

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BREMERTON**

In the Matter of the Application of	)	No. BP10-00066
	)	
	)	
<b>Bremerton Investment Group, LLC</b>	)	<b>FINDINGS, CONCLUSIONS,</b>
	)	<b>AND RECOMMENDATION</b>
<u>For Approval of a Rezone</u>	)	

**SUMMARY OF RECORD**

Request:

Bremerton Investment Group, LLC, requests a rezone of 0.34 acres on the northeast corner of 15<sup>th</sup> Street and Cambrian Avenue from Neighborhood Center Core (NCC) to Low Density Residential (R-10\*), in Bremerton, Washington. The Comprehensive Plan designation is NC, Neighborhood Center.

Hearing Date:

The City of Bremerton Hearing Examiner held an open record hearing on the request on February 28, 2011.

Testimony:

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

JoAnn Vidinhar, Director, Department of Community Development  
Victor Targett, Applicant Representative

Exhibits:

The following exhibits were admitted into the record:

1. Application for Zone Reclassification, dated December 2, 2010
2. City of Bremerton, 1970 Zoning Map, dated August 1970
3. City of Bremerton, 1988 Zoning Map
4. City of Bremerton, 2005 Zoning Map
  - a. Site Specific Rezone Aerial View
5. City of Bremerton Official Land Use Map, dated November 17, 2009
6. Letter from Victor Targett, and neighbors of 15<sup>th</sup> and Cambrian to City of Bremerton DCD, dated January 13, 2011 (3 pages); Parcel search map; portion of 2005 Zoning Map; house plan
7. Notice of Application & Notice of Public Hearing
  - a. Notice of Application & Notice of Public Hearing, dated December 30, 2010
  - b. Affidavit of Publication, dated December 30, 2010
  - c. Affidavit of Posting, dated December 30, 2010
  - d. Affidavit of Mailing, dated December 28, 2010, with mailing list
8. Staff Analysis & Conclusions (Staff Report), dated February 17, 2011

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9. Applicant's response to City Staff Report, dated February 24, 2011

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

### **FINDINGS**

#### Application and Notice

1. Bremerton Investment Group, LLC (Applicant) requests a rezone of 0.34 acres from Neighborhood Center Core (NCC) to Low Density Residential (R-10\*). The property is located on the northeast corner of 15<sup>th</sup> Street and Cambrian Avenue, in Bremerton, Washington.<sup>1</sup> *Exhibit 1; Exhibit 8, Staff Report, page 1.*
2. The City of Bremerton (City) received the rezone application on December 2, 2010. The City determined that the application was complete on December 16, 2010. The City gave combined notice of the application and the open record hearing associated with the application by posting the property and publication in the *Kitsap Sun* on December 30, 2010. On December 28, 2010, the City mailed notice to surrounding property owners. An open record hearing was held on the application on February 28. *Exhibit 7.*

#### Environmental Review

3. The City acted as lead agency in reviewing the environmental impacts of rezoning the Applicant's property as required by the State Environmental Policy Act (SEPA). SEPA rules allow existing environmental documents to be used to evaluate proposed actions. *WAC 197.11.600.* The City adopted its December 2004 Comprehensive Plan Supplemental Environmental Impact Statement as the environmental review of the proposed rezone. *Exhibit 7; Exhibit 8, Staff Report, page 1.*

#### Comprehensive Plan Designation

4. The Applicant's property is designated Neighborhood Center (NC) under the City's Comprehensive Plan adopted in December 2004. The property is part of the 27-acre Haddon Neighborhood Center. The City Comprehensive Plan notes that the Haddon Neighborhood Center surrounds a relatively small core area at the intersection of Callow Avenue<sup>2</sup> and North 15<sup>th</sup> Street that will provide mixed use structures of two or three stories with residential uses above commercial street-level uses. *City Comprehensive Plan, page LU-10; Exhibit 8, Staff Report, pages 1 and 2.*
5. The City Comprehensive Plan's discussion of the Neighborhood Center land use designation includes the following description:

