

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

AND DECISION ON PERMITS

HEARING EXAMINER FILE NO: HEX2022-012

APPLICANT: DPS LLC, a Washington limited liability company (hereinafter the “Applicant” or “DPS”), is the applicant for the present rezone as the record owner of the real property subject thereto. DPS was represented at the hearing by Christine Phillips of BCRA.¹ For purposes of this Report, Recommendation, and Decision, references to “DPS” and/or the “Applicant” also include any employees, agents and/or contractors of the Applicant in regard to conditions and compliance issues set forth herein, and in regard to the intended development of the Subject Property (defined below).

SUMMARY OF REQUEST:

This Report, Recommendation, and Decision (this “Recommendation”) addresses a request to rezone an approximately seven-acre parcel from R2-STGPD, Single-Family to C2-STGPD,² General Community Commercial for the development of 133 senior affordable housing units. The rezone request was accompanied by an application for a Critical Area Development Permit (“CADP”) for impacts to a Biodiversity Area, as well as a variance to building height. The rezone application required review under the State Environmental Policy Act (“SEPA”). At the conclusion of the City’s SEPA review, the Planning and Development Services (“PDS”) Director issued a final mitigated determination of nonsignificance (“MDNS”) on September 8, 2022. The MDNS was not appealed.

LOCATION:

The Subject Property is located at the street address of 4901 South 25th Street, and it is assigned Pierce County tax parcel number 0220126002 (the “Subject Property” or the “Site”).

RECOMMENDATION:

The Hearing Examiner recommends approval of the requested rezone, subject to the conditions set forth herein below. Under the authority set forth in Tacoma Municipal Code (“TMC”) sections 1.23.050.A.1, 1.23.130, and chapters 13.05, 13.06, 13.11 and 13.12, the Examiner heard testimony and reviewed the

¹ See Ex. C-3 Property Owner Free Consent Form.

² “STGPD” refers to the South Tacoma Ground Water Protection District. Even if this designation is not used in every instance where zoning of the Subject Property is referenced, it is to be understood that the Subject Property is in the South Tacoma Ground Water Protection District.

presented record regarding the requested rezone (hereafter, the “Rezone”). The Examiner’s recommendation of approval is based on the hearing and the hearing record.

DECISION: The CADP and the height variance are conditionally approved, contingent upon the City Council’s decision on the Rezone. If the City Council approves the Rezone, the approval of the permits will be final and no longer conditioned. If the City Council denies the Rezone, the permits will likewise be denied as they are contingent upon the Rezone approval.

PUBLIC HEARING:

After reviewing the Preliminary Report submitted by PDS (herein the “PDS Report”—*Ex. C-1*) and all attendant information on file, the Hearing Examiner convened a public hearing on the Rezone on September 29, 2022.³

Testimony at the hearing was taken from all of the following:

City of Tacoma

Shirley Schultz, Principal Planner
Karla Kluge, Senior Environmental Specialist

DPS

Christine Phillips, BCRA
Zachary Crum, P.E., BCRA
Zachary Baker, Southport Financial Services
Bryan Peck, Habitat Technologies.

No non-party members of the public offered testimony/comment at the hearing. Written comments were submitted pre-hearing from Heidi Stephens and these are included in the record as Exhibit C-18.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION:

FINDINGS OF FACT:

The Application

1. DPS submitted an application, through its duly designated representative, requesting the reclassification of an approximately seven-acre parcel from R2-STGPD, Single-Family to C2-STGPD, General Community Commercial to facilitate the development of 133 senior affordable housing units on the Subject Property. Prior to formally submitting the application, the Applicant and the City engaged in numerous discussions regarding various configurations on the Subject Property in order to try to reach agreement on a development plan that would be financially viable and still comply with all applicable laws and regulations. After these discussions, the application was formally submitted on August 1, 2022. PDS determined DPS’s application to be technically complete on August 2, 2022. DPS’ filing included

³ Due to, as yet unexpired COVID-19 restrictions, and at the request of the parties, the public hearing in this matter was conducted virtually using Zoom teleconferencing with both internet visual and audio access, as well as separate telephonic access via call in number on Zoom, all at no cost to any participant.

application for a Critical Area Development Permit (the “CADP”) to address impacts to a Biodiversity Area, and also included a request for a variance to building height. The CADP addresses the presence of a Biodiversity Corridor, steep slopes, and a wetland buffer on portions of the Subject Property, as well. Obtaining a CADP is required as a precursor to development of the Site. The Rezone application also required review under SEPA, as set forth further below. *Schultz Testimony, Phillips Testimony; Ex. C-1, Ex. C-2, C-4, Ex. C-5, Ex. C-8, Ex. C-10, Ex. C-15.*

The Site

2. The Site/Subject Property is currently undeveloped, and was only recently segregated (as a separate parcel) from the adjacent church property in a short plat (final plat LU22-0063) recorded under Pierce County Auditor’s File No. 202206165004. *Schultz Testimony; Ex. C-1, Ex. C-19.*

3. The Site has never been permanently occupied or improved; however, it has been used in the past by the adjacent church, as evidenced by what appears to be a former outdoor worship area and trails/landscaping that are present. The Site has also been occupied by homeless camps, and subjected to illegal dumping. The Site has been zoned R-2 Single-Family Dwelling District since the City’s zoning code was first adopted in 1953 and it has not been rezoned since that time. Adjacent properties to the north and south were rezoned to C-2 in 1998 and 1996, respectively. The current Land Use Intensity (land use designation from the City’s *One Tacoma* Comprehensive Plan [the “Comp Plan”]) for the Site is “General Commercial.” *Schultz Testimony, Phillips Testimony; Ex. C-1.*

4. The Site is located in an area of commercial and institutional uses. It is bordered on the east by State Route 16 (“SR 16”). Some of the steep slopes on the Site were created by cuts for the highway right-of-way. The property to the north of the Site is developed with a self-storage facility, and the properties to the south are developed with the City of Fircrest’s water tower and a Lowe’s Home Improvement store. As referenced above, a church abuts the Subject Property to the west, and the Subject Property was formerly part of the church’s property. *Id.*

5. The western portion of the Site is steeply sloped, possibly due to adjacent prior development activity. This steeply sloped area is treed. The eastern portion of the Site is also steeply sloped but the vegetation in this area is mixed and largely native. Much of this eastern edge of the Site is categorized as a Biodiversity Corridor per the City’s Critical Areas Protection Ordinance, Title TMC 13.11. The west-central portion of the Site at the top of the hill is relatively flat, and is comparatively open and free of trees. Wetlands have been identified near the Site to the west and southwest, with a 75-foot buffer from the southwest wetland extending slightly onto the Site. The buffer of the wetland to the west is interrupted by SR 16. Hydrology for the offsite wetland will not be affected by the proposed development as the wetland basin will not be altered. The primary source of hydrology continues to be drainage associated with the adjacent Lowes store site, which again, will not be altered. *Schultz Testimony, Peck Testimony, Crum Testimony; Ex. C-1, Ex. C-4, Exs. C-7~C-11, Ex. C-15, Ex. C-19.*

