



City of Tacoma  
Hearing Examiner

July 22 2016

Heather and James (J.T.) Curry  
Cornered LLC  
3008 Magnolia Lane  
Gig Harbor, WA 98335-5117  
(First Class & Electronic Mail Delivery)

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City of Tacoma  
Planning and Development Services  
747 Market Street Room 345  
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McCarthy & Causseaux  
902 South 10<sup>th</sup> Street  
Tacoma, WA 98405

**Re: HEX 2016-001 (REZ2015-40000261491/SEP2015-40000261492)**  
**“Cornered LLC” Rezone**

Dear Parties,

In regard to the above reference 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 July 22, 2016.

Sincerely,

Louisa Legg  
Office Administrator

Enclosure (1) – Findings, Conclusions, and Recommendation

cc: *See attached 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 July 22, 2016, at Tacoma, WA.

Louisa Legg

**TRANSMITTAL LIST – CORNERED LLC HEX 2016-001**

Transmitted via First Class Mail Delivery

Steve and Charrie Hayward, 7031 S. Puget Sound Avenue, Tacoma, WA 98409  
Pennie Smith, 6613 S. Prospect Street, Tacoma, WA 98409  
John Miles, 5606 S. Junett Street, Tacoma, WA 98409  
Karen Wild, 6839 S. Junett Street, Tacoma, WA 98409  
James H. Rich, 5424 South Tacoma Way, Tacoma, WA 98409-4313  
Micaela Cooley, Pierce Conservation District, PO Box 1057, Puyallup, WA 98371-0256  
Brenda Valentine, South Tacoma Business District Assoc., PO Box 9445, Tacoma, WA 98490-0445  
Ken Sikes, 7009 S. Warner Street, Tacoma, WA 98409-3928  
Beryl Christiansen, 3415 South 72<sup>nd</sup> Street, Tacoma, WA 98409  
David L. Gear and Winona J. Gear, 7035 S. Puget Sound Avenue, Tacoma, WA 98409  
Kim Tyler, 7045 S. Puget Sound Avenue, Tacoma, WA 98409  
Scott M. Hansen, Puget Creek Restoration Society, 702 Broadway STE 101, Tacoma, WA 98402

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 Water, Water Distribution (Jesse Angel)  
Public Works, City of Tacoma (Sue Simpson)  
Public Works Traffic Engineering Division, City of Tacoma (Jennifer Kammerzell)  
Public Works Facilities Mgt. (Mina Zarelli)  
Planning and Development Services Department, City of Tacoma (Lisa Spadoni)  
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 ON REZONE**

**APPLICANT:** Cornered LLC

**HEARING EXAMINER FILE NO:** HEX 2016-001 (REZ2015-40000261491; SEP2015-40000261492)

**SUMMARY OF REQUEST:** The City of Tacoma Planning and Development Services Department received an application to rezone a 6,000 square foot (0.14 acre) parcel at the corner of South Puget Sound Avenue and South 70<sup>th</sup> Street from R-4L Low-Density Multiple-Family Dwelling District to C-2 General Community Commercial District to allow for continued presence of a garage and its use for commercial purposes. The remainder of the parcel is currently used for a community garden, which would be retained by agreement; however, the rezoning request would extend C-2 zoning to the entire parcel.

**LOCATION:** The site is located at 7002 South Puget Sound Avenue, Parcel Number 4940002690.

**RECOMMENDATION:** To deny the Applicant's request to rezone the property from R-4L Low-Density Multiple-Family Dwelling District to C-2 General Community Commercial District.

**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 original rezone request on March 31, 2016. The Applicant made a request to continue the hearing due to a recent death in the family. The Hearing Examiner granted the request, but allowed citizens present at the hearing to testify if they were going to be unavailable for the new hearing date of June 2, 2016. The Applicant subsequently revised the rezone request to include the entire ownership rather than the originally requested westerly portion of the lot. *Ex. R-7*. This change required further State Environmental Policy Act (SEPA) review and further notice. As a result, the matter was continued to July 7, 2016. The hearing was conducted on July 7, 2016, and the record includes the testimony given at the March 31, 2016, hearing. The Hearing Examiner also visited the site of the proposed rezone and surrounding area on July 6, 2016.



