

**TUMWATER HEARING EXAMINER PUBLIC HEARING
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CONVENE: 7:00 p.m.

CASE NUMBER: **Kingswood Commercial TUM-22-1731 and TUM-22-1732**

DESCRIPTION OF PROPOSAL: Applicant requests approval to construct a seven-lot commercial Binding Site Plan with associated landscaping, infrastructure, and parking and open space. The Applicant submitted a Variance application for required zoning setbacks along a portion of Littlerock Road under the requirements of the Tumwater Municipal Code.

PROJECT NAME: Kingswood Commercial Preliminary Binding Site Plan and Variance

APPLICANT: **Kingswood Capital, Inc.**
701 W Georgia Street Suite 520
IBM Tower, Vancouver, CA V7Y1A1

**PROJECT PROPONENT/
REPRESENTATIVE:** **Tyrell Bradley, LDC Corp.**
1411 Slate Ave NE, Suite 200
Olympia, WA 98506

PUBLIC HEARING: Hearing Examiner Andrew Reeves with Sound Law Center convened the public hearing at 7:00 p.m. to consider the applicant's request for a Preliminary Binding Site Plan and Variance for construction of a seven-lot commercial binding site plan with associated landscaping, infrastructure, parking, and open space.

Examiner Reeves reported the purpose of the hearing is to collect evidence in the form of exhibits and testimony to determine whether the proposal complies with the City's Comprehensive Plan, zoning ordinances, Critical Areas Ordinances, and the specific requirements for a Preliminary Binding Site Plan to allow for a seven lot commercial development with associated open space, parking, landscaping and infrastructure and a Variance from required zoning setbacks along a portion of Littlerock Road under the requirements of Tumwater Municipal Code (TMC).

Examiner Reeves reported that prior to the public hearing he received and reviewed the following 27 exhibits:

Exhibit 1 Staff Report
Exhibit 2 Preliminary Binding Site Plan Preliminary Development Plans
Exhibit 3 Vicinity Map
Exhibit 4 Notice of Application
Exhibit 5 MDNS with SEPA Checklist (TUM-22-1724)
Exhibit 6 Public Hearing Notice 06-16-2023
Exhibit 7: Preliminary Binding Site Plan Application

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Exhibit 8: Variance Application
Exhibit 9: Variance Narrative – Applicant
Exhibit: 10 Variance Request Exhibit
Exhibit: 11 Zoning Map
Exhibit 12: Public Notice Certification
Exhibit 13: Notice of Application Comments
Exhibit 14: MDNS Comments
Exhibit 15: Transportation Concurrency Determination 03-01-2023
Exhibit 16: Drainage Report
Exhibit 17: Geotechnical and Stormwater Evaluation
Exhibit 18: Traffic Impact Analysis with Exhibits 05-25-2022
Exhibit 19: Tumwater Water and Sewer Availability Certificate
Exhibit 20: Mazama Pocket Gopher Studies
Exhibit 21: Foresters Report
Exhibit 22: Preliminary Landscape Plan
Exhibit 23: Formal Site Plan Review Letter (TUM-22-0234)
Exhibit 24: Home Depot Approval Letter
Exhibit 25: Title Report
Exhibit 26: Land Use Map
Exhibit 27: Indemnity Agreement

Examiner Reeves admitted the 27 exhibits into the record in addition to Exhibit 28 and 29 added during and after the hearing.

Examiner Reeves reported all testimony will be under oath or affirmation because if the decision should be appealed, the audio recording of the hearing, admitted exhibits, and the decision would serve as the foundation for an appeal. The order of testimony begins with the City of Tumwater providing an overview of the proposal and any recommendations, testimony by the Applicant to present any additional information, testimony from the public, and closing arguments by the City of Tumwater and the Applicant.

CITY TESTIMONY: Examiner Reeves administered the oath to Tumwater Associate Planner Alex Baruch.

Planner Baruch reported the Applicant is requesting approvals of a Preliminary Binding Site Plan (TUM-22-1732) and Variance (TUM-22-1731). The proposal is to subdivide two parcels totaling approximately 9 acres into a seven-lot commercial development with associated open space, parking, and infrastructure. The property is located at 1401 and 1551 Kingswood Drive SW, Tumwater, WA 98512 within the General Commercial zone district. The property is vacant with the exception of Bonneville Power Administration (BPA) stanchions on the western portion of the property and existing vegetation and trees. The topography of the property is mostly flat with some small changes in topography.

