

COURT OF APPEALS
DIVISION II

No. 383616

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

PIERCE COUNTY and NEIGHBORS UNITED FOR THE LOOP,
Appellants,

v.

ALLAN DEUTSCHER and MARIJKE DEUTSCHER,
Respondents.

BRIEF OF RESPONDENTS DEUTSCHER

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OVERVIEW

Respondents Allan and Marijke Deutscher initiated this Land Use Petition Act (“LUPA”) appeal to challenge the Pierce County Deputy Hearing Examiner’s denial of their requested conditional use permit to construct and operate an attractively designed, fully landscaped 10,000 square foot day care center in Spanaway that will serve up to 100 children. Instead, the Examiner approved a day care that was arbitrarily limited to serve 33 children in a single building not to exceed 3,500 square feet.

In response to their appeal, the Honorable Bryan Chushcoff concluded that the Examiner’s decision to limit the size and capacity of the proposed day care facility was not supported by the substantial evidence, but instead appeared to be an arbitrary reduction that was inappropriately influenced by neighborhood dissent. Judge Chushcoff correctly reversed the Examiner’s decision to limit the size of the facility and this Court should affirm that decision.

This is not the first time that the Deutschers have presented a LUPA appeal on their conditional use permit application. Following a public hearing in 2005, in which several of the neighbors appeared to express their displeasure and objection to having a day care facility in their

neighborhood, the same Examiner denied approval of the requested conditional use permit. The Examiner denied approval based primarily upon his own conclusion that the proposed day care would negatively impact traffic. The Deutschers' property is located at the intersection of Spanaway Loop Road and Military Road, and the Examiner concluded that traffic from the day care could not be adequately mitigated.

Remarkably, contrary to the Examiner's conclusion, substantial expert testimony was presented by both the Deutschers' Traffic Engineering expert and Pierce County's Traffic Engineer that measures could, in fact, be implemented to successfully mitigate the traffic that would be generated from this project. No expert analysis or study was presented to dispute the expert opinions of these two engineers. Obviously swayed by the neighbors' general discontent, the Examiner accepted the speculative lay opinions presented by these neighbors that the traffic impacts could not be mitigated, rather than accept the expert analysis on the issue presented by the engineers.

The Deutschers appealed the Examiner's decision pursuant to LUPA. The Honorable Ronald Culpepper appropriately reversed the Examiner's decision, finding that the Examiner's conclusions regarding traffic impacts were not supported by the substantial evidence in the record. Judge Culpepper found:

The undisputed expert evidence before the Hearing Examiner was that the project traffic, with the proposed mitigation, could be safely and conveniently accommodated by existing roads under the proposed designs. Therefore, it was error for the Hearing Examiner to disapprove the project on any basis relating to traffic impact, traffic volumes (existing or projected), traffic safety or other traffic factor or concern.

(Administrative Record¹ (“AR”) 160.)²

Judge Culpepper determined that it was unclear from the Examiner’s decision whether the Examiner fully considered the conditional use permit criterion with regard to factors other than traffic. Accordingly, the Court remanded the matter back to the Examiner for further proceedings so that the Examiner may consider “the size of the project and its compatibility with the neighborhood as to matters other than traffic.” (AR 160-161.) The Court also indicated that the Deuschers could present revised designs to address specific concerns relating to size and compatibility. (*Id.*)

¹ Pierce County has certified and filed a copy of the record that was created before the Hearing Examiner in the proceeding that is the subject of this appeal. Pierce County has numbered each individual page of the certified record. The administrative record was not renumbered with Clerk’s Paper numbers. Citations to that certified record will be preceded with “AR” and followed by the page number assigned by the County when the record was compiled and certified.

The verbatim transcript of proceeding of the public hearing before the Pierce County Deputy Hearing Examiner conducted on January 10, 2008 has been assigned Clerk’s Paper numbers. (*See* Clerk’s Paper (“CP”) 292-366.) Accordingly, citations to the verbatim transcript will be through reference to the corresponding Clerk’s Paper number.

² For convenient reference, Judge Culpepper’s LUPA Order (AR 159-62) is attached as Appendix A to this brief.

Thus, the Deuschers' conditional use permit application and proposed day care was again presented at a public hearing. As before, neighbors appeared to express their general displeasure at the possibility of having a day care center in their immediate neighborhood. Though Judge Culpepper clearly ruled that traffic impacts had been fully addressed and should not be considered further in the remand proceeding, the neighbors again focused their comments on traffic. They complained, again without substantiation, that a facility designed and staffed to serve 100 children would generate too many negative traffic impacts. The neighbors also speculated that the children at the day care center would generate too much noise to be compatible with the neighborhood and that there was not a demand for the facility. Finally, the neighbors complained about the size of the building (10,000 square feet), as compared to the purported "typical" house size in the neighborhood, without consideration of the screening that would be provided by the planned landscaping.

The Deuschers were able to address all of the neighbors' non-traffic related concerns. Because the Deuschers operate several other day care centers that are similar in design and size and are also located in residential neighborhoods, the Deuschers were able to present testimony that their well-designed and well-managed facilities have blended, fit in well and have been compatible with the surrounding residential

neighborhoods. Though not required to do so, the Deuschers presented evidence that the area is underserved with regard to quality day care facilities, and that there is indeed a demand for their proposed center. With regard to the size of the building, the Deuschers offered an alternative site design comprised of three buildings, with each building being less than 3,500 square feet in size. Notably, if the Deuschers developed their property for residential use, under the current zoning code, the Deuschers could construct up to five homes on this same property.

Once again, the Examiner was swayed by the general neighborhood opposition and the neighbors' speculation that the proposed day care center is too intense to be compatible with the neighborhood. Despite that the Examiner expressly found that

- the proposed design of the facility is compatible with the home designs in the surrounding area;
- the proposal aesthetically meets all of the location criteria as an attractive one story facility under the Comprehensive Plan; and
- the proposed 100 children Day Care will not be detrimental to the public health and safety, and will not be injurious to the uses and property in the neighborhood,

the Examiner again refused to approve the requested 100-child day care facility. The Examiner summarily concluded that the day care facility, as proposed, was too large and too intense to be compatible with the

surrounding vicinity, and then arbitrarily limited development on the site to a 3,500 square-foot facility that would serve no more than 33 children. Contrary to Judge Culpepper's instruction, the Examiner again based his decision on unsubstantiated assertions regarded purported traffic impacts. To support his decision, the Examiner found: "The traffic of a smaller facility would have less impact on the neighborhood." (AR 35 at Finding 37.)³ The Examiner gave little other justification for his decision beyond recognition of the neighbors' objection to the proposed day care.

Beyond the supposed traffic impacts, the findings reflect that the Examiner based his decision on the general dissent of the neighborhood.

The Examiner stated in his Findings:

...all members of the residential neighborhood who testified by petition, or at both hearings of the Advisory Committee and before the Examiner were in solid opinion that the proposed day care facility of 100 children was not compatible in size density and intensity with the neighborhood. (AR 33, Finding 22.)

* * *

The substantial and overall heavy weight of testimony from the area of citizenry is that the heavy commercial use in the heart of an old established residential neighborhood is not compatible with the surrounding residential uses. (AR 34, Finding 32.)

³ The Examiner's January 24, 2008 Decision and his subsequent January 30, 2008 Decision with Conditions are attached to the Appellants' Brief as Appendix B and C, respectively.

The law in Washington is clear, however. Projects cannot be denied based upon general community displeasure. *Maranatha Mining vs. Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990).

The Deutschers presented a well-designed proposal that is compatible with the Comprehensive Plan and the surrounding neighborhood. Perceived incompatibility is based on no more than speculation and a general opposition to having a day care facility in the neighborhood, despite authorization for this use in the applicable County Code and Comprehensive Plan. Like the superior court below, this Court should reverse the Examiner's decision to limit the facility to 3,500 square feet and 33 children, and should direct the Examiner to approve the facility as proposed by the Deutschers.

ASSIGNMENTS OF ERROR

Respondents Deutscher agree with the superior court's decision and did not file a cross appeal. Thus, the Deutschers are not required to make assignments of error. However, the Deutschers note that, since they appealed the Hearing Examiner's decision pursuant to LUPA, the Deutschers included in their Land Use Petition Act Petition statements of error as required by RCW 36.70C.070(7). (CP 6-8.) In their statements of error, the Deutschers assigned error to the Examiner's finding of fact numbers 14, 18, 20-22, 27, 30-39 and 41-42. (*Id.*) The Deutschers also

assigned error to the Examiner's conclusion numbers 6-11 and 42. (*Id.*) Though it is not required in order to preserve the Deuschers challenges in their LUPA appeal, the Deuschers incorporate by reference the statement of errors set forth in the Petition filed with the superior court.

STATEMENT OF THE CASE

A. The Deuschers' Property And Proposed Day Care Center

The Deuschers own 1.58 acres of unimproved real property located at 14510-16th Avenue Court South in the Spanaway area ("Property"). The Property is located at the corner of the intersection of Old Military Road and Spanaway Loop Road South, which is the busiest intersection in the area. (AR 53, AR 55, AR 30, Finding 3, AR 220.)

On August 26, 2002, the Deuschers applied for a conditional use permit to construct and operate on their property a Spanaway Kids Kampus Daycare – a 100-child day care center. (AR 53.) The project, as currently proposed, consists of a one story, 25-foot high, 9,990 square foot building, with exterior playground and ball field areas, and a 37 space parking lot. (AR 53; AR 30, Finding 3; CP 295-96.) The proposed access to the day care center utilizes both 16th Avenue Court South/Old Military Road and Spanaway Loop Road. (*Id.*) The day care center will be served by public roads, public water, and an on-site septic system. (*Id.*)

The Property is designated with the Moderate Density Single-Family zoning classification ("MSF"), which zoning classification allows

the construction and operation of day care facilities upon the issuance of a conditional use permit.⁴ (AR 30, Findings 3-4, AR 53.) The Pierce County Comprehensive Plan encourages the location of community facilities such as day care facilities within close proximity of residential living areas. (AR 66.) In this case, the proposed day care facility would be a convenient location for residents in the immediate community, as well as for parents commuting to work via Spanaway Loop Road and Military Road, since both roads serve as commuting routes for residents in the immediate area and in east and south Spanaway, Fredrickson and portions of Graham. (CP 300.)

The neighborhood immediately surrounding the Deuschers' property is primarily residential. There are, however, large commercial and recreational establishments located east of the site, including Sprinker Field and Recreational Center on Military Road, a small mall, Spanaway Park, Spanaway Golf Course and strip commercial establishments along Pacific Avenue. (AR 31, Findings 9-10.)

⁴ This appeal involves a land use application that is vested under prior zoning. At the time of the Deuschers' application, day care facilities for up to 24 children were permitted outright and day cares for more than 24 children were allowed upon approval of a conditional use permit. (CP 302.) Since the Deuschers filed their land use application in 2002, the property has been redesignated through the Parkland Spanaway Midland Community Plan as within the Rural Resource Zone ("RR"), which is primarily a single family residence zone and allows up to three homes per acres. (CP 363.) Under the current RR zone, all day care facilities require a conditional use permit and day care facilities in this zone may not serve more the 24 children. (CP 363-64.)

B. The First Public Hearing And Hearing Examiner Decision And Its Reversal By The Superior Court

As noted earlier, the Hearing Examiner decision before the Court in this LUPA appeal is not the first Examiner decision on the Deuschers' conditional use permit application. Their application was first brought to a public hearing before Pierce County Deputy Examiner Keith McGoffin on December 1, 2005. (AR 53-54.) The Pierce County Planning Staff presented the application at the hearing with a recommendation of approval with appropriate conditions. (AR 127, AR 141-43.)

At the first hearing, the primary focus of the testimony from experts, Staff and the public was on the impact the proposed day care facility will have on traffic. (See AR 142-148.) The Deuschers' traffic engineer testified that because of the availability of two driveways, as well as the time of the projected traffic trips, the day care would have little impact on the traffic. (See AR 143-144.) Pierce County's Traffic Engineer also testified as to the existing traffic conditions and accepted the conclusions of the Deuschers' Traffic Engineer. The County Engineer testified that there were no significant safety or other traffic issues or impacts associated with the project. (AR 144-145.) While the neighbors disagreed with the analysis of the Deuschers' traffic expert and the County Engineer, they presented no expert testimony or data to support

their lay opinion that the proposed day care facility will result in traffic impacts. (*See* AR 145-148.)⁵

On January 20, 2006, the Examiner issued its Findings, Conclusions and Decision, which denied the Deutchers' application for a Conditional Use Permit to develop the Kids Kampus Daycare. (AR 138-153.) Despite overwhelming evidence to the contrary, the Examiner embraced the neighborhood opposition and based his denial on his belief that additional traffic could not be successfully added without significant additional impacts to the already congested Spanaway Loop and Military Roads. (AR 151-152.) The Deutchers' appealed the Examiner's decision pursuant to the LUPA under Pierce County Superior Court Cause No. 06-2-05159-4, and the matter was heard by the Honorable Ronald Culpepper.

