



City of Tacoma
Hearing Examiner

June 29, 2018

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Re: HEX2018-009 (LU18-0096)

Applicant: Touchstone Mullen Street I LLC through its agent Apex Engineering

Dear Parties,

In regard to the above-referenced matter please find enclosed a copy of the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation to the Tacoma City Council entered on June 29, 2018. A public hearing was held in the matter on June 21, 2018.

Sincerely,

Louisa Legg, Office Administrator

Enclosure (1): Findings of Fact, Conclusions of Law, and Recommendation

Transmitted First Class Mail Delivery

State of Washington, Department of Ecology, Southwest Regional Office, ATTN: Eva Barber,
Toxics Cleanup; Derek Rockett, Waste 2 Resources; and Chris Montague-Breakwell, Water Quality,
PO Box 47775, Olympia, WA 98504-7775

Transmitted via Electronic Mail Delivery

City of Tacoma: Nicole Emery, City Clerk's Office; Steve Victor, Office of the Tacoma City Attorney;
Chris Seaman, Tacoma Fire; Shannon Brenner, Planning and Development Services (PDS);
Jennifer Kammerzell, Public Works (PW) Traffic Programs; Vicki Marsten, PW Traffic Safety & Review;
Frank Marescalco, Environmental Services; Gloria Fletcher, CEDD; Rudy Eckert, Tacoma Power; Shelly
Shaffer, Tacoma Water; Sue Simpson, PW/RPS; Jana Magoon, PDS; Lucas Shadduck, PDS; and Lihuang
Wung, PDS.

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 June 29, 2018, at Tacoma, WA.
Louisa Legg

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

APPLICANT: Touchstone Mullen Street I LLC through its agent Apex Engineering (collectively the “Applicant”).¹

FILE NO.: HEX2018-009 (LU18-0096)

SUMMARY OF REQUEST: The Applicant proposes a major modification to the previous rezone approved by the Tacoma City Council (Ordinance No. 26441) on August 24, 1999, under File No. REZ98-00007. The original rezone reclassified real property, including the Subject Property (defined below), from “R-2” One-Family Dwelling District and “R-5” Multiple-Family Dwelling District to “C-2” Commercial District to allow development of a 117,064 square foot retail hardware and garden supply store with a 14,790² square foot outdoor garden area (Home Depot) and a request to provide access to the development and a wetland mitigation area. The original rezone did not include a discussion of development, other than as parking and access, on the Subject Property. The requested major modification will allow development of the Subject Property with a use and structure generally allowed by the City’s C-2 General Community Commercial District requirements, which is already the zoning designation in place on the Subject Property. The current proposal for development is a self-storage facility.³

LOCATION: The Subject Property is located at 3001 South Mullen Street in Tacoma and the associated Tax Parcel Number is 6135000267 (the “Subject Property”). The rezone modification area is 1.01 acres within the total parcel area of 3.88 acres.

RECOMMENDATION: The Hearing Examiner recommends that the proposed major modification to the previously approved rezone be approved subject to existing conditions as further set forth herein below.

PUBLIC HEARING: After reviewing the Preliminary Report (herein the “Report”) of the Planning and Development Services Department (“PDS”) and examining available information on file with the

¹ “West Coast Self-Storage” is also an involved party with this application, presumably as a buyer or tenant in-waiting for the Subject Property.

² The Report and documentation from the 98 Rezone (defined below) differ on the square footage figure here slightly, with the Report showing it as 14,709, while the 98 Rezone documentation lists it as 14,790. This difference is immaterial to the Recommendation herein.

³ It should be noted here that nothing in this Report and Recommendation recommends requiring that the Subject Property be developed as a self-storage facility; that is simply what is being proposed at present. Nothing about a request for a major modification to the previous rezone requires the Applicant to pick and stick to one particular development plan.

