

**BEFORE THE LAND USE HEARING EXAMINER  
OF CITY OF BATTLE GROUND, WASHINGTON**

Regarding an application by Scotton Landing 1, LLC for approval ) **FINAL ORDER**  
of a zone change from RC to MU-R on a 10- to 12-acre parcel ) **File No. ZC:03-14**  
located in the southwest quadrant of the intersection of SW ) **(Scotton Landing**  
Scotton Way and SR503 in the City of Battle Ground, Washington ) **Zone Change)**

**A. SUMMARY**

1. Scotton Landing 1, LLC (the "applicant") requests approval of a Zone change from "RC" (Regional Commercial) to MU-R (Mixed-Use Residential) on property located in the southwest quadrant of the intersection of SW Scotton Way and SR503 in the City of Battle Ground, Washington. The zone change is requested for a ten to twelve acre portion of Tax Lots 192351-000, 192381-000, 192405-000, and 986029996 as shown in the maps included in the application (the "site"). The site and surrounding properties to the northeast, east and south have a comprehensive plan designation of MXE (Mixed-Use Employment) and are currently zoned RC. Properties to the northwest and west are currently zoned R-12 (Residential, 12 units/acre), with a comprehensive plan designation of P/OS (Park/Open Space) to the northwest and UM (Urban Medium) to the west. The site is currently vacant.

2. Hearing Examiner Joe Turner (the "examiner ") conducted a public hearing to receive testimony and evidence about this application. City staff recommended denial of the application. See the City of Battle Ground Staff Report to the Hearing Examiner dated March 23, 2015 (the "Staff Report"). Staff argued that, although the application complies with the approval criteria for a zone change, the proposed zone change conflicts with a December 15, 2010 development agreement (Exhibit 1, the "Development Agreement") between the City and Mill Creek 1 of Battle Ground LLC/CJ Dens Land Company BG 503 LLC (the "Developers"), which affects a roughly 38-acre parcel of land described in the agreement (the "Property"). Attorney LeAnn Bremer and developer TJ Fontenette appeared on behalf of the applicant. No one else testified orally or in writing.

3. Based on the findings provided or incorporated herein, the examiner concludes that the applicant sustained the burden of proof that the proposed use does or can comply with the relevant approval standards of the Battle Ground Municipal Code (the "BGMC"), provided the applicant complies with conditions of approval recommended by City staff to ensure the proposed use does comply in fact with those standards. Therefore the examiner approves the zone change, subject to the conditions at the end of this final order.

**B. HEARING AND RECORD HIGHLIGHTS**

1. The examiner received testimony at the public hearing about this application on March 27, 2015. All exhibits and records of testimony are filed at the City of Battle Ground. The examiner announced at the beginning of the hearing the rights of persons with an interest in the matter, including the right to request that the examiner continue the

hearing or hold open the public record, the duty of those persons to testify and to raise all issues to preserve appeal rights and the manner in which the hearing will be conducted. The examiner disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the examiner of selected testimony and evidence offered at the public hearing.

2. City planner Sam Crummett summarized the Staff Report and the applicable standards.

a. He noted that the comprehensive plan designates the property MXE (Mixed-Use Employment). The site is currently zoned RC (Regional Commercial). Both the existing RC and proposed MU-R zone implement the MXE designation, based on Table 3-1 of the Battle Ground comprehensive plan. The RC zone is primarily a commercial district, with residential development allowed only above ground floor commercial development. The MU-R zone is primarily a residential district, with up to 25-percent commercial development. The proposed zone change complies with the applicable approval criteria in BGMC 17.146.040.D.

b. The City entered into a Development Agreement with Developers in 2010 to finance the extension of SW Scotton Way west of SR503. The Development Agreement included a concept plan that showed commercial development on the properties the Properties, including the site. The Developers established a Walmart store on a portion of the Property north of the site. However the Developers were unable to find an anchor store interested in locating on the site. Therefore the applicant proposed this zone change to allow multi-family residential development on the site.

c. He argued that the proposed zone change violates the Development Agreement, which assumed the site would be developed exclusively for commercial uses. Therefore he recommended the examiner deny the zone change application. The examiner has authority to deny the rezone application based on BGMC 2.10.080.A(2), which authorizes the examiner to hear applications for revisions or rescissions of agreements concomitant to rezones.

