

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

In the Matter of the Application of)	Nos. LU16-CUP-02; LU16-SH
)	SDP-03; LU16-SH VAR-01
)	
Alan Keimig, the Keimig Associates, on behalf of Eagle 253, LLC)	Bruce Titus Ford Dealership
)	
For a Conditional Use Permit, Shoreline Substantial Development Permit, and Approval of a Shoreline Variance)	FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

The requests for a conditional use permit, a shoreline substantial development permit, and approval of a shoreline variance to redevelop two parcels of property at 1207-1215 Bay Street in Port Orchard are **APPROVED**. All existing structures on-site would be demolished and, following required environmental remediation, a new auto dealership would be constructed on the western parcel of the site. The eastern parcel would be used to showcase cars and would not be redeveloped with buildings. In addition, the Bay Street Pedestrian Path would be extended along the waterfront side of the parcels to provide public access to the shoreline. Conditions are necessary to mitigate specific impacts of the proposal.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the requests on September 27, 2016.

Testimony:

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

Stephanie Andrews, Associate City Planner
Mark Dorsey, City Public Works Director
Alan Keimig, Applicant Representative

Exhibits:

The following exhibits were admitted into the record:

1. Letter from Stephanie Andrews to Bob Oldright, dated June 4, 2015
2. Shoreline Permit Application Materials, including:
 - A. Shoreline Substantial Development Permit, Shoreline Variance Application, and Conditional Use Permit, received June 21, 2016

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- B. Surrounding Property Owners List and Maps with signed verification statement, dated May 31, 2016
- C. Project Narrative for Shoreline Substantial Development Permit, received June 21, 2016
- D. Project Narrative for Shoreline Variance, received June 21, 2016
- E. Legal Description of Properties, received June 21, 2016
- F. Vicinity Map, received June 21, 2016
- G. SEPA Environmental Checklist, dated May 31, 2016
- H. Preliminary Storm Drainage Analysis, N.L. Olson and Associates, Inc., dated May 2016
- I. Traffic Impact Analysis, Heath & Associates, Inc., dated May 13, 2016
- J. Asbestos Survey Report, ADVANCE Environmental, Inc., dated June 9, 2016
- K. Limited Phase II Environmental Site Assessment Report for 1209 Bay Street, Stemen Environmental, Inc., dated February 26, 2015
- L. Limited Phase II Environmental Site Assessment Report for 1215 Bay Street, Stemen Environmental, Inc., dated January 15, 2011
- M. Limited Phase II Environmental Site Assessment Report for Maple Street Waterway, Stemen Environmental, Inc., dated January 15, 2011
- N. Additional Environmental Investigations Report, Stemen Environmental, Inc., dated March 25, 2011
- O. Project Plans (13 Sheets), received June 21, 2016
- 3. Conditional Use Permit Application, received June 21, 2016, with attached Project Narrative
- 4. Parcel Report and Map, dated June 21, 2016
- 5. Application Review Materials:
 - A. Application Transmittal (Shoreline Permits), dated June 21, 2016
 - B. Application Transmittal (Conditional Use Permit), dated June 21, 2016
- 6. Comments from South Kitsap Fire and Rescue:
 - A. Letter from Deputy Fire Marshal Brad Wiggins regarding Shoreline Permits, dated June 23, 2016
 - B. Letter from Deputy Fire Marshal Brad Wiggins regarding Conditional Use Permit, dated June 23, 2016
- 7. Email from Doug Price to Stephanie Andrews, dated July 1, 2016
- 8. Memorandum from Andrea Archer-Parsons to Stephanie Andrews, dated July 11, 2016
- 9. Determination of Completeness, dated July 14, 2016
- 10. Notice of Application with SEPA Determination of Nonsignificance, dated July 22, 2016
- 11. Affidavit of Posting (Notice of Application), dated July 21, 2016
- 12. Affidavit of Mailing (Notice of Application), dated July 21, 2016
- 13. Affidavit of Publication (Notice of Application), dated July 22, 2016
- 14. Determination of Nonsignificance, dated August 12, 2016
- 15. Agency Distribution of SEPA Determination, dated August 15, 2016
- 16. Notice of Public Hearing, dated September 16, 2016

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17. Affidavit of Publication (Notice of Hearing), dated September 16, 2016
18. Affidavit of Posting (Notice of Hearing), dated September 15, 2016
19. Affidavit of Mailing (Notice of Hearing), dated September 16, 2016
20. Capacity Reservation Certificate, dated August 29, 2016
21. Revised Site Plan, dated September 13, 2016
22. Certification of Public Notice, undated
23. Staff Report, dated September 16, 2016

