



City of Tacoma
Hearing Examiner

May 4, 2017

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Re: HEX 2017-002 (LU16-0288)

Applicant: Contour Engineering, LLC/Michael Musica

Dear Parties,

In regard to the above referenced matter, please find enclosed a copy of the Tacoma Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation to the Tacoma City Council entered on May 4, 2017, as the result of a public hearing held on April 27, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1) – Findings, Conclusions, and Recommendation

cc: See Page 2 Transmittal List

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through City of Tacoma Mail Services to the parties or attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED May 4, 2017, at Tacoma, WA.

TRANSMITTAL LIST
HEX 2017-002 (LU16-0288)
Applicant Contour Engineering, LLC/Michael Musica

Transmitted via First Class Mail Delivery

Michael Musica, P.O. Box 111882, Tacoma, WA 98411-1882
James David Chambers, 3828 S. Monroe Street, Tacoma, WA 98409-3006
Tim Faker, 3819 S. Monroe Street, Tacoma, WA 98409-3005

Transmitted via Inter-office Mail Delivery

Pierce County Assessor-Treasurer

Transmitted via Electronic Mail Delivery

Clerk's Office, City of Tacoma (Nicole Emery)
Legal (Jeff Capell)
Tacoma Power (Dan Reed)
Tacoma Water, Water Distribution (Jesse Angel)
Tacoma Fire (Chris Seaman)
Public Works, City of Tacoma (Sue Simpson)
Environmental Services, Site Development, City of Tacoma (Shannon Brenner)
Public Works Traffic Engineering Division, City of Tacoma (Jennifer Kammerzell)
Planning and Development Services Department, City of Tacoma (Craig Kuntz)
Planning and Development Services Department, City of Tacoma (Trevor Perkins)
Planning and Development Services Department, City of Tacoma (Jana Magoon)
Planning and Development Services Department, City of Tacoma (Lihuang Wung)

OFFICE OF THE HEARING EXAMINER
CITY OF TACOMA
REPORT AND RECOMMENDATION
TO THE CITY COUNCIL

APPLICANT: Contour Engineering, LLC on behalf of Michael Musica

HEARING EXAMINER FILE NO.: HEX 2017-002 (LU16-0194) (Tyler Street Apartments)

SUMMARY OF REQUEST:

A rezone of two adjacent parcels of property (No. 0220131009 and No. 0220131120) from R-2SRD Residential Special Review District and R-3 Two-Family Dwelling District to R-4-L Low-Density Multiple-Family Dwelling District to allow development of a multifamily apartment complex containing approximately 46 units and 72 associated parking stalls¹.

LOCATION:

The two parcels are located at 3925 S. Tyler Street (parcel no. 0220131009) and 3931 S. Tyler Street (parcel no. 0220131120).

RECOMMENDATION:

The Hearing Examiner recommends approval of the rezone, subject to conditions.

PUBLIC HEARING:

After reviewing the report of the City's Planning and Development Services Department and reviewing information on file, the Hearing Examiner convened a public hearing on the rezone request on April 27, 2017. The Hearing Examiner has visited the site of the proposed rezone and surrounding area.

¹ The current apartment design is required to include 69 parking spaces. The Applicant's request is for 72 spaces. Any reference in the documents containing a different number of spaces is a scrivener's error. *Spadoni Testimony*.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

ORIGINAL

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION:

FINDINGS OF FACT:

1. Contour Engineering, LLC submitted an application on behalf of property owner Michael Musica proposing a rezone of two adjacent parcels of property from R-2SRD Residential Special Review District and R-3 Two-Family Dwelling District to R-4-L Low-Density Multiple-Family Dwelling District to allow development of a multifamily apartment complex containing approximately 46 units and 72 associated parking spaces. *Ex. 1; Bridgeford Testimony*. The project density would be approximately 29 units per acre, which is within the R-4-L target density of 14-36 dwelling units per acre. *Ex. 7*.

2. The site is currently developed with a two story single-family dwelling on the northern parcel (3925 S. Tyler Street). The southern parcel (3931 S. Tyler Street) is vacant and is covered with a mix of Himalayan blackberry, mature trees and shrubs. Both parcels have steep slopes along the eastern property lines that are heavily vegetated with mature trees and shrubs. The site is generally rectangular in shape with the northern parcel being slightly larger/deeper than the southern parcel. South Tyler Street abuts the site on the west and the undeveloped South 40th Street right-of-way abuts the site to the south. South Tyler Street is Minor Arterial in this area. *Ex. 1; Spadoni Testimony*.