Judge Culpepper ruled that the Examiner's decision, to the extent that it was based on traffic impacts, was not supported by the substantial evidence in the record. (AR 160.) Judge Culpepper ruled:

The undisputed expert evidence before the Hearing Examiner was that the project traffic, with the proposed mitigation, could be safely and conveniently accommodated by the existing road under the proposed design. Therefore, it was error for the Hearing Examiner to disapprove the project on any basis relating to traffic impact, traffic

⁵ The record from the prior proceeding was certified and filed with the Court in the earlier LUPA proceeding under Pierce County cause number 06-2-05159-4. (*See* AR 169-162.) Since traffic impacts are not before the Court on this LUPA appeal, it was not necessary for the Court in this appeal to consider the transcript and exhibits from the 2005 hearing.

volumes (existing or projected), traffic safety or other traffic factor or concern.

(Id.)

The Examiner had also concluded that the proposed day care was not compatible with the surrounding area, but it was unclear if that conclusion was founded upon the Examiner's conclusions with regard to traffic impacts. Accordingly, Judge Culpepper remanded the matter back to the Examiner to determine whether the Deuschers' proposal met the CUP criteria in the absence of consideration of traffic impacts. (AR 160-161.) Judge Culpepper's order provided that the Deuschers could present for consideration modified designs to address some of the concerns raised by the public in the first proceedings with regard to the size of the proposed building and its compatibility with the surrounding neighborhood. *(Id.)*

C. The Second Public Hearing

On August 24, 2007, the Deuschers submitted a revised site design and layout to address previously expressed non-traffic related concerns of the Planning Staff, neighbors and the Parkland-Spanaway-Midland Advisory Committee.⁶ (AR 23, AR 187, AR 190-93.) Specifically, the Deuschers moved the building further to the west,

⁶ Copies of the revised conceptual site plan (AR 187) and the revised conceptual landscaping plan (AR 190-93) are attached to this brief as Appendix B and C, respectively.

enlarged the entrance to further facilitate the flow of traffic in and out of the center, and moved the play area to the west, farther away from neighboring residences, to lessen potential noise impacts. Previously, the building and the outdoor play ground was located near the property line adjoining the neighbors to the north and to the east, while the parking lot was adjacent to Spanaway Loop and Military Road. (CP 295-96, 310-11.)

The Deutchers' conditional use permit application was presented for another public hearing on January 10, 2008. As with the hearing in 2005, several of the neighbors appeared to protest the proposed day care center.⁷ (*See* AR 92-109, AR 195-198, AR 201-03, AR 220-222, AR 450-61, CP 321-55.) Though the issues of traffic impacts for the project had already been decided by Judge Culpepper, virtually all of the appearing neighbors objected on the basis of claimed traffic impacts. (*See* AR 93-101, 103-105, 107-109.)

Some of the neighbors also complained about the size of the 10,000 square foot building, noting that it was approximately three times the size of most of the residences in the neighborhood, which are approximately 3,500 square feet. (*See* AR 93-94, 107-09) Note that there are also much larger homes in the area. In fact, one complaining neighbor,

⁷ The same neighbors also appeared before the Parkland-Spanaway-Midland Advisory Commission whose members also live in the general area. The Advisory Commission joined in the neighbor's dissent. (AR 59-65.)

Daniel Fox, recognized the larger homes in the area and suggested that “this building should be sized to no more than six thousand feet to be compatible with the other residences in the area.” (AR 222.)

Some neighbors speculated that the noise from the children playing in the outdoor playground would be incompatible with the surrounding residential neighborhood. (See AR 101, 104.) Others speculated that there is no need for a 100-child day care center in the area. (See AR 102, CP 295, 332-33.) Finally, some neighbors expressed fear that approval of the day care center would set a precedent for future commercial development in their neighborhood.⁸ (See AR 97-100, 105, CP 333, 327.)

The Deutchers were able to respond to each and every one of the neighbors’ unfounded concerns because they had available evidence of real life experiences with existing, similarly situated daycare facilities. Significantly, the Deutchers already own and operate Kids Kampus Daycare facilities in Pierce County and Thurston County, including facilities in Olympia, Lacey, and Dupont that are very similar to the one proposed in this case.⁹ (CP 310-11; AR 31-32, Finding, 12; AR 204.)

⁸ The neighbors also speculated that the on-site septic system would impact the water wells of nearby residences. This concern is not addressed in this brief because the Examiner did not adopt it as a basis for its decision. The neighbors’ speculative concern regarding the impact of the septic system was appropriately rejected, since the septic system cannot be installed in the absence of all required approvals from the Tacoma-Pierce County Health Department. (AR 85, AR 75; CP 301, 307, 360-61.)

⁹ A copy of the aerial photographs depicting the locations of the other day care centers (AR 204) is attached as Appendix D to this brief.

With regard to the neighbors' concerns for the aesthetic impact of the proposed day care facility, the Deuschers established that the Deuschers' day care facilities are well-run and attractively designed facilities. The Deuschers, through their planning consultant, presented photographs of their other facilities,¹⁰ which are also located in residential neighborhoods, demonstrating that the buildings are designed to and do blend with surrounding residential structures and are also landscaped to blend the facilities with the surrounding residential properties. (AR 31-32, Finding 12, CP 309-11, 319, AR 207-219.)

In direct response to neighborhood concerns about the size of the proposed building (10,000 square feet), the Deuschers offered two alternative designs utilizing multiple smaller buildings. In one design, the facility would be comprised of two approximately 4,500 to 5,000 square foot buildings. (CP 313-14, AR 205.) In the other alternate design, the facility would be comprised of three 3,330 square foot buildings¹¹ (CP 313-14, AR 206.) Notably, under the current zoning of the property, the Deuschers could construct five homes on their property.¹² (CP 363-64.)

¹⁰ Copies of the photographs presented (AR 207-19) are attached as Appendix E to this brief.

¹¹ The two-building alternate design (AR 205) is attached to this brief as Appendix F. The three-building alternate design (AR 206) is attached as Appendix G.

¹² The Deuschers believe that they could construct as many as seven homes on their property. (CP306.) The County Planner testified that the current zoning allows up to 3 homes per acre and concluded that up to five homes could be constructed on the

So the tree and vegetation removal and improved area would be substantially the same and perhaps greater if the Property was developed with homes. Though developing the day care facility with multiple structures would cost the Deutschers in terms of operational efficiencies, the Deutschers advised the Examiner that they were willing to construct one of the alternate designs to address concerns about the size of the building.¹³ (CP 313-14.)

With regard to neighborhood concerns that the day care facility, most particularly the children attending the facility, would generate too much noise, the Deutschers were also able to point to their other facilities to alleviate concerns. Again, the Deutschers' day care centers are very well run. The outdoor playground area is fenced with a six-foot solid wood fence. Children only go to the outdoor play area in small groups and they are supervised by teachers. The teachers teach the children appropriate behavior and, of course, control their noise level. (CP 312.) Notably, at the Dupont center, the facility is backed right up to the property line that adjoins neighboring houses and it has created no

Deutscher's Property. (CP 363-64.) For purposes of this briefing, the Deutschers are using the Planner's determination.

¹³ Note that the applicable Pierce County Code sets the maximum building height for buildings in the MSF Zone at 35 feet. PCC Table 18A.28.030 B.2-1. All of the buildings that the Deutschers propose, including the single 10,000 square foot building, are limited to a height of 25 feet. (AR 187, AR 205, AR 206. *See also*, AR 30-31, Findings 3 and 12.)

problems for that neighborhood. (CP 310.) In this case, the Deuschers have moved the building and play area away from the property line to accommodate noise concerns. (CP 310-11.) Additionally this proposed site is bigger than most of the Deuschers' other sites, it has approximately ½ an acre more than the Dupont site, and the Deuschers were able to include additional vegetative buffers to reduce noise. (CP 310-12.) The hours of operation are non-holiday weekdays, 6:30 a.m. to 6:00 p.m., so the facility would be silent after 6:00 p.m. on weekdays, as well as on weekends and holidays. (CP 316-17.)

The Deuschers' planner (who's own children attend the Dupont facility and is thus very familiar with the facilities' operations) testified that the other Kids Kampus Daycare facilities "fit seamlessly into the neighborhoods of Pierce County and Thurston County" and are "considered. . .good. . .neighbor[s]." (CP 310.) An analysis was conducted of the assessed values of the homes neighboring the existing facilities as compared to homes in the same neighborhood, but further away from the facility. The analysis revealed the day care facilities had no measurable negative impact on the value of the homes adjacent to the facilities. (CP 315.) No contrary testimony was presented regarding the fact that the Deuschers' other facilities are well run and have blended well with their surrounding residential neighborhoods without negative impact.

Finally, with regard to the neighbors' lay assessment that there is no need for a 100-child day care facility, the Deuschers presented evidence that the area is underserved. (CP 315-16.) As explained later in this brief, the law imposes no requirement to demonstrate need or demand for the development. Regardless, the Deuschers presented evidence that there is in fact a need for their facility.

D. The Examiner's Second Decision

Under the Pierce County Code, a conditional use permit shall be approved if evidence presented will support a finding that granting the conditional use permit will not:

1. be detrimental to the public health, safety, and general welfare;
2. adversely affect the established character and planned character of the surrounding vicinity; nor
3. be injurious to the uses, planned uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located.

(Pierce County Code ("PCC") 18A.75.030(B); AR 31, Finding 5A.)

Following review of the application, the materials supporting the application and the agency and public comments, the Pierce County Planning Staff concluded that all of the above criteria were satisfied and

recommend approval of the permit with appropriate conditions. (AR 74-81.)

On January 24, 2008, the Examiner again issued Findings, Conclusions and a Decision. (AR 21-38.) Notably, the Examiner agreed with the Planning Staff on two of the three criteria. The Examiner found:

The Examiner must find that the Permit will not be detrimental to the public health, safety and general welfare; not adversely affect the established character and planned character of the surrounding vicinity nor be injurious to the uses, planned uses, property, or improvements adjacent to and in the vicinity of the site upon which the proposed use is to be located.

The Examiner does find that the proposed 100 children Day Care will not be detrimental to the public health and safety and will not be injurious to the uses and property in the neighborhood.

(AR 33-34, Findings 28 -29.) Thus, the Examiner found that the first and third criteria (18A.75.030(B)(1) and (3)) were satisfied. Additionally, the Examiner made the following positive findings with regard to the Deuschers' proposed day care facility:

- This proposal is in general conformance with the County Comprehensive Plan and generally meets the policies and Criteria of the Plan. (AR 31, Finding 7.)
- The proposal aesthetically meets all of the location criteria as an attractive one story

facility under the Comprehensive Plan (AR 32, Finding 14.)

- The projected design of the facility, as presented by the applicants, is compatible with the home designs in the surrounding area. (AR 33, Finding 24.)
- The proposal is for a 100 child day care facility with a one story structure and a play area with parking. The applicant has similar operations in Yelm, Olympia and Dupont and the facilities are attractive buildings with landscaping to blend into the surrounding residential properties. (AR 32, Finding 12 (emphasis added).)

Error has not been assigned to any of the above positive findings of fact.

Despite the above findings, with regard to the second criteria (compatibility), the Examiner queried:

The ultimate question is: “is the location of this use not incompatible with the uses permitted in the surround area” and will not... adversely affect the established character and planned character of the surrounding vicinity”. Or, in other words, is the size, density and intensity of the proposed use compatible with the residential neighborhood surrounding this site?

(AR 34, Finding 30.) In response to that question, the Examiner concluded that a 10,000 square foot day care center serving 100 children was not compatible with the surrounding residences. (AR 34., Finding 36.) The Examiner found that:

A day care facility would be compatible if it were a size, density and intensity use similar to the surrounding residences. Traffic of a smaller facility would have less impact on the neighborhood.

(AR 35, Finding 37.)

Because several of the homes in the surrounding area are of the approximate size of 3,500 square feet, the Examiner concluded that the day care building also should not exceed 3,500 square feet. (AR 35, Finding 38.) Thereafter, the Examiner applied a simplistic analysis to reduce the number of children that the day care may serve. The Examiner concluded that, because 3,500 feet represents 1/3 of the proposed building size (10,000 square feet) and because the citizens who testified suggested (without any real analysis or basis) that the center should be limited to 24 or 50 children, the facility's capacity should be limited to 33 children, 1/3 of the capacity requested. (AR 35, Findings 39-42. *See also*, AR 6, Conditions 13 and 14.) Significantly, the Examiner gave no consideration to the Deuschers alternate design that would divide the day care facility into three separate buildings, each building being less than 3,500 square feet.