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Surrounding properties are zoned General Commercial to the north and east, Mixed Use to the south, and both General Commercial and Single Family Low Density to the west. The Aquifer Protection Overlay District also applies to the property. The overlay district restricts hazardous uses to protect aquifer recharge areas. The proposed commercial uses include three fast food restaurants, oil change service station, one seated restaurant, retail and office space, a hotel, and an electric vehicle charging station and are not restricted land uses in the Aquifer Protection Overlay zone district.

The proposed improvements are reflected on the Preliminary Site Development Grading Plan and include connections to the surrounding road network, grading, infrastructure, and open space. All new utilities on site will be underground pursuant to the TMC. Additionally, a Variance has been requested to reduce the required 20-foot setback from a residential zoned property to zero. The request is for a portion of the property along Littlerock Road abutting lots 3, 4, and 5. The Single Family Low Density zone property is owned by the Tumwater School District for school uses. The site is designated as for Public Institutional uses on the City's Future Use Map. Staff reviewed variance criteria listed in 18.58.040 and found there are unique circumstances that would not allow for the reduction in setback requirements. Some of the conditions include Littlerock Road, a boulevard style street with trees down the middle-of-the-road allowing for a visual separation and a minimum 60-foot right-of-way separating the properties. Additionally, the intent of the code is met through right-of-way separation to meet the 20-foot minimum.

In terms of the regulatory framework, the Preliminary Binding Site Plan application was submitted. A Notice of Application was issued on December 15, 2022. During the Notice of Application comment period, the Nisqually Indian and the Squaxin Island Tribes submitted comments about the project and requested a Cultural Resources Study prior to issuance of any grading permits on the property. Condition 2 was included in response to that request.

Concurrently, the project was reviewed by the City of Tumwater Transportation Manager. The Transportation Manager issued a transportation concurrency ruling stating that traffic generated from the project would cause level of service (LOS) at Kingswood Drive and Tyee Drive to fall below the City's level of service standard and that mitigation would be required by the construction of a compact roundabout at that intersection prior to the issuance of the first Certificate of Occupancy. Additionally, trips are proposed to be routed through the Tumwater Boulevard I-5 interchange requiring payment of mitigation fees or the construction of required interchange

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improvements.

The City reviewed a SEPA Environmental Checklist and other information submitted by the applicant. A Mitigated Determination of Nonsignificance (MDNS) was issued on May 19, 2023. No appeals of the SEPA threshold determination were filed. During the SEPA comment period, Washington State Department of Ecology provided specific comments related to elements of construction activities but no immediate concerns regarding the land use application.

A public hearing notice was mailed on June 16, 2023. Notices for all three processes were mailed to property owners located within 300 feet of the subject property and to various agencies, posted on-site, and published in *The Olympian*.

Staff finds that the Preliminary Binding Site Plan, Variance request, and conditions conform to the Comprehensive Plan, Tumwater Municipal Code, planning standards, development standards, and policies of the City of Tumwater. Adequate provisions have been made for public health, safety, and general welfare and that public use and interest would be served by the proposal. Staff recommends approval of the Preliminary Binding Site Plan and Variance application with the attached conditions.

Planner Baruch offered to answer any questions.

Examiner Reeves said he understands the City is already experiencing traffic issues at more than one intersection near the project site with several intersections operating at a lower level of service. The City's analysis has indicated the project would add additional trips; however, the Applicant would be providing mitigation through the recommended conditions but also because the requirements under the SEPA MDNS require addressing traffic LOS. The LOS problem has already been acknowledged by the City within the Six-Year Transportation Improvement Program and other City plans. The concept of growth paying for growth would likely be solved by the improvements required to address the traffic issues. Examiner Reeves asked for confirmation as to whether his synopsis was accurate. Planner Baruch responded that the I-5/Tumwater Boulevard interchange improvements are in alignment with growth paying for growth because the impacts from the project to that area would be addressed through the payment of mitigation fees. The project would create the need to install a roundabout, which is included in the development application with the developer paying for construction of the roundabout as part of the project.

Examiner Reeves said the roundabout is located north of the

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interchange based on the location of the project site. Technically, interchange improvements would not be considered frontage improvements for the project, as the interchange is not located adjacent to the property; however it appears the determination identified the number of trips anticipated to result from the development that would affect the interchange. It appears the construction of the roundabout would address the immediate area's problems. In other areas of the City, mitigation fees are assessed to address the I-5/Tumwater Boulevard interchange LOS. It appears there are two separate transportation issues and the project, through the construction of the roundabout, would address the immediate local issue as well as address the larger issue of interchange LOS through traditional transportation impact fees. He asked whether his interpretation was correct.