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. Alan Keimig, the Keimig Associates, on behalf of Eagle 253, LLC (Applicant), requests a conditional use permit (CUP), a shoreline substantial development permit (SSDP), and approval of a shoreline variance (SVAR) to redevelop two parcels at 1207-1215 Bay Street in Port Orchard.¹ All existing structures on-site would be demolished, including an auto dealership and a building housing the St. Vincent de Paul thrift store. Following required environmental remediation, a new auto dealership would be constructed on the western parcel of the site, between 46 and 60 feet from the ordinary high water mark (OHWM) of Sinclair Inlet, in an area designated a “High-Intensity” shoreline environment under the City of Port Orchard (City) Shoreline Master Program (SMP). An SSDP and SVAR are required because the proposal would exceed the \$6,416 exemption threshold for shoreline development and would place structures within the 75-foot standard shoreline buffer for the High-Intensity shoreline environment required by the City SMP. The CUP would allow the maximum height of a portion of the auto dealership to extend approximately five feet higher than the 27 feet allowed by Port Orchard Municipal Code (POMC) 16.40.025. The eastern parcel would be used to display vehicles for sale and would not be redeveloped with additional buildings. The Applicant would also extend the Bay Street Pedestrian Path along the waterfront side of the property to provide new public access to the shoreline. *Exhibit 1; Exhibit 2.A; Exhibit 2.C; Exhibit 2.D; Exhibit 3; Exhibit 23, Staff Report, pages 1 through 7.*
2. The City of Port Orchard (City) deemed the application complete on July 14, 2016. On July 21, 2016, the City posted notice of the application on the property and mailed notice to owners of surrounding property and applicable agencies as required by City

¹ The subject properties are identified by tax parcel numbers 252401-2-018-2004 and 252401-2-020-2000. *Exhibit 2.E; Exhibit 23, Staff Report, page 1.* A legal description of the property is provided in the application materials. *Exhibit 2.E.*

ordinances.² The next day, the City published notice of the application in the *Port Orchard Independent*. On September 15, 2016, the City posted notice of the open record hearing associated with the application. The next day, the City mailed notice of the hearing to surrounding property owners and applicable agencies and published notice in the *Port Orchard Independent*. Associate City Planner Stephanie Andrews testified that the City did not receive any public comments in response to its notice materials. *Exhibit 9; Exhibit 10; Exhibit 11; Exhibit 12; Exhibit 13; Exhibit 16; Exhibit 17; Exhibit 18; Exhibit 19; Exhibit 22; Testimony of Ms. Andrews.*

State Environmental Policy Act

3. The City acted as lead agency and analyzed the environmental impacts of the proposal, as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). The City used the optional Determination of Nonsignificance (DNS) process allowed by Washington Administrative Code (WAC) 197-11-355 and provided notice with the notice of application, dated July 22, 2016. The notice materials stated that the City expected to issue a DNS for the proposal and provided a comment period from July 22 to August 12, 2016. Ms. Andrews testified that the City received no comments in response to its notice materials. Following the comment period, the City reviewed the Applicant's SEPA checklist and other available information on file, including an asbestos report, multiple environmental site assessments, a stormwater drainage analysis, and a traffic impact analysis, and determined that the proposal would not have a probable significant adverse impact on the environment. The City issued a DNS on August 12, 2016. Ms. Andrews testified that the SEPA determination was not appealed. *Exhibit 2.G; Exhibit 2.H; Exhibit 2.I; Exhibit 2.J; Exhibit 2.K; Exhibit 2.L; Exhibit 2.M; Exhibit 2.N; Exhibit 10; Exhibit 14; Exhibit 15; Testimony of Ms. Andrews.*

Comprehensive Plan, Zoning, and Surrounding Property

4. The project site is designated "Commercial" by the City Comprehensive Plan and is located in a Center of Local Importance (Downtown Port Orchard/City Center). City staff identified as relevant to the proposed project City Comprehensive Plan Land Use Goals and Policies that encourage the development of active, vibrant, and attractive destinations throughout the community and that encourage safe pedestrian travel to and within commercial areas, while requiring adequate transitions between different land uses to mitigate potential negative impacts of noise, light, and air pollution.³ The proposal is also within a Fish and Wildlife Habitat Conservation Area associated with nearby Blackjack Creek as well as with the Sinclair Inlet shoreline. Accordingly, staff identified Comprehensive Plan Natural Systems Goals and Policies that encourage the protection of

² Port Orchard Municipal Code (POMC) 16.06.060 requires the City to send written notice to all property owners of record within a radius of 300 feet of the exterior boundaries of the subject property.

