners
- G. Preliminary Storm Drainage Report for Williams Plat
- H. Site Plan, Storm Drainage Plan, Offsite Storm Drainage Plan and Pond Sections
- 2. Letter of Completeness, Determination of Completeness, dated August 12, 2008
- 3. Affidavit of Mailing and Posting of Notice of Application/Public Hearing, dated August 13, 2008
- 4. Application Transmittal Letter, Request for Review
- 5. Affidavit of Publication of Notice of Application/Public Hearing, dated August 14, 2008
- 6. City of Port Orchard Resolution No. 1971
- 7. South Kitsap Fire & Rescue comments, dated June 25, 2008
- 8. Comments from Assistant City Engineer Andrea Archer, dated July 1, 2008
- 9. Comments from Assistant City Engineer Andrea Archer, dated August 18, 2008
- 10. Aerial Map, dated September 9, 2008
- 11. Staff Report prepared for September 18, 2008 public hearing
- 12. Memo South Kitsap Fire & Rescue, revised September 23, 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 variance from City code standards prohibiting private roads in subdivisions and requiring that a dead-end road culminate in a cul-de-sac.¹ The property subject to the request is 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.² *Exhibit 1.A; Exhibit 1.E; Exhibit 11, Staff Report, page 1.*
2. The City of Port Orchard (City) received the variance application on August 8, 2008. *Exhibit 1.A.* The City determined that the application was complete on August 12, 2008. *Exhibit 2.* The City transmitted notice of the application to relevant agencies on August 14, 2008. *Exhibit 4.* On August 16, 2008, the City posted notice of the application and associated open record hearing on-site and mailed notice to owners of property

¹ The Applicant also submitted separate applications to subdivide the property into 18 single-family lots (No. SUBDIV 08-02) and to rezone the property from R4.5 to R12 (No. R-1171). *See Hearing Examiner Findings, Conclusions, and Decision, Williams Plat No. SUBDIV 08-02; Hearing Examiner Findings, Conclusions, and Recommendation, Williams Rezone No. R-1171.*

² 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 1.C; Exhibit 1.D; Exhibit 1.E; Exhibit 11, Staff Report, page 1.* A legal description is included with the variance application. *Exhibit 1.C.*

surrounding the subject property. *Exhibit 3*. The City published notice of the application and open record hearing in the *Port Orchard Independent* on August 16, 2008. *Exhibit 5*.

3. The City staff report states that the variance request is exempt from environmental review requirements under the State Environmental Policy Act (SEPA), pursuant to Washington Administrative Code (WAC) 197-11-800.³ *Exhibit 11, Staff Report, page 8*.
4. 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 11, Staff Report, page 1*.
5. The City Council enacted the Medium Density Residential (MDR) Comprehensive Plan designation in 2000 through City Ordinance No. 1807.⁴ Pursuant to the Ordinance, the MDR 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 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. *City Ordinance No. 1807*.
6. The property is zoned R12. Surrounding properties to the north, south, and west are zoned R8. Property to the east is zoned CF. *Exhibit 11, Staff Report, page 1*. The R12 zone allows development at a density of up to 12 dwelling units per net usable acre. 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

³ WAC 197-11-800(6) provides that certain minor land use decisions are categorically exempt from the SEPA review process, including “(b) Granting of variances based on special circumstances, not including economic hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use or density.” *WAC 197-11-800(6)(b)*. However, the City analyzed the environmental impacts of the preliminary plat and rezone request for the subject property, and issued a Determination of Nonsignificance on June 28, 2008. *See Hearing Examiner Findings, Conclusions, and Decision, Williams Plat No. SUBDIV 08-02; Hearing Examiner Findings, Conclusions, and Recommendation, Williams Rezone No. R-1171*.

⁴ The Ordinance states that the land use designations “have been developed as a result of extensive public participation and planning goals.” *City 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.” *City Ordinance No. 1807, Attachment A*.

communities. *POMC 16.13.130(2)*. The R12 zone mandates a minimum lot size of 3,630 square feet; maximum lot coverage of 85 percent; and minimum landscaping site coverage of 15 percent. *POMC 16.40.025 Table 9*.