6. Geologically hazardous areas are present on the Subject Property. These include moderate and steeply sloped areas exceeding 40%. The proposed buildings are located outside of the steeply sloped areas and their required geo-buffer setback areas, however. *Ex. A-1, Ex. A-2, Ex. C-1, Ex. C-7, Ex. C-12.*

7. Because the central-eastern and majority of the eastern portion of the Site is vegetated with native plant species,⁴ it was identified as a Biodiversity Area pursuant to the definition thereof in TMC 13.09 and TMC 13.11 (the “Biodiversity Area”). This area contains moderately to steeply sloped areas with trails, indicia of homeless encampments, and areas of illegal dumping. *Schultz Testimony; Kluge Testimony, Peck Testimony; Ex. C-1, Exs. C-7~C-10.*

8. The Site is accessed by South 25th Street, which becomes a private driveway approximately 400 feet from its connection to South Orchard Street. The City of Fircrest uses South 25th Street, coupled with an access agreement to reach its water tower. *Ex. C-1.*

9. The current Land Use Intensity designation (from the Comp Plan) for the Site is “General Commercial,” which is not consistent with the current R-2 Single-Family Dwelling District zoning. *Id.*

10. The height limit in the C-2 District is 45 feet, as measured per the International Building Code. The Applicant has calculated proposed building heights for its intended development to range from 45' 9" to approximately 47' above what should be the improved grade. These heights exceed the allowance in the targeted C-2 District. These slightly non-compliant heights, and a variance that would allow them, are necessary to be able to develop the Site with 133 residential units, thereby making the development financially viable, while still avoiding impacts to the Biodiversity Area to the greatest extent possible. Additional height would allow for necessary roof pitch/structure and will not provide for any additional habitable space, but does allow for more standard ceiling heights within each unit. Further, no views will be blocked by the additional height and, given the location and surroundings of the Site, the additional height will have minimal, to no discernible impact. City staff testified that it had no problem recommending the height variance be approved, but suggested an allowance up to 50 feet as a “just in case” measure. The Applicant went along with that approach. Allowing up to 50 feet is still less than 10% of variance from the existing 45-foot limit.⁵ *Schultz Testimony, Phillips Testimony; Ex. C-1, Ex. C-6.*

The Project

11. As alluded to above, the Applicant proposes to develop the Subject Property with 133 senior affordable housing units in two buildings of 4-5 stories each, along with parking for 96 cars and associated site and frontage improvements. The target density for the C-2 District is 45-75 dwelling units per acre. The Applicant’s proposal achieves a density of approximately 49 units per acre. To develop the Site, utility main extensions from South Orchard Street will be necessary. To accomplish the project and comply with public funding requirements, the Applicant is requesting an alternative

⁴ Exhibit C-7 describes in detail the type and even number of various plant species found on the Subject Property. Exhibit C-7 is part of the hearing record and is incorporated herein as a part hereof to the extent that nothing in Exhibit C-7 conflicts with this Recommendation.

⁵ In the PDS Report and at the hearing, the City presented the variance as a minor variance presumably under TMC 13.05.010.B.1.b. This section of the TMC does not allow minor variances for height, however, and the Examiner pointed this out to the parties post-hearing. In Exhibit C-6, the Applicant addressed the TMC 13.05.010.B.2.a criteria for non-minor variances prior to the hearing and the Applicant’s analysis was part of the hearing record prior to conclusion of the hearing. The City submitted additional analysis of the TMC 13.05.010.B.2.a criteria post-hearing (now Exhibit C-21). Both the City and the Applicant agreed that for purposes of the decision rendered herein, the variance should be considered under TMC 13.05.010.B.2.a.

equivalent means of meeting affordable housing requirements, as set forth in Tacoma Municipal Code (“TMC”) 1.39, as well as a variance to building height that will allow all 133 units to be built without lowering ceiling heights in individual units, and will provide space for necessary/desirable roof structures and facilities. *Id.*

12. The Applicant has represented that its intended development of 133 residential units will be 100% affordable senior housing available to rent at 60% of area median income or below. The Applicant contends that this will provide more affordable housing than the City’s current code requirements in TMC 1.39 that must be met in order to obtain rezone approval. City staff represented that staff concurs with the Applicant’s contention that its proposal is at least functionally equivalent to the TMC’s current requirement, and actually exceeds the TMC requirement(s) in net gain of affordable housing units. The Examiner concurs in this determination. *Schultz Testimony, Phillips Testimony; Ex. C-1, Ex. C-6.*

The CADP

13. On the way to applying for the CADP, the Applicant had a *Critical Areas Assessment* prepared by Habitat Technologies (the “CAA”). The CAA was reviewed by Karla Kluge, a Senior Environmental Specialist for the City. The CAA identifies a Biodiversity Area on the eastern portion of the Site that is approximately 163,976 square feet in size. The Biodiversity Area meets the definition therefor found at TMC 13.01.110.B. *Kluge Testimony, Peck Testimony; Ex. C-1, Ex. C-7, Ex. C-10.*

14. The Biodiversity Area is heavily vegetated and provides habitat for common urban species in and around the Subject Property. No Federal or State listed, or priority species were identified within the Biodiversity Area, other than one Garry Oak tree. There are, however, numerous mature trees located on the Site, along with (and constituting) a Significant Tree Grove, and many trees therein are considered Exceptional Trees under the City’s definitions.⁶ There have been multiple homeless encampments located within the Biodiversity Area and these encampments have resulted in damage to the vegetation through removal, garbage placement, and other debris being deposited in various locations in the Biodiversity Area. *Id.*

15. The CAA catalogues the plant community within the eastern portion of the Site and the Biodiversity Area, indicating that the area is dominated by “mixed upland forest.” The Biodiversity Area includes an area of vertically diverse assemblage of primarily native vegetation with multiple canopy layers. The individual observed species in this area are listed in Exhibits C-7 and C-10. Again, a Significant Tree Grove and Exceptional Trees were identified within the Biodiversity Area. *Id.*

16. As part of Kluge’s review of the CAA and the Applicant’s proposed project and restoration plan, she visited the Site numerous times. Kluge verified the existence of the Biodiversity Area through these visits and through her thorough review of the Applicant’s submitted documents. *Kluge Testimony; Ex. C-7.*

