BEFORE THE HEARING EXAMINER
FOR THE CITY OF PORT ORCHARD

In the Matter of the Application of ) No. SDP 118-12/SCUP 119-12
) )
) )
James Weaver, on behalf of the ) Blackjack Creek Trail
City of Port Orchard ) )
) )
For a Shoreline Substantial Development Permit ) FINDINGS, CONCLUSIONS
And Shoreline Conditional Use Permit ) AND DECISIONS

SUMMARY OF DECISIONS

The request for a Shoreline Substantial Development Permit to establish 1.25 miles of Blackjack Creek Trail, running south along Blackjack Creek, in the shoreline jurisdiction in Port Orchard, Washington, is APPROVED. Conditions of approval are necessary to mitigate specific project impacts.

The request for a Shoreline Conditional Use Permit to construct 1.25 miles of Blackjack Creek Trail beginning at Bay Street, running south along Blackjack Creek, in Port Orchard, Washington is APPROVED. Conditions of approval are necessary to mitigate specific project impacts.

SUMMARY OF RECORD

Request:
James Weaver, on behalf of the City of Port Orchard, requests a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit to construct and establish 1.25 miles of Blackjack Creek Trail beginning at Bay Street and running south along Blackjack Creek, in the shoreline jurisdiction in Port Orchard, Washington. Trail construction includes construction of an ADA-accessible elevated boardwalk with two viewing platforms; conversion of two parking spaces into ADA-accessible spaces; adding trailhead signage and lighting; adding stairs and switchbacks along a steep section of trail; realignment of a trail section within City right-of-way; completing safety improvements along the trail; and maintenance of the pedestrian crossing over Blackjack Creek.

Hearing Date:
The Hearing Examiner held an open record hearing on the request on June 14, 2012.
Testimony:
The following individuals presented testimony under oath at the open record hearing:

Thomas Bonsell, City Associate Planner
James Weaver, Applicant Representative
Dean Christofferson
Chris Henry

Exhibits:
The following exhibits were admitted into the record:

1. Application submittal, including the following documents:
   A. Application for Shoreline Substantial Development Permit and Conditional Use Permit, Shorelines, dated March 28, 2012
   B. Contact Information, dated March 23, 2012
   C. Tax parcel numbers and legal descriptions, dated April 27, 2012
   D. Project Narrative, dated April 27, 2012
   E. Responses to Port Orchard Shoreline Master Program, Part IV, Chapter 4.2, Conditional Uses, dated April 27, 2012
   F. Biological Assessment, dated March 2012
   G. Surrounding property owners list, mailing labels, and map, with signed verification statement, dated March 28, 2012
   H. SEPA Checklist, dated March 28, 2012
   I. Project drawings – 9 sheets, dated April 4, 2011
   J. Cultural Resources Field Inventory, dated August 2011

2. Property Reports and Aerial Site Maps, dated April 27, 2012
3. Application Transmittal sheet, dated April 30, 2012
4. Comment memo from South Kitsap Fire & Rescue Fire Prevention Manager Greg Rogers, dated May 1, 2012
5. Determination of Completeness, dated May 2, 2012
6. Distribution list for environmental review: SEPA Checklist, Notice of Application with SEPA Threshold Determination, & Site Map, dated May 4, 2012
9. Comments from David Rill, Sunset Lane Memorial Park, dated May 17, 2012
10. Comments from Gina Piazza, Area Habitat Biologist, Washington Department of Fish & Wildlife: received via e-mail, dated May 18, 2012
11. Comments from Alison O’Sullivan, Biologist, Suquamish Tribe: received via e-mail, dated May 18, 2012
12. Comments from Dean Christofferson, dated May 21, 2012
13. MDNS, dated May 22, 2012

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 2 of 17
The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

**FINDINGS**

**Application and Notice**

1. James Weaver, on behalf of the City of Port Orchard (Applicant), requests a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit to construct and establish 1.25 miles of Blackjack Creek Trail beginning at Bay Street, running south along Blackjack Creek, within the shoreline jurisdiction in Port Orchard, Washington. Trail construction includes construction of an ADA-accessible elevated boardwalk with two viewing platforms; conversion of two parking spaces into ADA-accessible spaces; adding trailhead signage and lighting; adding stairs and switchbacks along a steep section of trail; realignment of a trail section within City right-of-way; completing safety improvements along the trail; and maintenance of the pedestrian crossing over Blackjack Creek. *Exhibit 1.A; Exhibit 1.B; Exhibit 1.D; Exhibit 17, Staff Report, pages 1 to 2.*

