

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

In the Matter of the Application of)	No. V-1189
)	
Alex Roland)	Blackjack Creek PRD
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Variance</u>)	AND DECISION

SUMMARY OF DECISION

The request for a variance from street development standards, as set out in City Council Resolution No. 1971, to benefit property located on the east side of Sherman Avenue, approximately 1,100 feet south of the intersection of Sherman Avenue and Fireweed Lane, in Port Orchard, Washington, is **GRANTED**. Conditions of approval are necessary to mitigate specific impacts of the proposed development.

SUMMARY OF RECORD

Request:

Alex Roland, Roland & Roland Partnership, requests a variance from City Council Resolution No. 1971, regarding street development standards, to allow construction of a primary access road with a 20-foot pavement width. The property subject to the request is located on the east side of Sherman Avenue, approximately 1,100 feet south of the intersection of Sherman Avenue and Fireweed Lane, in Port Orchard, Washington.

Hearing Date:

The Hearing Examiner held an open record hearing on the request on November 20, 2008.

Testimony:

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

Tom Bonsell, City Planner
Mark Dorsey, City Engineer
Steve Pesce, Pacland, for Applicant
Robert Oliver
Don Sandefur
Pamela O'Neil-Allen

Exhibits:

The following exhibits were admitted into the record:

1. Variance application packet, received October 24, 2008, with the following attachments:

*Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Variance No. V-1189*

- A. Variance Application, signed October 17, 2008
- B. Contact Information Form, dated October 17, 2008
- C. Variance Application and Blackjack Creek Subdivision cover letter, dated October 23, 2008
- D. Blackjack Creek Preliminary Plat Project Narrative
- E. Preliminary Plat Map
- F. New Parcel Legal Descriptions
- G. Resultant Parcels with Boundary Line Adjustment
- H. Neighboring property owners mailing lists and maps, with certification statement signed October 17, 2008
2. Application Transmittal Letter, dated October 31, 2008
3. Letter of Completeness, dated October 29, 2008
4. Determination of Completeness, dated October 29, 2008
5. Notice of Application / Public Hearing
6. Affidavit of Mailing and Posting of Notice of Application/Public Hearing, dated November 4, 2008
7. South Kitsap Fire & Rescue comments, dated October 29, 2008
8. Affidavit of Publication of Notice of Application/Public Hearing
9. Aerial Maps:
 - A. Sherman Avenue area of variance proposal
 - B. Northern section of Sherman Avenue
 - C. Center section of Sherman Avenue
 - D. Southern section of Sherman Avenue
10. Staff Report prepared for November 20, 2008 hearing

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

FINDINGS

1. Alex Roland (Applicant) for Roland and Roland Partnership requests a variance from City Resolution 1971 requiring that access roads be developed with 50 feet of right-of-way, 28 feet of pavement width, and curb and gutter. The Applicant proposes improving Sherman Avenue, an existing substandard access road, to only 20 feet of pavement width. The variance request is associated with a preliminary plat/PRD application for development on property located on the east side of Sherman Avenue, approximately 1,100 feet south of the intersection of Sherman Avenue and Fireweed Lane, in Port Orchard, Washington.¹ *City Resolution 1971; Exhibit 1.A; See also Hearing Examiner Findings, Conclusions, and Decision, Blackjack Creek Plat/PRD No. SUBDIV 08-01.*

¹ The subject property is identified by Assessor's Parcel Nos. 022301-3-034-2000 and 112301-2-050-2000. A legal description of the property is included with the variance application submittal. *Exhibit 1.A; Exhibit 1.F.*

2. The City of Port Orchard (City) received the variance application on October 24, 2008. *Exhibit 1.A.* The City determined that the application was complete on October 29, 2008. *Exhibit 3; Exhibit 4.* The City transmitted notice of the application to relevant agencies on October 27, 2008. *Exhibit 2.* On November 4, 2008, the City provided notice of the variance application and associated open record hearing as required by City code, posting notice on-site and mailing notice to owners of property surrounding the subject property.² *Exhibit 5; Exhibit 6; Exhibit 10, Staff Report, page 6.*
3. The City Staff Report states that the variance request is exempt from environmental review requirements under the State Environmental Policy Act (SEPA), as provided by Washington Administrative Code (WAC) 197-11-800.³ *Exhibit 10, Staff Report, page 5.*
4. The property to be benefited by the variance is designated Medium Density Residential and Greenbelt in the City Comprehensive Plan. Surrounding property to the north and west is designated Medium Density Residential; and property to the east is designated Commercial. Property to the south is designated for State Highway 16. *Exhibit 10, Staff Report, page 2.*
5. The City Council enacted the Medium Density Residential (MDR) Comprehensive Plan designation in 2000 through City Ordinance No. 1807. According 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 to be benefited by the variance is zoned R4.5, as is surrounding property to the north and west. Property to the east is zoned Commercial (CO). Property to the south contains State Highway 16; the zone classification was not provided. Property to the north and west is developed with single-family residences. Property to the east is