17. The Applicant cannot avoid all impacts to the Biodiversity Area—specifically reduction in size and reductions to the Significant Tree Grove and Exceptional Trees—while still maintaining a financially viable development for affordable senior housing. Approximately 29% (47,750 square feet of

⁶ These can be found at Exhibit C-7, p. 8. These definitions are incorporated herein by this reference.

the 163,976 square foot total) of the Biodiversity Area will be impacted by the Applicant's proposed development. *Kluge Testimony, Peck Testimony; Ex. C-1, Ex. C-7, Ex. C-10.*

18. Exceptional Trees proposed to be removed include eight (8) conifers greater than or equal to 30 inches in diameter, one (1) Madrone greater than or equal to 12 inches in diameter, and one (1) Garry Oak, 14 inches in diameter. An additional 24 Exceptional Trees are proposed for removal within the Significant Tree grove's contiguous canopy that did not meet the singular exceptional tree size requirement (33 Exceptional Trees total). *Kluge Testimony, Ex. C-7, Exs. C-9~C-11.*

19. The Applicant proposes to mitigate the reduction of the Biodiversity Area and removal of Exceptional Trees through restoration and enhancement of the remaining Biodiversity Area and replacement of the Exceptional Trees through planting replacements within an adjacent vegetated area that will eventually create additional area to, or in other words expand the Biodiversity Area (after reduction of existing via development) as the replacement trees grow and mature. Mitigation ratios are proposed at, and will comply with the required 1.5:1 mitigation ratio. Kluge determined that "Mitigation sequencing has been satisfied and the remaining impacts will be mitigated for through restoration, enhancement of the remaining Biodiversity Area on [S]ite and the 'creation' of future Biodiversity Area on-site along the eastern property border." The Examiner concurs with Kluge's determinations. *Id.*

20. The CADP is only necessary for the impacts to the Biodiversity Area. The project presents no impacts to the geologically hazardous areas (slopes), the Biodiversity Corridor, or Wetlands. *Id.*

21. As the legal standard for assessing the CADP, the Applicant advanced the Public Interest Test of TMC 13.11.240.C. The Applicant contends that the City of Tacoma has a clear shortage of affordable housing, this project will help alleviate that shortage by providing 133 affordable senior housing units, and that such provision is critical to the City and to the public interest. The Comp Plan supports the increase of equitable access to housing that this proposed development will provide. *Id.*

Environmental Review

22. Review under SEPA was required prior to the hearing and the issuance of this Recommendation because rezone applications are not exempted as minor land use decisions from SEPA review. *Ex. C-1, Ex. C-2.*

23. PDS conducted this review prior to the rezone hearing. Pursuant to the State's SEPA Rules (WAC 197-11) and the City of Tacoma's Environmental Code (TMC 13.12), the PDS Director issued a Mitigated Determination of Environmental Non-Significance (the MDNS) for the proposed rezone and project on September 8, 2022. The MDNS was based on a review of the Applicant's Environmental Checklist and other supporting information on file with PDS. The MDNS concluded "that if mitigated appropriately this project does not have a probable significant adverse impact on the environment. The proposal will have no significant adverse environmental impacts to fish and wildlife, water, noise, transportation, air quality, environmental health, public services and utilities, or land and shoreline use." The appeal deadline for the MDNS was September 22, 2022, prior to the hearing. No appeals were filed. *Ex. C-1, Ex. C-2.*

The Hearing

24. Public notice of the hearing was sent out on August 26, 2022. The notice included a preliminary SEPA determination that included notice of the opportunity to comment until September 6, 2022. *Ex. C-1.*

25. As part of the review process for the Project, and in preparation for the hearing, PDS provided notification of the rezone request to various City departments/divisions, and outside governmental and non-governmental agencies. Departmental comments and requirements regarding this proposal are included in the PDS Report and the hearing record. These agencies/departments/divisions recommended important conditions they believed would properly be attached to the Project if the rezone is approved by the City Council. *Schultz Testimony; Ex. C-1, Ex. C-2, Ex. C-16, Ex. C-17.*

26. No non-party members of the public commented at the hearing.⁷ One written public comment relating to the CADP was received as a result of the hearing notice. In summary, the comment related to the importance of preserving vegetation and the Biodiversity Area/Corridor, as well as addressing the protection of groundwater quality through maintaining pervious surfaces. Further, the comment noted confusion about accessing information due to the recent creation of the Subject Property as a separate parcel, and the location of documents on the City's website. City staff have responded to the location/document question in separate correspondence. *Ex. C-1, Exs. C-7~C-11, Ex. C-18.*

27. The Applicant did not express any objection to the City's recommended conditions, as set forth in the hearing record, and also below. *Phillips Testimony, Crum Testimony, Peck Testimony, Baker Testimony; Ex. C-6.*

28. With the exception of characterizing the variance as minor, the PDS Report accurately describes the requested rezone and the Applicant's project, the requested permits, general and specific facts about the Site, applicable sections of the Comp Plan, and applicable regulatory codes. The PDS Report is marked as Exhibit C-1, and by this reference, is incorporated herein as though fully set forth. To the extent that anything in the PDS Report conflicts with the contents of this Report, Recommendation and Decision, this Recommendation shall control.

29. Any conclusion of law⁸ herein which may be more properly deemed a finding of fact ("FoF") is hereby adopted as such.

CONCLUSIONS OF LAW:

1. The Hearing Examiner has jurisdiction over the subject matter of this proceeding to conduct a hearing and make a recommendation to the City Council in regard to a reclassification (rezone) request. The final decision on any requested reclassification is made through an ordinance by the City Council. *TMC 1.23.050.A.1 and TMC 13.05.* The Hearing Examiner has authority over deciding whether to approve the CADP and the height variance pursuant to *TMC 13.05.080.A, TMC 13.05.090.E, and TMC 13.05.110.C*, which allow the Hearing Examiner to consider consolidated

⁷ Although it appeared that at least one or two were among the 14 people in attendance.

⁸ Conclusions of Law may be abbreviated as "CoL" hereafter.

applications where an open-record hearing is required, effectively taking on the authority of the PDS Director to make permit decisions of first instance.

2. The requirements of SEPA have been met by the City's issuance of the MDNS,⁹ which has not been appealed.

The Rezone

3. Under TMC 13.05.030.C.b, the applicant for a rezone is required to demonstrate consistency with all of the following criteria:¹⁰

- (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.

