

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

In the Matter of the Application of	)	No. CUP 8-21
	)	
<b>Rex Orkney, on behalf of</b>	)	<b>Andis Road Drive-Through CUP</b>
<b>LaVenture Group, LLC</b>	)	
	)	FINDINGS, CONCLUSIONS,
<u>For a Conditional Use Permit</u>	)	AND DECISION

**SUMMARY OF DECISION**

The request for a conditional use permit to establish a drive-through facility associated with a 2,455 square foot restaurant on the ground floor of a recently completed mixed-use building, at 989 South Burlington Boulevard, is **APPROVED**. Conditions are necessary to address specific impacts of the proposed development.

**SUMMARY OF RECORD**

Hearing Date:

The Hearing Examiner held an open record hearing on the request on April 28, 2022, using remote access technology.

Testimony:

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

Brad Johnson, City Community Development Director  
Rex Orkney, Applicant Representative

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report and Recommendation, dated April 5, 2022
2. Site Plan, dated January 17, 2022
3. Photograph of Drive-Through Site, undated
4. Zoning Map, undated
5. Notice of Complete Application, dated January 5, 2022
6. Land Use Permit Application, dated December 14, 2021
7. Floor Plan, undated
8. Site Aerial Photograph, dated April 14, 2021
9. SEPA Environmental Checklist, dated March 25, 2020; Land Use Permit and SEPA Determination for Grafton Park Apartments (No. LUP 4-20), dated August 18, 2020
10. Notice of Public Hearing

*Findings, Conclusions, and Decision  
City of Burlington Hearing Examiner  
Andis Road Drive-Through CUP  
No. CUP 8-21*

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. Rex Orkney, on behalf of LaVenture Group, LLC (Applicant), requests a conditional use permit (CUP) to establish a drive-through facility use associated with a 2,455 square foot restaurant that would be located on the ground floor of an existing mixed-use building. Construction of the mixed-use building, including the drive-through window and associated drive aisle that would support the proposed use, was authorized by the City of Burlington (City) Community Development Department (CDD) on August 18, 2020, and has been recently completed. Accordingly, no exterior additions or significant modifications to the existing building or other site improvements would be required for the proposed use. The drive-through facility would be located within a vehicular access tunnel that would be accessed from an internal parking area and would exit onto Andis Road. The property is located at the intersection of South Burlington Boulevard and Andis Road at 989 South Burlington Boulevard.<sup>1</sup> *Exhibit 1, Staff Report, pages 1 and 2; Exhibit 2; Exhibit 3; Exhibits 6 through 8.*
  
2. The City of Burlington (City) determined that the application was complete on January 5, 2022. On January 10, 2022, the City provided notice of the application consistent with the requirements of Burlington Municipal Code (BMC) 14A.05.090 by mailing notice to surrounding property owners and by publishing notice in the *Skagit Valley Herald*, with a comment deadline of January 24, 2022.<sup>2</sup> On or about April 8, 2022, the City provided notice of the open record hearing associated with the application by publishing notice in the *Skagit Valley Herald* and by mailing notice to interested parties. The City did not receive any comments on the proposal in response to its notice materials. *Exhibit 1, Staff Report, page 2; Exhibit 5; Exhibit 10.*

### State Environmental Policy Act

3. The CDD acted as lead agency and analyzed the environment impacts of the original mixed-use building proposal under the State Environmental Policy Act (SEPA), Chapter 43.21 Revised Code of Washington (RCW). The environmental checklist for the mixed-use building project noted that the proposed site development would include a drive-through lane through the building, the future use of which would require CUP approval. CDD reviewed the Applicant's environmental checklist for the mixed-use building proposal and issued a Mitigated Determination of Nonsignificance (MDNS) on April 18,

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<sup>1</sup> The property is identified by Skagit County Tax Parcel No. P23805. *Exhibit 1, Staff Report, page 1.* A legal description of the property is included in the SEPA Environmental Checklist. *Exhibit 9.*