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

### **FINDINGS OF FACT:**

1. Cornered LLC (Cornered) submitted an application seeking a rezone from R-4L Low-Density Multiple-Family Dwelling District to C-2 General Community Commercial District to allow for the retention of a garage that was constructed on the 6,000 square foot lot at 7002 South Puget Sound Avenue. The garage was built under a permit allowing the structure as an accessory use to a planned single-family dwelling. Building permits were issued simultaneously for both structures. *Ex. R-5*. The garage was constructed first and the primary residence was never constructed. The garage is located on the westerly portion of the lot. The owners have allowed the easterly portion of the lot to be used for the South Tacoma Community Garden. *Ex. R-1; Ex. R-8*.

2. Cornered LLC is owned by Heather and James Curry. The Currys are also the owners of several adjacent parcels to the west that front on South Tacoma Way. The parcels on South Tacoma Way are zoned C-2 General Community Commercial District and are being used for a vehicle sales business run by the Currys known as “Motors Northwest.” Mr. Curry would like to use the garage on the lot in question for vehicle repairs, detailing, or storage associated with his adjacent business. *Curry Testimony*. This use would require C-2 zoning, rather than the existing R-4L zoning. *Kinlow Testimony*. James Curry indicated that he has no plan to use the easterly portion of the site for anything other than the existing community garden. He is willing to stipulate to a condition of approval for the rezone stating that the nature of the use on the easterly portion of the site will not change without the City’s permission. *Curry Testimony*.

3. In 2015, the City of Tacoma began a Code enforcement action regarding use of the garage the Currys had constructed on the property in question. The City’s land use code does not allow detached accessory buildings to remain on a site when the main structure has not been built. After the building permit for the proposed single-family dwelling expired without any progress toward construction, the City notified Mr. Curry that the garage constituted a violation. *Ex. R-1 at p. 5*.

4. Mr. Curry appealed the violation and participated in a meeting with City personnel regarding the situation on October 22, 2015.<sup>1</sup> In connection with the Code enforcement case, Mr. Curry and the City staff explored different paths he could pursue to resolve the violation including: (1) Obtain approval of a rezone request allowing commercial zoning on the property; (2) Build a dwelling unit on the property; or (3) Remove the existing structure and discontinue the associated commercial use. Mr. Curry decided to apply for the rezone and entered into a Plan of Action with the Code Enforcement Division reflecting his intent to seek a rezone. *Ex. A-1*. The Plan of Action stated that Mr. Curry would complete the rezone application on or before January 1, 2016. He further agreed to provide and submit any necessary information in a timely manner. If the rezone was approved, he agreed to contact

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<sup>1</sup> The City representatives at this meeting were Dan McConoughy of Neighborhood and Community Services Enforcement, Charla Kinlow of Planning and Development Services, and Peter Rambo of Building Inspection.



Planning and Development Services within 30 days to rectify building Code requirements. The agreement also specifically provided that if the rezone application was denied, the Applicant would have 30 days to get a modified plan of action approved by the City. *Ex. A-1*.

5. Mr. Curry understood, from talking with City staff, that new *Comprehensive Plan* provisions were anticipated by the end of 2015. He thought he would be filing the application prior to January 1, 2016, in order to avoid any problems that might arise from the new *Comprehensive Plan* provisions. *Curry Testimony*. However, soon after the October 22, 2015, meeting, Charla Kinlow wrote Mr. Curry an email specifically indicating that she had been informed that vesting did not apply to *Comprehensive Plan* amendments and warning Mr. Curry that applying before the effective date would not assure that the older *Comprehensive Plan* would be applied to his project. *Ex. R-21; Kinlow Testimony*. Mr. Curry testified that he skimmed over this memorandum and was under the impression that the application would be approved. He was very surprised when the City staff recommended denial of the application in connection with the first scheduled hearing on the rezone. *Curry Testimony*.

6. The property proposed for rezoning is a rectangular corner lot. The parcel is approximately 50 feet wide by 120 feet deep. The site has frontage on South 70<sup>th</sup> Street to the north and South Puget Sound Avenue to the east. The area across South Puget Sound Avenue contains single family homes. A single-family residence is also located on the lot to the south of the subject property and Motors Northwest is located to the west. The site currently has a paved parking area on the north and west sides of the garage structure. The westernmost 10 feet of the site contains an existing access easement that functions as an alley. *Ex. R-14*. The garage is accessed through this easement. A line of arborvitae vegetation has been planted separating the garage from the community garden area. *Ex. R-1*.