3. Approximately 1,125 cubic yards of unpermitted fill has been placed on the northern parcel prior to the current ownership. This unpermitted filling activity resulted in a Code Enforcement Action (File Number VIOL16-0274). *Ex. 1; Ex. 8*. The Applicant has submitted for an after-the-fact Site Development Permit to resolve the violation. *Ex. 1*.

4. The surrounding area has a mix of residential, commercial, and industrial zoning. Properties to the north and west are zoned R-2SRD, R-3, and R-4-L. Properties to the west are zoned R-3 and R-4-L. Properties to the south are zoned C-1 Community Commercial, T- Transitional, and M-1 Light Industrial. Properties to the east are zoned R-2SRD and M-1. The larger surrounding area is included within the STGPD (South Tacoma Groundwater Protection District Overlay), an aquifer recharge area.

5. Development in the area includes a variety of residential units, as well as some commercial office units. The properties adjacent to the north are developed with four triplex buildings. The property to the north of these was rezoned to R-4-L in 2006. Permits for a 24-unit apartment building on this property are currently under review by Planning and Development Services.

The parcels to the west across S. Tyler Street are developed with a single-family home, a triplex, a fourplex, and a 5-unit apartment building. The apartment building site was rezoned in 1996 to allow conversion of an existing triplex to the apartment building.

The parcels across S. Tyler Street and South 40th Street to the southwest (diagonal from the site), are developed with a commercial office complex.

The parcels across South 40th Street to the south are owned by Burlington Northern Santa Fe Railroad and are currently undeveloped.

The parcels adjacent to the east are also vacant and largely composed of steep slopes, wetlands and buffers.

Zoning maps, historic zoning maps, and an aerial map for the area, labelling the areas identified above, are included as attachments to the staff report. *Ex. 4 through 6; Spadoni Testimony.*

6. The subject site was classified R-3 Two-Family Dwelling District when zoning was first established in 1953. In 1981, the City adopted an area-wide rezone that changed the majority of the property on both parcels from R-3 to R-2SRD. The western 120 feet of both properties remained R-3. (Ordinance #22445). *Ex. 1.*

7. The *Urban Form Element* of the City's *Comprehensive Plan* designates the northern parcel as "Multi-Family (low-density)" and the southern parcel as "Parks and Open Space." The southern parcel is also located in an Open Space Corridor.

The southern parcel was owned by the City of Tacoma and was included in the City's Open Space inventory until 2014. At that time, the City performed a comprehensive review of properties within the Open Space inventory and determined that the subject parcel could be released from the inventory and sold for development purposes. It was sold to the current owner in 2016 with the expectation that it would be developed. *Ex. 1; Spadoni Testimony.*

8. The City is currently reviewing the northern parcel of this proposal as part of a city-wide rezone process in connection with its Future Land Use Implementation Project. The purpose of the project is to implement the goals of the *Comprehensive Plan* through appropriate area-wide rezones consistent with the Future Land Use Map and Land Use Designations. The project is intended to correct inconsistencies between land use designations and existing zone districts. Under this project, the City is considering the northern parcel as part of an area-wide rezone to either R-3 or R-4-L. Action on the area-wide effort is not expected until 2018. The proposed rezone of the northern parcel to R-4-L would be more consistent with the *Comprehensive Plan's* Multi-Family (low-density) designation for the site than the existing R-2 and R-3 zoning. *Ex. 1; Spadoni Testimony.*

9. The Applicant submitted an Off-site Wetland, and Fish and Wildlife Habitat Assessment prepared by Soundview Consultants. The report concluded that no potentially regulated wetlands and/or fish and wildlife habitat were present on the subject property. The subject property is also located outside of the buffers associated with an excavated Type Ns2 stream and Category II wetland offsite and to the south and east of the property. *Ex. 2 to Determination of Environmental Nonsignificance.* The City agreed that there were no critical areas on the site. *Ex. 9 (2), S. Brenner Comment.* The evidence demonstrates that the proposed use of the property under R-4-L zoning would not be harmful to fish and wildlife habitat.