<sup>2</sup> Under BMC 14A.05.090.C, notice of a conditional use permit application is not required to be posted on-site when the project is limited to interior remodels. *Exhibit 1, Staff Report, page 2.*

2020, which was not appealed. City Community Development Director Brad Johnson testified at the hearing that the proposed drive-through facility use was accounted for as a potential addition to the mixed-use building in the SEPA review and, therefore, additional SEPA environmental review would not be required for the current CUP proposal. The MDNS required that all construction and development activities associated with the mixed-use building project comply with all applicable City code requirements and with all conditions of the approved building development permit. *Exhibit 1, Staff Report, page 6; Exhibit 9; Testimony of Mr. Johnson.*

#### Comprehensive Plan and Zoning

4. The City Comprehensive Plan designates the subject property as “Commercial-Business.” The Commercial-Business designation is intended to accommodate a mix of commercial and high-density residential uses. City staff identified the following Comprehensive Plan policies as relevant to the proposal:

- Ensure a wide range of opportunities for residents and businesses, ranging from the small-scale entrepreneur to the growing business, from low-income resident to the commuter, as examples. [Land Use Policy 3-A]
- Maximize site planning opportunities to provide intermodal access, pedestrian oriented street environments, well landscaped and pedestrian linked parking lots, and consideration of linking together larger areas in terms of access, visual continuity. [Land Use Policy 3-B]
- Mixed-use development is encouraged to create a balance of incomes, jobs, and housing. [Business, Commercial, and Industrial Policy 1-B]
- Plan and site each new development to minimize the impact of new traffic generated on the level of service. Maintain a good level of service on Burlington Boulevard and at key intersections to ensure concurrent mitigation is feasible and that there will not be a need to curtail development because of traffic impacts. [Business, Commercial, and Industrial Policy 1-F]
- Carefully manage the allocation of new traffic generation to minimize the impact on level of service and retain the capacity to build out the retail core with good traffic flow, meeting concurrency standards. [Special Planning Districts– Retail Core Planning Area Policy 1-C]
- Create streetscape continuity through façade treatments, window and door openings, buildings edges, property edge treatment, streetscape elements, and landscaping. [Business, Commercial, and Industrial Policy 3-A]
- Streets provide order for the placement of buildings and open spaces and a “build-to” line is required along commercial and business frontages to keep visual interest and prevent the image of streets lined with parking lots. [Business, Commercial, and Industrial Policy 3-B-3]

- Build towards a future that will have the flexibility to handle pedestrians as well as motorists as employment and transit use increase. [Special Planning Districts– Retail Core Planning Area Policy 1-B]

*Exhibit 1, Staff Report, pages 4 and 5.*

5. The property is located within the General Commercial District (C-1). The purpose of the C-1 zoning district is to “provide for the location of a grouping of uses which are considered compatible uses having common or similarly performance standards in that they represent types of enterprises involving the rendering of services, both professional or to the person, or on-premises retail activities.” *BMC 17.50.030*. Drive-through facilities are allowed in the C-1 zoning district with a conditional use permit. *BMC 17.50.070.D*.

Drive-through uses are only permitted in the C-1 zone when “located on a tenant pad or on an existing development site or at a signalized intersection.” *BMC 17.50.070.D*. City code does not provide a definition for “tenant pad.” Mr. Johnson explained at the hearing, however, that City staff interprets “tenant pad” to mean a commercial space within a larger multi-tenant development where parking and access arrangements are provided jointly for the commercial tenants in the development. He indicated that the proposed drive-through facility would be consistent with this interpretation of “tenant pad” because it would be located in a multi-tenant development; access would be provided internally through the site and was reviewed as part of a larger project; and facilities such as parking, utilities, and mail services would be jointly provided. In addition, Mr. Johnson explained that, although the intersection of Andis Road and South Burlington Boulevard does not currently have a signal, the City has allocated for, and is planning to install, a signal at this location. *Exhibit 1, Staff Report, pages 2 and 3; Exhibit 4; Testimony of Mr. Johnson.*