2. The City of Port Orchard (City) determined the applications were complete on May 2, 2012. *Exhibit 5.* The City posted notice of the applications on the subject property, published notice in *The Kitsap Sun,* and mailed notice to surrounding property owners in accord with City ordinances on May 4, 2012. *Exhibit 6; Exhibit 7; Exhibit 8.* The mailed notice of applications included notice of the open record hearing date. *Exhibit 7.* The City published notice of the record hearing in *The Kitsap Sun* on June 1, 2012. *Exhibit 16.* Thomas Bonsell, City Associate Planner, testified that the City gave reasonable notice of the hearing. *Testimony of Mr. Bonsell.*

---

1 The Applicant is the City of Port Orchard Planning Department. The Applicant Representative is James Weaver, City Development Director. Thomas Bonsell, City Associate Planner, is the City planner assigned to review the application. *Exhibit 1.B; Exhibit 17, Staff Report, page 1.*

2 Mr. Bonsell testified that the subject property is identified by Tax Parcel Nos. 4031-005-001-0003, 4062-010-006-0000, and 4062-002-001-0002. Mr. Bonsell testified the remainder of property that would be impacted by the proposal is City right-of-way (ROW). *Testimony of Mr. Bonsell.* A legal description of the property is included with the applications. *Exhibit 1.C.*

---

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 3 of 17
3. The City acted as lead agency and analyzed the environmental impact of the proposal, as required by the State Environmental Policy Act (SEPA), Ch. 43.21C RCW. The City determined that with 17 conditions, the proposal would not have a probable significant adverse impact on the environment. The City issued a Mitigated Determination of Nonsignificance (MDNS) on May 22, 2012. Conditions concern sediment and erosion control measures; compliance with a Joint Aquatic Resources Permit Application (JARPA) permit issued by the Washington Department of Fish and Wildlife (WDFW); work during daylight hours only; compliance with local, state and federal permit restrictions; no permanent constructed access route to Blackjack Creek; removal of non-native plant species; and no use of pentachlorophenol or Creosote chemicals during construction. Mr. Bonsell testified the MDNS was not appealed. Applicant Representative James Weaver testified that the Applicant will need to submit an application for Hydraulic Project Approval (HPA) by the WDFW. Exhibit 13; Testimony of Mr. Bonsell; Testimony of Mr. Weaver.

Comprehensive Plan and Zoning

4. The subject property is designated Greenbelt by the City Comprehensive Plan. City of Port Orchard Comprehensive Plan, Appendix A, Comprehensive Plan Map. The designation is created to ensure that lower densities occur in the close proximity of Critical and environmentally sensitive areas. Comprehensive Plan, Land Use Element, page 2-8 (December 2009). City Comprehensive Plan Parks Element Objectives, Goals, and Policies encourage increased public access to the marine shoreline; open space preservation; connected open space throughout the City, with preserved natural systems, protected wildlife habitat and corridors, recreation land, physical activity opportunities, natural landforms, and scenic areas; and enhanced and expanded existing park facilities. City Comprehensive Plan, Parks Element (December 2009), pages 4-8 to 4-10 and 4-12. City Comprehensive Plan Shoreline Element Goals and Policies encourage increased public awareness of the historical, cultural, and environmental influences of Port Orchard’s shorelines, with waterfront historical districts and educational and interpretive projects. City Comprehensive Plan, Shorelines Element (December 2009), page 9-3.

5. The subject property is located within the City’s Greenbelt zoning district. Exhibit 17, Staff Report, page 2. The purpose of the greenbelt zone is to preserve and protect natural areas that are unique in character, and ensure that natural systems will be maintained. Port Orchard Municipal Code (POMC) 16.13.110(1). A trail is a permitted use within the Greenbelt zoning district. POMC Table 16.30.060.

Proposal, Existing Site Conditions, and Surrounding Property

6. The proposed trail would begin at Bay Street near Etta Turner Park, extend south within the Blackjack Creek canyon, and end at an existing trail and pedestrian bridge running west-east at Kendall Street. Over the length of the trail, the trail would be located anywhere between 20 feet and 300 feet from the Blackjack Creek ordinary high water line.
mark (OHWM). The trail would provide for public passive recreation, hiking, wildlife observation, and education experiences. The initial 200 feet of trail would consist of an elevated boardwalk, allowing for ADA access to the initial portion of the trail. Two 12-foot-by-12-foot viewing platforms would be located along the elevated boardwalk for nature and wildlife observation. The trail would be covered with natural pervious material. Trail signage and lighting would be installed at the trailhead. Two ADA accessible parking spaces would also be installed at the trailhead. The Blackjack Creek pedestrian bridge would be repaired. The existing wood bridge structure would remain, but the existing wood deck would be replaced with plastic grid decking for light penetration. The existing wood bridge railing and support would be painted. Mr. Bonsell testified that, if approved, trail construction would occur all at once and would not be divided into phases. Mr. Weaver testified that the City received a grant in 2009 for trail construction and design, and that Exhibit 1.F depicts proposed trail alignment. Exhibit 1.F; Exhibit 1.I; Exhibit 19; Testimony of Mr. Bonsell; Testimony of Mr. Andrews.