The Applicant bears the burden of establishing by a preponderance of the evidence that the requested rezone conforms to all of the foregoing criteria, which are addressed below in turn. *TMC 1.23.070.A.*

4. Consistency with the Comp Plan—TMC 13.05.030.C.b.(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.”*

⁹ See TMC 13.12.430.

¹⁰ Numbering of the criteria is kept the same as in the TMC for consistency.

As found above (*FoF 9*), the Subject Property currently falls within an area the Comp Plan designates “General Commercial.” The requested change in classification to C2-STGPD, General Community Commercial, is consistent with this designation, more so than the current R-2 classification. The “General Commercial” designation encompasses medium to high intensity commercial uses intended to serve a large community base. General Commercial allows a wide variety of residential development, community facilities, institutional uses, and some limited production and storage uses. These types of development are generally intended to be located along major transportation corridors, often with reasonably direct access to a highway, which is the case here (SR 16). *FoF 4*. General Commercial is characterized by larger-scale buildings, longer operating hours, and moderate to high traffic generation. The Target Development Density for residential in a C-2 General Commercial district is 45-75 dwelling units/net acres, which the Applicant’s proposal meets at 49. *See FoF 12*.

With respect to being “generally consistent with... policies, and other pertinent provisions of the Comprehensive Plan” we start with noting again that the change in zoning and the proposed development of the Subject Property is consistent with the Comprehensive Plan designation for the Subject Property. In addition to that general designation consistency, PDS staff listed three plus pages worth of Comp Plan goals and policies that are furthered by the Rezone and the Applicant’s intended development of the Subject Property beginning at page 10 of the PDS Report. The Examiner concurs with PDS’ assessment of the alignment of these goals and policies with approving the Rezone, and the Rezone leading to the development of the Subject Property as affordable senior housing. This criterion is met.

5. Substantial Changes—TMC 13.05.030.C.b.(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.”*

In regard to the rezone criteria found in TMC 13.05.030.C.b.(2) that deals with substantial change, the City provided the following analysis:

The area surrounding the site has developed gradually over the years to a mix of commercial and institutional uses; in addition, housing has become more scarce and more expensive, and the City has adopted many measures within the last several years to increase housing construction and housing choice within the city.

The Examiner agrees with the City’s above characterization regarding changed conditions. The Comp Plan designates the Subject Property as being intended for the types of uses allowed in the requested C-2 District and those types of uses already surround the Subject Property. The dire need for housing in the Tacoma market is another changed circumstance that indicates the requested zoning change is appropriate and approvable.

All that notwithstanding, granting the requested rezone can also be seen as “[i]mplement[ing] an express provision or recommendation set forth in the Comprehensive Plan, [making] it [] unnecessary to demonstrate changed conditions supporting the requested rezone.” The Comp Plan is the City Council’s

overarching policy statement regarding land use and regulation. The Comp Plan designates this area as “General Commercial.” If the rezone is approved, the Subject Property’s zoning will comport with its Comp Plan designation. As such, the second prong of TMC 13.05.030.C.b.(2) is met.

6. District Establishment Statement—TMC 13.05.030.C.b.(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.”*

The district establishment statement for C-2 General Commercial reads as follows.

C-2 General Commercial District. 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. [Emphasis added.]

The Applicant proposes a medium-density multi-family housing development with larger structures and a density of approximately 49 units per acre. *FoF 12*. The Site abuts larger-scaled, more traditionally commercial and institutional uses, but the Subject Property itself is likely not appropriate for the same type of commercial development because of access, topography and critical areas constraints. It is better suited for higher (than R-2) density residential use, as proposed, which is an appropriate use for the Subject Property if the rezone is approved. As such, the Examiner concludes that TMC 13.05.030.C.b.(3) criterion is satisfied.

7. Recent Area-Wide Rezone—TMC 13.05.030.C.b.(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.”*

The Site has not been rezoned within the last two years. *FoF 3*. This criterion is satisfied.

8. Relationship to the Public Welfare—TMC 13.05.030.C.b.(5) *“That the change of zoning classification bears a substantial relationship to the public health, safety, morals, or general welfare.”*

PDS staff’s analysis of this criterion provided the following:

The site is planned to accommodate commercial multi-family housing through its Comprehensive Plan designation. Multiple goals and policies within the Comprehensive Plan (see below) speak to the need for additional housing and a variety of housing choices. In addition, the Plan, along with implementing regulations, sets forth multiple standards for site layout, building design, and landscaping that ensure new development is an asset to the neighborhood. If conditioned appropriately, the change of zoning will allow infill development

(responding to housing need) with a good site plan (responding to critical areas concerns) that meets the needs of the developer.

Further, the City’s Engineering Division has reviewed the proposal for impacts to the surrounding transportation infrastructure. The review resulted in traffic mitigation requirements under SEPA that must also be carried forward with the rezone decision. The purpose of these mitigating conditions is to support the Transportation Master Plan policies to “prioritize the movement of people and goods via modes that have the least environmental impact and greatest contribution to livability in order to build a balanced transportation network that provides mobility options, accessibility, and economic vitality for all across all neighborhoods.” It [the rezone and its proposed development] is also consistent with policies 2.3 Improve Safety, 2.4 Promote Health, 2.5 Traffic Calming Measures, 2.6 Safer Routes to Schools, 3.1 Complete Streets/Layered Network, 3.2 Green Hierarchy, 3.6 Street System Design, 3.7 Special Needs of Transportation Users, 3.9 Pedestrian Facilities, 3.10 Bicycle Facilities, and 3.18 Roadway Capacity.

As already stated above, the Comp Plan is the City Council’s overarching policy statement regarding land use and the desired regulation of real property.¹¹ Making the determination that the Subject Property best fits within a designation of General Commercial is already a policy determination from the City Council that the uses that come along with that designation are essentially in the best interest of the public at the Site. Implementing a use compatible with the Comp Plan designation through an aligning rezone, and doing so in accordance with development conditions such as those imposed here will ensure that any potential negative impacts are thoroughly outweighed by the addition of affordable senior housing to the Tacoma housing market.

One of the biggest challenges in the areas of public health, safety and welfare facing the City at present is homelessness and housing affordability. Developing the Subject Property in compliance with applicable laws, ordinances and regulations, together with the conditions set forth in this Recommendation, will ensure that this criterion is met both because the development will not have any appreciable adverse impacts on the health, safety, morals, or general welfare of the people of Tacoma, but also will help alleviate homelessness, especially for Tacoma’s older population.

Given the foregoing, the Examiner concludes that the requirements of TMC 13.05.030.C.b.(5) are met or will be met through the development of the Project for the use specified and in conformance with applicable laws and the conditions set forth herein.