7. The parcel in question is zoned R-4L Low-Density Multiple-Family Dwelling District to serve as a transition zone between the C-2 General Community Commercial District to the west and the R-2 Single-Family Dwelling District to the east, across South Puget Sound Avenue. The R-4L zoning was placed on the property as part of a larger rezone that was implemented in 2008. Prior to 2008, the subject site and other parcels on the west side of South Puget Sound Avenue in this area were zoned R-2 Single-Family Dwelling District. In 2008, a proposal was put forward by property owners with frontage on South Tacoma Way to rezone the lots extending between South Tacoma Way and South Puget Sound Avenue from R-2 to C-2. The enunciated purpose of the proposed rezone was to allow expansion of the existing commercial uses located along South Tacoma Way. *Ex. R-1 at p. 3*.

8. The proposed area-wide rezone to accommodate easterly expansion of businesses on South Tacoma Way was denied. The decision appeared to be based, in part, on the inconsistency of commercial uses with the adjacent single-family residential neighborhood. Further encroachment of the commercial uses was seen as a threat to existing housing stock and as incompatible with the adjacent residential uses. *Ex. R-1 at p. 3*. The analysis conducted in connection with the proposed area-wide rezone to C-2 led to a City-initiated rezone of the properties on the west side of South Puget Sound Avenue from R-2 to R-4L. The subject property was included in the area-wide rezone. The R-4L zone was considered a buffer between the more intense commercial uses to the west and the R-2 uses to the east. *Ex. R-1 at p.3; Ex. R-13*. The staff report prepared in connection with the proposed area-wide rezone to C-2 indicated that R-4L zoning would not prevent future site-specific applications for rezoning



that might allow auto-oriented or other businesses in the area. However, the site specific process would enable the City to address any impacts such proposals would have on residential areas to the east as contemplated by the *Comprehensive Plan. Ex. R-1*; No evidence was presented at the hearing that any property owners along South Tacoma Way have obtained rezones from R-4L to C-2 for an adjacent parcel fronting on South Puget Sound Avenue after the 2008 area-wide rezone to R-4L.<sup>2</sup>

9. The original zoning for this property, established in or around 1953, was R-2 Single-Family Dwelling District. The R-2 zoning was changed to R-4L Low-Density Multiple-Family Dwelling District in or around 2008. The area has changed, to a limited degree, over the years as more commercial development has occurred along South Tacoma Way. However, the basic separation of uses and competing interests have remained primarily the same. The businesses face South Tacoma Way and residences are located on the next block back facing both sides of South Puget Sound Avenue. Many of the homes in this area have been in place for decades. There has been some encroachment onto the block between the alley and South Puget Sound Avenue by long-standing commercial uses or individual rezones. The tension between the South Tacoma Way business owners' desire to expand businesses eastward and their neighbors' goal to resist commercial encroachment has not changed.

10. The City received public comments on the proposed rezone both from citizens supporting the action and from citizens opposing the change. The members of the public supporting the rezone pointed to the ongoing transition from residential to commercial uses in the area and the increased opportunity for investment presented by commercial zoning. Continued use of the easterly portion of the property for the South Tacoma Community Garden was also cited as a reason to allow the C-2 zoning because without it a residence would likely be placed where the garden is currently growing. *Ex. R-1, Ex. R-8.*

11. Citizens opposing the rezone expressed concern that allowing commercial uses to move east would change the character of their residential neighborhood and result in more light, noise, traffic, and parking problems. Neighbors cited the property at 6648 South Puget Sound Avenue, which obtained a rezone to C-2 in 2005, as an example of a use with significant negative impacts on the neighborhood. The GT Auto Sales business at this location has extended its buildings and parking to encompass the entire area between South Tacoma Way and South Puget Sound Avenue and parking has overflowed onto the surrounding streets. *Ex. R-9; Hayward Testimony; Wild Testimony.* The South Tacoma Neighborhood Council has also submitted a letter opposing a rezone from residential to commercial in this location. *Ex. R-9; Smith Testimony.*

12. The District Establishment Statement for the requested C-2 zone provides:

This district is intended to allow a broad range of medium-to high-intensity uses of larger scale. Office, retail, and service uses that serve a large market

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<sup>2</sup> There are at least two properties within a few blocks of the subject property that obtained rezones to allow expansion of commercial uses behind businesses on South Tacoma Way prior to the 2008 area-wide rezone to R-4L. *Curry Testimony; Ex. A-5.* The City indicated that the provisions governing rezones were different when the other rezones were approved. *Kinlow Testimony.*



area are appropriate. Residential uses are also appropriate. This classification is not appropriate inside Comprehensive Plan designated mixed-use centers or low-intensity areas.