To support his decision to limit the size of the day care center, the Examiner seemed to rely exclusively upon perceived traffic impacts (in

contravention to Judge Culpepper's LUPA Order),¹⁴ the size of the building¹⁵ and general neighborhood opposition. The neighborhood opposition to a day care facility clearly had the greatest influence on his decision. The Examiner stated in his findings:

At the Examiner's remand hearing, the residents in the area, by petition, by presentation of written and oral testimony at this hearing, before the Advisory Committee on two occasions and at the prior Examiner's hearing all spoke against the intrusion of this large commercial use within an all residential neighborhood stretching from Pacific Ave to McChord and 116th to 176th Street. The specific area is surround by large well designed homes and the access road to the Day Care (16th Ave Court South) is the service road for several residences.

...all members of the residential neighborhood who testified by petition, or at both hearings of the Advisory Committee and before the Examiner were in solid opinion that the proposed day care facility of 100 children was not compatible in size density and intensity with the neighborhood.

(AR 33, Findings, 21-22.)

¹⁴ The Examiner stated in his findings:

The proposal aesthetically meets all of the location criteria as an attractive one story facility under the Comprehensive Plan; however, the intensity of the use, 100 children with attending staff and service personal [sic] and traffic raises serious questions in regard to compatibility with the surrounding residential area and the effect on traffic. (AR 32, Finding 14, emphasis added. *See also*, AR 35, Finding 37 ("The traffic of a smaller facility would have less impact on the neighborhood."))

¹⁵ AR 34-35, Findings 36-38, 40.)

The substantial and overall heavy weight of testimony from the area of citizenry is that the heavy commercial use in the heart of an old established residential neighborhood is not compatible with the surrounding residential uses.

(AR 34, Finding 32.)

As with his first decision, the Examiner succumbed to the general opposition of the neighbors, rather than give fair consideration to the evidence demonstrating compatibility.

E. The Superior Court's Reversal Of The Examiner's Second Decision.

The Deutchers again filed a timely appeal pursuant to LUPA. (CP 58.) The Honorable Bryan Chushcoff concluded that the Examiner's decision to limit the Deutchers' proposed day care facility to a structure of no more than 3,500 square feet serving 33 children condition limiting the size and capacity of the proposed day care facility was not supported by the substantial evidence in the record. (CP 276.) Accordingly, Judge Chushcoff reversed the Examiner's decision to limit the size and capacity of the proposed day care, and ordered that the conditional use permit for a 9,900 square foot day care facility to serve 100 children be approved. (CP 276-77.) Appellants Pierce County and Neighbors United For the Loop thereafter filed the appeal that is before this Court. (CP 279-89.)

The Superior Court appropriately recognized that the Examiner's decision was not supported by the substantial evidence, but instead was arbitrary and inappropriately influenced by neighborhood consent. This Court should affirm the decision of the superior court to reverse the Examiner's decision to limit the size and capacity of the day care facility.

ARGUMENT

A. Standards of Review

Final land use decisions are reviewed per the procedures established in LUPA. Ch. 36.70C RCW. When reviewing a land use decision under LUPA the superior court sits in its appellate capacity and reviews the administrative record before the local jurisdiction's body or officer with the highest level of authority to make a final determination, which in this case is the Pierce County Hearing Examiner. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). This Court sits in the same position as the Superior Court and applies the LUPA standards directly to the administrative record before the Hearing Examiner. *Id.*

Relevant to this appeal, a court may grant relief from the Examiner's decision when:

- (1) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(2) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]

(3) The land use decision is a clearly erroneous application of the law to the facts;...

(4) The land use decision violates the constitutional rights of the party seeing relief.

RCW 36.70C.130(1)(b), (c), (d). In order to obtain relief under LUPA, it is not necessary to prove that the local jurisdiction's action was arbitrary and capricious. RCW 36.70C.130(2).

Questions of law are reviewed de novo. LUPA directs this Court to accord deference to the construction of a law by a local jurisdiction with expertise, but do so only when the ordinance is ambiguous. *Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 191, 920 P.2d 1216 (1996). Accordingly, if the relevant statute or ordinance is not ambiguous there is no need to defer to the local jurisdiction's interpretation. Moreover, LUPA's standard of review does not provide for absolute deference to a local jurisdiction interpretation of an ambiguous ordinance, but only "such deference as is due to a local jurisdiction with expertise." RCW 36.70C.130 (c). Thus, under LUPA deference is not a guarantee. Instead, deference is only given when it is appropriate as set forth by the common law or "as is due," and then, it is only given to the

local jurisdiction with expertise. Of course, the Court has the ultimate authority in determining legal issues.

With regard to review of factual questions, the Court reviews the decision-maker's findings of fact under the substantial evidence test. "Substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). Findings of fact by an administrative officer are subject to the same requirements as findings of fact by a trial court. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994). The purpose of the findings of fact is to ensure that the decision-maker has dealt fully and properly with all of the issues in the case before he decides it, and so that the reviewing court and parties involved may be fully informed as to the bases of his decision. *Id.* A statement of the positions of the parties or a summary of the evidence presented followed by findings which consist of "general conclusions drawn from an 'indefinite, uncertain, undeterminative narration of general conditions and events' are not adequate." *Id.* at 36 (citations omitted). If the findings of fact are supported by the substantial evidence, the findings are then reviewed to determine if the findings will support the conclusions of law. *Proctor v. Huntington*, 146 Wn. App. 836, 844, 192 P.3d 958 (2008).

B. The Purpose And Appropriate Analysis For Conditional Use Permits.

Appellants emphasize that compatibility is a factual question and infer that the Hearing Examiner has broad discretion in rendering its decision on conditional use permit applications. Appellants seem to imply that, because the Hearing Examiner approved a day care facility at one-third the size proposed, rather than completely deny it altogether, the Hearing Examiner's exercise of "discretion" is beyond judicial scrutiny. Their position is not consistent with the law. If it were, the rule would subject landowners to arbitrary decisions based upon speculative complaints and effectively provide neighbors with the power to veto projects that meet permitting criteria. A general discussion of conditional use permits will facilitate evaluation of the Examiner's findings and conclusions.

A conditional use permit is a mechanism that allows a property owner to use his property in a manner expressly permitted by the local zoning regulation. *Lund v. Tumwater*, 2 Wn. App. 750, 754, 472 P.2d 550, *rev. denied*, 78 Wn.2d 995 (1970). *See also Whisper Wind Dev. v. Planning & Zoning Comm'n*, 630 A.2d 108, 110 (Conn. App. 1993), *aff'd*, 640 A.2d 100 (Conn. 1994); Anderson, *American Law of Zoning* § 21.01, pp. 629-630 (1986). The establishment of a conditional use in a zoning ordinance "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and that it will not adversely

affect the neighborhood.” *South Woodbury Taxpayers Ass’n v. American Institute of Physics*, 428 N.Y.S.2d 158, 163, 14 A.D.2d 490 (1908); *see also Wahl v. Zoning Board of Appeals*, 497 N.Y.S. 2d 784, 785 (A.D.4th 1985) (When a zoning ordinance authorizes a particular use, the ordinance constitutes a "legislative finding" that the use is appropriate for the area.); *Pioneer-Evans Co. v. Garvin*, 595 N.Y.S.2d 586, 587 (A.D.4th 1993) (the “classification of a particular use [as a conditional use or special use] . . . constitutes a legislative finding that the use is consistent with the zoning plan.”). Further, the authorization for a special use upon satisfaction of certain conditions imposed by the ordinance reflects the legislative determination that “a use will not adversely affect the neighborhood.” *C & A Carbone, Inc. v. Holbrook*, 591 N.Y.S.2d 493, 495 (A.D.2d 1992).

To grant a conditional use permit, the issuing authority “must find the project will not be detrimental to the general comprehensive plan and surrounding property.” *Pease Hill v. County of Spokane*, 62 Wn. App. 800, 807, 816 P.2d 37 (1991). However, inclusion of specific uses in an ordinance “reflects a legislative finding that the listed conditional uses advance the ‘public convenience and necessity.’” *Id.*; *see also McNaughton v. Boeing*, 68 Wn.2d 659, 664, 414 P.2d 778 (1966). Therefore, no “specific finding of need” is necessary in order to issue a conditional use permit for a use specified in the applicable ordinance. *Id.* Further, the fact that the project “will alter the surrounding area” is not

sufficient to justify the denial of a conditional use permit. *Pease Hill*, 62 Wn. App. at 808. “The law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible.” *Id.* Accordingly, courts have been particularly sensitive to denial of permits based on disharmony with surrounding properties, because such a determination is subjective with a potential for abuse:

The courts rarely disapprove the granting of a special permit solely on the grounds that the use is not in harmony with a neighborhood, or with the intent and purpose of the zoning ordinance. Legislative authorization of a special permit supports a presumption that the use is generally in harmony with a neighborhood and that it will promote the general welfare. The burden of proof will rest with a municipality or person protesting the granting of the permit.

3 Robert M. Anderson, *American Law of Zoning*, at 680-81 (3d ed. 1986).

A County's issuance of a conditional use is an administrative act. *Durocher v. King County*, 80 Wn.2d 139, 153, 492 P.2d 547 (1972) (unclassified use permit); *State ex rel Standard Min. v. Auburn*, 82 Wn.2d 321, 327, 510 P.2d 647 (1973) (special use permit); *Lund v. Tumwater*, 2 Wn. App. 750, 755, 472 P.2d 550 (1970) (special use permit). The issuing authority must grant a conditional use permit as proposed if the applicant has satisfied the standards of the ordinance.¹⁶ *State ex rel Ogden*, 45

¹⁶ This rule is now embodied in Washington State statutory law:

“(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project’s consistency with applicable development regulations, or in the

Wn.2d at 495; *Pease Hill*, 62 Wn. App. at 807-09; *see also Grace Church v. Planning and Zoning Com'n*, 615 A.2d 1092, 1097 (Conn. Supp. 1992) (an issuing authority may deny the permit “only for failure to meet specific standards in the regulations.”) (emphasis added). Once the applicant has demonstrated compliance, “a presumption arises that (the proposed use) is consistent with the health, safety and general welfare of the community.” *Id.*; *Manor Healthcare v. Zoning Hearing Bd.*, 590 A.2d 65, 70 (Pa. 1991).

Recall that, under the Pierce County Code, a day care is an authorized use in this zoning district upon issuance of a conditional use permit. In Pierce County, a conditional use permit must be approved if evidence presented will support a finding that granting the conditional use permit will not:

1. be detrimental to the public health, safety, and general welfare;

absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

(a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;

(b) Density of residential development in urban growth areas; and

(c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by Chapter 36.70A RCW.”

2. adversely affect the established character and planned character of the surrounding vicinity; nor
3. be injurious to the uses, planned uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located.

(Pierce County Code (“PCC”) 18A.75.030(B); AR 31, Finding 5A.) The Examiner found that the first and third criteria (18A.75.030(B)(1) and (3)) were satisfied:

The Examiner must find that the Permit will not be detrimental to the public health, safety and general welfare; not adversely affect the established character and planned character of the surrounding vicinity nor be injurious to the uses, planned uses, property, or improvements adjacent to and in the vicinity of the site upon which the proposed use is to be located.

The Examiner does find that the proposed 100 children Day Care will not be detrimental to the public health and safety and will not be injurious to the uses and property in the neighborhood.

(AR 33-34, Findings 28 -29.) The examiner also found:

- This proposal is in general conformance with the County Comprehensive Plan and generally meets the policies and Criteria of the Plan. (AR 31, Finding 7.)
- The proposal aesthetically meets all of the location criteria as an attractive one story facility under the Comprehensive Plan (AR 32, Finding 14.)
- The projected design of the facility, as presented by the applicants, is compatible

with the home designs in the surrounding area. (AR 33, Finding 24.)

- The proposal is for a 100 child day care facility with a one story structure and a play area with parking. The applicant has similar operations in Yelm, Olympia and Dupont and the facilities are attractive buildings with landscaping to blend into the surrounding residential properties. (AR 32, Finding 12.)

No error was assigned to these findings and the findings are verities on this appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

C. The Examiner's Conclusion That The Proposed Day Care Is Incompatible With The Surrounding Area And His Decision To Limit The Day Care In Size And Capacity Was Contrary To The Applicable Law And The Evidence In The Record.

Despite all of these favorable findings regarding the aesthetic of the proposal, the Examiner found that the proposed day care is not "compatible" with the surrounding area exclusively because of its size as compared to some of the homes in the area. (AR 35.)

Though the burden of proof with regard to conditional use permit criteria generally lies with the applicant, such is not the case when a jurisdiction opts to deny a project as proposed, based upon general standards such as compatibility. Instead, courts place the burden on the government to adequately justify its decision. Washington's Supreme Court explained the rational for placing the burden on the municipality in

when it addressed a controversial application to construct a group home crisis residential center intended to serve abused or neglected children. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995). Like here, the proposed development drew ardent opposition from the community.