9. Affordable Housing - TMC 13.05.030.A.7 sets forth the following:

Affordable housing – privately initiated upzones.

Privately initiated residential upzones shall be conditioned to provide for inclusion of affordable housing. For development proposals meeting the

¹¹ Although the Comp Plan itself is not a site specific regulatory document.

thresholds and criteria of TMC 1.39, a certain number of the dwelling units shall be entered by the project proponent into the City’s Affordable Housing Incentives Program. That number may be designated at the time of the upzone, or alternatively the upzone shall be conditioned to provide that designated percentage of affordable units at such time as a specific residential development proposal is submitted to the City.

The purpose of TMC 1.39 is to incentivize developers to provide more affordable housing in the Tacoma market. The TMC 1.39 framework generally contemplates requiring or incentivizing the inclusion of a certain number of affordable units in what otherwise is intended to be a market-rate development. That framework does not fit here because the Applicant intends to make all 133 of its units affordable at 60% of area median income or below. *FoF 12*. This number far exceeds the affordable units required under TMC 1.39.040.B. The Applicant is not seeking any density bonuses as *quid pro quo* for the provision of affordable units here either.¹²

City staff determined that TMC 1.39 would require the Applicant to provide 18 units at an affordability level of 50% of AMI for a period of 50 years. The Applicant proposed that its 133 units at 60% of AMI for 50 years would exceed TMC 1.39’s requirement. City staff agreed. The Examiner does not disagree, and recommends that the Rezone should be conditionally approved for requirements related to the provision of affordable housing, but that updates to TMC 1.39 should be made prior to the building permit stage of the project that would allow for functional equivalency determinations to be made by the City Council in approving rezones.¹³

Also, prior to building permits being issued, the Applicant must enter into an Affordable Housing Incentives Program Covenant Agreement (TMC 1.39.040.G) with the City that can be recorded against the Subject Property memorializing, and making enforceable, the affordability agreement between the City and the Applicant. *See Conclusion of Law 33 A.1 below*.

The CADP

10. The intent of the City’s Critical Areas Code (TMC 13.11) is to ensure that the City’s remaining critical areas are preserved and protected from degradation caused by improper use and development as described under TMC 13.11.120.

11. Here, a Critical Areas Development Permit is necessary because the Applicant’s development cannot feasibly avoid all impacts to the Biodiversity Area on the Subject Property, and the resulting impacts do not qualify as “minor” under TMC 13.11.220.B.2. The CADP was not necessary for wetlands, biodiversity corridor, or steep slopes even though all three (or their buffers) are present on the Subject Property because the proposed development will not impact any of these. *FoF 5, FoF 17*.

12. TMC 13.11.220.B.3, provides that “A decision will be issued where, the Director determines that avoidance and minimization have not eliminated all impacts and compensatory

¹² See *Ex. C-6, p. 3 of 5*.

¹³ TMC revisions could, of course, encompass more than just functional equivalency determinations.

mitigation will be required as a result of the proposal.” In this case, because of the consolidation of the CADP with the Rezone, the Hearing Examiner stands in the shoes of the Director to issue a decision on the CADP.

13. TMC 13.11.220.B.3.a~c provides that:
 - a. The applicant must meet the requirements of one of three legal tests; No Practicable Alternatives, Public Interest or Reasonable Use, and
 - b. Demonstrate Mitigation Sequencing, and
 - c. Provide mitigation as required in accordance with this Chapter.

The City’s expert (Ms. Kluge) determined that the Applicant’s proposal demonstrated adequate mitigation sequencing as well as TMC compliant mitigation ultimately. *FoF 17~19*. The Examiner agrees. *See also CoL 17*.

The Applicant provided information and argument addressing the Public Interest test under subsection a. above. *FoF 21*.

14. The criteria for meeting the Public Interest test are set forth at TMC 13.11.240.C, as follows:

C. Public Interest.

In determining whether a proposed use or activity in any Critical Area is in the public interest, the public benefit of the proposal and the impact to the Critical Area must be evaluated by the Director. The proposal is in the public interest if its benefit to the public exceeds its detrimental impact on the Critical Area. In comparing the proposal’s public benefit and impact, the following should be considered:

1. The extent of the public need and benefit;
2. The extent and permanence of the beneficial or detrimental effects of the use or activity;
3. The quality and quantity of the Critical Area that may be affected;
4. The economic or other value of the use or activity to the general area and public;
5. The ecological value of the Critical Area;
6. Probable impact on public health and safety, fish, plants, and wildlife; and
7. The policies of the Comprehensive Plan.

15. PDS staff provided the following analysis of whether the Applicant met the Public Interest test for approving the CADP:

PDS Staff Analysis:

The applicant provided a response for the Public Interest Test. The applicant argues that the City of Tacoma has identified a shortage of affordable housing and this project will provide 133 affordable senior housing units and affordable housing has been identified by the City of Tacoma as a critical need.

The Biodiversity Area provides a heavily vegetated area that provides habitat for common urban species within the nearby vicinity. No Federal or State listed, or priority species were noted within the Biodiversity Area, other than one Garry Oak tree. The trees located on site are mature and numerous and many are considered Exceptional Trees under the City of Tacoma definitions. However, there were also numerous homeless encampments located within the Biodiversity Area and these encampments have resulted in damage to the vegetation through removal of vegetation, garbage, and debris being deposited within some areas of the Biodiversity Area.

Approximately 47,750 square feet of the 163,976 square foot total Biodiversity Area will be affected by the proposed development. The remaining Biodiversity area will be enhanced and restored where the homeless encampments were and the vegetated adjacent to and outside the perimeter of the Biodiversity Area will also be planted with trees and enhanced in a manner that will result in an expansion of the remaining Biodiversity Area exceeding the required mitigation ratios.

The One Tacoma Comprehensive Plan supports the development for equitable access to housing that this proposed development offers.

Against the backdrop of the City's analysis, the Examiner now looks at each criterion of the Public Interest test.

16. TMC 13.11.240.C.1 - The extent of the public need and benefit.

It is virtually uncontroverted that the city of Tacoma is in dire need of additional housing and that there is an affordability crisis for existing housing in the Tacoma market.¹⁴ In other words, the identified public need is great. In general, additional housing adds to the available supply and helps to bring prices/rents to more affordable levels. Here specifically, the Applicant has proposed, and committed to keeping all units in its development to an affordability level below the market. This enhances the public benefit in the face of the established affordable housing need. Providing 133 units is also significant in number. The Examiner concludes that this criterion is met. *See Findings of Fact 11 and 12.*

¹⁴ These links provide just a few examples of Tacoma's housing situation being addressed in the media: 1) <https://www.kiro7.com/news/south-sound-news/tacoma-mayors-state-city-highlights-housing-crisis-rising-crime-amid-pandemic/PFUURXP6WRGMBF2YDYUS4VQFCI/>; 2) <https://movetotacoma.com/tacoma-isnt-affordable-anymore-this-is-why/>; 3) <https://invisiblepeople.tv/tacoma-splits-over-how-to-handle-its-housing-crisis/>.