The District use table allows repair services as a permitted use in the C-2 zone. *Tacoma Municipal Code (TMC) 13.06.200.C.4, District Use Table*. The parties disagree over whether the language in the District Establishment Statement indicating that the C-2 classification is not appropriate in low-intensity areas under the *Comprehensive Plan* applies in this case. Under the current *Comprehensive Plan*, the site in question is given a designation consistent with a low-intensity area. *Ex. R-1 at pp. 5 and 17.*<sup>3</sup> Under the *Comprehensive Plan* in effect prior to December 31, 2015, the area in question was designated as a medium intensity use area. *Ex. R-1*.

13. 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 14, 2016. *Ex. R-1*. Additional notice was provided after the proposal was modified by the Applicant and the hearing was rescheduled to July 7, 2016. In addition, a public notice sign was posted on the property. *Kinlow Testimony*.

14. 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 comments and requirements regarding this proposal are included as attachments to the City's Staff Report. If a rezone was approved departments have recommended important conditions that would be properly attached to such an approval. *Exs. R-1 and 16-20*.

15. On June 15, 2016, the City issued a Determination of Environmental Non-Significance for the proposed project under the State Environmental Policy Act (SEPA). The DNS was not appealed. *Ex. R-1*.

16. No area-wide rezone action affecting this property has been taken by the City Council in the two years preceding the instant rezone application. *Ex. R-1; Kinlow Testimony*.

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 R-1, and by this reference, is incorporated herein as though fully set forth.

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

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<sup>3</sup> The staff report indicates the site's current low-density designation "...was effective December 31, 2016." This date reference appears to be a scrivener's error as the *Comprehensive Plan* amendments were effective December 31, 2015.

## **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 Determination of Environmental Non-Significance, 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 foregoing criteria. *TMC 1.23.070.A.*<sup>4</sup>

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<sup>4</sup> The Appellant's brief suggests that the Plan of Action Mr. Curry signed regarding the alleged garage violation at the property was a contract binding the City to use the 2015 version of the *Comprehensive Plan* or that City employees' statements to him raise a legal issue of collateral estoppel. The Plan of Action specifically addresses actions that Mr. Curry would take if the rezone was denied. As a result, the Plan of Action presents no limitation on the otherwise applicable criteria that must be demonstrated to support a zoning reclassification under TMC 13.06.650.B. Moreover, as the Appellant observes, the issues of contractual accord and satisfaction, breach of contract, and estoppel fall outside the jurisdiction of the Hearing Examiner. *See, TMC 1.23.*



4. The Applicant's brief argues, by analogy, that two reported decisions in variance cases stand for the proposition that the rezone should be granted because other rezones have been granted to businesses in the same area. See, *St. Clair v. Skagit County*, 43 Wn. App. 122, 715 P.2d 165 (1986); *Ling v. Whatcom County Bd. of Adjustment*, 21 Wn. App. 497, 585 P.2d 815 (1978). These cases do not compel a specific result in this matter. The cited decisions involved the issue of whether existing nonconforming uses located on substandard properties would provide a basis for approval of an application for a variance addressing similar property deficiencies. The variances in both cases were denied and the court refused to grant relief based on other existing uses. *Id.* In this case, the action involved is a rezone rather than a variance. Each rezone is evaluated individually under the Code criteria governing reclassification. *TMC 13.06.650.B*. The presence of two other businesses that obtained rezones many years ago does not mandate the City's action on the current request for C-2 zoning by Cornered LLC. The application must be analyzed under the applicable regulations.

