

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

In the Matter of the Appeal of)	No. S-1137 R-1
)	
Mark Kuhlman, on behalf of)	
Chuck Childress)	
)	
Of the City's Approval of)	FINDINGS, CONCLUSIONS,
<u>Short Plat No. S-1137 R-1</u>)	AND DECISION

SUMMARY OF DECISION

The appeal of the City of Port Orchard's February 25, 2009 modified decision to approve Short Plat S-1137 R-1, with conditions, is further modified consistent with resolution of the issues by the parties to the appeal.

SUMMARY OF RECORD

Background:

On November 18, 2008, the City Development Director approved, with conditions, a Short Plat application submitted by Chuck Childress (Applicant). The parcel to be short platted into three lots is addressed as 2227 Sidney Avenue. The Applicant filed a Request for Reconsideration of the conditions of approval. On February 25, 2009, the City modified the conditions of approval. The Applicant now appeals the City's modified decision to the Hearing Examiner.¹

Hearing Date:

The Hearing Examiner held an open record hearing on the appeal on June 16, 2009. During the course of the hearing, the parties requested an opportunity to discuss potential settlement. The parties did so off the record, and returned with an agreement that is now captured within this decision.

Testimony:

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

Mark Kuhlman, Team4 Engineering, for Appellant

¹ On March 10, 2009, James Weaver, City Development Director, extended the appeal period for 14 days. *City Extension of Reconsideration Decision, dated March 10, 2009.*

Mark Dorsey, City Public Works Director/City Engineer
Greg Rogers, Fire Prevention Manager, South Kitsap Fire & Rescue

Gregory Jacoby, Attorney at Law, represented the City of Port Orchard at the open record hearing.

Mark Kuhlman, Team4 Engineering, represented the Appellant at the open record hearing.²

Exhibits:

The following exhibits were admitted into the record:

1. Initial Submittal, received September 8, 2008, including the following items:
 - A. Application, received September 8, 2008
 - B. Narrative letter, dated August 21, 2008
 - C. Legal descriptions, received September 8, 2008
 - D. Vicinity Map, received September 8, 2008
 - E. Authorization Letter, received September 8, 2008
 - F. Short Subdivision Drawing, dated August 21, 2008
 - G. Short Plat storm plan, sewer and water plan, and details and notes (3 sheets), dated September 3, 2008
 - H. Project Narrative – Utilities, dated September 5, 2008
2. Property Ownership Verification: Kitsap County parcel map and property report, dated September 10, 2008
3. Application Transmittal Letter, dated September 10, 2008
4. Memorandum from South Kitsap Fire & Rescue – Shawn Shepherd, dated September 23, 2008
5. Memorandum from Port Orchard Assistant Engineer Andrea Archer, dated October 13, 2008
6. Email correspondence between Assistant Planner Jim Fisk and Fire Technician Shawn Shepherd, with attachments, dated October 2008, with attachments
7. Summary of proposal and Decision with Exhibit A, dated November 18, 2008
8. Facsimile from Steve Ottmar to Jim Fisk, dated November 19, 2008
9. Request for Reconsideration from Mark Kuhlman, dated December 2, 2008
10. Application Transmittal Letter, dated December 2, 2008
11. Memorandum from South Kitsap Fire & Rescue – Greg Rogers, dated December 18, 2008
12. Email correspondence between Mark Kuhlman and Greg Rogers, dated January 29, 2009 – February 3, 2009
13. Summary of Proposal and Decision with Exhibit A, dated February 25, 2009

² Mark Kuhlman stated at the open record hearing that David Horton, Attorney at Law, provided legal counsel to the Appellant in the matter of the appeal of Short Plat S-1137 R-1, but did not attend the open record hearing on the appeal. *Statement of Mr. Kuhlman.*

14. Extension of Reconsideration Decision with Exhibit A, dated March 10, 2009
15. Request for Appeal by Mark Kuhlman, dated March 24, 2009
16. Notice of Hearing, dated May 8, 2009
17. Affidavit of Publication of Notice of Hearing, dated May 8, 2009
18. Email message from Mark Kuhlman and James Weaver with attached brief, dated June 2, 2009
19. Appeal brief from Mark Kuhlman, dated June 2, 2009
 - A. Construction costs for frontage improvements provided by Mark Kuhlman, dated June 3, 2009
20. Email from Jacoby to Horton, 6/02/09 [not admitted]³
21. Email from Horton to Kuhlman & Childress, dated 6/03/09 [not admitted]
22. Notice of Public Hearing, dated June 5, 2009
23. Affidavit of Publication for Hearing, dated June 16, 2009
24. Response brief from Greg Jacoby, dated June 9, 2009
25. Site plan map, Sidney and Goldenrod Short Plat, dated June 10, 2009 [admitted for illustrative purposes only]

