BEFORE THE HEARING EXAMINER
FOR THE CITY OF PORT ORCHARD

In the Matter of the Application of

Kim Coy

For Approval of a Rezone

No. R-1173

Coy Rezone

FINDINGS, CONCLUSIONS,
AND RECOMMENDATION

SUMMARY OF RECOMMENDATION

The Hearing Examiner recommends that the City Council APPROVE the request for a rezone from R 4.5 to either Commercial or Business Professional for a 0.68-acre parcel located at 1710 Pottery Avenue, in Port Orchard, Washington.

SUMMARY OF RECORD

Request:
Kim Coy, Conner Hearing Aid Clinic, requests a rezone of a 0.68-acre parcel from R4.5 to Commercial. The property is located at 1710 Pottery Avenue, in Port Orchard, Washington.

Hearing Date:
The Hearing Examiner held an open record hearing on the request on August 5, 2010.

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

Tom Bonsell, City Planner
James Weaver, Planning Director

Attorney David Horton represented the Applicant at the hearing.

Exhibits:
The following exhibits were admitted into the record:

1. Pre-Application letter, dated January 4, 2010
2. Application submittal, including the following documents:
   A. Application, dated June 7, 2010
   B. Contact Information, dated June 7, 2010
   C. Legal description
   D. Project narrative, dated June 7, 2010
   E. Property owners list verification, map, and mailing list, dated June 7, 2010
   F. SEPA Checklist

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G. Statement addressing decision criteria
H. Site Plan
I. Vicinity Map
J. Site photos

4. Application transmittal letter, dated June 10, 2010
5. Notice of complete application, Determination of completeness, dated June 15, 2010
6. Comments from South Kitsap Fire & Rescue – Greg Rogers, dated June 23, 2010
10. Record of distribution to Agencies: NOA/SEPA Threshold Determination and SEPA Checklist, dated June 25, 2010
11. Determination of Nonsignificance, dated July 13, 2010
12. Record of distribution to Agencies and Interested Parties: DNS, dated July 13, 2010
15. Affidavit of mailing and posting: Hearing notice, dated July 23, 2010
16. Staff report, prepared for August 5, 2010 hearing

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

**FINDINGS**

1. Kim Coy (Applicant), owner of Conner Hearing Aid Clinic, requests a zone reclassification (rezone) of a 0.68-acre parcel from R 4.5 to Commercial. The property is located at 1710 Pottery Avenue, in Port Orchard, Washington.\(^1\) *Exhibit 2.A; Exhibit 2.D; Exhibit 2.G; Exhibit 16, Staff Report*, page 1.

2. The City of Port Orchard (City) accepted the rezone application on June 9, 2010, and transmitted notice of the application to relevant agencies on June 10, 2010. The City determined that the rezone application was complete on June 15, 2010. On June 25, 2010, the City mailed notice of the application and threshold environmental determination to owners of property surrounding the subject property; posted notice on the subject property; and published notice of the application in the *Port Orchard Independent*. On July 23, 2010, the City posted notice of the open record hearing associated with the application; mailed notice to surrounding property holders in accordance with City ordinances; and published notice of the hearing in the *Port Orchard Independent*.

\(^1\) The subject property is identified by tax parcel numbers 342401-4-028-2007. *Exhibit 2.A; Exhibit 2.C; Exhibit 16, Staff Report*, page 1. A legal description is included with the rezone application. *Exhibit 2.C.*

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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). After review of the Environmental Checklist and other information on file, the City determined that with compliance with federal, state, and local regulations, the rezone would not have a probable significant adverse impact on the environment. The City issued a Determination of Nonsignificance (DNS) on July 13, 2010. City Planner Tom Bonsell testified that City did not receive any comments or appeal of the DNS. Exhibit 11; Exhibit 12; Exhibit 16, Staff Report, pages 2 and 5; Testimony of Mr. Bonsell.