7. Surrounding property to the east, west and south is located within the City’s Greenbelt zoning district. Property to the north is located within the City’s Commercial zoning district. Surrounding property is mostly undeveloped due to steep slopes associated with the Blackjack Creek drainage area. Some single-family residences, residential buildings, and private cemeteries exist at the top of the slope adjacent to the creek canyon. Areas directly adjacent to the creek banks and between the upland trail alignment and creek banks are undeveloped. Mr. Bonsell testified the proposal would impact three parcels of private property, City right-of-way (ROW), and City-owned property. According to the Biological Assessment prepared by the City, dated March 16, 2012, the trail entrance would be located at Bay Street parallel to Maple Avenue, adjacent to the existing Kentucky Fried Chicken parking lot. Exhibit 1.F; Exhibit 17. Staff Report, page 2.

8. Mr. Bonsell testified that establishing the trail would depend on City acquisition of easements from private property owners and that some owners have not yet agreed to grant an easement across their property. Mr. Weaver testified that easement negotiations would continue following the local permitting process and, if easements are not granted, an alternate trail route would be required. Mr. Weaver added that the alternate route is depicted within Exhibit 1.I. Testimony of Mr. Bonsell; Testimony of Mr. Weaver.

9. Mr. Weaver testified that no trees would be cut as a result of trail construction. Mr. Weaver added that some vegetation was cleared by a surveyor in 2010 to complete a survey of property on which the proposed trail would be constructed. He acknowledged that this clearing may have led to increased use of the trail area. Mr. Weaver testified that, if the proposed trail is approved, unauthorized activity should decline due to increased authorized use and ease of enforcement. Testimony of Mr. Weaver.

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 5 of 17
Shoreline Management Act and Regulations

10. The primary goal of the Shoreline Management Act (SMA), Ch. 90.58 RCW, is to protect the public interest in the State’s shorelines through a coordinated development process. The SMA contemplates protecting against adverse effects to the public health, the land, the vegetation, the wildlife, and the waters, and preserving the public’s opportunity to enjoy the physical and aesthetic qualities of the natural shoreline to the greatest extent feasible. Permitted uses in the shorelines must be designed and conducted in a manner to minimize damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water. Revised Code of Washington (RCW) 90.58.020.

11. The Port Orchard Shoreline Master Program (revised April 1994) (POSMP) includes master program element goals for shoreline uses as well as conservation, recreation, public access, circulation, economic development, and historical/cultural goals. POSMP, pages 5 to 6. The proposed trail would be located on property designated a part of the POSMP Natural shoreline environment. Exhibit 17, Staff Report, page 2.

12. The Natural shoreline environment is characterized by shorelines possessing unique or fragile features, either natural or cultural, which are essentially unaltered from their natural state or relatively intolerant of human use other than passive activities. Any activity which would bring about a change in the existing situation is desirable only if such a change would contribute to the preservation of the existing character. POSMP, page 29.

13. Mr. Bonsell testified that the banks of Blackjack Creek comprise a shoreline of statewide significance. Testimony of Mr. Bonsell. All development within shorelines of statewide significance must adhere to the following policies:

   (1) Recognize and protect the statewide interest over local interest;
   (2) Preserve the natural character of the shoreline;
   (3) Result in long term over short term benefit;
   (4) Protect the resources and ecology of the shoreline;
   (5) Increase public access to publicly owned areas of the shorelines;
   (6) Increase recreational opportunities for the public in the shoreline.

RCW 90.58.020; POSMP, Part VII.7, page 32.

14. The POSMP provides that no substantial development shall be undertaken on the shorelines of the city except those consistent with the policies of the State Shoreline Management Act of 1971 and the POSMP goals, policies and regulations. POSMP, Sec. 1.6, page 3. Substantial development permits are issued for activities classified as permitted uses by the POSMP. POSMP, Sec. 4.1, page 18. State law defines “substantial development” as any development of which the total cost or fair market value exceeds $5,718, adjusted for inflation every five years, or any development that
materially interferes with the normal public use of the water or shorelines of the state. RCW 90.58.030(3)(e). Water-dependent\(^3\) and water-enjoyment recreation uses are allowed within the Natural shoreline environment with a SCUP. POSMP, page 34. Mr. Bonsell testified that a SCUP is required for the portions of the proposed trail within the Natural shoreline environment. Mr. Weaver testified that some portions of the proposed trail are within the City’s shoreline jurisdiction and much of the trail is outside the shoreline jurisdiction. Testimony of Mr. Bonsell; Testimony of Mr. Weaver.