³ Staff specifically identified Land Use Goals 7 and 8 and Land Use Policies LU-25, LU-26, CN-2, and CN-4. *Exhibit 23, Staff Report, pages 3 and 4.*

water quality, flows, and the ecological integrity of streams, wetlands, and Sinclair Inlet and encourage the protection of the biological diversity of Port Orchard and Puget Sound.⁴ Because the Applicant would extend the Bay Street Pedestrian Path along the waterfront of its parcels, staff also identified Comprehensive Plan Parks Goals and Policies, which encourage expanding the Bay Street Pedestrian Path and enhancing public use of the shoreline, as relevant to the proposal.⁵ Properties to the east and west are also designated Commercial under the Comprehensive Plan. Properties to the south, across Bay Street, carry multiple designations, including Commercial, Residential Medium Density, and Residential High Density. Sinclair Inlet abuts the property to the north. *Exhibit 23, Staff Report, pages 2 through 4.*

5. The project site is zoned Commercial (Co) under the City zoning ordinances. The purpose of the 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 to offer significant employment opportunities. *POMC 16.13.150(1)*. Motor vehicle dealers are permitted outright in the Co zone. *Table 16.30.100 POMC*. The project site is also located within the “East Gateway” of the Downtown Overlay District (DOD). POMC 16.20.201 provides that uses allowed within the east and west gateways of the DOD may include uses allowed within the underlying zone, making the auto dealership a permissible use.⁶ Properties to the east and west are zoned Commercial, and properties across Bay Street to the south are zoned either Commercial or Residential. *Exhibit 2.A; Exhibit 2.C; Exhibit 2.D; Exhibit 23, Staff Report, page 2.*

Existing Property

6. The building that currently houses the St. Vincent de Paul thrift store, which is addressed as 1207-1213 Bay Street, was constructed in 1952, is sited approximately 25 feet from the OHWM of Sinclair Inlet, and provides no pedestrian access to the water. The existing auto dealership at 1215 Bay Street (on the eastern parcel) was constructed in 1948, provides no pedestrian access to the shoreline, and housed a vehicle fueling facility from approximately 1952 to 1975. An underground fuel storage tank system was removed from the property in 1989. Subsurface soils and waters in the area, however, contained contamination from the removed tanks. Stemen Environmental, Inc., prepared a Phase II Environmental Site Assessment Report, dated July 15, 2011, addressing environmental cleanup at the site and at the adjacent Maple Street right-of-way. Several

⁴ Staff specifically identified Natural Systems Goals 2 and 11, and Policies NS-5, NS-6, NS-50, and NS-53. *Exhibit 23, Staff Report, page 4.*

⁵ Staff specifically identified Parks Goals 6 and 7, and Policies PK-28, PK-29, PK-31, and PK-32. *Exhibit 23, Staff Report, Page 4.*

⁶ Ms. Andrews explained that, although auto dealerships are prohibited in the DOD, itself, under POMC 16.20.201(2)(w), because they are permitted outright in the Co zone, they are also permitted outright in the gateways to the DOD. *Testimony of Ms. Andrews.*

cleanup actions have been taken since then to remove contaminated materials from the site. City Public Works Director Mark Dorsey testified that final environmental remediation of the site would occur in conjunction with demolition of the existing auto dealership and that there are no other contaminated areas on either parcel. *Exhibit 2.G; Exhibit 2.H; Exhibit 2.K; Exhibit 2.L; Exhibit 2.M; Exhibit 2.N; Exhibit 23, Staff Report, page 3; Testimony of Mr. Dorsey.*

7. The Bay Street Pedestrian Path, a multi-use waterfront trail that would ultimately connect the Port Orchard Ferry Terminal to the Annapolis Ferry Dock, was first approved by the City Hearing Examiner on February 14, 2012. *In re City of Port Orchard Public Works Department, No. SDP 107-11/SDP 108-11/SDP 109-11.* Although some portions of the Bay Street Pedestrian Path have been constructed, the portion adjacent to 1207-1215 Bay Street has not yet been built. As part of its proposal, the Applicant would construct this portion of the Bay Street Pedestrian Path as conditioned by the Hearing Examiner's 2012 decision. *Exhibit 2.A; Exhibit 2.C; Exhibit 2.D; Exhibit 23, Staff Report, page 12.*

Conditional Use Permit

8. POMC 16.35.010 allows "certain specified uses, which are deemed necessary to the public convenience but are found to possess characteristics which make impractical such uses being identified exclusively with any particular zone classification." The City uses the CUP process as a mechanism by which it may require special conditions on development, or on the use of land, in order to ensure that designated uses or activities are compatible with other uses in the same land use district, such as in the vicinity of the subject property. *POMC 16.35.010(2).* POMC 16.20.211 dictates that the maximum allowable building height in the DOD's East Gateway is 27 feet. The maximum height of a structure may be increased up to 39 feet, however, when an applicant meets the requirements for a conditional use permit, as set forth in POMC 16.35.010; provides a special amenity, such as a waterfront pathway; modulates building height; and ensures that view corridors and solar access of neighboring lots are maintained. *POMC 16.20.211, -.219.*
9. Part of the proposed auto dealership would be 32 feet tall, necessitating a CUP. As required by POMC 16.20.211 and .219, the Applicant would provide a waterfront pathway (by constructing the portion of the Bay Street Pedestrian Path along the waterfront side of its properties), modulate the building height, and ensure that view corridors and solar access of neighboring lots are maintained. The Applicant provided a project narrative addressing also the CUP criteria of POMC 16.35.010(3). The Applicant asserts that it has met these criteria, because:
 - The height increase is consistent with the character and appearance for other auto dealerships and would fit into the surrounding environment of Bay Street and this particular location;