4. The property is currently zoned R 4.5, as are surrounding properties to the north and west. Properties to the east are zoned R 8. Properties to the south are zoned Commercial. The City’s Comprehensive Plan designates the subject property and surrounding properties to the north and west as Low Density Residential. Properties to the east are designated Medium Density Residential. Properties to the south are designated Commercial. Properties to the north, east, and west are developed with single-family residences. Properties to the south are developed with commercial uses and health care services. Exhibit 2 A; Exhibit 2 D; Exhibit 2 G; Exhibit 3; Exhibit 16, Staff Report, pages 2 and 5; See also City Comprehensive Plan Tremont Corridor Land Use Map.

5. The current R 4.5 zone allows for development at a density of up to 4.5 dwelling units per net usable acre. 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) 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(1). The Applicant submitted a Project Narrative describing the proposed use as a hearing aid clinic. The City Staff Report classifies the proposed use as “office/patient clinic.” This use is not permitted within the R 4.5 zone. POMC 16.30.040; Exhibit 2 D; Exhibit 16, Staff Report, pages 1 and 4.

6. The purpose of the Commercial (Co) zone is to “provide for the broadest mix of retail, service, office, and commercial recreation/cultural uses serving the Port Orchard and surrounding market areas and offering significant employment opportunities.” POMC 16.13.150(1). These purposes are accomplished by “ Providing for office uses as well as a wider range of the retail, professional, governmental, and personal services than are found in neighborhood and community business areas.” POMC 16.13.150(2)(a). The Co zone is appropriate where designed by the comprehensive plan when such areas are

\[1\] 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.

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served by adequate public sewers, water supply, roads, and other needed public facilities and services; and where "Areas are provided convenient, visible, and safe access by vehicle, transit, bicycle, and pedestrian circulation systems located on minor and major arterial roads." POMC 16.13.150(3). The Co zone mandates maximum lot coverage of 85 percent, and minimum landscaping coverage of 15 percent. The Co zone requires a ten-foot wide street right-of-way setback, and a five-foot wide setback from adjacent residential zones and from adjacent nonresidential zones. The City Code does not specify a minimum lot size for the Co zone. POMC 16.40.025. The proposed hearing aid clinic, classified as "office/patient clinic" is a permitted use in the Co zone, as are other health services, including nursing and personal care facilities, medical/dental lab, and miscellaneous health. Hospitals are not permitted in the Co zone. POMC 16.30.040; Exhibit 16, Staff Report, pages 4 and 5.

7. Government/business service land uses permitted in the Co zone include construction and trade; transportation service; automotive rental and leasing; research, development and testing; and commercial/industrial accessory uses. POMC 16.30.030. General services land uses permitted in the Co zone include daycare; veterinary clinic; automotive and boat service and repair; and health services. POMC 16.30.040. Manufacturing land uses permitted in the Co zone include food processing; furniture and fixtures; printing and publishing; and fabricated metal products. POMC 16.30.050. Recreational and cultural land uses are permitted in the Co zone, including theaters; bowling centers; and amusement arcades. POMC 16.30.060. Hotels/motels, bed and breakfasts, and accessory residential living quarters are permitted residential land uses in the Co zone. POMC 16.30.080. A wide range of retail land uses are also permitted in the Co zone. POMC 16.30.100. In addition to the permitted land uses, a wide range of land uses are allowed as a conditional use or with an administrative permit. POMC 16.30.030 - .100.