15. POSMP use policies, goals, and regulations are relevant to the proposal. SMP goals encourage regulation of shoreline uses for long-term benefits; public recreation; enhanced public access to shorelines and views; and historical and cultural preservation. SMP parks and recreation policies encourage public lands development to assure maximum recreational opportunities; incorporation of unique and sensitive natural areas into public open space; linked recreational areas through trails; use of shoreline street ends for access and recreation; and minimized adverse environmental impacts. Shoreline regulations set forth within SMP Section 8.12.1 require that recreational facilities make adequate provision for water supply, sewage disposal, and garbage collection; make adequate provision for screening, buffer strips, fences, signs preventing park overflow, and other measures to protect adjacent property; prohibit tree cutting and limit the taking of marine life, driftwood, and similar items; minimize signs associated with recreational facilities; prohibit off-road use of all-terrain vehicles; make adequate provision for vehicular parking; and provide for parking surface runoff prevention. POSMP, page 69.

Public, Tribe, and Agency Comment

16. The City received a letter from David Rill, Sunset Lane Memorial Park, dated May 17, 2012, stating there are no issues with environmental impact of the trail but there are concerns with granting an easement to the City for use of Park property for the trail. The letter stated Mr. Rill would continue to communicate with Mr. Weaver about these concerns. Exhibit 9.

17. A memorandum from Gina Piazza, WDFW Area Habitat Biologist, received May 18, 2012, recommends that buffer widths be consistent with the WDFW’s Recommendations for Washington’s Priority Habitats – Riparian. According to the memorandum, WDFW recommends 250-foot wide buffers for Type I and Type II streams and 200-foot wide buffers for Type III streams. The memorandum states that trails should not be located within recommended riparian habitat areas for most of trail length, and instead occasional bends or perpendicular side trails should allow for viewing or access to streams and wetlands. If trails are constructed within riparian areas, pervious surfaces should be used.

---

\(^3\) A “water dependent use” means a use that cannot exist in any other location and is dependent on the water by reason of the intrinsic nature of its operations. A “water enjoyment use” means a use providing passive and active recreation for large numbers of people along shorelines, and ensures the ability to interact with the shoreline. The use must be open to the public with most, if not all, of the shoreline devoted to fostering shoreline/people interaction. Water enjoyment uses include public waterfront parks. POSMP, Part III.3, pages 13 - 16.

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 7 of 17
Tree removal should be minimized; stream crossings should be limited; stream impacts should be limited; and Creosote and pentachlorophenol should not be used for any part of proposed structures. Mr. Bonsell testified that these concerns are addressed in conditions of approval recommended by the City. Exhibit 10; Testimony of Mr. Bonsell.

18. A memorandum from Alison O'Sullivan, Suquamish Tribe Biologist, received May 18, 2012, states that a site visit to the proposed trail site revealed dirt work and modification beyond minor clearing, to the extent that there was exposed soil and material in the creek. The memorandum requested mitigation for these buffer impacts and treatment for erosion control. The memorandum also requested that clearing activity cease until project approvals are granted. According to the memorandum, vegetation removal and trail clearing has significantly increased risk of slope failure and stream impacts due to steep topography and unstable soils present on the site. The memorandum recommended continuing discussions between the Applicant, WDFW and Tribe to address a failing stream crossing at the top of a hill; removal of invasive plant species; prohibition on use of treated wood; avoiding impacts to critical areas and prohibiting direct access to the creek and buffers; minimizing use of impervious surfaces and stormwater impacts; and early and continuous discussion with the Tribe and regulatory agencies in trail siting and development. A follow up email dated June 12, 2012 recommended continued cooperative work between the Tribe, Applicant and WDFW to resolve outstanding issues. Mr. Bonsell testified that these concerns are addressed in conditions of approval recommended by the City. Exhibit 11; Exhibit 20; Testimony of Mr. Bonsell.