ORIGINAL

application, the Hearing Examiner conducted a public hearing on the application on June 21, 2018. At the conclusion of the proceedings, the Hearing Examiner held the hearing record open until June 29, 2018, to allow the parties time to review applicable sections of the Tacoma Municipal Code (“TMC”) regarding whether any variances needed for the intended development of the Subject Property as a self-storage facility had to be combined with the present request for a major modification to rezone, or if any such variance(s) can be considered separately by the PDS Director at a later time. Upon early receipt of the parties’ electronic mail submissions addressing this issue on June 25, 2018, the hearing record closed.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS OF FACT:

1. The Applicant has requested a major modification to a prior rezone (REZ98-00007, herein referred to as the “98 Rezone”) to allow the existing C-2 General Commercial zoned portion of the Subject Property to be developed in accordance with the requirements of the existing zoning. The development currently proposed from the Applicant side is an approximately 90,000 square foot, 3-level self-storage facility with approximately 14 parking and loading stalls. *Spadoni Testimony, Ebsworth Testimony; Ex.1, Ex. 3, Ex. 17.*

2. The Subject Property is located at 3001 S. Mullen Street in the city of Tacoma, and is a portion of Pierce County Tax Parcel No. 6135000267 (separately, the “Subject Tax Parcel”). *Ex. 2.* The Subject Property was originally zoned R-2 One-Family Dwelling District, as was the majority of the surrounding area in 1953, at the outset of the City’s zoning enactments. The northern 75 feet of the Subject Tax Parcel was rezoned to C-2 Commercial⁴ District in 1961 (City of Tacoma Ordinance No. 16822). *Spadoni Testimony, Ex. 9.* This portion of the property was developed as a parking lot. The 1961 rezone did not include conditions of approval or a Concomitant Zoning Agreement, which allows the northern 75 feet of the Subject Tax Parcel to be used commercially (in compliance with C-2 district requirements) without condition, and without amending the 1961 rezone. *Spadoni Testimony, Ex. 1; Ex. 9.*

3. The central 185 feet of the Subject Tax Parcel, which is the subject of this request (the Subject Property), was developed as parking in the 1960s to support commercial development to the north. It was rezoned to C-2 in 1999 as part of the 98 Rezone. The 98 Rezone appeared to detail specifically what development was permitted via the rezone and included a Concomitant Zoning Agreement dated August 19, 1999 (the “CZA”) which outlined the same, along with setting forth multiple other conditions addressing that development, again apparently as part of the rezone approval paradigm. *Spadoni Testimony, Ex. 7, Ex. 8.* The approved project description did not appear to allow for any change to the existing parking area in the central 185 feet comprising the Subject Property, except to include vehicle and pedestrian access to the proposed Home Depot. *Ex. 1, Ex. 8.*

⁴ Ordinance 16822 refers only to “C-2’ Commercial⁴ District” although the City’s Report (Ex. 1) refers to the present zoning designation at various places as “C-2 General Commercial.”

4. The development set forth under the 98 Rezone expressly allowed development of a 117,064 square-foot retail hardware and garden supply store with a 14,790 square foot outdoor garden area (now a Home Depot) and a 3,200 square foot fast food restaurant. The Subject Property was included in the request to provide access to the development with a wetland mitigation area in the south end of the Subject Tax Parcel. *Ex. 8*. When the Home Depot was developed in 2000, an access driveway to S. Mullen Street across the Subject Property was constructed in accordance with the approved site plan. *Spadoni Testimony, Ex. 1*.

5. The Subject Tax Parcel's current zoning map shows it is zoned C-2 General Commercial District on the northern 260 square feet (which includes the Subject Property) and zoned R-2 Single-Family Dwelling District on the southern 300 feet. The southern 300 foot area contains a known wetland and buffer area. No change is proposed or requested to this southern area. *Spadoni Testimony, Ebsworth Testimony; Ex. 1, Ex. 4*. The requested rezone modification would allow the entire northern 260 feet of the Subject Tax Parcel, including the Subject Property, to be developed in accordance with the C-2 district regulations. *Ex. 1, Ex. 5*. No area-wide rezone action was taken by the City Council in the two years preceding the Applicant's filing of the present rezone application. *Ex. 1*.