7. Prior to submittal of the variance application, the Applicant requested a preliminary plat to subdivide the subject property. The preliminary plat contained proposed conditions of approval requiring that all streets within the plat be dedicated to the City and constructed to City standards, and requiring that dead-end streets be constructed as cul-de-sacs. The Applicant opposed these conditions at the preliminary plat open record hearing. City staff testified that the Applicant could obtain a variance from the street requirements. On August 11, 2008, the Hearing Examiner approved the preliminary plat application, including the following conditions of approval:

39. At the time of Site Development Permit application, the Applicant/developer shall submit drawings revising private road Tract B to include a right of way in compliance with City ordinances. The Applicant/developer may request a variance from City private road standards in constructing private road Tract B.
40. Per Port Orchard Municipal Code Section 16.55.030, dead end streets shall end in cul-de-sacs, unless a variance is requested by the Applicant/developer and granted in accord with City ordinances.

Hearing Examiner Findings, Conclusions, and Decision, Williams Plat No. SUBDIV 08-02; Exhibit 11, Staff Report, page 2.

8. As proposed by the Applicant, the plat features Public Road A, extending east from Sidney Avenue and dead-ending at the eastern property border; and Private Road B, which extends north from Public Road A, and dead-ends south of the stormwater tract. Private Road B would serve proposed Lots 2 and 8 and the stormwater tract. *Exhibit 1.A; Exhibit 1.E; Exhibit 1.H*
9. Port Orchard Municipal Code (POMC) 16.55.030(1)(b)(iii) provides that:

Dead-end streets shall be used on access streets only and shall terminate in a cul-de-sac. Streets which dead-end and which would normally be continued if the adjacent property were developed, should be shown as temporary turnarounds. The land beyond the normal right-of-way for such streets shall revert to the abutting property owners when the street is continued.

POMC 16.55.030(1)(b)(iii).

10. The Applicant asserts that application of the street standards regarding dead-ends and private streets would reduce the available lot size, result in irregular lot shapes, increase the amount of impervious surface on the property, create additional maintenance costs for the City, and increase the cost of development and result in less affordable housing. The

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Applicant asserts that the shape of the property and the location of the stormwater facilities and surrounding development restrict the Applicant's ability to construct the streets to City standards. The Applicant notes that the proposed private road would only serve two lots. In the Project Narrative, the Applicant points out that other subdivisions in the area feature hammerhead turn-arounds rather than cul-de-sacs. The Applicant states that the proposed hammerhead and private street would provide pedestrian accessibility and would comply with the fire code. The private street would be developed to City private street standards. *Exhibit 1.E; Exhibit 1.H; Exhibit 11, Staff Report, pages 3 – 7.*

11. The City staff report generally concurs with the Applicant's analysis. The City states in the staff report that the Applicant is proposing development on property that does not fit easily into a street grid pattern. The City notes that although other subdivisions may have avoided application of the City street development standards in the past, all future developments shall be reviewed for compliance with City standards, and variances shall be required for any deviation from the standards. *Exhibit 11, Staff Report, pages 3 – 8.*
12. South Kitsap Fire and Rescue approved the proposed hammerhead turn-around and private street in a memo dated revised September 23, 2008. The memo states that fire access appears adequate, and requests that language be added indicating that the private road shall serve only proposed Lots 2 and 8, with access to Lots 7 and 9 from a public road only. The memo states that if more than two residences are served by the private road, then all residences shall be required to include a fire sprinkler system, or the private road must be converted to a public road. The memo also specifies width and turning radius requirements for fire access roads. *Exhibit 12.*
13. City Planner Tom Bonsell testified that the variance request meets all variance criteria. City Public Works Director Mark Dorsey testified that with the variance, the proposed streets would meet City standards. The City recommended approval of the variance request, with a proposed condition of approval requiring conformance with all conditions of the preliminary plat as modified by the variance. Applicant Representative Kyle Kettel testified that the Applicant agrees with the staff report. *Exhibit 11, Staff Report, pages 3 – 9; Testimony of Mr. Bonsell; Testimony of Mr. Dorsey; Testimony of Mr. Kettel.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to conduct an open record hearing on a variance request, and to grant, grant with conditions, or deny the application based on evidence in the record. *Port*

*Orchard Municipal Code (POMC) 2.76.080; POMC 2.76.100; POMC 2.76.110; POMC 16.35.150.*⁵

Criteria for Review

Variations shall be granted only in cases where the particular property, because of special circumstances applicable to the property, is deprived of privileges commonly enjoyed by other properties in the same vicinity and zone and where the variance will remedy the disparity in privilege. Before a variance shall be granted, the following requirements shall be met:

1. The strict enforcement of the provisions of this title create an unnecessary hardship to the property owner;
2. The variance is necessary because of the unique size, shape, topography, or location of the subject property;
3. The subject property is deprived, by provisions of this title, of rights and privileges enjoyed by other properties in the vicinity and under an identical zone;
4. The need for the variance is not the result of deliberate actions of the applicant or property owner;
5. The variance does not create health and safety hazards;
6. The variance does not relieve an applicant from any of the procedural provisions of this code;
7. The variance does not relieve an applicant from any standard or provision that specifically states that no variance from such standard or provision is permitted;
8. The variance does not relieve an applicant from conditions established during prior permit review or from provisions enacted pursuant to a property-specific development standard;
9. The variance does not allow establishment of a use that is not otherwise permitted in the zone in which the proposal is located;
10. The variance does not allow the creation of lots or densities that exceed the base residential density for the zone by more than 10 percent;
11. The variance is the minimum necessary to grant relief to the applicant;
12. The variance from setback or height requirements does not infringe upon or interfere with easement or covenant rights or responsibilities; and
13. The variance does not relieve an applicant from any provisions under the critical areas overlay district except for the required buffer area widths.

POMC 16.35.150.

⁵ City Council Resolution No. 1971, Section 2.5 provides that “[p]rivate roads will be limiting [sic] to serving 5 dwelling units and can only be used in short plats, unless an exemption is specifically approved by the City Council.” *City Council Resolution No. 1971, Section 2.5; Exhibit 6; Exhibit 11, Staff Report, page 8.* However, on December 19, 2007, the Port Orchard City Council passed and the Port Orchard Mayor signed City Ordinance No. 047-07, adding a new POMC Chapter 2.76 (Hearing Examiner). The adoption of this ordinance supersedes Resolution No. 1971, such that the Hearing Examiner has final authority to make decisions on variance applications.

Conclusions

1. **The strict enforcement of the provisions of this title creates an unnecessary hardship to the property owner.** The proposed private street would serve only two lots and the stormwater tract. The property is of unusual shape, and surrounding development is not conducive to a street-grid pattern. Strict enforcement of the City's dead-end street and private street requirements would force the Applicant to develop the property with irregular lot shapes and smaller lot sizes. Application of the street standards would unnecessarily increase impervious surfaces, creating additional environmental impacts. The City supports the Applicant's variance request. *Findings 1 – 14.*

2. **The variance is necessary because of the unique size, shape, topography, or location of the subject property.** The property's unusual shape, and the location of the stormwater facilities and surrounding development are not conducive to a street-grid pattern. The two proposed streets would both dead-end on the property. The City concurs with the Applicant that application of the City street standards regarding private streets and dead-ends would force the Applicant to develop the property with irregular lot shapes and smaller lot sizes, would increase the cost of development, and would create additional environmental impacts with increased impervious surfaces. *Findings 7 – 14.*

3. **The subject property is deprived, by provisions of this title, of rights and privileges enjoyed by other properties in the vicinity and under an identical zone.** The Applicant asserted that other developments in the area feature dead-end roads and private streets. The City responded that although other subdivisions may have avoided application of the City street development standards in the past, all future developments shall be reviewed for compliance with City standards, and variances shall be required for any deviation from the standards.⁶ However, strict enforcement of the City street standards would force the Applicant to develop the property with irregular lot shapes and smaller lot size, and would increase the cost of development. *Findings 7 – 14.*

4. **The need for the variance is not the result of deliberate actions of the applicant or property owner.** The shape of the property and the location of the stormwater facilities and surrounding development restrict the Applicant's ability to construct the streets to City standards regarding private streets and dead-ends. The shape of the property and location of surrounding development are not the result of the deliberate actions of the Applicant. *Findings 7, 8, 11, 12.*

5. **With conditions, the variance does not create health and safety hazards.** The proposed development would provide adequate fire and pedestrian access. The proposed private road would be constructed to City private street standards. The proposed hammerhead turn-around and private street have been approved by South Kitsap County

⁶ The Hearing Examiner notes that prior erroneous enforcement of a land use regulation does not foreclose proper exercise of authority in subsequent cases. *Dykstra v. Skagit County*, 97 Wn. App. 670, 677 (1999), review denied 140 Wn.2d 1016 (2000).