19. A memorandum from Thomas Bonsell, City Associate Planner, dated June 14, 2012, states that the site for the proposed trail does not traverse any wetlands but does traverse some wetland buffers and stream habitat buffers. The memorandum cites POMC 18.04.050 and POMC 18.04.060 as regulations that govern trail construction in buffers. POMC 18.04.050 states trails are permitted within regulated wetlands and buffers subject to review under regulations set forth within POMC 18.04.060(7)(a) to (e). These regulations prioritize use of previously-disturbed areas; minimize soil, vegetation, and hydrological impacts; minimize wildlife disturbance; limit trails within buffers to the outer portion of the buffer, a minimum of 25 feet from the wetland edge, except where approved wetland crossings or viewing areas are located; and generally limit trails to pedestrian use. Trails and trail-related facilities are allowed within the buffer of Blackjack Creek, a Type S stream, if in accord with regulations set forth in POMC 18.06.030(9)(a) – (d), which are similar to POMC 18.04.060(7) wetland buffer restrictions. Exhibit 18.

20. The Biological Assessment prepared by the City, dated March 16, 2012, determined that the proposal may affect but is not likely to adversely affect fish and bird species listed as threatened under the federal Endangered Species Act. The Biological Assessment also determined that the proposal would have no effect or would not likely adversely affect critical habitat designated under the Endangered Species Act. Exhibit 1. F.
21. A Blackjack Creek Wilderness Trail Cultural Resources Field Inventory, prepared by ASM Affiliates, Inc., dated August 2011, found no cultural resources within the proposal's area of potential effect (APE). The Inventory also found that there is a low probability of cultural resources occurring within the majority of project area, except for the extreme northern end of the project areas on a level terrace immediately above the creek. The Inventory concluded that construction excavation could possibly encounter smaller-scale or relatively deeply buried cultural resources, but dense vegetation and substrate conditions preventing excavations below 50 cm made encounters unlikely. The Inventory recommended a professional archaeologist monitor all ground-disturbing activity in the far northern end of the project APE, and that the City contact the Suquamish Tribe THPO before construction activities occur to offer an opportunity for a Tribal monitor of construction activity. Mr. Bonsell testified that these concerns are addressed in conditions of approval recommended by the City. Exhibit 1.J; Testimony of Mr. Bonsell.

22. Dean Christofferson testified that he has lived in the greenbelt area above Blackjack Creek for the past 25 years. Mr. Christofferson testified that persons traversing the area broke into his house, and that persons have been congregating and perhaps living by the existing bridge. Mr. Christofferson testified he is in favor of the proposed trail, but is concerned about this unauthorized activity. Mr. Christofferson added that this activity seems to be increasing. Mr. Christofferson requested more enforcement against unauthorized activity along the trail. Mr. Weaver acknowledged this concern, and opined that completion of the trail should reduce unauthorized use due to increased pedestrian use of the trail and ease of enforcement. Testimony of Mr. Christofferson & Mr. Weaver.

23. Chris Henry, a Kitsap Sun reporter, testified to inquire whether bicycles and horses would be allowed along the proposed trail. Mr. Weaver responded that bicycle and horse use would be prohibited along the trail. Testimony of Mr. Henry; Testimony of Ms. Weaver.

Staff Recommendation and Applicant Response

24. Mr. Bonsell testified that City staff recommends approval of the requests with 25 conditions of approval, including MDNS conditions. Proposed conditions include conditions that concern sediment and erosion control measures to protect surface waters and other critical areas; compliance with other required permits; a work window; low impact development techniques to minimize stormwater runoff; non-native plant removal; delayed construction if easements are not acquired; prohibition on use of pentachlorophenol or Creosote chemicals; WDFW project approval; and City building permit requirements. Mr. Weaver testified that the Applicant has read, understands, and agrees with all proposed conditions. Exhibit 17, Staff Report, pages 10 to 11; Testimony of Mr. Bonsell; Testimony of Mr. Weaver.

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 9 of 17
CONCLUSIONS

Jurisdiction

The City of Port Orchard Hearing Examiner is authorized to hold a hearing on the shoreline substantial development permit and shoreline conditional use permit applications. Based on the evidence in the record, the Hearing Examiner may grant, modify and grant, or deny the applications. Port Orchard Municipal Code (POMC) 2.76.080; POMC 2.76.100; POMC 2.76.110; POMC 16.01.021(3).

Criteria for Shoreline Substantial Development Permit Review

Shoreline Management Act

The Shoreline Management Act is codified at RCW 90.58.020. Applicable policies of RCW 90.58.020 include those to foster “all reasonable and appropriate uses;” protect against adverse effects to the public health, the land and its vegetation and wildlife; and give priority to single family residences and appurtenant structures in authorizing alterations to the natural condition of the shoreline. Permitted shoreline uses must be designed to “minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” RCW 90.58.020.