10. A Traffic Impact Assessment for the projected use was conducted by traffic consultants, Heath and Associates, Inc. The City reviewed the Assessment and concluded that the development

would impact the transportation system. To mitigate the anticipated traffic impacts and support the goals of the Transportation Master Plan regarding the safe movement of people and mobility options, the City is requesting a condition on the rezone requiring the installation of pedestrian actuated beacons at the South 40th Street and S. Tyler Street crosswalk. *Ex. 9(2), Kammerzel Comment.*

11. The Planning and Community Development Services Division has calculated the maximum number of residential units allowed on the property under the current zoning at a total of 19 units. The proposed development would include 46 units. Any units in excess of the allowed 19 units would require provision of affordable housing units or payment of an in-lieu fee in compliance with Tacoma Municipal Code (TMC) 1.39 and TMC 13.06.650.H. *Ex. 1.*

12. In accordance with the requirements of TMC 13.05.020 regarding notice of rezone applications, written notice of the application was mailed to all owners of property within 400 feet of the site, the appropriate neighborhood council, and qualified neighborhood groups on January 27, 2017. In addition, a public notice sign was posted on the property. *Ex. 1; Spadoni Testimony.* The public notice form mailed to property owners within 400 feet contained a typographical error regarding the address of one of the parcels. The project location was listed as 3825 and 3931 S. Tyler Street, when it should have read 3925 and 3931 S. Tyler Street. The parcel numbers were also contained on the notice and they were correct. *Ex. 11.* A reference to further information on the City's website and contact information for the Principal Planner on the project were also included on the notice. *Id.* In light of the correct address for one of the parcels involved, the accurate parcel numbers, and the sign posted on the correct property, the notice of this public hearing on the proposed rezone was adequate and served to give reasonable notice to the public of the proposed action and the scheduled hearing.

13. The City received an email containing comments from James D. Chambers. Mr. Chambers lives in the area and indicated that the subject property had been covered with fill dirt in past years. He expressed concern that the soil would not be stable enough to support the construction and would be subject to settling. *Ex. 8.*

14. Timothy Faker appeared at the hearing to testify regarding the proposed project. He is a long-time neighbor living on S. Monroe Street to the north and east of the subject property. He is requesting that the project be designed in a way that will minimize impacts on their quiet street. He indicated that allowing access to the property from the S. Monroe Street side would be a problem. *Faker Testimony.* The Applicant stated that the owners do not intend to access the apartments from the S. Monroe Street side. Access will be provided off S. Tyler Street. *Musica Testimony.* As a neighbor, Mr. Faker is expecting the City to assure that the development has adequate stormwater facilities to prevent water runoff to surrounding properties. He is also wondering whether the elevation of the property will be increased prior to construction, thereby aggravating any view impacts. *Faker Testimony.* The Applicant indicated there were no plans to bring in expensive fill to change the elevation of the property when it is already mostly level. *Musica Testimony.* Mr. Faker expressed the desire that design elements be considered that would shield the use from nearby properties, including a fence near the dead end of S. Monroe Street. *Faker Testimony.* The Applicant noted Mr. Faker's concern and expressed a willingness to consider these interests, within reason, in developing the final design. *Musica Testimony.*

15. As part of the project review process, Planning and Development Services provided notification of this rezone request to various City, outside governmental, and non-governmental agencies. Departmental advisory comments and requirements regarding this proposal are included as attachments to the City's Staff Report. If a rezone is approved, departments have recommended important conditions that should be attached to such an approval. *Ex. 1; Exs. 9 and 10.*

16. On April 7, 2017, the City issued a Mitigated Determination of Nonsignificance (MDNS) under the State Environmental Policy Act (SEPA) for the proposed project. *Ex. 2.* The MDNS was not appealed. *Ex. 1; Spadoni Tesimony.*

17. The Staff Report in this matter accurately describes the proposal, general and specific facts about the site, applicable sections of the *Comprehensive Plan*, and applicable regulatory codes. The Report is marked as Exhibit 1, and by this reference, is incorporated herein as though fully set forth.

18. Any conclusion of law herein which may be deemed properly considered a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW:

1. The Hearing Examiner has jurisdiction over the subject matter of this proceeding. The Examiner's role is to make a recommendation to the City Council. The final rezone decision is made by the City Council. *See TMC 1.23.050.A.1 and TMC 13.05.*

2. The requirements of SEPA have been met by the City's issuance of a DNS, which was not appealed.

3. Under TMC 13.06.650.B, the applicant for a rezone is required to demonstrate consistency with all of the following criteria:

1. That the change of zoning classification is generally consistent with the applicable land use intensity designation of the property, policies, and other pertinent provisions of the Comprehensive Plan.

2. That substantial changes in conditions have occurred affecting the use and development of the property that would indicate the requested change of zoning is appropriate. If it is established that a rezone is required to directly implement an express provision or recommendation set forth in the Comprehensive Plan, it is unnecessary to demonstrate changed conditions supporting the requested rezone.

3. That the change of the zoning classification is consistent with the district establishment statement for the zoning classification being requested, as set forth in this chapter.