3. City attorney Brian Wolfe argued that the Development Agreement is an applicable approval criteria for the proposed zone change. RCW 36.70B.180 provides, "A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement."<sup>1</sup> The zone change is an approval by the City. Therefore approval of the zone change must be consistent with the Development Agreement. Sections 3.2 and 3.3 of the Development Agreement state that the property subject to the agreement will be developed with commercial uses. The City Council believed that the properties subject to the Development Agreement would be developed for commercial uses. The proposed zone change violates the spirit of the Development Agreement.

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<sup>1</sup> Section 5.8 of the Development Agreement contains identical language.

4. Attorney LeAnn Bremer and developer TJ Fontenette appeared on behalf of the applicant.

a. Ms. Bremer summarized her Memorandum dated March 27, 2015 (Exhibit 16).

i. She argued that BGMC 2.10.080.A(2) is inapplicable in this case. The Development Agreement is not an agreement concomitant to a rezone. The purpose of the Development Agreement was to fund the extension of SW Scotton Way. Section 3.5 of the Development Agreement states that the intent of the agreement was to ensure that bonds issued by the City to finance Scotton Way “[a]re fully paid for by sales tax and increased property taxes generated from the development of the [property subject to the agreement]. In addition, the applicant did not request any revisions or rescission of the Development Agreement.

ii. The proposed rezone is consistent with RCW 36.70B.180. Nothing in the language of the Development Agreement prohibits the proposed zone change or requires commercial development on the site.

(A) Section 3.2 of The Development Agreement states:

Developers plan to develop the Developers’ Property with uses and designs envisioned by the City in its planning and policy documents, and that are allowed in the City’s Comprehensive Plan and under the zoning regulations applicable to the Developers’ property.

The proposed zone change is consistent with the City’s Comprehensive Plan. The proposed MU-R zoning implements the MXE comprehensive plan designation for the site. Any future development on the site will be consistent the proposed MU-R zoning.

(B) The language of the Development Agreement does not require commercial development on the site. The conceptual plans attached to the agreement showed commercial development. However the plans are expressly identified as “concept plans.” In addition, Section 5.8 of the Development Agreement expressly allows for “[m]odifications, additions, or changes to the Conceptual Site Plans in Exhibit D...”

(C) The Development Agreement assumes that the zoning, development and other land use regulations that apply to the Property may change over time. Section 5.8 of the agreement allows the Developer to comply with the regulations in effect on the date of the Development Agreement or “[t]o be subject to later enacted laws, regulations and ordinances...” Section 5.5 of the Development Agreement vests vehicle trips from development on the Property based on the Transportation Impact Analysis, Exhibit F of the Development Agreement (the “TIA”). The TIA assumed the Property

would be developed with commercial uses. However Section 5.5 of the Development Agreement assumes that other types of development may occur and authorizes the City to require additional traffic analysis and mitigation, “[a]t the time of site plan application review, or other land use application, and approval for any development on the Property.”

b. Mr. Fontenette noted that he was not personally a party to the Development Agreement. The agreement is between the City and two LLCs.

i. He noted that the majority of the Property will be developed for commercial uses. The Development Agreement covered 38 acres and a stormwater tract. The proposed zone change will allow residential development on 7.5 acres, or 20-percent of the Property. The remainder of the Property will be developed with commercial uses. This is consistent with the comprehensive plan goals of providing 75-percent residential and 25-percent commercial development in the City. In addition, the existing RC zone allows residential development, provided it is located above first-floor commercial development.

ii. The Development Agreement only imposes two requirements; 1) that the City build SW Scotton Way and 2) that the Developer pay a portion of the bonds used to fund construction of the road. There is no timeline for development or any obligation to develop the property at all.

iii. If the City wanted to limit development on the Property to commercial, or to prohibit future zone changes, it could have said so in the Development Agreement. However nothing in the language of the Development Agreement prohibits the proposed zone change. Therefore the applicant should be allowed to develop the site as the market and development regulations allow.