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<sup>1</sup> The Applicant's property is identified by tax parcel numbers 3774-006-016-0106; 3774-006-017-0006; and 3774-006-018-0005. *Exhibit 7; Exhibit 8, Staff Report, page 1.* A legal description is provided as part of the Staff Report. *Exhibit 8, Staff Report, page 1.*

<sup>2</sup> Callow Avenue is two blocks to the east of Cambrian Ave. *Exhibit 4.*

Neighborhood Centers are mixed-use environments with an emphasis on mixed use structures, pedestrian oriented design, mixed and varied housing types, and the provision of neighborhood scale commercial, professional, and community services. The size and scale of a Neighborhood Center is such that it provides a focus and services for an area of approximately one mile in diameter surrounding the center. . . . Neighborhood centers have an identifiable central area with building heights of at least two or three stories with retail or office uses at ground level and residential above. . . . Away from the central focus area, residential uses may predominate. *City Comprehensive Plan, page LU-48*

The Comprehensive Plan also states that “Neighborhood Centers. . . provide a focus for a single neighborhood area of approximately one square mile. Moderately intense residential use is incorporated above the commercial spaces, within mixed use structures and near a center’s core to create a busy, pedestrian-oriented area.” *City Comprehensive Plan, page LU-9.*

#### City Zoning

6. The Applicant’s property is currently vacant and zoned Neighbor Center Core (NCC). Property to the east is also zoned NCC and contains a warehouse, restaurant and bakery. A total of 1.86 acres between Cambrian Avenue and Callow Avenue, north of 15<sup>th</sup> Street, is zoned NCC. Property to the north, west, and south contain single family residences on property zoned R-10\*. *Exhibit 8, Staff Report, pages 1 and 2; Exhibit 4.*
7. The Zoning Code describes the intent of the NCC zone as one “to establish base threshold standards for the central core of the neighborhood centers that preserve future opportunity for full realization of the centers concept. The NCC designation assumes that future amendments to the zoning code will more fully implement the centers intent.” Listed permitted uses within the NCC zone include residential as a secondary use to commercial development on the same property. *BMC 20.66.010; -020.*
8. The BMC Zoning Designation chart identifies a Low Density Residential R-10 zone, but not an R-10\* zone. *Chapter 20.40, Figure 20.40(a).* The City Staff Report describes the R-10\* zone as a placeholder classification for future subarea planning. *Exhibit 8, Staff Report, pages 1 and 4.* The City’s 2005 Zoning Map identifies the residential properties surrounding the Applicant’s property to the north, east and south as R-10\* - Low Density Residential. The legend of this zoning map describes R-10\* as: “R-10\* - Low Density Res. \* Future adjustment to zoning anticipated upon completion of Subarea Planning.” This is the only description of the R-10\* zone anywhere within the City’s Comprehensive Plan and Zoning Code. *Exhibit 4.*
9. The Zoning Code describes the intent of the Low-density R-10 zone as one “to accommodate single-family housing by infilling at a range of lot sizes consistent with urban growth patterns. Some attached single-family housing may be appropriate when

responding to sensitive areas or with innovative design. Residential development at higher densities is encouraged at the edge of designated centers.” *BMC 20.160.010*. The BMC Comprehensive Plan/Zoning Consistency chart lists both Low Density Residential (R-10) and Neighborhood Center Core (NCC) zoning districts as consistent with the Neighborhood Center (NC) Comprehensive Plan designation.<sup>3</sup> *Chapter 20.40 BMC, Figure 20.40(b)*.