6. Adjacent properties include right-of-way, other commercial development, and the City of Tacoma's (the "City") Land Fill. Properties to the north, east and west are zoned C-2 with a General Commercial land designation and are occupied by a restaurant and bank to the north, the Home Depot store to the east, and retail and veterinary/pet clinic to the west. Property to the south is zoned R-2 with a Parks and Open Space land designation and principally is occupied by the City of Tacoma's solid waste Recovery & Transfer Center. *Ex. 1, Ex. 2, Ex. 4*.

7. The Subject Property slopes upward from S. Mullen Street. Portions of the Subject Property are between approximately one (1) and ten (10) feet higher than the S. Mullen Street right-of-way. The Subject Property is currently developed with a parking lot and access driveway to the Home Depot development to the east. *Ex. 1*.

8. As referenced above, the 98 Rezone appeared to obtain its approval based, at least in part, on the property subject to the request, which included the Subject Property, being developed only as set forth in the request itself. *Spadoni Testimony; Ex. 1, Ex. 7, Ex. 8*. The Applicant's proposed development of the Subject Property as an approximately 90,000 square foot self-storage facility would increase the developed structures on the real property subject to the 98 Rezone by sixty-seven percent (67%) and change the use of the Subject Property from what was designated in the 98 Rezone. *Id.* PDS staff determined that the requested rezone modification could not be processed as a minor modification under TMC 13.05.080.B because the proposed development "[a]dd[s] to the site or approved structures more than a 10 percent increase in square footage." *TMC 13.05.080.B.2.; Spadoni Testimony; Ex. 1*.

9. The 98 Rezone and the CZA included numerous, specific conditions as part of the approval. Condition DD. states the following:

The recommendation set forth herein is based upon representations made and exhibits, including the site plan [Exhibit 16 in the Hearing Examiner's record] and proposals, submitted at the hearing conducted by the Hearing Examiner. Any substantial change(s) or deviation(s) in such site plan [Exhibit 16], proposals, or conditions of approval

imposed shall be subject to the approval of the Hearing Examiner and may require further and additional hearings. *Ex. 7.*

10. As part of the City's review process, comments were solicited from City departments and divisions, as well as relevant state agencies. *Spadoni Testimony; Ex. 1, Ex. 10 through Ex. 13.* Comments received back were directed primarily to the Applicant's proposed development of the Subject Property as a self-storage facility, and not to the requested rezoning modification *per se. Id.* During this review process, PDS staff provided comments addressing the Applicant's proposed design/elevations/site plan for the self-storage facility indicating elements for which variances might be required. *Spadoni Testimony; Ex. 11.* The Applicant did not apply for any variances prior to the hearing. As a result, there was no formal joinder of variance requests with the application for the rezoning modification. *Spadoni Testimony; see also Ex. 18.*

11. The Applicant did, however, present testimony at the hearing regarding the aspects of the intended development for which variances may be needed as its intended project moves forward. *Ebsworth Testimony, Fitzpatrick Testimony, Kispert Testimony; Ex. 17.* After conclusion of the hearing, and prior to the record closing on June 25, 2018, both the City and the Applicant submitted e-mailed communications agreeing that, in their view, nothing in the TMC barred later submission of variance applications as the development of the Subject Property moves forward. *Ex. 18.*

12. Pursuant to the State Environmental Policy Act ("SEPA"), SEPA's accompanying regulations (WAC 197-11), and the City of Tacoma's Environmental Code (TMC 13.12), the PDS Director issued a Determination of Environmental Nonsignificance ("DNS") for the requested rezoning modification and proposed project on May 21, 2018. The DNS was based on a review of the Applicant's Environmental Checklist and other supporting information on file with PDS. The SEPA appeal period ended June 4, 2018, and no appeals of the SEPA determination have been filed. *Ex. 6.*