In promulgating the Shoreline Management Act of 1971, the legislature recognized that “ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development” of the state’s shorelines.” RCW 90.58.020. The legislature also determined that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” RCW 90.58.020. Accordingly, the Shoreline Management Act requires local governments to develop a master program to regulate shoreline uses consistent with its guidelines. RCW 90.58.080(1).

Shoreline Management Act Regulations

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 sets forth permitting procedures and permit criteria. The Hearing Examiner reviews the application using the following criteria:

(1) A substantial development permit shall be granted only when the development proposed is consistent with:
   (a) The policies and procedures of the act;
   (b) The provisions of this regulation; and
   (c) The applicable master program adopted or approved for the area. Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.
(2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.  
*WAC 173-27-150.*

The Hearing Examiner must review the relevant Port Orchard shoreline master program goals and policies to determine whether the proposal complies with the Shoreline Management Act regulations. All development activity in identified shoreline areas must be consistent with the policies of the Shoreline Management Act (RCW 90.58) and the Port Orchard Shoreline Master Program. *City SMP, Sec. 5.3, page 25.*

**Criteria for Shoreline Conditional Use Permit Review**

Uses which are classified or set forth in the City SMP as conditional uses may be authorized by the Hearing Examiner provided the applicant can demonstrate all of the following:

a. The proposed use will not interfere with the normal public use of public shorelines;
b. The proposed use of the site and the design is compatible with other permitted uses in the area;
c. The proposed use will cause no significant adverse effects to the shoreline environment; and  
d. The public interest will suffer no substantial detrimental effect.  
*City SMP, Sec. 4.2, page 19.*

The total or cumulative impacts of the conditional use should also remain consistent with RCW 90.58.020 policies and should not produce significant adverse effects on the shoreline environment. In authorizing a conditional use, special conditions may be attached to the permit to prevent undesirable effects of the proposed use. *City SMP, Sec. 4.2, pages 4 – 5.*

The criteria for review adopted by the Port Orchard City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

**Conclusions**

**Shoreline Substantial Development Permit**

A. With conditions, the proposed project meets the criteria to obtain a Shoreline Substantial Development Permit.

1. The proposed project would be consistent with state Shoreline Management Act policies and procedures. A recreational trail to provide recreational use and public access to the shoreline is a reasonable and appropriate use of the shoreline. The trail would provide for public passive recreation, hiking, wildlife observation, and
education. The initial 200 feet of trail would consist of an elevated boardwalk, allowing for ADA access to the initial portion of the trail. Two 12-foot-by-12-foot viewing platforms would be located along the elevated boardwalk for nature and wildlife observation. The proposal may affect, but would not likely adversely affect species listed under the Endangered Species Act (ESA) or adversely affect critical habitat. The City determined that with conditions, the proposal would not have a probable significant adverse impact on the environment, and the determination was not appealed. Conditions are necessary to ensure sediment and erosion control to protect surface waters and other critical areas; compliance with other required permits; low impact development techniques to minimize stormwater runoff; non-native plant removal; prohibition on use of pentachlorophenol or Creosote chemicals; and WDFW project approval. Findings 1, 3, 6, 9, 10 – 21, 24.

2. The proposed project would be consistent with Chapter 173-27, Washington Administrative Code regulations. The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 sets forth permitting procedures and permit criteria. This proposal is being reviewed under the criteria set forth in WAC 173-27-150. These criteria are intended to implement the policies of the SMA, which requires that all shoreline projects be consistent with the SMA and an approved local Shoreline Master Program. The proposal would be constructed primarily within City ROW and private property, and would require easements over private property. According to City staff, easements needed for construction have not yet been secured. The proposal is consistent with the City SMP, as described in more detail below. Conditions are necessary to ensure construction of trail sections does not begin if appropriate easements and or agreements have not been finalized with affected private land owners for those trail sections. Conditions are also necessary to ensure sediment and erosion control to protect surface waters and other critical areas; compliance with other required permits; low impact development techniques to minimize stormwater runoff; non-native plant removal; prohibition on use of pentachlorophenol or Creosote chemicals; and WDFW project approval. Findings 1, 6 - 9, 10 – 20, 24.

3. The proposed project would be consistent with the Port Orchard Shoreline Master Program and Port Orchard Shoreline Management Regulations. The proposed trail would provide public recreation access to the Blackjack Creek shoreline and would connect to an existing trail at Kendall Street, consistent with POSMP use policies, goals, and regulations. Some project work would occur within the City’s shoreline jurisdiction, in area designated as Natural shoreline environment. Water-dependent and water-enjoyment recreational uses are allowed within the Natural shoreline environment with a Shoreline Conditional Use Permit (SCUP). The Applicant has filed a related request for a SCUP to authorize the project. Conditions
are necessary to ensure sediment and erosion control to protect surface waters and other critical areas; compliance with other required permits; low impact development techniques to minimize stormwater runoff; non-native plant removal; prohibition on use of pentachlorophenol or Creosote chemicals; and WDFW project approval. 