The *Sunderland* Court noted that uses authorized by a special use permit are “uses, in distinction with variances, [that] are *permitted*, not prohibited, subject to the right of the municipality to impose conditions or to disapprove.” 127 Wn.2d at 796, *citing*, Robert M. Anderson, *American Law of Zoning*, § 21.02 (3d ed. 1986)(emphasis in original). The Court explained:

The majority of jurisdictions require the municipal legislative authority to adopt specific standards for disapproval **or imposition of conditions**. Such standards protect the applicant from arbitrary action, prevent discrimination, and facilitate judicial review.

Washington, however, has adopted the minority position and does not require specific standards. We require only general standards, such as those contained in a comprehensive plan. Without standards, reviewing courts are unable to judge whether an applicant has met the reasonable conditions for issuance of a permit. **When such standards have not been adopted, it is for the decision-making body to have the burden to justify its decision. The usual presumption of reasonableness does not attach to the permit decision.**¹⁷

¹⁷ Notably, the *Sunderland* case was decided before the Land Use Petition Act pursuant to a writ of certiorari. LUPA imposes a lower burden of proof on the appellant (the

127 Wn.2d at 796-97 (emphasis added)(citations omitted).¹⁸

The facts in *Sunderland* are very similar to this case. Like this case, the neighbors in *Sunderland* asserted that the project was commercial in nature and that the “location and size of the proposed use are not harmonious with the orderly and existing development of the residential district where the subject property is located. The intensity of the propose operations is not harmonious with the otherwise purely residential character of the neighborhood.” 127 Wn.2d at 793. Also, like this case, the neighbors speculated that the children that would be served by the facility would not be appropriately controlled and would disrupt the neighborhood. *Id.* at 794. Ultimately, the Supreme Court held that concerns expressed by the neighbors did not represent objective evidence that could support the Hearing Examiner’s unfavorable findings, and the Hearing Examiner’s findings were reversed. The Supreme Court held that community opposition alone cannot justify a local land use decision. *Id.* at 797.

Deutschers) than was previously imposed on land use appellants who appealed under the writ of certiorari process.

¹⁸ See also 3 Robert M. Anderson, *American Law of Zoning*, at 680-81 (3d ed. 1986):

The courts rarely disapprove the granting of a special permit solely on the grounds that the use is not in harmony with a neighborhood, or with the intent and purpose of the zoning ordinance. Legislative authorization of a special permit supports a presumption that the use is generally in harmony with a neighborhood and that it will promote the general welfare. The burden of proof will rest with a municipality or person protesting the granting of the permit.

This case is no different than *Sunderland*. Here, Pierce County's staff, based upon his experience reviewing proposed development in light of the applicable code and comprehensive plan provisions, determined that the project complies with the standards and recommended approval. (AR 74-81.) It was only the community members that expressed opposition. In its opposition to location of a day care facility in the area, the community unilaterally complained that the project was too intense and too large and speculated that harm, such as noise would result from the project. The community did not, however, present any objective evidence to support their speculative fears. To the contrary, evidence was presented to disprove the community's claims. In light of the applicable law, the above findings and the substantial evidence in the record, the Examiner erred when he concluded that the proposed 100-child day care facility will not be compatible with the surrounding area.

Appellants only point to the fact that the primary existing character of the neighborhood is residential in nature to support the Examiner's ultimate conclusion. They argue that, since the proposed day care is commercial in nature, it cannot be compatible with the area. This argument is contrary to the legal principles state below and is addressed further immediately below. Though the other complaints proffered by the neighbors in the proceedings below were not discussed in Appellants

opening brief, those issue are addressed as well, in the event these other complaints are subsequently cited in Appellants' reply brief to support the Examiner's findings.

1. That the project is for a use that is commercial in nature does not justify the Hearing Examiner's decision.

Appellants protest the proposed day care center because the development immediately surrounding the Deuschers' property is residential. Of course the site is located less than 200 feet from the busiest intersection in the area. (AR 220.) In light of this inescapable fact, the neighborhood cannot be characterized as a quiet community. Moreover, the Sprinker Field and Recreational Center is located only 8/10 of a mile to the east on Military Road. (AR 31, Findings 9-10; AR 202.)

More importantly, Pierce County has authorized this use – a day care facility – within this particular residential zoning district. Inclusion of specific uses in an ordinance “reflects a legislative finding that the listed conditional uses advance the ‘public convenience and necessity.’” *Pease Hill, supra*, 62 Wn. App. at 807; *see also McNaughton, supra*, 68 Wn.2d at 664. The fact that the project “will alter the surrounding area” is not sufficient to justify the denial of a conditional use permit. *Pease Hill*, 62 Wn. App. at 808.

Appellants reliance on *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 61 P.3d 332 (2002), is misplaced. In that

case, the Examiner limited the size of a church based upon specific comprehensive plan provisions. Moreover, the size of the church was reduced to be comparable to a neighboring commercial use (an Albertson's store and BP gas station. (*Id.* at 178, 186.) The court did not force the commercial use, which like here was allowed under the code with a condition use permit, to be similar in size to the neighboring residential uses. Moreover, the Examiner did not drastically reduce the size of the church as requested by the neighbors (from 80,000 square feet to 20,000 square feet), but instead reduced the project so that it was not substantially larger than other commercial uses in the area.

It is abundantly clear that the neighbors oppose any commercial use at all in their immediate community. As one of the neighbors stated at the hearing: "...however it is shaped or sized or, or, designed, the reality is that it does change the use of the area and, or brings a different use to the area." (CP 341.) Their opposition, however, must yield to the Pierce County Code that authorizes the use. The Hearing Examiner's condition limiting the size of the facility to 3,500 square feet and 33 children is not supported by the substantial evidence in the record, but instead is an arbitrary condition intended to appease the discontented neighbors.

2. The Examiner improperly considered traffic impacts to support his conclusion that the proposed day care is incompatible with the surrounding area.

If the Examiner's decision to limit the size of the facility to serve only 33 children was not wholly arbitrary, then it is clear that the Examiner considered traffic impacts to reach his conclusion that a day care facility (with associated support staff) that will support and care for 100 children is too great in "intensity" or "density" and should be limited to 1/3 the requested size. (AR 32, Finding 14; AR 35, Finding 37.) Such consideration, however, was clear error in light of Judge Culpepper's prior ruling, which ruling is the law of this case. Judge Culpepper ruled that, based upon the evidence presented, "the project traffic, with the proposed mitigation, could be safely and conveniently accommodated by existing roads under the proposed designs." (AR 160.) Judge Culpepper also unequivocally ruled that "it was error for the Hearing Examiner to disapprove the project on any basis relating to traffic impact, traffic volumes (existing or projected), traffic safety or other traffic factor or concern."

Just as it was error in the first proceeding, it was error in the second proceeding for the Examiner to consider traffic impacts to reach his determination with regard to compatibility.

3. The Examiner improperly relied on building size to support his conclusion that the day care is too large in size or intensity to be compatible with the surrounding area.

The Examiner relied heavily on the comparative building size of the surrounding homes to determine that the 10,000 square foot building proposed for this day care facility is incompatible with the surrounding neighborhood. The building size cannot, however, support a finding of incompatibility.

To begin, the Examiner failed to consider the fact that the building will not exceed 25 feet in height, which is 10 feet less than the maximum allowed in the MSF Zoning district. (See PCC Table 18A.28.030 B.2-1.) Because the site here is approximately ½ an acre greater in size, the Deutchers had more land available to provide additional vegetative screening, to include trees. The Examiner gave no consideration to the landscaping plan that will screen the view of the larger sized building and blend it into the neighborhood. Of course, the Examiner acknowledged in his findings that: “The applicant has similar operations in Yelm, Olympia and Dupont and the facilities are attractive buildings with landscaping to blend into the surrounding residential properties.” (AR 32, Finding 12 (emphasis added).) There is no evidence that this proposed day care facility will not similarly blend with the surrounding residential neighborhood.

Additionally, the Examiner's conclusion that the building is not compatible with the surrounding area is wholly inconsistent with his express findings that the proposal, as designed, is compatible with the home designs in the surrounding area (AR 33, Finding 24); aesthetically meets all of the location criteria as an attractive one story facility under the Comprehensive Plan (AR 32, Finding 14); and is in general conformance with the County Comprehensive Plan and generally meets the policies and Criteria of the Plan (AR 31, Finding 7).

Finally, the Examiner completely failed to give consideration to Deuschers' alternative design that would divide the facility into three separate buildings that would not exceed 3,500 square feet, the same size of most of the homes in the area. (*See* CP 313, AR 206.) This would resolve all concerns regarding building size, especially since, under the current zoning, the Deuschers could improve the same property with up to five single family homes. (CP 363-64.) Building size is not a viable justification to support a conclusion that the proposed day care facility is not compatible with the surrounding area.

To the extent the Examiner may simply be relying on a general and subjective feeling that the proposal is too large, then the standards, as the Examiner applied them are unconstitutionally vague. As applied by the Examiner here, the compatibility standard unconstitutionally allows the decision-maker to make wholly discretionary and arbitrary decisions based

upon vague, unarticulated and unpublished standards. *See, Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 64 (1993). The substantial evidence in the record does not support the Examiner's findings that the day care, as proposed, is incompatible because of its size or intensity.

4. The Examiner improperly relied upon community displeasure to support his decision.

The neighbors made it clear to the Examiner that they oppose the location of a day care facility in their immediate neighborhood. To justify their objection, the neighbors again speculated that the traffic impacts could not be mitigated. (*See e.g.* AR 93-109.) Of course, this speculative objection has already been rejected by Judge Culpepper as a viable objection to the project.

Some of the neighbors speculate that the noise associated with a 100-child facility will be too great. (*See e.g.* AR 101, 104.) However, the Deutchers' operational method of only allowing small supervised groups of children on the play ground at any single time, the limited hours of operation and the fact that noise has not been an issue for the residential neighbors of the other facilities demonstrates that the neighbors' speculative concern is without merit. CP 310-317.)

In the end, when speculation is put aside, the neighbors' objections are little more than a strong opposition to day cares in the neighborhood. The law, however, requires hearing examiners to support their decisions

with reasons backed by policies and standards. It will not allow a hearing examiner, as was the case here, to base its decision on community displeasure. *Maranatha Mining, Inc. v. Pierce County*, *supra*, 59 Wn. App. at 805. *See also*, *Department of Corrections v. Kennewick*, 86 Wn. App. 521, 533, 937 P.2d 1119 (1997); *Anderson v. Pierce County*, 86 Wn. App. 290, 306, 936 P.2d 432 (1997); *Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995).

Maranatha Mining is illustrative. In that case, the property owners sought an unclassified use permit to operate a surface gravel mine. The neighbors opposed the proposed mine. Among the neighbors' concerns was that the ground water would be impacted by the mining operation. To address this concern, the mining proponents presented expert testimony that groundwater would not be affected and presented evidence that demonstrated that impacts could be successfully mitigated. Like in this case, at the *Maranatha* public hearings, "[s]everal area residents ... spoke against the application, challenging many of the expert conclusions, but offering little concrete evidence and no expert testimony of their own." 59 Wn. App. at 798. Following the first public hearing, the hearing examiner appropriately concluded that the evidence in the record supported approval of the requested permit. However, after a second public hearing on appeal to the City Council, the Council reversed the Examiner and concluded that

the permit should be denied. The court of appeals held that the record would not support denial of the requested permit. It therefore held that the use permit should have been issued. The court explained:

We cannot escape the conclusion, in view of the evidence in support of Maranatha's application, that the Council based its decision on community displeasure and not on reasons backed by policies and standards as the law requires.

Id. at 805. Accordingly, the *Maranatha* court held that the Council had acted arbitrarily and capriciously (a burden of proof higher than required under LUPA) when it denied approval of the requested permit.

The outcome should be the same in this case. No definitive or concrete impacts were presented at the hearing. The evidence in the record will not support denial of the day care facility as proposed.

5. The Examiner improperly applied current zoning laws in derogation of the Deuschers' vested property rights.

There is no disagreement that the conditional use application presented to the Examiner in this case is an application vested under prior zoning laws. As the Examiner noted, after the Deuschers submitted a complete application, the County rezoned the area to limit the size of day care facilities to a capacity of 24 children. (AR 34, Finding 34; AR 35, Finding 39; AR 36, Conclusion 9.) The Examiner also noted that

The Parkland-Spanaway-Midland Community plan called for goals and policies and zoning

to limit the size of day care facilities to meet the comparable use in the vicinity.

(AR 34, Finding 33.)¹⁹ It is readily apparent that the Examiner considered and factored in the new size limitation under the current zoning to arrive at the size limit he imposed on the Deutschers' day facility. (See AR 35, Findings 39 and 42; AR 36, Conclusion 9.) The Examiner's decision violated the Deutschers' vested property rights.