- The project is a stand-alone facility, which would not discourage or hinder development or façade design of neighboring properties and would be an uplifting influence on the general architectural characteristics of Bay Street. The additional height requested would allow for a glass curtain wall façade that would provide increased visibility of the shoreline and become an iconic part of the Port Orchard urbanscape and shoreline;
- The height is in character both in substance and scale to the overall facilities design;
- The Applicant would provide an important public amenity by constructing a portion of the Bay Street Pedestrian Path along the waterfront side of the properties and provide a positive connection along the east property border with Blackjack Creek, enhancing public access to area trails;
- The use would not affect the health or safety of the community, and completion of an additional portion of the Bay Street Pedestrian Path would provide increased access and interaction with the Port Orchard waterfront;
- The use would not create any additional hazardous conditions or conflict with existing and anticipated pedestrian and vehicular traffic;
- The use would be less intrusive than what currently exists on-site, and reconfiguration of driveways would provide safer site ingress and egress.

Exhibit 2.O; Exhibit 3; Exhibit 23, Staff Report, pages 6 through 8.

10. City staff reviewed the proposal for consistency with the City’s CUP criteria and determined that the proposal would satisfy the criteria of POMC 16.35.010(3). Specifically, staff noted that: the existing structures on-site are approximately 27-foot tall already, and demolition of the existing auto dealership would open up viewing opportunities to the shoreline along the entire property; constructing the Bay Street Pedestrian Path would increase recreational opportunities on the shoreline and provide a public benefit; vehicle circulation would not be affected because traffic is expected to decrease with the removal of multiple tenants; and landscaping would be incorporated to increase green space in an area that is entirely paved. *Exhibit 23, Staff Report, pages 6 through 8.*

Shoreline Substantial Development Permit

11. The proposal is within the City’s shoreline jurisdiction and is therefore subject to the Washington Shoreline Management Act (SMA), Chapter 90.58 RCW, and the City SMP. The SMA was passed by the legislature in 1971 and adopted by the public in a referendum. *City SMP, Chapter 1, Introduction, § 1.1 (March 2013)*. The legislature enacted the SMA with the primary goal of protecting the public interest in the state’s shorelines through a coordinated development process. The legislature also enacted the SMA to protect against adverse effects to the public health, the land, vegetation, wildlife, and waters, and to preserve the public’s opportunity to enjoy the physical and aesthetic qualities of the natural shoreline to the greatest extent feasible. Under the SMA,

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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 to minimize any interference with the public's use of the water. *RCW 90.58.020. Exhibit 1; Exhibit 23, Staff Report, page 8.*

12. The City enacted its SMP to carry out its responsibilities under the SMA; promote uses and development of the Port Orchard shoreline consistent with the City Comprehensive Plan, while protecting and restoring environmental resources; and promote the health, safety, and general welfare by providing a guideline and regulation for future development of the city's shoreline resources. *City SMP, Chapter 1, Introduction, § 1.2.*
13. The SMA and the SMP require an SSDP for any substantial development undertaken on the city's shorelines. *RCW 90.58.140; City SMP, Chapter 8, Shoreline Administration and Permit Procedures, § 8.5.* A *substantial development* is one for which the fair market value exceeds \$6,416 or any development that materially interferes with normal public use of the water or shoreline. *RCW 90.58.030(3)(e); City SMP, Chapter 8, Shoreline Administration and Permit Procedures, § 8.5.* The total cost of the proposal would exceed the \$6,416 threshold, thus requiring an SSDP. *Exhibit 23, Staff Report, page 9.*
14. The City SMP forbids substantial development on the shorelines of the city unless the development is consistent with the policies of the SMA and the goals, policies, and regulations of the City SMP. *City SMP, Chapter 8, Shoreline Administration and Permit Procedures, § 8.5.* The City SMP designates the project site as within its High-Intensity shoreline environment. The City adopted the High-Intensity shoreline environment to provide for high-intensity, water-oriented commercial, transportation, and industrial uses while protecting existing ecological functions. *City SMP, Chapter 4, Shoreline Environments, § 4.31.* The City assigns the High-Intensity designation to shorelines that already support high-intensity uses related to commerce, transportation or navigation, and mixed-use or multifamily residential development, and to shorelines that are suitable and planned for high-intensity, water-oriented uses. *City SMP, Chapter 4, Shoreline Environments, § 4.3.3.* "Commercial – non-water oriented" uses are permitted in the High-Intensity shoreline environment. *City SMP, Chapter 7, Shoreline Development Standards and Use Regulations, Chapter 7.1. Exhibit 23, Staff Report, page 8.*
15. Several management policies govern uses in the High-Intensity shoreline environment. As set forth in the City SMP, these management policies:
 - Give first priority to water-dependent uses, with water-related and water-enjoyment uses receiving second priority;
 - Prefer full utilization of the existing urban shoreline areas before allowing further expansion of intensive development;

- Require that new development assure no net loss of shoreline function and require, where feasible, environmental restoration and clean-up to comply with relevant state and federal laws;
- Provide for visual and physical public access as required by WAC 173-26-221(4)(d); and
- Implement aesthetic objectives through sign control regulations; appropriate development siting, screening, and architectural standards; and maintenance of natural vegetative buffers.