17. TMC 13.11.240.C.2 - The extent and permanence of the beneficial or detrimental effects of the use or activity.

The housing created by DPS' development, although possibly not permanent, will last for decades providing affordable shelter to people in need. The reduction in and impacts to the Biodiversity Area will be compensated for by (a) restoring and enhancing the remaining Biodiversity Area and replacing the Exceptional Trees and other planting replacements, and (b) expanding the Biodiversity Area over time into areas of the Subject Property outside the development footprint. The City's expert determined that "Mitigation sequencing has been satisfied and the remaining impacts will be mitigated for through restoration, enhancement of the remaining Biodiversity Area on [S]ite and the 'creation' of future Biodiversity Area on-site along the eastern property border." The Examiner does not disagree. The beneficial effects of the proposed project are great; the detrimental effects have been sufficiently mitigated for this criterion to be met. *See Findings of Fact 12, and 17~19.*

18. TMC 13.11.240.C.3 - The quality and quantity of the Critical Area that may be affected.

The Biodiversity Area provides heavy vegetation and habitat for common urban species in and around the Subject Property, but has no Federal or State listed, or priority species within its confines beyond one Garry Oak tree. In addition to the one Garry Oak, there are numerous other mature trees and a Significant Tree Grove with many Exceptional Trees. The Biodiversity Area has also been damaged by dumping and trespass, but these damages are proposed to be remedied by the Applicant's restoration plan. *FoF 14, FoF 19.* The Biodiversity Area is certainly worth preserving, but does not present as overwhelmingly special.

On the quantity side, the proposed development affects only 29% of the Biodiversity Area keeping within the threshold of TMC 13.11.550.E.1.a, which requires that "A minimum of 65% of the Biodiversity Area and Corridor area shall be left in an undisturbed natural vegetated state." The Applicant's mitigation plan will then, over time, expand the overall area of the Biodiversity Area regaining some, if not all of the lost 29%. *FoF 17 and FoF 19.*

Balancing these two considerations, neither appears to prevent the Public Interest test from being met, and rather point toward approval of the CADP.

19. TMC 13.11.240.C.4 - The economic or other value of the use or activity to the general area and public.

As already stressed above, the addition of 133 units of affordable senior housing to the Tacoma market is potentially hugely impactful. Tacoma needs more housing—especially housing that is made available below market. That is what the Rezone and the CADP will facilitate. This factor leans heavily toward approval.

20. TMC 13.11.240.C.5 - The ecological value of the Critical Area.

As already addressed at Conclusion of Law 18 above, the Biodiversity Area presents vegetation that is worth preserving in and of itself, but that vegetation also provides habitat for common urban

species as well. Nothing of extreme note is presented by the Biodiversity Area, however, beyond the one Garry Oak tree. This factor should not prevent approval of the CADP as a result, in light of the mitigation proposed.

21. TMC 13.11.240.C.6 - Probable impact on public health and safety, fish, plants, and wildlife.

The City's MDNS has already concluded "that if mitigated appropriately this project does not have a probable significant adverse impact on the environment. The proposal will have no significant adverse environmental impacts to fish and wildlife, water, noise, transportation, air quality, environmental health, public services and utilities, or land and shoreline use." *FoF 23*. The MDNS has not been appealed. As a result, its conclusions are considered verities. Given that, this criterion allows for the CADP to be approved.

22. TMC 13.11.240.C.7 - The policies of the Comprehensive Plan.

As stated succinctly in Ms. Kluge's Technical Memorandum, "The One Tacoma Comprehensive Plan supports the development for equitable access to housing that this proposed development offers." If the development is completed in keeping with the conditions contained herein, and in compliance with the TMC and other applicable laws and regulations, there is no reason to not approve the CADP.

TMC 13.11.240.C distills the heart of the test down to "The proposal is in the public interest if its benefit to the public exceeds its detrimental impact on the Critical Area." Ultimately, the provision of 133 units of affordable senior housing in the Tacoma market far outweighs the 29% reduction to the Biodiversity Area because, the remaining 71 percent will be restored and enhanced and the reduction in area will be recouped over time through the Applicant's proposed expansion outside of the development footprint.

The Height Variance

23. Variances to Development Standards

If minor variances, as defined in TMC 13.01.060.V, and further addressed in TMC 13.05.010.B.1.b were clearly allowed for height, the request to vary from the 45-foot limit in the C-2 General Commercial up to 50 feet would be within the 10 percent allowance and could be perfunctorily permitted. Unfortunately for the Applicant, TMC 13.05.010.B.1.b appears to disallow minor variances for height. As such the variance request here has to be analyzed against the regulatory backdrop provided by TMC 13.05.010.B.2.a, which is as follows:¹⁵

TMC 13.05.010.B.2.a provides the following:¹⁶

¹⁵ Again, in Exhibit C-6, the Applicant addressed the TMC 13.05.010.B.2.a criteria for non-minor variances prior to the hearing.

¹⁶ Outline numbering and lettering is once again kept the same as in the TMC for consistency of reference.

2. Specified variances.

a. Variance to development regulations (bulk, area).

(1) Applicability. These shall include variances to building setbacks, building location, **building height**, lot coverage, lot area, lot width, lot frontage, yard space, and minimum-density requirements. These shall not include variance to sign development standards, to design standards, parking lot development standards, or off-street parking quantity standards. [Emphasis added.]

(2) Criteria. The Director may, in specific cases, authorize a variance to the development regulations, subject to the criteria set forth below. In granting a variance, the Director or Hearing Examiner may attach thereto such conditions regarding the location, character and other features of the proposed structure as may be deemed necessary to ensure consistency with the intent of the Code and Comprehensive Plan and to ensure that the use of the site will be as compatible as practicable with the existing development on the site and surrounding uses. In instances in which a variance to building height is approved, no occupiable space above the district height limit shall be added.¹⁷

(a) The restrictive effect of the specific zoning regulation construed literally as to the specific property is unreasonable due to unique conditions relating to the specific property, and which do not result from the actions of the applicant, such as: parcel size; parcel shape; topography; location; documentation of a public action, such as a street widening; proximity to a critical area; location of an easement; or character of surrounding uses.