² Exhibit 8 is described as "Affidavit of Publication of Notice of Application/Public Hearing;" however, no documents were included in Exhibit 8. The Planner testified that notice of the hearing had been given, and it is assumed that these affidavits are available in the City files.

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/PRD request for the subject property, and issued a Mitigated Determination of Nonsignificance on October 14, 2008. *See Hearing Examiner Findings, Conclusions, and Decision, Blackjack Creek Plat/PRD No. SUBDIV 08-01.*

vacant. The subject property is undeveloped. *Exhibit 1.A; Exhibit 1.D; Exhibit 10, Staff Report, page 2.*

7. The R4.5 zone allows development of up to 4.5 dwelling units per net usable acre.⁴ The R4.5 zone requires a minimum lot size of 6,000 square feet; maximum lot coverage of 45 percent; minimum landscaping coverage of 55 percent; 15-foot wide setbacks from street right-of-ways; five-foot wide side yard setbacks; 10-foot wide rear yard setbacks; and five-foot wide rear setbacks for corner lots. *POMC 16.40.025 Table 9.*
8. Prior to submittal of the variance application, the Applicant requested a preliminary plat/PRD to subdivide the subject property. The plat/PRD contains proposed conditions of approval requiring that Sherman Avenue, which serves as the sole access to the plat, be improved to comply with City access road standards, or that the Applicant obtain a variance from the standards. The plat/PRD conditions of approval mandate that Sherman Avenue must be widened to a minimum of 20 feet. The Hearing Examiner held a combined hearing on the preliminary plat/PRD and the variance requests. *Hearing Examiner Findings, Conclusions, and Decision, Blackjack Creek Plat/PRD, No. SUBDIV 08-01; Exhibit 10, Staff Report, page 3.*
9. The property contains ten wetlands and Blackjack Creek, which limits the development of the site. The proposed residential lots would be clustered along the northwest portion of the property. State Route 16 – Sedgewick Road Interchange runs along the southern portion of the property; however, there are four wetlands between the proposed lots and the southern property boundary. Due to the location of the on-site critical areas, the sole access to the property would be from Sherman Avenue. Sherman Avenue is currently substandard, with pavement width varying from 16.5 to 18 feet. The Applicant proposes improving Sherman Avenue to a width of 20 feet, with no sidewalks. *Exhibit 1.A; Exhibit 1.C; Exhibit 1.D; Exhibit 1.G; Exhibit 10, Staff Report, page 3.*
10. City Resolution 1971 mandates that access roads must provide 50 feet of right of way with curb and gutter, with a pavement width of 28 feet. The resolution notes that the access road standards allow parking on both sides of the road. *City Resolution 1971.*
11. The Applicant would extend Sherman Avenue through the proposed plat/PRD, and develop it to City standards. However, the Applicant asserts that widening the off-site portion of Sherman Avenue to City standards would not be possible without significantly impacting existing developments and properties along Sherman Avenue, including fences, power poles, significant trees, mailboxes, and retaining walls. *Exhibit 1.C.*

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.” *Port Orchard Municipal Code (POMC) 16.40.040.*