Planner Barack affirmed his interpretation as correct.

Examiner Reeves referred to the exhibits and indicated one of the exhibits was comprised of blank pages. The label of the exhibit indicates 2a, but the remaining pages are blank. Page 205 is identified as *Attachment A Exploration Logs* with the remaining information comprised only of blank pages. He conceded that it could have been a user issue on his end. Planner Baruch offered to forward a new file.

Examiner Reeves asked for review of Exhibits 26 and 27 because they are late submittals. Planner Baruch explained that Exhibit 26 is a Comprehensive Plan Future Land Use Map reflecting the school property designated for future use as Public Institutional. The information helps to explain that although Single Family Low Density is the current zoning designation, future use would be for a school purpose.

Examiner Reeves asked whether the Variance request would not have been necessary if the City Council had changed the zoning to reflect Public Institutional as the intent is to use the property for school purposes. Planner Baruch affirmed that the future intent of the property is to remain school property.

Planner Baruch described Exhibit 27. Originally, staff proposed a BPA land use agreement to be executed between the Applicant and BPA to enable the project to move forward with development grading on the project. However, it was important the City had some assurances City infrastructure would be available for future use. The Indemnity Agreement was an alternative to indemnify the City and hold the property owner accountable moving forward to maintain the infrastructure and other maintenance requirements under the power lines into the future as part of the development.

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Planner Baruch identified the location of the BPA easement using a site map. The stanchions are located on both sides of the road entering the subject property. The transmission power lines are at a substantial height.

Jeff Myers reported he is an attorney practicing in the City of Olympia and is representing the City of Tumwater. BPA executed easement agreements for the power transmission lines with all underlying property owners. The lines are located at considerable height and supported by the stanchions including the two towers as described by Planner Baruch. The easement rights enable BPA to maintain the transmission lines free from interference by the underlying property owner or other parties that might have acquired rights to a property. The easement enables BPA to remove anything that might interfere with the electric transmission lines. The City's standard approach is to execute an agreement between the property owner and the BPA to ensure the property owner can proceed with the development. The City's review of the site plan did not reflect anything that would create any interference and it was important to ensure protection of any future City infrastructure. In the event a future action requires removal of structures, the action would be at the expense of the property owner. Any liability associated with using the easement would not be the responsibility of the City, which is why the Indemnity Agreement was executed and is included as Exhibit 27. Essentially, the Indemnity Agreement covers any liability that might arise from BPA's easement rights that would be resolved by the property owner and their successors. The Indemnity Agreement is attached to the land.

Examiner Reeves entered the City's email communication to his office as Exhibit 27.

Examiner Reeves reported that procedural communication with his office speaks to amending language for one of the proposed conditions.

Planner Baruch explained that the amendment adds a sentence to the existing language.

Examiner Reeves entered the procedural email as Exhibit 28 and asked Planner Baruch to cite the additional language for the record.

Planner Baruch said the additional language states, "Alternatively, an Indemnity Agreement shall be agreed upon and approved by the City to be recorded by the Applicant against the subject property prior to site development grading issuance." The agreement has been signed and notarized but not recorded. The first section of the agreement is a

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provision providing the Applicant with an option to pursue the land use approval with BPA; however, if for some reason the Applicant no longer wanted to record the Indemnity Agreement and would prefer the land use approval process with the BPA, the City wanted to ensure that those opportunities were available.

Examiner Reeves confirmed the submittal as Exhibit 28 as the additional information clarified the matter.

**APPLICANT
TESTIMONY:**

Examiner Reeves administered the oath to Tyrell Bradley.

Tyrell Bradley reported he is the Applicant's civil engineer and is serving as the project manager. He is with LDC (Land Development Consultants) Corporation.

Examiner Reeves asked Mr. Bradley to address any concerns with respect to Exhibit 28.

Mr. Bradley reported the Indemnity Agreement is to provide the City with more assurance as the BPA in the 1930s installed infrastructure and recorded easements against properties. Those easements were somewhat flexible and afforded property owners the ability to remove trees but not place structures within the boundaries of the easement. During the 1970s, the BPA recorded new easements for the properties requiring property owners to complete BPA's land use approval process to construct any structure under the power lines. The prior property owner refused to sign the new agreement and insisted on retaining the original agreement. The project is unique because the properties abutting both sides of the subject project have updated easements with BPA to pursue a land use approval process, which would essentially indemnify the City, as the BPA would approve the infrastructure under the power lines. The subject project is unique as the owner does not need to seek approval from the BPA, which places the City in a risk position should the BPA later decide to move power poles, which is the purpose of the Indemnity Agreement.