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 (Appellant) does not challenge the findings or conclusions of the City of Port Orchard (City)'s February 25, 2009 modified decision to approve Short Plat S-1137 R-1, with conditions. The appeal is directed only to the City's conditions of approval. The appeal requests deletion or modification of parts of or all of the following conditions (deletions are shown as strikeouts, insertions in [brackets]), or objects to a condition in its entirety:
 2. Site preparation designs will be prepared by a professional engineer licensed by the State of Washington for ~~such work if required at the time of the building permit submittal.~~
 3. All storm drainage from roofs, driveways, access ways, and other surface drainage shall be collected on site and conveyed to the City storm system ~~or adjacent wetland systems as required,~~ using methods and materials acceptable to the Public Works Department.
 5. The following statement shall be completed and placed on the short plat Mylars:

³ At the open record appeal hearing, Gregory Jacoby, City Attorney, objected to including proposed Exhibits 20 and 21 in the record. The reasons for his objection were that the documents were not submitted by the deadline given in the Hearing Examiner's Revised Pre-Hearing Order, and that the documents refer to settlement negotiations between the Appellant and the City. The Hearing Examiner ruled that proposed Exhibits 20 and 21 would not be admitted, as they were not submitted in a timely manner.

A ~~conceptual~~ Stormwater management plan dated ___/___/___ was reviewed by and approved by the Director of Public Works on ___/___/___ for storm drainage. This drawing [plan] is available under permit number _____ from the Public Works Department, 216 Prospect Street, Port Orchard, WA 98366. Additional permits and approvals are required for construction.

7. All of the development shall conform to the [requirements of] ~~most recent copy of the~~ City of Port Orchard's Developers Handbook [in effect] at time of [submittal of the] complete application [for the short plat (___/___/___)].
 8. If all impervious surfaces total to more than 5,000 square feet, submit a stormwater permit to Department of Ecology. *Appellant objects to this condition.*
 10. Drainage Analysis shall be provided, and shall apply to complete parcel [, if required by the City of Port orchard Stormwater Manual].
 12. Frontage Improvements shall be provided in compliance with the Comprehensive Plan and Zoning Ordinance. *Appellant objects to this condition.*
 13. Any future development of the lots shall be consistent with the zoning designation of the property and other applicable sections of the POMC at the time of development. *Appellant objects to this condition.*
 14. No permanent structure(s) shall be erected within the easement area(s). Permanent structures shall mean any concrete foundation, ~~concrete slab, wall, rockery, pond, stream, building, deck, overhanging structure, fill material, tree, recreation sport court, carport, shed, private utility, fence,~~ or other site improvement that restricts or unreasonable interferes with the need to access or construct utilities in said easement(s). Permanent structures shall not mean improvements such as flowers, ground cover and shrubs less than 3-feet in height, lawn grass, asphalt paving, gravel, or other similar site improvements that do not prevent the access of men, material, and machinery across, along, and within the said easement area.
 18. A five-foot cement concrete sidewalk shall be constructed along Sidney Street and Goldenrod Street, abutting the site, to the approval of the City Engineer. *The Appellant objects to this condition.*
2. An open record appeal hearing was convened on June 16, 2009 to allow the Appellant an opportunity to present argument in support of his appeal, and to allow the City an opportunity to respond to the argument of the Appellant. At the open record hearing, the parties requested a break from the hearing for the purpose of settlement discussion. Following the break, Gregory Jacoby, City Attorney, stated that the Appellant and the City of Port Orchard (City) reached agreement on resolution of the issues raised on

Findings, Conclusion, and Decision
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appeal. Mark Kuhlman, Appellant representative, stated that the Appellant was in agreement with the City that the issues on appeal had been resolved. The parties agreed that the conditions within the City's February 25, 2009, short plat decision would be modified as follows:

2. Site preparation designs will be prepared by a professional engineer licensed by the State of Washington for such work if required at the time of the building permit submittal.
3. All storm drainage from roofs, driveways, access ways, and other surface drainage shall be collected on site and conveyed to the City storm system or adjacent wetland systems as required, using methods and materials acceptable to the Public Works Department.
5. The following statement shall be completed and placed on the short plat Mylars:

A conceptual Stormwater management plan dated ___/___/___ was reviewed by and approved by the Director of Public Works on ___/___/___ for storm drainage and determined to be a minor development activity. This drawing [plan] is available under permit number _____ from the public Works Department, 216 Prospect Street, Port Orchard, WA 98366. Additional permits and approvals are required for construction.
7. All of the development shall conform to the most recent copy of the City of Port Orchard's Developers Handbook at time of complete application.
8. If more than one acre is disturbed, the applicant shall submit an NPDES stormwater permit to the Department of Ecology.⁴
10. Drainage Analysis shall be provided, and shall apply to complete parcel.
12. The Applicant agrees to execute a no protest agreement in lieu of frontage improvements.
13. Any future development of the lots shall be consistent with the zoning designation of the property and other applicable sections of the POMC at the time of development.
14. No permanent structure(s) shall be erected within the City maintained utility easement area(s). Permanent structures shall mean any concrete foundation, concrete slab, wall, rockery, pond, stream, building, deck, overhanging structure, fill material, tree, recreation sport court, carport, shed, private utility, fence, or other site improvement that restricts or unreasonable interferes with the need to access or construct utilities in said easement(s). Permanent structures shall not mean improvements such as flowers, ground cover and shrubs less than 3-feet in height, lawn grass,

⁴ Though not an issue upon appeal, Mr. Jacoby stated for the City at the open record appeal hearing that neither party objected to inserting "September 8, 2008" in Condition No. 9 of the City's February 25, 2009 modified Short Plat S-1137 R-1 decision, as the date of complete short plat application submittal to the City. Mr. Kuhlman affirmed Mr. Jacoby's statement. Thus, Condition No. 9 as modified would read "Developer shall comply with all stormwater requirements in the City of Port Orchard Stormwater Manual as of September 8, 2008, the date of complete short plat application submittal to the City." *Statement of Mr. Jacoby; Statement of Mr. Kuhlman.*

asphalt paving, gravel, or other similar site improvements that do not prevent the access of men, material, and machinery across, along, and within the said easement area.⁵

18. A five-foot cement concrete sidewalk shall be constructed along Sidney Street and Goldenrod Street, abutting the site, to the approval of the City Engineer. The parties will work cooperatively to locate the sidewalk in a way that minimizes the cost to the applicant.
3. Because the issues were resolved by agreement of the parties, additional findings need not be issued by the Hearing Examiner. The parties agreed that conditions would be modified as stated in Finding No. 2, and that the appeal should be dismissed as there are no remaining issues that require a decision by the Hearing Examiner. *See Finding 2.*

CONCLUSIONS

Jurisdiction

The City of Port Orchard Hearing Examiner is authorized to conduct an open record hearing on an appeal of a City administrative decision to approve a short plat with conditions, based upon a consideration of the whole record and supported by substantial evidence in the record. *Port Orchard Municipal Code (POMC) 2.76.080; POMC 16.01.021(4); POMC 16.06.072(1).*

Criteria for Review

The applicant has the burden of proof to establish, by a preponderance of the evidence, that the project or matter under consideration is consistent with applicable law and serves the interests of the community. *POMC 2.76.090.*

Conclusions Based on Findings

At the open record hearing on the appeal, representatives of the City and of the Appellant reached agreement to resolve all issues on appeal. The issues are resolved by modification of the conditions as stated in Finding 2. These modifications shall be the conditions of plat approval, as they are consistent with law. The complete list of conditions is as follows. Findings 1-3.

1. The following statement shall be placed on the short plat Mylars:
Grading and erosion control plans shall be submitted to and approved by the City of Port Orchard Public Works Department prior to any grading in excess of 50

⁵ Greg Rogers, Fire Prevention Manager, South Kitsap Fire & Rescue, testified that the fire district agrees that the language proposed by the Appellant in the Appellant's brief be used to modify Condition No. 17 of the City's February 25, 2009 modified Short Plat S-1137 R-1 decision. Mr. Rogers testified that this modification would resolve any disagreement between the Appellant and the fire district in the matter of Short Plat No. 1137 R-1. According to the proposed modification in the Appellant's brief, dated June 2, 2009, Condition No. 17 would read "Before any above ground construction related to this project is initiated, the fire hydrants and access roads shall be installed and approved by SKFR and the City of Port Orchard. Access roads shall be a minimum of 20 feet in unobstructed width, be designed and maintained to support the imposed load of fire apparatus (75,000 pounds) and must have a surface that provides all-weather driving capabilities."

cubic yards taking place on the site. Grading, excavation or filling in excess of 500 cubic yards will require the filing of an Environmental Checklist.