Fire & Rescue. The City provided adequate public notice of the variance request and associated open record hearing. Although the variance request is categorically exempt from environmental review under the State Environmental Policy Act (SEPA), the City reviewed the preliminary plat associated with the property for environmental impacts. Conditions of approval are necessary to ensure that the proposed private street and dead-ends are developed consistent with the South Kitsap County Fire & Rescue requirements, and that the Applicant comply with all conditions of the approved preliminary plat, as amended by this variance. *Findings 1 – 3, 7 – 14.*

6. **The variance does not relieve an applicant from any of the procedural provisions of this code.** The variance request does not involve procedural provisions of the Port Orchard Municipal Code. *Findings 7 – 10.*
7. **The variance does not relieve an applicant from any standard or provision that specifically states that no variance from such standard or provision is permitted.** The Applicant requests a variance from POMC 16.55.030(1)(b)(iii) and City Resolution No. 1971, Section 2.5, neither of which preclude variances. The City concurs that the requested variance is appropriate. *7 – 12, 14.*
8. **With conditions, the variance does not relieve an applicant from conditions established during prior permit review or from provisions enacted pursuant to a property-specific development standard.** The Hearing Examiner approved the Applicant’s preliminary plat application on August 11, 2008, with conditions requiring that the Applicant either comply with City street standards or obtain a variance. Approval of this variance would comply with the preliminary plat conditions of approval. Conditions of variance approval are necessary to ensure that the Applicant comply with all other preliminary plat conditions during plat development, as amended by this variance, and that the Applicant comply with the provisions of the South Kitsap County Fire & Rescue memo revised September 23, 2008. *Findings 7, 12 – 14.*
9. **The variance does not allow establishment of a use that is not otherwise permitted in the zone in which the proposal is located.** The requested variance involves deviation from City street standards regarding private streets and dead-end streets. The requested variance does not involve any change in use. *Findings 7 – 10.*
10. **The variance does not allow the creation of lots or densities that exceed the base residential density for the zone by more than 10 percent.** The shape of the property and the location of the stormwater facilities and surrounding development restrict the Applicant’s ability to construct the streets to City standards regarding private streets and dead-ends. Approval of the variance will not increase the number of proposed lots or the overall density. However, the variance would facilitate development of the property with lot sizes and shapes consistent with the property’s R12 zoning classification and Medium Density Residential Comprehensive Plan designation. *Findings 4 – 7, 9 – 12.*

11. **With conditions, the variance is the minimum necessary to grant relief to the applicant.** The proposed development would provide adequate fire and pedestrian access. The proposed private street would be developed to City private street standards. South Kitsap County Fire & Rescue has approved the proposed private street and hammerhead turn-arounds. Conditions of variance approval are necessary to ensure that the Applicant complies with the conditions of preliminary plat approval, as amended by this variance, and with the provisions of the South Kitsap Fire & Rescue memo revised September 23, 2008. *Findings 7 – 14.*
12. **The variance from setback or height requirements does not infringe upon or interfere with easement or covenant rights or responsibilities.** The requested variance involves deviation from City street standards regarding private streets and dead-end streets. The requested variance does not involve setback or height requirements. *Findings 7 – 10.*
13. **The variance does not relieve an applicant from any provisions under the critical areas overlay district except for the required buffer area widths.** The requested variance involves deviation from City street standards regarding private streets and dead-end streets. The requested variance does not involve deviation from critical areas requirements. *Findings 7 – 10.*

DECISION

Based on the above findings and conclusions, the request for a variance from City code standards prohibiting private roads in subdivisions and requiring that a dead-end road culminate in a cul-de-sac, for 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, is **GRANTED**, subject to the following conditions:

1. The Applicant shall conform to all conditions of the preliminary plat except as modified by this request for variance. *See Hearing Examiner Findings, Conclusions, and Decision, Williams Plat No. SUBDIV 08-02.*
2. The Applicant shall comply with all provisions of the South Kitsap Fire & Rescue memo, revised September 23, 2008 (Exhibit 12) including the requirement that if more than two

residences are served by the private road, then all residences shall be required to include a fire sprinkler system, or the private road must be converted to a public road.

Decided this 2nd day of October 2008.


THEODORE PAUL HUNTER
Hearing Examiner