"[V]esting' refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). The purpose for the vesting doctrine in such cases "is to allow developers to determine, or 'fix,' the rules that will govern their land development." *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

[O]ur vesting doctrine is rooted in constitutional principles of fundamental fairness. The doctrine reflects a recognition that development rights represent a valuable and protectable property right. By promoting a date certain vesting point, our doctrine

¹⁹ Interestingly, one of the objections asserted by the neighbors was that approval of the proposed conditional use permit will set a dangerous precedent to allow future approval of similar facilities. The rezone, however, precludes future similar approvals. Only property owners with applications vested under the prior zoning code could seek similar approvals. No evidence was presented that there are any such vested applications. So the "dangerous precedent" argument has no merit.

insures “that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.” Our vested rights cases thus establish the constitutional minimum: a “date certain” standard that satisfies due process requirements.

Erickson & Associates v. McLerran, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994) (citations omitted) (quoting *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)). The Examiner’s failure to honor the Deuschers’ vested property rights and incorporate current zoning provisions into his analysis and determinations was error.

CONCLUSION

The Examiner had no legitimate or viable basis to deny approval of the day care facility as proposed, nor did he have a viable basis to limit the day care center to a 3,500 square foot building that will serve no more than 33 children. As acknowledged by the Examiner, the Deuschers’ Kids Kampus Daycare centers are well-designed and well-managed and the existing facilities have blended with the surrounding residential neighborhoods without negatively impacting those neighborhoods. (AR 31, Finding 12.) The day care center proposed here is compatible with the home designs in the surrounding area (AR 33, Finding 24); aesthetically meets all of the location criteria as an attractive one story facility under the Comprehensive Plan (AR 32, Finding 14); and is in general conformance

with the County Comprehensive Plan and generally meets the policies and Criteria of the Plan (AR 31, Finding 7).

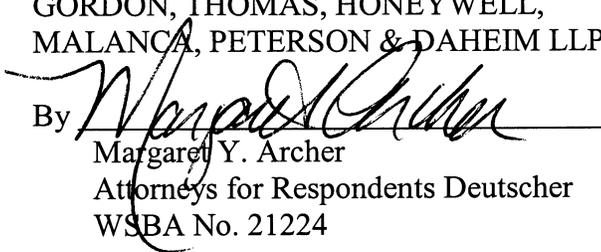
The only “evidence” presented to challenge the Deutschers’ proven track record and the thoughtful and conforming designs presented with their current application was neighbor speculation of perceived traffic and noise impacts and general neighborhood opposition to a day care facility of any kind. Under Washington law, such evidence will not support a decision to withhold approval of a proposed development.

Like the superior court below, this Court should reverse the decision of the Examiner to limit the size and capacity of the day care center and direct the Examiner to approve the day care as proposed, subject to the conditions recommended by the County’s Planning Staff.

Dated this 13th day of March, 2009.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By 

Margaret Y. Archer

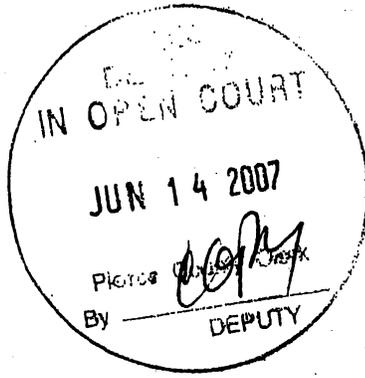
Attorneys for Respondents Deutscher

WSBA No. 21224

APPENDIX A

Order on Land Use Petition Act Appeal,
Reversing Decision of Hearing Examiner in
Part, and Remanding For Further Proceedings
signed by Judge Ronald E. Culpepper on 7/14/07
(AR 159-162)

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ALLAN and MARIJKE DEUTSCHER,

Petitioners,

vs.

PIERCE COUNTY, a Washington municipal
corporation,

Respondent.

NO. 06-2-05159-4

ORDER ON LAND USE PETITION ACT
APPEAL, REVERSING DECISION OF
HEARING EXAMINER IN PART, AND
REMANDING FOR FURTHER
PROCEEDINGS

ASSIGNED TO THE HONORABLE
RONALD E. CULPEPPER

THIS MATTER came on for hearing before the Honorable Ronald E. Culpepper on July 14, 2006, under a Land Use Petition Act ("LUPA") Petition filed by Allan and Marijke Deutscher under RCW Chapter 36.70C. The Deutschers' LUPA Petition seeks review of the January 20, 2006 Findings, Conclusions and Decisions of the Hearing Examiner in Case No. CP14-02. The Respondent Pierce County appeared through its attorney, Jill Guernsey from the Pierce County Prosecuting Attorney's Office, and Petitioners Allan and Marijke Deutscher appeared through their attorneys William T. Lynn of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim.

ORDER ON LAND USE PETITION ACT APPEAL - 1 of 4
(06-2-05159-4)
[1373479 v5.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1187
TACOMA, WASHINGTON 98401-1187
(253) 820-8500 • FACSIMILE (253) 820-8565

COPY

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2 Pursuant to RCW Chapter 36.70C, the court reviewed the administrative record
3 certified and filed by Pierce County, and the certified Verbatim Transcript of the hearing held
4 before the Pierce County Hearing Examiner. The court also considered the oral arguments of
5 the parties through their attorneys of record, and considered the pleadings filed by the parties,
6 including:

- 7 A. Petitioners Deutchers' Opening Brief dated June 21, 2006;
8 B. Brief of Respondent Pierce County dated July 5, 2006; and
9 C. Petitioners Deutchers' Reply Brief dated July 12, 2006.

10 Having conducted this review, the court finds that the Petitioners Deutscher have met their
11 burden under RCW 36.70C.130(1) with respect to traffic impacts. The Examiner's decision,
12 to the extent that it is based on traffic impacts, is not supported by evidence that is substantial
13 when viewed in light of the record before the Court.

14 The undisputed expert evidence before the Hearing Examiner was that the project
15 traffic, with the proposed mitigation, could be safely and conveniently accommodated by
16 existing roads under the proposed design. Therefore, it was error for the Hearing Examiner to
17 disapprove the project on any basis relating to traffic impact, traffic volumes (existing or
18 projected), traffic safety or other traffic factor or concern.

19 With respect to the size of the project and its compatibility with the neighborhood as
20 to matters other than traffic, the Examiner's Findings of Fact and Conclusions are supported
21 by testimony but are not sufficiently clear and specific as to allow the parties to understand
22 what aspect of the proposal failed to meet the Conditional Use Permit criteria. It is unclear
23 whether the Hearing Examiner was expressing concern about the size of the project because
24 of its traffic impacts, or because of some other characteristic. Further, Petitioners are willing
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to make revisions and should be given an opportunity to modify the design so as to address any specific concerns about size and compatibility.

NOW, THEREFORE, based upon the foregoing it is hereby ORDERED, ADJUDGED AND DECREED that the Hearing Examiner's decision, to the extent it is based upon traffic volumes (existing or projected), traffic impacts, traffic safety or other traffic concerns as set forth in paragraph 1 in this Order, is reversed under RCW 36.70C.130(1).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter is remanded to the Hearing Examiner: to determine whether the proposed project meets the County requirements for a Conditional Use Permit as to matters other than traffic; for additional findings consistent with this decision; and for consideration of any alternatives, design modifications, and/or mitigation that might allow the required Conditional Use Permit findings to be made.

IT IS FURTHER ORDERED, ADJUDICATED AND DECREED that each party shall bear its own costs.

DONE IN OPEN COURT this 14 day of June, 2007.

FILED
DEPT. 17
IN OPEN COURT
JUN 14 2007
Pierce County Clerk
JULY

15/ RONALD CULPEPPER

HONORABLE RONALD E. CULPEPPER

PRESENTED BY:

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM, LLP

By William T. Lynn
William T. Lynn, WSBA No. 07887
Margaret Y. Archer, WSBA No. 21224
Attorneys for Petitioners

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APPROVED AS TO FORM, NOTICE
OF PRESENTMENT WAIVED:

OFFICE OF THE PROSECUTING ATTORNEY

By: Jill Guernsey
Jill Guernsey, Deputy Prosecuting Attorney
WSBA No. 09443
Attorney for Respondent

162

APPENDIX B

Revised Conceptual Site Plan (AR 187)

SITE INFORMATION

PROPERTY OWNER: ALAN & MARLENE REITSCHER
 1401 MURRAY RD NE
 SUITE 307-254
 LACUY, IN 46050

PROJECT REPRESENTATIVE: SHEA CARR & JEWELL
 2102 LORRAINE DR, BLDG H
 SUITE 200
 (317) 252-1400
 CONTACT: JEAN CARR

TAX PARCEL NUMBER(S): 03120301A, 031203009

SITE ADDRESS: 1410 IRL AVENUE CT S

PARCEL SIZE: 1.58 ACRES

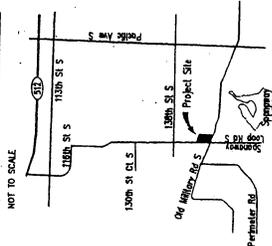
PROPOSED USE: KIDS KAMPUS DAY CARE CENTER

ZONING: MODERATE DENSITY RESIDENTIAL

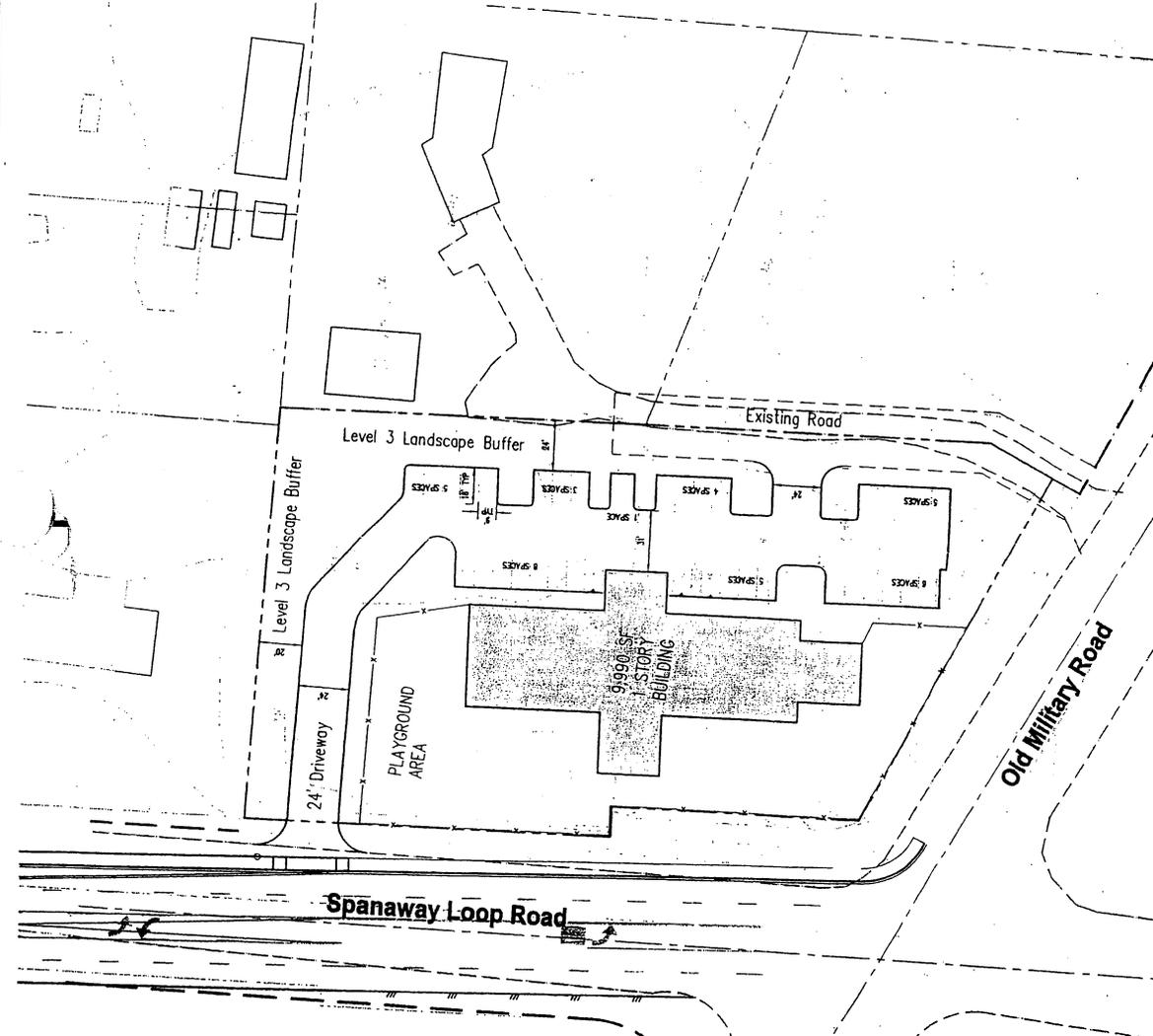
PARKING: ○
 ADA VAN ACCESSIBLE: 1
 ADA STANDARD: 2
 TOTAL PARKING: 37

WATER: PARKLAND LIGHT & WATER
 SEWER: ON-SITE SYSTEM
 POWER: CLAMBERT POWER COMPANY

VICINITY MAP



	HORIZONTAL SCALE: 1"=60' DATE: AUGUST 6, 2007	JOB No.: 290-01 DRAWING FILE No.: 290-01-SP-2.dwg	EXHIBIT No.: 1
	CONCEPTUAL SITE PLAN		SHEET No.: 2