12. The City Staff Report generally concurs with the Applicant's analysis. The City states that the Applicant is proposing development on property that does not fit easily into a street grid pattern. Development of the property, including street access, is constrained by environmentally sensitive areas. 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 10, Staff Report, pages 3 – 5.*
13. Robert Oliver testified that Sherman Avenue is dangerous for pedestrians, particularly school children who must walk to the school bus stop at the corner of Sherman Avenue and Fireweed Road. He testified that the worst section of Sherman Avenue is between Echo Court and Fireweed Road. However, Mr. Oliver agreed that fences, poles, and trees are located up to the edge of Sherman Avenue, intruding on the right-of-way and limiting the ability to expand the street. Dan Sandefur testified that there are no turn-outs to allow vehicles to pass each other at the narrow sections of the street. Pamela O'Neil-Allen also testified regarding traffic and pedestrian safety concerns. *Testimony of Mr. Oliver; Testimony of Mr. Sandefur; Testimony of Ms. O'Neil-Allen.*
14. The Applicant proposed off-site improvements to widen Sherman Avenue to a minimum of 20 feet. No sidewalks would be provided with the off-site street improvements. Mr. Sandefur testified to question whether a 20-foot wide access road would be sufficient to allow passage of emergency vehicles, delivery trucks, or garbage trucks. Mr. Sandefur testified that although the east side of the Sherman Avenue is fixed, and would be a challenge to widen, the west side of the street could be widened to provide a four-foot wide pedestrian path with fog line. Mr. Sandefur recognized that street widening would require the removal of trees and vegetation. City Engineer Mark Dorsey testified that it appears that Sherman Avenue could be widened to 23 feet, with a three-foot wide walking trail and fog line along the west side. He testified that the increased costs for the additional three feet of pavement width would be minimal, and that he is of the opinion that the extra cost is necessary to achieve safety improvements. Steve Pesce testified for the Applicant that the Applicant would not be opposed to a 23-foot wide road with pedestrian walkway, but noted that the additional width would come at a cost. *Exhibit 1.A; Exhibit 1.C; Exhibit 9; Exhibit 10, Staff Report, page 1; Testimony of Mr. Sandefur; Testimony of Mr. Dorsey; Testimony of Mr. Pesce.*
15. South Kitsap Fire and Rescue (SKFR) accepted the reduced pavement width for Sherman Avenue in a memo to the City dated October 29, 2008. SKFR stated that access roads must provide a minimum 20 feet of unobstructed width. Because the plat would be served with one access road, SKFR also required that the proposed residences include approved automatic fire sprinklers. *Exhibit 7.*
16. City Planner Tom Bonsell testified that the variance request would improve safety along Sherman Avenue, and that the 23-foot wide pavement width is the best that could be

accomplished. The City recommended approval of the variance request with conditions of approval including conformance with all conditions of the preliminary plat/PRD as modified by the variance and installation of fire sprinkler systems in all dwelling units. Mr. Pesce testified that the Applicant agrees with the staff report and proposed conditions of approval. *Exhibit 10, Staff Report, page 6; Testimony of Mr. Bonsell.*

CONCLUSIONS

Jurisdiction

The City of Port Orchard 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

Variances 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;

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. Although Resolution No. 1971 gives the City Council the authority to consider modifications of street standards, the City Staff Report states that City Ordinance No. 049-07, enacted after the resolution, authorizes the Hearing Examiner to hear the requested variance. *Exhibit 10, Staff Report, page 5.*

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.*

Conclusions

1. **The strict enforcement of the provisions of this title creates an unnecessary hardship to the property owner.** Sherman Avenue provides the sole access to the proposed plat. Sherman Avenue cannot be improved to 28 feet in width due to existing constraints, including trees, retaining walls, fences, power poles, and mailboxes. The strict enforcement of the access road standards would preclude development of the proposed plat, or require the Applicant to obtain additional access through environmentally sensitive areas. The City supports the Applicant's variance request. *Findings 1 – 16.*
2. **The variance is necessary because of the unique size, shape, topography, or location of the subject property.** The location of ten wetlands and Blackjack Creek on the subject property limits the potential location of access roads. Extension of a different access road would negatively impact the environmentally sensitive areas on-site. Sherman Avenue would dead-end on the property. Sherman Avenue cannot be fully improved due to existing constraints, including trees, retaining walls, fences, power poles, and mailboxes. The City concurs with the Applicant that the property's location, on-site environmentally sensitive areas, and existing constraints along Sherman Avenue create the need for the proposed variance. *Findings 1 – 16.*
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 City noted that other subdivisions may have avoided application of the City street development standards in the past; however all future developments shall be reviewed for compliance with City standards, and variances shall be required for any deviation from the standards.⁶ The Applicant would be prevented from developing the proposed plat/PRD without approval of the variance, as full improvement of Sherman Avenue to access road standards is not possible. *Findings 8 – 16.*

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).