10. Zoning classifications must be consistent with City Comprehensive Plan land use designations as described in Chapter 20.40 BMC, Figure 20.40(b). Low Density Residential (R-10) and Neighborhood Center (NCC) are both described as consistent with the Neighborhood Center designation as detailed in Figure 20.40(b). The R-10\* designation does not appear in Figure 20.40(b). *RCW Chapter 36.70A; BMC 20.40.170*.
11. In its Staff Report, the City’s Department of Community Development (DCD) states that the rezone application is not consistent with the Comprehensive Plan, as the R-10\* zone does not appear in Figure 20.40(b). DCD also determined that the rezone request failed to meet six additional criteria identified in its Staff Report.<sup>4</sup> The City does agree that one criterion would be met: there would be adequate essential public facilities and services are available and adequate for the rezone request. The Staff Report contains a recommendation of denial of the rezone request. The Staff Report notes that the property received its current zone of NCC to accommodate job growth in the City as envisioned by the Comprehensive Plan and that any change would reduce the chances of meeting that vision. The City also notes that a rezone would result in a ‘break up’ of the street block of 15<sup>th</sup> Street between Cambrian and Wycoff with residential development. *Exhibit 8, Staff Report, pages 2-4*.

#### Testimony

12. At the hearing, JoAnn Vidinhar, Department of Community Development Director, testified that the R-10\* designation means that subarea planning is needed before zoning designations can become final. She characterized the R-10\* designation as a ‘placeholder’ until further review by the City is complete. She notes that the City has 12 centers where subarea plans are needed, and that only five subarea plans are completed.

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<sup>3</sup> The Application for Zone Reclassification (Exhibit 1, page 3) listed criteria for approval including: “1. Is the proposed Rezone consistent with the *Comprehensive Plan*? (See Bremerton Municipal Code, Section 21, Figure 090, ‘Plan/Zoning Consistency’ of this code.)” The existing BMC no longer contains this code citation. The Hearing Examiner has identified Chapter 20.40 BMC, Figure 20.40(b) as the current figure containing the Comprehensive Plan/Zoning Consistency.

<sup>4</sup> In its Staff Report, DCD used criteria for review that are different from those in the City ordinance governing rezone requests. It appears that DCD relied upon criteria on the application form that differ from those in the code. The City determined that the rezone request is not in the public interest to accommodate needed changes within the immediate vicinity or neighborhood; will not correct an inappropriate zone classification when established; is not a planned step in a phasing process to bring zoning into consistency with the Comprehensive Plan; is not an overlay or underlying zoning designation request; does not meet a public need that would clearly benefit the local neighborhood or community; and is not part of a larger zoning district. *Exhibit 8, Staff Report, pages 2-5*.

She acknowledged that the City does not know when subarea planning for the Haddon Neighborhood Center would begin, but testified that development could occur within that area without the necessity of a rezone. Either Low Density Residential, (R-10\*) or Neighborhood Center Core (NCC) development can take place in the NC designation without waiting for future subarea planning. She noted that residential use is allowed in the NCC zone as a secondary use, but understands that the Applicant prefers to build single family houses rather than a mixed use development. She acknowledged he would need a rezone to R-10 to do that. She recommends denial of the rezone request, however, in order to preserve an area for commercial development within the NC zone until such time as subarea planning can occur and to allow for future commercial development to occur. *Testimony of Ms. Vidinhar.*

13. Victor Targett, Applicant Representative, testified that although the application requests a rezone from NCC to R-10\*, he views the R-10\* designation as the same as Low Density Residential R-10, as the asterisk merely signifies that future subarea planning may occur. Despite past zoning for commercial uses, the property has been vacant for 41 years. He submitted testimony and documents in support of the rezone request, including a petition with 37 signatures of support for the rezone.<sup>5</sup> He notes that the property has remained vacant in part because the Charleston Commercial District exists two blocks to the south and is not fully occupied with commercial uses. He also argues that the R-10 zoning designation is allowed under the Comprehensive Plan designation of NC, and that it has been seven years since the NCC zone was applied to the property. Mr. Targett suggests the City can adjust the NCC zone during the Subarea Plan review, and move it north, south or east at the time the City further reviews the area. Finally, he notes that adding more residential development to the area would assist the existing businesses in the area; by placing more residents in the area commercial development will come. *Exhibit 1; Exhibit 6; Exhibit 9; Testimony of Mr. Targett.*