8. City Planner Mr. Bonsell testified that the Business Professional zone might be more appropriate to the property. Testimony of Mr. Bonsell. The purpose of the Business Professional (BP) zone "differs from general commercial designations in that business professional limits the amount, size and type of retail uses. This designation is intended to support major employment centers such as Harrison Hospital and surrounding hospital/medical district and the Kitsap County administration campus, while serving as a transition with adjacent residential neighborhoods." POMC 16.13.200(1). The purposes of the BP zone are accomplished by "providing for office uses as well as a wider range of the retail, professional, governmental, and personal services than are found in neighborhood and community business areas." POMC 16.13.200(2)(a). The BP zone is appropriate where designated by the comprehensive plan; where areas are provided safe vehicle, transit, bicycle, and pedestrian access; and where traffic management is required. POMC 16.13.200(3). Attorney David Horton spoke on behalf of the Applicant to agree that the BP zone could be an appropriate zone for the subject property. Statement of Mr. Horton.
9. Chapter 36.70A Revised Code of Washington (RCW) mandates that zoning classifications should be consistent with Comprehensive Plan designations. Mr. Bonsell testified that the City Council will review the Applicant’s request to amend the Comprehensive Plan designation as part of a docket of Comprehensive Plan amendments. He explained that the rezone would not be approved if the City Council does not approve the Comprehensive Plan change by the end of the year 2010. Testimony of Mr. Bonsell.

10. According to the December 2009 Final Comprehensive Plan, the economic centers of the City provide centralized retail, professional office facilities, tourist and related services. The commercial zoning designation provides the most comprehensive list of uses that support the goals and policies of not only economic sections of the Comprehensive plan and also supports a portion of the housing goals by providing the framework for creation of affordable housing units. The Commercial Comprehensive Plan designation includes zoning designations of Mixed-use, Commercial and Business Professional. City Comprehensive Plan, Land Use Element (December 2009).

11. The City Staff Report states that proposed rezone would be consistent with the Comprehensive Plan goals and policies, and with the City’s long-term Comprehensive Plan direction. Exhibit 16, Staff Report, pages 2 and 4. Planning Director James Weaver testified that in 2008, the surrounding area was designated Commercial, along with an overlay area for intensive development. The intent was to locate health care services in the same area. However, Sunset Lane residents objected to a change in the Comprehensive Plan designation. Testimony of Mr. Weaver. Sunset Lane West runs east / west to the north of Clay Lane. The Sunset Lane residential area is now surrounding by commercial and business professional zones to the north and south. Harrison Hospital lies to the north of Tremont Street West, north of Sunset Lane West, and is on property designated Community Facility. See, City Comprehensive Plan, Tremont Corridor District Land Use Map. Thus, the residential area is now an island which will become commercial as ownership changes or in 2012, when the Comprehensive Plan review is scheduled. Mr. Weaver testified that the transition to a commercial zone is consistent with the Comprehensive Plan goals and policies for the Tremont area, where the subject property is located. Mr. Weaver identified Tremont Corridor Overlay District Goal 14 and Policy POLU-61 as particularly relevant to the rezone request. Testimony of Mr. Weaver.

12. City Comprehensive Plan Land Use Element Goal 14 for the Tremont Corridor Overlay District encourages development within the area that supports the major hospital and medical installations (Harrison Hospital and Group Health) and assists the emergency response agencies in the corridor (South Kitsap Fire District). Policy POLU-61 encourages professional and office uses that support the medical industry and create pedestrian oriented health care focus. City Comprehensive Plan, Chapter 2: Land Use, page 2-28.
13. Clay Street runs east / west along the northern property boundary. Pottery Avenue runs north / south along the eastern property boundary. The property is developed with a single-family residence, a garage, a covered storage area, and a gravel parking area. No changes to the existing structure are proposed. The Applicant would provide five parking spaces, including handicapped access parking, as described in the proposed site plan. Mr. Bonsell testified that adequate parking would be provided on the site. The Applicant anticipates that two people would work in the proposed hearing aid clinic. There are no critical areas on-site. Exhibit 2.D; Exhibit 2.F; Exhibit 2.H; Exhibit 3; Testimony of Mr. Bonsell.

14. City Planner Mr. Bonsell testified that landscaping is necessary to buffer adjacent residential uses from the proposed use. The Applicant would provide a landscaping plan in conformance with POMC Section 16.50.100 prior to approval of a Certificate of Occupancy. Exhibit 16, Staff Report, page 5; Testimony of Mr. Bonsell.