APPENDIX C

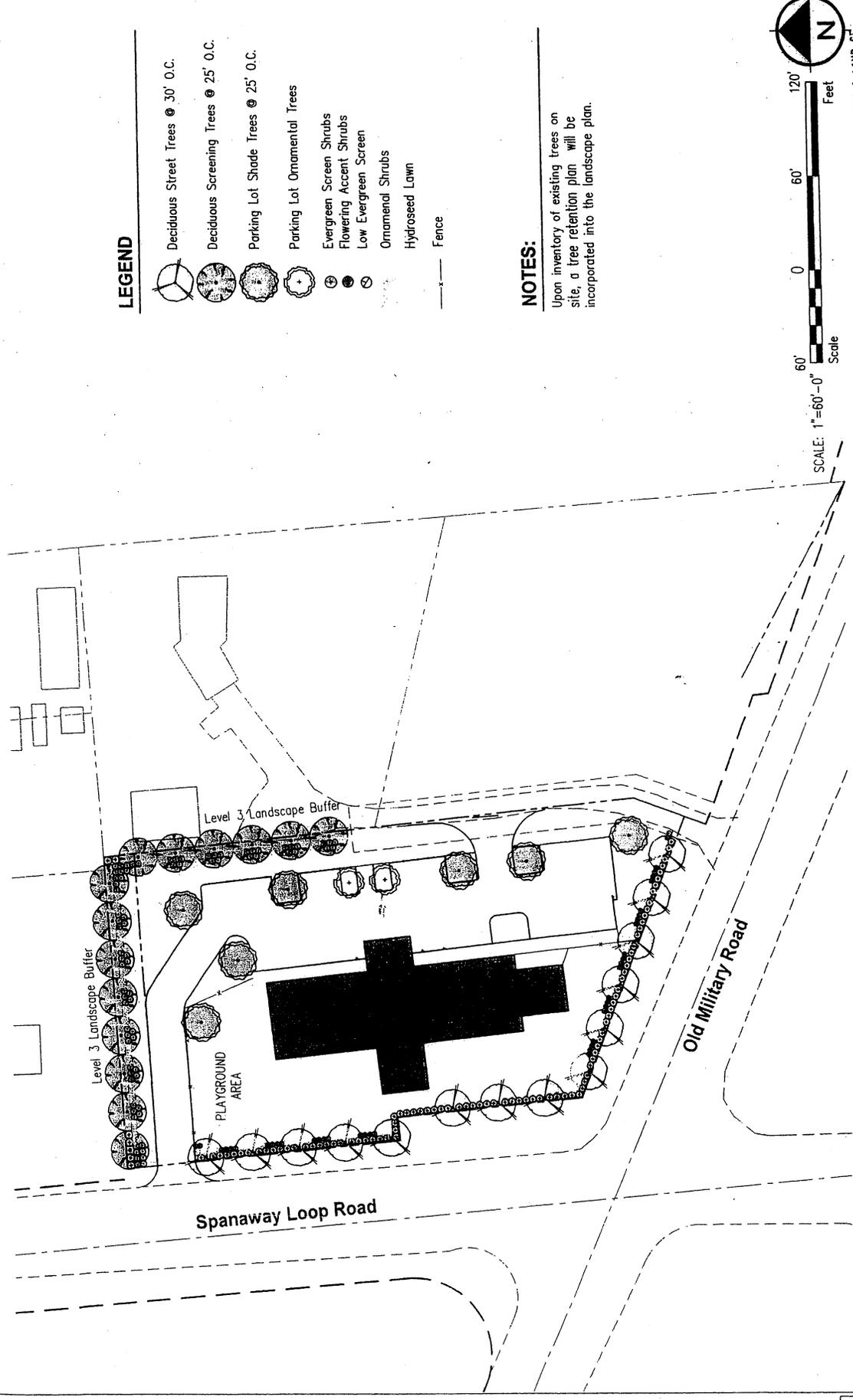
Revised Conceptual Landscape Plan
(AR 190-193)

LEGEND

-  Deciduous Street Trees @ 30' O.C.
-  Deciduous Screening Trees @ 25' O.C.
-  Parking Lot Shade Trees @ 25' O.C.
-  Parking Lot Ornamental Trees
-  Evergreen Screen Shrubs
-  Flowering Accent Shrubs
-  Low Evergreen Screen
-  Ornamental Shrubs
-  Hydraseed Lawn
-  Fence

NOTES:

Upon inventory of existing trees on site, a tree retention plan will be incorporated into the landscape plan.



	2111 CARRIAGE DRIVE OLYMPIA, WASHINGTON 98512 P: 360-333-1888 WWW.SHEACARRJEWELL.COM	HORIZONTAL SCALE: 1"=60'	JOB No.: 290-01
	DATE: AUGUST 6, 2007	DRAWING FILE No.: 290-01-EX-C.dwg	PHASE 01
CONCEPTUAL LANDSCAPE PLAN		SPANAWAY KID'S KAMPUS	
NOV 16 2007		PLANNING & LANDSCAPE ARCHITECTS	
SHEA CARR JEWELL		EXHIBIT No.: LA-1	
SHEA CARR JEWELL		SHEET No.: 2	

SITE INFORMATION

PROPERTY OWNER: ALAN & MARALEE REUTSCHER
 1401 MILWAUKEE RD NE
 SUITE 307-24
 LAKEY, WA 98024

PROJECT REPRESENTATIVE: SHEA, CARR & JEWELL
 1700 CARLISLE BLVD, SUITE H
 WASHINGTON, DC 20002
 (202) 331-1400
 CONTACT: JAM CAMP

TAX PARCEL NUMBER(S): 031203001A, 031203001B

SITE ADDRESS: 1400 10th ANDOME CT S

PARCEL SIZE: 1.28 ACRES

PROPOSED USE: KIDS KAMPUS BAY CAFE CENTER

ZONING: MODERATE DENSITY RESIDENTIAL

PARKING: 1
 ADA VIA ACCESSIBLE 2
 ADA STANDARD 34
 TOTAL PARKING 37

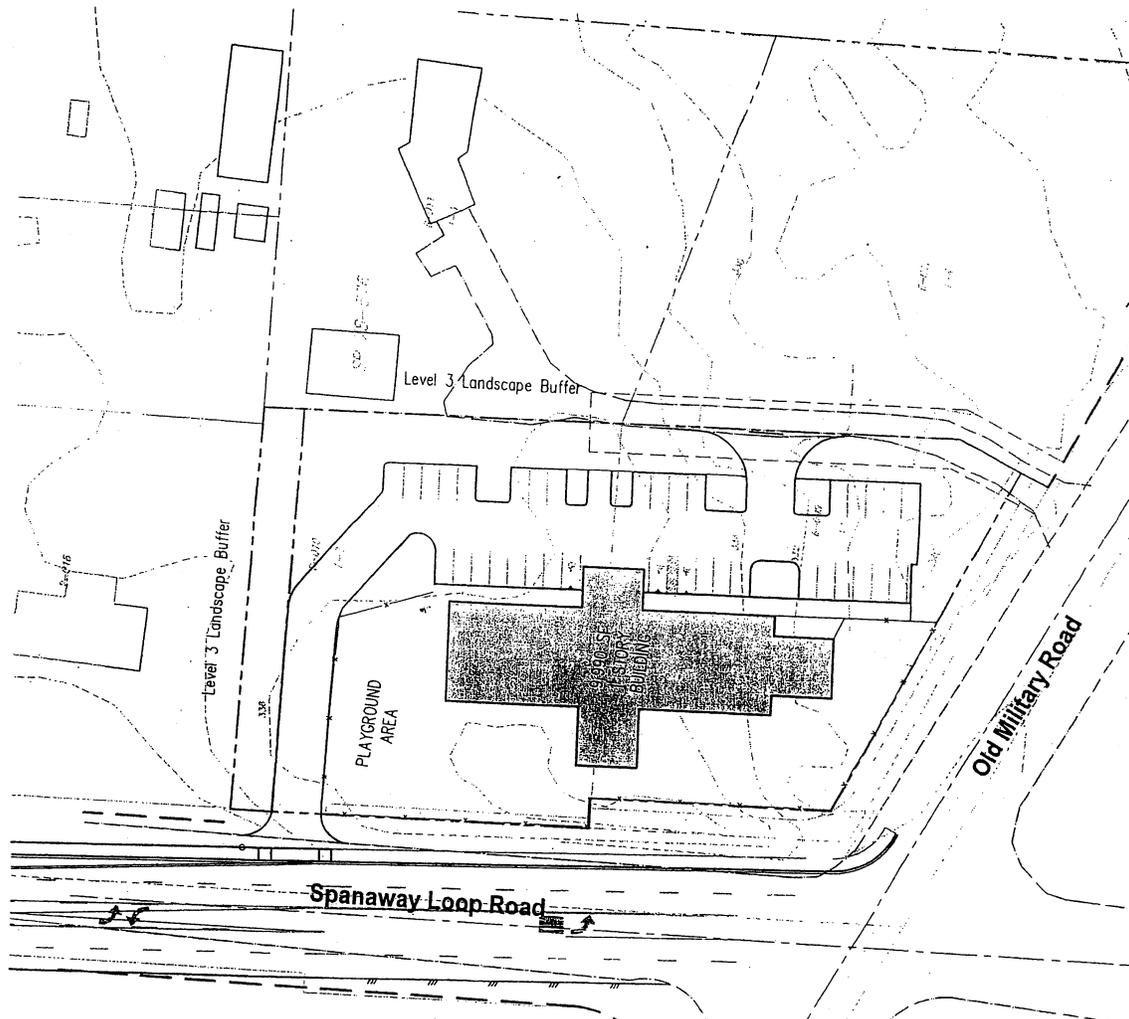
WATER: PARCELAND LIGHT & WATER

SEWER: ON-SITE SYSTEM

POWER: ELKHART POWER COMPANY

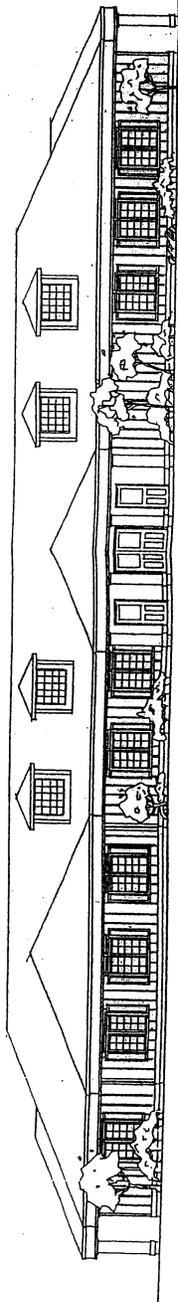
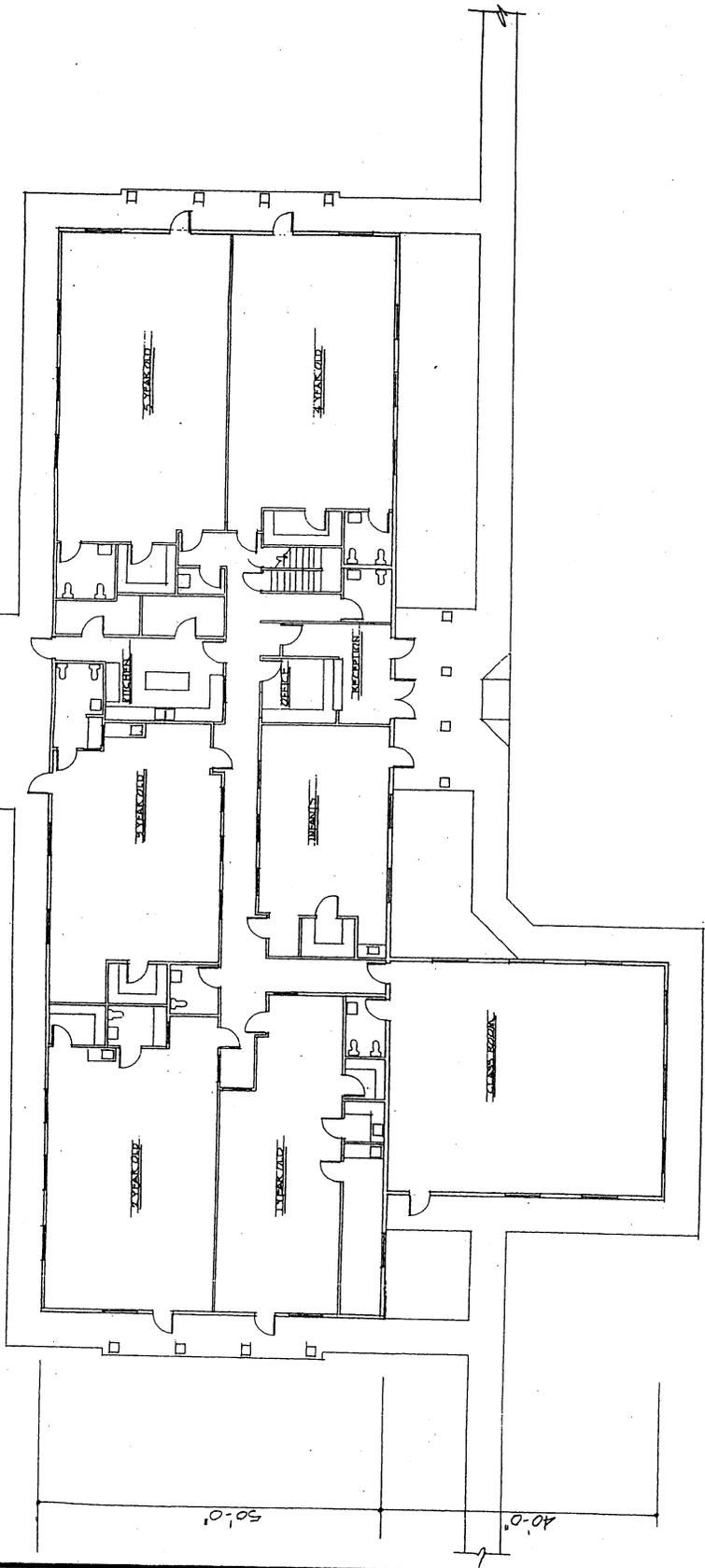
VICINITY MAP