#### Consistency with the *Comprehensive Plan*

5. The first criteria that must be met in seeking a rezone is consistency with "the applicable land use intensity designation of the property, policies, and other pertinent provisions of the *Comprehensive Plan*." In this case, the property in question was included in the medium-intensity category under the version of the *Comprehensive Plan* that applied up until amendments became effective on December 31, 2015. The *Comprehensive Plan* amendments changed the method for categorizing different land uses. Rather than using low-, medium-, and high-intensity designations, the new approach identified uses by type on a land use map with intensities included in some instances as a parenthetical. Under this approach, the property in question was designated Multi-family (Low-Density) which is consistent with the R4-L zoning in the area. The parties disagree strongly over whether the new *Comprehensive Plan* provisions should apply to this case. The typical argument in favor of applying an earlier version of a land use regulation is that the application was "vested" to the older provision. The City has cited valid authority for the proposition that vesting does not apply to *Comprehensive Plan* policies. *Potala Village Kirkland LLC v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014). The Applicant has argued that vesting is not at play, but that other legal doctrines would force the City to consider only the earlier version of the *Comprehensive Plan* in evaluating this application. As indicated above, application of those doctrines to this fact pattern is questionable and the resolution of such issues falls outside the Hearing Examiner's jurisdiction. Accordingly, the analysis in this decision will apply the currently governing *Comprehensive Plan*.

6. At this point in time, to the extent intensity is mentioned in the *Comprehensive Plan*, the designation for this site is Low-Density as expressed in the category "Multi-Family (Low-Density)." The rezone request is seeking a C-2 General Community Commercial District classification, which would be a higher intensity use under the *Comprehensive Plan*. The reclassification, therefore, would not be consistent with land use intensity provisions of the *Comprehensive Plan*. Moreover, the reclassification must also be consistent with policies and other pertinent provisions of the *Comprehensive Plan*. In this case, the proposal is inconsistent with a number of relevant *Comprehensive Plan* policies.



7. The most compelling inconsistency arises under Goal DD-9 which involves support for development patterns that result in compatible and graceful transitions between differing densities, intensities and activities.

Policy DD-9.2 Improve the interface between non-residential activities and residential areas, in areas where commercial or employment areas are adjacent to residential zoned land.

Policy DD-9.3 Use land use and other regulations to limit and mitigate impacts, such as odor, noise, glare, air pollutants, and vibration that the use or development of a site may have on adjacent residential or institutional uses, and on significant fish and wildlife habitat areas

Policy DD-9.4 Minimize the impacts of auto-oriented uses, vehicle areas, drive-through areas, signage and exterior display and storage areas on adjacent residential areas.

The project is also inconsistent with policies such as DD-4.1 regarding preservation and enhancement of the quality, character and function of Tacoma's residential neighborhoods and UF-1.10 involving the impacts of land use decisions on the physical characteristics of neighborhoods and current residents. Overall, the Applicant has failed to establish that proposed reclassification is in keeping with the *Comprehensive Plan's* vision for areas of transition between commercial and residential uses.

#### Changed Conditions

8. Case law and the TMC require that the applicant for a rezone show conditions have changed since the original zoning or latest zoning amendment and that the rezone bears a substantial relationship to the public health, safety, morals or general welfare. *See Bassani v. County Commissioners*, 70 Wn. App. 389, 853 P.2d 945 (1993) citing *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978); *Woodcrest Invs. Corp. v. Skagit Cy.*, 39 Wn. App. 622, 694 P.2d 705 (1985); *TMC 13.06.650.B.2*. No showing of compelling circumstances is required. Under Washington law, a "strong showing" of change is not required and the rule is intended to be flexible and allow consideration of each case on its own facts. *Bassani* at 394.

9. In this case the conditions in this area have not changed substantially since the latest zoning amendment to R-4L in 2008. The zoning amendment to R-4L was undertaken after property owners made an effort to obtain a large-scale rezone in the area that would allow businesses on South Tacoma Way to expand eastward toward South Puget Sound Avenue under C-2 zoning. The desire to expand businesses to the east from South Tacoma Way was the impetus for the attempt to obtain C-2 zoning in 2008. The ultimate result of the unsuccessful rezone to C-2 was a large-scale rezone to R-4L to acknowledge the need for a transition area between the businesses on South Tacoma Way and the residential neighborhood to the east. The business interests and competing neighborhood concerns are the same now as they were during consideration of the R-4L rezone in 2008. The limited rezones to C-2 that have been allowed in this area pre-dated the 2008 R-4L zoning decision and were processed using



different rezoning criteria applicable at the time. The overall property owners' interests and the types of competing uses in the area have not changed significantly since the 2008 area-wide rezone to R-4L.