#### Conditional Use Permit

6. As noted above, the Applicant requests a conditional use permit to establish a drive-through facility serving a restaurant in a mixed-use building. City staff analyzed the proposal and determined that it would meet the specific criteria for approval of a CUP under *BMC 14A.05.140.D*, noting:
  - The drive-through would be located along the South Burlington Boulevard corridor, a commercial strip with many drive-through uses, restaurants, and other uses similar to the proposed development. The drive-through facility would not alter parking, loading, utilities, or screening in the approved permit for the existing development in which the drive-through would be located. The City’s Public Works Department reviewed the proposed plans and concluded that, subject to the final approval of a striping and signage plan, traffic demands would be met.
  - The proposed use would not be inconsistent with the Comprehensive Plan.

- The design and layout of the proposed drive-through is consistent with the City’s urban design objectives and minimizes conflict with pedestrian traffic. Drive-through facilities are typically located as stand-alone developments or buildings with one or more queuing lanes separating the building from adjacent streets. This layout tends to negatively impact pedestrian safety and the appearance of the street frontage. The proposed development would be located within a mixed-use building that features continuous street walls along Andis Road and South Burlington Boulevard.
- The City’s Engineering Department reviewed the application and determined it would not cause any traffic concurrency issues. In addition, the City’s Capital Improvement Plan/Transportation Improvement includes signal installation at the intersection of Andis Road and South Burlington Boulevard, which would further minimize traffic impacts and improve pedestrian safety.
- The surrounding area is characterized by a mixture of commercial and residential uses. The South Burlington Boulevard corridor has many other drive-through facilities. As such, the proposed use would be harmonious with the design, character, and appearance of the surrounding area.
- The proposal would not have a greater impact on public infrastructure than the construction of a conventional restaurant, which does not require a conditional use permit in the C-1 zone. The Applicant would be required to pay impact fees and system development charges to offset a proportionate share of the impacts associated with the proposed use. The Applicant has already paid impact fees to offset fire and park system impacts under the permit for the existing building.
- For projects involving modification or additions to existing structures, landscaping is only required commensurate with the extent of the proposed modifications or additions. *BMC 17.80.070.C*. The proposal does not include any additions or exterior modifications, and the existing site has been landscaped in compliance with all applicable code requirements. No additional landscaping is required or proposed.

*Exhibit 1, Staff Report, pages 2 through 6.*

#### Testimony

7. City Community Development Director Brad Johnson testified generally about the proposal and how, with conditions, it would comply with the City Comprehensive Plan and zoning ordinances and would satisfy the specific criteria for approval of a CUP. He noted that the subject property is in the C-1 zoning district and that drive-through facilities are allowed in the C-1 zone with a conditional use permit. He noted that the City interpreted the proposed development to be in compliance with the undefined “tenant pad” requirement for drive-through facilities as conditional uses in C-1 zoning districts. Mr. Johnson testified that the proposed use would not include any new construction and would be added to a recently completed building. He explained that the SEPA review for the existing building accounted for the potential addition of a drive-

through facility. Mr. Johnson further explained that the City is currently in the process of constructing a signalized intersection at Andis Road and South Burlington Boulevard. He testified that City Public Works staff reviewed the proposal and determined that traffic impacts would be controlled for by installing striping and signage, which the City incorporated into its recommended conditions for CUP approval. *Testimony of Mr. Johnson.*

8. Applicant Representative Rex Orkney testified that the proposed development was designed in collaboration with the City. He noted that, in compliance with the traffic concurrency plan for the recently completed building, the Applicant has made financial contributions in excess of \$275,000 to mitigate traffic impacts and has made right-of-way improvements. Mr. Orkney explained that the right-of-way improvements included widening the vehicular access tunnel to permit two lanes of egress by the drive-through facility, as well as sidewalk design modifications to increase pedestrian safety. *Testimony of Mr. Orkney.*