13. No one appeared at the hearing expressing opposition to the proposed rezoning major modification.

14. Written notice of the application was mailed to all owners of property within 400 feet of the Subject Property, the appropriate neighborhood council, and qualified neighborhood groups on April 24, 2018. In addition, a public notice sign was posted on the Subject Property. No public comments were received as a result of the public notice. *Spadoni Testimony; Ex. 1.*

15. Any conclusion hereinafter stated which may be more properly deemed or considered a finding is hereby adopted as such.

CONCLUSIONS OF LAW:

1. The Hearing Examiner has jurisdiction in this matter under TMC 1.23.050.A.1 and 13.05.080.C.

2. PDS staff is correct that the requested rezoning modification could not be processed as a minor modification under TMC 13.05.080.B because the proposed development "[a]dd[s] to

the site or approved structures more than a 10 percent increase in square footage.” *TMC 13.05.080.B.2.*

3. Requests for major rezone modifications must follow the procedures, and are subject to the same decision criteria, that are currently required for the type of permit being modified—in this case, a rezone request. *TMC 13.05.080.C.1.* In addition to the standard criteria applicable to the permit decision, the Hearing Examiner is to address the applicability of any specific conditions of approval for the original permit. *TMC 13.05.080.C.2.*

4. The Applicant bears the burden of proof to demonstrate that the request is consistent with the criteria for the approval of rezone applications found in Section 13.06.650 of the TMC.

5. The required criteria for zoning reclassification are outlined in TMC 13.06.650.B as follows:

- a. 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.
- b. 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.
- c. That the change of zoning classification is consistent with the district establishment statement for the zoning classification being requested, as set forth in this chapter.
- d. 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.
- e. That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare.

TMC 13.06.650.B.1. through B.5.

5. The facts demonstrate that the proposed major modification is generally consistent with the above criteria as follows:

a. 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.

As PDS staff correctly noted, the requested modification to the 98 Rezone is not a request to change the zoning classification. The request here is more properly characterized as a request to remove what was possibly an express limitation on development, but may also have been an unintended consequence of the 98 Rezone's wording. The Subject Property is already zoned C-2. Consistency with the Comprehensive Plan is not an issue here, and compliance with this criteria dates back to the 98 Rezone.

b. 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 rezoning 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 rezoning.

Similar to 5.a. above, the substantial changes in conditions, and etc. that justified the change to C-2 for the Subject Property in the 98 Rezone have not reversed themselves, or otherwise changed to the point where maintaining the current C-2 designation would be somehow inappropriate. The Subject Property is already classified the way the Applicant wants it. There is no reason that manifests through this proceeding for it to be otherwise.

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

In repetition of the already developed theme, the Subject Property is already C-2. No change is requested. The current zoning is consistent with the applicable district establishment statement, and the Applicant's intended use is an allowed use in this classification.

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

No area-wide rezone action was taken by the City Council in the two years preceding the Applicant's filing of the present rezone application. This criterion is met.

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

Once again, the Applicant is not seeking a change of zoning classification for the Subject Property. The Applicant merely seeks to be released from the development strictures apparently put in place in the 98 Rezone, i.e., the requirement that the property subject to the 98 Rezone be developed only as proposed at that time. Since the Subject Property was designated as a parking lot and drive aisle, changing that use appeared to require approval of a modification to the 98 Rezone and its expressed limitations. The City, as formalized in Ordinance No. 26441, determined that the real property included in that rezone request, which includes the Subject Property, should be zoned C-2 Commercial (now "C-2 General Commercial"). Addressing herein what may have been simply an unintended consequence is not difficult. The Applicant's proposed use conforms with the zoning classification granted in the 98 Rezone. Nothing was presented, either in writing or at the hearing, that would suggest the findings that supported the change to C-2 in 1998 are inapposite now. City staff's review of the potential impacts of the proposed development as a self-storage facility showed no detrimental effects if accomplished in compliance with current development regulations. Releasing any limitation on the use of the Subject Property (beyond those imposed in the C-2 zoning district generally) will allow the Subject Property to be used more productively and in a more economically beneficial manner, thereby benefitting the property owner and the public.