5. No one else testified orally or in writing about the application. The examiner closed the record at the end of the hearing and announced his intention to approve the application subject to the conditions in the Staff Report.

### **C. DISCUSSION**

1. City staff concluded that the application complies with the applicable approval criteria for a zone change, based on affirmative findings in the Staff Report. The examiner adopts those affirmative findings in the Staff Report as his own, except to the extent they are inconsistent with the remaining findings in this Final Order.

2. The examiner finds that the proposed zone change is consistent with the Development Agreement. RCW 36.70B.180.

a. The express purpose of the Development Agreement is to ensure that bonds issued by the City to fund the extension of SW Scotton Way “[a]re fully paid for by sales tax and increased property taxes generated from the development of the Developers’ Property.” Section 3.5 of the Development Agreement. The proposed zone change will have no impact on the Developers’ agreement to pay their share of those bonds.

b. The conceptual plan attached to the Development Agreement proposed commercial development on the Property. However nothing in the language of the agreement requires development consistent with those plans. The plans are expressly identified as “conceptual.” In addition, the Development Agreement assumes that the regulations affecting the types of development allowed on the Property and/or the mix of uses proposed may change over time. See Sections 5.5 and 5.8 of the Development Agreement.

c. There is no language in the Development Agreement that requires the Property be developed with commercial uses or that prohibits approval of zone change application that is consistent with applicable approval criteria for a zone change. Mr. Wolfe’s argument that the zone change application is inconsistent with the “spirit” of the agreement is without merit. Subjective opinions about the intent and spirit of an agreement cannot alter or replace the agreement's objective, written terms. “When interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Hearst Communs., Inc v. Seattle Times Co.*, 154 Wn.2d 493, 503-04.

3. The examiner finds that the Development Agreement is not an agreement concomitant to a rezone. As discussed above, the purpose of the Development Agreement was to fund the extension of SW Scotton Way. The Development Agreement did not address the zoning on the Properties. Therefore BGMC 2.10.080.A(2) is inapplicable.

#### **D. CONCLUSION**

Based on the findings and discussion provided or incorporated herein, the examiner concludes that File No. ZC:03-14 (Scotton Landing Zone Change) should be approved, because the application does or can comply with applicable standards of the BGMC, provided it is subject to conditions that ensure timely compliance in fact with the BGMC and relevant Comprehensive Plan Policies incorporated by reference in the Staff Report.

#### **E. ORDER**

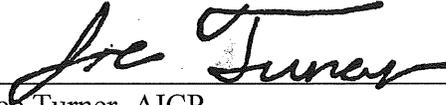
The Hearing Examiner APPROVES File No. ZC:03-14 (Scotton Landing Zone Change) Zone change subject to the following conditions of approval:

#### **CONDITIONS OF APPROVAL**

1. This rezone is not effective until the U.S. Army Corps of Engineers (the “Corps”) approves a new wetland permit based on the proposed site plan.
2. After the close of the appeal period and Corps approval of a new wetland permit, staff shall update the official zoning map and notify Clark County GIS Department of this site specific zone change.

3. The applicant is responsible for submitting a separate site plan application and building permit application to the Community Development Department for development on the site.

DATED this 7th day of April 2015.

A handwritten signature in black ink that reads "Joe Turner". The signature is written in a cursive style with a horizontal line underneath it.

Joe Turner, AICP  
City of Battle Ground Hearing Examiner