#### Staff Recommendation

9. City staff reviewed the proposal and determined that, with conditions, it would comply with all applicable code requirements and would meet the specific criteria for CUP approval. *Exhibit 1, Staff Report, page 6.*

### **CONCLUSIONS**

#### Jurisdiction

The Hearing Examiner is vested with the duty and authority to hold public hearings and render decisions on Type III land use decisions, including conditional use permit requests. *BMC 14A.05.060.C.7; BMC 14A.05.140; BMC 17.120.120.*

#### Criteria for Review

The Hearing Examiner shall only approve a request for a conditional use permit if it is consistent with the following criteria:

1. The use will have no more adverse effect on the health, safety or comfort of persons living or working in the area, and will be no more injurious, economically or otherwise, to property or improvements in the surrounding area, than would any use generally permitted in the district. Among matters to be considered are traffic flow and control, access to and circulation within the property, off-street parking and loading, refuse and service areas, utilities, screening and buffering, signs, yards and other open spaces, height, bulk and location of structures, location of proposed open space uses, hours and manner of operation, and noise, lights, dust, odor, fumes and vibration; and
2. The proposal is in accordance with the goals, policies and objectives of the comprehensive plan; and

3. The proposal complies with all the requirements of this title; and
4. The proposal can be constructed and maintained so as to be harmonious and appropriate in design, character, and appearance with the existing or intended character of the general vicinity and provides a high quality of development; and
5. The proposal will not adversely affect the public infrastructure.

*BMC 14A.05.140.D.*

The criteria for review adopted by the City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

#### Conclusions Based on Findings

1. **With conditions, the use would have no more adverse effect on the health, safety, or comfort of persons living or working in the area, and would be no more injurious, economically or otherwise, to property or improvements in the surrounding area than would any use generally permitted in the C-1 zoning district.** The City provided reasonable notice and opportunity to comment on the proposal. The City did not receive any comments on the proposal in response to its notice materials. The Applicant proposes to establish a drive-through facility for a 2,455 square foot restaurant on the ground floor of a mixed-use development. Drive-through uses are allowed as a conditional use in a C-1 zoning district when located on a tenant pad on an existing development site. City staff determined the proposed development would be located on an existing tenant pad.

The City determined that the MDNS SEPA threshold determination issued for the building in which the development would be located accounted for the potential addition of the drive-through facility and, therefore, no additional SEPA review would be required for the proposed drive-through facility use. The property currently contains sufficient parking, loading, utilities, and screening; the addition of a drive-through facility would not alter these factors. The proposal would have no more impact on public infrastructure, traffic, or utilities than the construction of a conventional restaurant, a use that is permitted in the C-1 zoning district without a conditional use permit. The Applicant would be required to pay impact fees and system development charges to offset a proportionate share of the traffic impacts associated with the proposed use. The Applicant has already paid impact fees to offset fire and park system impacts under the permit of the existing building (Land Use Permit 4-20). The proposed use would not include any exterior additions or significant modifications to the existing structure. Accordingly, the proposed project would not create any additional impervious surface area that could impact stormwater runoff on the property.

*Findings, Conclusions, and Decision  
City of Burlington Hearing Examiner  
Andis Road Drive-Through CUP  
No. CUP 8-21*

Conditions are necessary to ensure that the Applicant completes the development in a timely manner and complies with the approved plans, the requirements of the municipal code, and all applicable building, fire, and safety code requirements. *Findings 1 – 9.*