(b) The requested variance does not go beyond the minimum necessary to afford relief from the specific hardship affecting the site.

(c) The grant of the variance would allow a reasonable use of the property and/or allow a more environmentally sensitive site and structure design to be achieved than would otherwise be permitted by strict application of the regulation, but would not constitute a grant of special privilege not enjoyed by other properties in the area.

(d) The grant of the variance will not be materially detrimental or contrary to the Comprehensive Plan and will not adversely affect the character of the neighborhood and the rights of neighboring property owners.

(e) The grant of the variance will not cause a substantial detrimental effect to the public interest.

(f) Standardized corporate design and/or increased development costs are not cause for variance.

¹⁷ This has already been shown to be the case and will be complied with. *FoF 10*.

These criteria are now addressed in turn.

24. **TMC 13.05.010.B.2.a(2)(a)** – The Applicant’s project needs to result in 133 units in order to remain financially viable. *FoF 10*. The presence of the various critical areas and buffers on the Subject Property has necessitated the Applicant’s presently proposed development plan. The presence of the critical areas is not due to any action or fault of the Applicant. This criterion specifically calls out “proximity to a critical area” as an example of a unique condition that could precipitate a variance. A slight overage in height is needed for standard ceiling height in the units and for roof structure and pitch. It would certainly seem unreasonable to deny a variance of five additional feet that would require abnormally low ceiling heights and/or roof pitches, especially when the additional height will not impact views, will not provide additional habitable space, and will not have any other discernible impacts on the surrounding neighborhood. *FoF 10*. This criterion is satisfied.

25. **TMC 13.05.010.B.2.a(2)(b)** – The requested variance—even at PDS staff’s recommended five additional feet—is a minimal addition to the allowed height of 45 feet in the C-2 zone. This criterion is satisfied.

26. **TMC 13.05.010.B.2.a(2)(c)** – Using the Subject Property to develop affordable housing for seniors is a reasonable use of the Subject Property. Allowing the minimal increase in height allows for more standard ceilings and roof pitch while reducing the building footprint to what is presently proposed in order to preserve as much of the Biodiversity Area as possible and still keep the project financially viable.

27. **TMC 13.05.010.B.2.a(2)(d)** – Nothing about the requested height variance is necessarily contrary to the Comp Plan. The Subject Property is not in a View-Sensitive Overlay District and City staff determined that no views will be blocked by the additional height in any event. Staff further determined that, “[g]iven the location and surroundings of the Site, the additional height will have minimal, to no discernible impact” on the surrounding neighborhood. *FoF 10*. The Examiner does not disagree with this determination.

28. **TMC 13.05.010.B.2.a(2)(e)** – As has been discussed at length herein, the Applicant’s project will actually serve the public interest by providing much needed affordable housing to the Tacoma market. *FoF 21*. Given that the minimal addition in height will not affect views, nor have any other discernible negative affects to this otherwise commercially zoned neighborhood, the Examiner can find no detrimental effects to the public interest that should preclude the variance being approved.

29. **TMC 13.05.010.B.2.a(2)(f)** – There are no standardized corporate design and/or increased development costs that are driving this request for variance.

Conclusions and Summary

30. Findings entered herein, based on substantial evidence in the hearing record, support a conclusion that the Rezone is consistent with the applicable criteria and standards for rezones and should be approved. The Examiner therefore recommends that the Rezone be approved subject to all conditions set forth herein, in the MDNS, and as elsewhere expressly stated in the hearing record.

31. Based on the above Findings of Fact and Conclusions of Law 10 through 22, the CADP is conditionally approved, contingent only upon the City Council’s final decision on the Rezone. If the City Council approves the Rezone, the conditional status of the CADP approval will be removed and the CADP will stand as fully and finally approved. If the City Council denies the Rezone, the CADP conditional approval will be rescinded without further action being necessary.

32. Given the above analysis based on the Findings of Fact and Conclusions of Law 23 through 29, the request for height variance meets the criteria set forth in TMC 13.05.010.B.2.a(2), and the height variance is conditionally approved, contingent only upon the City Council’s final decision on the Rezone. If the City Council approves the Rezone, the conditional status of the height variance approval will be removed and the height variance will stand as fully and finally approved. If the City Council denies the Rezone, the conditional height variance approval will be rescinded without further action being necessary.

33. The Rezone is recommended for approval subject to the following conditions:

A. RECOMMENDED CONDITIONS OF APPROVAL: “Conditions” set forth herein are derived primarily from the PDS Report and secondarily from the remainder of the hearing record. As is typical with a rezone recommendation, the conditions below have more to do with the code compliance of the Applicant’s intended development of the Subject Property after approval of the requested rezone than they do with the Rezone itself, i.e., they are not generally recommended herein as conditions precedent that must be met fully prior to approving the Rezone. Compliance with later development conditions prior to approving the Rezone is, in most cases, physically and temporally impossible.

As set forth at FoF 28 above, the PDS Report is incorporated herein by reference. The Applicant should also continue to pay close attention to (1) the MDNS and the mitigation requirements therein, (2) the City’s Exhibit C-7 and the Applicant’s own Restoration Plan (Exhibit C-9), as well as (3) the City staff and other agency comments in Exhibits C-16 and C-17. These provide useful guidance and notice of development requirements that are applicable to the later actual development of the Subject Property.

City Council approval of the requested rezone does not release the Applicant from state or other permitting requirements for subsequent development of the Subject Property, nor does anything in this Report and Recommendation, other than the height variance, take precedence over application of, and compliance with, the TMC. *See Usual Condition 2 below.*

Therefore, should this request be approved, the Examiner recommends making the following conditions from the PDS Report conditions of the rezone and accompanying permits as applicable to the Project:¹⁸

1. AFFORDABLE HOUSING

- a. Prior to Certificate of Occupancy, the Applicant shall record on title, as a covenant running with the Subject Property, that 100% of units are to be rented to households earning at or below 60% of the Area Median Income, for a minimum of 50 years. The notice/covenant

¹⁸ If the City Council adopts the Examiner’s recommendation by formal vote, these conditions will then become part of the formal approval of the Rezone.

shall state that if at any time the income restrictions for the Subject Property are changed or removed, the appropriate affordability under City code will be provided at that time. The notice on title shall also include age restrictions as necessary to comply with TMC requirements for parking.

- b. The Applicant shall provide its annual reporting to the Housing Division of the City of Tacoma.