4. **The need for the variance is not the result of deliberate actions of the applicant or property owner.** The on-site environmentally sensitive areas and existing off-site conditions limit the Applicant's ability to construct a fully improved access road. The on-site environmentally sensitive areas and existing off-site conditions are not the result of the deliberate actions of the Applicant. *Findings 8, 9, 11 – 14.*
5. **With conditions, the variance does not create health and safety hazards.** South Kitsap Fire and Rescue determined that the proposed development would provide adequate emergency vehicle access. Widening Sherman Avenue to 23 feet would provide improved traffic and pedestrian safety by providing a three-foot wide walkway with fog line. 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/PRD associated with the property for environmental impacts. Conditions of approval are necessary to ensure that Sherman Avenue is developed consistent with the South Kitsap County Fire and Rescue requirements; that Sherman Avenue is widened to a minimum of 23 feet of pavement, to include a three-foot walkway and fog line; and that the Applicant comply with all conditions of the approved preliminary plat, as amended by this variance. *Findings 1 – 16.*
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 1 – 3, 8, 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 City Resolution No. 1971, Section 2.3, which does not preclude variances. The City concurs that the requested variance is appropriate and that the Hearing Examiner is authorized to grant the variance. *Findings 1, 8 – 10.*
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.** Approval of the Applicant's preliminary plat/PRD is conditioned on the Applicant either complying with City street standards or obtaining a variance. Approval of this variance request would comply with the preliminary plat/PRD 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 Fire and Rescue memo dated October 29, 2008. *Findings 8 – 16.*
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 access street pavement width. The requested variance does not involve any change in use. The proposed development of a preliminary plat/PRD is a permitted use in then R4.5 zone. *Findings 1, 6, 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 variance request refers to off-site improvements to Sherman Avenue. Approval of the requested variance will not increase the number of proposed lots or the overall density of the preliminary plat/PRD. However, approval of the variance would facilitate development of the property consistent with the property's R4.5 zoning classification and Medium Density Residential designation under the Comprehensive Plan. *Findings 4 – 7, 11.*
11. **With conditions, the variance is the minimum necessary to grant relief to the applicant.** The proposed development would provide adequate emergency vehicle access. Sherman Avenue is currently substandard, as narrow as 16.5 feet in places. Approval of the variance request would result in improved traffic and pedestrian safety by allowing the street to be widened to a minimum of 23 feet with a three-foot wide walkway set off by a fog line. South Kitsap County Fire and Rescue has accepted the proposed use of Sherman Road as an access road. Conditions of approval are necessary to ensure that the Applicant complies with the conditions of preliminary plat/PRD approval, as amended by this variance, and with the provisions of the South Kitsap Fire and Rescue memo dated October 29, 2008, and that the Applicant widen Sherman Avenue to a minimum of 23 feet, with three-foot wide walkway and fog line. *Findings 8 – 16.*
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 access road standards. The requested variance does not involve setback or height requirements. *Findings 1, 8, 10, 11.*
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 access road standards. The requested variance does not involve deviation from critical areas requirements. *Findings 1, 8, 10, 11.*

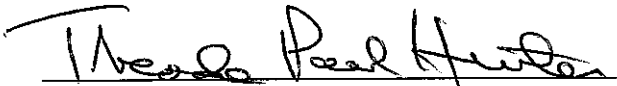
DECISION

Based on the above findings and conclusions, the request for a variance from City Council Resolution No. 1971, regarding street development standards, for property located on the east side of Sherman Avenue, approximately 1,100 feet south of the intersection of Sherman Avenue and Fireweed Lane, in Port Orchard, Washington, is **GRANTED**, subject to the following conditions:

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City of Port Orchard Hearing Examiner
Blackjack Creek Variance No. V-1189*

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, Blackjack Creek Plat/PRD, No. SUBDIV 08-01.*
2. Developments exceeding 30 or more dwelling units are required to provide two means of access. If all the dwellings within the plat associated with the variance request are provided with a fire sprinkler system and this condition is recorded on the plat, then a separate means of access is not required.
3. Per the adopted City of Port Orchard Fire Code, Fire Department Access roads shall be a minimum of 20 feet in unobstructed width, be designed and maintained to support the imposed loads of fire apparatus (45,000 pounds) and must have a surface that provides all-weather driving capabilities.
4. Prior to issuance of the required site development permit, the Applicant shall submit engineered drawings indicating improvements to Sherman Avenue for review by the Engineering Department.
5. Prior to commencement of construction activities on Sherman Avenue, the Applicant shall obtain a right-of-way permit from the City.
6. The Applicant shall improve Sherman Avenue with a minimum of 23 feet of pavement width, to include a three-foot wide walkway delineated with a fog line.

Decided this 9th day of December 2008.


THEODORE PAUL HUNTER
Hearing Examiner