Examiner Reeves conveyed appreciation for the explanation as it provides some historical information as to the particular situation. He noted that staff has conveyed that the agreement has been signed and notarized but not recorded. It might be possible that the agreement may not be recorded instantaneously, as there is a second option for the property owner to update the agreement with BPA to place the property under the 1970s provisions. It appears the Applicant has two paths forward.

Mr. Bradley affirmed the possibility. The property owner also owns other properties within BPA easements and has completed BPA's land

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use process. Mr. Bradley said he has also completed a BPA land use process. Nothing in the proposal is outside what BPA has approved previously. If the Applicant should elect to pursue that avenue, the development team is confident that it would be a viable site.

Examiner Reeves said the option affords the Applicant with some flexibility until the project commences. Mr. Bradley said that summation is accurate.

Examiner Reeves referred to the email he previously received and asked whether the additional language had been reviewed with the Applicant. He plans to convert the information to a PDF format to ensure it is part of the official record as Exhibit 28 and wants to ensure the Applicant agrees there is no issue with the additional language.

Mr. Bradley agreed that the change to Condition 52 based on the additional language would be appropriate.

Mr. Myers disconnected from the meeting.

Examiner Reeves invited Mr. Bradley and other members of the team to provide any additional details or clarifications.

Mr. Bradley advised that he has no comments pertaining to the Variance or the application materials reviewed by Planner Baruch. However, further clarification is offered on the roundabout at Kingswood Drive and Tyee Drive. When the project was initially proposed, the traffic engineer learned existing level of service at the intersection was rated "F." The Applicant proposed restriping to provide a left turn pocket from Tyee Drive heading north so a vehicle had the option to wait in the lane until the roundabout opened for northbound movement.

For the benefit of the discussion, Planner Baruch displayed an illustration of the current intersection.

Mr. Bradley said that following the recommendation to restripe the roundabout, the Transportation and Engineering Director indicated the City preferred a more robust option. The first option consisted of a stop-controlled intersection. However, that option would not be allowed on Tyee Drive, as the roadway is a non-stop controlled roadway. The second and only viable option was a compact roundabout. The intersection is not identified on the Transportation Improvement Plan as the road is only 20 years old. He and Director Hicks discussed options given that the roadway was 20 years and designed initially for commercial uses. The parties agreed the City and the Applicant would work together and use some of the

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transportation impact fees at building permit to help offset the cost of the compact roundabout. During those discussions, Mr. Bradley said that it was acknowledged that the failed intersection was not the result of the proposed project but was caused by multiple commercial entities and that fees contributed by the Applicant would be substantial to construct an expensive resolution. Additionally, the roundabout is some distance from the subject property and clearly not near the project site. Mr. Bradley identified on the map the location of the subject property and the location of the intersection located approximately 1,000 feet west of the project site.

The Applicant believed there could be the possibility of double dipping by paying a transportation impact fee and constructing the offsite infrastructure. However, the City is willing to work with the Applicant to offset some of the cost through the utilization of the Transportation Impact Fee Fund.

Examiner Reeves said he wants to ensure that the provisions within the proposed conditions would not create any problems with the proposal for the City to work with the Applicant to reduce some of the costs associated with offsite infrastructure improvements. He cited language within the MDNS for the project. It appears the discussions with City staff have involved acknowledgment of some leeway for the mitigation fee based on the cost of construction of the roundabout. Planner Baruch verified that the discussions with Director Hicks have confirmed the ability to use funds collected by transportation impact fees across the City for transportation improvements and that offsetting costs is within the Director's ability following the issuance of the MDNS to enable the Director to work with the Applicant to address concerns.

Examiner Reeves said it would be important to clarify that the mitigation measure is not the roundabout but that it represents LOS F at I-5/Tumwater Boulevard freeway ramps affected by more than one project. However, mitigation fees have been identified to pay partially for those improvements. Additionally, the second issue of the Kingswood Drive/Tyee Drive roundabout reflects missing information or lack of acknowledgment within mitigation measures that the Applicant would be unfairly required to construct the roundabout at Kingswood Drive and Tyee Drive because of other development contributing to the LOS. Because of the lack of any latecomer agreements with other properties and no prior projects paying fees, staff believes that some of the mitigation fees related to the Tumwater Boulevard mitigation could be reduced to assist in offsetting costs to the Applicant for construction of the roundabout. He inquired as to whether his summation of the situation was accurate.