2. **The proposal would be in accord with the goals, policies, and objectives of the City’s Comprehensive Plan.** The Comprehensive Plan designates the subject property and all adjacent properties as Commercial-Business. The proposed addition of a drive-through facility to a mixed-use structure would be consistent with Comprehensive Plan land use, commercial, and special planning districts policies encouraging a wide range of opportunities for residents and businesses; intermodal access; balance of incomes, jobs, and housing; minimization of new traffic impacts; and streetscape continuity. *Findings 1, 4 – 9.*
3. **With conditions, the proposal would comply with all the requirements of the municipal code.** As conditioned, the proposed facility would meet all development standards applicable to the C-1 zoning district, including standards related to minimum lot area and parking. There are no landscaping or stormwater management requirements associated with the proposal because it would not include any exterior additions or other significant site improvements. *Findings 1, 5 – 9.*
4. **The proposal would be constructed and maintained so as to be harmonious and appropriate in design, character, and appearance with the existing or intended character of the general vicinity and would provide a high quality of development.** The area surrounding the subject property is characterized by a mixture of commercial and residential uses. The South Burlington Boulevard corridor has several other drive-through establishments. The Applicant is proposing to establish a drive-through facility at an existing mixed-use building. Accordingly, when completed, the drive-through facility would be harmonious with surrounding uses. *Findings 1, 5 – 9.*
5. **The proposal would not adversely affect the public infrastructure.** City Public Works staff reviewed the proposal and did not raise any concerns about the project’s impacts to traffic, parking, or utilities. The proposed drive-through facility would not adversely affect the public infrastructure as compared to the construction of a new conventional restaurant, which is a use that is permitted outright in the C-1 zoning district. As addressed above in Conclusion 1, the property currently contains adequate parking, loading, utilities, and screening for the proposed use. The Applicant would pay proportionate traffic impact fees and already has paid impact fees to offset fire and park system impacts under the permit for the existing building. *Findings 1, 5 – 9.*

## DECISION

Based on the preceding findings and conclusions, the request for a conditional use permit to establish a drive-through facility on the ground floor of a mixed-use building at 989 South Burlington Boulevard is **APPROVED**, with the following conditions:<sup>3</sup>

1. This approval shall not be construed to authorize any development or site modifications beyond those described in the application and shown on the approved plans. The approved plans shall be the plans and other project documents attached to, or referenced in, this decision. This decision permits the use of a drive-through facility at an existing mixed-use building.
2. Except as otherwise required by the conditions of approval identified in this decision all work, construction, and development activities shall conform to the approved plan. The approved plans shall be the plans and other project documents attached to, or referenced in, this decision. Minor modifications necessary to implement any changes requested by the Building Official, Fire Marshal, or City Engineer are permitted when necessary to ensure compliance with established regulatory requirements.
3. This approval shall expire two years from the date of approval unless the use authorized by this decision is initiated within two years of the date of this decision.
4. This permit does not authorize the location, design, construction, or installation of any signs. No signs may be installed unless authorized by a sign permit.
5. Storage, handling, and disposal of hazardous substances shall be limited to minor quantities which are clearly secondary and incidental to the primary use permitted by this decision.
6. A signage and striping plan illustrating the proposed on-site traffic circulation and controls shall be submitted to, and approved by, the City Engineer. No building permit shall be issued until the signage and striping plan has been approved by the City Engineer. No final occupancy or inspection shall be approved until all of the required improvements shown on the approved signage and striping plan have been installed and inspected by the City Engineer.
7. A “Fats, Oil, and Grease Discharge Survey” (FOG) for the restaurant utilizing the drive-through facility shall be completed and submitted to the City Sewer Supervisor. No building permit shall be issued until the FOG has been submitted.

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<sup>3</sup> Conditions include both legal requirements applicable to all developments and requirements to mitigate the specific impacts of this development.

8. Plans for any required grease traps or sewer connection improvements specified by the City Sewer Supervisor shall be submitted to, and approved by, the City Sewer Supervisor. No building permit shall be issued until the required plans have been submitted and approved. No final occupancy or inspection shall be approved until the Sewer Supervisor has inspected and approved any required grease trap or sewer connection improvements.

DECIDED this 12<sup>th</sup> day of May 2022.



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ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center