2. TRAFFIC

- a. To mitigate the potential for increased conflicts between vehicles and pedestrians with vision impairments, new accessible pedestrian push buttons must be installed at the intersection of South 25th Street and South Orchard Street. This mitigation includes all work required to update the traffic signal to support new APS buttons installed to current City of Tacoma standards. This mitigation may be waived by the City Traffic Engineer at a later date if unforeseen complications arise to the modification of the signal system that are deemed infeasible or disproportionate to the scope of the project impacts.
- b. To mitigate increased volumes of pedestrians on South Orchard Street, a length of sidewalk from South 25th Street to the northern property line of 4901 South 25th Street must be widened to the minimum arterial sidewalk width of 7 feet. The additional width will allow pedestrians of all ages and abilities, and those with mobility devices, to pass each other without requiring travel too close to the relatively high traffic volume lanes on the South Orchard Street. The widened sidewalk may be permitted to narrow for short distances around utility poles and other obstructions in the right-of-way if relocating those obstructions is deemed infeasible or disproportionate to the scope of the project impacts. Driveway entrances along 2401 South Orchard Street must be reconstructed to current standards as part of sidewalk replacement.
- c. Sidewalk and driveways on South 25th Street between the development and South Orchard Street must be improved to remove any ADA accessibility defects.
- d. ADA compliant curb ramps must be installed for all potential pedestrian crossings of South Orchard Street and South 25th Street. This may require modification of the signal system to accommodate a new pedestrian crossing on the south leg of the intersection. The south leg crossing may only remain closed if there is a documented engineering reason for the closure, such as observed crash concerns or for essential signal operations.
- e. A public turnaround bulb must be provided at the eastern end of South 25th Street that will allow for a passenger car to turnaround fully within the public right-of-way. The turnaround must be provided with a 10-foot wide concrete entrance and appropriate signage, to make it obvious to drivers that the public right-of-way ends and that on-street parking is not permitted in the area required for a vehicle to turn around.

3. CRITICAL AREAS

- a. The Applicant shall record Notice on Title per *TMC* Section 13.11.280 prior to the final occupancy being issued for the Site.

- b. A protective covenant or conservation easement shall be recorded with Pierce County Assessor’s Office and include the total remaining Biodiversity Area and also include the “created” Biodiversity Area along the eastern side of the Site. The protective covenant or conservation easement shall be approved by the City of Tacoma and a copy provided to the City of Tacoma prior to the final occupancy being issued for the Site.
- c. The Applicant shall provide a response to the criteria below upon building permit application and incorporate the following per TMC 13.11.560 to minimize disturbance:
 - (1) Minimize light disturbance by directing lights away from critical areas.
 - (2) Place activities that generate noise furthest from critical areas.
 - (3) Limit disturbance from humans and pets with “impenetrable” natural vegetation between the development and critical areas.
 - (4) Design infrastructure to minimize impacts through such steps as designing narrower streets or integrating LID approaches.
 - (5) Seasonal restriction of construction activities.
- d. The Applicant shall provide mitigation per the “*Critical Areas Assessment and Biodiversity Area Plant Community Restoration Program*” July 31, 2022, prepared by Habitat Technologies with the red-line changes included on the plan.
- e. Two Garry Oaks shall be planted and be healthy and thriving at the end of the 10-year monitoring period.¹⁹ It is recommended that more than two (2) trees be planted to achieve this mitigation goal.
- f. A portion of 10 stems (trunks), 20-30 feet long, from the removed Exceptional trees shall be placed within the Biodiversity Area on the moderately sloped areas to provide additional structural diversity in habitat. A Geotechnical report shall be provided with recommendations for the safe placement of the stems on the slope.
- g. The Applicant shall provide monitoring for a period of 10 years for both the total area of Biodiversity Area restoration, enhancement, and creation and for the individual Exceptional Tree replacement including the Garry Oaks. Monitoring reports shall be provided to the City in years 1, 2, 3, 5, 7, and 10 with all required fees. At the end of the 10-year period, 100% survival of the Exceptional Tree replacement trees and two Garry Oaks must be thriving and healthy. If less than 100% of the replacement Exceptional Trees and two Garry Oaks are not healthy and thriving, supplemental planting and additional monitoring shall be provided.
- h. A 10-foot vegetated geo-buffer shall be provided along the entire perimeter of the steep slope abutting the development area.
- i. Permanent fencing such as a split rail fence or similar fence shall be constructed along the outside perimeter of the Biodiversity Area and signage shall be attached to the fence to alert residents of the boundary limits of the Critical Area. The Applicant shall use the approved sign template of the City of Tacoma and signs shall be placed approximately every 50 feet.

¹⁹ The City testified at the hearing that financial surety provisions of the TMC will ensure that viability requirements are met.

- j. The CADP approval is only applicable to the proposed project as described above and based upon the information submitted by the Applicant. Modifications to the development proposal and future activities or development within the regulated buffers may be subject to further review and additional permits as required in accordance with the *Tacoma Municipal Code*.
 - k. (Advisory) The Applicant must obtain other approvals prior to construction as required by other local, state, and federal agencies including the Army Corps of Engineers, Department of Ecology and the Washington Department of Fish and Wildlife as applicable.
4. ZONING
- Building heights are limited to 50', as measured per building code. Any height in excess of 45' shall not provide habitable space.

B. USUAL CONDITIONS:

- 1. The recommendation and decision set forth herein is based upon representations made and exhibits, including development plans and proposals and intended use, submitted at the hearing conducted by the Hearing Examiner. Any **material** 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 additional review/hearings.
 - 2. If the recommendation made herein leads to approval of the Rezone, such approval shall be 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 a continuing requirement of such approvals. By accepting any resulting approval, the Applicant represents that the development (the project) and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development (the project) and activities permitted do not comply with such laws, regulations, and ordinances, the Applicant shall promptly bring such development or activities into compliance.
34. Any finding of fact herein which may be more properly deemed or considered a conclusion of law is hereby adopted as such.

RECOMMENDATION:

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

DECISION:

The CADP and the height variance meet the criteria set forth in the TMC and are conditionally approved, contingent only upon the City Council's final decision on the Rezone. If the City Council approves the Rezone, the conditional status of the CADP and height variance approval will be removed and the CADP and height variance will stand as fully and finally approved. If the City Council denies

the Rezone, the conditional approval of CADP and height variance will be rescinded without further action being necessary.

DATED this 24th day of October, 2022.



JEFF H. CAPELL, 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.

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.

Once the permit decisions are finalized, any appeal thereof should be taken pursuant to the provisions of the Land Use Petition Act (LUPA, RCW 36.70C).

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
RECOMMENDATION & DECISION**

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION ON PERMITS

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision on the CADP and the height variance may be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner will likely need to be commenced within 21 days of the issuance of the decision by the Examiner, unless otherwise provided by statute.