6. Nothing in this Report and Recommendation should be construed to limit use of the Subject Property to a self-storage facility. Although that is the Applicant's intended use at present, if the City Council approves this rezone modification request, any use within the C-2 General Commercial zoning district should be available to the property owner, if and to the extent that such use can be accomplished in compliance with all applicable laws and regulations.

7. To the extent that variances are needed later for the development of the Subject Property, they should be applied for and processed in due course with the City. Even though testimony was presented at the hearing, and submissions addressing potential variances were admitted (*Ex. 17*), the Examiner is not in a position to render a decision on any variances because they were not formally applied for, nor were application requirements, including any notice provisions, complied with prior to the hearing. As a result, whether the Examiner agrees

with the parties' interpretation of the applicable provisions of the TMC is of no moment.⁵

8. Any finding hereinbefore stated which may be more properly deemed or considered a conclusion is hereby adopted as such.

REZONE MODIFICATION CONDITIONS:

1. Approval of the major modification to rezone should be approved subject to the following:

All conditions of approval in the 98 Rezone (REZ98-00007) that have not been satisfied to date shall remain in effect and be complied with, except as modified by this request to allow development of the Subject Property in conformance with the requirements of the C-2 zone district and other applicable requirements of the TMC and applicable laws generally.

2. THE REZONE MAJOR MODIFICATION RECOMMENDED FOR APPROVAL HEREIN IS SUBJECT TO ALL APPLICABLE FEDERAL, STATE, AND LOCAL LAWS, REGULATIONS, AND ORDINANCES. COMPLIANCE WITH SUCH LAWS, REGULATIONS, AND ORDINANCES IS BOTH A CONDITION PRECEDENT TO THE RECOMMENDED APPROVAL AND A CONTINUING REQUIREMENT OF SUCH APPROVALS IF GRANTED BY THE CITY COUNCIL. BY ACCEPTING ANY RESULTING APPROVAL, THE APPLICANT REPRESENTS THAT THE DEVELOPMENT AND ACTIVITIES ALLOWED WILL COMPLY WITH SUCH LAWS, REGULATIONS, AND ORDINANCES. DURING THE TERM OF THE APPROVAL (IF) GRANTED, IF THE DEVELOPMENT AND ACTIVITIES PERMITTED DO NOT COMPLY WITH SUCH LAWS, REGULATIONS, OR ORDINANCES, THE APPLICANT AGREES TO PROMPTLY BRING SUCH DEVELOPMENT OR ACTIVITIES INTO COMPLIANCE.

RECOMMENDATION:

Based upon the foregoing Findings and Conclusions, the Hearing Examiner recommends that the requested major modification to rezone be approved, subject to conditions set forth in Rezone Modification Conditions 1 and 2 above.

DATED this 29th day of June, 2018.



JEFF H. CAPELL, Hearing Examiner

⁵ Much to his own surprise given conditioned statements made at the hearing, the Examiner found the use of the modal "shall" in places in the TMC such as TMC 1.23.120 and TMC 13.05.040.E to be problematic under the current request for rezone modification. The parties seem to be adding language to the TMC in these locations such that the Code would read something like "shall wherever practicable..." instead of what is actually present in the Code. The Examiner agrees with the parties that, from a standpoint of practicability, in many cases the need for a variance or other permit may not be fully ascertained enough to consolidate review with an initial permit that requires a hearing. Given that, the City may want to consider clarifying the language present in its code for situations such as what presented here.

REZONE MODIFICATION APPEAL PROCEDURES

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. (*Tacoma Municipal Code 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.