15. Greg Rogers, Fire Prevention Manager, wrote a letter to Mr. Bonsell, dated June 23, 2010, in response to the proposed rezone. The letter included comments and stipulations regarding any future construction and requiring final inspection of the property prior to

3 POMC 16.50.100 provides that:

(1) Perimeter landscaping along interior lot lines and between zones shall be as provided within Table 16.50.296, Landscape Design Requirements. Perimeter landscaping may be modified where appropriate by the planning director to account for aboveground subregional utility developments and distribution or transmission corridors or other utilities and infrastructure.

(2) Urban buffers shall be landscaped based on the extent to which the activity is to be screened from adjacent uses in accordance with the categories identified below. However, common standards applied to all buffer areas include:

(a) Within the landscape buffer areas about the property, particularly along secondary access roads and around parking lots that do not abut the public pedestrian walkway or trail corridors, site plantings should be grouped to simulate natural stands and should not be planted symmetrically or of even spacing.

(b) Landscape designs should reflect natural planting materials and settings that are representative of the local and regional landscape.

(c) Where practical and feasible, buffer areas should retain existing larger trees and vegetation to maintain continuity with adjacent greenways and natural areas.

(d) Within higher density residential developments, buffers or open spaces may be grouped into common open space areas that define building placements, provide visual accents, preserve landscape or landform features, or house common activity areas.

(3) Urban Buffers with Filtered Screening. Urban buffers to be filter screened are the perimeter landscape areas provided between nonresidential land uses within the commercial (C0), mixed use (Mxd), employment (Eo), and community facilities (Cf) zones. These buffers shall function as a visual separator between uses within these zones. The plant materials and design may mix evergreen and deciduous trees and shrubs to create a filtered screen effect.

(4) Urban Buffers with Full Screening. Urban buffers to be fully screened are the perimeter landscape areas provided between residential and nonresidential zones. These buffers shall function as a visual barrier to obscure views of incompatible activities and improvements. The plant materials and design may include a mix of primarily evergreen trees and shrubs to form an effective full screen effect.
issuance of a Certificate of Occupancy. The City Staff Report states that future
development on the property would be reviewed for compliance with the City code and
development standards, including stormwater, parking, and other requirements. Exhibit
6; Exhibit 16, Staff Report, pages 3 and 4.

16. The Applicant’s Environmental Checklist states that the proposed use would not result in
an increased need for public services, and that no utility construction is required. Exhibit
2.F. The Applicant addressed the rezone criteria, stating that approving the rezone would
allow a business that would contribute to public health and welfare and would provide a
necessary service to the community as a whole. Exhibit 2.G.

17. Mr. Bonsell testified that the area where the property is located is in transition from
residential to commercial uses. Harrison Hospital is nearby to the north, and the area will
eventually become a commercial zone. Properties in the area have been sold for health
care purposes. Mr. Bonsell noted that Sunset Lane to the north is a truly active
residential area that wishes to remain residential. Property owners to the east and west
are not opposed to the Comprehensive Plan amendment to Commercial designation. An
office complex with health services lies to the south of the property. The City Staff
Report describes Harrison Hospital as an anchor for health care uses. The area contains
numerous health clinic and health services. Adjacent property to the south contains two
buildings leased to doctors, eye clinics, and dentists. Mr. Bonsell testified that the
property feels like a commercial zone, in which single-family residential use is unusual.
Exhibit 16, Staff Report, page 3; Testimony of Mr. Bonsell.

18. Mr. Horton testified for the Applicant that the property was purchased at the time the
Commercial designation was proposed. He noted that there has been no opposition to the
rezone of the subject property, as it is located adjacent to property zoned Commercial.
Testimony of Mr. Horton. Mr. Bonsell testified that the Planning Department considered
the proposed rezone to be consistent with City criteria. The Planning Department
recommends approval of the proposed rezone. Exhibit 16, Staff Report, page 5;
Testimony of Mr. Bonsell.