- a. The grading and erosion control plans shall include, at a minimum, the following primary measures to limit the adverse impacts of the project upon the off-site drainage system:
 1. A proposed construction phasing plan that will ensure erosion control measures will be installed before (and adjusted and maintained during) grading is performed and that grading will be performed immediately prior to commencing construction of permanent improvements, or only as needed.
 2. Measures to provide settlement and/or filtration of sediment prior to discharge. These measures must be either a sediment trap or sediment pond, depending on tributary area, augmented by other measures such as filter fabric fencing for small areas.
 3. Revegetation of disturbed areas as soon as practical following grading.
2. Site preparation designs will be prepared by a professional engineer licensed by the State of Washington for such work if required at the time of the building permit submittal.
3. All storm drainage from roofs, driveways, access ways, and other surface drainage shall be collected on site and conveyed to the City storm system or adjacent wetland systems as required, using methods and materials acceptable to the Public Works Department.
4. Prior to recording the short plat, a short plat storm drainage plan shall be prepared detailing how storm drainage from roofs, driveways, access ways, and other surfaces will be collected and conveyed to the City storm system or adjacent wetland systems as required, using methods and materials acceptable to the Public Works Department.
5. The following statement shall be completed and placed on the short plat Mylars:

A conceptual Stormwater management plan dated ___/___/___ was reviewed by and approved by the Director of Public Works on ___/___/___ for storm drainage and determined to be a minor development activity. This drawing [plan] is available under permit number _____ from the public Works Department, 216 Prospect Street, Port Orchard, WA 98366. Additional permits and approvals are required for construction.

6. The following statement shall be placed on the short plat Mylars:
Prior to obtaining any future development permits on these properties, the proponent shall contact the appropriate City departments to make the necessary arrangements for all required improvements. The required approvals shall be acquired from the appropriate departments, including, but not necessarily limited to, Puget Sound Energy and Port Orchard Public Works.
7. All of the development shall conform to the most recent copy of the City of Port Orchard's Developers Handbook at time of complete application.
8. If more than one acre is disturbed, the applicant shall submit an NPDES stormwater permit to the Department of Ecology.
9. Developer shall comply with all stormwater requirements in the City of Port Orchard Stormwater Manual as of September 8, 2008, the date of complete short plat application submittal to the City.
10. Drainage Analysis shall be provided, and shall apply to complete parcel.
11. Sewer profile needs to be shown on the plans.
12. The Applicant agrees to execute a no protest agreement in lieu of frontage improvements.
13. Any future development of the lots shall be consistent with the zoning designation of the property and other applicable sections of the POMC at the time of development.
14. No permanent structure(s) shall be erected within the City maintained utility easement area(s). Permanent structures shall mean any concrete foundation, concrete slab, wall, rockery, pond, stream, building, deck, overhanging structure, fill material, tree, recreation sport court, carport, shed, private utility, fence, or other site improvement that restricts or unreasonable interferes with the need to access or construct utilities in said easement(s). Permanent structures shall not mean improvements such as flowers, ground cover and shrubs less than 3-feet in height, lawn grass, asphalt paving, gravel, or other similar site improvements that do not prevent the access of men, material, and machinery across, along, and within the said easement area.
15. The following statement shall be inked on the face of the short plat mylar:
The private road serving Lots, "B", "C" also serves lot 188 of SP-1137, therefore the road serves more than two dwellings per the City of Port Orchard Fire Code.

One of the new dwelling units will be required to be provided with a fire sprinkler system in all houses built. This requirement needs to be indicated and recorded on the Plat and plans. Indicate which lot and structure will require fire sprinkling on the face of the plat.

16. A minimum fire flow of 1,000 gallons per minute, measured at a residual pressure of 20 p.s.i., is required for one- and two-family dwellings not exceeding 3,600 gross square feet. Provide existing hydrant and water supply main information with resubmittal for determination of fire flow requirements.
 - a. Locate hydrants no closer than eighteen inches (18") to curb or sidewalk, and no closer than three feet (3'-0") to property line.
 - b. Where a fire hydrant is located on a fire apparatus access road (public or private) the minimum unobstructed road width shall be 26 feet. The 26 foot dimension shall apply 20 feet to either side of the fire hydrant, centered on the hydrant.
 - c. Parking spaces appear to be adequately placed as to not interfere with hydrant placement, such as no vehicle is allowed to park within 15 feet of a fire hydrant.
17. Before any above ground construction related to this project is initiated, the fire hydrants and access roads shall be installed and approved by SKFR and the City of Port Orchard. Access roads shall be a minimum of 20 feet in unobstructed width, be designed and maintained to support the imposed load of fire apparatus (75,000 pounds) and must have a surface that provides all-weather driving capabilities.
18. A five-foot cement concrete sidewalk shall be constructed along Sidney Street and Goldenrod Street, abutting the site, to the approval of the City Engineer. The parties will work cooperatively to locate the sidewalk in a way that minimizes the cost to the applicant.

DECISION

Based on the above findings and conclusions, the appeal of the City of Port Orchard's February 25, 2009 modified decision to approve Short Plat S-1137 R-1, with conditions, should be modified as agreed to by the parties to the appeal, and the modified conditions become the conditions of approval of this short plat.

So ordered this 1st day of July 2009.


THEODORE PAUL HUNTER
Hearing Examiner