4. That the change of the zoning classification will not result in a substantial change to an area-wide rezone action taken by the City Council in the two years preceding the filing of the rezone application. Any application for rezone that was pending, and for which the Hearing Examiner's hearing was held prior to the adoption date of an area-wide rezone, is vested as of the date the application was filed and is exempt from meeting this criteria.

5. That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare.

TMC 13.06.650.B. The Applicant bears the burden of establishing, by a preponderance of the evidence, that the requested rezone conforms to all of the required criteria. *TMC 1.23.070.A.*

Consistency with the *Comprehensive Plan*

4. The *Comprehensive Plan* includes the northern part of the site within the Multi-Family (low-density) designation. The current R-2SRD zoning on the parcel is not consistent with this *Comprehensive Plan* designation. Approval of the rezone request would create greater consistency between the zoning and the *Comprehensive Plan* for this parcel. A portion of the southern parcel is given a Parks and Open Space and Open Space Corridor designation under the *Comprehensive Plan*. However, the City removed the parcel from the Open Space Inventory and sold it for the purpose of development. To remain consistent with the goal of creating development with consideration for the natural features of the site, construction will not be allowed on geologically hazardous portions of the site. The area will retain a continuous vegetated connection with nearby open space properties and regulations will require a 50-foot geo-setback. Through the recommended conditions of approval, the project will be generally consistent with the *Comprehensive Plan*.

Changed Conditions

5. The proposed rezone of the northern parcel will directly implement an express provision or recommendation set forth in the *Comprehensive Plan* because it will make the zoning designation more consistent with the site's Multi-Family (low density) designation. As to the southern parcel, the conditions have changed. The City previously owned the land, which was designated for Open Space. In furtherance of an intentional program to re-evaluate open spaces, the City chose to remove the parcel from its Open Space Inventory and sell it to the current owner for development purposes. This constitutes a major change in circumstances. There have also been changes in the neighborhood zoning similar to the requested action. Two other properties in the immediate vicinity have been rezoned from R-2SRD to R-4-L. The evidence established the presence of changed conditions for the southern parcel.

Consistency with District Establishment Statement

6. The district establishment statement for the R-4-L District indicates that the district is intended to accommodate low-density multiple-family housing:

This district is intended primarily for low-density multiple-family housing, mobile home parks, retirement homes and group living facilities. It is similar to the R-4 Multiple-Family Dwelling District, but more restrictive site development standards are intended to minimize adverse impacts of permitted and conditional uses on adjoining land. The district is characterized by amenities and services associated with single- and two family residential districts, and it is located generally along major transportation corridors and between higher and lower intensity uses.

TMC 13.06.100.B.7. The proposed rezone would enable use of the property for the very type of low-density multiple-family development contemplated by the district establishment statement. The project is also consistent with the goal of locating multi-family development along transportation corridors because it would be accessed from S. Tyler Street, a Minor Arterial capable of handling the anticipated traffic. In addition, the property is near existing commercial and multi-family residential properties. The evidence demonstrated the required consistency with the applicable district establishment statement.

Recent Area-Wide Rezone

7. Records indicate that there have been no area-wide rezone actions taken by the City Council in the past two years affecting this property.

Relationship to the Public Welfare

8. The change in zoning proposed for this site will be consistent with the interests of public health, safety, morals and the general welfare. The proposed apartments will provide housing options for the citizens of Tacoma. The construction will increase economic development. Given the development standards that the project will be required to incorporate into the final design, a number of public interests will be addressed such as landscaping, parking, usable open space, and protection of sensitive areas. Both the recommended conditions identified by City departments, and the development standards contained in the Municipal Code, will insure consistency with the public interest.

9. Findings entered herein, based on substantial evidence in the hearing record, support a conclusion that the proposed rezone is consistent with applicable criteria and standards for rezones, provided the conditions set forth in this recommendation are imposed and complied with by the Applicant. The Applicant has agreed to the proposed conditions.

10. Accordingly, the proposed rezone requested should be approved subject to the following conditions:

A. RECOMMENDED CONDITIONS OF APPROVAL

1. Portions of both parcels are considered geologically hazardous areas as defined and regulated by Chapter 13.11 Critical Areas Ordinance. It is therefore necessary for the Applicant to complete a geotechnical report

consistent with TMC Section 2.02.260 Excavation and Grading and that addresses erosion and landslide hazards per TMC 13.11.700 prior to approval of any site development or building permits. Compliance with either the required geo-setback or any modifications to the geo-setback approved through review of a geotechnical analysis may result in required changes to the proposal. Any changes to the proposal would be reviewed to determine if they require a minor or major modification to the requested rezone.