CONCLUSIONS

Jurisdiction

The City of Port Orchard Hearing Examiner has jurisdiction to hold a hearing on rezone
applications that are not part of the Comprehensive Plan Amendment process. Based on the
evidence in the record, the Hearing Examiner may recommend that the City Council approve,
approve with modifications, or deny the application. Port Orchard Municipal Code (POMC)
2.76.080; POMC 2.76.100; POMC 2.76.110; POMC 16.01.021(3).

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. 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. An “open record hearing” is defined as a “hearing, conducted by the hearing examiner that creates the City's official record through testimony and submission of evidence and information.” POMC 16.08.520. In contrast, the closed record hearing to be held by the City Council does not allow for the submittal of new evidence or testimony. See POMC 16.08.138. If the City Council determines that no mistake has been committed by the Hearing Examiner, the City Council would likely approve the Hearing Examiner’s recommendation. If the Council amends or rejects the findings of the Hearing Examiner, it should do so only with specific reference to exhibits or testimony in the record that support the rejection or amendment. If the Council believes a mistake was made in a conclusion, it is suggested the Council also review the underlying support for that conclusion to determine specifically how it fails to provide support. Conclusions should only be modified or rejected if the reference in support of the conclusion fails to provide substantial evidence in support of the conclusion.

Criteria for Review
Port Orchard Municipal Code (POMC) 16.25.060 sets forth the standards and criteria the Hearing Examiner must use to evaluate a request for a rezone. A request for a rezone shall only be granted if:

1. The reclassification is substantially related to the public health, safety, or welfare; and
2. The reclassification is warranted because of changed circumstances or because of a need for additional property in the proposed land use zone classification or because the proposed zoning classification is appropriate for reasonable development of the subject property; and
3. The subject property is suitable for development in general conformance with zoning standards under the proposed zoning classification; and
4. The reclassification will not be materially detrimental to uses or property in the immediate vicinity of the subject property or incompatible with such uses; and
5. The reclassification has merit and value for the community as a whole; and
6. The reclassification is in accord with the comprehensive plan; and
7. The reclassification complies with all other applicable criteria and standards of the Port Orchard Municipal Code.

POMC 16.25.060.

Either substantially changed conditions or a substantial relationship to public health, safety, or welfare, may alone justify a rezone. Although community opposition may be considered, it may not be the underlying reason for denial of a rezone. Parkridge v. Seattle, 89 Wn.2d 454, 573 P.2d 359 (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). Property may be rezoned consistent with the comprehensive plan even

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when the ordinance implementing the comprehensive plan amendment allowing the proposed use has not yet been adopted. *Homeowners Ass’n v. Cloninger & Associates*, 151 Wn.2d 279 (2004).

Conclusions

1. **The rezone is substantially related to the public health, safety, or welfare.** The City provided appropriate notice of the rezone application and associated open record hearing. The proposed rezone would allow for development with a broad range of uses to support the nearby hospital and health care services, in compliance with the City Comprehensive Plan goals and policies for the Tremont Corridor. The City Council will review the potential impacts of an increased range of uses with review of the Commercial land use designation. The proposed rezone will be consistent with the Comprehensive Plan assuming the City Council adopts the requested amendment. Property may be rezoned consistent with the comprehensive plan even when the ordinance implementing the comprehensive plan amendment allowing the proposed use has not yet been adopted. *Homeowners Ass’n v. Cloninger & Associates*, 151 Wn.2d 279 (2004). The City analyzed the potential environmental impacts of the proposed rezone, and determined that it would not result in probable significant adverse environmental impacts. Any future development of the property would be reviewed for compliance with City requirements, including transportation, fire safety, public utilities, erosion control, and stormwater drainage standards. *Findings 2, 3, 6, 8, 12, and 16.*