City SMP, Chapter 4, Shoreline Environments, § 4.3.2.

16. The master goal for the City SMP is to plan for shoreline uses that enhance, promote, and protect the balance between the sensitive ecology of Port Orchard's shoreline and its urban development. *City SMP, Chapter 5, Master Program Goals, § 5.1.* The City SMP sets out a number of other goals. From these, City staff identified as relevant those goals directed at enhancing public access to city shorelines and preserving views of the water; improving and maintaining publicly owned shorelines dedicated to public recreation and developing their potential for visitors and citizens; and coordinating the regulation for a variety of shoreline uses that result in long-term rather than short-term benefit. *City SMP, Chapter 5, Master Program Goals, §§ 5.2-5.6. Exhibit 23, Staff Report, page 8.*
17. City staff analyzed the proposal and determined that the project is consistent with the identified goals and policies of the City SMP. Specifically, staff noted that the proposal would redevelop an existing commercial site and provide additional viewing opportunities of the water and increasing waterfront access for pedestrians through construction of the Bay Street Pedestrian Path. The proposal would replace two existing structures, which are approximately 25 feet from the OHWM of Sinclair Inlet, with one building sited 46 to 60 feet from the OHWM. Final environmental remediation of the eastern parcel (formerly the site of a fuel station) would also occur during demolition, providing an ecological benefit. In addition, the Applicant would provide landscaping, which would increase green space in an area that is entirely paved, and would provide increased pedestrian access to the trail over Blackjack Creek. *Exhibit 23, Staff Report, pages 3 through 9.*

Shoreline Variance

18. A shoreline *variance* is a request to adjust the applicable setback and/or bulk and dimensional requirements of the City SMP where there are extraordinary or unique circumstances relating to the subject property and where the strict implementation of the SMP requirements would impose unnecessary hardship on an applicant or thwart the policies set forth in the SMA. *City SMP, Chapter 8, Shoreline Administration and Permit Procedures, § 8.7.1.* In this instance, approval of a shoreline variance is necessary because the City SMP requires a 75-foot setback for commercial, non-water oriented development within the High-Intensity shoreline environment, but the Applicant

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proposes siting the new auto dealership between 46 and 60 feet from the OHWM of Sinclair Inlet. *City SMP, Chapter 7, Shoreline Development Standards and Use Regulations, § 7.2. Exhibit 23, Staff Report, page 9.*

19. The Applicant provided a project narrative addressing the shoreline variance criteria of Section 8.7.2 of the City SMP. The Applicant asserts that it has met these criteria, because:
- The existing structures, which are to be removed, are currently located within 25 feet of the OHWM of Sinclair Inlet, and the continuation of the Bay Street Pedestrian Path, although a public amenity, would be located entirely within the required buffer;
 - The new auto dealership would be set back between 46 and 60 feet from the OHWM;
 - Given the current lot configurations, land mass, shoreline buffer, and required front yard setback from Bay Street, the site would be undevelopable without a variance;
 - The proposal would allow open vistas on the east parcel of the site and visual access to the shoreline and Blackjack Creek, and would include new pedestrian access to the trail along Blackjack Creek;
 - The project design adheres to the intentions of the City Comprehensive Plan and SMP and would be compatible with existing use of the property and surrounding developments;
 - The variance would not grant a special privilege because the use is allowed in the Co zone and most other development along Bay Street is set back approximately 40 feet from the OHWM of Sinclair Inlet;
 - The proposal is designed to provide the minimum impacts necessary to the required shoreline buffer;
 - The variance would be in the best interest of the public, providing renewed economic vitality to the area and granting a better view of the shoreline;
 - The public would benefit from sidewalk improvements along Bay Street and the continuation of the Bay Street Pedestrian Path along the waterfront side of the project.

Exhibit 2.D; Exhibit 23, Staff Report, pages 9 through 11.