2. No development and no vegetation removal, other than management of invasive species, shall occur on the geologically hazardous (steep slope) area or the minimum required 10-foot geo-buffer. The intent of this condition is to protect the slope and adjacent property and to provide a vegetated corridor adjacent to the other sites in the Open Space Corridor.
3. Impervious surfaces on the southern parcel shall be limited to the maximum extent feasible to allow for the development of 46 dwellings. Parking proposed in excess of the minimum parking requirements shall not be located in the area of the southern parcel unless pervious pavement is used. The intent of this condition is to provide consistency with *Comprehensive Plan* policy EN-3.6 which indicates that impervious surface should be limited in Open Space Corridors.
4. To mitigate impacts to the neighborhood and City transportation system for pedestrian and bicycle safety, as well as the increase in pedestrian/bicycle trips, the Engineering Division has determined that pedestrian actuated beacons will be required at the South 40th Street and S. Tyler Street crosswalk.
5. Affordable housing units or an in-lieu fee shall be provided for dwelling units in excess of 19 units in accordance with the requirements of TMC 13.06.650.H and TMC 1.39.

B. USUAL CONDITIONS:

1. THE RECOMMENDATION SET FORTH HEREIN IS BASED UPON REPRESENTATION MADE AND EXHIBITS, INCLUDING DEVELOPMENT PLANS AND PROPOSALS, SUBMITTED AT THE HEARING CONDUCTED BY THE HEARING EXAMINER. ANY SUBSTANTIAL CHANGE(S) OR DEVIATIONS(S) IN SUCH DEVELOPMENT PLANS, PROPOSALS, OR CONDITIONS OF APPROVAL IMPOSED SHALL BE SUBJECT TO THE APPROVAL OF THE HEARING EXAMINER AND MAY REQUIRE FURTHER AND ADDITIONAL HEARINGS.

2. THE AUTHORIZATION GRANTED HEREIN IS SUBJECT TO ALL APPLICABLE FEDERAL, STATE, AND LOCAL LAWS, REGULATIONS, AND ORDINANCES. COMPLIANCE WITH SUCH LAW, REGULATIONS, AND ORDINANCES ARE CONDITIONS PRECEDENT TO THE APPROVAL GRANTED AND ARE CONTINUING REQUIREMENT OF SUCH APPROVALS. BY ACCEPTING THIS APPROVAL, THE APPLICANT REPRESENTS THAT THE DEVELOPMENT AND ACTIVITIES ALLOWED WILL COMPLY WITH SUCH LAWS, REGULATIONS, AND ORDINANCE. IF, DURING THE TERM OF THE APPROVAL GRANTED, THE DEVELOPMENT AND ACTIVITIES PERMITTED DO NOT COMPLY WITH SUCH LAWS, REGULATIONS, AND ORDINANCES, THE APPLICANT SHALL PROMPTLY BRING SUCH DEVELOPMENT OR ACTIVITIES INTO COMPLIANCE.

RECOMMENDATION:

The Hearing Examiner recommends approval of the rezone, subject to the conditions listed above in paragraph 10.

DATED this 4th day of May, 2017.


PHYLLIS K. MACLEOD, Hearing Examiner

NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S RECOMMENDATION

RECONSIDERATION:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (TMC 1.23.140)

APPEALS TO CITY COUNCIL OF EXAMINER'S RECOMMENDATION:

Within 14 days of the issuance of the Hearing Examiner's final recommendation, any aggrieved person or entity having standing under the ordinance governing such application and feeling that the recommendation of the Examiner is based on errors of procedure, fact or law shall have the right to appeal the recommendation of the Examiner by filing written notice of appeal with the City Clerk, stating the reasons the Examiner's recommendation was in error. **EACH APPEAL SHALL BE ACCOMPANIED BY A FEE AS SET FORTH IN TACOMA MUNICIPAL CODE (TMC) 2.09.170. THE FEE SHALL BE REFUNDED TO THE APPELLANT SHOULD APPELLANT PREVAIL. APPEALS SHALL BE REVIEWED AND ACTED UPON BY THE CITY COUNCIL IN ACCORDANCE WITH TMC 1.70.**

GENERAL PROCEDURES FOR APPEAL: The Official Code of the City of Tacoma contains certain procedures for appeal, and while not listing all of these procedures here, you should be aware of the following items which are essential to your appeal. Any answers to questions on the proper procedure for appeal may be found in the City Code sections heretofore cited:

1. The written request for review shall also state where the Examiner's findings or conclusions were in error.
2. Any person who desires a copy of the electronic recording must pay the cost of reproducing the tapes. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.