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner has authority to conduct an open record hearing on a rezone request and to issue a recommendation on the request to the Bremerton City Council. *BMC 2.13.070; BMC 2.13.080(3); BMC 20.02.040(d) and (e), Table 040; BMC 20.58.040(b).*

### Criteria for Review

The City may grant a site-specific rezone only if it finds that:

- (1) The rezone is consistent with the Comprehensive Plan;
- (2) The rezone will advance the public health, safety, or welfare, and will not have adverse impacts on adjacent properties;
- (3) The rezone is necessary because either:

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<sup>5</sup> The Hearing Examiner notes that a petition for approval – or denial – of the request cannot alone be a reason for a decision on a rezone application. *See, Parkridge v. Seattle*, 89 Wn.2d 454 (1978).

- (i) Conditions in the immediate vicinity or neighborhood have so markedly changed that it is in the public interest to approve the rezone; or
  - (ii) The rezone will correct a zone classification or zone boundary that was inappropriate when established; and
- (4) The rezone is in the public interest.

*BMC 20.58.040(d).*<sup>6</sup>

#### Conclusions Based on Findings

1. **There is insufficient information in the record to determine if a request for a rezone from NCC to R-10\* is consistent with the Comprehensive Plan; the Council alone must make that determination.** This matter comes before the City Council without a clear recommendation because the Applicant and the Department of Community Development (DCD) have a good faith disagreement about the significance of the asterisk in the R-10\* designation, and there is nothing in the record that can clearly resolve this disagreement. Figure 20.40(b) specifies what zoning designations are consistent with the Comprehensive Plan designation. The chart shows that both NCC and R-10 zoning are consistent with the NC designation specified in the Comprehensive Plan. While DCD is correct that the R-10\* designation does not appear in Figure 20.40(b) as a zoning designation consistent with the NC comprehensive plan designation, the Applicant points out that the R-10\* designation may be the same as an R-10 designation, as it is nowhere defined in the code. The City Council must therefore make a decision on this rezone as the only body empowered to do so. *Lutz v. City of Longview*, 83 Wn.2d 566 (1974).

Resolution of the dispute involves the meaning of the asterisk. The only guidance offered as to the meaning of asterisk is the legend on the 2005 Zoning Map that describes the asterisk to mean that “future adjustment to zoning (is) anticipated upon completion of subarea planning.” There is nothing in the code language itself or in the Comprehensive Plan to further define what the asterisk means. There is no legislative history offered that can help determine if the asterisk on the R-10 zone is intended to be a de facto moratorium prohibiting any rezone until such time as subarea planning occurs, or if it is intended as a ‘heads up’ that the zoning may change. Only the City Council can determine if the requested rezone is consistent with the Comprehensive Plan.

One way the Council may do this is by looking at the plain meaning of the phrase on the Zoning Map to determine what an R-10\* zone means. *See, Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 117 (1999). The plain meaning of the phrase describing the asterisk on the R-10 zone is that a certain zone may not last; nothing in the phrase leads one to believe that a rezone would not be allowed. There is some question as to the timing of any zoning changes, as the phrase states that

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<sup>6</sup> Although the City Staff Report (Exhibit 8) references BMC 20.58.040(d), the Staff Report and the Application for Zone Reclassification (Exhibit 1) contain criteria for approval that are similar but not identical to that provided in BMC 20.58.040(d). It appears the criteria referenced in the Staff Report are outdated, but remained in the template for the Staff Report.

adjustments are anticipated “upon completion of subarea planning.” This does not state that there would be no adjustments prior to then, but that rezones are likely to occur after that. DCD reads the asterisk as a placeholder, meaning rezones should not occur prior to subarea planning; the Applicant reads the asterisk as a statement that rezones are likely to occur after subarea planning, but not as a prohibition against rezones prior to that time. The Hearing Examiner’s reading of the plain meaning of the phrase describing the asterisk is that a rezone may occur prior to subarea planning, and that there will likely be rezones following subarea planning. There is nothing in the plain meaning of the phrase that would prohibit a rezone prior to subarea planning. Therefore, a request for a rezone from NCC to R-10\* could be consistent with the Comprehensive Plan designation of NC and could be allowed as consistent with Figure 20.40(b). The ongoing asterisk means that the zone may be re-examined again at the time of subarea planning. However, the fact that the R-10\* zone does not appear in Figure 20.40(b) could evidence an intent of the Council to not allow a rezone to that designation, as argued by DCD. *Findings 6-11.*