20. City staff reviewed the proposal for consistency with the shoreline variance criteria of the City SMP and concurred with the Applicant's assessment. Specifically, staff noted that: application of the standard 75-foot buffer would leave a small area of property unsuitable for a commercial structure; the Applicant has attempted to minimize impacts to the buffer and maximize opportunities for shoreline views and access; the hardship is related to the unique property conditions, including irregular lot size and natural features; the use of an auto sales dealership is already established on the site, and the proposal would increase the buffer between the new structure and the shoreline; and construction of the Bay Street

Pedestrian Path would increase recreational opportunities on the shoreline and provide a public benefit. *Exhibit 23, Staff Report, pages 9 through 11.*

Testimony

21. Ms. Andrews testified generally about the application and its consistency with the review criteria for a CUP, SSDP, and approval of an SVAR. She stressed that the proposal would reduce existing nonconformities on-site because the project would eliminate one structure within the required shoreline buffer (the existing auto dealership) and replace another structure that is currently only 25 feet from the OHWM of Sinclair Inlet (the St. Vincent de Paul thrift store) with a structure set further back from the shoreline. In addition, the Applicant would provide a public amenity by constructing portions of the Bay Street Pedestrian Path along the waterfront of the property. She noted that a number of public agencies were notified of the proposal, including the Washington State Department of Fish & Wildlife and the Department of Ecology, and none expressed concerns over the proposal. *Testimony of Ms. Andrews.*
22. In addition to testifying about the ongoing environmental remediation related to the site, Mr. Dorsey noted that the City has a pump station near the project site requiring upgrades and improvements, and the proposal would allow for ingress/egress to this facility. He also clarified that a carwash on-site would be used solely by the auto dealer and would connect to the on-site sewer system for discharge. *Testimony of Mr. Dorsey.*
23. Applicant Representative Alan Keimig testified that the Applicant believes the proposal would be a benefit to the city and the Sinclair Inlet shoreline, and could serve as a catalyst for future development in the area. He noted that the Applicant has taken care to ensure that the facility would enhance the waterfront and allow better public access. Further, the proposal would allow direct access from the newly constructed portions of the Bay Street Pedestrian Path to the Blackjack Creek Trail, which is a portion of the larger Mosquito Fleet Trail that runs throughout the area. Mr. Keimig also confirmed that the proposal accounts for ingress/egress to the City's pump station. *Testimony of Mr. Keimig.*

Staff Recommendation

24. Ms. Andrews testified that City staff reviewed the application and determined that, with conditions, the proposal would be consistent with the City SMP, the City Comprehensive Plan, the POMC, and all other applicable City regulations and that, accordingly, City staff recommends approval of the CUP, SSDP, and shoreline variance. Mr. Keimig testified that the Applicant understands the proposed approval conditions and takes no issue with them. *Exhibit 23, Staff Report, pages 2 through 13; Testimony of Ms. Andrews; Testimony of Mr. Keimig.*

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CONCLUSIONS

Jurisdiction

The City of Port Orchard Hearing Examiner is authorized to hear and decide the conditional use permit, shoreline substantial development permit, and shoreline variance applications. Based on the evidence in the record, the Hearing Examiner may grant, grant with conditions, or deny the applications. *POMC 2.76.080, -.100-, .110; POMC 16.01.021(3).*

Criteria for Review

Conditional Use Permit

A conditional use permit shall be granted only if the Applicant demonstrates that the proposed use:

- (a) Will be designed in a manner which is compatible with the character and appearance with the existing, or proposed development in the vicinity of the subject property;
- (b) Will not hinder neighborhood circulation or discourage the permitted development or use of neighboring properties due to the location, size, and height of buildings, structures, walls and fences, and screening vegetation of the proposed use;
- (c) Will be designed in a manner that is compatible with the physical characteristics of the subject property;
- (d) Will mitigate impacts in a manner equal to or greater than the standards of the Port Orchard Municipal Code;
- (e) Will not conflict with the health and safety of the community;
- (f) Will not create pedestrian and vehicular traffic that will be hazardous or conflict with existing and anticipated traffic in the neighborhood; and
- (g) Will provide adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities.

POMC 16.35.010(3).

Shoreline Substantial Development Permit

The SMA provides that no substantial development shall be undertaken on the shoreline of the state without first obtaining an SSDP. Regardless of whether a development constitutes a substantial development, a development must comply with the requirements contained in the SMA and the SMP; other permits or approvals under the SMP may be required. Permits may be issued with conditions or limitations that ensure consistency with the SMA and the SMP. *POMC 16.01.021(3).*

The Applicant has the burden of proof to establish that the development is consistent with the SMA, the SMP, and any other applicable City policies and regulations. Upon consideration of the evidence offered at the public hearing, the Hearing Examiner will issue a decision containing

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findings of fact and conclusions describing the manner in which the decision is consistent with the City Comprehensive Plan, the SMA, and the SMP. *POMC 2.76.090; POMC 2.76.110(3)*.

Shoreline Management Act, Chapter 90.58 RCW

The policies underlying the SMA are codified at RCW 90.58.020. Applicable policies include those to foster “all reasonable and appropriate uses” and protect against adverse effects to the public health, the land, vegetation, and wildlife. 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*.

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 WAC 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 WAC sets forth permitting procedures and permit criteria. The Hearing Examiner reviews the application under 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.