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Planner Baruch explained that mitigation fees of \$4,219 are only specific to the I-5/Tumwater Boulevard roundabout and cannot be used for other projects in the City. Separately, traffic impact fees (TIF) are collected based on the use of a property and are not part of the mitigation package. Those fees are assessed for each building permit for potential transportation impacts created by the new uses. The fees are not referenced in the MDNS but are separate fees required at the time of building permit issuance. The prior explanation speaks to the use of some of those fees contributing to the mitigation measure for the Kingswood Drive/Tyee Drive compact roundabout.

Examiner Reeves said that since his oversight does not pertain to the MDNS, it would be helpful to review the proposed conditions for the particular issue to ensure the condition is accurately reflected.

Mr. Bradley cited page 347 of the Staff Report to provide additional clarification. The lots are listed on the page. The SEPA mitigation fee is the fee assessed for the I-5 interchange. Each lot must pay fees for improvements to the I-5 interchange off Tumwater Boulevard. The information also speaks to the TIF assessment per lot. Those funds are accessible to the City to help offset the construction of the roundabout by the Applicant.

Examiner Reeves said his objective is to ensure the conditions captures the concept the City and the Applicant have agreed to implement as it pertains to the roundabout at Kingswood Drive and Tyee Drive. Some suggested language could state that the City has the discretion to reduce fees to account for the desired outcome.

Mr. Bradley agreed because it is a goal the Applicant would like to achieve as well. The Applicant would prefer to include those provisions within a condition because the concept has only been discussed between the parties (City and Applicant).

Planner Baruch supported the proposal explaining that he does not believe there would be any hesitancy on the part of the City to include a condition addressing the contribution by the City to help offset construction costs of the roundabout. Staff can meet with Director Hicks to draft language for a condition.

Examiner Reeves recommended the condition should be a standalone exhibit and indicated it would be entered as Exhibit 29. The condition ensures the City has the discretion and it ensures the provision has been captured to avoid any future issues.

Mr. Bradley cited another condition surrounding the requirement to construct the Kingswood Drive/Tyee Drive roundabout prior to the

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Certificate of Occupancy for the first building. However, the project's first traffic trips would not be generated until after the first lot is constructed. The Applicant would like to defer the construction date of the roundabout, as the binding site plan construction drawings have been prepared at risk while the roundabout design has recently been initiated. His concern is delaying the binding site plan based on the timing of the offsite roundabout.

Examiner Reeves said there should be an agreement that it is appropriate to ensure that the roundabout is functional before any trips are generated from the property while acknowledging that there is a difference between permits issued for infrastructure development versus permits issued for operating businesses. He asked about the condition(s) that might require alteration. Mr. Bradley said the SEPA condition speaks to the construction of the roundabout at site development grading. His goal is to clarify that condition because it could be misinterpreted as the time of site development grading of the lots or at the time of the binding site plan.

Examiner Reeves said he has no authority to alter the SEPA condition and recommended adding another condition that speaks to the parties acknowledging that the intent of the mitigation requirement under SEPA was and that as a condition of the project approval, provisions are included for the timing of the construction of the roundabout.

Planner Baruch supported adding a condition to clarify when the roundabout needs to be constructed.

Examiner Reeves recommended combining the new condition with Exhibit 29 to clarify the issues. He suggested citing the exhibit as the Joint Document between the City and Applicant Addressing Proposed Conditions.

**PUBLIC
TESTIMONY:**

Examiner Reeves acknowledged that there were no public members in attendance.

Examiner Reeves reviewed outstanding exhibits and advised staff of required actions prior to his rendering a determination on the proposals.

Examiner Reeves asked whether any changes to the City's Comprehensive Plan and zoning code would affect the proposal.

Planner Baruch advised of no changes affecting the proposal. He added that the Applicant received a copy of Exhibit 28 as previously requested by the Examiner. Examiner Reeves affirmed that he would

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convert the exhibit to a PDF format. Mr. Bradley supported the recommendation.

Examiner Reeves closed the public hearing and indicated he would render a decision within the next several weeks following receipt of the additional information from staff for Exhibit 29 by end of business hours on Friday, June 30, 2023.

ADJOURNMENT: **With there being no further business, Examiner Reeves adjourned the public hearing at 8:12 p.m.**

Prepared by Valerie L. Gow, Recording Secretary/President
Puget Sound Meeting Services, psmsoly@earthlink.net