The Comprehensive Plan provides some guidance as to the meaning of the NC designation, which may be helpful in determining if a rezone should be granted. The NC designation is clearly intended to embrace both NCC and R-10 zones, in order to accomplish a mix of commercial and higher density residential development. There is a need for both zones within a NC designated area, as certain types of commercial development do best when surrounded by residential development. It is the balance of those uses that is the challenge with this rezone request. The Applicant notes that no commercial development has occurred on his property in over 40 years and that it is unlikely to occur in the future. The City, on the other hand, believes that the property should remain NCC to allow for future commercial development as part of the mix envisioned in the neighborhood center.

The City Council is in the best position to resolve the differing views of what is appropriate for this particular property in an area designed by the Comprehensive Plan as a Neighborhood Center, when it is now zoned NCC but that the Applicant wishes to rezone to R-10\* in order to develop the property with single-family homes. There appears to be no practical difference between an R-10 zone and an R-10\* zone, with the exception of the language on the Zoning Map. It may have been an oversight to not include the R-10\* zone in Figure 20.40(b) or it may have been the intent of the Council to exclude that designation from Figure 20.40(b). Only the Council can make that determination.

2. **If the Council determines that R-10\* is consistent with the Comprehensive Plan, the Council should remand the application to the Planning Department for review using the criteria for rezones established by the Council.** The criteria for rezone approval in the rezone application form differ from those criteria established by the City Council when adopting the current Zoning Code in 2005. BMC 20.58.040(d) requires the Council to make specific findings prior to approving a rezone application. It must find that:

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- (1) The rezone is consistent with the Comprehensive Plan;
- (2) The rezone will advance the public health, safety, or welfare, and will not have adverse impacts on adjacent properties;
- (3) The rezone is necessary because either:
  - (i) Conditions in the immediate vicinity or neighborhood have so markedly changed that it is in the public interest to approve the rezone; or
  - (ii) The rezone will correct a zone classification or zone boundary that was inappropriate when established; and
- (4) The rezone is in the public interest.

If the City finds the request to rezone from NCC to R-10\* within an area designated as a Neighborhood Center in the 2004 Comprehensive Plan is consistent with that Comprehensive Plan, it is recommended that the Council remand the application to DCD for review of consistency with the remaining criteria within a specified time. The professional planners within DCD have not had the opportunity to review the application with reference to the current criteria for approving a rezone, as the criteria in the application form differ from that in the City code. Any decision on the rezone request could be viewed as inconsistent with law if the governing criteria were not used in making that decision. The prudent course to follow is to refer to the governing criteria from the inception of review of the rezone request. If, however, the Council determines that the rezone request is not consistent with the Comprehensive Plan, there is no need to conduct an analysis of the remaining criteria as failure to meet any one of the criteria provides an adequate basis for denial of the request.

#### **RECOMMENDATION**

Based on the preceding Findings and Conclusions, the Hearing Examiner recommends that the City Council review the Comprehensive Plan, the City's 2005 Zoning Map where the R-10\* is described, and the rezone application to determine if the rezone request from NCC to R-10\* is consistent with the Comprehensive Plan. If so, it is recommended that the Council remand the application to the Department of Community Development to analyze the remaining criteria for approval of rezone to determine if the request should be granted. If not, then the rezone request would be denied and the Council need not take further action at this time.

Recommended this 8<sup>th</sup> day of March 2011.

  
THEODORE PAUL HUNTER  
Hearing Examiner  
Sound Law Center