Thus, the Hearing Examiner must review the application in light of the goals and policies found in the SMA and the City SMP.

Shoreline Variance

The Hearing Examiner may grant a variance provided the Applicant demonstrates:

1. That the strict application of the bulk, dimensional, or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;

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2. That the hardship described is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;
3. That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;
4. That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
5. That the variance request is the minimum necessary to afford relief; and
6. That the public interest will suffer no substantial detrimental effect.

City SMP, Chapter 8, Shoreline Administration and Permit Procedures, § 8.7.2.

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

1. **With conditions, the proposed project would be consistent with the criteria for conditional use permit approval under POMC 16.35.010(3).** The proposal would be designed in a manner compatible with the character and appearance of existing or proposed development in the vicinity. Specifically, the proposal would incorporate as much glass as possible to provide increased view access to the Sinclair Inlet waterfront; existing structures on-site are approximately 27 feet tall, and demolition of the existing auto dealership would open viewing opportunities to the shoreline along the entire property; constructing the Bay Street Pedestrian Path would increase recreational opportunities on the shoreline and provide a public benefit; vehicle circulation would not be impacted because traffic is expected to decrease with the removal of multiple tenants; and landscaping would be incorporated to increase green space in an area that is entirely paved.

Conditions are necessary to ensure that the Applicant constructs on-site improvements associated with the Bay Street Pedestrian Path as conditioned by the Hearing Examiner's February 14, 2012 decision; provides a landscaping plan consistent with Chapter 16.50 POMC; satisfies all requirements of City departments and other agencies prior to final inspection of the property; ensures development conforms to the most recent version of the City Developers Handbook; complies with all stormwater requirements, including payment of stormwater fees; obtains all necessary permits, including a Site Development Activity Permit and a National Pollutant Discharge Elimination System permit;

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coordinates site development with the City's need for future upgrades to the nearby wastewater pump station; pays all required impact fees and builds all required frontage improvements; and ensures that the carwash on-site (used solely by the dealer) connects to the sewer system for discharge and that no trash enclosures are placed in close proximity to storm drainage facilities. *Findings 1, 4 – 10, 21 – 24.*

- 2. The proposed project would be consistent with the criteria for shoreline substantial development permit approval under WAC 173-27-150 and the City SMP.** The City provided reasonable notice of the application. The City also provided reasonable opportunity to comment on the application. The City received no public or agency comments in response to its notice materials. The City analyzed the environmental impacts of the proposal and determined that it would not have a probable significant adverse impact on the environment. The City's SEPA determination was not appealed. The total value of the proposed project requires an SSDP under the SMA and the City SMP.

The proposed project is consistent with City SMP goals, policies, and regulations. The proposed auto dealership is a permitted use in the High-Intensity shoreline environment. The proposed project would redevelop an existing site by eliminating one non-conforming structure and replacing another non-conforming structure with a structure set further back from the OHWM of Sinclair Inlet. This would provide increased view access to the shoreline and net ecological benefits consistent with the SMP. In addition, the Applicant would provide a public amenity by constructing the Bay Street Pedestrian Path and a pedestrian connection to the Blackjack Creek trail.

The proposed project is consistent with SMA policies and regulations. The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 WAC. Chapter 173-26 WAC 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 WAC sets forth permitting procedures and permit criteria. This proposal is being reviewed under the criteria set forth in WAC 173-27-150. The criteria require that all shoreline projects be consistent with the SMA, SMA-implementing regulations, and an approved local Shoreline Master Program. The proposed project would be consistent with the public access goals of the SMA by increasing access to Sinclair Inlet. With the construction of the Bay Street Pedestrian Path, the proposed project would also be consistent with SMA goals related to preserving the shoreline environment and increasing shoreline access and recreational opportunities. *Findings 1 – 7, 11 – 24.*

- 3. With conditions, the proposed project would be consistent with the criteria for shoreline variance approval under the City SMP.** Strict application of City SMP bulk, dimensional, or performance standards would preclude reasonable use of the property. The need for the variance arises from natural conditions: the involved parcels are

irregularly shaped and would be unsuitable for commercial development if the 75-foot shoreline buffer required in the High-Intensity shoreline environment, the buffers associated with Blackjack Creek, and the required front yard setback for Bay Street were all met. The proposed project is compatible with other permitted activities and would not cause adverse effects to adjacent properties or the shoreline environment. The proposed auto dealership is a permitted use in the High-Intensity shoreline environment. The project would allow increased public access to the waterway, especially with construction of the Bay Street Pedestrian Path. The proposal is consistent with nearby uses of the shoreline, many of which are commercial or retail in nature. The proposed project would result in a reduction of nonconformity to the shoreline buffer by demolishing the current structures on-site and constructing the new dealership further from the OHWM of Sinclair Inlet, all of which would benefit the shoreline environment. In addition, required environmental remediation of the eastern parcel (formerly a fuel service station) would benefit the environment.