Findings 1, 10 – 20, 24.

Shoreline Conditional Use Permit

B. With conditions, the portions of the proposed trail within the Natural shoreline environment meet the criteria for granting a Shoreline Conditional Use Permit (SCUP).

1. The proposed use will not interfere with the normal public use of public shorelines. The subject property is designated Greenbelt under the City Comprehensive Plan and located in the City’s Greenbelt zoning district. A trail use is permitted within the zoning district. The area of the property immediately adjacent to the creek shoreline and between the upland trail section and the creek is undeveloped. Trail uses are permitted within stream and wetland buffer, subject to City regulations that prioritize use of previously-disturbed areas; minimize soil, vegetation, and hydrological impacts; minimize wildlife disturbance; limit trails within buffers to the outer portion of the buffer, a minimum of 25 feet from the wetland edge, except where approved wetland crossings or viewing areas are located; and generally limit trails to pedestrian use. The trail would connect to an existing trail at Kendall Street. The proposal would be constructed primarily within City ROW and private property, and would require easements over private property. According to City staff, easements needed for construction have not yet been secured. Conditions are necessary to ensure construction of trail sections does not begin if appropriate easements and or agreements have not been finalized with affected private land owners for those trail sections. Findings 1, 4 – 8, 24.

2. The proposed use of the site and the design is compatible with other permitted uses in the area. The area of the property immediately adjacent to the creek shoreline and between the upland trail section and the creek is undeveloped. Trail uses are permitted within stream and wetland buffer, subject to City regulations that prioritize use of previously-disturbed areas; minimize soil, vegetation, and hydrological impacts; minimize wildlife disturbance; limit trails within buffers to the outer portion of the buffer, a minimum of 25 feet from the wetland edge, except where approved wetland crossings or viewing areas are located; and generally limit trails to pedestrian use. The trail would connect to an existing trail at Kendall Street. Surrounding property in three directions is located within the City’s Greenbelt zoning district; property to the north, in the vicinity of the trailhead, is located in the City’s Greenbelt.
Commercial zoning district. The proposal would be constructed primarily within City ROW and private property, and would require easements over private property, featuring single-family residential development and cemeteries. According to City staff, easements needed for construction have not yet been secured. Conditions are necessary to ensure construction of trail sections does not begin if appropriate easements and or agreements have not been finalized with affected private land owners for those trail sections. *Findings 1, 4, 6 – 8, 16 – 24.*

3. **The proposed use will not cause significant adverse effects to the shoreline environment.** The proposal may affect, but would not likely adversely affect species listed under the Endangered Species Act (ESA) or adversely affect critical habitat. The City determined that with conditions, the proposal would not have a probable significant adverse impact on the environment, and the determination was not appealed. Conditions are necessary to ensure sediment and erosion control to protect surface waters and other critical areas; compliance with other required permits; low impact development techniques to minimize stormwater runoff; non-native plant removal; prohibition on use of pentachlorophenol or Creosote chemicals; and WDFW project approval. *Findings 1, 3, 6 – 9, 16 – 21, 24.*

4. **The public interest will not suffer substantial detrimental effect.** The City gave adequate notice and opportunity to comment on the proposal. The City determined that with conditions, the proposal would not have a probable significant adverse impact on the environment, and the determination was not appealed. The proposed use is consistent with City Comprehensive Plan Objectives, Goals, and Policies; is allowed within the City’s Greenbelt zoning district; and is allowed within wetland and stream buffer, subject to City regulations that prioritize use of previously-disturbed areas; minimize soil, vegetation, and hydrological impacts; minimize wildlife disturbance; limit trails within buffers to the outer portion of the buffer, a minimum of 25 feet from the wetland edge, except where approved wetland crossings or viewing areas are located; and generally limit trails to pedestrian use. Trail use may present security and enforcement concerns, especially where the proposed trail would cross private property. According to City staff, easements needed for construction have not yet been secured. Conditions are necessary to ensure construction of trail sections does not begin if appropriate easements and or agreements have not been finalized with affected private land owners for those trail sections. Conditions are also necessary to ensure sediment and erosion control to protect surface waters and other critical areas; compliance with other required permits; low impact development techniques to minimize stormwater runoff; non-native plant removal; prohibition on use of pentachlorophenol or Creosote chemicals; and WDFW project approval. *Findings 1 – 4, 6 – 8, 16, 19, 22 – 24.*