NOT TO SCALE



<p>THE CARLISLE DRIVE WASHINGTON, DC 20002 P: 202-331-1400 F: 202-331-1400 WWW.SHEACARRJEWELL.COM</p>	<p>HORIZONTAL SCALE: 1"=60'</p> <p>DATE: AUGUST 6, 2007</p>	<p>JOB No.: 290-01</p> <p>DRAWING FILE No.: 290-01-SP-2.dwg</p>	<p>CONCEPTUAL SITE PLAN</p>
	<p>SPANAWAY KID'S KAMPUS</p> <p>PHASE 01</p>		<p>PLANNING & ENGINEERING SERVICES</p> <p>NOV 16 2007</p>

1912



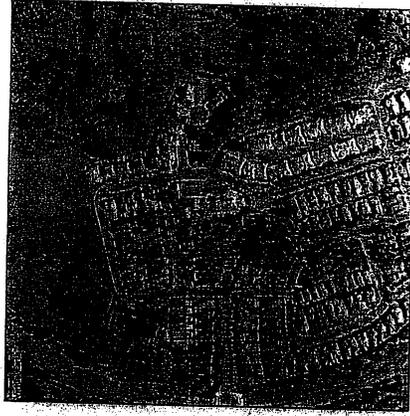
APPENDIX D

Aerial Photographs Depicting Locations of
Other Day Care Centers (AR 204)

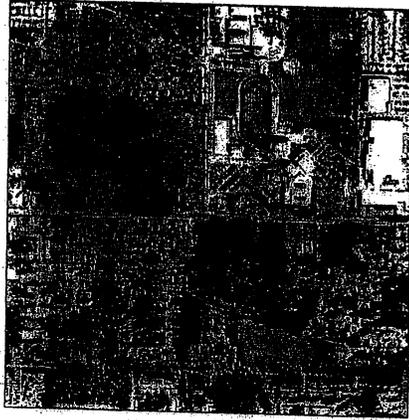
**Kids Kampus
Childrens Center
West Olympia**



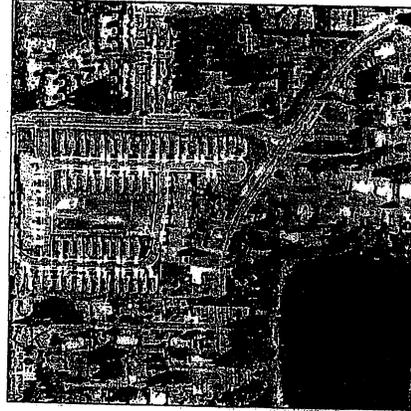
**Stepping Stone
Childrens Center
Dupont, WA**



**Stepping Stone
Childrens Center
NE Lacey**



**Proposed Spanaway
Kids Kampus Site**



**Stepping Stone
Childrens Center
Thurston County**

Hearing Examiner _____
Case No.: _____
Exhibit No.: 27

204

APPENDIX E

Photographs Presented at Haring (AR 207-219)



Hearing Examiner

Case No.: _____

[Signature]

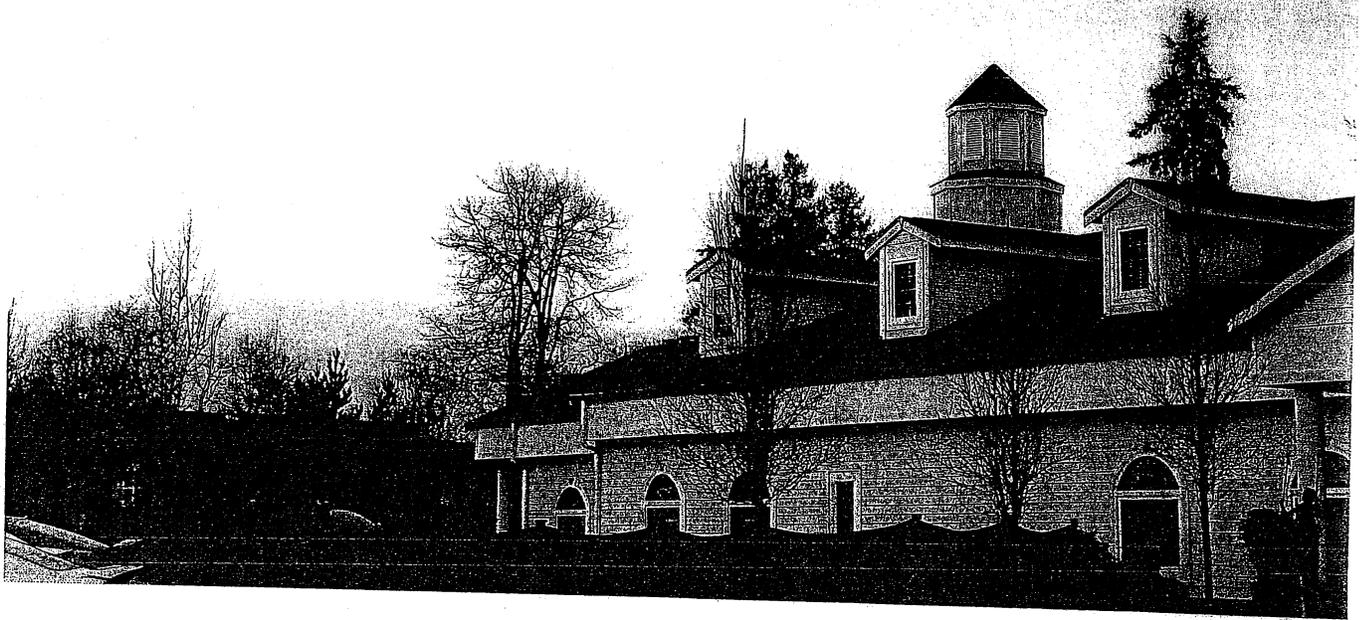
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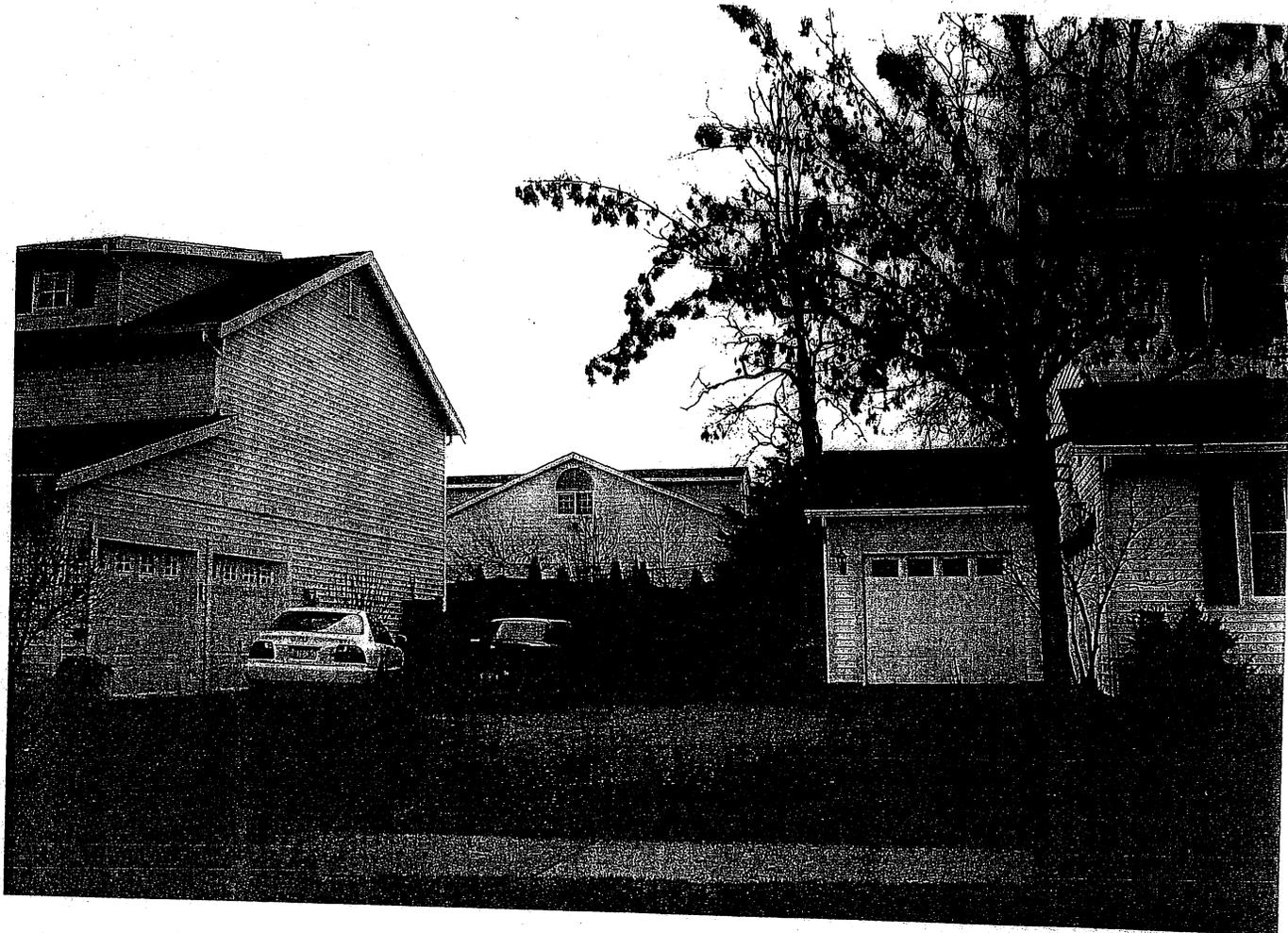


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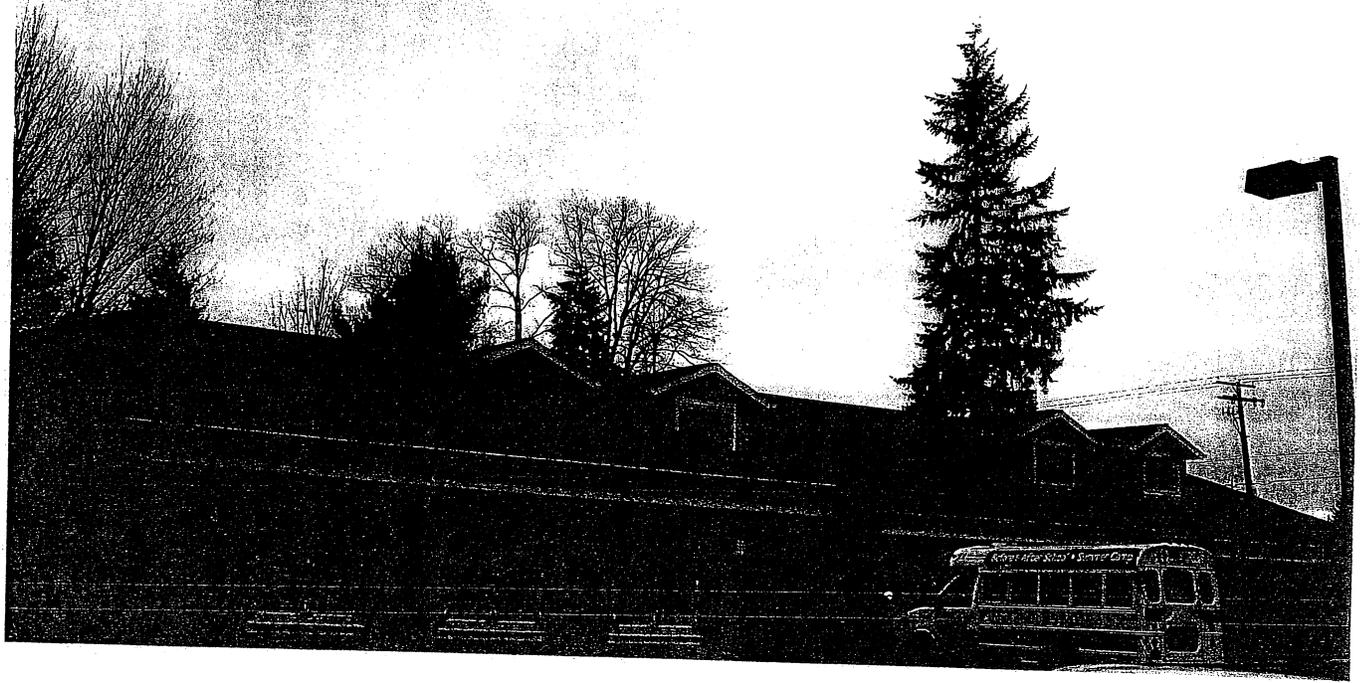