The variance would not grant a special privilege because the use is allowed in the Commercial zone and most other development along Bay Street is setback approximately 40 feet from the OHWM of Sinclair Inlet. The Applicant has attempted to minimize impacts to the shoreline buffer and maximize opportunities for shoreline views and access, and the variance is the minimum necessary to allow relocation of the auto dealership in a new facility on-site. The public interest would suffer no substantial detrimental effects from the proposal, and the proposal would provide a public amenity – the Bay Street Pedestrian Path.

Conditions are necessary to ensure that the Applicant constructs on-site improvements associated with the Bay Street Pedestrian Path as conditioned by the Hearing Examiner's February 14, 2012, decision; provides a landscaping plan consistent with Chapter 16.50 POMC; satisfies all requirements of City departments and other agencies prior to final inspection of the property; ensures development conforms to the most recent version of the City Developers Handbook; complies with all stormwater requirements, including payment of stormwater fees; obtains all necessary permits, including a Site Development Activity Permit and a National Pollutant Discharge Elimination System permit; coordinates site development with the City's need for future upgrades to the nearby wastewater pump station; pays all required impact fees and builds all required frontage improvements; and ensures that the carwash on-site (used solely by the dealer) connects to the sewer system for discharge and that no trash enclosures are placed in close proximity to storm drainage facilities. *Findings 1, 4 – 24.*

DECISION

Based on the above findings and conclusions, the requests for a conditional use permit, a shoreline substantial development permit, and approval of a shoreline variance to redevelop two parcels of property at 1207-1215 Bay Street are **APPROVED**, with the following conditions:

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1. The property owner shall construct the on-site improvements associated with the Bay Street Pedestrian Path that are within parcels 252401-2-018-2004 and 252401-2-020-2000, as approved by the Hearing Examiner on February 14, 2012 (SDP 107-11, SDP 108-11, SDP 109-11).
2. A 20' easement shall be provided to the City of Port Orchard, consistent with the approval by the Hearing Examiner under SDP 107-11, SDP 108-11 and SDP 109-11 for access and maintenance of the Bay Street Pedestrian Path after construction and prior to occupancy of the building.
3. A landscaping plan that is consistent with the Port Orchard Municipal Code (Chapter 16.50) shall be submitted at the time of Site Development Activity Permit application. This plan shall include screening of the trash enclosure from all points where visible to the general public, including the waterside.
4. All conditions identified by City departments and other agencies shall be met prior to final inspection.
5. All of the development shall conform to the most recent copy of the City of Port Orchard's Developers Handbook at the time of complete application.
6. The Applicant shall comply with all stormwater requirements within the currently adopted City of Port Orchard Stormwater Manual for the proposed regional stormwater detention facility and associated collection/conveyance systems. Additionally, this project meets the definition of a "major development," and shall require a preliminary drainage plan and analysis prepared by a licensed civil engineer.
7. Following land use approval, a Site Development Activity Permit (SDAP) shall be required prior to construction activities. The Applicant shall submit seven (7) copies of plans with the SDAP Application.
8. The site plan indicates that greater than 1 acre will be disturbed during construction, requiring a National Pollutant Discharge Elimination System (NPDES) Stormwater Construction permit from the State Department of Ecology. More information about this permit can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction> or by contacting Josh Klimek at 360-407-7451 or jokl461@ecy.wa.gov. An approved copy of this permit is required prior to issuance of any construction permits.
9. Stormwater fees shall be assessed at commercial stormwater rates. Commercial rates are calculated based on actual impervious surface area, the equation is [(Square Feet of Impervious Area on Property) / (3,000 Square Feet per Impervious Surface Unit (ISU))] x

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\$7.00 (or current rate) per month per ISU) x 2 months/billing cycle = Stormwater Bill for 1 billing cycle which is every two months. If the total decimal of the ISUs is 0.5 or greater the ISUs are rounded up, however if the total decimal of the ISUs is 0.4 or lower the ISUs are rounded down. The Applicant shall provide total impervious area calculations on the plans submitted with the SDAP Permit.

10. The Applicant shall coordinate future site planning needs with the City of Port Orchard for future upgrades to the Bay Street Pump Station (aka Coast to Coast) and provide easements as needed.
11. Transportation and Parks Impact Fees shall be due at the time of Building Permit Issuance.
12. Frontage improvements shall be required. The Applicant shall refer to the current Development Guidelines at time of submittal for required improvements. Improvements shall include, at a minimum, ADA sidewalks, curb ramps and curb cuts meeting Washington State Department of Transportation Standards, and a marked sidewalk/crosswalk from right-of-way to the main entry point of the building.
13. Washington State Department of Transportation shall review and approve the design prior to the City issuing a Site Development Permit.
14. The car wash associated with the car dealership shall be connected to sewer for discharge.
15. No trash enclosures shall be placed in close proximity to storm drainage facilities, specifically catch basins.

Decided this 11th day of October 2016.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center