**DECISIONS**

*Findings, Conclusions, and Decision*

City of Port Orchard Hearing Examiner

Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 14 of 17
Based on the above findings and conclusions, the requests for a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit to construct and establish 1.25 miles of Blackjack Creek Trail beginning at Bay Street, running south along Blackjack Creek, in Port Orchard, Washington is APPROVED, subject to the following conditions:

1. Prior to implementing work, the “Project Area” must be completely delineated with the appropriate sediment and erosion control measures. In addition, the “Upland Staging Area” must also be clearly delineated on-site and installation of appropriate containment instrument shall be in place.

2. No trail construction involving shovels or stripe painting will occur in periods of significant rain or wet weather. The contractor will use the BMP’s including silt fencing to control sediments from vegetation removal or ground disturbing activities.

3. The contractor will designate at least one employee as the sediment control (ESC) lead. The ESC lead will be responsible for the installation and monitoring of erosion control measures and maintaining spill containments and control equipment. The ESC lead will also be responsible for ensuring compliance with all local, state and federal erosion and sediment control requirements.

4. The ESC lead will inspect all temporary and permanent erosion and sediment control measures on a regular basis, maintain and repair temporary erosion and sediment control measures to assure continued performance of their continued function, inspect silt fences after each rainfall and at least daily during prolonged rainfall, remove sediment as it collects behind silt fences and prior to their final removal.

5. The Contractor will install perimeter protection/silt fencing as needed to protect surface waters and other critical areas. The actual locations will be specified in the field, based on site conditions.

6. Erosion control blankets will be installed during construction directly adjacent to the trail on steep slopes that are susceptible to erosion and where ground disturbing activities have occurred. This will prevent erosion and assist with establishment of native vegetation.

7. Exposed soils will be seeded and covered with straw mulch after construction in complete. Any temporary construction impact areas will be re vegetated with native plants.

8. All exposed soils will be stabilized during the first available period, and shall not be untreated for more than seven days without receiving the erosion control specified. For

---

4 This decision includes conditions required to reduce project impacts as well as conditions required to meet City Code standards.

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12
Western Washington, no soils shall remain un-stabilized for more than two days from October 1 to April 30, and no more than seven days from May 1 to September 30.

9. All work will be performed according to the requirements of the JARPA permit issued by the Washington Department of Fish & Wildlife (WDFW)-required JARPA. Conditions of JARPA approval shall be conditions of the project.

10. All development within 200 feet of Blackjack Creek is to be conducted between July 15 and October 31, consistent with the Kitsap freshwater General Work Window.

11. Project staging and material storage areas shall be located in currently developed areas, such as parking lots and/or other managed areas.

12. The contractor will limit site work to daylight hours and comply with local, state and federal permit restrictions.

13. The applicant is prohibited from constructing a permanent constructed access route directly to Blackjack Creek.

14. To the maximum extent possible the applicant will utilize low impact development construction techniques to minimize stormwater run-off.

15. Removal of non-native plant species adjacent to trail is encouraged at one year intervals utilizing public volunteers.

16. The use of pentachlorophenol or Creosote chemicals during construction is generally prohibited.

17. Contractor shall provide SWPPP to Public Works for review prior to start of construction and shall notify Public Works by the next business day of any changes.

18. Approval of this SDP and CUP is limited to the phase of trail construction supported by the LWCF grant and identified by this Development Permit. Additional sections of trail improvements will require additional shoreline permitting.

19. All conditions identified by City Departments and other agencies must be met prior to final inspection.

20. Prior to commencing construction activities the applicant shall receive approval from the Washington State Department of Fish and Wildlife.

21. A City of Port Orchard building permit will be required for the construction of the boardwalk.

Findings, Conclusions, and Decision
City of Port Orchard Hearing Examiner
Blackjack Creek Trail, No. SDP 118-12/SCUP 119-12

Page 16 of 17
22. If required State or Federal permits are not approved, a City building permit will not be issued for construction.

23. Construction of the trail project shall not commence for sections, if appropriate easements and or agreements have not been finalized with affected private land owners for those trail sections.

24. Construction of the trail project shall minimize, wherever possible, removal of any tree with a trunk diameter in excess of 6" during the construction of this project.

25. Removal of any tree deemed necessary for this project shall be replaced subject to the requirements as identified within Port Orchard Municipal Code section 16.50.220.

Decided this 22nd day of June 2012.

THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center LLC