2. **The rezone is warranted because of changed circumstances.** The Applicant, City Planner, and City Staff Report all describe the subject property as located in an area of transition from residential to commercial uses. Neighboring properties have been leased to health care clinics and services that support and complement Harrison Hospital to the north. City staff testified, and the Applicant agreed, that the Business Professional zone may be more appropriate to the subject property. The Commercial zone would allow the broadest mix of retail, service, office, and commercial recreation/cultural uses. The Business Professional zone is intended for transitional areas from residential to commercial, and would allow development that supports major employment centers such as Harrison Hospital. With either the Commercial or Business Professional zones, the proposed rezone would allow professional and office uses that support the medical industry and Harrison Hospital, consistent with the City Comprehensive Plan goals and Policies for the Tremont Corridor Overlay District. The area in which the subject property is located has experienced changed circumstances, and a rezone to Commercial or Business Professional would recognize this. Furthermore, proof of changed circumstances is not required for a rezone if the proposed rezone and associated development implement policies are 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). The proposed rezone would implement policies contained in the comprehensive plan. Approval of the rezone is conditioned upon City Council

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approval of the Comprehensive Plan amendment before the end of 2010. *Findings 4 – 12, 17, and 18.*

3. **The subject property is suitable for development.** The subject property currently contains a single-family residence, which would be retained and converted to office use. Vehicles would access the property through Pottery Avenue. Adequate parking would be provided on-site. There are no critical areas on the property. The City reviewed the environmental impacts of the proposed rezone and determined that approval would not result in probable significant adverse impacts. Future development would be reviewed for consistency with City code and development standards. *Findings 3, 13, 15, and 16.*

4. **The rezone will not be materially detrimental to or incompatible with uses and properties in the immediate vicinity.** The area in which the property is located is in transition from residential to commercial uses. Although nearby residential owners have objected to the transition to commercial uses in the past, there has been no opposition to the present rezone request. The area appears to observers as if it already carries a Commercial zoning; uses and properties in the immediate vicinity of the subject property cater to health care related services. Harrison Hospital is located nearby to the north. Adjacent property to the south is developed to provide health care services. The Commercial zone would provide the broadest mix of uses. The Business Professional zone would limit potential uses to allow transition from residential to commercial uses. The Applicant would provide landscaping to buffer the property from adjacent residential uses. *Findings 4, 6, 8, 10 – 12, 14 – 18.*

5. **The rezone has merit and value for the community as a whole.** Rezone to Commercial would allow development with the broadest mix of uses. Rezone to Business Professional would allow development to support Harrison Hospital while providing a transitional area between nearby residential uses and commercial uses. Approval of a rezone to either Commercial or Business Professional would allow professional and office uses that support the existing medical industry and Harrison Hospital. The proposed use would provide a needed hearing aid clinic to the community. Future development would be reviewed to ensure compliance with the City code and development regulations. *Findings 1, 5 – 8, 10, 11 – 13, 15 – 18.*

6. **The rezone is in accordance with the Comprehensive Plan and complies with the City code.** The Comprehensive Plan goals and policies encourage professional and office uses in the Tremont Corridor to support the medical industry, and Harrison Hospital in particular. Approval of the rezone to either Commercial or Business Professional would allow uses to support health care services. Approval of the rezone is conditioned upon City Council approval of the associated Comprehensive Plan amendment by the end of this year. Future development would be reviewed at the time of application to ensure compliance with City code and development regulations in effect at that time. *Findings 5, 6, 8 – 12, 15 – 18.*
RECOMMENDATION

Based on the above findings and conclusions, the Hearing Examiner recommends that the City Council APPROVE the request for a rezone from R4.5 to either Commercial or Business Professional for a 0.68-acre parcel located at 1710 Pottery Avenue, in Port Orchard, Washington. The recommended approval of the rezone request is conditioned upon City Council approval of a Comprehensive Plan amendment Land Use Designation to Commercial by the end of the current 2010 docket year.

Recommended this 18th day of August 2010.

THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center