#### Consistency with District Establishment Statement

10. The proposal is consistent with portions of the "C-2" District Establishment Statement which states:

This district is intended to allow a broad range of medium-to high-intensity uses of larger scale. Office, retail, and service uses that serve a large market area are appropriate. Residential uses are also appropriate. This classification is not appropriate inside Comprehensive Plan designated mixed-use centers or low-intensity areas.

The rezone will allow a commercial service use of the property that is consistent with the service businesses contemplated under the C-2 District Establishment Statement. However, the classification is not consistent with the language in the District Establishment Statement indicating that the classification is not appropriate for property included in low-intensity areas under the *Comprehensive Plan*. As indicated above, the *Comprehensive Plan* in effect in 2015 gave the property in question a Medium-Intensity designation. When the *Comprehensive Plan* was amended in 2015, the designations were changed and the property in question was included in a Low-Density classification. While the language of the C-2 District Establishment Statement has not yet been amended to use the same verbiage as the new *Comprehensive Plan* amendments on the issue of intensity, the *Comprehensive Plan* clearly expresses the intent that the R4-L mapped areas be considered low-intensity. As a result, the proposed reclassification appears to be in conflict with that portion of the District Establishment Statement for the C-2 General Community Commercial zone indicating it is inappropriate for low-intensity areas.

#### Recent Area-Wide Rezone

11. The proposed rezone will not modify an area-wide rezone action taken by the City Council in the past two years. The evidence indicated that the City has not undertaken an area-wide rezone action in this vicinity within the relevant time period.

#### Relationship to the Public Welfare

12. The proposed rezone would not further the public health, safety, morals or general welfare of the area. The existing zoning on the site was the result of an intentional effort to create a transition area between the residential uses on South Puget Sound Avenue and the commercial uses fronting on South Tacoma Way. The public interest was considered best served by not allowing commercial activity to intrude further east to South Puget Sound Avenue. The properties that have been allowed commercial uses through rezones granted many years ago are having negative impacts on the adjacent residential neighborhood and the residents' quality of life. Neighbors have reported problems with noise, lighting, traffic, and parking created by commercial uses along South Puget Sound Avenue. The planning process, as enunciated in the *Comprehensive Plan*, has taken the approach of protecting the

residential neighborhood on South Puget Sound Avenue from further commercial encroachment. A reclassification of this parcel from R-4L to C-2 is inconsistent with the public interest expressed by the neighboring residents and by the *Comprehensive Plan*.

13. The Currys point to the community garden on the site as a benefit to the neighborhood. The garden is currently an amenity to the area; however, reclassifying the entire parcel to C-2 would allow for much more intense use of the parcel in the future. Moreover, no rezone is necessary to continue use of the parcel for gardening. Mr. Curry has offered to include a condition in the rezone restricting the use of the easterly portion of the lot to open space or garden uses, but the details of how that would be established as an enforceable condition on future owners, are not enunciated.

14. Mr. Curry contends that the property formerly was the site of a dilapidated house that was the site of many illegal activities. He tore down the derelict structure and built the garage. The garage structure appears to be well constructed and is visually attractive from the street. At the same time, the garage was only allowable if it was an accessory use to a residence. The garage can be retained if a residential use is developed on the site.<sup>5</sup> The facts of the case simply do not establish any public benefit that would accrue from changing the zoning on this parcel from R-4L to C-2.

15. The findings substantiate a conclusion that the Applicant has failed meet the burden of establishing, by a preponderance of evidence, that the requested rezone will conform to the applicable approval criteria. The proposed reclassification is not consistent with the goals of the *Comprehensive Plan* for this area. The conditions in the area have not changed substantially since the R-4L zoning was adopted for the site in 2008. Questions exist regarding compliance with the full terms of the District Establishment Statement for the C-2 zone. The change in zoning would not further the public welfare, health or safety. Any one of these shortcomings would substantiate denial of the rezone request under TMC 13.06.650.B.

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

**RECOMMENDATION:**

The Hearing Examiner recommends that the rezone application be denied.

**DATED** this 22<sup>nd</sup> day of July, 2016.



**PHYLLIS K. MACLEOD, Hearing Examiner**

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<sup>5</sup> The details of how the garage could be used would be subject to applicable regulations. It is possible that other regulatory provisions would apply to commercial use of the garage.



## 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.