21'



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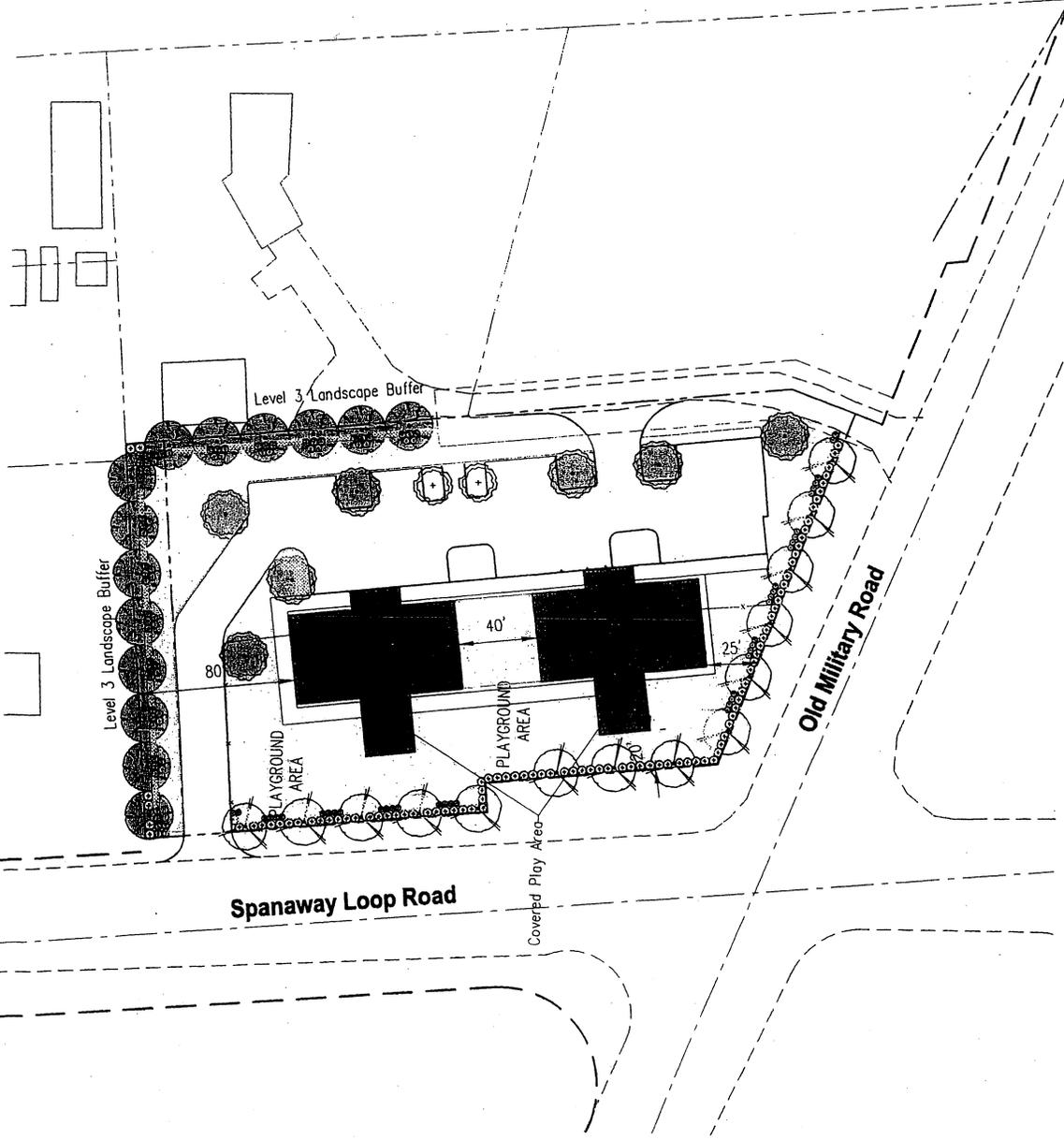
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APPENDIX F

Two-Building Alternate Design (AR 205)



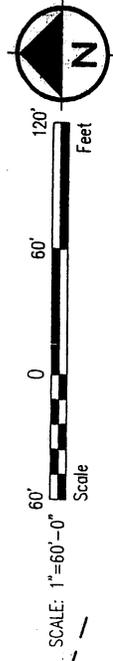
LEGEND

- Deciduous Street Trees @ 30' O.C.
- Deciduous Screening Trees @ 25' O.C.
- Parking Lot Shade Trees @ 25' O.C.
- Parking Lot Ornamental Trees
- Evergreen Screen Shrubs
- Flowering Accent Shrubs
- Low Evergreen Screen
- Ornamental Shrubs
- Hydraseed Lawn
- Fence

NOTES:

Upon inventory of existing trees on site, a tree retention plan will be incorporated into the landscape plan.

Hearing Examiner
 Case No.: _____
 Exhibit No.: R



	2812 CAROLINA DRIVE WOOD LAKE, MISSOURI 64087 PHONE: 816-352-4444 FAX: 816-352-4444 WWW.SHEACARRJEWELL.COM	HORIZONTAL SCALE: 1"=60'	JOB No.: 290-01	SPANAWAY KID'S KAMPUS PHASE 01	CONCEPTUAL LANDSCAPE PLAN	EXHIBIT No.: LA-2
		DATE: AUGUST 6, 2007	DRAWING FILE No.: 290-01-EX-B.dwg			

APPENDIX G

Three-Building Alternate Design (AR 206)

LEGEND

-  Deciduous Street Trees @ 30' O.C.
-  Deciduous Screening Trees @ 25' O.C.
-  Parking Lot Shade Trees @ 25' O.C.
-  Parking Lot Ornamental Trees
-  Evergreen Screen Shrubs
-  Flowering Accent Shrubs
-  Low Evergreen Screen
-  Ornamental Shrubs
-  Hydroseed Lawn
-  6' Solid Wood Fence

NOTES:

1. Upon inventory of existing trees on site, a tree retention plan will be incorporated into the landscape plan. As many existing trees as possible will be retained.
2. Native trees, shrubs and ground cover will be utilized where existing trees cannot be retained.

Hearing Examiner
 Case No.: PA
 Exhibit No.: PA



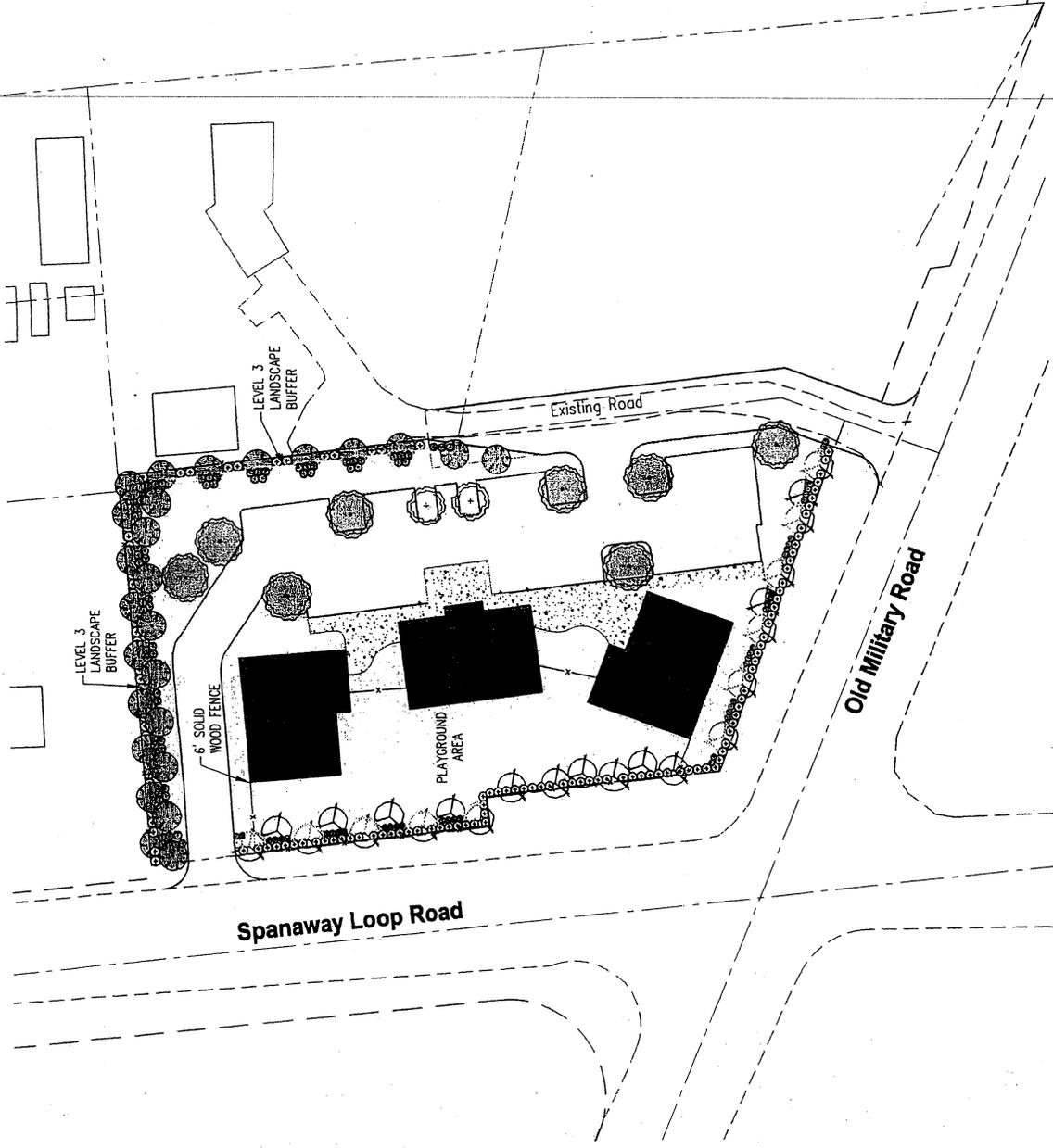
EXHIBIT No: **1**
 SHEET No: **2**

CONCEPTUAL LANDSCAPE PLAN

SPANAWAY KID'S KAMPUS

JOB No.: 280-01
 DRAWING FILE No.: 280-01-Ex-D.dwg
 HORIZONTAL SCALE: 1"=60'
 DATE: JANUARY 9, 2008

210 CAROLINE DRIVE
 WILMINGTON, N.C.



FILED
COURT OF APPEALS
DIVISION II
09 MAR 13 PM 2:18
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION
OF STATE OF WASHINGTON

PIERCE COUNTY and NEIGHBORS
UNITED FOR THE LOOP,

Appellants

vs.

ALLAN DEUTSCHER and MARIJKE
DEUTSCHER,

Respondents.

NO. 383616

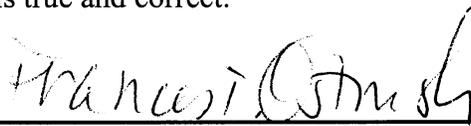
CERTIFICATE OF SERVICE

The undersigned certifies that on the 13th day of March, 2009, she placed with ABC Legal Messengers, Inc. a true and correct copy of the Brief of Respondents Deutscher for hand-delivery to counsel of record listed below:

Jill Guernsey
Deputy Prosecuting Attorney
955 Tacoma Ave S. #301
Tacoma, WA 98402

Douglas V. Alling
Smith Alling Lane
1102 Broadway Plaza #403
Tacoma, WA 98402

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Frances T. Ostruske